Hospital Appeal Board

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DECISION NO. 2015-HA-003(a)

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

BETWEEN:	Dr. Michael Butler	**APPELLANT**
AND:	Vancouver Coastal Health Authority	**RESPONDENT**

BEFORE: A Panel of the Hospital Appeal Board
David G. Perry, Chair

DATE: Conducted by way of written submissions concluding on November 23, 2015

APPEARING: For the Appellant: Sean Hern and Erica Miller, Counsel
For the Respondent: Penny A. Washington, Counsel

PRELIMINARY APPLICATION TO DISMISS APPEAL and APPLICATION FOR A STAY

INTRODUCTION

[1] This is an appeal brought by Dr. Michael Butler seeking to have hospital privileges at Richmond Hospital and Mount St. Joseph Hospital either continued or extended.

[2] The Vancouver Coastal Health Authority representing those hospitals opposes the appeal.

[3] The Hospital Appeal Board ("HAB") has received two preliminary applications. The Respondent Health Authority applies to have the appeal or appeals dismissed on the basis of want of jurisdiction. Properly speaking, the application is that the Appellant Dr. Butler does not have standing pursuant to Section 46 (1) of the *Hospital Act* to bring the appeal.

[4] The Appellant brings an application for a stay which could properly be characterized as an Order of Mandamus seeking continuation of hospital privileges at Richmond Hospital and Mount St. Joseph Hospital.

ORDER OF APPLICATIONS

[5] There is an initial dispute between the parties as to which application should be determined first.

[6] In this particular instance, the order of determination of applications is immaterial as I am denying both applications.

[7] However, on general principles, I agree with the Respondent that prior to granting any order for a stay or other interim relief, it is appropriate to first determine whether or not the HAB has any authority to hear the appeal.

[8] The HAB recently made a similar decision in *Sorokan v. Fraser Health Authority* (Decision No. 2014-HA-002(a), June 30, 2015) as to whether it was appropriate to make a preliminary determination of jurisdiction as a question of pure law before hearing evidence in the appeal. 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.

[9] *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.

[10] For the reasons set out in *Crockford*, I find that the HAB is "bound to answer" the preliminary objection raised by the Respondent. What I take the Court to mean is that the preliminary objection has to be addressed one way or

the other. In this case the issue however, is whether the matter is a question of pure law which can be determined prior to a hearing or a matter of mixed law and fact and therefore inextricably intertwined with the substantive and factual issues under appeal. If the preliminary objection to jurisdiction cannot be determined without a full hearing on the evidence then it must be dismissed. For the reasons set out below I find that this question cannot be appropriately determined in this case without a hearing of evidence as part of an appeal on the merits.

APPLICATION TO DISMISS FOR WANT OF JURISDICTION

[11] The Respondent characterizes the issues under appeal as

(a) a "privilege issue" related to the Appellant's form of locum tenens privileges and whether he has any right to appeal a cessation of those privileges;

(b) whether or not a December 9, 2014 letter and resume submitted in response to a posting for ophthalmological hospital privileges at Richmond Hospital is in fact an application as defined under the *Hospital Act*.

[12] The Appellant characterizes the issues under appeal as whether or not there was a failure to determine or consider, or a refusal by the Respondent of a December 9, 2014 application for privileges, failure to consider an August 10, 2015 application for hospital privileges and whether or not there has been cancellation of his locum tenens privileges.

[13] For the purposes of this preliminary decision only, I consider the issues under appeal to be:

1. refusal to renew locum tenens privileges;

2. refusal of a December 9, 2014 application for privileges; and

3. failure to consider an August 10, 2015 application for privileges.

[14] I note at the outset that as this is a preliminary decision made without the benefit of hearing full evidence, any references to the documents or affidavits submitted by the parties are not a determination of fact, but solely to inform the initial considerations.

[15] I also note generally that although the submissions from both parties were made on the basis that this is solely a question of law, there was invariably a crossing over to argument on the substantive issues in appeal. Both parties submitted affidavit evidence and made extensive reference to "facts" in their submissions. None of the comments made below are a finding of fact and any reference to the evidence submitted is not binding on any subsequent panel hearing the appeal.

[16] The Respondent argues generally that the decisions under appeal are operational only and are not subject to appeal. The Appellant submits that the issue of jurisdiction can only be determined following a hearing on the merits.

1. Locum Tenens Privileges

[17] With respect to the issue of locum privileges the Respondent says that determination of these privileges is an operational matter only and that the appeal appears to assume that the Appellant is "entitled as a matter of right to be included in the on-call schedule and afforded access to OR time after his role as a locum comes to its natural end with the return of the physician he was replacing or the selection of a candidate for recommendation to the Board to fill the vacancy created by the physician's retirement".

[18] The Respondent makes reference to the definition of locum privileges which is found in the Medical Staff Bylaws Section 6.6 and the Medical Staff Rules found at 6.7.

[19] Bylaw 6.6.2 states that "[r]enewal of privileges may be considered upon review".

[20] Contrary to the Respondent's submission that a locum expires automatically upon end of a term, the Bylaw itself provides that such a locum may be renewed.

[21] I also note that Rule 6.7.4 states that Bylaw 6.6 of the Bylaws governs appointments for locum tenens.

[22] It is not apparent on the face of the appeal that the Appellant's dispute over termination of his locum tenens privileges is based on a claim of "entitlement as a matter of right". Contrary to the HAB decision in *Hicks v. Fraser Health Authority*, (June 17, 2013), it is not clear on the face of the *Hospital Act*, the Bylaws, nor the Rules that there is no appeal allowed to a holder of locum tenens privileges who has those privileges terminated or abrogated.

[23] Given the Bylaw 6.6.2 providing that the privileges may be renewed, on the face of it, a failure to renew those privileges potentially engages section 46(1)(a) of the *Hospital Act*, which provides for practitioner appeals to the HAB from

> (a) a decision of a board management that modifies, refuses, suspends, revokes or **fails to renew "**a practitioner's permit to practice in a hospital".

[24] The nature of the Appellant's permit as a locum tenens is highly contested between the parties. Given the conflicting evidence produced to date it, is not appropriate to determine that question as one of pure law.

[25] There was extensive argument between the parties as to whether or not the failure to renew locum privileges or to terminate them was made by lower

levels of management rather than "a board of management" as defined in section 1 of the *Hospital Act*.

[26] The Appellant raises procedural, substantive, and in some areas, what I will characterize as bad faith arguments, including a claim that his hospital privileges have been terminated as a result of a "coercive strategy". All of these claims rely extensively on an evidentiary basis rather than a pure question of law.

[27] Dealing with the issue of whether or not the decision to terminate locum privileges (in addition to the "failure to approve the December 2014 application") was made by the Board of Management, as noted there was extensive argument made from both parties on this matter and detailed affidavits. The Affidavit evidence from Dr. Butler and Dr. Wagner is contradictory on this point. It is entirely unclear on the record produced so far whether or not the decisions made at what the Respondent terms an operational level were delegated from the Board or were expected to be ultimately made by the Board. I note the preamble to the Bylaws which provides that "the Board of Directors is ultimately accountable for the quality of medical care and provision of appropriate resources in its facilities and programs operated by the Vancouver Coastal Health Authority" (preamble page 2).

[28] It appears to be an open question that needs to be determined after a full hearing of the evidence whether or not the failure to renew locum tenens privileges is an operational decision outside the ambit of the HAB or is a decision ultimately made by the Board of Management and accordingly, subject to appeal.

[29] In the result, the Respondent's preliminary application to dismiss Dr. Butler's appeal with respect to abrogation or termination of locum tenens privileges on the basis it is outside the jurisdiction of the HAB is denied and deferred to the panel hearing the appeal on its merits.

2. December 2014 Application for Privileges

[30] The differences between the parties on this point are focused on whether or not the submission of a letter of interest and resume by the Appellant in response to an October 2014 posting of an opening at Richmond Hospital is an "application" for purposes of section 46(1)(b) of the *Hospital Act* which provides for an appeal of "the failure or refusal of a board of management to consider and decide on an application for a permit." The Respondent refers to the detailed definition of "application" found in Bylaw 4.1.3.

[31] The Appellant responds that the initial posting of an opening at Richmond Hospital for operating room privileges does not make reference to submission of an application with the level of detail contemplated in the Bylaws. In fact, the Appellant's letter and attached CV were not apparently characterized as merely an "expression of interest" until counsel became involved on behalf of both parties in the summer of 2015.

[32] The Appellant applied for the position, was interviewed and was eventually not shortlisted. He deposes at no point was he advised that his application material was deficient.

[33] The Respondent also argues that the appeal is premature with respect to the December 2014 application and cites *Pratt v. Fraser Health Authority*, 2007 B.C.S.C. 1731. I note that in *Pratt*, the issue was whether or not judicial review is available for interim steps in an application for hospital privileges prior to an eventual decision by a hospital board. It is unclear whether that decision applies to the within appeal as a central issue in dispute between the parties is whether the selection of another candidate following the October 2014 posting was a decision of the Board or of lower management.

[34] Eventually, the Respondent did select another candidate for the operating privileges which were posted in October 2014 and therefore, as characterized by the Appellant, apparently made a decision to refuse privileges to the Appellant.

[35] The Respondent characterizes the search process as being operational but I note that in the policy for physician selection process produced in the Respondent's application, paragraph 19 states that "[t]his process is conducted on behalf of the VCH Board", and in paragraph 18 that approval is required from the VCH Board before privileges could be granted.

[36] Accordingly on the face of it, reviewing the documents, statute, bylaws and rules, it is not clear as a question of law, that the decision to grant operating room privileges to another candidate other than the Appellant was purely operational and outside of the jurisdiction of the HAB. Nor is it clear that only an "application" as defined in the Bylaws rather than a letter expressing interest in a posted position gives rise to appeal rights when that application is unsuccessful. Both of these questions should be determined following a hearing on the merits.

3. August 2015 Application for Privileges

[37] Following intervention by counsel on behalf of the Appellant, the Respondent took the position that the December 2014 application for privileges was not an "application" as defined and suggested that a new application could be made.

[38] The Appellant then delivered a more fulsome application in August 2015.

[39] The Respondent says that given the timeline as set out in section 8(4) of the *Hospital Act Regulation* providing for 120 days for the hospital board to respond to such an application, the current appeal is premature.

[40] As the appeal was brought in August 2015, and the 120 days does not expire until December 2015, I agree that this application is premature as at the time of filing, no decision had yet been made by the Board and the time for the Board to consider the application under the regulation had not yet expired.

[41] The HAB was provided information suggesting that the Respondent will make a determination on that application in December 2015.

[42] In any event, the appeal insofar as it relates to the August 2015 application is premature, as at the time the notice of appeal was filed no right to appeal pursuant to section 46(1) of the *Hospital Act* had yet been triggered. Accordingly I find that the HAB does not have jurisdiction to hear it.

[43] This decision is made without prejudice to the Appellant's right to bring a subsequent appeal regarding the August 2015 application and to apply to join that appeal, if brought, with the current appeal.

APPLICATION FOR STAY

[44] Pursuant to s.46 (4.2) of the *Hospital Act*, the HAB has the authority under s.25 of the *Administrative Tribunals Act* to order a stay of the decision under appeal. Section 25 of the *Administrative Tribunals Act*, provides as follows:

> **Appeal does not operate as stay**
>
> **25** The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[45] The parties are in agreement that the test for a stay as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 applies.

[46] That decision which has been cited on many occasions by courts and administrative tribunals provides that an appellant must demonstrate the following:

(a) there is a serious issue to be tried;

(b) irreparable harm will result if the stay is not granted; and

(c) the balance of convenience favours granting the stay.

a) Serious Issue

[47] Given the importance of this appeal to the Appellant's current and future livelihood, the allegations raised in his Notice of Appeal which have yet to be tested by evidence and the contradictions in the evidence presented to date, there is little doubt in my mind that there is a serious issue to be tried.

[48] The Respondent says there is no serious issue relying on arguments that there is no jurisdiction in the HAB to hear the matter, and that the procedure was fair.

[49] The issue of jurisdiction, for purposes of the preliminary application, has already been determined. Arguments on the substance of the appeal cannot be determined at this time.

[50] Accordingly, I find that the Appellant has satisfied this requirement for a stay.

b) Irreparable Harm

[51] The Appellant argues that there will be financial harm to him and potentially professional harm to his reputation.

[52] He argues there will also be harm to his patients. This is strenuously denied by the Respondent, particularly in the affidavit of Dr. Wagner.

[53] I am not satisfied on the evidence before me that the harm identified by the Appellant is irreparable. On his own evidence, he practices in several different jurisdictions, and his operating room privileges in Richmond were around two days per month. It is entirely unclear that his waiting list of patients cannot be accommodated by other surgeons within the jurisdiction of the Respondent.

[54] With respect to potential financial harm to him, although both parties concede that the HAB has no power to award damages and therefore the Appellant cannot recover monetary damages from the Respondent within the HAB appeal process, the evidence of "irreparable harm" in the sense that it can never be recovered, is weak.

[55] The Appellant is a young doctor in first stages of his career. If the appeal is heard within a reasonable period of time he will have many years of practice to overcome any current denial of privileges. Given the preliminary nature of this application, there is insufficient evidence to suggest that being denied operating room privileges pending the disposition of this appeal will cause him irreparable harm.

c) Balance of Convenience

[56] As noted above, there are at least three different issues which the Appellant intends to appeal, namely termination or reduction in his locum tenens privileges, the rejection of the December 2014 application for privileges and the failure to determine the August 2015 application for privileges.

[57] The Respondent produced evidence that following a search for an ophthalmologist to provide operating services at Richmond Hospital a successful candidate was appointed.

[58] The Respondent also produced evidence that the locum under which the Appellant had been provided privileges has come to an end as the permanent candidate who has been appointed has obviated the need for any further locum services.

[59] Granting a stay would require the HAB to craft an order imposing operating room privileges on the Respondent in circumstances where they claim that there is no need for any such services. I am not able at this preliminary stage to make a finding regarding that claim. Given the limited number of operating room days available in Richmond Hospital and Mount St. Joseph Hospital, granting a stay would not only require the Respondent to grant operating room days to the Appellant, but also to take them away from other surgeons.

[60] The Respondent submits such an order would interfere with their operations. I note that given the lengthy fraught history between the parties, there is also the possibility of the HAB being required to supervise such an order and invariably being involved in lower level administrative decisions. Of course, if Dr. Butler's appeals are ultimately successful the HAB's decision would force the Respondent to accommodate his operating room privileges at that time. Absent a full hearing on the merits I find that the balance of convenience clearly favours the Respondent.

[61] However, it is important to note that in deciding the question of the balance of convenience for purposes of an application for an interim stay or mandatory order, this decision should in no way be taken to predetermine or speak to the outcome or merits of the appeal which will be determined by the hearing panel.

DECISION

[62] The Respondent's application for dismissal of the appeal filed September 24, 2015, based on want of jurisdiction by the HAB is dismissed, except with respect to that portion of the notice of appeal relating to the August 10, 2015 application for privileges.

[63] The Appellant's application for an interim stay of the decision to deny operating room access and order that the Respondent grant privileges pending a determination of this appeal is denied.

[64] The Parties are invited to contact the Registrar in order to obtain an early hearing date.

" David Perry"

David G. Perry, Chair
Hospital Appeal Board

December 9, 2015