

HOSPITAL APPEAL BOARD

In the matter of

DR. W.R. E. J.

And

ST. PAUL'S HOSPITAL

RULING ON ADMISSIBILITY OF EVIDENCE

I. Background

Dr. J. is a cardiovascular and thoracic surgeon who practiced at Vancouver General Hospital from approximately 1977 to June of 1995 when he moved to St. Paul's Hospital.

On December 10, 2001, the Hospital Board of St. Paul's confirmed a September 13, 2001 decision of its Board of Trustees, (1) revoking Dr. J.'s clinical privileges for Cardiovascular and Thoracic Surgery and revoking his appointment to the active staff; (2) appointing him to the Scientific and Research Staff; and (3) granting him privileges to assist surgical procedures upon the invitation of other surgeons.

Dr. J. appealed to this Board on December 19, 2001. 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*".

II. The Objection

Consistent with our custom and with the nature of our hearings, the Hospital introduced its case first. In that context, on May 15, 2002, the Hospital called Dr. Hilton Ling as a witness. In the course of his examination in chief, the following exchange took place:

Q. After Dr. J. came to St. Paul's Hospital did you attend with him in open heart cases that he was performing?

A. That's correct.

Q. Why did you do that?

A. Well, you know, there were a lot of rumours before he came over. We didn't want to listen to any rumours about his ability and whatever. We felt,

if he came over and we all worked together and took turns, you know, assisting and helping, that he would get off to a better start and not have any of the problems we had heard about. Like I say, that is only hearing [hearsay]. Nothing was ever shown to me in documentation. That's the attitude we took, that we would start from the beginning and set things off on the right foot.

Q. You have indicated that you did attend or scrubbed in with him in cases?

A. Yes, we did.

Q. Was one of your objectives in scrubbing in with him to form your own view as to what kind of surgeon he was?

A. Well, no – the thing is we wanted to help him to make sure that when he started off his practice it would be on a new foot, no baggage from another hospital or whatever rumour had been going around and that he would start off fresh. Of course, in helping someone, it is just natural to you evaluate people when you are working with them.

Q. Now, did you in those early cases form any views with respect to Dr. J.'s surgical abilities?

MR. HINKSON: I am going to object at this stage Mr. Armour. The B.C. Evidence Act applies to these proceedings and, in particular, Section 10(1) provides that a proceeding for the purposes of the act includes a quasi-judicial administrative hearing. This is either one or both of those things. Section 11(1) of the Act provides that a person must 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, the facts on which that opinion is formed, has been furnished at least 30 days before the expert testifies....

We have heard a lot of evidence I think probably that could be characterized as opinions from nurses. I have not objected to it so far because my position at the end of the day is this is going to be largely uninformed opinion, perhaps based on misunderstandings or untruths, but we are now at the stage where Mr. Webster wants to lead opinion evidence from a specialist surgeon about Dr. J.'s skill and ability. At this stage I suppose the case is recast and I am entitled to notice of that. I have given Mr. Webster notice of the expert opinions that I intend to call. It is unfair to put me in a position where I am expected to cross-examine a specialist about his opinions not knowing what it is or the basis upon which it is reached and the Evidence Act is clear that Mr. Webster has an obligation to give me notice.

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

The Appellant submits that Dr. Ling is not entitled to give expert opinion evidence about Dr. J.'s surgical abilities unless the statutory notice and content requirements of the *Evidence Act* are met. The Appellant cites in particular sections 10(1) and 11(1) of the *Evidence Act*:

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.

The Appellant 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....

The Appellant submits that while the Board has a broad discretion in applying the rules of evidence, it is bound by the mandatory statutory provisions in the *Evidence Act*, which reinforce the principles of procedural fairness. The Appellant states that Dr. Ling's opinion is medical in nature, and submits as follows regarding his evidence and the evidence of any other expert witnesses called by the Hospital:

The Appellant has not received a written statement of Dr. Ling's opinion, nor the facts upon which that opinion is formed. There are no notes, letters or other documents authored by Dr. Ling in the volumes of material provided to date by the Hospital. The Appellant ought not [to] be obliged to sift through this material and anticipate what Dr. Ling's evidence might be. The *Evidence Act*, the common law and the principles of natural justice demand that the Hospital disclose Dr.

Ling's opinion and the facts upon which it is based well in advance of that evidence being adduced.

IV. Hospital's submission

The Hospital submits that, in considering the Appellant's submission, the Board must take into account that Dr. Ling's evidence would include, but not be confined to, expert opinion evidence. It states that "Dr. Ling's testimony is not confined to offering an opinion within his particular area of expertise. Indeed, the testimony that Dr. Ling is expected to give falls along a spectrum from statements of fact to expressions of opinion".

Counsel for the Hospital argues notice is not required on matters such as what Dr. Ling observed, and is also not required to explain his reaction to events he has observed, where these do not depend on his qualification and skill as a cardiac surgeon and where they are offered to explain why he acted as he did: Sopinka, *The Law of Evidence in Canada* (1992), at p. 526, referring to *R. v. Graat*, [1982] 2 S.C.R. 819. Counsel goes further and states that testimony by colleagues with direct knowledge of a party's professional expertise is routine in civil trials, with no suggestion that these co-workers should be treated as expert witnesses. This reveals, in counsel's submission, that the question whether evidence falls within notice requirements is a matter of some subtlety: *Toronto Helicopters Ltd. v. Intercity Ford Ltd.* (1995), 60 A.C.W.S. (3d) 105 (Ont. Ct. Gen. Div.).

Finally, counsel concedes that Dr. Ling may well be asked to give expert opinion:

...it is anticipated that Dr. Ling will testify that when he was called in to provide assistance to Dr. J. in cases where problems had arisen, for example aortic cases, he would take over the conduct of the surgery rather than simply assist Dr. J. In order to provide an explanation for his actions, it may be necessary for Dr. Ling to express an opinion with respect to Dr. J.'s ability to remedy the problem and complete the surgery. This opinion may very well require Dr. Ling to rely upon his "special knowledge" as a cardiac surgeon.

Counsel notes that with respect to this evidence, the Board should have regard to s. 11(2) of the *Evidence Act*, which gives the Board discretion to abridge the notice requirements where there would be no unfairness to the Appellant. Counsel argues:

Dr. Ling and Dr. Abel (another cardiac surgeon at St. Paul's Hospital) were on the witness list provided to Dr. J.'s counsel on April 19, 2001. Counsel for Dr. J. raised no objection to their testimony until Dr. Ling was actually in the witness box....

To the extent that any testimony by Dr. Ling falls within this third category of evidence described above, it will be difficult for Dr. J. to argue that he did not have at least some advance notice of the views that Drs. Ling and Abel would offer. Dr. J. has had for some time a copy of the notes prepared by Dr. Manson of

his interview with Dr. Ling and his interview with Dr. Abel, both of which occurred in October of 1998, and in which both Dr. Ling and Dr. Abel provided their assessment of Dr. J. Further, Dr. Ling and Dr. Abel will testify regarding their conversation with Dr. J.

Dr. J. has records of all of his open heart surgery cases since he came to St. Paul's Hospital, and through these records it would appear that he is able to determine in which cases Dr. Ling and Dr. Abel and other surgeons were involved. Counsel for Dr. J. has made no request for the charts of any of these cases, even though such a request would not have been refused by the Hospital.

Under the circumstances, there is nothing before the Board that would indicate that fairness to Dr. J. requires either the exclusion of the evidence, or that notice now be given during the lengthy hiatus in the hearing.

V. Appellant's Reply Submission

In reply, the Appellant emphasizes that the surgical career of Dr. J. is at stake in these proceedings, that he should not have to guess as to the nature of the evidence Dr. Ling intends to call, and that the *Evidence Act* applies where Dr. Ling's factual evidence is informed by his expertise. In this regard, counsel argues that *R. v. Graat* has little application in this case – in *R. v. Graat*, the Court merely held that no particular expertise is required to make observations of sobriety, while here, “individuals without medical training would not be able to offer evidence of the nature that Dr. Ling can...” Appellant's counsel also cautions the Board about other judicial decisions referred to in the Respondent's submission, which were not decided based on the BC *Evidence Act*, and where some of the background facts of those decisions (regarding notice) was unclear.

With respect to the notes in his possession, the Appellant submits as follows:

It is simply no answer for Mr. Webster to assert that Dr. J. received notes prepared by Dr. Manson of interviews he conducted with Drs. Ling and Abel. Clearly notes that Dr. Manson took of discussions with others in no way comply with the requirements of the *Evidence Act* and his distillation of his understanding of conversations with others is of no assistance in ascertaining either the opinions of Drs. Ling and Abel or the basis for those opinions. It is this information to which Dr. J. is entitled....

It is unrealistic to suggest that [Appellant's] counsel should review all of the cases Dr. J. has conducted at St. Paul's in order to divine which other surgeons were involved in those cases and from that to try to anticipate the opinions that might be offered arising from those cases.

Appellant's counsel concedes that the Board has discretion to dispense with notice, but only where unfairness will not result and expediency requires the Board to do so. However, it states that there is no need to do so in this case.

VI. Decision

The Board recently decided a related evidentiary objection in another appeal before this Board. In *Ng v. Richmond Health Services Society*, the Board held that - with the exception of quality assurance reports under s. 51 of the *Evidence Act* and *viva voce* testimony relating to those reports by their authors - ss. 10 and 11 of the *Evidence Act* apply to Hospital Appeal Board hearings. While our decision in *Ng* dealt primarily with the s. 51 exception, it held as follows with respect to a physician's evidence that fell outside the scope of s. 51:

... 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. Robson testify as to the three cases where she did not co-author a quality assurance report.

In our view, to have Dr. Robson 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. Robson give evidence that dramatically extends the contents of the quality assurance report in *Jaswal* that she did co-author would also require notice to Dr. Ng 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.

The above passage reflects the Board's view that expert opinions in chief do require compliance with the notice provisions in the *Evidence Act*, but that the Board is prepared to consider whether to grant relief from those requirements if counsel cannot resolve the matter of a fair notice period among themselves in light of the scheduling of the particular case.

In the circumstances here, the Board agrees with the Appellant that it would not be productive to begin parsing Dr. Ling's evidence into categories. Obviously, if Dr. Ling (or any other physician) gives evidence only as to what he saw in the operating room, or gives evidence of what Dr. J. said to him, an opinion is not being offered and notice is not required. However, to the extent that his evidence will have him making statements about Dr. J.'s skill and proficiency as a surgeon, either in general or to explain why Dr. Ling acted in particular ways, his expertise as a surgeon will be unavoidably implicated, and this triggers the duty to give the Appellant notice of those opinions.

In our view, a very stark example of this is raised by the very question that triggered the particular objection and this submissions process:

Q. Now, did you in those early cases form any views with respect to Dr. J.'s surgical abilities?

In our view, Dr. Ling's views regarding Dr. J.'s surgical abilities is clearly a question requiring the expression of an opinion to the Board - an opinion which the Hospital will undoubtedly ask us to rely upon and which may well have significant implications for Dr. J. In fairness, Dr. J. should have advance notice of these opinions.


The Board wishes to make clear that, consistent with the purposes of administrative tribunals and the need to conduct proceedings effectively and efficiently, our decision in this matter should not be taken as stating that we will apply the *Evidence Act* provisions in a mechanistic manner. For example, where the sum total of a proposed expert's evidence is already contained in other documents in the file (which may well be the case given the nature of many of our hearings), the Board does not consider it appropriate to require a repetition of all that in a formal "report". In such cases, it would suffice for one counsel merely to advise another, in a timely fashion, that he intends to call the physician to speak to the evidence contained in the particular document. However, where a party decides to call the witness to provide opinions not already contained in the documents, it is only fair that they provide a proper report under s. 11 of the *Evidence Act*, subject always to its right to apply to this Board for relief under s. 11(2).

While it is not entirely clear to us from Mr. Webster's written submission, it appears that he will in fact be asking Dr. Ling (and Dr. Abel) to give evidence on questions that extend beyond opinions attributed to them in the documents. Thus, in the circumstances here, we believe that it is appropriate for Mr. Webster to give Mr. Hinkson notice under the *Evidence Act*.

We do not, however, think it is necessary to be rigid about the 30 day time requirement. The proceedings are well underway, and many of the points made by Mr. Webster satisfy us that, in all the circumstances here, a notice requirement of 14 days before the opinion evidence is called in chief would be fair and appropriate. If some exceptional circumstance arises whereby Mr. Hinkson considers that he cannot properly prepare his cross-examination with 14 days notice, we are prepared to hear from him on the point.

We close this decision by noting that we have carefully considered Mr. Webster's suggested "guidelines for the receipt of evidence that includes an element of expertise and opinion". We are grateful for the effort he put into these suggestions, and we will take them under advisement in respect of any future rules this Board issues regarding expert evidence. It will suffice to state that, for purposes of this case, the best balance between certainty and flexibility is provided in ss. 11(1) and (2) of the *Evidence Act*, which provisions provide the Panel with the tools it needs to ensure that notice of expert opinion takes place in a fashion that is both fair and practical, without becoming rigid and legalistic, and which allows us to take into account the particular circumstances of this case.

The parties are to govern themselves accordingly.

A handwritten signature in dark ink, appearing to read "Gordon Armour", written over a horizontal line.

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

Dated: August 2nd, 2002, Williams Lake, British Columbia