NOVA SCOTIA COURT OF APPEAL
Citation: MacKenzie v. Kutcher, 2004 NSCA 4

Date: 20040112
Docket: CA 201896
Registry: Halifax

Between:

Allan MacKenzie

Appellant

v.

Stanley Kutcher and Sharon Samland

Respondents

Judges:	Bateman, Hamilton & Fichaud, JJ.A.
Appeal Heard:	November 21, 2003, in Halifax, Nova Scotia
Held:	Leave to appeal granted, but appeal dismissed with costs payable by the appellant to the respondents in the amount of $1,000 each, including disbursements, as per reasons for judgment of Hamilton, J.A.; Bateman & Fichaud, JJ.A. concurring.
Counsel:	Randall P. H. Balcome, for the appellant George W. MacDonald, Q.C. & Sarah Kirby, for the respondent Kutcher Raymond F. Larkin, Q.C. & Bradley Ridge, for the respondent Samland

Reasons for judgment:

[1] The appellant, Allan MacKenzie, seeks leave to appeal, and if granted, appeals the May 29, 2003 interlocutory order of Justice Allan P. Boudreau of the Nova Scotia Supreme Court wherein he dismissed the appellant's application for production of documents pursuant to **Civil Procedure Rules 20.02 and 20.06**. His application was dismissed on the basis the documents he sought from the respondents, Stanley Kutcher and Sharon Samland, were not relevant to the claims made in his statement of claim, or if "marginally logically relevant" the production sought was not necessary to a fair and just determination of the issues, and on the basis the documents sought were protected from production both under s.60 of the **Evidence Act**, R.S.N.S. 1989, c.154 and at common law in accordance with the "Wigmore Privilege."

[2] The first paragraph of the chambers judge's decision, reported at (2003), 213 N.S.R. (2d) 288, summarizes the facts as follows:

> This case raises the important and often debated issue of the privacy and privilege protection afforded to the sources and information gathered by hospital review committees, both by statute and at common law. The plaintiff, Allan MacKenzie, is the former Administrative Director for Mental Health Services at the Yarmouth Regional Hospital, which is under the governance of the Western Regional Health Board ("WRHB'). Mr. MacKenzie's employment with WRHB was terminated after a review by the defendants, Dr. Stanley Kutcher and Sharon Samland, and upon their recommendation. Mr. MacKenzie has sued Dr. Kutcher and Ms. Samland alleging defamation, libel, negligence and negligent misrepresentation on the part of the defendants in the preparation and release of their report and recommendations and thereby causing his termination. The present is an application by Mr. MacKenzie seeking disclosure of the list and schedule of persons, i.e., staff, interviewed by the defendants and the defendants' personal notes of those interviews, the questionnaires completed by staff, as well as other personnel files or materials which may have come into their possession.

[3] Each of the respondents entered into a written agreement with the WRHB setting out the terms on which they would conduct an "operational review of all programs delivered by the Yarmouth Mental Health Services." Each agreed to conduct the review in accordance with the following terms of reference that were attached to their agreements as Appendix A:

TERMS OF REFERENCE

Purpose

The Chief Executive Officer of the Western Regional Health Board has requested an external operational review of the Yarmouth Mental Health Program to determine if the services provided meet all acceptable standards.

Parameters

1) The review is an internal quality management process and as such the report and information will be internal to the WRHB and presented to the CEO who will have complete discretion over its circulation and use.

2) The review will examine all aspects of care including, but not limited to, treatment strategies, client confidentiality, existing policies, procedures and regulations, adequate client outcomes and client satisfaction.

3) The review will examine whether existing staffing policies and practices support safe, effective care including, but not limited to, staff employment orientation, staffing patterns, job descriptions, evaluation practices, communications and guidelines for practice.

4) The final report will identify strengths and weaknesses with the existing programs and identify gaps. The report will provide recommendations for improving services including, but not limited to, programming, policies and practices, resource allocation and staff related issues. If possible, the report will identify priorities among the recommendations.

Methodology

The review will be conducted by recognized experts in Mental Health who do not normally practice within the Western Region. Particular expertise (i.e. legal) can be sought by review members

> for consultation on specific issues after discussion with WRHB senior staff.
>
> The review will be conducted to determine compliance with the relevant standards from the Mental Health Services section of the CCHA accreditation standards.
>
> The review will be interactive involving all disciplines and support staff. Opportunities for all staff to be involved will be provided. Staff are encouraged and expected to be involved.
>
> The review team will liaise with the Director of Regional Community Health Programs, who has administrative responsibility for Mental Health Services within the Western Region.
>
> Client input is an essential part of the review and the reviewers will determine how this will be accomplished.
>
> Any and all documentation related to Mental Health Services will be made available to the Review Team and held in confidence by them. (Underlining mine)

[4] The documents sought to be produced are set out in ¶ 16 of Ms. Samland's unchallenged affidavit:

> 16. That in the course of conducting the operational review and preparing the report I came into possession or created various documents which can be conveniently grouped and described as follows:
>
> A. Copies of parts of employees' personnel files and applications for employment
>
> B. Various forms used by the administrative staff
>
> C. Financial information and data provided by the WRHB for the purposes of the Operational Review
>
> D. Correspondence from the Risk Management Committee with regards to an incident that occurred in the Psychiatry

Department which resulted in a serious staff injury; correspondence on this issue

E. Information on the PEP Funds distribution

F. Internal Audit Report on Quality Assurance

G. Internal Memos

H. Staff Meeting minutes dated December 1996

I. Organizational and administrative information with regards to various departments

J. Letter of complaint dated January 29, 1996

K. Interview guidelines developed by clients and reworked drafts of same

L. Questionnaires sent out to consumers which consist of the Focus Group Questions

M. Data gathered as a result of the Focus Group Meetings

N. Verbal Report of the findings of the Focus Group dated May 12, 1997

O. Letter dated May 22, 1997 recommending the need for a financial audit; accompanying documents

P. Handwritten notes on a copy of the Canadian Hospital Accreditation Standards for Mental Health

Q. Handwritten notes containing information on the Operational Review

R. Completed questionnaires by staff members (confidential)

S. Interview schedules containing confidential information such as the names of the participants in the staff interviews

> T. Confidential handwritten notes taken during meetings with staff, which include "peer reviews"

[5] At the hearing before the chambers judge it was agreed, with the consent of the WRHB, that the documents listed as A to J inclusive would be produced. In addition the documents listed as "L" and "O" were produced by Dr. Kutcher. It is the remainder of the documents listed above that are still in issue.

[6] In paragraphs 18 to 24 of her affidavit Ms. Samland reviews the documents in issue and indicates how they came into existence and were used during the review:

> 18. That certain of the documents listed above, namely the documents lettered "K" through "T" are records that were used in the course of the operational review or actually arose out of the review and evaluation of the mental health services at the Yarmouth Regional Hospital.
>
> 19. That documents "Q" through "T" are notes or records of confidential communications between health care professionals at the Yarmouth Regional Hospital and the review team on the subject matter of the operational review.
>
> 20. That the documents which are listed as "Q" to "T" came into existence as a result of a process which began with a letter from Dr. Kutcher and myself dated April 4, 1997 to the staff members of the mental health program at the Yarmouth Regional Hospital. A copy of this letter is attached as Exhibit "D". Attached to our letter of April 4, 1997 was a list of topics for team and individual meetings with staff and a staff member questionnaire, copies of which are attached as Exhibits "E" and "F" to my Affidavit.
>
> 21. That, our letter of April 4, 1997 to the staff included an assurance in bold type that "All answers are confidential and will only be used to form a composite picture for the evaluation and recommendations of the program". The staff member questionnaire which is Exhibit "E" to this my Affidavit also included the statement in bold at the end of the questionnaire that "All responses are confidential and will only be used to form a composite picture for the evaluation and recommendations".
>
> 22. That in response to our letter of April 4, 1997 we received a number of completed questionnaires which are identified as "R" on my list of documents

> above. In some cases these completed questionnaires included additional letters expanding on the topics raised by our letter of April 4, 1997.
>
> 23. That as pointed out in our letter of April 4, 1997 arrangements were made to meet with every staff member and to interview them on the matters within the scope of the Terms of Reference. The documents identified as "S" in the list above are interview schedules which include information such as the names of the participants in the staff interviews.
>
> 24. That the staff interviews were conducted in late April 1997 and that in every case Dr. Kutcher and I told the staff who were being interviewed that all of their responses, whether by way of letter, by completing the questionnaire or by communications in the interview would be kept in confidence. We specifically told the staff who were interviewed that although the information would be used in preparing the report it would be provided in such a way that no individuals would be identified specifically. Interviews were then conducted and I kept notes of these interviews which are identified as "T" in the list of documents above.

[7] In paragraphs 27 and 28 of her affidavit Ms. Samland states that many of the staff members interviewed expressed concern that there would be reprisals if they met with the respondents and that some of them would not have participated in the review if the information given by them could be divulged at a later date.

[8] The documents now in issue have not been disclosed by the respondents to anyone.

[9] The grounds of this appeal are:

> 1. That the Learned Chambers Judge erred in law in concluding that the documents in question were not relevant to any cause or issue raised in the proceeding;
>
> 2. That the Learned Chambers Judge erred in law in deciding that the documents in question were privileged from production by virtue of section 60 of the ***Evidence Act***, R.S.N.S. 1989, c.154;
>
> 3. That the Learned Chambers Judge erred in law in deciding that the documents in question were privileged from production by virtue of a common law "confidentiality" or "Wigmore" privilege.

[10] The standard of review in an appeal taken from an interlocutory decision of a chambers judge is that this court will not interfere unless wrong principles of law have been applied or a patent injustice would result or unless the chambers judge made a palpable and overriding error with respect to his findings of fact. **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 .

[11] I will first deal with the second ground of appeal relating to s. 60 of the **Evidence Act.**

[12] Section 60 provides as follows:

> **60 (1)** In this Section,
>
> (a) "legal proceeding" means any civil proceeding, inquiry, proceeding before any tribunal, board or commission or arbitration, in which evidence is or may be given, and includes an action or proceeding for the imposition of punishment by fine, penalty or imprisonment for the violation of a Provincial enactment;
>
> (b) "witness" includes every person who, in the course of a legal proceeding, is examined *viva voce* for discovery or is cross-examined upon an affidavit made by that person, answers any interrogatories or makes an affidavit as to documents or is called upon to answer any question or produce any document, whether under oath or not.
>
> **(2)** A witness in any legal proceeding, whether a party thereto or not, is excused from answering any question as to any proceedings before, or producing any report, statement, memorandum, recommendation, document or information of, or made by
>
> (a) a research committee of a hospital;
>
> (b) a hospital committee established for the purpose of studying or evaluating medical or hospital care or practice in a hospital; or

> (c) a research committee recognized by the Minister of Health and Fitness and approved for the purpose of this Section,
>
> and that is used in the course of, or arising out of, any study, research or program carried on by a hospital or any such committee for the purpose of education or improvement in medical or hospital care or practice.
>
> **(3)** Subsection (2) does not apply to original medical and hospital records pertaining to a patient.
>
> **(4)** Subject to subsection (2), a witness in any legal proceeding who is or has been a member of, has participated in the activities of, has made a report, statement, memorandum or recommendation to, or has provided information to a committee referred to in subsection (2), is not excused from answering any question or producing any document that the witness is otherwise bound to answer or produce. (Underlining mine)

[13] The chambers judge found that s. 60 applied to the documents in issue and excused the respondents from producing them:

> [22] Mr. MacKenzie contends that the review in question was not to evaluate and improve medical or hospital care or practice as specified in section 60(2)(b). He says it was primarily an administrative review because it focussed on his position as Administrator of the Unit. The line of cases cited in support of Mr. MacKenzie's position are dependant on the nature of the inquiry or review being conducted. If it was a review of a particular incident or incidents then it is usually not protected by section 60(2)(b) There can be little doubt that the Administrator's position and performance was part of the review, but, with all due respect, I cannot agree that that was its primary purpose or that it functioned primarily as such. One only has to look at the Background, the Terms of Reference, the Methodology and the resulting report and recommendations and it becomes clear that the review was to encompass all aspects of the delivery of services by the Mental Health Unit.
>
> [23] I find that the primary and overriding purpose of the review and the recommendations and the use to which the report was put were to study, evaluate and improve the medical and hospital care and practice in the Mental Health Unit. Assessing patient care and resulting satisfaction was a basic objective of the review and the report and recommendations.

> [24] For these reasons I find that the defendants are excused, by virtue of section 60(2) of the **Evidence Act**, *supra*, from producing the information sought by Mr. MacKenzie on this application, regardless of any relevance.

[14] The appellant makes five arguments in support of his position that the chambers judge erred in deciding that s. 60 applies to the documents in issue so as to excuse the respondents from producing them.

[15] His first argument is that s. 60 does not apply because the respondents were not a "hospital committee" as required by the s. 60(2)(b). He argues that only a committee made up of "internal" persons, health care professionals employed by or practising in a hospital, qualifies as a "hospital committee" under s. 60(2)(b), not a committee composed solely of "external" persons such as the respondents who have no ongoing relationship with the hospital.

[16] His second argument is the same argument he made to the chambers judge, that s. 60 does not apply because the dominant purpose of the review was related to the appellant's administrative practices, and not to the dual purpose of "studying or evaluating medical or hospital care or practice in a hospital" provided for in s. 60(2)(b) and of being used for "education or improvement in medical or hospital care or practice" as provided at the end of s. 60(2).

[17] His third argument is that s. 60 does not apply to documents which were not authored by the committee, i.e. the questionnaires completed by staff.

[18] His fourth argument is that the chambers judge should have followed **Doyle v. Green** (1996), 182 N.B.R. (2d) 341 (NBCA) and ordered the production of the documents in issue.

[19] His final argument is that the respondents waived their right not to produce the documents in issue since, with the consent of the WHRB, they produced some of the documents originally sought.

[20] With respect to the appellant's first argument, there is nothing in the wording of s. 60 to suggest that in order for a committee to be a "hospital committee" within the meaning of s. 60(2)(b) that the committee must include

"internal" persons as argued by the appellant. The fact that the wording of the similar section in the **British Columbia Evidence Act** considered in **Sinclair v. March** (2000), 78 B.C.L.R. (3d) 218 (BCCA) requires a committee to be composed of "health care professionals employed by or practising in that hospital" in order for their section to apply, does not require us to read such words into s. 60. The absence of such words in s. 60 may have been intentional.

[21] In determining whether we should read s. 60(2)(b) narrowly to require that a "hospital committee" must include "internal" persons, we have to read "the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the **Act**, the object of the **Act**, and the intention of Parliament." **Rizzo v. Rizzo Shoes Ltd.** [1998] 1 S.C.R. 27, ¶ 21.

[22] Since s. 60 is contained in a general statute, the **Evidence Act**, no sense of its object or scheme can be gleaned from other sections of the **Act**. However, reading s. 60(2) itself indicates there are two statements of purpose that must be taken into account when determining the object or purpose of s.60. The first statement of purpose is in s. 60(2)(b) which provides that a hospital committee is one that has been established for the purpose of studying or evaluating medical or hospital care or practice in a hospital. The second statement of purpose is at the end of s. 60(2) where it states a witness is excused from producing any document "that is used in the course of, or arising out of, any study, research or program carried on by a hospital or any such committee for the purpose of education or improvement in medical or hospital care or practice.

[23] Similar but by no means identical sections are contained in the Evidence Acts of other provinces, some of which have been considered by courts. The British Columbia Court of Appeal considered the similar British Columbia section in **Sinclair** and approved the statement of the purpose of the section set out in **Lew (Guardian ad litem) v. Mount St. Joseph Hospital Society** (1995), 46 C.P.C. (3d) 168:

> ¶ 23 The object and purpose of the section was discussed by Madam Justice Baker in Lew (Guardian ad litem) v. Mount St. Joseph Hospital Society (1995), 46 C.P.C. (3d) 168, where she said at para. 18:

> The objection to production based on s. 57 should be expressed by specific reference to s. 57(2)(b), and the documents should be described in sufficient detail to permit the court, if required, to determine whether the documents meet the criteria set out in the section. At the same time, the court must not require a degree of particularity that would defeat the purpose of s. 57, which is to protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this task. [Emphasis added]

¶ 24 The chambers judge endorsed that opinion and I accept it as well. It is in accord with the legislative history of the section.

....

¶ 26 It can be seen from this analysis 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. In the course of deciding an issue under s. 51 a court should give the language of the enactment its full force and effect with the object in mind: s. 8, ***Interpretation Act***, R.S.B.C. 1996, c. 238. This was the approach taken by Mr. Justice Low in ***Cole v. St. Paul's Hospital*** (21 August 1998), Vancouver Registry No. C963888 (B.C.S.C.), at para. 7:

> Although the defendant claims privilege with respect to these documents in its form 93, it's specifically stated in the form that production is not permitted under s. 51(2)(b) of the ***Evidence Act***. Without considering the matter fully, I doubt that these documents, in the circumstances of this case, would be subject to common law privilege and their relevance is apparent, although their admissibility into evidence at trial would likely meet with some hearsay objections. However, s. 51(2)(b) does not set up a privilege. Rather, it sets up a prohibition against production. It is a statutory directive that is not attacked on constitutional or other grounds. The plaintiff argues that the subsection should be interpreted strictly, but I am unable to see any basis upon which its application could be narrowed to accommodate the plaintiff's wishes in this case. The language of the statute is clear and unequivocal, and its meaning and application here unarguable. No exceptions or judicial discretion are allowed for in

> the statute. The plaintiff will have to acquire the information in the documents, such as names of potential witnesses, by other means of discovery available to him. [Underlining mine]

[24] Considering the foregoing, I accept Ms. Samland's suggestion that the purpose of s. 60 is "to support the activities of hospitals improving medical or hospital care or practice by ensuring confidentiality for the documents and proceedings of committees that are given the task of studying or evaluating medical or hospital care or practice."

[25] Reading s. 60(2)(b) in light of this purpose indicates there is no reason to narrowly interpret the phrase "hospital committee" to require that it include "internal" persons. There are times, such as in this case, where the persons responsible for the operation of a hospital deem that the study or evaluation to be conducted by a hospital committee would be better carried out by external persons. Where that is the case, there is no reason why documents made or used by them should be treated differently from those of a committee that includes "internal" persons. Both committees would be seeking the same objective.

[26] The chambers judge had before him the unchallenged affidavits of both respondents. Dr. Kutcher states in his affidavit:

> 10. THAT I worked jointly with the Defendant Sharon Samland in the preparation of the Report and that throughout the interviews and preparation of the Review I considered myself to be acting on behalf of the WRHB.
>
> 11. THAT I am informed by Victor Maddalena, and do verily believe that the Senior Management Team considered both myself and Sharon Samland to be acting on their behalf and as their agents for the purposes of conducting interviews and authoring the Review. (Underlining mine)

[27] In Ms. Samland's affidavit she states:

> 15. That I worked jointly with Dr. Kutcher in studying, investigating and evaluating the hospital practices and hospital care provided by health care professionals in the delivery of mental health services at the Yarmouth Regional Hospital and that throughout the process of interviews and preparation of a report, I considered myself, with Dr. Kutcher to be acting on behalf of the senior

> management of the Western Regional Health Board and its Board of Directors. (Underling mine)

[28] In light of the purpose and the particular wording of s. 60 and considering this affidavit evidence, the appellant has not satisfied me the chambers judge erred in finding that the respondents were a "hospital committee" within the meaning of s. 60(2)(b).

[29] With respect to his second argument, the appellant has also failed to satisfy me that the chambers judge erred in finding that the review conducted by the respondents was not mainly related to his administrative practices, but was mainly for the purpose of studying or evaluating medical or hospital care or practice in a hospital" as provided in s. 60(2)(b), and that the documents sought were used by them for the purpose of "education or improvement in medical or hospital care or practice" as provided near the end of s. 60(2).

[30] The affidavit of Dr. Kutcher provides the following:

> 6. THAT during the course of my initial discussions with Brenda Montgomery, I was informed and did verily believe that it was the intention that the results of the review would be used to improve medical and hospital care and practice in the Mental Health Program.
>
> 24. THAT I am advised by Victor Maddalena and do verily believe that the Review was used for the purpose of improving the general practice and hospital care of the Mental Health Program. (Underling mine)

[31] The affidavit of Ms. Samland provides the following:

> 7. Under my Agreement with the Western Regional Hospital Board and the Terms of Reference, I was to conduct an operational review of all programs delivered by Yarmouth Mental Health Services. The purpose of the review was to determine if the services provided met all acceptable standards and I agreed to conduct a review in compliance with and according to the Terms of Reference.
>
> 8. The review was initiated by Mr. Victor Maddalena, Chief Executive Officer of the Western Regional Health Board who retained my services and the services of Dr. Kutcher to carry out the functions identified in the Terms of Reference. At the time I was retained I was advised by Mr. Victor Maddalena and I do verily believe

> that he and senior management had met with staff and the representatives of employees at the Yarmouth Regional Hospital in December 1996 and that the staff had identified a number of concerns about medical and hospital care or practices in the provision of mental health services at the Yarmouth Regional Hospital.
>
> 9. Mr. Maddalena further advised me and I do verily believe that he, with the approval of the Western Regional Health Board of Directors, had decided to conduct an operational review of the mental health services provided at the Yarmouth Regional Hospital for the purpose of reviewing and evaluating medical and hospital care or practices in the delivery of mental health services and programs at the Yarmouth Regional Hospital.
>
> 10. Mr. Maddalena advised me and I do verily believe that he and the Board of Directors of the Western Regional Health Board decided to conduct the operational review by employing external reviewers to look at all aspects of the mental health programs and services at the Yarmouth Regional Hospital and to report to the Chair of the Board of Directors of the Western Regional Health Board.
>
> 14. Under the Terms of Reference the services of Dr. Kutcher and myself were to be employed for the purpose of studying and evaluating hospital care and practices at the Yarmouth Regional Hospital and determining whether they met the acceptable standards of care.
>
> 15. That I worked jointly with Dr. Kutcher in studying, investigating and evaluating the hospital practices and hospital care provided by health care professionals in the delivery of mental health services at the Yarmouth Regional Hospital and that throughout the process of interviews and preparation of a report, I considered myself, with Dr. Kutcher to be acting on behalf of the senior management of the Western Regional Health Board and its Board of Directors. (Underlining mine)

[32] The Terms of Reference attached to the agreements that the respondents entered into with the WRHB, reproduced in ¶ 3, state that the CEO is seeking to determine if the services provided meet all acceptable standards. In ¶ 2 it provides that all aspects of care will be reviewed. Paragraph 3 provides for a review of staffing to support safe, effective care. Paragraph 4 states the review will identify strengths and weaknesses with the existing programs and identify gaps. Under Methodology, compliance with relevant standards is again referred to. The Terms of Reference are all about assessing hospital care and practice.

[33] Compared to this affidavit evidence which supports the purpose as found by the chambers judge, there is no evidence supporting the appellant's argument that the Terms of Reference were a facade to hide a purely administrative review.

[34] Faced with this evidence, the chambers judge concluded:

> 23. I find that the primary and overriding purpose of the review and the recommendations and the use to which the report was put were to study, evaluate and improve the medical and hospital care and practice in the Mental Health Unit. Assessing patient care and resulting satisfaction was a basic objective of the review and the report and recommendations.

[35] The evidence supports the chambers judge's conclusion as to the purpose of the respondents' review, which meets the dual purposes set out in s. 60(2). Accordingly the chambers judge did not err.

[36] With respect to his third argument relating to the questionnaires completed by the staff at the respondents' request, again the appellant has not satisfied me the trial judge erred. In the first paragraph of s. 60(2) it provides that a witness is excused from producing any document "of , or made by" the witness. I am satisfied that the expression "of or made by" is broad enough to include the questionnaires, which, while the contents were not authored by the respondents, were completed at the respondents' request and solely for the purpose of the review.

[37] With respect to his fourth argument, the appellant has not satisfied me that the chambers judge erred in not following **Doyle**, supra. In **Doyle** an injured patient was seeking production of 127 documents relating to the anaesthetist involved with his hernia operation that resulted in his becoming a paraplegic. With the exception of opinion evaluations of Dr. Green from various medical doctors, the court ordered the production of these documents. The documents included a report on air quality control in the operating room, climate control reports for drugs used and documents such as those referred to in ¶ 19:

> ¶ 19 Item 27 is a letter of complaint about Dr. Green's tardiness in arriving at the operating room; item 28 reminds Dr. Green of protocol; item 29 relates to his unavailability by beeper; item 30 refers to the admission of a patient admitted but not seen by him; item 31 asks for a response to five incidents; item 32 refers to two patients admitted by the doctor but not seen by him; item 33 alleges neglect; item 34

> is a complaint from two residents from Deer Island; item 35 is a response from Dr. Green to a complaint from an extra-mural nurse; item 36 refers to the doctor's response to a page call; item 37 relates to an emergency; item 38 relates to his reappointment to active staff; items 39 and 40 refer to Dr. Green's completion of Workers' Compensation files; items 41 and 42 are letters of recommendation addressed to whom it may concern, and item 43 is a letter to Dr. Green concerning an offer of a contract for anaesthesia services. All these documents fail the exclusivity and dominant purpose limits in (b). This applies to items 10 and 21 objected to by Dr. Green's counsel as well.

[38] The type of document at issue in **Doyle** is qualitatively different from the documents at issue in this appeal which are described by Ms. Samland in her affidavit as set out in ¶'s 4 and 6 herein.

[39] In ordering production of the documents at issue in **Doyle** the court noted the specific wording used in s. 43.3 of the **New Brunswick Evidence Act**, the section similar to s. 60:

> 43.3(2) A witness, whether a party to a legal proceeding or not, is excused from
>
> > (a) providing any information as to any proceeding before a committee established by a hospital to conduct any study, research or program for the purpose of medical education or improvement in medical or hospital care or practice, and
> >
> > (b) producing any document made by a hospital or by a committee established by the hospital, prepared <u>exclusively</u> for the purpose of being used in the course of, or arising out of, any study, research or program, <u>the dominant purpose</u> of which is medical education or improvement in medical or hospital care or practice. (Underlining mine)

[40] The court concluded on the facts before it that the documents did not meet that test:

> ¶ 17 In reviewing documents 23 to 43 and 44 to 85 <u>it is important to note two qualifying words in s.43.3(2)(b): "exclusively" and "dominant purpose". These words are intended to limit the exclusionary privilege to documents generated by a hospital or committee.</u> A hospital or hospital committee cannot be required to produce a document prepared exclusively for the purpose of being used in the course

> of, or arising out of, any study, research or program, the dominant purpose of which is medical education or improvement in medical or hospital care or practice,
>
> ¶ 18 Tracking closely the footsteps of the motions judge, I conclude that although certain aspects of the matters dealt with in committees related to improvements in care the documents did not come into existence exclusively or for any dominant purpose relating to any study, research or program.
>
> ....
>
> ¶ 23 Undoubtedly some of the results in some of the documents were produced by a committee or committees established by the hospital and might well be called a study directed at medical education or improvement in medical hospital care or practice. These ingredients are essentials under s. 43.3(2)(b). What is missing are the two integral features of having been prepared "exclusively" and for the "dominant purpose" of medical education or improvement in care or practice.
>
> ¶ 24 The dominant purpose for the creation of the committees was a response to apparent common disasters to certain patients. The documents cannot be given protection under (2)(b). (underlining mine)

[41] Section 60 differs from s. 43.3 of the **New Brunswick Evidence Act** in several ways including that there is no requirement in s. 60 that the documents be prepared exclusively in connection with a study, research or program, the dominant purpose of which is medical education or improvement in medical or hospital care or practice. Even if there were such a requirement in s. 60, given the nature of the documents at issue in this appeal, they would probably be found to be governed by s. 60 since they only came into being in connection with the review done by the respondents.

[42] Given the difference in the nature of the documents and the difference in the wording of the statutes considered in **Doyle**, I am not satisfied the chambers judge erred in not following it.

[43] The appellant's last argument was that the actions of the respondents in agreeing, with the consent of the WRHB expressed before the chambers judge, to produce some of the documents requested prevented them from refusing to produce the remaining documents sought. Without deciding the question of whether a privilege is created by s. 60, I am satisfied that the nature of the documents that it has

been agreed will be produced are not so intertwined with the documents sought that the documents sought must now be produced.

[44] None of the appellant's arguments persuade me that the chambers judge erred in concluding that s.60 applied to the documents in issue, excusing the respondents from producing them.

[45] Since I am satisfied the chambers judge did not err in finding that s. 60 excused the respondents from producing the documents sought, it is unnecessary for me to deal with the first and third grounds of appeal. However with respect to the first ground of appeal, relating to the relevance of the documents sought, I do not endorse the analysis of the chambers judge or his determination that the documents in issue are not relevant and for that reason need not be disclosed pursuant to **Rules 20.02 and 20.06**. On the contrary, I would find that the documents are clearly relevant to the allegations that the respondents breached the standard of care, with which the respondents joined issue by their denials in the defences.

[46] Insofar as the chambers judge, in deciding relevance, applied a "cost benefit analysis" I would note that the test stated by Matthews J.A. in **Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp**. (1995), 141 N.S.R. (2d) 180 (CA) remains the law. There is no component of "cost benefit analysis" in this test. The source of the "cost benefit analysis" in the passage from **R. v. Mohan,** [1994] 2 S.C.R. 9, quoted by the chambers judge, refers to "the trial process". In the pretrial discovery process, this is not a barrier to production of a document which meets the test stated by Matthews, J.A.

[47] During the hearing the issue was raised of possible prejudice to the appellant if the respondents decided close to or during the trial that they would disclose the documents they have now exercised their right under s.60 not to produce. The respondents indicated that they may be estopped from reversing their position and relying on these documents to defend themselves, not having included them in their lists of documents and having refused to disclose them. They also indicated that the trial judge, having the responsibility to ensure a fair trial, could take measures to protect the appellant from any prejudice which would arise from the untimely disclosure by the appellants of the documents in dispute. These are all matters for the trial judge to deal with if and when they arise.

[48] For the foregoing reasons I would grant leave to appeal, but dismiss the appeal, with costs payable by the appellant to the respondents in the amount of $1,000 including disbursements each.

Hamilton, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.