

HOSPITAL APPEAL BOARD

In the matter of

DR. IMRAN SAMAD

And

**PROVINCIAL HEALTH SERVICES AUTHORITY and
THE CHILDREN'S AND WOMEN'S HEALTH CENTRE OF
BRITISH COLUMBIA**

DECISION ON DISCLOSURE OF DOCUMENTS

On January 9, 2007 the Appellant appealed to the Hospital Appeal Board ("the Board") from a December 8, 2006 decision of the Provincial Health Services Authority ("the Authority"). The Appellant seeks an order granting him full Active Medical Staff Privileges at British Columbia Children's Hospital, in accordance with terms and conditions he enjoyed in 1995, as described in paragraph 4(a) of his Notice of Appeal. As stated by the Appellant in a June 21, 2007 submission: "In its essence, the appeal seeks to reinstate [the Appellant] to an equivalent appointment status as he possessed over a 12 year period from 1993 to 2005".

Pre-hearing conferences were conducted on May 10, June 26 and July 5, 2007, and a hearing date has been set for September 5, 2007.

One issue that the pre-hearing conferences did not resolve by agreement was whether the Authority should be required to disclose to the Appellant the full text of two reports which otherwise fall within the scope of s. 51 *Evidence Act*. These reports – one external and one internal - are reviews of the Department of Otolaryngology at Children's Hospital, conducted in 2004.

An earlier dispute about whether and to what extent a 1994 external review report should be disclosed has been resolved by consent. However, the 2004 reports remain in issue. The Respondent is prepared to disclose certain portions of those reports which she feels are relevant. However, the Appellant seeks access to the entire reports.

It is common ground that the reports in issue here fall within s. 51 *Evidence Act*, which confers special legislative protection on evidence, studies and investigations in respect of a hospital committee: see generally, *Sinclair v. March*, 2000 BCCA 459 at p. 26. The legislature has, in s. 46.1 *Hospital Act*, however provided that this Board, in carrying out its statutory function, may admit such evidence in proceedings before it.

46.1 (1) The Hospital Appeal Board may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

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(6) For the purposes of section 51 of the *Evidence Act*, a proceeding before the Hospital Appeal Board is a proceeding before a board of management.

(7) Information that is inadmissible before a court under section 51 of the *Evidence Act* is admissible in a proceeding before the Hospital Appeal Board.

The Board is a quasi-judicial tribunal which has full substitutional authority in respect of decisions of boards of management. It is axiomatic that the Board must conduct itself having regard to the principles of natural justice. Where evidence is properly admissible before the Board, such evidence must be disclosed to all parties unless there are clear and compelling grounds to receive such evidence *ex parte*. The mere fact that evidence may generally fall within the purview of s. 51 *Evidence Act* is insufficient to exclude it from the application of the ordinary rules of natural justice governing proceedings before this Board.

The language of s. 46.1(6) and (7) *Hospital Act* must be read with s. 51(2) *Evidence Act* and the exclusion of this Board's hearings from the definition of "legal proceedings" in s. 51(1) *Evidence Act*. Properly interpreted, these provisions make clear that information within the purview of s. 51 *Evidence Act*, where relevant to the issues before this Board, may be admitted in evidence in this Board's hearings in accordance with the requirements of natural justice. They reflect a legislative policy that the "sensitive, privileged and protected nature of the documents" should not limit their admissibility in this Board's proceedings.

This limited and carefully defined widening of s. 51 may be taken to have been enacted for the purpose of ensuring that the Board can carry out its statutory mandate, as described in s. 46(3) *Hospital Act*: "The Hospital Appeal Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this section and to make any order permitted to be made." The Board remains subject to the statutory prohibition against wider disclosure in s. 51(5) *Evidence Act*. Board hearings are not open to the public. Significantly, for present purposes, the parties are subject to the confidentiality requirement in s. 46(6) *Hospital Act*, which makes privileged all information or evidence presented to or received by the Board on an appeal.

Against this backdrop, the issue on this application turns, in my view, upon a determination at this stage as to whether the document production sought by the Appellant is relevant to the issues on appeal. "Relevance" at this stage

may be equated with “relating to the matters in question on the appeal”. If they are relevant in this sense, then they ought to be disclosed pursuant to Rules 4(1) and 10(14) *Hospital Appeal Board Rules*, issued under authority of the *Administrative Tribunals Act*:

4(1) Each party is required to disclose to the other party, as soon as practicable, all documents in that party’s possession or control relating to the matters in question on the appeal.

10(14) The report of any committee within the scope of s. 51 of the *Evidence Act* must be delivered to the appellant, and to the board as part of the record, no later than 30 days after the notice of appeal is delivered to the respondent.

Counsel for the Respondent submits that the Hospital would have no difficulty disclosing the reports to the Appellant if they were about the Appellant or any of his cases. Counsel for the Respondent is prepared to disclose to the Appellant those portions of the reports she agrees are relevant to the issue of Operating Room time, even where that is limited to such issues as they pertain only to active staff doctors. However, the Respondent says that the remainder of the reports, dealing with matters internal to active hospital staff, is simply irrelevant on this Appeal, and that to order disclosure to accommodate a fishing expedition would only result in the improper disclosure of information which the hospital took great pains to ensure was collected in confidence from hospital staff.

The Appellant does not agree. He argues that the dysfunction that led the Hospital to undertake two reviews in 2004 is relevant not just to his claim that he was blocked from booking Operating Room time, but will also help the Board understand the history of the department in question, and also potentially be relevant other issues regarding his treatment by the Hospital.

Essentially, the remaining dispute between the parties turns on whether the “dysfunction” among department staff and management which is said to have given rise to the 2004 reviews, and which is likely reported therein, is potentially relevant to the disposition of this Appeal.

The *Hospital Appeal Board Rules*, Rule 4(1), contemplates the disclosure of documents “relating to the matters in question on the appeal”. For present purposes, a document may be said to relate to the matters in question if it contains information which may directly or indirectly enable the Appellant to advance his appeal or undermine the Respondent’s position on the Appeal.

Of course, a document which may be producible at this stage may not necessarily be admissible as evidence on the hearing. The Appellant concedes that the contents of the documents sought to be produced may in fact not ultimately be determined to be relevant and admissible on the hearing, in the context of the whole of the evidence before the Hearing Panel. This remains to be determined on the hearing of the Appeal.

The standard of relevance for application at this stage in deciding on disclosure matters should not be too low, but neither should it be too stringent. The management and functionality of the Department of Otolaryngology appears to have been of sufficient concern to the Hospital that it undertook two reviews on the matter in 2004. The Appellant's "pleadings" raise the allegation that departmental dysfunction is germane both to the issue of how the Hospital developed its human resources plan and to his allegation that his efforts to book Operating Room time for patients was blocked. Indeed, it appears from the record of the decision on appeal that that decision was animated, to some degree by the view that the Appellant had not historically utilized his Operating Room privileges. Further, public interest issues will be relevant in this Appeal, and in that context the reports in question would be relevant in ensuring that this Board has an accurate historical picture as to the development of the present hospital rules and the context in which they were developed. These matters are put in question by the Appellant's pleadings.

It is apparent that the Hospital disagrees with the allegation that the Appellant's Operating Room time was blocked at all. The question whether the Appellant will ultimately be able to prove his allegations is, however, not determinative on this application. The Board cannot determine at this stage the weight that may ultimately be assigned to the reports in question should they be admitted in evidence or the hearing. The question at this stage is whether the documents relate to matters in question in the Appeal, which matters are determinable at this stage with reference to the pleadings.

In my view, the Appellant has satisfied the test of relevance for purposes of the present application having regard to the *Hospital Appeal Board Rules*. The admissibility and weight, if any, to be given to information contained in the reports is a matter the Board will determine in due course, just as it may decide whether a particular line of questioning based on the Reports should, or should not, be permitted.

The question of whether any disclosure order should be the subject of a formal undertaking by Appellant's counsel has been canvassed in argument. In view of the privileged nature of the Appeal proceedings, I regard such an undertaking as unnecessary insofar as the disclosure ordered is for the within Appeal proceedings. I also have concerns whether a disclosure conditioned upon an undertaking of counsel to refrain from disclosing the documents to the Appellant is proper or even workable.

Whether a document or class of documents may be required to be disclosed will be determined in the unique circumstances of each case. However, if documents are disclosed within proceedings before the Board pursuant to the *Hospital Appeal Board Rules*, the receiving party and his or her counsel is bound by an implied undertaking of confidentiality that the documents will not be used for any purpose other than the Appeal. This recognizes to some extent the concerns raised by the Respondent and is compatible with the privilege which attaches to the document by virtue of s. 46(6) *Hospital Act*.

For the foregoing reasons, the following order is made that:

1. the Respondent shall produce to the Appellant and the Hospital Appeal Board, the 2004 internal and external reviews;
2. the Respondent shall produce to the Appellant and the Hospital Appeal Board, the 1994 external review report, redacted to disclose only those two portions related to the relationship between the community and hospital otolaryngologists; and
3. the documents shall be produced no later than August 14, 2007.

DATED this 27th day of July, 2007

"Derek Brindle"

Derek A. Brindle, Q.C.
Chair, Hospital Appeal Board