HOSPITAL APPEAL BOARD

In the matter of

DR. TIMOTHY NG

And

RICHMOND HEALTH SERVICES SOCIETY
(now VANCOUVER COASTAL HEALTH AUTHORITY)

RULING ON ADMISSIBILITY OF EVIDENCE

I. Background

The Appellant is an obstetrician and gynecologist. On December 21, 2001, the Public Administrator for the Richmond Health Services Society ("the Hospital") revoked his hospital privileges as a member of the Provisional Active Staff at the Richmond Hospital. The Hospital's decision followed quality assurance reviews in four surgeries conducted by the Appellant.

The Appellant appealed the Hospital's decision to this Board on January 16, 2002. The appeal is governed by s. 46(1) of the *Hospital Act*, R.S.B.C. 1996, c. 200 and ss. 8-10 of the *Hospital Act Regulation*, B.C. Reg. 121/97. Section 8(8) of the Regulation states that "An appeal to the Hospital Appeal Board is a new hearing of the subject matter of the appeal". The reference to a "new hearing" is a plain language expression of the previous Regulation's reference to a "hearing *de novo*".

As part of the documentation filed by the Hospital on February 12, 2002, the Hospital included, for each case, the relevant quality assurance report referred to above. Each report was commissioned by the Chair of the Medical Advisory Committee and was prepared by a committee of the Appellant's peers.

II. The Objection

Consistent with our custom and with the nature of our hearings, the Hospital introduced its case first. In that context, the Hospital called Dr. R to the stand on March 26, 2002. Dr. R is an obstetrician and gynecologist on Richmond Hospital staff. Dr. R was one of five committee members who authored one of the quality assurance reports. Her name is not included on the other three quality assurance review reports.

In the course of Dr. R's March 26, 2002 examination in chief, an objection was raised as follows:

> Mr. Hinkson: Just before we get into this case, which isn't a question the witness was asked, Ms. Washington full well knows I'm entitled to notice of expert opinions that she proposes to lead. If this witness is going to comment on these cases it's without notice to me and I will object to that. If she's going to answer the question she was asked, I don't object….

Following the exchange of oral submissions, the parties were asked to provide the Board with written submissions respecting Mr. Hinkson's objection.

III. Appellant's submissions

Mr. Hinkson's submission is that Dr. R, who was not present during the surgeries, is not entitled to give expert opinion evidence about the Appellant's care unless the statutory notice and content requirements of the *Evidence Act* are met. Mr. Hinkson cites in particular sections 10(1) and 11(1):

> 10(1) In this section and sections 11 and 12, "proceeding" includes a quasi-judicial or administrative hearing but does not include a proceeding in the Court of Appeal, the Supreme Court or the Provincial Court.
>
> 11(1) A person must not give, within the scope of that person's expertise, evidence of his or her opinion in a proceeding unless a written statement of that opinion and the facts on which that opinion is formed has been furnished, at least 30 days before the expert testifies, to every party that is adverse in interest to the party tendering the evidence of the expert.

Mr. Hinkson's first point is that Dr. R cannot give opinion evidence regarding these four cases unless and until he receives a written statement of her opinion and the facts on which it is based, under s. 11 of the *Evidence Act*. Mr. Hinkson emphasizes that the purpose of the notice provisions in the *Evidence Act* is to ensure fairness to the parties, and he relies on the decision in *Pedersen v. Degelder*, [1985] B.C.J. No. 2694 (S.C.), which decision has been applied to the Court's subsequent civil rules (*Kroll v. Eli Lilly Canada Inc.*, [1995] B.C.J. No. 412 (S.C.) and by a labour arbitrator in arbitration proceedings: *Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Re)* (1999), 80 L.A.C. 21. In *Pedersen*, the Court considered the operation of ss. 10 and 11 when the notice provision was 14 days:

> As I see it, the intent of ss. 10 and 11 of the British Columbia Evidence Act is to give 14 days notice to the opposite party of the expert testimony that will be presented at trial. Where one party believes it advantageous to introduce the expert evidence through a written statement, he may use section 10. But where he wants to call the expert to give expert testimony, he must use s. 11…. Notice is an important ingredient in each section. An opposite party should not be taken by surprise at the trial….

Mr. Hinkson submits that his objection includes the critical incident review that Dr. R coauthored. Mr. Hinkson states that even though Dr. R was a co-author of one of the reports, and even though that report was in the Appellant's hands since November 8, 2001, it is not a proper expert report and does not comply with s. 11. He submits as follows:

> … the Memorandum …in no way fulfills the requirements of the Act or the common law as set out above [*Emil Anderson Const. Co. v. B.C. Ry. Co.* (1987), 15 B.C.L.R. (2d) 28 (S.C.); *Heidebrecht v. Fraser-Burrard Hospital Society* (1995), 15 B.C.L.R. (3d) 189 (S.C.); *Mazur v. Moody*, [1987] B.C.J. No. 1027 (S.C.); *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (S.C.)]. It is written by five authors, and at no point does it differentiate Dr. R's opinion from those of her committee colleagues. The Memorandum sets out a presumed factual scenario as if it were proven, when much of the scenario is disputed by the Appellant. The Memorandum does not disclose where or from whom those "facts" originated or how they were made known to the authors, and it is the veracity of those facts that is the very subject upon which this Panel must decide. The Appellant submits that, therefore, the Memorandum does not fulfill the requirements set out by the *Evidence Act* or the common law, and Dr. R's opinion should therefore be found to be inadmissible.

IV. Hospital's submissions

The Hospital, through its counsel Ms. Washington, submits that both the Reports and Dr. R's evidence as an ad hoc committee member, are admissible in evidence.

With regard to the reports, Ms. Washington submits that they are not tendered as "expert reports" within the meaning ss. 10 and 11 of the *Evidence Act*. Instead, they are quality assurance reports protected by section 51 of the *Evidence Act*, the disclosure of which is authorized to this Board which sits in the place of the Hospital Board. Ms. Washington cites *Re City of Toronto and CUPE Local 79* (1982), 35 O.R. (2d) 545 (C.A.) as a caution against an overly technical approach to these proceedings. She submits that the cases relied on by the Appellant (*Mazur* and *Emil Anderson*) are of no assistance here since they deal with reports commissioned by counsel for purposes of litigation. She emphasizes that rather than focussing on the strict rules of evidence, we should focus on the principles of procedural fairness at common law. If there is no procedural unfairness, we should admit the evidence and give it the weight it deserves after it has been tested. On the matter of procedural fairness, she submits:

> …Counsel for the Appellant had full notice that the reports would be put before the Panel. The Reports are included in the Hospital's submissions, dated February 12, 2002, of which counsel for the Appellant had full disclosure, and they had earlier received the reports when they were submitted to the MAC in November of 2001. The Reports list the Ad Hoc

> Committee Members and each doctor who contributed to the Report is cited by the Hospital as a potential witness. It is obvious that obstetrician mentors are responsible for the comments on obstetrical practice. Furthermore, the Appellant attended before each Ad Hoc Committee and in at least one case with counsel.
>
> The nature of the within proceeding also enables Counsel for the Appellant to fully cross-examine each doctor who has contributed to the Reports and who is called before the Panel to offer testimony on the Reports. Any concerns or inconsistencies in the Reports or in testimony can be addressed both in cross-examination and by the Appellant directly. This is in full accordance with the principles of natural justice.

As for Dr. R and the other committee members, Ms. Washington submits that they can give evidence on the opinions and facts from which the Report stemmed.

V. Appellant's reply

Mr. Hinkson submits in reply that the *Evidence Act* requirements are binding statutory requirements. The reports express opinions and therefore are captured by the *Evidence Act*; it does not matter whether they were commissioned by counsel. He submits that material considered prior to our hearings should not be received other than pursuant to the provisions of the *Evidence Act*.

As for the report's authors, while they are free to speak about matters within their personal knowledge, they were not present at any of the surgeries and so are not entitled to give expert opinion evidence without also complying with ss. 10 and 11 of the *Evidence Act*.

VI. Decision

A. Do ss. 10 and 11 of the *Evidence Act* apply to Hospital Appeal Board hearings?

The threshold question we must decide is whether ss. 10 and 11 of the *Evidence Act* even apply to Hospital Appeal Board hearings. In our view, the answer is "yes". Sections 10 and 11 of the *Evidence Act* do apply to this Board. Sections 10(1) and (2) of the *Evidence Act* specifically state that the rules in those sections apply to a "proceeding", which includes a quasi-judicial or administrative hearing, unless the body has enacted or made its own rules for the production of expert evidence. Our hearing is a quasi-judicial hearing or administrative hearing, as is the hearing held by the Hospital's board of management. The Board has not to date made its own rules for the admission of expert evidence. In contrast to the *City of Toronto* case relied on by the Hospital, there is no general statement in our enabling statute or regulation providing that the Board may admit evidence whether or not it is admissible in

Court. While the common law grants administrative tribunals flexibility about the rules of evidence, those common law rules are subject to statutory override.

A. Are quality assurance reports inadmissible because they run afoul of the notice and content requirements of ss. 10 and 11 of the *Evidence Act*?

Having determined that ss. 10 and 11 of the *Evidence Act* apply to Hospital Appeal Board hearings, it does not necessarily follow that Quality Assurance Reports are subject to the admissibility rules in ss. 10 and 11.

As the Hospital points out, the four committee reports in question were generated as part of the Hospital's quality assurance process. The quality assurance process has been deemed so important that it has been given special legislative protection. Section 51 of the *Evidence Act* states that such reports cannot be disclosed or used in proceedings against medical practitioners. In *Sinclair v. March*, [2000] B.C.J. No. 1676 (C.A.), the Court of Appeal held 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." This ban on the disclosure and use of these reports by *litigants* means of course that the *litigation rules* in ss. 10 and 11 of the *Evidence Act* are a practical and legal non-starter in litigation, and before other quasi-judicial and administrative tribunals. Their purpose and use are limited and narrowly defined.

This raises the question whether the Legislature could have intended ss. 10 and 11 of the *Evidence Act* to apply to the narrow instances where quality assurance reports are properly disclosed, such as disclosure to boards of management - and by extension, to this Board, which makes its own <u>independent</u> decision by placing itself "in the shoes of the Board of Management" (*Samson v. Sisters of Charity*, *supra*, para. 11; *Hicks v. West Coast General Hospital*, [1993] B.C.J. No. 107 (S.C.)) - for purposes of proceedings regarding privileges.

We would answer "no", for two reasons. First, if the 30 day rule in s. 10 of the *Evidence Act* (which cannot be abridged) applied, it would clearly undermine a hospital's ability to take prompt and corrective action to protect patients. We do not think the Legislature could have intended such a result. Second, the content requirements of ss. 10 and 11 of the *Evidence Act* as interpreted by the courts, such as the "no drafting by committee" rule set out in the cases relied on by Mr. Hinkson, are contrary to the express terms of s. 51 which make clear that the very nature of quality assurance reports is that they are committee (peer review) reports. These two factors make it clear to us that the notice and content obligations in ss. 10 and 11 of the *Evidence Act* were never intended to touch quality assurance reports prepared within hospitals for the use of boards of management and by this Board on a new hearing regarding the subject matter of hospital privileges.

Legislation should not be interpreted in a fashion that gives rise to conflicts within the same statute; further, general legislation must be read in light of specific provisions in other sections of the same statute. An irreconcilable conflict would arise if the very feature that defines a quality assurance report – its nature as a committee report - excluded it from consideration by boards of management and by this Board on the grounds that such reporting is contrary to the general content requirements of ss. 10 and 11 of the *Evidence Act*. The only interpretation that avoids conflict is the one which acknowledges the special character of s. 51 reports and excludes them from the requirements of ss. 10 and 11 of the *Evidence Act*, while still ensuring that these reports are used fairly – in particular, by ensuring their timely disclosure to affected practitioners and granting those practitioners a right to challenge the facts and conclusions of the reports' authors.

In the Panel's view, all four reports are admissible. The Appellant has had notice of them for many months now. The weight they will be given in the end will depend on the totality of the evidence as it is tendered and tested by the parties.

Before closing on this issue, we would add that even if we had found that ss. 10 and 11 of the *Evidence Act* did apply to these reports, we still would have admitted them under s. 11(2) of the *Evidence Act* provided their authors were called to give evidence, as the Hospital advises they will be here.

C. Dr. R's oral evidence regarding the co-authored report

For the same reasons we have found the quality assurance reports admissible, Dr. R – as an author of this report - is entitled to give oral evidence regarding the facts, conclusions and recommendations that informed her opinion as set out in that report. The Appellant has had ample notice of those facts, conclusions and recommendations, and it is fully open to him to test those facts, conclusions and recommendations by way of cross-examination and by tendering his own evidence. In our view, there is no prejudice whatsoever to the Appellant in having Dr. R give oral evidence regarding that report.

D. Dr. R's oral evidence regarding the other three cases and quality assurance reports

Having made the finding in C above, however, we wish to emphasize that we take a different view of what appeared to be the Hospital's attempt (as reflected in one of its questions) to have Dr. R testify as to the three cases where she did not co-author a quality assurance report.

In our view, to have Dr. R give expert evidence regarding those cases would require compliance with the *Evidence Act* provisions above since such opinions would fall outside the special nature of s. 51 quality assurance reports.

Further, if the Hospital wishes to have Dr. R give evidence that dramatically extends the contents of the quality assurance report that she did co-author would also require notice to the Appellant under the *Evidence Act*. Depending on the nature of such evidence, the Board is prepared to consider whether to exercise its discretion in s. 11(2) of the *Evidence Act* to relieve the Hospital from strict compliance with the 30 day rule. Having said this, the Board expects both counsel, who are experienced litigators and experienced in hearings before this Board, will be able to work these matters out between themselves in accordance with these reasons.

"Gordon Armour"

_____

Gordon Armour (for the Panel)
Chair, Hospital Appeal Board

Dated: June 10, 2002, Williams Lake, British Columbia