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HOSPITAL APPEAL BOARD

In the matter of Dr. M. Graham Clay (appellant)

and

Vancouver Hospital & Health Services Centre (respondent)

<u>Members of the Hospital Appeal Board</u>

Norah Andrew: Chair

Anne Toupin: Member

Gayle Raphanel: Member

Counsel for the Appellant: Christopher Hinkson

Counsel for the Respondent: Dale Sanderson

Dated: April 24, 1997

I Background

By letter dated May 9, 1996, the Appellant was advised by the Acting Vice-President of Medical Affairs for Vancouver Hospital & Health Sciences Centre ("the Hospital"), that the Board of Trustees had "approved his appointment to the Honorary Medical Staff." As the "Honorary" designation does not authorize the practice of surgery in the Hospital, this letter implicitly constituted a rejection of the Appellant's application to have his surgical privileges renewed for the period commencing July 1, 1996.

The Hospital's rejection of the Appellant's application (a decision which was apparently made on April 23,1996) was based solely on the Hospital's application of what it described as the "unequivocal" language of s. 5.04 of the *Regulations Governing the Medical, Dental and Allied Staff and Practice* within the Hospital ("the Staff Regulations"):

> 5.04 **Retirement**- Members of the staff shall retire from medical practice at the Hospital at the end of the appointment year in which they pass their 65th birthday.

Shortly after the Board's determination was communicated to the Appellant, the latter retained legal counsel and on June 19, 1996, applied to the Board to appear and make representations to the Board regarding its decision: *Hospital Act Regulations*, B.C. Reg. 289/73, s.15(5) (c). To that end, the Appellant's counsel forwarded a written submission to the Hospital Board dated June 25, 1996. In that submission, counsel sought "a modification to Regulation 5.04" (para. 26) and/or "an exception to Regulation 5.04 in Dr. Clay's case to enable him to continue to provide his much needed services to the Vancouver Hospital until a surgical oncologist replacement is found" (para.30).

Meanwhile, on June 24, 1996, counsel for the Hospital wrote to Appellant's counsel advising that while there was no room on the agenda for the Appellant to appear at that evening's Board meeting, he could appear at the next scheduled meeting to address the Honorary designation. However:

> We confirm that the Board of Trustees has no authority or jurisdiction to renew a physician's appointment to the Active Staff in cases where the physician has reached the mandatory retirement age as provided in the By-laws and Regulations of the Vancouver Hospital.

On June 28, 1996, the Hospital confirmed its refusal of the Appellant's request to extend his privileges.

II The Appeal to This Board

In accordance with s. 37 of the *Hospital Act*, R.S.B.C. 1979, c. 176 and s. 17(2) of the *Hospital Act Regulations* in effect at that time, the Appellant filed an appeal to this Board on August 2, 1996. His Notice of Appeal lists 5 grounds of appeal:

1. The decision the Board of Trustees of the Hospital to appoint the Appellant to the honourary staff category of membership was reached in a manner contrary to the principals (sic) of natural justice because the Board of Trustees' meeting of April 23, 1996 was conducted in the absence of the Appellant. Moreover, the Appellant has not been given an opportunity to make representations to the Board regarding its' (sic) decision to appoint him to the honourary staff category of membership.

2. The Board ... failed to render its' (sic) decision with respect to the Appellant's privileges within the 120 day time period required by the *Hospital Act* regulations.

3. The Board ... erred in stating that it had no discretion to re-appoint the Appellant to the active staff category of membership and that it was bound by regulation 5.04.

4 The decision … to appoint the Appellant to the honourary staff category of membership was contrary to the best interests of both the Hospital and the Appellant's patients.

5. The Board … failed to consider all of the relevant evidence in rejecting the Appellant's application for re-appointment to the active staff category of membership in the Hospital. Specifically, the Board … failed to consider the issues of patient care, recruitment problems, and physician shortage in the treatment of breast cancer.

The *Hospital Act* was amended by the *Miscellaneous Statutes Amendment Act*, 1996 S.B.C. 1996, c. 13 (sections 9-15), which was proclaimed into force on April 15, 1997. Section 14 of that *Act* repealed and replaced section 37. The changes re-name this Board the "Hospital Appeal Board", re-organize various sub-sections within s.37 and make other minor changes. Section 37(9) states: "All appeals received by a medical appeal board before the coming into force of this subsection are to be continued before a hospital appeal board". As there are no changes of substance that affect the issues to be decided by this Panel, and as the right of appeal is defined by the law as it existed at the time of appeal, we will refer in this decision to the provisions as they existed at the time the Appellant filed his appeal. However, if the new provisions represent the law, we reach the same conclusions regarding our jurisdiction: see *Milk Board v. Grisnich* (1995), 126 D.L.R. (4th) 191(S.C.C.).

III The Preliminary Objection of the Hospital

On September 18, 1996, the Hospital filed with this Board a submission in Answer to the appeal. Key to that submission is a jurisdictional objection which can be summarized in the following propositions:

1. Article 5.04 of the Hospital's by-laws is mandatory. Unlike its predecessor sections – provisions which gave rise to significant controversy and litigation (see *Stoffman v. Vancouver General Hospital* (1990), 76 D.L.R. (4th) 700 (S.C.C.)) – the present version of this Article makes clear that there is no residual discretion on the Board to allow a physician to practice past the age of 65.

2. The only way the Appellant could lawfully practice in the Hospital would be if Article 5.04 were amended.

3. The Board of Trustees has no unilateral power to amend Article 5.04. While Article 15.08 of the same by-law states that "Notwithstanding anything to the contrary contained herein, the Board may, at any time and from time to time, modify or change these regulations", this article must be read with s. 2(1)(c) of the *Hospital Act* which provides that medical staff by-laws are not effective "until approved by the minister".

4. If the Board of Trustees has no power to amend Article 5.04, neither does this Board. The Medical Appeal Board's jurisdiction is no wider than that of the Board of Trustees.

IV The Hospital's judicial review application

In November, 1996, with these submissions pending before the Board, the Hospital filed a judicial review application seeking to prohibit this Board from hearing this appeal in view of the jurisdictional submission just described and also in view of a complaint about the institutional impartiality of the board – the latter also having been raised in the Hospital's Answer before this Board.

The Hospital subsequently withdrew the latter complaint and adjourned its Petition pending this Board's resolution of the jurisdictional issue identified above.

V The Appellant's position in response to the judicial objections

In response to the Hospital's submissions, the Appellant argues as follows:

1. Whatever the basis for the refusal, the Hospital has nonetheless made a "decision" within the meaning of s. 37(1) of the *Hospital Act*.

2. By virtue of ss. 15 end 20 of the *Hospital Act Regulations* – which overrides any inconsistent Hospital staff by-laws – the Hospital is under an obligation to consider and review every application made by a "duly qualified" medical practitioner. To the extent that By-law Article 5.04 categorically prohibits the genuine application of a duly qualified practitioner over the age of 65, it is inconsistent with s. 20 of the *Hospital Act Regulations*. In other words, the Hospital cannot create a by-law to fetter the legislative obligation to genuinely consider the application of a duly qualified medical practitioner, including the obligation to make its decision within the proper time limits.

3. The Hospital's position that it has no discretion in the face of Article 5.04 is also open to question. If, as *Stoffman* indicates, Article 5.04 is merely a "rule or directive of internal management", it cannot fetter the Board discretion to make exceptions. The MAB has jurisdiction to decide whether the Hospital interpreted its powers correctly.

4. The Appellant is not merely appealing a regulation he dislikes. His objection is to a Hospital Board decision that affects his privileges.

VI Reply by the Hospital

In its reply, the Hospital makes these points:

1. If the MAB does not have the power to provide the relief requested in this appeal (i.e., to give the Appellant surgical privileges despite the wording of Article 5.04), we have no jurisdiction to entertain this appeal. There would be no point considering the merits if we are bound

by a Rule whose only inquiry is whether the applicant has reached the age of 65.

2. When the Board created Article 5.04, it was acting as a "quasi-legislature". Having enacted this rule, the Board cannot deviate from it in its "quasi-judicial" role.

3. There is no inconsistency in the legislation, either between s. 37 of the *Hospital Act* and s. 15(6) of the *Regulations*, or between s. 15(4) of the *Regulations* and Article 5.04. On the latter point, the term "duly qualified" must be read in light of the particular regulations of the hospital to which he is applying. If not, a staff member who was suspended would be able, during the period of his suspension, to apply for a permit to practice.

VII Analysis

a. Relevant statutory provisions

The Medical Appeal Board derived its existence from section 37 of the *Hospital Act*. Subsections (1) and (2) provide as follows:

> 37(l) The Lieutenant Governor in Council may, by regulation,
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> (a) establish one or more medical appeal boards; and
>
> (b) prescribe the powers and duties of a medical appeal board, including the quorum, the time limited for appeals and the rules of practice and procedure for appeals to and hearings before the medical appeal board,
>
> for providing medical practitioners and dentists appeals from boards of management about
>
> (c) a decision that modifies, refuses, suspends, revokes or fails to renew a permit to practice medicine or dentistry in a hospital; or
>
> (d) the failure or refusal of a board of management to consider and decide on the application for a permit.
>
> (2) A medical appeal board may affirm, vary, reverse, or substitute its own decision for that of a board of management on terms and conditions it considers appropriate. The decision of the medical appeal board is final and binding.

In accordance with this authority, the Medical Appeal Board was established by section 16(1) of the *Hospital Act Regulations*: "A Medical Appeal Board having not more than 9 members appointed by the minister shall be established"... Section 15(6) also addressed the right of appeal:

15(6) A medical practitioner or dentist may appeal to the medical appeal board pursuant to the Act and regulations

(a) where he is dissatisfied with the decision of the board, or

(b) where the board fails to notify him of its decision within the period specified in these regulations.

We conclude that this section must be read with, and is in fact consistent with, section 37(1) of the *Hospital Act*.

Section 17(12) describes the nature of an appeal to this Board: "An appeal to the Medical Appeal Board shall proceed as a hearing de novo". In *Hicks v. West Coast General Hospital* (January 21, 1993, unreported, B.C.S.C.), MacKenzie J. commented on the meaning and nature of such a hearing:

> The reason [for a hearing de novo] is obvious when the appeal is taken from an internal decision-making process within an institution. The internal decision may be tainted by institutional self-interest or personality conflicts that cannot be eliminated by the best of intentions and protestations. The appeal to an outside body is intended to overcome these elements, and to ensure that an objective, independent judgment is made. The intended purpose of the appeal is frustrated if the appellate tribunal gives deference to the subjective judgments below. It strikes to the heart of de novo proceedings and amounts to a grave jurisdictional error. (p. 5.)

That statement is consistent with *Samson v. St. Vincent's Hospital* (February 8, 1984, unreported, B.C.S.C.); appeal dismissed (1985), 64 B.C.L.R. 240 (C.A.), approving this Board's statement that "This Board has always conceived its function in reviewing an order of a Board of Management to place itself in the shoes of the Board of Management and to reach a decision on the evidence before it and not merely the evidence before the Board of Management".

b. Purpose of the Medical Appeal Board

In British Columbia, most hospitals are organized to provide for hospital care for the patients of private medical practitioners. However, before a practitioner will be allowed to serve a patient in a hospital, he or she must obtain a permit from the "board of management", which permit authorizes "the treatment of patients" in the hospital: *Hospital Act*, s. 36(3)(d); *Hospital Act Regulations*, s. 15.

These permits are more commonly known as "hospital privileges" or "admitting privileges". The reference to "privilege" reflects the legal reality that no licensed practitioner has a "right" to practice, or to continue to practice, in a public hospital: *Jain v. North and West Vancouver Hospital Society* (1974), 43 D.L.R. (3d) 291 (B.C.S.C.); *Hatfield v. Board of Fort Saskatchewan General Hospital District No. 98* (1986), 24 Admin. L.R. 250 (Alta. Q.B.). Being a member in good standing of the relevant professional regulatory body is therefore necessary, but not sufficient, to gain hospital privileges.

The fact that there is no legal right to work in a hospital does not, however, mask the reality that the exercise of the Hospital's discretion may have serious consequences indeed for a practitioner. As noted by the trial court in *Stoffman*, (1986] 6 W.W.R. 23 (B.C.S.C.):

> Admitting privileges ... involve a great deal more than the right to book patients into the hospital. They carry also the right to assume primary responsibility for the patient's treatment. In the case of a surgeon, the right to admit carries with it the right to operate and to have operating room time.... The consequences of denial of admitting privileges are obviously not so severe in the case of those general practitioners who admit patients for the purpose of putting them under the care of a surgeon or other specialist, as they are in the case of specialists, especially surgeons, whose practice will very often be entirely dependent on the continuation of their right to operate and to supervise treatment given to patients.

The matter has been described in this way by Saltsman, "Physicians Staff Privileges in Ontario Hospitals" (1976), 8 Ottawa L. Rev. 382:

> For most physicians, the ability to practice medicine fully and effectively requires extensive use of hospital services, and the consequences for a doctor who fails to obtain adequate hospital privileges are frequently serious, and sometimes calamitous. Specialists have the most to gain or lose through access to staff privileges. Most of them spend the bulk of their practice in the hospital environment and depend on regular use of sophisticated services and equipment, assistance of other health professionals and consultation with other doctors – all of which are available only in the hospital...
>
> For any doctor the inability to acquire privileges, the loss of such privileges, or even undue restrictions on his ability to practice medicine in a hospital, may mean the loss of some or all of his practice or income. Once lost, privileges will be harder to acquire elsewhere. A doctor without privileges may suffer a deterioration in his professional standing and will be deprived of the experience of continuing education that is an informal but vital by-product of close association with other doctors in the hospital.

One court has even gone so far as to remark on the impact of such a decision on "reputation". See *Hutfield, supra*, per MacDonald J.:

> The Board has no duty to grant hospital privileges to an applicant such as Dr. Hutfield.... There is no such duty and no such right even if Dr. Hutfteld is professionally qualified. In terms of the recent English cases, it cannot even be said that he had a legitimate expectation of being granted hospital privileges by the Board; at best, he had a hope of benefiting from the Board's decision on his application. Nevertheless, there is no doubt that his professional interests would be affected by the decision. Moreover, if the staff committee

> recommends that he should be denied hospital privileges, it is a justifiable inference that there has been a finding adverse to him in regard to one or more of his "credentials, training, suitability, experience or references", and such a recommendation therefore casts a slur on his reputation.

While it is likely too extreme to suggest that "reputation" is always in issue with these decisions, the point has been made: these are decisions which the law recognizes as having "high stakes" and which are closely tied to livelihood.

The difficulty is that neither financial resources nor concerns for quality of patient care are such that every practitioner who applies for hospital privileges should receive them. Therein lies the rub. The granting and revocation of hospital privileges leads to significant conflicts between a practitioner's desire to maximum access to public hospitals, the hospital's need to exercise control over the number of practitioners working in the institution and their qualifications, and the public's interest in an efficient, cost effective and high quality health care service.

Based on the interests at stake, it should not be surprising that the Legislature thought it desirable to take these decisions outside the setting of a particular hospital and subject to them to a full and fresh review in an external setting such as the Medical Appeal Board.

c. The Board's duty to hear those appeals, but only those appeals, which fall within the Act and Regulations

Section 17 (1) of the *Regulations* directs that "The Medical Appeal Board shall deal with only those appeals which meet the requirements of the Act and the regulations". Thus, while it is our duty to hear appeals which fall within the *Act* and *Regulations*, we must, like all administrative tribunals, respect the boundaries of the mandate we have been given by legislation.

In this case, the Hospital has forcefully argued that the Appellant's appeal does not meet the requirements of the *Act* and *regulations*, and therefore this Board has no jurisdiction to consider this appeal. After a careful and considered review, we are unable to accept the Hospital's submission that the Medical Appeal Board has no jurisdiction to entertain this appeal.

Before explaining the reasons for our conclusion, we wish to emphasize that these preliminary reasons have nothing to do with the question whether the Appellant should gain admitting privileges, nor do they speak to whether "mandatory retirement" in a hospital setting (while constitutional) is desirable or undesirable. The question whether the Appellant should or should not gain admitting privileges to Vancouver Hospital or under what conditions is a question for the "merits" of the hearing. The exclusive focus of these reasons concerns the entirely separate question of whether we even have the power to hear this appeal.

We have concluded that we do have jurisdiction to hear this appeal.

d. Even accepting the Hospitals argument that it had no power to deviate from article 5.04 it still made a decision that is subject to appeal to this Board

Even if we accept the Hospital's position that Article 5.04 meant that the only question it had the power to decide was whether the Appellant was 65, the fact remains that this was still a "decision" that it was required to make in accordance with the process set out in s. 15 of the *Hospital Act Regulations*. That the Hospital in fact processed the Appellant's application pursuant to the requirements of s. 15 reflects the same understanding by the Hospital. While the Hospital argues that it had a very narrow decision to make, it was still a decision. As such, it is appealable to this Board pursuant to s. 37 of the *Act* and s. 15(6) of the *Regulations*.

The Hospital's argument effectively reduces to this: there is no point proceeding with this appeal if the only question was whether the Appellant was 65 because there is no issue as to his age. However, the question whether there is utility in proceeding with the appeal is an entirely different question from whether there is a decision subject to appeal. The appeal may or may not have merit. It scope may be narrow. The parties' respective view of the merits may or may not affect the Appellant's desire to proceed with the appeal. But that does not deprive us of jurisdiction even to hear an appeal.

The Hospital also argues that that we have no power to hear this appeal because we cannot grant the remedy that the Appellant seeks. Again, we think this argument confuses our jurisdiction to hear the appeal with the merits. Whether we can hear the appeal is a separate question from whether we have the power to grant the Appellant the remedy he seeks. Moreover, we are not prepared to decide at this stage that – even accepting the Hospital's position that Article 5.04 is binding – it could simply ignore the time limits in s. 15(4) of the *Regulations*. The question whether there ought to be a remedy for a breach of these time limits even in the case of a person turning 65 is, we think, a matter for further argument and would be an issue before us on the appeal.

To this point, we have concluded that we have the jurisdiction to hear this appeal because, narrow or not, the Hospital Board made a decision regarding the Appellant, which decision is therefore appealable to us. Given that there is an appeal properly before us, we have considered whether to simply leave all other issues, including the lawful scope of the decision that could have been made by the Hospital, until the end of the case.

After much deliberation, we have decided that we should deal with this issue in these reasons, in part because it has been fully argued and in part because we did not think it would be fair to require the parties to address issues that we felt were beyond the scope of the appeal hearing, even though an appeal was in fact properly before us.

e. Was the Board prohibited in law from considering the Appellant's request that they make an exception from Article 5.04 or that Article 5.04 be amended?

We answer this question "no" and conclude that the Hospital Board took too narrow a view of its own jurisdiction.

We do not agree with the Hospital Board's argument that Article 5.04 is a rule that legally prohibits the Board from making exceptions. This would indeed be so if Article 5.04 constituted government legislation. It is a basic part of our legal system that unqualified laws enacted by government must be complied with by both citizens and administrative agencies. However, only the State can enact legislation or deem some rule issued by an agency to be legislation. Where an administrative agency issues an internal directive that is not legislation, such rules and directives cannot fetter the statutory discretion of the administrative agency.

It is therefore important to understand exactly what is the legal status of Article 5.04: is it legislation, or is simply an internal directive issued by an administrative agency? In *Stoffman*, that very question was decided by the Supreme Court of Canada. It was common ground that if Article 5.04 was in fact a government "regulation", it was subject to review under the *Charter* because the *Charter* applies to all government action. Because s. 2(1)(c) of the *Hospital Act* referred to hospital staff "by-laws", and provided that those by-laws were "not effective until approved by the minister", it was argued that these articles were clearly government legislative action and therefore subject to the Charter. However, a majority of the Court rejected this argument as follows (p. 735):

> The respondents argued that it is unnecessary in this appeal to consider whether the Vancouver General is one of the subordinate bodies to which the Charter applies. It argues that because Reg. 5.04 could only take effect upon the approval of the Minister of Health, its adoption and subsequent administration must be characterized as actions of the executive branch of government, to which the Charter obviously applies...
>
> I do not think that the question of the applicability of the Charter to the facts of this case can be so easily disposed of. To my mind, the fact that Reg. 5.04 only came into effect when approved by the Minister of Health does not alter its character as a regulation for the internal management of the hospital and its staff which was developed, written and adopted by the authorities entrusted with the ongoing management of the hospital's internal affairs.... The evidence does not show that Reg. 5.04 was instigated by the Minister of Health, or that it in any way represents ministerial policy with respect to the renewal of admitting privileges. Instead, it shows that Reg. 5.04 was the result of an internal review of policies relating to the retirement of – medical staff which the hospital undertook at the initiative of the board of trustees in 1979... To put it somewhat differently, there is no reason to assign greater weight to the fact that Reg. 5.04 took effect after being approved by the Minister of Health than is assigned to the fact that it emerged from an internal policy review undertaken independently of the Ministry or overall government policy. I agree with the appellants that this view is supported by the evidence that there is considerable variety between the hospital by-laws dealing with retirement that have obtained approval in British Columbia. *This evidence suggests that retirement policy is left to the judgment of*

> *those entrusted with the responsibility of managing individual hospitals.*
>
> and at p. 737
>
> *Pursuant to what 1 have said above, I would think it clear that Reg. 5.04, concerned as it is with the retirement of medical staff, is not delegated legislation, but is quintessentially a "rule or directive of internal management" ... The requirement of approval by government is nothing more than a mechanism to ensure that the hospital's actions do not run counter to the powers conferred on the government by the legislature to prescribe standards in respect of hospital administration. It is a mere supervisory power to that end. It does not displace the ongoing responsibility of the board to manage the affairs of the hospital for the benefit of the community.* [emphasis ours]

In our view, the Supreme Court of Canada has made it clear that Article 5.04 is a "rule or directive of internal management", not delegated legislation. If it is not delegated legislation, but is merely an internal "rule or directive", then it cannot be binding on the Board in the same way as legislation would be. Whether described as an internal "rule", "directive" or "policy", its legal status is the same: it cannot unduly fetter an administrative agency that must by legislation exercise a discretion. It will be recalled that the version of 5.04 which the Court dealt with in *Stoffman* specifically allowed exceptions to be made. That discretion has been removed from the language of the present Article. However, the fact that the language has been removed does not alter the legal status of the Article. As noted by the *House of Lords in British Oxygen Co. Ltd. v. Minister of Technology*, [1971] A.C. 610 (H.L.), at p. 624:

> There are two general grounds on which the exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any genuine or real exercise of discretion. But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.
>
> It was argued on the authority of *Rex v. Port of London Authority, Ex parte Kynoch*, [1919] 1 K.B. 176 that the Minister is not entitled to make a rule for himself as to how he will in future exercise his discretion... Bankes L.J. said, at p. 184:
>
> > There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and without refusing to hear an applicant, intimates to him what the policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection

> could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between the two classes of cases.

I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" … I do not think there is a great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change in policy. *What the authority must not do is refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say*… [emphasis ours]

We therefore reject the Hospital's argument that its by-laws have the same legal effect as "municipal by-laws" or "speed limits". We conclude that the Hospital had jurisdiction, as do we, to consider whether to make an exception to Article 5.04 and that the Hospital wrongly refused even to consider whether to make such an exception.

We should add as well that the very wording of Article 5.04 suggests that it is a directive to medical staff, rather than a fetter on the Board: "Medical staff shall retire from medical practice at the hospital at the end of the appointment year in which they reach their 65th birthday". This language does not purport to limit the Board from making exceptions to the direction it has given to staff through the by-law.

Whether such an exception should be granted, and the basis on which it should be granted, is of course an entirely separate question.

f. Alternatively, did the Hospital Board have the authority to initiate an amendment to Article 5.04?

In addition to asking the Hospital Board to make an exception to Article 5.04, the Appellant also requested the Board to amend Article 5.04 pursuant to Article 15.08 of the same by-law:

> 15.08 Powers of Board: Notwithstanding anything to the contrary contained herein, the Board may, at any time and from time to time, modify or change these regulations.

The Board argues that it had "no power" to change the Regulation pursuant to Article 15.08 without first consulting with the executive body of the Medical Staff (Regulations, s. 5) and without obtaining ministerial approval.

Accepting that this is so, the fact remains that it was within the Board's jurisdiction to consider whether it would initiate an amendment to Article 15.08 in response to the Appellant's specific request prior to making its decision. In view of the passage from *Stoffman* above, it is difficult to accept that obtaining ministerial approval would have been anything other than a formality, although certainly this process might well have taken some time. Even if Ministerial approval were not a formality, the Board nonetheless had to initiate the process in the form of a decision that only it could make.

Whether such an amendment was desirable in the context of the Appellant's case, whether a decision would have been made in his favour and how much time all this would have taken are entirely distinct issues from whether the Hospital Board, and hence this Board, have the power to consider them – i.e., to make a decision.

On this point we note that in the record before us there is an April 10, 1996 letter from Dr. C to Dr. F stating: "The only possible alternate approach would be if the Credentials Committee were to recommend an amendment to the Rules and Regulations. In any event, as you know, the MAC has indicated that it will not entertain this approach".

It was clearly within the jurisdiction of the Hospital Board to refuse to initiate an amendment to the Staff By-Laws in response to the Appellant's application. Having so decided, it would have made a decision that was subject to appeal. Because we have the responsibility to make the same decision the Hospital could have made, we have the power to consider this argument as part of this appeal.

VIII Conclusion

For the reasons we have given, we conclude that we have jurisdiction to hear this appeal. We have not found it necessary to deal with the Appellant's further argument that Article 5.04 is actually inconsistent with s. 15(I) of the *Regulations* insofar as it improperly alters the meaning of "duly qualified practitioner". Part of that issue may well be tied up in arguments pertaining to mandatory retirement that were addressed in *Stoffman*. We prefer to express no opinion about that question in these reasons.

We have therefore concluded that we have jurisdiction to hear this appeal. In accordance with the dates previously arranged with the parties, we order that this appeal to proceed as scheduled on April 29 and 30, 1997. Hearing details should be obtained through the Board Secretary.

"Norah Andrew"