SECTION 51 BACKGROUNDER

BC's quality assurance legislation falls under the Ministry of Attorney General's *Evidence Act [RSBC1996]*. Section 51 of the *Evidence Act* (Section 51; see Appendix A) was developed to promote quality assurance or quality improvement by supporting an environment where health care providers could speak truthfully about the care they or others provided, without fear that the information produced during a review could be used as evidence in a legal proceeding.

The legislation articulates a qualifying committee structure and sets out that information provided to and produced by a qualifying committee is prohibited from being used in legal proceedings. The intent is to provide a safe space for frank and open discussion amongst health care professionals.

The legislation has had some changes in the ensuing 25+ years since its inception but not enough to keep pace with broadly accepted and modern approaches to patient safety and quality improvement. It does not apply across all health care settings or include all care providers; it does not contemplate sharing of information beyond a very narrow scope; and it does not take into consideration the "systems" view of health care (versus the notion that quality care is tied solely to an individual practitioner's role). Despite these challenges it is the current guiding legislation in BC although we now recognize the value of reviewing patient safety incidents from across the care continuum and applying improvements outside designated facilities.

FOCUS ON IMPROVEMENT

Within the health care system, quality assurance legislation is designed to ensure patient safety incidents are reviewed in a manner that allows for open and honest discussion and system improvement. After a patient safety incident occurs, health care providers analyze the incident with the aim to identify what happened, what was learned and what can be done to reduce the risk of reoccurrence.

The *In Plain Sight (IPS)* report highlighted that conducting reviews under Section 51 often fails to meet the needs of Indigenous peoples and reinforces their mistrust in the health care system. *IPS* specifically recommends Section 51 be amended to ensure proper and appropriate information can be disclosed, incidents of Indigenous specific racism are documented and made public, and the current environment of secrecy and distrust is ended.

With these issues in mind, in keeping with other national jurisdictions, the Ministry of Health is reviewing Section 51 to identify opportunities for modernization. Ministry staff are conducting engagement sessions with health care, patient, and community partners to explore opportunities for amending Section 51, in accordance with Section 3 of Declaration on the

Rights of Indigenous People's Act (DRIPA). Engagement sessions will focus on cultural safety, current research, best practice, and partner feedback.

ROLE OF THE HEALTH CARE PROTECTION PROGRAM (HCPP)

As the organization defending health authorities (HAs) in legal actions resulting from patient harm, the Health Care Protection Program[1] (HCPP) is repeatedly turned to for interpretation and advice with respect to the application of Section 51.

BC's first publication of guidance materials in the early 2000s was under the banner of the BC Health Care Risk Management Society, the precursor to the current HCPP structure. Over time, HCPP has updated that guidance material twice, most recently in November 2022 following lengthy engagement with the Provincial Risk Management Committee.

The predominant view in high functioning health care systems is that following an adverse event, disclosure of what happened is the right thing to do, along with an apology and, potentially, restitution. Section 51 does not prevent the disclosure of medical facts, but it does legally prohibit disclosing the outcomes of an investigation and any recommendations made to improve the system as a result. In litigated situations, counsel engaged by HCPP will argue that information obtained during a Section 51 review is prohibited from release, as was recently upheld by the courts[2]. HCPP often ends up advising HAs of the legal prohibition to share full information with patients[3].

While appropriate from a legal defense perspective, there is a view that Section 51 is misused within the HAs (i.e. as a purely legal response to shield matters versus a quality improvement tool) and that, in the current clime, HCPP's guidance is a barrier to patient responsiveness, specifically to the use of a restorative approach to heal harms.

This is not a new issue; in addition to the findings of *IPS, IPS*.there are also numerous examples of non-Indigenous patients and families being dissatisfied with their experience with the health system following an adverse event, some of which have spawned well-formed and supported patient advocacy groups[4]. This lack of satisfaction may encourage litigation as people seek answers and remedies that are lacking under the current legislation; they are forced to litigate to feel they have been heard.

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[1] HCPP is RMB's branded program for the health care risk pool and its attendant coverage agreements
[2] *Gill vs. Fraser Health Authority* (2022), 638 BCSC
[3] The practical reality for a HA is that workarounds to an untenable and ethically troubling situation have evolved, often with legal support. Information regarding changes that have been implemented following a Section 51 review (versus recommendations that may or may not have resulted in actual change) are shared without making direct connection to the event itself.
[4] Patients for Patient Safety Canada

HCPP ADVICE

- There is no impediment for a patient to participate in a Section 51 review, however patient participation is not without its challenges and careful consideration of issues is advised. (Examples of relevant issues include patient resilience / support, legal understanding and orientation, clinical translations, psychological safety, financial implications, unanticipated areas of focus etc.)
- Case selection will be critical for success and, at the core, the purpose for which the review is being conducted must be addressed if the review is to be conducted under Section 51.
- A review outside of Section 51 remains an option, however individual practitioners may be uncomfortable providing frank input.
- Use of Section 51 is not mandatory but will unavoidably apply if a quality assurance investigation is conducted that fits with the parameters of Section 51. It is not possible to pick and choose which cases are in and which are out without removing them from the standard quality structures, which are typically designed with Section 51 requirements in mind.
- HCPP coverage concerns can potentially be addressed by the inclusion of HCPP in the overarching process and framework development. Coverage may become an issue when HAs engage in activities that are outside of a structured and agreed-on process and that have not considered issues of legal risk and financial compensation, jeopardizing HCPP's ability to defend a legal action.
- Finally, HCPP has confirmed its commitment as a collaborative partner in this work and are desirous of being part of the solution, not a barrier to implementation.

APPENDIX A

Health care evidence

51 (1)In this section:

"board of management" means a board of management as defined in the *Hospital Act* or the board of directors as defined in the *Emergency Health Services 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;

(b.1)a committee that is established or approved by the boards of management of 2 or more hospitals, that includes health care professionals employed by or practising in any of those hospitals and that, for the purposes of improving medical or hospital practice or care in those hospitals, or during transportation to or from those hospitals,

(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 those hospitals or during transportation to or from those hospitals, in relation to a matter of common interest among those hospitals, or

(ii)studies, investigates or carries on medical research or a program in relation to a matter of common interest among those hospitals;

(c)a group of persons who carry out medical research and are designated by the minister by regulation;

(d)a group of persons who carry out investigations of medical practice in hospitals and who are designated by the minister by regulation;

"health care professional" means

(a) and (b)[Repealed 2006-23-1.]
(c)[Repealed 2003-57-43.]
(d)[Repealed 1998-42-7.]
(d.1)an emergency medical assistant as defined in the *Emergency Health Services Act*,
(e)a person registered as a member of a college within the meaning of the *Health Professions Act*, or
(f)[Repealed 2003-77-37.]
(g)a member of another organization that is designated by regulation of the Lieutenant Governor in Council;

"hospital" means a hospital as defined in the *Hospital Insurance Act* and includes

(a)a hospital as defined in the *Hospital Act*,
(a.1)the corporation as defined in the *Emergency Health Services Act*, including any centres or stations established, equipped and operated by the corporation, and
(b)a Provincial mental health facility as defined in the *Mental Health Act*;

"legal proceedings" means an inquiry, arbitration, inquest or civil proceeding in which evidence is or may be given, and includes a proceeding before a tribunal, board or commission, but does not include any of the following proceedings:

(a)a proceeding before a board of management;
(b)a proceeding before a board or body connected with an organization of health care professionals, that is a hearing or appeal concerning the conduct or competence of a member of the profession licensed, certified, registered or represented by that organization;
(c)a proceeding in a court that is an appeal, review or new hearing of any matter referred to in paragraph (a) or (b);

"organization of health care professionals" means any of the following that are designated by regulation of the Lieutenant Governor in Council:

(a)an organization of health care professionals;
(b)a body or person that licenses, certifies or registers a class of health care professionals;

"witness" includes any person who, in the course of legal proceedings,

(a)is examined for discovery,

(b)is cross examined on an affidavit made by him or her,

(c)answers any interrogatories,

(d)makes an affidavit as to documents, or

(e)is called on to answer any question or produce any document, whether under oath or not.

(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.

(3)Subsection (2) does not apply to original or copies of original medical or hospital records concerning a patient.

(4)A person who discloses information or submits a record to a committee for the purpose of the information or record being used in a course of study, an investigation, evaluation or program of that committee is not liable for the disclosure or submission if the disclosure or submission is made in good faith.

(5)A committee or any person on a committee must not disclose or publish information or a record provided to the committee within the scope of this section or any resulting findings or conclusion of the committee except

(a)to a board of management or, in the case of a committee described in paragraph (b.1) of the definition of "committee", to the boards of management that established or approved the committee,

(b)in circumstances the committee considers appropriate, to an organization of health care professionals, or

(c)by making a disclosure or publication

(i)for the purpose of advancing medical research or medical education, and

(ii)in a manner that precludes the identification in any manner of the persons whose condition or treatment has been studied, evaluated or investigated.

(6)A board of management or any member of a board of management must not disclose or publish information or a record submitted to it by a committee except in accordance with subsection (5) (c) or (6.1).

(6.1)If information or a record submitted by a committee to a board of management of a hospital includes information that the board of management considers relevant to medical or hospital practice or care in another hospital, or during transportation to or from another hospital,

(a)the board of management may disclose the information or record to the board of management of the other hospital, and

(b)the board of management of the other hospital must not disclose or publish the information or the record disclosed to it under paragraph (a), except in accordance with subsection (5) (c).

(7)Subsections (5) to (6.1) apply despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1) (b), (2), (2.1) and (3) of that Act.

(8)Subsection (7) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for at least 100 years or to other information that has been in existence for at least 50 years.