IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Eastern Regional Integrated Health Authority v. Commission of Inquiry on Hormone Receptor Testing*, 2008NLTD27
Date: 20080214
Docket: 200701T5432

BETWEEN:

EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY

PLAINTIFF

AND:

COMMISSION OF INQUIRY ON HORMONE RECEPTOR TESTING

DEFENDANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF OF NEWFOUNDLAND AND LABRADOR

FIRST INTERVENOR

AND:

DR. KARA LAING et al

SECOND INTERVENOR

AND:

CENTRAL REGIONAL INTEGRATED HEALTH AUTHORITY, WESTERN REGIONAL INTEGRATED HEALTH AUTHORITY, AND LABRADOR-GRENFELL REGIONAL INTEGRATED HEALTH AUTHORITY

THIRD INTERVENOR

AND:

CANADIAN CANCER SOCIETY - NEWFOUNDLAND AND LABRADOR DIVISION

FOURTH INTERVENOR

AND:

MEMBERS OF THE BREAST CANCER CLASS ACTION

FIFTH INTERVENOR

AND:

NEWFOUNDLAND AND LABRADOR MEDICAL ASSOCIATION

SIXTH INTERVENOR

AND:

HEALTHCARE INSURANCE RECIPROCAL OF CANADA

SEVENTH INTERVENOR

Before: The Honourable Justice Wayne G. Dymond

Place of hearing: St. John's, Newfoundland and Labrador

Appearances:

Daniel Simmons	For Eastern Regional Health Authority
Bernard Coffey, Q.C. and Sandra Chaytor, Q.C.	For Commission of Inquiry on Hormone Receptor Testing
Peter Browne	For Dr. Kara Laing, et al
David Eaton, Q.C.	For Central Regional Integrated Health Authority, et al
Jennifer Newbury	For Canadian Cancer Society – Newfoundland and Labrador Division
Chesley Crosbie, Q.C.	For Members of the Breast Cancer Class Action
D. Mark Pike	For Newfoundland and Labrador Medical Association
Janet Grant	For Healthcare Insurance Reciprocal of Canada
(Not appearing and not represented)	Her Majesty the Queen in Right of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: Slavutych v. Baker, [1976] 1 S.C.R. 254.

STATUTES CONSIDERED: *Evidence Act*, RSNL 1990, c. E-16; *Public Inquiries Act*, *2006*, SNL 2006, c. P-38.1; *Health Care Association Act,* RSNL 1990, c. H-8; *Alberta Evidence Act, R.S.A.* 2000, c. A-18; *Health Care Association Act*, RSNL 1990 c. H-8.

TEXT CONSIDERED: *Merriam-Webster Medical Dictionary*; *Sullivan v. Driedger on the Construction of Statutes*, Fourth Edition Butterworths Canada Ltd. (Markham: 2002) by Ruth Sullivan.

REASONS FOR JUDGMENT

Dymond, J.:

INTRODUCTION

[1] The present application before the Court has been filed by the Eastern Regional Integrated Health Authority hereinafter referred to as "Eastern Health," to prevent the respondent Commission of Inquiry on Hormone Receptor Testing, hereinafter referred to as "the Inquiry" from public production of Reports prepared for Eastern Health by two outside consultants, one prepared by a Dr. Diponkar Banerjee and further reports prepared by Patricia Wegrynowski, hereinafter referred to as the "External Reports." Eastern Health makes claim that the External Reports are protected under the protection of s. 8.1 of the *Evidence Act*, RSNL 1990, c. E-16 and by the common law privilege often referred to as the Wigmore Privilege based on common law doctrine.

[2] The Commission of Inquiry claims that the *Public Inquiries Act*, *2006*, SNL2006, c. P-8.1 allows the use of these External Reports. The Commission further claims the right to be able to use these Reports in the public part of the

Inquiry which would include making the Report and its recommendations part of the public record. The Commission also requests that this would include being able to question the authors of the Reports and anyone the authors interviewed in completing the Reports for Eastern Health.

[3] The Commission further claims that its mandate cannot be fully carried out unless the Commission counsel is able to question the authors of the Report and anyone who provided information to the External Reviewers, being Dr. Banerjee and Ms. Wegrynowski.

[4] Eastern Health, prior to their hearing, in consultation with lawyers for the Commission, released to Eastern Health the names of the External Reviewers and the background information on the two Reviewers.

[5] Sometime later, on negotiations with counsel for the Inquiry, Eastern Health, as well, released the recommendations of the external review of the Reports. After further discussion, Eastern Health agreed to release the full Reports to the Commission for their use, with a written agreement that the Reports would not be released to any third party unless Eastern Health was given the opportunity to apply to the Supreme Court under the *Public Inquiries Act*.

[6] The burden is therefore on Eastern Health to satisfy the Court, on a balance of probabilities, that the Reports are protected by either statute or common law privilege.

[7] Eastern Health takes the position that these Reports were prepared under the protection of being Peer Review and/or Quality Assurance Committee Reports and, therefore, the protections pursuant to s. 8.1 of the *Evidence Act*, as amended, would be in full force and effect.

[8] Section 8.1 of the *Evidence Act* has been in force on the statute books of Newfoundland since 1991. The intent of the legislation was to allow hospitals, and other institutions, to be able to carry out Peer Review and Quality Assurance Reviews of these two Committees in an open and frank manner without these communications, or written reports being accessible in any proceedings in a Court of law, the premise being that such protection would foster open and frank dialogue between the doctors, medical staff, technicians and other health care providers so as to encourage reporting of facts and information which would improve patient safety and lead to a better care and treatment of patients.

[9] The Newfoundland and Labrador Medical Association, and the Nurses Union and other health care providers, attended hearings and submitted briefs to the Government in an attempt to request such legislation.

[10] All provinces in Canada have similar legislation. Counsel for Eastern Health has filed material showing that most states in the United States have similar legislation. The intent and purpose of the legislation is to promote an environment of openness in dealing with health care issues.

[11] Eastern Health, in its brief, refers to a 2002 report of the National Steering Committee on Patient Safety called Building a Safer System. Under the heading Improving the System at p. 10, found at Tab 3 of the Eastern Health's brief, it recommends as follows:

> The health-care system must develop an atmosphere of trust, in which openness and frankness in identifying and reporting problems or potential problems is encouraged and rewarded. No blame will be apportioned to individuals following reporting, subject to limited qualifications. These qualifications include failure to report safety hazards or critical incidents and premeditated or intentional acts of violence against people, equipment or property.

[12] It is this atmosphere of openness and frank discussion that Eastern Health says s. 8.1 protects as it relates to Peer Review Committee reports and Quality

Assurance Committee work. Eastern Health argues that without it there would be no disclosure, no frank discussion and less chance of improving quality health care.

[13] The Commission of Inquiry, on the other hand, claims that their terms of reference are to investigate and report to the public through the Inquiry process, in an open and frank manner, about what happened at Eastern Health leading up to the problems for which the Inquiry was formed to investigate and report upon.

[14] The terms of reference of the Inquiry are set out in the Commission brief at p. 4 as follows:

> (a) inquire into why the estrogen and progesterone hormone receptor tests done between 1997 and 2005 in the Newfoundland and Labrador health system resulted in a high rate of conversions when retested;
>
> (b) inquire into why the problem with the estrogen and progesterone hormone receptor tests was not detected until 2005, whether it could have been detected at an earlier date, and whether testing protocols during that period between 1997 and 2005 were reasonable and appropriate;
>
> (c) inquire into whether, once detected, the responsible authorities responded and communicated in a timely manner to those women and men who needed re-tests and those who were being tested for the first time;
>
> (d) inquire into whether, once detected, the responsible authorities communicated in an appropriate and timely manner with the general public and internally within the health system about the issues and circumstances surrounding the change in test results and the new testing procedures.
>
> (e) advise whether the estrogen and progesterone hormone receptor testing systems and processes and quality assurance systems currently in place are reflective of “best practices”; and
>
> (f) make the recommendations that the commission of inquiry considers necessary and advisable relating directly to the matters of public concern referred to in paragraphs (a) to (e).

[15] A Health Canada Report which was commissioned to the Health Law Institute of Dalhousie University for the purpose of looking at health care governance and public safety, entitled Silos to System, looks at health law safety in Canada, the United States and Australia. The balance between disclosure and nondisclosure of statute law or common law privilege is set out at p. 66 of the Report:

> Absent sufficient protection, individuals who may have information that could assist facilities and professional bodies to maintain or improve the safety of health services may be reluctant to come forward for fear of finding themselves involved in litigation. The privilege ought to strike a balance between allowing individuals to speak freely in quality assurance committees and still allowing for relevant information to remain free of privilege and, thus, accessible to patients or their representatives…

Further on it states:

> There is a public interest in the management and operation of public funded activities being transparent and open to scrutiny by the public. The public should be aware of information about adverse events and of safety and quality improvement mechanisms. Openness encourages effective accountability for the use of public funds and provision of public services…

[16] This latter position has been put forward in the form of a patient safety movement and takes the contrary position to Eastern Health on the question of whether or not these External Reports should be made part of the public part of the present Inquiry that is being conducted.

[17] These then are the two competing interests from a public policy perspective which clash and have to be resolved in the present application before the Court.

[18] On August 10th the Commission's Summons to Produce issued under s. 9(b) of the *Public Inquiries Act, 2006* requested that Eastern Health produce to the Commission:

> All the documents, records, including documents or records maintained in electronic form, and things in the custody or control of Eastern Regional Integrated Health Authority that may relate in any way to the terms of reference of the Commission of Inquiry on Hormone Receptor Testing.

[19] The External Reports are the only written materials that are the subject of the present application. Eastern Health argues that it has complied with the requirements of disclosure by providing the factual information in the Reports which the Commission can use in its investigation and that Eastern Health has put no restrictions on the use and the publication of the recommendations of the External Reports. The only prohibition or privilege relates to the opinions in the Reports themselves and individuals involved in the preparation of those opinions. Eastern Health requests protection of those opinions under s. 8.1 of the *Evidence Act*. Section 8.1 of the *Evidence Act* found on p. 11 of the Eastern Health brief states:

> 8.1 (1) In this section
>
> (a) "legal proceeding" includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal; and
>
> (b) "witness" includes a person who, in a legal proceeding
>
> (i) is examined orally for discovery,
>
> (ii) is cross examined on an affidavit made by that person,
>
> (iii) answers interrogatories,
>
> (iv) makes an affidavit as to documents, or
>
> (v) is called on to answer a question or produce a document, whether under oath or not.

(2) This section applies to the following committees:

(a) the Provincial Perinatal Committee,

(b) a quality assurance committee of a member, as defined under the Hospital and Nursing Home Association Act, and

(c) a peer review committee of a member, as defined under the Hospital and Nursing Home Association Act .

(3) No report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.

(4) Where a person appears as a witness in a legal proceeding, that person shall not be asked and shall not

(a) answer a question in connection with proceedings of a committee set out in subsection (2); or

(b) produce a report, evaluation, statement, memorandum, recommendation, document or information of, or made by, for or to, a committee to which this section applies.

(5) Subsections (3) and (4) do not apply to original medical or hospital records pertaining to a person.

(6) Where a person is a witness in a legal proceeding notwithstanding that he or she

(a) is or has been a member of;

(b) has participated in the activities of;

(c) has made a report, evaluation, statement, memorandum or recommendation to; or

(d) has provided information or a document to

a committee set out in subsection (2) that person is not, subject to subsection (4), excused from answering a question or producing a document that he or she is otherwise bound to answer or produce.

[20] In order for Eastern Health to be successful it has to satisfy the Court that Reports that were prepared come within the definition of s. 8.1 of the *Evidence Act* or are protected by common law privilege.

BACKGROUND TO THE PRESENT APPLICATION

[21] Between 1997 and 2005, Eastern Health and its predecessor, Health Care Corporation of St. John's, were responsible for the provision of laboratory services at the Health Sciences Centre in St. John's, including a type of testing known as immunohistochemical testing herein referred to as "IHC testing." Two of the IHC tests performed at the laboratory were tests for the assessment of the presence of estrogen receptors referred to as "ER receptors" and progesterone receptors, "PR receptors," in breast cancer tissue samples.

[22] ER and PR tests for many other health care institutions in Newfoundland and Labrador were performed at the laboratory in the Health Sciences Centre. The results of those tests were factors considered by treating physicians when deciding whether to recommend treatment by medication such as Tamoxifen for patients who had undergone surgery and, in some cases, other treatments for breast cancer.

[23] On May 11, 2005, Dr. Donald Cook received a call from one of the oncologists working at Eastern Health informing him of an ER/PR result that had been reported negative in a patient with infiltrating lobular carcinoma of the breast diagnosed in 2002. Upon re-test in May of 2005, this ER/PR result was interpreted as positive. This case was referred to in Dr. Cook's affidavit filed by Eastern Health, as the index patient. A meeting held on May 17, 2005, between Dr. Beverley Carter, Pathologist; Mr. Barry Dwyer, Division Manager of Anatomical Pathology; Dr. Joy McCarthy, Medical Oncologist; and Dr. Kara Laing, Medical Oncologist reviewed the index patient's case and one other that had shown up and had changed on a re-test from negative to positive.

[24] Dr. Cook reported the results of the May 17th meeting to Dr. Robert Williams, Vice President of Medical Services for Eastern Health, and Cook was asked for a written report to be provided to Dr. Williams. That report was in a letter form and was dated May 24th. It is found in Exhibit "A" to Dr. Cook's affidavit filed on this application.

[25] As a result of the May 17th meeting, a decision was made to re-test all negative ER/PR results from 2002 and possibly 2001. Dr. Cook also made several recommendations set out in the last paragraph, on p. 3, of his report to Dr. Williams dated May 24th. As a result of this meeting, contact was made with Dr. Diponkar Banerjee, Chief Pathologist at the B.C. Cancer Clinic in British Columbia. He agreed to perform a review of pathology. The first contact was made with Dr. Banerjee in late July of 2005 by Dr. Cook. Dr. Banerjee agreed to come on September 15 – 16 by a reply to Dr. Banerjee on August 3, 2005. Reference: Commission brief, Tab A21.

[26] Dr. Beverley Carter, a pathologist at Eastern Health was asked to try and contact someone to review the laboratory and its IHC services, with particular emphasis on the ER and PR receptor testing. Dr. Carter made contact with Patricia Wegrynowski, Chief Technologist at Mount Sinai in Toronto sometime prior to July 28, 2005. Reference: Commission affidavit, Tab A17.

[27] These two External Reviewers prepared initial Reports in 2005 and final Reports in 2006. These are the Reports that are the subject of this application.

[28] Throughout the application of Eastern Health these Reports are referred to as Quality Assurance and Peer Review initiatives at par. 6 of the affidavit of Dr. Howell, the new Vice President of Medical Services and Diagnostics of Eastern Health.

[29] At par. 7 he states Quality Assurance and Peer Review are an essential and nationally recognized means of ensuring that health care providers and institutions can conduct reviews for the purpose of continually improving the quality of care and services that they provide to the public.

[30] At par. 8 Dr. Howell sets out his understanding of the protections provided under s. 8 of the *Evidence Act*. He states:

> I am aware that the *Evidence Act* provides protections for quality assurance and peer review activities within the health care system and in particular that activities of, and reports prepared for, quality assurance and peer review committees of authorities such as Eastern Health has been protected by the *Evidence Act* from disclosure in legal proceedings.

[31] It is only the work involving Quality Assurance Committees and Peer Review Committees that is protected under the *Evidence Act*. Re: 8.1(2)(b) and (c). Not all Quality Assurance and Peer Review work which is undertaken in hospitals is protected.

[32] The Commission of Inquiry challenges these Reports as being prepared by, or for, a properly constituted Peer Review or Quality Assurance Committee.

[33] The *Evidence Act*, s. 8.1, prohibits a party to disclose in, or in connection with a legal proceeding, any reports, statements, evaluations, recommendations, memorandum, documents and information made by, for, or to a committee. S. 8.1(4)(b) of the *Evidence Act*. A public inquiry is a legal proceeding within the *Act*. Re: 8.1(1)(a).

[34] A committee as defined includes a Quality Assurance Committee and a Peer Review Committee of a member. Member, under the *Health Care Association Act,* RSNL 1990, c. H-8 includes a hospital of an association. The *Health Care*

Association Act defines association as the Newfoundland and Labrador Health Care Association. All regional health care authorities are members, including Eastern Health.

[35] As such, Eastern Health is a member which has the right to have committees pursuant to s. 8.1.

[36] Commission counsel claims the External Reports are not Reports prepared for or by a Quality Assurance Committee or a Peer Review Committee. The Commission in its written brief at par. 22 states as follows:

> The Commission submits that for the following two key reasons the Reviews and Reports are not of the nature contemplated for protection from disclosure pursuant to s. 8.1 of the *Evidence Act*:
>
> (a) the Reports were not prepared for properly constituted peer review or quality assurance committee as required by the *Evidence Act*, and
>
> (b) the reviews were investigative, not peer reviews or quality assurance reviews.

[37] The *Evidence Act* does not define "Peer Review Committee" or "Quality Assurance Committee." It is left open to the health care authorities to set out the terms of reference for both a Peer Review Committee and a Quality Assurance Committee. The *Act* states that s. 8.1 applies to:

> 8.1(2).
>
> (a) a provincial perinatal committee
>
> (b) a quality assurance committee of a member, as defined under the *Hospital and Nursing Home Association Act*, and
>
> (c) a peer review committee of a member as defined under the *Hospital and Nursing Home Association Act.*

[38] The applicant Eastern Health has taken the position throughout that these Reports were conducted as part of Peer Review and Quality Assurance Committee work. Dr. Howell, the new Vice President of Medical Services and Diagnostics Eastern Health since 2006, was cross-examined extensively on these issues along with Peer Review Policies.

[39] Dr. Howell's evidence was that in 2005 the hospital was acting under Peer Review Policies approved by the Board of Trustees of the Health Care Corporation of St. John's in March of 2004. The full Policy is attached to the affidavit of Dr. Howell as Schedule "A". That Policy states under s. 4.2 that all medical staff members shall be subject to Peer Review in accordance with these Policies. In order for there to be a Peer Review of a medical staff member there has to be a sentinel event and a sentinel event report. Dr. Howell gave evidence at the hearing that it was his understanding that there was nothing ever given or seen by him that was marked a sentinel event report. Dr. Howell was asked if more than one physician at a time could be subject to a Peer Review. His evidence was that the Policy, as approved and written in 2004, was designed and set up in such a way so as to investigate one physician at a time.

[40] Dr. Howell could not say whether a written Policy could be adopted to the review of several physicians at the same time. Dr. Howell was also asked whether a Peer Review would allow for the physician under investigation to be part of a review committee. He was given an example:

> Q. And if Dr. Banerjee was in fact conducting a work for a Peer Review Committee of Eastern Health, and one of the peers being reviewed was Dr. Cook, you would hardly have Dr. Cook retaining would you?
>
> A. If the Policy were followed strictly that would be correct.

[41] Dr. Howell also admitted that the Reports of Dr. Banerjee and Ms. Wegrynowski were never given to the physicians to comment upon as required under the Terms of Reference set out in the Peer Review. There was no sentinel report given to physicians to comment upon. Dr. Howell was asked, "So, whatever

was going on, this did not involve an application of the Peer Review Policies in accordance with the way they were spelled out?" to which he replied, "Correct." He was also asked whether, for instance, if the Clinical Chief or the Director of Discipline were considered to be somehow subject to Peer Review, would it be appropriate for that person to pick the person to lead the investigation? Again, Dr. Howell admitted on the Peer Review Policy, as set out and adopted by the Board of Directors of the Health Care Corporation St. John's, it would be inappropriate.

[42] Dr. Howell also agreed with the Commission counsel that any review of the ER/PR testing between 1997 and 2005 in the present situation would have to include both Dr. Carter and Dr. Cook.

[43] The point in time when Dr. Cook sent his report to Dr. Williams on May 24, 2005 with recommendations, Cook affidavit Schedule "A", there was nothing to implicate Dr. Cook or Dr. Carter. This was made clear by Commission counsel at the hearing. In fact, it was Dr. Carter's initiative to get something moving to find out why there were changes to positive on the re-testing. It was Dr. Carter who took the initiative in retaining Ms. Wegrynowski from Mount Sinai Lab in Toronto, one of the top people in Canada in her field.

[44] The investigation that commenced in May, and continued in August and September, could not be considered a Peer Review, as it did not resemble, in any way, a Peer Review as set out in Eastern Health's written Policy which would relate to a particular physician, at that time.

[45] Eastern Health argues that the Terms of Reference sent out specified that the work of Dr. Banerjee and Ms. Wegrynowski were Peer Review and Quality Assurance. These Terms of Reference were sent to Dr. Cook. He forwarded them on to the persons conducting the External Reviews.

[46] It is clear that these Terms of Reference were marked Peer Review and Quality Assurance and were said to be protected by s. 8 of the *Evidence Act*, Reference: Tab A32 of the Commission counsel's affidavit of Virginia Connors and Elaine Clarke. The heading states Terms of Reference External Quality Review of the Immunohistochemical Services. The Terms of Reference state the external quality review consultant will take directions from and make recommendations to the Leadership Team of the Laboratory Medicine Program.

[47] It goes on at p. 2 to state that the External Quality Review shall be in writing and include the Team's recommendations. The recommendations shall be shared with involved staff members. The final paragraph states:

> The peer review, its conclusions and the final report are protected under the *Evidence Act* and as such the final report will not be available to any third party and as well the final report is protected from any subsequent legal proceedings.

[48] This, according to the evidence of Dr. Cook, was sent to Dr. Banerjee and Ms. Wegrynowski just a day or so before they left to come to St. John's to start their review in mid-September of 2005. I will deal further with this issue when I deal with Quality Assurance Committee reports.

[49] The Terms of Reference are headed up External Quality Review and the last paragraph refers to Peer Review. The language between Peer Review and Quality Assurance nowhere refers to a Quality Assurance Committee report. It refers to directions being taken from the Leadership Team of the Laboratory Medicine. At that time it certainly did not exclude Dr. Carter or Dr. Cook from being members.

[50] Dr. Howell, in his cross-examination, was asked directly:

> Q. So, and we'll get to Quality Assurance in a moment, but in terms of the Peer Review aspect of it, just so his lordship is clear, it is not your – is it your position that Dr. Cook was retaining Dr. Banerjee to conduct a Peer Review of Dr. Cook and other doctors?

A. It is not.

[51] Dr. Howell, just prior to that, also claimed that if a proper Peer Review was being conducted, it would be improper for Dr. Cook to be recommending who should do the review, looking at the Peer Review Policy as set out in Dr. Howell's affidavit, Schedule "B," Dr. Cook, on cross-examination, was also clear that in his opinion this was not a Peer Review which was being conducted by Dr. Banerjee. If it was not a Peer Review pursuant to a Peer Review Committee, it could not get the protection of s. 8.1 of the *Evidence Act*.

[52] Based on the evidence of Dr Cook and Dr. Howell at the hearing, and the affidavit evidence supplied by Dr. Cook and Dr. Howell, I am not satisfied, on a balance of probabilities, that Eastern Health has shown that the External Reports of Banerjee were Reports prepared by a Peer Review Committee as the Legislature intended for protection under s. 8.1, Peer Review Committee. As will be stated later, even if they could be deemed to be a Peer Review Report by Dr. Banerjee, there are other reasons for exclusion.

ARE THE EXTERNAL REPORTS QUALITY ASSURANCE REPORTS PURSUANT TO A QUALITY ASSURANCE COMMITTEE AS SET OUT PURSUANT TO S. 8.1 OF THE *EVIDENCE ACT?*

[53] Eastern Health makes the argument that the *Evidence Act* does not state that Quality Assurance Review Policies have to be written. In fact, in 2005 there was no Quality Assurance Committee in place and there was no written Policy by Eastern Health as it relates to Quality Assurance. Dr. Howell was questioned by the Commission counsel on this point. He was asked if he, as Vice President of the Medical Services and Diagnostics, was in the process of drafting Quality Assurance Policies for Eastern Health. His answer follows:

A. There is a quality group within Eastern Health and we are bringing out a quality framework, that's correct.

Q. You are, and you're bringing out a quality framework that is going to be in some way similar to the Peer Review Policies that are Schedule "A" to your affidavit?

A. That will certainly be part, yes.

Q. In other words, you are actually going to create a Quality Assurance Committee -- you're actually finally going to get around to creating it and there's no reflection upon yourself as an individual, and I am sincere in that?

A. Certainly, I will want to see Quality Assurance Committees operating throughout Eastern Health and certainly in the area that I have responsibility for.

Q. And you want – you're going – you're involved in the process of creating such a framework, a written framework?

A. That's correct.

Q. Because there is no written framework right now is there?

A. It's an evolving process.

Q. There is no written framework right now is there?

A. There are guiding documents that we are following as we mobilize the framework through the organization.

Further, in cross-examination, Dr. Howell was asked:

Q. So, if the Health Care Corporation, because we're going back, in fact there isn't even a Peer Review Policy for Eastern Health – they've adopted and continued to apply for positions, the Health Care Corporation's right?

A. That is correct.

Q. I think it's important that the Court understands that there is nothing written, there is no Quality Assurance Committee written down anywhere is there?

A. No.

> Q. You are going about setting in place a written Policy, aren't you?
>
> A. We are working through that process, that's correct.
>
> Q. And with a view to ensuring that, and being able to identify that committee as a s. 8.1 committee isn't it?
>
> A. That would certainly be very important.

[54] It is clear from this exchange that in 2007 Eastern Health is still working towards establishing a Quality Assurance Committee. Back in July and August of 2005 there was no such committee and the formation of a formal Quality Assurance Committee through the bylaws of Eastern Health and approved through the various levels of the Board of Trustees, as had been done with the Peer Review Committee, had not taken place. To date, according to Dr. Howell, it still has not taken place.

[55] Eastern Health takes the position that the Quality Assurance Reviews that were taking place in 2005, and especially the External Reviews, were reviews of a Quality Assurance nature. The Committee definition did not exclude a one-person Committee and that Dr. Banerjee and Ms. Wegrynowski were given Terms of Reference that were deemed to be Quality Assurance Reviews and therefore protected.

[56] However, when one looks closely at the Terms of Reference, it does not say they are one-person independent committees to come in, review, report and recommend to the Vice President, Dr. Williams. This then would, or could be considered, a confidential report for Dr. Williams' eyes only. Instead, under the heading "Report," the Terms of Reference claim on p. 2, Tab A32:

> The External Quality Review shall be in writing and include the team's recommendations. The recommendations will be shared with involved staff members.

[57] So, the idea of Dr. Banerjee or Ms. Wegrynowski doing up a confidential report is not even in the Terms of Reference. If the External Review Reports were not one-person committee reports to be sent to the Vice President to act upon, what were they? The other suggestion of Eastern Health is that these were Quality Assurance Committee Reports because they were being conducted by the External Reviewers in conjunction with the written Policies of the Peer Review Committee Policy as set out in the Peer Review Policies and modified for the purpose of Quality Assurance Review and therefore protected under s. 8.1. It was the intent of Eastern Health that these Reports be deemed to be Quality Assurance Reports protected under the Quality Assurance Committee or a Peer Review Committee.

[58] There is no doubt that in the present reviews, whatever may have been intended by Eastern Health at the time, any Quality Assurance Review would have to have as part of it a Peer Review. This was as much as admitted by Dr. Howell on cross-examination. As well, it would be difficult to examine systems and processes and procedures without looking at the personnel using this equipment in the Lab. This difficulty was borne out by the Ventana Report which referred to Carol Quevillon's letter to Terry Gulliver, when she stated in the last paragraph of her August 5th letter:

> As a conclusion, I feel confident that the technicians know what they are doing, they know how to use the instruments and that the Benchmark instruments are staining as they should be.

Yet, Eastern Health does not deem either that report, nor the comments of Ms. Quevillon, as being either Peer Review Committee Reports, or Quality Assurance Review Reports, seeking protection under s. 8.1 of the *Evidence Act*.

[59] Eastern Health takes these statements as part of a report on the equipment itself and the overall operation of the Ventana machines. They dismiss these comments as Peer Review of medical personnel.

[60] Dr. Donald Cook was the Clinical Chief of Laboratory Medicine Program from October 11, 2002 to March 10, 2006. He was a duly qualified physician to practice the specialty of pathology in Newfoundland and Labrador. He was practicing at the Health Sciences Centre in that capacity in May of 2005 when the whole issue of the re-testing of ER/PR was first brought to light. Dr. Cook, was the first person to cause an investigation on the ER/PR testing. His affidavit is in support of Eastern Health's application.

[61] Dr. Cook's affidavit sets out at par. 11:

> …that the external reviews conducted by each of them had elements of both peer review and quality assurance and they were each considered to be designated peer review committees or quality assurance committee as contemplated under the *Evidence Act*.

I dealt with whether Dr. Banerjee and Dr. Wegrynowski could be deemed to be individual Peer Review Committees earlier in my decision and concluded, for the reasons given, that they were not. Were they Quality Assurance Committees pursuant to the *Evidence Act* or could they be deemed to be, Dr. Cook was questioned on these points in his affidavit. It certainly seems reasonable to assume that Ms. Wegrynowski was looking more to the Lab process. It was Dr. Beverley Carter who made the first contact with Ms. Wegrynowski. Dr. Cook requested that Dr. Carter contact somebody that could be brought in to look at the technical aspects of the lab and to choose who that person would be. According to Dr. Cook this process was not done by a Quality Assurance Committee.

[62] In July of 2005 Dr. Carter contacted Ms. Wegrynowski and she agreed to do the review. Cook admitted that when Dr. Banerjee was contacted and agreed to come in early August, between then and September 12, 2005 Banerjee still had not seen the Terms of Reference as set out in Dr. Cook's affidavit. He was coming anyway.

[63] As to Dr. Carter's involvement, she wrote a letter saying she would have nothing further to do with the review, whatever it entailed, except in a consultative capacity. Dr. Cook could not say what Wegrynowski's Terms of Reference were, except to say he sent over what Heather Predham had sent to him, unchanged, just a day or so before Ms. Wegrynowski was to arrive. Re: Tab A32 of the Commission counsel's brief.

[64] It seems clear from the evidence of Dr. Cook that Dr. Banerjee and Ms. Wegrynowski had committed to doing their External Reviews long before any Terms of Reference had been sent to them. In fact, it was only a day or two before arriving that the Terms of Reference were faxed to both. Yet, Dr. Carter had sent information to Ms. Wegrynowski, and Dr. Cook had briefed Dr. Banerjee long before September 13 and 14, 2005, about what needed to be investigated. Dr. Cook agreed that Dr. Banerjee had agreed to come without any Terms of Reference. He had agreed to conduct a review of the laboratory services, IHC, particularly ER/PR testing. He also agreed that this would involve pathologists and technicians. Dr. Cook also agreed that Dr. Banerjee and Wegrynowski had no communications up to September 12th or 13th that they were a Peer Review Committee or a Quality Assurance Committee other than the Terms of Reference that were sent late in September. He was asked if he sent anything about Peer Review or Quality Assurance before September 12th – 13th. His answer was, "Not by me."

[65] Dr. Cook, on further cross-examination by Commission counsel, stated that he was unaware that anyone else prior to September 12th or 13th had passed on information that their work be Peer Review or Quality Assurance Review work.

[66] In Dr. Cook's cross-examination as to the Quality Assurance Committee and Peer Review Committee work, he was asked whether any of this was on his mind in July and August of 2005 when he was communicating with Dr. Banerjee. His evidence was that he only wanted to get to the bottom of what was going on. Dr. Cook also admitted quite candidly that had he been aware that there were events being investigated of which he may have been part of, he as a pathologist would have excused himself from the investigation. He states:

A. If I was singled out for a specific event and I was being investigated for a specific event, yes, I would have excused myself.

Q. Yes, you -- sure you would, of course you would and this idea that the statement that Banerjee and Wegrynowski were designated Peer Review Committees or Quality Assurance Committees, that's covered by the *Act*, that notion, or that whole idea only came up long afterwards, didn't it?

A. That came up in the past six months, the past year or so, yes.

Q. Yeah, but it didn't occur in the fall of 05?

A. No, I wasn't thinking about that in the fall of 05.

Q. And, no one spoke to you about it at that time?

A. No.

[67] Dr. Cook admitted in cross-examination on his affidavit that Dr. Banerjee was looking at the work of all sixteen pathologists. He was asked:

Q. The work of the pathologists that was being reviewed -- no, to be fair and blunt, by yourself and Dr. Carter in June, July and August; September of 05 involved all pathologists who are involved in ER/PR?

A. That's correct.

Q Including yourself?

A. Correct.

Q. Sure, and your mission and goal, yourself, as Clinical Chief, was to get to the bottom, if you could, of why this had happened?

A. Yes.

[68] Dr. Cook also agreed that Ventana representatives or technicians should be brought in if necessary. This was arranged by Mr. Terry Gulliver.

[69] Dr. Cook, in his evidence on cross-examination, stated that he had Dr. Beverley Carter look around for a technologist to look at the wider technology systems and that Ms. Wegrynowski was the one she identified.

[70] Dr. Cook, on further cross-examination, also admitted that it was at Dr. Williams' request that he got Dr. Banerjee:

> Q. Can you explain why you were the one to identify and contact Dr. Banerjee to perform the review of pathology?
>
> A. I was asked by Dr. Bob Williams, our Vice President of Medical Services.

Dr. Cook claims it was in his capacity as Clinical Chief that he was acting. Dr. Cook was asked by counsel for the Canadian Cancer Society of Newfoundland and Labrador if he was following any particular policy of Eastern Health when he was making the arrangements to contact Dr. Banerjee and his answer was, "No, I was following a request of Dr. Williams."

[71] Dr. Cook also gave evidence that he did not discuss with Dr. Banerjee that he would have to share the report with the doctors or other medical staff he was reporting on. He said that this was not made part of the discussion with Dr. Banerjee. Dr. Banerjee was not informed by Dr. Cook that the medical staff members would be given an opportunity to respond in writing to his Report.

[72] His only direction to Dr. Banerjee was to look at everything and be frank and open and honest.

[73] Dr. Cook was asked if there was any connection between the Quality Assurance Committee of Lab and Medicine, chaired by Dr. Beverley Carter, and the external Quality/Peer Reviews set out in pars. 9 and 10 of his affidavit involving Ms. Wegrynowski or Dr. Banerjee. His response was, "There was no

connection." His further evidence was that the Quality Assurance Committee of Laboratory and Medicine was not an active Committee and was now transformed into a Quality Management Program Committee for the Lab Division of Pathology.

[74] His evidence was that prior to September of 2004 there was no active Quality Assurance Committee in place. This corroborates the testimony of Dr. Howell when he gave his evidence. Dr. Howell stated there were Quality Assurance activities, but not a specific Committee.

[75] Based on the evidence of Dr. Cook, and the evidence of Dr. Howell, it is evident that there was no Quality Assurance Committee in place in September of 2005. There were no written Policies in place for anyone to follow if someone wished to do so. It is clear that the external reviews were being requested by the Vice President of Medical Services according to Dr. Cook. Any external investigation did not set out any Terms of Reference until well after the External Experts had already agreed to come.

[76] It is also evident from evidence filed by Commission counsel in relation to the affidavits in support of the respondents, that information was being released concerning the Reports. Certainly the recommendations were also seen by persons within Eastern Health who had nothing to do with the preparation of the External Reports. Information was also going outside of Eastern Health as it related to some of the recommendations in the Reports.

[77] An example of information being distributed outside the group involved in the preparation of the External Reviews is set out in the Commission's documentation at Tab A34. This is a letter sent by Dr. Cook to Dr. Williams discussing information referred to in the exit interviews of the External Consultants. According to the documentation, this information was part of the Report. Yet, in the attached documentation this information was referred to a Louise Jones, Marie Tracy, and Dianne Clements.

[78] Dr. Cook requested the information be sent to those individuals responsible for OR bookings. The information also went to Dr. Felix and Dr. Kwan by fax. None of these individuals were members of a Leadership Team working with any External Review Committee.

[79] A further example is that Eastern Health had a press release done indicating that, "External experts have been invited to our Lab to review our process." The release informs patients that test results are being re-tested and what should be done. On p. 1 of that release, it states:

> Eastern Health has been retesting a select group of breast cancer patients -- those whose results indicate that they were negative for ER and PR. In 2004 the Lab at Health Sciences that does all of the ER and PR testing for the province introduced a new piece of technology and we discovered some inconsistent results from the old system.

Patients were requested to call the Patient Relations Officer at Eastern Health.

[80] After the Report had been received and reviewed, the Program Director, Terry Gulliver, wrote to Dr. Fontaine, Site Chief of Anatomical Pathology. In his response he refers to concerns raised by Dr. Fontaine in an earlier letter. Gulliver replied that, "The recommendations that we will be proposing will encompass the issues that are outlined in your letter." It is obvious that the Site Chief of Anatomical Pathology had written expressing concerns about the Report. It seems clear that within Eastern Health there was access to the information in the Report by persons other than the internal reviewers and any Leadership Team who had input into that Report.

[81] There was a meeting of Fontaine with Banerjee over a meal where Banerjee discussed the contents of the Report with Fontaine. One of the issues as it relates to the External Reviews prepared by Dr. Banerjee and Wegrynowski is whether they fit within the type of Quality Assurance Committee reports intended by s. 8.1 of the *Evidence Act*.

[82] There was no Quality Assurance Committee in place at the time and there was no written Quality Assurance Policy. It was only just before Dr. Banerjee and Ms. Wegrynowski left for Newfoundland that any suggestion of these being Peer Reviews or Quality Assurance reports were forwarded to them. Dr. Cook certainly did not regard these at the time as Peer Review and Quality Assurance. Quality Assurance is not defined in either the *Evidence Act* of Newfoundland and Labrador, nor is it defined in the *Health Care Associations Act*. One definition of "quality assurance" from the *Merriam-Webster Medical Dictionary* defines it as follows:

> A program for the systematic monitoring and evaluation of the various aspects of a project, service, or facility to ensure that standards of quality are being met.

[83] Counsel for the fourth intervenor noted this definition at p. 10 of its brief. The brief goes on to refer to the *Alberta Evidence Act, R.S.A.* 2000, c. A-18 which defines "quality assurance activity." Section 9.1 of the *Act* sets out what "quality assurance activity" is under that particular legislation. S. 9.1 states:

> In this section
>
> (a) quality assurance activity means a planned or systematic activity for the purpose which is to study, assess, or evaluate the provision of health services with a view to continual improvement of
>
> 1. the quality of health care or health services, or
>
> 2. the level of skill, knowledge and competence of the health care provider.

[84] The brief goes on to refer to the judicial interpretation of Quality Assurance under the Saskatchewan legislation under s. 35.1(b) which defines "Quality Assurance Committee" as a committee:

> …'to examine and evaluate on an ongoing basis the provision of care and services to patients in the hospital' for the purpose of educating hospital personnel and 'improving the care, practice or services provided to the patients in the hospital'.

[85] Dr. Michael Goodyear filed an affidavit in support of the fifth intervenor. He is an assistant professor at Dalhousie University and a qualified medical practitioner with a certification in internal medicine and oncology. At par. 7 of his affidavit he sets out a definition of Quality Assurance when he states:

> (b) Quality assurance is an ongoing programme of education and monitoring of benchmarks for the standard of care, and is performed both internally and externally through a variety of accreditation schemes. This is often referred to as continuous quality improvement.

[86] It is clear from an overall assessment of the evidence and cross-examination of Dr. Cook, that he certainly did not regard these External Reviews, at the time that he requested Dr. Banerjee to review the situation, as Quality Assurance Committee reports. Dr. Cook was the one responsible for retaining Dr. Banerjee, one of the External Reviewers, in the first place. In July and August, certainly as far as Dr. Cook was concerned, he did not discuss Peer Review or Quality Assurance with Dr. Banerjee. We do not know what the considerations were with Ms. Wegrynowski because no affidavit was filed by Eastern Health on that issue from Dr. Carter, who was the one that had retained her. We do know the Terms of Reference were sent without explanation.

[87] If one looks at Quality Assurance Committee criteria, one of the common threads would be the continuity of work by a Quality Assurance Committee. It would be a type of continuous process to have long-term goals and objectives set to be met. When one considers that there is no definition of a Quality Assurance Committee under the provincial legislation, one therefore has to consider other legislation as referred to above. The situation before the Court does not appear to fit within that type of committee report. In this case one has a whole department being investigated. No one individual is singled out for review. Everything in the IHC Lab is being looked at. No one is pointing the finger at any one individual, so it certainly would not fit into a Peer Review as set out by the Policies that Eastern Health were following and had adopted through the Health Care Corporation of St. John's back in 2004.

[88] To say that these Peer Review Policies could be modified to include some type of Quality Assurance Review Policy for the purposes of what was being investigated in the present situation, would certainly be a stretch even in a very liberal interpretation of that Policy.

[89] There were no Quality Assurance Committee Policies in writing to follow and there was no Quality Assurance Committee that had been struck.

[90] What one is faced with is a serious situation where re-testing was showing a changed result from earlier breast cancer tests. No one knew what the problem was or if any one person, or persons, was at fault. Dr. Cook, as the Clinical Chief, took the bull by the horns and started an internal investigation. This included a meeting on May 17, 2005 where certain steps were taken in consultation with Dr. Carter. The result is a report to Dr. Williams with recommendations which he had already set in motion. Reference: Report to Williams, Schedule "A" of Dr. Cook's affidavit, p. 3, Recommendations 1 to 4.

[91] It was agreed to have someone look at the Ventana system which had been in place for about one year. A report was prepared after a site visit. Reference: Tab A24 of the Commission's brief at p. 4.

[92] It is not just the issue of a lack of a Quality Assurance Program in writing, or the fact that there was no Quality Assurance Committee. If one examines what was going on in July and August it is clear that no one knew what the problem in the Lab was, or if in fact there was a problem. One has to just examine some of the notes of Dr. Williams to see this was a wide-ranging investigation. Reference: Inquiry affidavit Tab A14. This is Note 9 on ER/PR receptors, dated July 24, 2005. Just a few of the statements show some overall concern. I will cite a few:

- There may be a problem with methodology or with the lab.
- Working with Mount Sinai on quality control.

- Need to check new Ventana System.
- Take out some of our conversions and send to Montreal General.
- Need more information – systemic information.

[93] On July 27th Dr. Cook sent a letter to Dr. K. Walters, Acting Chief and Chair, McGill University, Department of Pathology, indicating they would be sending two unstained labeled slides to their Lab. Later in the same letter:

> …we may be evaluating anywhere from 40 to 50 cases. Of course, we will be reimbursing you for this service.

This letter from Dr. Cook was copied to Dr. Williams and Mr. Terry Gulliver. Re: Commission affidavit A16.

[94] On August 2nd, Dr. Cook wrote to all pathologists stating Dr. Ejeckam was the current source person for Immunohistochemical and that all inquiries regarding Immunohistochemical should be forwarded to Dr. Ejeckam. Also, if Dr. Ejeckam was not available, referrals were to go to Site Chief General Hospital, Dr. Dan Fontaine. Re: Commission counsel affidavit, A20.

[95] A note by Dr. Williams dated August 5th, Note No. 14 found at Tab A26 of the Inquiry brief, shows that there was a need for answers. In the last couple of lines of the Note it states:

- 10 – 11 patients who have converted have been told.
- People's reaction has been good to date.
- They have been told there was a problem with the testing and we don't know why yet.

[96] A report was prepared by Terry Gulliver, Program Director, and Dr. Cook, Clinical Chief, dated October 13, 2005. The objective of this proposal was "to identify the requirements needed to implement a complete Quality Assurance Program for the Immunohistochemistry Lab ensuring that we provide a standardized and reliable service equivalent to Mount Sinai reference lab in Toronto.

[97] The applicant Eastern Health argues that this report was just a routine funding program prepared for the Department of Health. It was more than just a funding proposal. It was something being done by Eastern Health in conjunction with the ER/PR testing and the review of the equipment put in by Ventana.

[98] These examples are only set out here to give some perspective of the scope of the investigation that was ongoing at the time. Eastern Health should not be criticized for these undertakings as they appeared necessary at the time. These initiatives are pointed out to show that Eastern Health had no problem with this information not coming under s. 8.1 of the *Evidence Act*. There are many more references in the documentation that could be referred to but at this time it is unnecessary.

[99] Arrangements were made for two people, Dr. Banerjee and Ms. Wegrynowski, to attend on the lab and examine the process. It would also mean discussing the situation with pathologists and technicians who were working at the Lab. There was no indication that this was privileged or Peer Review. The whole idea, according to Dr. Cook, was to come in and, in his words, "be frank and honest, to find out what is going on." This was not part of a continuous Quality Review process involving research on long-standing Policies set out in a particular department. In this case it was the Immunohistochemistry Department. There were issues that no one knew the answer to and the External Reviewers were asked to come in and find out if there were problems, and to investigate, report, and recommend what could and should be done.

[100] The Briefing Note to the Minister, which was as late as November 21, 2005 is instructive as to what type of review was going on. The Briefing Note is part of A49 of the Commission brief and on p. 2 states in answer to the question as to whether a review had occurred and how this situation came about as follows:

> This is still an ongoing investigation into the situation, however, there is ample literature to suggest that these tests have limitations and are not guided by national standards. In the meantime until all the results from retesting are obtained it is impossible to determine the exact details of the cause of the problem. Three review have taken place, of our current testing procedure, our pathology services and our technical services. Recommendations have been made and are being acted upon which will immediately ensure the quality and reproducibility of results. [Emphasis added]

[101] It is to the credit of the Eastern Health staff, including Dr. Cook and Dr. Williams, that they took a leadership role in the investigation.

[102] I am not satisfied, taking into consideration all that has been said, and the documentation that has been put before the Court, that these External Review Reports were anything more than one part of an investigation into the problems that Eastern Health was having back in 2004 and 2005 with its Lab testing.

[103] It started with reviews by Dr. Carter and Dr Cook; it continued by technicians looking at the systems, including a Ventana representative checking the machinery and the process; and continued with the External Reviewers trying to come up with answers. Those problems were still not answered as a result of the Ventana reports.

[104] As a result, the investigation continued in September with Dr. Banerjee and Wegrynowski. The Reports were completed and some of the recommendations were shared within Eastern Health and outside of Eastern Health. Eastern Health has seen fit to release some of the facts and information contained in the Report to other health care facilities whom they felt may benefit from the recommendations.

Other health care facilities were briefed on the recommendations. Government was briefed on the recommendations and what had happened. Eastern Health did not release the contents of the Report to Government or to other health care institutions, yet, a great deal of information was being disseminated by way of recommendations.

[105] As the Commission counsel at the hearing of this application pointed out, if the recommendations of the Report can be made public, how can one conclude that it was the intent of Eastern Health that the contents of the Report would remain confidential, as the recommendations of the Report were obviously coloured by the facts and the information in the Reports themselves. In fact, the Reports are now before the Commission for the Commission to review. Yet, the Commission can ask no questions of the author of the reviews. The Inquiry does have a mandate to investigate, recommend and report to Government.

[106] Eastern Health has not satisfied me, on a balance of probabilities, that the preliminary Reports and the final Reports of the reviews are Reports protected as Quality Assurance Committee reports under s. 8.1, nor are they Peer Review reports covered under s. 8.1 as contemplated by the *Evidence Act*, 8.1, and are therefore, Reports that can be used by the Commissioner as the Commission sees fit.

[107] I am concerned that some of the players in the process may have had the impression that these opinions were being protected. I am also confident that the Commission and Commission counsel have enough control over the process which will be part of the Inquiry to give proper consideration as to how it wishes to handle the Reports and the proponents of these Reports. It is not for me to say how these Reports should be used by the Commission; this is totally within the mandate of the Commission and how the Commission wishes to conduct its own affairs.

[108] If I am incorrect as to these Reports not being protected under s. 8.1 of the *Evidence Act*, does Common Law Privilege apply? The Court takes the position that the *Evidence Act*, SNL, 1991 replaces the Common Law in this particular

instance as it relates to the External Reports and the disclosure of communications relating to those Reports. As noted earlier in this decision, the Legislature conducted public hearings on the implementation of s. 8.1 of the *Evidence Act* back in 1987-1988.

[109] I refer to the authorities and the text *Sullivan v. Driedger on the Construction of Statutes*, Fourth Edition Butterworths Canada Ltd. (Markham: 2002) by Ruth Sullivan, p. 340. This citation is found at Tab 6 of the Commission counsel's list of authorities, Volume 2.

[110] Under the heading Governing Principles Legislation is Paramount:

> It follows from the principle of legislative sovereignty that validly enacted legislation is paramount over the common law. Acting within its constitutionally defined jurisdiction, the legislature can change, add to, or displace the common law as it thinks appropriate and the courts must give effect to that intention regardless of any reservations they might have concerning its wisdom. As stated by Martin, J.A. in *Schiell v. Morrison*:
>
> > It is true that the legislature is an encroachment on the common law doctrine…but if it is clear that it was the intention of the Legislature in passing a statute to abrogate the common law, it must give way, and the provisions of the statute must prevail.

[111] If I am incorrect in the position set out above, and the common law Wigmore rule applies, are the External Reports protected by the Wigmore Principles?

[112] It is quite evident from my earlier ruling, that the External Reports were never intended to be confidential so as to be protected by the Wigmore Principles. The four Wigmore Principles are set out in the case of Slavutych v. Baker, [1976] 1 S.C.R. 254. The four principles are set out on p. 40 of Commission's brief as follows:

> 1. The communications must originate in a confidence that they will not be disclosed.
>
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
>
> 3. The relationship must be one which, in the opinion of the community ought to sedulously fostered.
>
> 4. The injury that would incur to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

[113] It is clear from the evidence disclosed at the hearing in cross-examination of Dr. Cook that he himself admitted that he shared the Report with other pathologists. He was asked this question directly. As noted earlier in this decision, there was evidence that Dr. Fontaine, who was the lab head at the General Hospital, had a dinner meeting with Dr. Banerjee, and the contents of the Report were shared with him and he certainly could not be deemed to be a member of any Leadership Committee. Reference: Tab B6 of the Virginia Connors affidavit. Reference: Transcript of the interview with Dr. Dan Fontaine.

[114] Further evidence that Oncologist Dr. Kara Laing, not a member of any Leadership Team Review Committee, was permitted to sit in on exit interviews on Ms. Wegrynowski. The discussion and disclosure of findings of the review in the presence of Dr. Laing also confirms that this was not confidential. Reference: Transcript of interviews of Dr. Kara Laing, Tab B7 of Commission counsel's affidavit of Virginia Connors.

[115] There is further evidence Dr. Nash Denic, at a meeting in December of 2007, read out portions of Dr. Banerjee's first Report. This was done well after the recommendations had been implemented by Eastern Health. If this was to be a confidential Report this would have been a highly irregular procedure.

[116] These are clear instances of communications that Eastern Health argues were originating in confidence, with the understanding they would not be disclosed. The evidence does not bear this out.

[117] In relation to the second element of confidentiality, it being essential to the full and satisfactory maintenance of the relationship between the parties, this second principle could not be satisfied under the circumstances that developed in relation to these Reports.

[118] The parties in this case would include the consultant; the medical staff being reviewed; and the party the consultants reported to, i.e., the Leadership Review Team. Yet, the Terms of Reference for the external consultant specifically states that the external consultant was to interview individuals who may have relevant or pertinent background information of the IHC Lab with particular emphasis on ER/PR testing.

[119] Neither the Peer Review Policies as set out in Dr. Howell's affidavit, and the schedules attached, nor the specific mandate of the external consultant, allowed anonymity of reporting to the consultant. Under the Peer Review Policy of the medial staff, as set out in Dr. Howell's Schedules, any medical staff member under the Policy was entitled to obtain a copy of the Peer Review Report. This certainly flies in the face of confidentiality in that there were over a dozen pathologists who could have been subject to review at that time in 2005 – all of which could be interviewed, all of which would have a right to the Report. This says nothing for technicians and other health care workers who had no policy in place to protect any confidentiality in their reporting.

[120] In relation to the third and fourth principles as set out in the Wigmore Principles, a case for sedulously fostering the relations between the consultants and the participants, it is difficult to accept this when there is no evidence that there was any type of effective Quality Assurance Program in place at the Lab at Eastern Health, and that there was no Quality Assurance Committee which was active at the time of these incidents. Certainly, a strong case can be made for disclosure of

the Reports at common law in that this was not an isolated incident but a situation affecting many patients over an extended period of time.

[121] In relation to the fourth principle of Wigmore, weighing the injury from disclosure against the benefits thereby gained from the correct disposal of the litigation, this principle would weigh in favour of disclosure of the Reports in the context of this application because one is not in a situation where the Inquiry is looking at fault. The Inquiry is a fact-finding process and it can benefit from the opinions expressed knowing that the Inquiry is not concerned with fault. If the arguments now being made on the common law principles were in the context of a civil action, whereby fault is at issue, then these Wigmore principles would weigh more heavily in favour of nondisclosure at common law because it relates to the issue of fault and the Wigmore protection may have more weight in favour of nondisclosure.

[122] The Court finds that based on the evidence presented and the arguments set forward in counsel's brief that the four Reports prepared by the internal reviewers are not Peer Review Reports or Quality Assurance Reports and are therefore not protected by s. 8.1 of the *Evidence Act*. They are not protected by the Wigmore Principles as set out above for reasons as stated.

THE EFFECT OF S. 12(1) AND (3) OF THE *PUBLIC INQUIRIES ACT* ON S. 8.1 OF THE *EVIDENCE ACT*

[123] It is unnecessary to assess the provisions of s. 12(1), 12(2) and 12(3) of the *Inquiries Act, 2006*. For the sake of expediency in filing this decision, I reluctantly withhold comment on the consequences, if any, of s. 12(1) through 12(3) of the *Inquiries Act* and leave for another day the effect, if any, of those sections on s. 8.1.

[124] It may well be that further public debate may be necessary to determine what information of a medical nature can be put before an Inquiry.

[125] It is clear that Reports that properly fit under s. 8.1, being proper Peer Review Committee reports and proper Quality Assurance Committee reports, which come from properly constituted bylaws passed by various corporations and accepted by trustees under the *Health Care Association Act*, RSNL 1990 c. H-8 are, and will continue to be, protected pursuant to s. 8.1 of the *Evidence Act*.

[126] It will take clear and unambiguous legislation to take away the vested rights and the protections of medical and health care staff of past and future events as set out in s. 8.1 of the *Evidence Act*. Certainly s. 12(1) appears in the language to protect vested rights in that it says, "A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as a person would have in relation to the same disclosure and protections in a Court of law."

[127] Yet, s. 12(3) makes the following statement:

> Notwithstanding subs. (1) a person shall not refuse to disclose information to a Commission or a person authorized by a Commission on the grounds that the disclosure is prohibited or restricted by another act or regulation.

[128] I will only say at this particular point in time that the language in s. 12(1) and 12(3) is certainly ambiguous. For the purposes of this application, and on the basis of the findings and rulings that I have made, it is unnecessary to make a final determination on the effects of s. 12(1) and 12(3) of the *Inquiries Act, 2006* and s. 8.1 of the *Evidence Act* as I have found in this case that the information being requested by Eastern Health is not protected by s. 8.1 because they are not Peer Reviews or Quality Assurance Committee Reports.

[129] This argument is best left to a factual setting which requires an answer to these ambiguities as set out in s. 12(1) and 12(3) of the *Inquiries Act, 2006*.

_____

Justice