



Section 51 of the Evidence Act

Health Care Protection Program
Risk Management Branch

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Ministry of
Finance



Introductions

Sharon White

Director, Client Services

Sharon.P.White@gov.bc.ca

Kash Basi

Sr. Claims Examiner /
Legal Counsel

Kash.Basi@gov.bc.ca



HCPP acknowledges the territories of First Nations around BC and is grateful to carry out our work on these lands. We acknowledge the rights, interests, priorities, and concerns of all Indigenous Peoples - First Nations, Métis, and Inuit - respecting and acknowledging their distinct cultures, histories, rights, laws, and governments.



Agenda

- Section 51 and its purpose
- Requirements to fit under s.51
- Disclosure restrictions of s. 51
- Limits of section 51 protection
- Specific issues such as disclosure to patients/families; learning summaries; FOI, the Coroner; PSLS; & PCQO
- Resources & Questions



■ What is Section 51?

- This section of BC's *Evidence Act* sets out how health care evidence can be used in legal proceedings
- A review by a committee established under s. 51 is protected:
 - (a) records prepared for and by s. 51 committees CAN'T be used as evidence in a legal proceeding, and
 - (b) people participating in a s. 51 review can't be subpoenaed into Court to give evidence about the review

■ What is the purpose of Section 51

- The intent of these protected reviews is to support quality improvement activities in hospitals (or during transportation to and from hospitals) by promoting open, honest and constructive self-appraisal without fear of the information being used in civil legal proceedings.
- Without this protection, physicians and other health care providers may be unwilling to frankly discuss adverse events and opportunities to improve patient care and safety may be lost.

■ Requirements for a Section 51 Committee

“Committee” is defined in s. 51 as meaning (paraphrasing a bit):

- a medical staff committee,
- a committee approved by one or more “hospital” boards of management that includes “health care professionals”, for purpose of improving hospital practice or care (or transport to or from hospital), or
- groups designated by government regulation, who carry out:
 - (c) medical research, or
 - (d) investigations of medical practice in hospitals

■ Who can be on a s.51 Committee?

- Section 51 does not restrict who can be on a committee. However, having members from outside the organization present may inhibit frank discussions and limit the effectiveness of the review
- The patient, or family of the patient, who is subject of the review should not be members of a s.51 committee
- S. 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

■ Disclosure restrictions of Section 51

A committee or a person on a committee must not disclose/publish information or a record provided to the committee or any resulting **findings or conclusion** of the committee except:

(a) to a board of management,

(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

■ Disclosure to a Regulator (Professional College)

- As mentioned, section 51 permits disclosure to an “organization of health care professionals” (such as BCCNM or CP&SBC)
- But the College cannot rely on findings of a s.51 committee and should conduct its own investigation. The College is obligated to prove its case independently of any s. 51 information.
- A s. 51 committee has discretion here (it can disclose to a College “in circumstances the committee considers appropriate”).
- If a s. 51 committee decides to disclose to the College, we recommend providing only enough information for the College to identify the issue

Board Can Share With Another Hospital

If a board of management of a hospital believes s. 51 information is relevant to medical or hospital practice or care in another hospital (or to transportation to or from another hospital):

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

(b) the board receiving the information cannot disclose/publish it except for medical research/education AND only if the relevant patients are not identified

Limits of Section 51 Protection

1. Materials prepared for a review, opinions, summaries, findings & conclusions, are all protected by section 51
But
“original or copies of original medical or hospital records concerning a patient” [s.51(3)],
and the facts themselves, must be disclosed to the patient/family
2. “The fact that certain information went before a hospital committee does not make it privileged. If such information is at large and exists independently of any committee process, then it can be adduced as evidence in court.” *(Munro v. St. Paul’s Hospital, 2009 BCCA 340)*
3. Section 51 applies to in-hospital and in-ambulance care only, NOT to other care (for example, it doesn’t apply to care provided in clinics, doctors’ offices, or midwifery care in homes).

So, if care began in an area not covered by section 51 and then continued in ambulance and/or hospital, it is questionable that a section 51 review could cover the earlier care

■ Challenges and Issues

1. Section 51 is a very long provision, and over the years, even legal counsel very experienced in health care law have taken some different interpretations.
2. With wrestling with section 51 issues, our suggestion is to go back to the wording of the section. Sometimes, case law and policy documents can also be helpful
3. Special interest groups have over time called upon government to overhaul (and even repeal) section 51. Legislative change is outside the control of our office
4. We will now look at some of the specific challenges and issues we've come across when considering section 51

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Patient & Families May Say Secrecy is Unfair

“...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...”

(Sinclair v March 2000 BCCA 459)

“....the Legislature elected a prohibition against production. This was to encourage absolute candour in cooperation in quality reviews thereby ensuring high standards of patient care and professional competency. It protected against the possible chilling effect on cooperation of knowing that statements made could be shared outside the hospital.”

(Parmar v. Fraser Health Authority, 2012 BCSC 1596)

■ Implemented Changes Flowing From Reviews

1. “Findings or conclusions” from a section 51 review cannot be shared with patients/family
2. Changes implemented following a s. 51 review (for example, new or amended policies) can be shared but only if NOT CONNECTED back the review

For example, you can advise the patient/family:

“This new policy has been put in place since the time of the event...”

“We have put in place this new policy as part of our ongoing quality improvement activity...”

Patient Care Quality Office & Section 51

Can section 51 information be leveraged to help respond to a PCQO complaint?

No. Under s. 7 of the PCQRB Act, a PCQO may consider any information and records available to the health authority re the complainant and complaint OTHER THAN “information, records, findings or conclusions” described in section 51.

What if information protected by s. 51 is mistakenly built into a PCQO response – is the protection gone?

No. *“Section 51 creates an absolute prohibition, not a privilege that can be waived, either intentionally or inadvertently.”*

(Gill v. Fraser Health Authority, 2022 BCSC 638)

This distinguishes s. 51 protection from solicitor client privilege – the latter can be waived by the client but s. 51 protection is absolute.

To avoid problems, we recommend keeping PCQO and s.51 reviews separate (e.g. avoid using participants of s. 51 review when preparing PCQO responses).

■ Learning Summaries & Section 51

1. Recall that the wording of section 51 permits a disclosure or publication for the purpose of advancing “medical research or medical education” BUT ONLY IF the disclosure/publication doesn’t identify the patient/s
2. The provision could be more clear here. A broad interpretation of “medical” research and “medical” education would permit learnings to go out to health care workers other than physicians, such as nurses and respiratory therapists



Freedom of Information & Section 51

Can someone get s. 51 information through an FOI request?

- FOIPPA does permit an FOI request for any record in the custody or under the control of a public body; and
- Section 3(7) of FOIPPA says if one of its provisions is inconsistent or in conflict with a provision of another Act, FOIPPA prevails unless the other Act expressly provides that it applies; BUT
- Section 51(7) of the *Evidence Act* says its disclosure restrictions apply despite FOIPPA (with the exception of OIPC reviews)

So, section 51 effectively trumps FOIPPA; section 51 documents should not be provided in response to an FOI request

■ The Coroner & Section 51

“The coroner is not entitled to release of Section 51 information or documentation. The coroner is entitled to gather all the facts necessary to fulfill his/her mandate. ...However, a coroner should not be involved in the deliberations of a Section 51 Committee nor should the coroner be permitted to inquire about its proceedings and reports. .. The coroner is entitled to seize and inspect anything that the coroner has reasonable grounds to believe is material to the investigation so long as such evidence is not protected by Section 51.”

(From the Section 51 Toolkit)

What if the Coroner asks what implemented changes flow from a s.51 review?

I'd keep in mind the recommendation from a previous slide not to connect implemented changes to a s. 51 review – instead use alternate language

e.g. *“As part of our ongoing quality improvement activity, the following changes have been implemented since the time of the death...”*

■ Patient Safety Learning System & Section 51

- Given that the purpose of the PSLS is to enable the study, investigation or evaluation of hospital care (and transport to and from hospital), it makes sense to protect this information under s. 51
- Therefore, PSLS reports should be submitted within an appropriate s. 51 committee structure.
- When PSLS reports are generated at the request of a s. 51 Committee, section 51 protection has been confirmed by the Courts & OIPC:

see *Cameron v. Interior Health Authority*, BCSC 2019, and
also *OIPC Order F24-08 - Vancouver Island Health Authority*

■ Can s. 51 apply even if information doesn't actually make it to a Committee?

1. Yes, but courts will look closely at committee structure, bylaws, terms of reference, and other documents - and will want to review Affidavit evidence - before making any determination that s. 51 applies
2. *“...there was no formal committee meeting or process by which his conduct was reviewed. The communications over which the respondents claim protection from production were all preliminary to, or part of the initial stages of, such an investigation. However, the Bylaws, Rules and the Policy Manual clearly envision a preliminary, informal process to investigate complaints. Does the fact that no committee has yet to consider the complaint mean that records created in the early intervention phase are not protected? In my view, it does not.”*

(Nagase v. Entwistle, 2016 BCCA 257)

Release of s. 51 Info to Legal Counsel/HCPP

1. In litigation, each party must include on its List of Documents all documents relevant to the facts and matters at issue in the litigation regardless of whether the other parties in the litigation are entitled to see those documents. That would require listing s. 51 documents too.
2. We list s. 51 documents as statutorily prohibited from disclosure (on our List of Documents).
3. HCPP's external lawyer would need to review documents over which s. 51 protection is claimed to confirm the documents do in fact fit under s. 51.
4. Lawyers representing physicians under CMPA (which provides liability coverage for physicians) may also be privy to s. 51 documents (e.g. when involved in disputes regarding credentialing/privileges)
5. HCPP has agreed with CMPA that it would be unfair for a lawyer representing a hospital or a physician in medical malpractice litigation to have the benefit of having reviewed s. 51 information to the exclusion of the other

So, in situations where both hospital and physicians are involved in litigation, a “wall” is set up such that the particular lawyer who reviewed s. 51 information does not have conduct of the medical malpractice litigation

Can the Ministry of Health Demand s. 51 Information?

1. Section 10 of the *Ministry of Health Act*:
 - gives MoH the extraordinary power to demand personal information from a public body (such as a health authority) for a “*stewardship purpose*” (defined in the statute); and
 - the public body “must” then provide the information (assuming it has it), within the time requested.
2. So, we have the potential for conflict: s. 10 saying information demanded by MoH must be provided, but s. 51 saying information must be protected.
3. Our office has taken the position that piercing s. 51 protection requires clear and unambiguous language; our recommendation is that information protected by s. 51 should not be provided in response to a MOH demand under s. 10

■ Helpful Resources

- [Section 51 Q&A Risk Note](#)
- [Understanding Section 51 of the Evidence Act \(MWPP\)](#)
- [Legislation – Section 51 of the Evidence Act](#)
- Section 51 Toolkit



Questions

