IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Crisci v. Vancouver Island Health Authority,* 2023 BCSC 1883

Date: 20231026
Docket: S222199
Registry: Victoria

2023 BCSC 1883 (CanLII)

Between:

Elisabeth Crisci and Elisabeth Crisci Professional Corporation

Plaintiffs

And

Vancouver Island Health Authority and Shauna Tierney

Defendants

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiffs:	D. McWhinnie
Counsel for the Defendant, Vancouver Island Health Authority:	K. Zimmer
Counsel for the Defendant, Shauna Tierney:	N. Fishman H. Ahmed
Place and Dates of Hearing:	Vancouver, B.C. July 31 and August 1, 2023
Place and Date of Judgment:	Victoria, B.C. October 26, 2023

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INTRODUCTION

[1] In this action, the plaintiff, Dr. Elisabeth Crisci, a physician, advances allegations against the defendants arising from events that took place in a hospital setting where she formerly worked.

[2] Dr. Crisci claims damages for defamation as against the defendant, Dr. Shauna Tierney, a former colleague who is also a physician. Dr. Crisci and the corporate plaintiff, Elisabeth Crisci Professional Corporation (“ECPC”), also claim damages for breach of contract and breach of duty as against the defendant, Vancouver Island Health Authority (“VIHA”).

[3] VIHA and Dr. Tierney now apply for various relief:

a) That the action against them be struck and dismissed pursuant to R. 9-6 of the *Supreme Court Civil Rules* [*SCC Rules*] (i.e., summary judgment) on the basis that all of Dr. Crisci’s allegations are based on and inextricably linked to inadmissible evidence;

b) In the alternative, that the action against them be dismissed as disclosing no reasonable claim, being unnecessary, frivolous and vexatious, and constituting an abuse of process, pursuant to Rules 9-5 (1)(a), (b) and (d); and

c) In the further alternative, that the most recent iteration of Dr. Crisci’s claim purporting to add ECPC as a plaintiff, be struck due to the non-compliance with R. 6-2.

[4] Dr. Crisci opposes all of the relief sought.

BACKGROUND FACTS

[5] From 2013–2020, Dr. Crisci provided hospitalist physician services through a personal corporation pursuant to a hospitalist service contract between VIHA and others (the “Contract”).

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[6] Dr. Tierney is also a hospitalist.

[7] At the relevant time, Drs. Crisci and Tierney were colleagues who worked together as hospitalists at Victoria General Hospital ("VGH") and Royal Jubilee Hospital ("RJH"). In particular, both doctors were involved in working together on a "Hospital at Home" ("HaH") project that was intended to allow eligible, clinically stable patients who are admitted to a hospital to receive hospital level acute care in their homes that operated from VGH.

[8] The basic alleged facts giving rise to this action are:

a) At the end of November 2020, Dr. Tierney made a complaint about Dr. Crisci, which was received by Dr. Chloe Lemire-Elmore, who was the Medical Lead for hospitalists at VGH and also the Co-Division Head for hospitalists in Regions within VIHA (the "Complaint");

b) As a result of receiving the Complaint, Dr. Lemire-Elmore formed a committee, which included herself, to consider the matter (the "Committee");

c) On December 2, 2020, Dr. Crisci provided a response to the Complaint and also included complaints against Dr. Tierney;

d) On February 17, 2021, the Committee provided Dr. Crisci with a letter setting out its findings, which supported some or all of Dr. Tierney's complaints against Dr. Crisci (the "Letter of Findings"). In addition, the Committee noted that Dr. Crisci's resignation from her involvement in various projects and committees had been accepted at the end of December 2020; and

e) On August 19, 2021, Dr. Crisci ceased operating as a hospitalist under the Contract.

[9] Initially, on July 5, 2022, Dr. Crisci filed a notice of civil claim ("NOCC") as the sole plaintiff. She named Dr. Tierney and VIHA as defendants, along with Marko

Peljhan (Executive Director of Geographic Region 4 of VIHA), Dr. Lemire-Elmore (Medical Lead of Hospitalist for VGH and the Co-Division Head for Hospitalist at Regions of VIHA and a member of the Committee) and Janice Butler (acting Executive Director of the Hospital Service Branch with the British Columbia Ministry of Health) (collectively, the “VIHA Personal Defendants”).

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[10] In the NOCC, Dr. Crisci sought the following relief:

a) Damages for wrongful dismissal; and

b) Damages arising from defamatory statements made by all of the defendants, including alleged comments of Dr. Tierney to co-workers and colleagues in the November–December 2020 timeframe.

[11] On November 10, 2022, VIHA/VIHA Personal Defendants’ counsel sent Dr. Crisci’s former counsel an unfiled response to civil claim (“RTCC”), which stated that Dr. Crisci was not an employee; rather, she provided services as an independent contractor through her corporation, Dr. Elisabeth Crisci Inc. (“EC Inc.”). At that time, VIHA/VIHA Personal Defendants’ counsel asserted that Dr. Crisci’s claims lacked merit and, mirroring the arguments on this application, that the NOCC did not disclose any reasonable claims, were unnecessary, scandalous, frivolous, and vexatious, and an abuse of process of the court.

[12] In December 2022, Dr. Crisci retained new counsel who later advised that he would either be making significant amendments to the NOCC or filing a new NOCC in the unfiled form that he provided to counsel. Those “amendments” included adding ECPC as a plaintiff, which was asserted as being Dr. Crisci’s professional corporation.

[13] On February 2, 2023, Dr. Crisci’s new counsel proposed an “efficient” way of amending the NOCC in that he would redraft it entirely and replace that document rather than attempting to amend portions of the NOCC.

[14] On March 1, 2023, VIHA/VIHA Personal Defendant filed their RTCC.

[15] On March 10, 2023, VIHA/VIHA Personal Defendants' counsel wrote Dr. Crisci's counsel to enquire as to whether he would be filing the proposed new NOCC, "without prejudice to [VIHA's] right to argue abuse of process," or whether he would "be applying to court for leave to amend the existing action to, *inter alia,* add the new proposed Plaintiff, [ECPC]".

[16] On March 28, 2023, Dr. Crisci's counsel served the defendants' counsel with a new NOCC filed on March 27, 2023 in the original action. In the pleading, ECPC is added as a plaintiff and alleged to be the corporation that provided Dr. Crisci's medical services. In addition, the VIHA Personal Defendants are removed as defendants and the allegations against them are deleted.

[17] The new NOCC purports to be an amended NOCC pursuant to R. 6-1(1)(a) (the "ANOCC").

[18] The ANOCC introduces substantial changes to the allegations originally found in the NOCC, particularly as regards VIHA. Again, the allegations include that Dr. Tierney made defamatory comments about Dr. Crisci in the November–December 2020 timeframe. With respect to VIHA, the substance of Dr. Crisci's allegations are said to arise from VIHA's handling of the Complaint. Dr. Crisci alleges that VIHA breached the Contract and breached its duty to act in good faith resulting in damages.

[19] Also, on March 28, 2023, Dr. Crisci's counsel filed a Consent Dismissal Order dismissing the action against the VIHA Personal Defendants, consistent with the ANOCC. This followed the execution of a standard form release by Dr. Crisci in favour of these persons on March 26, 2023.

[20] In June 2023, Dr. Tierney filed her RTCC. In July 2023, VIHA filed an amended RTCC. Among other things, VIHA alleged that ECPC did not exist as a corporate entity and was not a proper plaintiff in any event.

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STATUTORY FRAMEWORK

[21] The defendants' arguments on this application are substantially grounded in the contention that Dr. Crisci can only succeed in her claims in this action by attempting to rely on evidence that is inadmissible in law.

The Hospital Organization

[22] Section 2(1)(c) of the *Hospital Act*, R.S.B.C. 1996, c. 200 stipulates that a hospital has an obligation to constitute a board of management and to enact bylaws and rules necessary for its administration and management. Here, VIHA is the board established under the *Health Authorities Act*, R.S.B.C. 1996, c. 180 and s. 2 of the *Regional Health Boards Regulation*, B.C. Reg. 293/2001.

[23] VIHA acts through its Board of Directors, which has adopted Medical Staff Bylaws ("Bylaws"), Medical Staff Rules ("Rules"), a Respectful Workplace Policy ("Policy") and Respectful Workplace Procedures ("Procedures").

[24] VIHA's Bylaws, Rules, Policy and Procedures set out a process for reporting, investigating and handling complaints regarding perceived unprofessional behavior or concerns about clinical competency of medical staff. In particular:

a) where perceived unprofessional behavior or concerns about clinical competence are observed or experienced in a VIHA facility or program, it is to be reported to a Division Head, Department Head, or Site Chief of Staff: Rules, Article 4.5.1.3 (here, that is Dr. Lemire-Elmore);

b) the purpose of managing unprofessional behavior is to create an environment that allows for both safe patient care and a respectful workplace: Rules, Article 4.5 item 1;

c) the Enhanced Medical Staff Support Committee ("EMSS") "supports medical leaders by assisting them to address professional practice issues in the workplace by enhancing their capacity to identify, understand, manage and resolve these issues effectively": Rules, p. 4;

d) the Health Authority Medical Advisory Committee ("HAMAC") makes recommendations to the Board of Directors with respect to the cancellation, suspension, restriction, or maintenance of the privileges of all members of the medical staff to practice within the facilities and programs operated by VIHA: Bylaws, Article 9.1.2;

e) the Board of Directors, on the advice of HAMAC, may establish additional Medical Advisory Committees ("MACs"): Bylaws, Article 10.1.1; and

f) the South Island Medical Advisory Committee ("SIMAC") was a committee or MAC comprised of Division Heads whose roles and responsibilities include collaborating with the Department Head to ensure the quality of clinical services by practitioners within the Division meet the acceptable standards: Rules, Article 2.3.3.6 (Dr. Lemire-Elmore was a member of SIMAC).

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The Hospital Appeal Board

[25] Pursuant to s. 46(1)(a) of the *Hospital Act*, a practitioner may appeal to the Hospital Appeal Board ("HAB") in respect of "a decision of a board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practice in a hospital..." Pursuant to s. 46(2.2) of the *Hospital Act*, a practitioner is not required to first proceed by way of an application to the hospital's board before appealing to the HAB.

[26] Pursuant to s. 46(3.1) of the *Hospital Act*, the HAB has exclusive jurisdiction and its orders are final and conclusive and are not open to question or review in any court.

[27] Information that is inadmissible before a court (including pursuant to s. 51 of the *Evidence Act*, R.S.B.C. 1996, c. 124, as discussed below) is admissible in a proceeding before the HAB: *Hospital Act*, s. 46.1(7).

[28] Dr. Crisci did not appeal to the HAB regarding the conclusions of the Committee as set out in the Letter of Findings.

The *Evidence Act*

[29] Section 51(2) of the *Evidence Act* provides:

> (2) A witness in a legal proceeding, whether a party to it or not,
>
> (a) must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and
>
> (b) must not be asked to produce nor be permitted to produce, in the course of the legal proceeding, a record that was used in the course of or arose out of the study, investigation, evaluation or program carried on by a committee, if the record
>
> (i) was compiled or made by the witness for the purpose of producing or submitting it to a committee,
>
> (ii) was submitted to or compiled or made for the committee at the direction or request of a committee,
>
> (iii) consists of a transcript of proceedings before a committee, or
>
> (iv) consists of a report or summary, whether interim or final, of the findings of a committee.

[30] “Committee” is defined in s. 51(1) of the *Evidence Act*:

> "committee" means any of the following:
>
> (a) a medical staff committee within the meaning of section 41 of the *Hospital Act*;
>
> (b) a committee that is established or approved by the board of management of a hospital, that includes health care professionals employed by or practising in that hospital and that, for the purposes of improving medical or hospital practice or care in that hospital, or during transportation to or from that hospital,
>
> (i) carries out or is charged with the function of studying, investigating or evaluating the medical or hospital practice of, or care provided by, health care professionals in that hospital or during transportation to or from that hospital, or
>
> (ii) studies, investigates or carries on medical research or a program;
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> …
>
> (d) a group of persons who carry out investigations of medical practice in hospitals and who are designated by the minister by regulation.

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[31] Section 41 of the *Hospital Act* provides:

> 41(1) In this section, "medical staff committee" means a committee established or approved by a board of management of a hospital for
>
> (a) evaluating, controlling and reporting on clinical practice in a hospital in order to continually maintain and improve the safety and quality of patient care in the hospital, or
>
> (b) performing a function for the appraisal and control of the quality of patient care in the hospital.

CASE LAW RE USE OF EVIDENCE

[32] All of the parties have referred to numerous case authorities that address the scope of s. 51 of the *Evidence Act* in the context of various procedural applications in advance of a determination of the merits of the allegations and based on the admissibility or lack of admissibility of evidence under that statutory provision.

[33] In *Sinclair v. March,* 2000 BCCA 459, the court addressed the scope of s. 51 in the context of an application for document production. At paras. 23–26, the court confirms that the provision is an absolute prohibition and represents a clear policy choice by the legislature to ensure hospital confidentiality, even if such protections have the effect of preventing litigants from accessing relevant evidence. However, the court also emphasized at para. 22 that it is only evidence related to the committee's work that is protected under s. 51, and such protection does not necessarily arise by reason of a witness being a member of a committee.

[34] In *Munro v. St. Paul's Hospital*, 2008 BCSC 1408, the physician had his privileges withdrawn, but was then reinstated on his appeal to the HAB. The plaintiff alleged that the hospital had refused to abide by the HAB's decision, resulting in losses. Justice Groves dismissed the hospital's application to dismiss the action under R. 9-5 on various grounds. One ground was that Groves J. found that the hospital's dealing with the plaintiff were outside of any committee matters. The Court stated:

> [16] The court in *Sinclair* accepted that s. 51 was intended to protect hospital committee deliberations. However, the court also observed that the provision does not protect evidence from witnesses merely on the basis that witnesses are members of a hospital committee. In order to be precluded

> from litigation, the hospital must show that the witness participated in committee work as described in s. 51. The court expressly recognized that the section does not protect evidence pertaining to hospital administration, and not within the committee structure.

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[35] Finally, Groves J. in *Munro* at para. 20 stated that, even if interpretations as to the effect of s. 51 arose in relation to the evidence upon which the plaintiff relied, a defence arose and it was not plain and obvious that no claim existed.

[36] The decision in *Munro* was upheld on appeal: *Munro v. St. Paul's Hospital Act,* 2009 BCCA 340 at paras. 9–11 and 14. At para. 12, the court accepted that it was not plain that the claim was bound to fail in the face of s. 51 since:

> … The fact that certain information went before a hospital committee does not make it privileged. If such information is at large and exists independently of any committee process, then it can be adduced as evidence in court.

[37] *Fouad v. Longman,* 2014 BCSC 785 [*Fouad Trial*] was an action involving cross-defamation claims among a group of physicians. In a *voir dire* before the trial, Justice Kloegman held that certain documents and statements that arose from physician reviews were inadmissible under s. 51: *Fouad v. Longman,* 2014 BCSC 327 [*Fouad VD*] at para. 126. This also applied notwithstanding allegations that the reviews had been requested for malicious reasons: *Fouad VD* at para. 13. At the trial, this ruling resulted in a reduction of the number of statements that were alleged to have been defamatory: *Fouad Trial* at para. 126.

[38] *Hamburger v. Fung*, 2014 BCSC 1625 involved an application to strike out and dismiss a claim in conspiracy and inducing breach of contract under Rules 9-5(1)(a) and (d). The defendants applied, without any evidence, as is required under R. 9-5(1)(a). At paras. 24–31, Justice Kent held that there was a lack of evidence that would inform the Court's assessment of the characterization of the roles played by hospital staff, such as the Bylaws and Rules (such as was considered in *Fouad VD*). As a result, the application to strike was dismissed.

[39] Justice Kent's decision was appealed and upheld: *Hamburger v. Fung,* 2015 BCCA 444. By the time of the appeal, the defendants' focus had switched from s. 51

to asserting common law witness immunity: para. 2. In any event, the court noted that the pleadings made no mention of any proceeding before a "committee" or MAC, such as would have presumably engaged s. 51: paras. 29 and 32–35.

[40] In *Nagase v. Entwistle*, 2015 BCSC 1654 [*Nagase BCSC*], the issue was also relating to document production (email and letters) sought by the plaintiff as evidencing the basis for his defamation claims. The defendants sought an order striking the claim under R. 9-5(1)(a) on the basis that the plaintiff was precluded from producing or utilizing those documents which related to the plaintiff's conduct and mental health. Counsel had agreed that, if s. 51 applied to those documents, the claim could not succeed: paras. 60–61.

[41] In *Nagase BCSC* at paras. 52–56 and 58, Justice Weatherill held that all of the documents in issue were part of an investigation into the plaintiff's conduct and ethics in accordance with policies and protocols, including those established by the HAMAC for the health authority involved.

[42] *Nagase BCSC* was upheld on appeal: *Nagase v. Entwistle*, 2016 BCCA 257 [*Nagase BCCA*]. On appeal, Dr. Nagase argued that his complaint process was never formally brought before an actual committee, such that s. 51 was engaged. He also submitted that s. 51 did not apply because the defendants allegedly did not follow the process in the applicable bylaws, rules and policies. Further arguments were made that the s. 51 only protected evidence that was compiled or made expressly for the purpose of submissions to a committee, or is a report of committee findings.

[43] In *Nagase BCCA*, Justice Garson carefully reviewed the actual roles played by the defendant physicians and rejected Dr. Nagase's narrow approach to s. 51. At para. 64, she agreed with Weatherill J.'s assessment that the communications were made for the purposes of an investigation that did engage s. 51. She stated:

> [58] It is true, as Dr. Nagase states, that there was no formal committee meeting or process by which his conduct was reviewed. The communications over which the respondents claim protection from production were all preliminary to, or part of the initial stages of, such an investigation. However,

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> the Bylaws, Rules and the Policy Manual clearly envision a preliminary, informal process to investigate complaints. Does the fact that no committee has yet to consider the complaint mean that records created in the early intervention phase are not protected? In my view, it does not.
>
> …
>
> [60] Dr. Nagase founds his argument on the literal language of s. 51(2). In my view, this approach ignores the scheme, object, and intention of the Legislature in enacting the section.
>
> [61] In enacting s. 51(2), the Legislature has chosen to absolutely protect communications made concerning the evaluation or investigation of medical staff, or for the purpose of improving medical or hospital practice or care. Dr. Nagase does not argue that the topic of the impugned communications is outside the broad purposes of s. 51(2), but rather that the communications did not originate with, or were not prepared at the behest of, a committee.
>
> [62] The effect of adopting the interpretation proposed by Dr. Nagase would be to permit production of records relating to the initiating phase of the discipline process while protecting only communications created at the more formal and serious stage of discipline. In my view, this interpretation is premised on a literal reading of the words of the statute divorced from the context in which they are used. It would result in a construction of the provision that is not consistent with the objects of the legislation or the stated purpose of the provision. In the debate on the bill at the committee stage, the then Attorney General, the Honourable B.R.D. Smith, stated that the purpose of the provision was to protect the "sanctity" of the peer review process in hospitals *(Sinclair* at para. 24):
>
> ...
>
> [64] When the purpose of the legislation is taken into account, I can find no error in the judge's conclusion that the chain of communications between Dr. Nagase, Dr. Entwistle and Dr. Slater was made for the purposes of an investigation into Dr. Nagase's conduct and is protected from production by s. 51(2). As noted above, the communication is expressly stated to be made pursuant to the various physician discipline processes. Similarly, Dr. Entwistle's communications with Dr. Cudmore occurred in the course of the investigation of Dr. Nagase's conduct. I do not agree with Dr. Nagase that the absence of a formal committee is fatal to the protection afforded by the section. Interpreting the language of s. 51(2) in such a manner would be contrary to the objectives of the legislation. To find otherwise would result in an anomaly whereby the formal committee proceedings would be exempt from production, but the preliminary and investigatory communications that form the foundation of such a committee proceeding would not be exempt. In my view, it would be an error to interpret the legislation in this manner, thereby ignoring its object and the intention of the Legislature.
>
> [Emphasis added.]

[44] As such, Garson J.A. upheld the dismissal of Dr. Nagase's claim pursuant to R. 9-5(1)(a) on the grounds that he was precluded by s. 51(2)(b) of the *Evidence Act*

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from proffering the correspondence which appears to have the sole basis for the claim and it was, therefore, bound to fail.

[45] *Nagase BCCA* was adopted and followed in *Kathirgamanathan v. Western Regional Integrated Health Authority*, 2021 NLSC 89. At para. 82, the court found that both the proceedings before the peer review committee and the initiating events that arose before the committee formally commenced its work were inadmissible under the Newfoundland legislation equivalent that the relevant BC legislation here. In that event, the court ruled that the entire cause of action was bound to fail and it was struck.

[46] The final authority referred to is *Gill v. Fraser Health Authority,* 2022 BCSC 638. An action was brought by parents against Fraser Health Authority alleging that their child's death was caused by a failure to properly diagnose and treat an infection. The health authority applied for an order declaring that a letter sent to the plaintiff had erroneously included information from an internal quality review process and it was therefore inadmissible in the proceedings pursuant to s. 51.

[47] Following *Sinclair*, at para. 30 of *Gill*, Justice Smith held that the letter contained information that arose from the "study, investigation, evaluation or program carried out by a committee" and included a "report or summary" of its finding that came within the purview of s. 51. Justice Smith stated:

> [19] The purpose of s. 51 of the *EA* is to "protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this task": *Lew* at para. 18. That description of its purpose was endorsed by the Court of Appeal in *Sinclair v. March,* 2000 BCCA 459 *[Sinclair]* at para. 23. The Court of Appeal added at para. 24 that the section represents a clear decision by the legislature to protect the "sanctity" of the peer review process, even at the expense of litigants' access to relevant evidence. After reviewing the record of debates in the Legislature when the section was introduced, the Court said at para. 26.
>
>> [26] It can be seen from this analysis that the Legislature intended to protect this area of hospital activity by preventing access by litigants. Rather than striking a balance of interests, the Legislature made a clear choice in favour of one interest, hospital confidentiality. In the course of deciding an issue under s. 51 a court should give the language of the enactment

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> its full force and effect with the object in mind: s. 8, *Interpretation Act,* R.S.B.C. 1996, c. 238. . . .

DISCUSSION

[48] The main issue for determination is whether this action should be struck on a summary trial (R. 9-6) or on any or all of the bases set out in Rules 9-5(1)(a), (b) or (d).

[49] The evidence before me includes the affidavits of Drs. Crisci and Lemire-Elmore.

[50] Dr. Crisci's allegations against Dr. Tierney are set out at paras. 14–18 of the ANOCC. She alleges that:

a) From November–December 2020, Dr. Tierney told "HaH" staff on at least one occasion that Dr. Crisci was "incompetent";

b) On December 15, 2020, Dr. Tierney told "HaH" staff at a meeting that VIHA wanted Dr. Crisci removed from the program given concerns about bullying and lying; that Dr. Crisci had psychologically abused her and made her feel "unsafe";

c) On December 20, 2020, Dr. Tierney published comments to third-parties that Dr. Crisci was probably bullying and lying; and

d) On December 22, 2020, Dr. Tierney republished her "bullying and lying" comment about Dr. Crisci to other third parties.

[51] Finally, Dr. Crisci alleges that the full extent of Dr. Tierney's untruthful comments about her are not yet to known to her. She alleges that Dr. Tierney's comments are motivated by malice and were intended to damage her reputation and standing with colleagues, co-workers and others.

[52] Dr. Tierney has not provided any sworn evidence on this application. However, her response to Dr. Crisci's allegations are found in her RTCC. In

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substance, Dr. Tierney says that, in response to her concerns regarding Dr. Crisci, Dr. Lemire-Elmore advised her that she could submit a complaint to Dr. Crisci and the EMSS pursuant to the Bylaws, Rules and Policy. That is what she did when she submitted the Complaint to Drs. Crisci and Lemire-Elmore on November 28, 2020 which led to the formation of the Committee to investigate the matter and the later various meetings.

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[53] Dr. Tierney denies that she made untruthful and damaging comments about Dr. Crisci to co-workers and colleagues or comments motivated by malice and intended to harm Dr. Crisci. Specifically, she denies organizing any meeting of "HaH" staff on December 15, 2020 at which she allegedly made derogatory comments about Dr. Crisci. Further, Dr. Tierney says that it was Dr. Crisci who published the existence of the Complaint on December 19, 2020 and Dr. Crisci's own complaints about Dr. Tierney to a number of colleagues. Dr. Tierney confirms that she emailed various people within the "HaH" group to address what she considered to be the falsehoods perpetrated by Dr. Crisci in the December 19, 2020 communication by her (which I assume was sent on December 20 and 22, 2020).

[54] In her affidavit, Dr. Lemire-Elmore outlines VIHA's Bylaws, Rules, Policy and Procedures as summarized above in relation to professional competency and behavior issues, and provides specific evidence about the course of her involvement in the matter.

[55] Dr. Lemire-Elmore states that upon receiving the Complaint on November 28, 2020, she was required, in her role as Medical Lead and Co-Division Head of the hospitalists and a member of SIMAC, to investigate the matter. As a result, and after consultations with other physicians, she formed the Committee.

[56] At para. 20 of Dr. Lemire-Elmore's affidavit, she outlines in detail the course of the Committee's work. In summary, the Committee met with Drs. Crisci and Tierney numerous times which led to the Letter of Findings dated February 17, 2021. Finally, Dr. Lemire-Elmore indicates that, commencing in December 2020, Dr. Crisci indicated an intention to resign as a hospitalist in the Region and relocate to

Nanaimo. As stated above, Dr. Crisci ceased working as a hospitalist under the Contract in mid-August 2021.

[57] Dr. Crisci's affidavit addresses numerous matters concerning the Complaint and the Committee's work and the various communications that took place between her and others and between her and Dr. Lemire-Elmore. In particular, Dr. Crisci mentions being told by nurses about Dr. Tierney's "bullying and lying" comments about her, which were the subject of the Committee's investigation of the issues. Dr. Crisci sets out her evidence where she disagrees with Dr. Lemire-Elmore's description of the Committee's work, actions and the outcome, including the circumstances by which she ended her involvement in the "HaH" program.

[58] I accept Dr. Crisci's counsel's overview of the allegations against VIHA in Part 1 of the ANOCC (Statement of Facts) (which I have amended slightly for readability):

a) Paragraphs 19–20: VIHA failed to "properly manage the conflict between [Dr. Crisci] and Dr. Tierney"; it was aware or ought to have been aware of publications allegedly made by Dr. Tierney, which are said to have been particularized at para. 16 of the ANOCC; and VIHA failed to take action to prevent the statements.

    (Dr. Lemire-Elmore confirms that part of the investigation related to Dr. Crisci's allegations that Dr. Tierney had made a derogatory statement about her to colleagues in December 2020).

b) Paragraphs 21–23: Dr. Tierney made the Complaint against Dr. Crisci pursuant to the Rules, Policy and Procedures; meanwhile, VIHA failed to support Dr. Crisci and treat her with respect during the Committee's process, and failed to properly handle the Complaint causing her harm, including reputational harm.

c) Paragraphs 24–32: VIHA failed to comply with the Rules when considering the Complaint and in reaching the conclusions in the Letter

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of Findings. This included the conclusion of the Committee in recommending that Dr. Crisci be removed from the "HaH" program. Further, VIHA vicariously threatened that Dr. Crisci would be reported to the College of Physicians and Surgeons or her privileges would be suspended or removed. Further, Dr. Crisci was compelled to leave the "HaH" program and VIHA and resign her privileges.

(Dr. Lemire-Elmore states that Dr. Crisci issued her resignation to the Committee with respect to her involvement with the "HaH" programs and that the Committee accepted the resignation and then made efforts to re-schedule her shifts at VGH and RJH).

d) Paragraph 33: VIHA failed to maintain confidentiality which prejudiced Dr. Crisci's ability to obtain a new position after her departure from the "HaH" program.

[59] VIHA contends, without controversy, that the EMSS, HAMAC and SIMAC all come within the definition of "committee" found in s. 51(1)(a) of the *Evidence Act* and s. 41 of the *Hospital Act*.

[60] Further, VIHA contends that the Committee comes within the definition of "committee" found in s. 51(1)(b) of the *Evidence Act* as it was a committee established and approved by the Board of Directors that included health care professionals employed by or practicing in any of the hospitals for the purposes of improving medical or hospital practice; and it carried out the function of investigating and evaluating the medical or hospital practices of, or care provided by, health care professionals in those hospitals.

[61] In addition, since the Committee was assigned to investigate the matter involving the Complaint, it also meets the definition of committee as found in s. 51(1)(a) of the *Evidence Act*, as it is a medical staff committee within the meaning of s. 41 of the *Hospital Act*. Finally, the Committee that investigated this matter also meets the definition of s. 51(1)(d) of the *Evidence Act*, as it constituted a group of

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persons who carry out investigations of medical practice in hospitals and who are designated to do so by the Ministry by Regulation: *Hospital Act Regulation*, BC Reg. 121/97; *Hospital Act*, s. 2(2).

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[62] It is a curiosity on this application that Dr. Lemire-Elmore has presented evidence concerning the circumstances leading up to the Complaint, the striking of the Committee and the Committee's work and outcome of that work, that VIHA contends is all inadmissible under s. 51. The same can be said for Dr. Crisci's evidence to the extent that she deals with the circumstances of the complaints and her involvement with the Committee and the results of the complaint process. As VIHA's counsel notes, in order to meet Dr. Crisci's evidence at any trial in this action, VIHA would have to adduce evidence consistent with what is in Dr. Lemire-Elmore's affidavit.

[63] Dr. Crisci argues that in the cases cited by VIHA—being *Fouad*, *Nagase BCSC/BCCA* and *Gill*—the Court was asked to exclude specific pieces of evidence. In *Fouad*, the documents in issue had been listed and produced. In *Gill*, a specific letter was in issue.

[64] Dr. Crisci argues that s. 51 cannot be used "at large" to effectively grant a physician or health authority "blanket immunity" from particular causes of action. Her counsel submits that the defendants should proceed with pre-trial procedures, such as preparing a list of documents and conducting discoveries before brining a summary trial application based on s. 51.

[65] With all due respect, I do not consider that an application, such as is brought by VIHA, must be dismissed in these circumstances. In my view, a summary trial is appropriate if it can be shown, by the pleadings and evidence, that there is no admissible evidence to support any genuine issue for trial given the strictures of s. 51.

[66] As Dr. Crisci's counsel notes, in a summary judgment application, the party seeking to strike the claim must prove that the claim is bound to fail: *Zheng v. Bank*

of China (Canada) Vancouver Richmond Branch, 2023 BCCA 43 at paras. 30–31. As was stated:

> [32] This Court in *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2022 BCCA 97, noted that a defendant can succeed on a R. 9-6 application “by showing the case pleaded by the plaintiff is unsound [does not support a cause of action] or by adducing sworn evidence that gives a complete answer to the plaintiff’s case”: at para. 42, citing *Beach Estate* at para. 48.

[67] Having reviewed the pleadings and the evidence presented, including the evidence of Drs. Crisci and Lemire-Elmore, I am satisfied that all of Dr. Crisci’s allegations against VIHA are inextricably bound up in the complaint process that was initiated by Dr. Tierney and which was investigated by the Committee to a conclusion. In that event, s. 51 dictates that all of the communications that arose from and concerned that process are prohibited from being introduced as evidence in this proceeding. That process includes not only the initial stages of the complaint, but also the actual work done by the Committee: *Nagase BCCA* at paras. 62–64.

[68] In particular, in my view, it is not necessary in these circumstances to have the Court review specific documents in order to come to this conclusion. In any event, I would note that the s. 51 prohibition relates not only to documentary evidence, but also to evidence from witnesses.

[69] I am also satisfied that Dr. Crisci’s allegations as to her resignation are also inextricably bound up with the Committee’s work. Applying the reasoning of *Nagase BCCA* at paras. 62–64, the actions taken by VIHA as a result of the Committee’s work are similarly covered by the s. 51 protections as being consistent with the objects of the *Evidence Act* and its stated purpose. As Garson J.A. stated at para. 62 of *Nagase BCCA*, it would be anomalous to restrict the interpretation of s. 51 to only the formal stage of the Committee’s work and not the entire process.

[70] In my view, that reasoning supports that s. 51 encompasses not only the initial investigatory stage, but also the implementation stage of the complaint process. This is consistent with the ruling in *Gill* at para. 30 which similarly protected the report or summary from the peer review process there.

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[71] Further, as VIHA argues, s. 46(3.1) of the *Hospital Act* affords exclusive jurisdiction to the HAB to review any decision by it that "modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practice in a hospital". In that event, Dr. Crisci's allegations concerning her resignation, whether involuntary or otherwise, must be determined by the HAB in the first instance and may be subject to judicial review: *Provincial Health Services Authority v. Campbell*, 2021 BCSC 823 at paras. 15–19.

[72] Dr. Crisci has not put forward, in defence of the summary judgment application, anything to suggest that her claims are not bound up in the Committee's work and that she can assert her claims without reference to the communications and correspondence that arose from that process: *Zheng* at para. 33. Indeed, her evidence confirms that it is the case. In short, Dr. Crisci was required to put her "best foot forward", as was VIHA, with respect to the material facts in meeting the summary trial application; she has not done so: *Skyllar v. The University of British Columbia*, 2022 BCSC 439 at para. 76; aff'd 2023 BCCA 90.

[73] In that event, I am satisfied that the evidence adduced on this application is a "complete answer" to Dr. Crisci's claims against VIHA in light of the statutory provisions that apply.

[74] In addition, and in the alternative, I am satisfied for the same reasons that the claims against VIHA are bound to fail and should be struck under R. 9-5(1)(a), consistent with the approach and conclusion of this Court in *Nagase BCSC*. In doing so, I acknowledge that the result in *Nagase BCSC* addressed particular correspondence and followed by counsel's concession that the correspondence was key to proving the claims.

[75] While the particular documents are not before me, again, Dr. Crisci has acknowledged that the documents in question that are relevant to her claims against VIHA all arose within the course of the Complaint and the Committee's work. The ANOCC demonstrates no reasonable cause of action, particularly one that concerns

any matter that does not involve inadmissible evidence under s. 51 or matters that do not fall within the exclusive jurisdiction of the HAB.

[76] The same reasoning would apply in respect of VIHA's application to strike Dr. Crisci's claim under Rules 9-5(1)(b) and (d). I conclude that the claims against VIHA in the ANOCC are unnecessary, frivolous, vexatious, and constitute an abuse of process since they cannot be proven, save by reference to documents which are inadmissible under s. 51. Essentially, when the claims that rely on such inadmissible evidence are removed, there are no claims remaining that could be the basis for the action: *Kathirgamanathan* at para. 82.

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[77] The above analysis applies equally to Dr. Crisci's claims against Dr. Tierney to the extent that they are bound up in the Complaint and the Committee's work, as asserted at paras. 16(a)–(d) of the ANOCC. This would include any communications to "HaH" staff including those made by Dr. Tierney: *Nagase BCCA* at paras. 44–45.

[78] As Dr. Tierney's counsel points out, the vague and general references to Dr. Tierney making defamatory comments about Dr. Crisci in the November–December 2020 timeframe (para. 16(a)) are not particularized, as required under R. 3-7(21): *Lu v. Shen*, 2020 BCSC 490 at paras. 41–51. In that event, there are no material facts pleaded to support a cause of action such that they are bound to fail.

[79] In that event, I also agree that this Court has the ability to strike a claim under Rules 9-5(1)(b) or (d) or its inherent jurisdiction on the basis that it is not sufficiently particularized, so as to prevent abuses of process: *Lu* at paras. 52–59.

[80] At para. 17 of the ANOCC, Dr. Crisci also refers to possible other defamatory communications that are not yet known to her. As stated at paras. 77–80 of *Skyllar*, vague references to evidence that might be available at a later time are not sufficient to meet the requirements of a summary judgment application.

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PLEADING ISSUE

[81] VIHA also raises various issues relating to the ANOCC, all arising from the unusual evolution of Dr. Crisci's claims from the NOCC to the ANOCC that occurred without any court application allowing that new pleading to be filed.

[82] VIHA says that Dr. Crisci initially pleaded that she was an employee of VIHA and sought remedies arising from that. VIHA says that now, through the purported amendments in the ANOCC, Dr. Crisci pleads she is an independent contractor, which is an inconsistent allegation that is not allowed under Rules 3-7(6) and (7). VIHA says that it is an abuse of process for a party to knowingly take inconsistent positions: *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at paras. 93–94.

[83] In addition, VIHA says that Dr. Crisci circumvented the *SCC Rules* by filing the ANOCC to add a party (ECPC) without leave of the Court, contrary to Rules 6-1(1) and 6-2(7): *Alexis v. Duncan*, 2015 BCCA 135 at paras. 20–21. VIHA says that ECPC, now unilaterally added as a plaintiff in the ANOCC, is not even a legal entity. This allegation is conceded by Dr. Crisci's counsel who acknowledges that the correct party should be EC Inc.

[84] Finally, VIHA also says that the NOCC (at para. 44) contains certain admissions, in that Dr. Crisci stated that the Complaint did not result in any disciplinary action being taken against her. Leave of the court was required if that admission was to be withdrawn: Rules 6-1(1) and 7-7(5)(c).

[85] Failure to comply with the *SCC Rules* is an irregularity, not a nullity: *Alexis* at para. 26. The Court may strike the pleading in that event, with or without granting leave to apply to amend.

[86] Dr. Crisci's counsel acknowledges his error in not bringing an application for leave to amend the NOCC. By the time these procedural errors or concerns were raised by VIHA, Dr. Crisci's counsel was aware of the looming applications to dismiss the entirety of the claims under Rules 9-5 and 9-6. In that event, he simply

saw the unilateral filing of the ANOCC as an “efficient” way to address the concerns of VIHA, although it certainly was not in that it raised more issues than it resolved.

[87] At the end of the day, VIHA and Dr. Tierney only sought to strike the claim under the *SCC Rules* for non-compliance as it related to the naming of the proper corporate defendant as EC Inc. Given my conclusions on the substantive issue before the Court, such relief is not necessary.

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CONCLUSION

[88] I find that s. 51(2) of the *Evidence Act* precludes Dr. Crisci and EC Inc. from producing documents and compelling evidence from witnesses that relate to the matters in issue.

[89] Accordingly, the claims in this action are struck and dismissed.

[90] VIHA has requested leave to make submissions on costs of the action and this application. No party opposed that approach. That relief is so ordered, provided that any application to address costs in favour of any party shall be filed no later than 60 days from the issuance of these reasons and that, thereafter, the parties will make reasonable efforts to schedule a hearing before me to address costs at the earliest opportunity.

“Fitzpatrick J.”