RISK NOTE

Subject: **Q&A ON SECTION 51 OF THE BC *EVIDENCE ACT* INCIDENT MANAGEMENT**

Background

This document addresses many common questions about section 51 of the BC *Evidence Act* [RSBC] 1996 chapter 124. The answers reflect a consensus of risk management leaders in the health authorities and Providence Health Care, the Health Care Protection Program of the Ministry of Finance and the Quality and Issues Management areas of the Ministry of Health.

Introduction

Section 51 of the *Evidence Act* ("s.51") was created to support a forum where health care providers could speak frankly about their opinions related to care they or others provided in a hospital. It is intended to remove fear that any information generated in a quality assurance review could be used against participants in a legal proceeding. The ability to conduct frank and forthright conversations when reviewing patient safety events promotes safer patient care. Section 51 holds that a witness to a legal proceeding may not provide to that proceeding information or records generated by or for committees which conform to the criteria set out in Section 51 of the *Evidence Act* (a "s.51 committee"). Additionally, information and records considered and created by those committees are also restricted from being shared outside the s.51 committee, except as specifically authorized by s.51.

There has been some uncertainty and disagreement among those working in health care quality and risk management interpreting some aspects of s.51. The information below is intended to help health care workers balance the requirement to comply with the statutory restrictions in s.51 with modern expectations for disclosure.

1. **What is a s.51 committee?**

   A s.51 committee is a committee established to conduct quality assurance investigations in a hospital setting and conforms to the criteria set out in section 51 of the *Evidence Act*.

2. How is a s.51 committee formed?

Criteria for establishing a s.51 committee is set out in section 51 of the *Evidence Act*[1] and any committee which meets these criteria is a s.51 committee which must comply with the legislation. A s.51 committee can be created in three ways:

I. Board Mandated

Any committee which meets all the following requirements would be considered a duly constituted s.51 committee:

i) it is established or approved by the board of management of a hospital;
ii) includes at least one health care professional employed by or practising there; and
iii) its purpose is to improve hospital practice or medical care in that hospital or during transportation to or from that hospital; and, for that purpose:
   a. studies, investigates or evaluates care provided by health care professionals in that hospital or during transportation to or from it, or
   b. studies, investigates or carries on medical research or a program.

II. A "medical staff committee" within the meaning of section 41 of the Hospital Act[2]

A committee established or approved by a hospital board to:

i) evaluate, control and report on clinical practice in a hospital to maintain and improve the safety and quality of patient care, or
ii) perform a function for the appraisal and control of the quality of patient care in the hospital

III. Committees designated by regulation

A group of persons who are designated in regulation by the Attorney General (the minister responsible for the *Evidence Act*) and:

i) carry out medical research, or
ii) carry out investigations of medical practice in hospitals

[1] See Appendix A or https://www.bclaws.ca/civix/document/id/complete/statreg/96124_01 for precise wording
[2] See Section 41(1) of the *Hospital Act* for precise wording of the definition: https://www.bclaws.ca/civix/document/id/complete/statreg/96200_01

3. **Does an organization's Board of Directors need to formally approve each s.51 committee or subcommittee?**

   No - although Board approval (or establishment) is required for most s.51 committees, some are designated by regulation, as set out above.

   Board mandated committees, which include medical staff committees, may create subcommittees with the authority to carry out s.51 reviews. These subcommittees need not be specifically endorsed by the Board, but must report back to the Board mandated committee that created them.

   Whatever the case, the organization should ensure the terms of reference for all quality committees, clearly outlines:

   - their mandate / function for review of quality of care by professionals (including Emergency Medical Attendants - EMAs);
   - their composition includes health care professionals (including EMAs); and
   - the restrictions on disclosing or disseminating information.

   This information makes it clear that the committee meets the criteria set out in s.51.

4. **Can one *decide* to "do a s.51 review"?**

   Yes. If one decides to conduct a quality review, and the committee conducting the review meets the required s.51 criteria, it is a s.51 review. If a health authority / hospital chooses to carry out a review that does not meet s.51 criteria, it will not be a s.51 review.

   Incident reports in a Patient Learning Improvement System (PSLS) are created for review by a s.51 committee and therefore fall within the restrictions of s.51 when related to improving care in hospitals or during transportation to or from hospitals.

   If a review is being carried out to respond to a patient complaint, this is for a different purpose than s.51 contemplates and must be carried out separately - for example, through the Patient Care Quality Office (PCQO).

   It is possible that a patient complaint may also prompt a hospital to carry out a s.51 review, but that s.51 review is conducted separately from the review carried out to respond to the patient's complaint. Information and materials generated in the s.51 review are subject to s.51 restrictions and cannot be shared in PCQO responses.

5. **Does s.51 *protect* information or *restrict* information?**

   Both, depending on perspective. Section 51 creates a statutory prohibition which prohibits the sharing of information created by or for a s.51 committee, except when it is done for the limited purposes explicitly permitted under s.51. In other words, it is illegal to share information created by or for a s.51 committee in most instances.

   Health care providers may feel more comfortable sharing information with a committee knowing that it is 'protected', so that term may be helpful when discussing the concept with health care providers. However, telling patients and families that s.51 information is 'protected' may leave the impression that the health authority is deliberately choosing to withhold information from them. It may be more helpful to use the term 'restricted' (or 'statutorily prohibited from disclosure' or 'illegal') when explaining to patients, families, or others why certain information cannot be shared with them.

6. **Does the s.51 restriction apply to Patient Safety Learning Systems?**

   Most, if not all, health authorities have formally embedded their patient safety learning systems into their respective quality structures/committees. Because these committees meet the required s.51 criteria, PSLS reports related to improving care in hospitals or during transportation to or from hospitals, are also protected under s.51.

7. **Does the s.51 restriction apply across the health system?**

   No. The restriction only applies to quality committees established under s.51 to improve care in hospitals or during transportation to or from those hospitals. "Hospital" is defined in s.51[3] and includes a hospital as defined in the *Hospital Act*, BC Emergency Health Services' centres or stations, and a Provincial mental health facility as defined in the *Mental Health Act*.

8. **Can s.51 committees include participants from outside the organization, including from organizations not set out in s.51 scope (i.e. from other than hospitals and ambulance)?**

   Section 51 does not prevent external people from participating in or providing input to a s.51 committee, and this could be beneficial in some cases. Section 51 committees should be comprised of members who have expertise and information that will best inform the review, and contribute to the most helpful outcomes, learnings, and recommendations of the committee. All members of the committee must abide by the restrictions set out in s.51.

[3] See Appendix A or https://www.bclaws.ca/civix/document/id/complete/statreg/96124_01 for precise definition of "hospital"

However, it is important to remember s.51 came about to support a forum where health care providers could speak frankly about their opinions related to the care they or others provided. Having members from outside the organization present may inhibit frank discussions and limit the effectiveness of the review. Committees should take this into consideration when selecting members.

9. Can s.51 committees include patients or families as participants?

Patients and families directly involved in an event under review may be invited for an interview and/or to make a written or personal presentation to the committee, to share their experience and their suggestions for quality improvement. However, they cannot be members of a committee reviewing any information available to the Section 51 committee, nor can information created by or for the s.51 committee be shared with them beyond the fact that a review is being conducted. Whatever the method of involvement, it is important that patient and family participants understand the invitation is strictly an opportunity to provide their perspective on what occurred so that the committee may include this in their review.

If patients or families are being invited to provide information for a review, it is imperative to inform them in advance that they will not be provided with any information about the review, its conclusions, findings or recommendations (due to the restrictions imposed by s.51). Patients and families can be informed that any outstanding questions they have regarding care are best directed to the Patient Care Quality Office.

Creative ways to bring the patient and family voice into a review include:

- interviews with or submissions by those directly involved or affected; and/or,
- engaging Patient Partners[4] who are not directly involved in the situation under review either as part of the s51 review committee itself or a committee to which the review committee reports (e.g. regional program quality committee or organizational quality committee).

10. What information created by or for S.51 committees can be disclosed to patients or families, either verbally or in writing?

No information created **by or for** s.51 committees can be shared with patients or families, verbally or in writing.

Medical records and factual information that is, or should be, included in the patient's chart, is shareable as this information is not created for the committee and therefore not restricted by s.51.

[4] Patient Partners - patients, families and caregivers working together with health care partners to improve our health care system. Patient Partners have participated in specific orientation to the system and committee.

Policies and guidelines may be shared with patients and families because these documents are not created by or for Section 51 committees.

Patients and families can also access medical records through the *Freedom of Information and Protection of Privacy Act* (FOIPPA), subject to that statute's exceptions to disclosure. It is important to note that information restricted by s.51 is not accessible through FOIPPA.

Information that is created solely for s.51 committees (e.g. expert opinions) or by s.51 committees (e.g. findings or conclusions) **must not be** shared with anyone outside the quality committee and the board(s) to which the committee reports, or as specifically permitted by s.51.

Specifically permitted disclosure includes disclosure of review recommendations for changes once these have been accepted and implemented (e.g. updated policies, procedures and guidelines). However, when communicating with the patient or family, the changes cannot be ascribed or connected to the s.51 review. The changes can be framed as quality improvement changes made since the event or as part of ongoing quality assurance activities. Hospital risk management departments can provide further guidance on how to talk to families about changes that have been implemented following an incident, without connecting the change to the Section 51 review.

11. Can any of the Section 51 committee's deliberations or recommendations be disclosed to staff at the site where the review took place (e.g. through a Learning Summary)?

There is no question that learnings gleaned in a s.51 review may help health care providers and other staff understand the rationale for a change in practice or procedure. However, s.51 sets a prohibition against sharing this information:

"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 [in very limited circumstances][5]"

A committee can share the findings or conclusions from a Section 51 review when: "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]" It is reasonable to interpret the term "medical" broadly, to allow information to be shared with any health care professional, not just physicians.

structures, through the Patient Voices Network or some other health authority program for patient and community engagement. (www.patientvoicesbc.ca)

[5] BC Evidence Act, s.51 (5)

[6] BC Evidence Act, s.51 (5) c

Information arising from a s.51 review can shared as follows:

I. Members of the s.51 Committee:

Members may be advised of conclusions reached, recommendations made and, when known, the changes the organization will implement moving forward. Committee members must not share any of this information.

II. Staff and operations leadership within the organization:

To support system change or as part of a learning summary, and provided the information does not identify the patient or connect to a particular review, staff and leaders may be told:

- the organization is implementing change(s) as part of an ongoing quality improvement activity (not a specific review),
- the organization is developing new policies, procedures or guidelines (there should be no connection made between their creation and a specific review);
- action taken and changes which have already been made or implemented; and
- where necessary to improve patient care in a timely manner, lessons learned which the organization will address with dedicated resources.

III. To Medical leadership and medical staff:

See b), above.

IV. To other organizations:

See b) above.

In addition, if a board of management receives findings, or a conclusion (including recommendations) from a s.51 review, it can share them with another hospital board if relevant to medical practice or patient care in that hospital.

12. If disclosing anything to the patient or family, or staff of the s.51 review site, can one mention the information arose from the restricted s.51 quality committee?

No. Disclosure for learning purposes is only authorized if the information is disclosed to “advance medical education” and “in a manner that precludes the identification in any manner of the persons whose condition or treatment has

been studied, evaluated or investigated[7]". Making a connection with the event in a learning summary or a disclosure discussion would contravene this restriction.

While the patient or family may want the comfort of knowing that the review of their case resulted in change, it is important not to make any connections between the review, the recommendations and the actions (even though the connection might seem obvious). Staff can tell the patient or family that the facility is always looking to make improvements in health care, and that the review of cases such as theirs drives improvements and ultimately improves health care for others.

Organizations may wish to consider the following wording when advising of changes:

- For the patient or family, or for the media, Coroner, or other external agency:

  "Changes that have been made since the time of the event include…"

- For learning summaries:

  "We have made the following changes as part of our ongoing quality improvement activity"

[7] BC Evidence Act, s.51 (5) c

APPENDIX A: Section 51 of the BC Evidence Act

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.