

IN THE MATTER OF DR. A.H. HEFNAWI AND
THE HEALTH CARE PRACTITIONER'S SPECIAL COMMITTEE FOR AUDIT HEARINGS

Decision from the interim application of Dr. Hefnawi made January 7, 2014

Dr. Hefnawi is a registered with College of Podiatric Surgeons of British Columbia and is enrolled as a Practitioner under the Medicare Protection Act (the "Act"). The purpose of the Act is set out in s. 2 and in furtherance of the purpose, permits Practitioner's to provide the enumerated procedures to Beneficiaries (commonly called patients or clients) and then bill the Commission, established under the Act, for payment for those procedures. Podiatrists are included in the Act's definition of Health Care Practitioners and their enrollment under the Act is optional (s.13(1)). Once enrolled a Practitioner is bound by the statutory obligations of the Act and the rules and regulations flowing therefrom.

To ensure that Practitioners comply with their obligations the Act establishes a mechanism to investigate and verify that Practitioners have properly billed for Procedures. Dr. Hefnawi is the subject of such an investigation. Upon concluding the first phase of the investigation, an audit, the Commission through its Billing Integrity Program ("BIP") alleges billing irregularity. As such, it informed Dr. Hefnawi by way of letter dated February 22, 2012, that it is proceeding under s. 37 of the Act and subsequently by letter dated August 3, 2012, that it is proceeding under s. 15 of the Act.

The hearing that is permitted under ss.37 & 15 is set for five days and is to commence January 20, 2014. I was advised during the telephone conference of January 7, 2014 that the hearing was originally set to commence June 10, 2013 but was adjourned at the request of Dr. Hefnawi.

Dr. Hefnawi, through his counsel, brought this application requesting orders or directions as to:

- Disclosure;
- Joinder of ss.37 & 15 in one hearing;
- Whether the Commission can adduce evidence by way of affidavit; and
- Jurisdiction of the Panel established by the Commission to hear this matter (brought up by counsel for Dr. Hefwani in his reply to the submissions of the BIP).

I was presented two letters from Dr. Hefwani's counsel dated December 18, 2013 which convened the hearing held by telephone conference on January 7, 2014. I then received written submissions from Dr. Hefwani's counsel dated January 8, 2014, a reply from counsel for the BIP dated January 9, 2014, which included the ss. 37 & 15 notices and associated correspondence

providing further particulars, and the reply of Dr. Hefwani's counsel dated January 10, 2014. I thank counsel for their able submissions and will refer to certain decisions here without further citation.

Disclosure

Dr. Hefwani requests disclosure as detailed in paragraphs a) - d) of his submissions of January 8, 2014. Counsel for BIP has answered c) and has agreed to provide copies of the decisions requested in d). The items requested under a) and b) can be described as source documents that went into the preparation of any expert reports and witness statements. BIP says that what is requested are privileged communications and that sufficient disclosure has been provided in the administrative context. Dealing with the latter issue first, BIP says that it has provided Dr. Hefnawi with all the documents, reports and affidavits on which it will rely. As to the affidavits, BIP says that it has provided all of its letters to Dr. Hefnawi's patients and their replies. BIP says its obligation is to provide Dr. Hefnawi with sufficient materials so that he knows the case against him and they have done so.

Stinchcombe, a Supreme Court of Canada decision in a criminal matter held that the prosecution has a duty to disclose all material to an accused. However, a later decision by the same court, *Baker v. Canada* held that in administrative proceedings the tribunal must act fairly toward the affected person and sets out a non-exhaustive list of factors to consider. They include, the nature of the statutory scheme, the nature of the decision being made, the importance of the decision to the affected person, and the choice of the agency. The Act deals with billings to the Commission for procedures to Beneficiaries. If the Commission determines that there has been irregular billing, the Act permits the practitioner to challenge it by way of hearing. The practice adopted is to permit an oral hearing before a tribunal and prior to that, full exchange of documents and materials very close to what is required in civil proceedings in B.C. If the allegations are proved, on the civil standard, the remedies allowed include return of monies that are determined to have been improperly billed along with statutory penalties and interest and, a determination whether the Practitioner can continue to bill the Commission and, if so, when and under what conditions. If the Practitioner is dissatisfied with the decision, there is right of appeal to the Supreme Court and a further right, with leave, to the Court of Appeal.

Dr. Hefnawi says that an adverse decision could terminate or so severely restrict his ability to pursue his career that the principles in *Stinchcombe* apply. In support, he cites a number of decisions. I note that all of the decisions in support cited by Dr. Hefnawi are in the context of professional discipline. It appears that the courts have carved out an exception to the lower

standard of disclosure required in administrative procedures when dealing with professional registration or licensing. This has most recently been stated by the Federal Court of Appeal in *Sheriff v. Canada (Attorney General)*. All of these decisions are distinguishable since a proceeding under the Act is for a truly administrative purpose. An adverse decision may restrict a Practitioner from accessing a source of funds, thereby possibly causing economic hardship, but it does not prevent them from continuing to practice their profession nor from billing patients directly for their services. I am bolstered in this conclusion by ss. 16 & 37(4) of the Act. It is interesting to note that whether or not an allegation under s.15 is to be reported to the Practitioner's disciplinary body is within the discretion of the Chair of the Commission while an adverse finding under s. 37 must be reported.

I conclude that there has been sufficient disclosure to Dr. Hefnawi and the BIP only need disclose that to which they have agreed in their January 9, 2014 submission. As I have concluded there has been sufficient disclosure, I do not need to consider the issue of privilege.

Joinder

Dr. Hefnawi says that the nature of the proceedings under s. 15 and s. 37 of the Act are so different, because of different evidentiary requirements and burdens of proof, that separate hearings are required.

As to the burden of proof, I agree with the submission of the BIP that the burden in a proceeding under both sections of the Act is the same; the common law standard: the balance of probabilities.

The proceedings arise from the same set of facts. The requirements of the Administrative Tribunals Act, as adopted in s.5(3) of the Act, on a plain reading of the section, apply to a hearing under both sections. The evidence will, to a large extent, overlap. To say that the Panel will be prejudiced by some of the evidence is to say that the Panel is unable to distinguish the purpose of the two sections. S. 15 concerns the continued enrollment of a Practitioner under the Act and the conditions, if any, of that enrollment while s.37 concerns payment recovery. I view the sections largely complementary and that the Panel can easily distinguish and apply the evidence correctly. To sever this proceeding will result in an unnecessary multiplicity of proceedings and unduly interfere with the efficient administration of the Act.

The s. 15 and s.37 proceedings are joined.

Affidavit Evidence

The BIP intends to adduce evidence by way of affidavit. Dr. Hefnawi says this is a gross breach of procedural fairness since he is deprived of the ability to test the alleged allegations of fraud.

The BIP provided all affidavits on which it intends to rely to Dr. Hefnawi no later than August 30, 2013.

Our Court of Appeal in the recent decision of *British Columbia (Securities Commission) v. Alexander* noted that it is permissible for an administrative tribunal to admit hearsay evidence including unauthenticated hearsay evidence. The court held that a tribunal is able to consider what weight to give to such evidence. Dr. Hefnawi says that whether or not “surgery” as defined in the Act’s regulations was performed needs to be adduced orally. It appears, from the submissions, that the affidavits are from patients of Dr. Hefnawi and it is doubtful that patients will be able to enlighten the panel as to definitions in the Act. Whether or not a procedure was “surgery” is best addressed in argument.

Furthermore, Dr. Hefnawi refers on page 1 of his January 8, 2014 submission to s. 34(3) of the *Administrative Tribunals Act* which allows for requiring attendance of witnesses. It permits any party to make application for a summons to a witness. Dr. Hefnawi can, should he choose, make such an application. In the event he is not familiar with the process, the BIP can assist.

Affidavit evidence can, if relevant, be admitted. Dr. Hefnawi has the right to apply for witness summons

Jurisdiction

Dr. Hefnawi says, on pages 2 & 3 of his January 10, 2014 that the Panel has no jurisdiction as it was improperly constituted for the reasons set out therein. In short, he says that Health Practitioner’s Special Committee for Audit made the decision to proceed and not the Podiatry Special Committee which ought to have done so. He points to an agreement between the Commission and the B.C. Medical Association but does not say that there is the same or any agreement with Podiatrists. The Act distinguishes between Medical Practitioners and Health Care Practitioners, the latter which includes Podiatrists. I have not heard from BIP and do not need to since a full answer can be found in s. 4 of the Act which states:

Special committees respecting health care practitioners

4 (1) After consultation with the appropriate licensing body, the Lieutenant Governor in Council may establish one or more special committees to exercise the powers, duties or functions of the commission under this Act that are specified by the Lieutenant Governor in Council for a body of health care practitioners.

(2) A special committee established under subsection (1) is composed of the persons the Lieutenant Governor in Council specifies and exercises its powers, duties or functions on the terms and conditions the Lieutenant Governor in Council specifies.

(3) A special committee established under subsection (1) may establish a panel and the powers, duties and functions of the special committee may be exercised, subject to the regulations, by the panel.

(4) A power, duty or function given under subsection (1) to a special committee may continue to be exercised by the commission unless the Lieutenant Governor in Council directs that the commission not exercise the power, duty or function.

(5) A power, duty or function given under subsection (1) to one special committee may also be given under subsection (1) to another special committee.

(6) The Lieutenant Governor in Council must designate the chair of each special committee and may designate a deputy chair of each special committee.

Ss(5) is clear. The Health Practitioners Special Committee for Audit can have concurrent jurisdiction with the Podiatry Special Committee and can initiate a proceeding and as such the Panel has jurisdiction. As there is no evidence that it has not been given concurrent jurisdiction, the presumption is that it can. Therefore, the Panel has been properly appointed.

Summary

- BIP has made sufficient disclosure subject only to providing that which it agreed to in its submission of January 9, 2014;
- The s15 & s37 proceedings are joined;
- BIP may adduce evidence by affidavit. Dr. Hefnawi can apply as set out in the *Administrative Tribunals Act*;
- The Panel has jurisdiction.

January 13, 2014



Oleg Tomchenko, Chair

demanded much time to present his arguments, often without any supporting evidence, and made requests to allow time to arrange the production of allegedly material witnesses who did not appear and to produce allegedly material documents which were not produced, thereby unnecessarily extending the hearing. This conduct warrants an award of costs at the higher end of the scale. Considering all of the foregoing, the Applicant's costs at one half of the maximum being \$20,362.10 are approved.

The Respondent complains about the disbursements without providing any cogent argument. A simple statement that photocopy costs of 24 cents a page is not supportable without more is not something to be considered. That amount and greater amounts have been allowed for photocopy expense for many years. Likewise the complaints about the expert costs and other matters without more is not to be considered. BIP presented the Bill of Costs and the supporting material in a cogent and proper manner. The 1st Affidavit of Sally Sampson presents adequate material, easily understandable and is unchallenged. It is sufficient evidence that the disbursements were necessary and the amounts claimed reasonable. As such the Disbursements claimed by the Applicant in the sum of \$31,724.59 are approved.

For the reasons above, costs totalling \$52,086.69 are awarded to the Commission.

Dated: October 16, 2015



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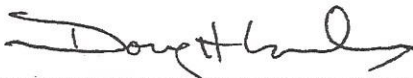
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10/19/2015

Douglas Lamb



Jonathan Oddleifson