Hospital Appeal Board

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DECISION NO. 2014-HA-002(a)

In the matter of an appeal under section 46 of the *Hospital Act*, RSBC 1996, c. 200.

BETWEEN:	Dr. Stephen Todd Sorokan	**APPELLANT**
AND:	Fraser Health Authority	**RESPONDENT**
BEFORE:	David G. Perry, Chair	
DATE:	Heard by way of written submissions concluding on January 26, 2015	
APPEARING:	For the Appellant: Trevor R. Thomas, Counsel For the Respondent: Penny A. Washington, Counsel	

PRELIMINARY DECISION ON TIMING FOR DETERMINING JURISDICTION

INTRODUCTION

[1] These are reasons following an application by the Respondent Fraser Health Authority ("FHA") for a preliminary determination on whether or not the Hospital Appeal Board ("the Board") has the authority to accept this appeal.

[2] Both parties accept that pursuant to section 46 of the *Hospital Act,* C. 200 R.S.B.C., 1996 the Board has the power to make such a preliminary determination.

[3] In fact given the authorities presented by the parties it is apparent that when a question of whether or not an appeal properly lies to an administrative tribunal is raised by one of the parties, the tribunal not only may determine that question but must.

[4] The Respondent submits that this determination should be made prior to the hearing on the merits, while the Appellant submits that the hearing should not be bifurcated and the preliminary issue should be addressed as part of the hearing on the merits of the appeal.

[5] *H.M.T.Q. v. Crockford,* 2005 BCSC 663 (appeal allowed on other grounds 2006 BCCA 360) dealt with a preliminary objection to the BC Human Rights Tribunal accepting a complaint with respect to exercise of crown prosecutor discretion.

> [64] It is my opinion that where the respondent to a complaint challenges the Tribunal's jurisdiction on the ground that the actions do

> not fall within s. 8(1)(b) the Tribunal must determine the legal question whether those actions do or do not represent services available to the public. In my view, the Tribunal cannot defer that decision on the ground that it does not have a sufficient evidentiary basis. It is only if the actions meet the legal test that it may be necessary to consider evidence relating to the nature and extent of the custom before determining whether the actions complained of offend the section of the *Code*.
>
> [65] In this case the Tribunal Member deferred the decision about jurisdiction not on the grounds that she lacked evidence relating to custom but on the ground that she lacked a sufficient evidentiary record to determine whether the activities of prosecutors constitute a "service". In my opinion that is a question of pure law, which the Tribunal Member lacked any discretion to defer. The petitioner having raised the question of law, the Tribunal Member was bound to answer it one way or the other and having declined to do so, this court is in just as good a position as the Tribunal to make that determination.

[6] Accordingly, the Board is "bound to answer" the preliminary objection raised by the Respondent. The issue however, is whether the matter is a question of pure law which should be determined prior to a hearing or a matter of mixed law and fact and therefore inextricably intertwined with the merits of the appeal.

APPEAL

[7] The *Hospital Act,* s. 46(1) provides as follows:

> **46** (1) The Hospital Appeal Board, consisting of the members appointed under subsection (4), is continued for the purpose of providing practitioners appeals from
>
> (a) a decision of a board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practise in a hospital, or
>
> (b) the failure or refusal of a board of management to consider and decide on an application for a permit.

[8] The narrow issue before the Board is whether the allegation made by the Appellant that there have been a series of reductions in his on-call shifts at Royal Columbian Hospital ("RCH") constitute a modification, refusal, suspension, revocation or failure to renew his permit to practise.

[9] As the FHA states succinctly in their submissions on the preliminary issue, "the only determination to be made by the Board in respect of the Appellant's privileges is whether he has a right to participate in the on-call rota at RCH because it forms part of his privileges so as to bring his exclusion from it within the Board's jurisdiction".

PURE LAW

[10] The FHA submits that this preliminary question is a matter of pure law.

[11] The FHA cites the following FHA Medical Staff Bylaws:

[12] Article 1 of the Bylaws defines "Privileges" in the following manner:

> The right granted by the Board to Members to provide specific types of medical care within the facilities and programs of the Health Authority. Privileges are differentiated into:
>
> - Core Privileges: Those activities or procedures which are permitted by virtue of possessing a defined set of credentials usually obtained as part of a standard training program.
>
> - Non-Core Privileges: Those activities and procedures which are outside of the core privileges, that require specific training or certification or reflect advances in medical practice not currently reflected in core privileges.

[13] The Bylaws define "Primary Regional Department" as:

> The Regional Department to which a Member is appointed according to his/her training, and within which the Member delivers the majority of care to patients.

[14] Article 6.3.6 of the Bylaws indicates that:

> Unless specifically exempted by the Health Authority, members of the active staff are required to participate in fulfilling the organizational and service responsibilities, including on-call responsibilities, of the Regional Department to which the member is assigned, as determined by the Health Authority and described in Medical Staff Rules.

[15] The scope of the Board's authority to hear appeals was discussed in *Hicks v. Fraser Health Authority* (British Columbia Hospital Appeal Board June 17, 2013) ("*Hicks*"). The Panel in that case held "we conclude section 46(1)(a) of the *Hospital Act* makes clear that the Board's mandate is to hear appeals from decisions that adversely affect the *permit* itself" (at p. 4, emphasis in original).

[16] The FHA argues that the outcome in *Hicks* also determines the appropriate decision in this application.

[17] However, there are significant differences between the responsibilities of a consultant practitioner and an active practitioner as defined in the Medical Staff Bylaws of the Fraser Health Authority January 2, 2013.

[18] In particular reference to the issue under appeal, namely the provision of on-call opportunities to medical practitioners, Bylaw 6.3.6 provides with reference to Active Medical Staff:

> Unless specifically exempted by the Health Authority, members of the active staff are <u>required</u> to participate in fulfilling the organizational and service responsibilities including on-call responsibilities of the

> regional department to which the member is assigned as determined by the Health Authority and described in medical staff rules. (emphasis added)

[19] With respect to Consulting Staff it is provided in Bylaw 6.5.5:

> Unless specifically exempted by the Health Authority, members of the consulting staff may be required to participate in fulfilling the organizational and service responsibilities, including on-call responsibilities, of the Regional Department to which the member is assigned as determined by the Health Authority and described in Medical Staff Rules. (emphasis added)

[20] The panel in *Hicks* was able to determine based solely on review of the Bylaws a category of medical practitioners had been created that:

> . . . established a class of permit created primarily as a means to facilitate the exercise of effective hospital management, without corresponding legal rights, and whose purpose is to have available specialized or other services given the complex array of interests and responsibilities engaged in operating a hospital (at p. 6, citation omitted).

[21] Given the differences in privileges between Consulting and Active medical staff, I am unable to find that the bylaw defining responsibilities for active medical staff is sufficiently clear in itself to determine the preliminary question of whether or not I should order a full hearing.

FACTS AND LAW

[22] The Appellant argues that the issue of whether or not the Board can accept this appeal must be informed by full canvassing of evidence and that the evidence that will be led to dispose of the preliminary issue is the same evidence that the Appellant will lead regarding the merits of the appeal. He relies on authorities that distinguish *Crockford* on the basis that an evidentiary examination is required for a determination of the jurisdictional question: *Hospital Employee's Union v. Canadian Forest Products Ltd.* 2005, BCSC 877 and *Vancouver (City) Police Department v. Hayes* 2008 BCCA 148.

[23] The key issue as defined by the Appellant is whether or not the Appellant's reduction in on-call shifts from 6 calls a month to 2 calls a month in May 2010 and the subsequent further reduction to no calls as of December 1, 2012 negatively affected his permit to practise.

[24] This in turn requires an assessment of what are the actual terms of that permit to practise.

[25] The Appellant had "primary privileges" as defined by the FHA at Surrey Memorial Hospital. As noted above the definition of primary regional department is a place where the member "delivers the majority of care to patients" (emphasis added). The Appellant also had privileges at two other hospitals, RCH and Eagle Ridge Hospital.

[26] The fact that the Appellant had privileges at multiple locations within the same regional department and that the definition of primary regional department is majority of care, i.e. not exclusive care, as part of his permit to practise suggests that the Appellant was not restricted to the primary location.

[27] The further question of what the actual content of those privileges were at RCH is not clear from review of the Bylaws. In its submission the FHA says "it is generally accepted practice throughout the FHA that medical staff are only obligated pursuant to the Bylaws to provide call at their primary site". This was not set out in any Bylaws or Rules provided to the Board nor in the limited documents that were produced. (I note the concern raised by the FHA that documents were submitted to the Board without supporting testimony or affidavit and as will be made clear below I have not made any findings of fact based on the limited materials produced to date).

[28] Certainly at least the Appellant does not share this "general acceptance".

[29] This leaves open the question of whether or not active medical staff with privileges at multiple locations have a permit to practise which includes a right to participate in on-call rota at all of those locations or are restricted to their primary location.

[30] There is no doubt that in some circumstances the elimination or reduction in on-call privileges may give rise to right of appeal (*Tsang v. Delta Hospital* 2000 BCSC 323, *McDonald v. Mineral Springs Hospital* 2008 ABCA 273). Whether or not those circumstances exist in this case can only be determined by a consideration of evidence as part of the hearing of the merits, not by review of the Bylaws or further preliminary evidence adduced by affidavit.

[31] The Appellant says that his on-call privileges were reduced both in May 2010 and December 2012. He says that he appealed to the FHA and cited those reductions in addition to failure to obtain a position at RCH and his appeals were rejected by way of letter dated May 21, 2014.

[32] It is not apparent on review of the Medical Staff Bylaws nor of the medical staff rules that a medical practitioner with primary privilege at one hospital necessarily has no on-call privileges as part of his "permit to practise" at secondary hospitals.

[33] FHA raises issues such as "absurd and impractical results" if medical practitioners were on-call at multiple locations. FHA also relied upon committee minutes from June 3, 2010 from the RCH department of pediatrics which in its submission make it clear that the Appellant knew or ought to have known that his on-call allocation could be eliminated at any time per operational reasons.

[34] Neither of these propositions is self-evident. In fact they amplify the Appellant's argument that in order to determine what is the content of the Appellant's permit to practise a full hearing must be held.

OTHER ISSUES

[35] FHA has argued given the limitation period in s. 46(3.2) of the *Hospital Act* the scope of the hearing must be limited to the May 21, 2014 decision of the FHA board of directors.

[36] The Appellant says in turn that the matters argued before the FHA board were broader than those contained in the decision.

[37] The issue of the scope of the appeal is best left to the panel hearing the full appeal.

[38] The Appellant has indicated a desire to cross-examine the members of the FHA board which made the May 21, 2014 decision. The FHA has objected. Again this is a matter best left to the panel hearing the full appeal.

[39] Some documents including emails, minutes of meetings, and correspondence were referred to in the course of this application.

[40] This decision is limited in scope solely to the question of the timing of the determination of whether or not the Board can properly accept this appeal and no findings have been made with respect to questions of fact nor on the merits of the underlying appeal nor indeed of whether or not the Board has authority to hear the appeal.

DECISION

[41] The application by FHA for the Board to reject the appeal is dismissed and I find that the issue of whether the Board is empowered to hear this appeal pursuant to section 46(1) of the *Hospital Act* does not turn on a question of pure law but rather comprises a question of mixed fact and law that can only be determined as part of a full hearing on the merits.

[42] The parties are invited to contact the Registrar in order to set a further pre-hearing conference and hearing dates.

"David Perry"

David G. Perry, Chair
Hospital Appeal Board

June 30, 2015