IN THE MATTER OF AN APPEAL TO THE HOSPITAL APPEAL BOARD

BETWEEN:

DR. TRACY EUGENE HICKS

APPELLANT

AND:

FRASER HEALTH AUTHORITY,
operating as PEACE ARCH HOSPITAL

RESPONDENT

Counsel for the Appellant — Terrance L. Robertson, Q.C.

Counsel for the Respondent: — Penny A. Washington

DECISION ON PROCEDURE FOR DETERMINING JURISDICTION

THE PROCEDURAL ISSUE

[1] The procedural issue for decision by the Hospital Appeal Board is whether the Hospital Appeal Board should hear and determine, in advance of the hearing of the merits of the Appeal, the Fraser Health Authority's jurisdictional objection. This decision does not address the merits of the jurisdictional objection or the Appeal. It is concerned only with the matter of procedure.

THE APPEAL

[2] The Appellant, Dr. Tracy Eugene Hicks, appeals pursuant to s.46 of the *Hospital Act* from an August 12, 2010 decision of the Board of the Fraser Health Authority, conveyed to him on December 2, 2010, that he be removed from the Peace Arch Hospital's on-call

roster for emergency orthopedic surgery. In his Notice of Appeal, the Appellant alleges that "the decision altered Dr. Hicks' consulting privileges [at Peace Arch Hospital] by effectively rendering them nugatory" and that his "removal … from the on-call roster of emergency physicians … amounts to a *de facto* termination" of his privileges at the Peace Arch Hospital.

[3] The Appellant says that his practice is "entirely dependent upon his role as an on-call physician attending to patients admitted through the emergency department" and that "the full nature and effect" of the impugned decision must be considered in its factual context. The Appellant further says that the "(Fraser Health Authority) ignored (his) length of service as an orthopedic surgeon at Peace Arch Hospital in granting active staff privileges to two new orthopedic surgeons, without considering that these appointments would result in (him) being removed from the orthopedic emergency on-call schedule". He seeks reinstatement on the orthopedic surgery on-call emergency roster.

[4] The Appellant alleges as a ground of Appeal that "the Administration of the Peace Arch District Hospital coerced and intimidated the surgeons at the Peace Arch Hospital in order to compel them to discontinue (his) involvement in the emergency on-call rota".

THE JURISDICTIONAL OBJECTION

[5] Section 46(1)(a) of the *Hospital Act* provides:

> "46(1) The Hospital Appeal Board, consisting of the members appointed under ss. (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 practice in a hospital …"

[6] The Health Authority submits that the Hospital Appeal Board has no jurisdiction to entertain the Appeal because there has been no decision by a board of management that "modifies, refuses, suspends or revokes" the Appellant's permit to practice at Peace Arch Hospital within the purview of s.46(a) *Hospital Act*. The position of the Health Authority is that the Appellant's permit to practice, and his legal status as a physician with "consulting staff privileges" under the By-laws of the Peace Arch Hospital, is unchanged by the decision appealed from. It says that that decision does not "modify" or "revoke" the Appellant's privileges.

[7] Under the Medical Staff By-law of the Fraser Health Authority "Privileges" is defined as follows:

> "Permission to practice medicine, dentistry, midwifery or as a nurse practitioner in the facilities and Programs operated by the FHA and granted by the FHA to a Member of the Medical Staff. Privileges describe the extent of clinical practice of an individual Member based on the member's credentials, competence, performance and professional suitability. Privileges are based on the needs of the programs and communities supported by FHA in capacity of the facilities and Programs to support the member's scope of clinical practice. Privileges describe and define the extent and scope of the permitted clinical practice of a Member in the facilities and Programs of FHA."

THE PROCEDURAL QUESTION

[8] The procedural question before the Board at this stage is whether the objection to the Board's jurisdiction should be heard and determined separately in advance of any hearing of the merits of the Appeal.

THE POSITION OF THE PARTIES

[9] The Health Authority characterizes the decision to remove the Appellant from the on-call roster of emergency physicians as one which does not go to the matter of his privileges but is merely an internal management or operational decision falling outside the scope of

s.46(1)(a) of the *Hospital Act* which circumscribes the jurisdiction of the Hospital Appeal Board. It argues that the decision appealed from is consonant with what the Medical Appeal Board expressly contemplated in an earlier decision regarding Dr. Hicks: *Hicks v. Peace Arch Hospital*, (Medical Appeal Board, January 5, 1996):

> ... there is no obligation on the part of the Hospital to give emergency calls to a Visiting Consultant whose services have been needed previously. The fact that the Visiting Consultant was no longer needed by the Hospital would be made clear by the Actions of the Hospital without precipitating the difficulties which might arise from the failure to renew an appointment.

[10] The Health Authority submits that the Appellant enjoyed consulting staff privileges at Peace Arch Hospital prior to his removal from the on-call roster. As such he was able to act as a *locum* for other members of the medical staff and did so. The Appellant is said to continue to enjoy consulting staff privileges at Peace Arch Hospital notwithstanding his removal from the on-call roster and that he continues to be able to act as a *locum*. In essence, the Health Authority argues that the "Appellant's privileges are unchanged, but for his participation in the on-call rota" and accordingly the decision has not affected his privileges for jurisdictional purposes.

[11] In addition to reliance upon the Medical Appeal Board's 1995 decision, the Health Authority relies upon case authorities in respect of which it contends the matter of participation in the on-call roster has been held to be an operational one and not falling within the jurisdiction of the Hospital Appeal Board: *Tsang v. Delta Hospital*, [2000] B.C.J. No. 385 [S.C.]; *Paulus v. Surrey Memorial Hospital*, [2000] B.C.J. No. 1079 [C.A.]; and *Munroe v. St. Paul's Hospital* (Hospital Appeal Board, December 22, 2000).

[12] The Health Authority says that its objection to the Hospital Appeal Board's jurisdiction should be decided in advance of the hearing of the Appeal as a question of pure law. It argues that the objection can be decided on "facts" that are already before the Hospital Appeal Board on the pleadings and arguments presented on the procedural question. It

frames the question as "whether participation in the on-call rota forms part of the Appellant's privileges so as to bring its removal within the Board's Jurisdiction". No actual evidence has been formally tendered to this point.

[13] The Health Authority relies on the reasoning in *British Columbia v. Crockford*, 2005 B.C.S.C. at paras. 64-65 (Appeal allowed on other grounds, 2006 BCCA 360):

> "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;*
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> 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."
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> (emphasis added)

[14] Having characterized the jurisdictional issue as raising a question of pure law, the Health Authority then turns to what it argues is the factual matrix and an operational comparison of the activities permitted to the Appellant prior to, and following, the impugned decision:

> "... Specifically, the Appellant admits the only action taken by Peace Arch Hospital to potentially affect his privileges was his removal from the on-call roster of emergency physicians ...

> Nonetheless, all other aspects of the Appellant's privileges at Peace Arch Hospital remain intact. The Appellant may still write orders and treat patients in a consulting capacity. He may perform elective operations and consult with patients at the Hospital. He may also undertake treatment of patients seen in the Emergency Department and requiring urgent surgery. The fact the Appellant "does not have any elective operating time at Peace Arch Hospital" and "does not consult to patients in the medical wards of the Hospital" is due to the nature of the Appellant's own practice, not a change in his privileges.
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> The Appellant's argument illustrates that his privileges have not been terminated. If the Appellant's assertion that participation in the on-call rota forms part of his consulting staff privileges at Peace Arch Hospital is true, which is denied, the Appellant's privileges are unchanged but for his participation in the on-call rota. The Appellant simply does not use his other privileges. The fact that the Appellant does not use his privileges cannot amount to a *de facto* termination of his privileges".

[15] In response, the Appellant submits that the Health Authority's objection should be addressed as part of the hearing of the Appeal on its merits. The Appellant concedes that the authorities generally regard on-call scheduling decisions as not being sufficient to constitute a "modification or revocation" of privileges. However, the Appellant argues that those same cases also contain qualifications to that general proposition, on which he is seeking to rely.

> "A complete denial of rota time arguable may amount to a revocation or suspension of a doctor's privileges ..."
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> *Tsang v. Delta Hospital, supra*, per Melvin J. in *obitur* at para 16:
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> "... The scheme of the *Act,* in my view, reflects a legislative intent not to burden the HPAB with a flood of appeals every time that an aggrieved physician is of the view that a scheduling change impinges, however slightly, on his or her OR time. The Board is not, and must not, function as a physician grievance board. *If a Hospital were to employ scheduling of OR time as a pretense to revoke or reduce a physician's privileges, that would be another matter.* But, there is no evidence of mischief in this case and none is suggested."
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> (emphasis added)
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> *McDonald v. Mineral Springs Hospital,*
> [2008] A.J. No. 891 (CA), per Berger J.A. (dissenting)

[16] The Appellant argues that the jurisdictional question is not one of pure law, but one of mixed fact and law, requiring an evidentiary hearing to determine. He relies upon authorities that distinguish *Crockford* on the basis that some factual inquiry into the nature of the conduct complained of is necessary for the tribunal to determine the jurisdictional question: *Hospital Employees' Union v. Canadian Forest Products Ltd.* 2005, BCSC 877 and *Vancouver (City) Police Department v. Hayes* 2008 BCCA 148. The Appellant also points to what it says is an analogous decision in which the Hospital Appeal Board accepted jurisdiction on an appeal from a decision to remove a cardiologist's right to elective or emergency surgical referrals but continued his participation in other activities falling with the scope of his privileges: *Munro, supra.*

[17] The Appellant argues that his case falls within these "qualifications" to the general proposition that internal management decisions do not normally engage the jurisdiction of the Hospital Appeal Board, and that to establish his case the Hospital Appeal Board's normal processes relating to document disclosure and an oral hearing on the merits of the Appeal, are necessary to decide both the jurisdictional issue and the Appeal:

> "... the Hospital Appeal Board must assess whether the Respondent's control of the on-call scheduling was a means of removing Dr. Hicks from Peace Arch Hospital. The historical background and the Fraser Health Authorities' motives and knowledge regarding the removal of Dr. Hicks is crucial to the determination of jurisdiction. It is the Appellant's submission that the Fraser Health Authorities' removal of Dr. Hicks from the on-call schedule was part of the Respondent's concerted effort to get rid of Dr. Hicks."

[18] In his argument, the Appellant says that, following the Medical Appeal Board's 1995 decision, the orthopedic department at the Peace Arch Hospital refused to remove him from the on-call schedule until 2009, and that his inclusion in the schedule continued despite the appointment of another surgeon in 1999. The Appellant adverts to events he says have occurred since 1999, and particularly within the past two years, which evince an intention to prevent him from practicing at Peace Arch Hospital. Applying the

dissenting Reasons in *McDonald*, he says these events, and the decision appealed from, reflect the Health Authority's "manipulating practice time (as) a pretense to revoke a physician's privileges".

ANALYSIS

[19] The Hospital Appeal Board is not, on this preliminary procedural point, being asked to find facts or to decide the jurisdictional question. This decision on the preliminary procedural issue does not decide, and should not be taken to anticipate the results of, the jurisdictional objection nor the merits of any appeal. Even if the Hospital Appeal Board were to later agree that it has jurisdiction, insofar as the impugned decision might be held to have effected a modification or revocation of the Appellant's privileges, the ultimate issue on Appeal would remain for determination on an evidentiary hearing *de novo*.

[20] The Appeal itself raises the question of whether a decision to completely deny a physician a substantial incident of his hospital practice, as a pretense to revoke or reduce his privileges, which has the effect of depriving him of a significant aspect of his exercise of privileges, can constitute a decision to modify or revoke his permit to practice within the purview of s.46 of the *Hospital Act*. As framed by the Appellant, the question is whether, on the arguments, the board of management's decision falls within the "qualifications" discussed in *Tsang* and *MacDonald* and the jurisdiction of the Hospital Appeal Board.

[21] In my view, the Appellant's objection to jurisdiction does not turn on a question of pure law which can be decided irrespective of the facts alleged. It comprises a question of mixed fact and law.

[22] Taken as a whole, the Fraser Health Authority's position on jurisdiction does not appear to be that the revocation of on-call roster participation cannot, under any circumstances

and even assuming all of the Appellant's allegations are factual, constitute a modification or revocation of privileges. The Health Authority does not seem to have gone so far as to take this approach. It has not argued that the "qualifications" discussed in the cases relied upon by the Appellant, are wrong in law or in principle. Rather, it has sought to distinguish those authorities on the facts having regard to the nature of the practices of the anesthetist (*Tsang*) and cardiac surgeon (*Munro*) and the effect of the decisions appealed from in each case. Implicit in this approach is a recognition that the factual matrix can be relevant to a determination of this jurisdictional question.

[23] Neither does the Health Authority's reliance on the Medical Appeal Board's earlier decision in *Hicks* determine the issue on this application. The earlier decision in *Hicks* did state that if a third surgeon were appointed, the Peace Arch Hospital was not obliged to continue to give emergency call to a visiting consultant "whose services had been *needed* previously". It may be open for the Appellant to seek to adduce evidence on a hearing of the Appeal that his services are still *needed* having regard to considerations of resource allocation and community need. Evidence as to the effect of the decision upon the ability of the Appellant to undertake a significant part of his practice may be relevant in deciding whether the decision has *de facto* revoked his privileges. That said, it is neither necessary nor desirable at this stage to circumscribe the nature of the evidence that may be sought to be relied upon by the Appellant.

[24] The Health Authority does not appear to have gone so far as to argue that the Hospital Appeal Board has no jurisdiction on the basis that there could be no "modification" or "suspension" of his permit to practice even if all of the allegations made by the Appellant are proved to be true and in my view, jurisdiction in the circumstances of this case turns on a question of mixed fact and law. In my view, this is not a case in which the jurisdictional issue can be parsed as a pure question of law, as was the case in *Crockford*. The Hospital Appeal Board may, in the exercise of its discretion, direct that the

jurisdictional issue be determined as a component of the hearing of the Appeal on its merits.

[25] The evidentiary overlap on the jurisdictional question and the merits of the appeal are readily apparent. It is neither an appropriate or efficient use of the resources and time of the parties and the Hospital Appeal Board to determine in advance, the matter of jurisdiction. Little efficiency will be gained by that approach having regard to the Appellant's representation that "the evidence the Appellant will need to lead regarding the jurisdictional issue is the very same evidence the Appellant will lead regarding the hearing of the merits of the Appeal".

[26] Authorities subsequent to *Crockford* make it clear that where the full and proper resolution of jurisdictional questions requires the hearing of evidence, an administrative tribunal may defer answering the jurisdictional question until the hearing of the appeal: *Hospital Employees Union v. Canadian Forest Products, supra,* and *Vancouver (City) Police Department v. Hayes, supra.* In my view, some factual inquiry into the nature of the decision complained of and its effects on the Appellant's hospital practice is necessary to determine the jurisdictional question. Although a preliminary decision on jurisdiction could, if successful, dispose of the appeal.

DECISION

[27] In the circumstances of this case, the objection to the Hospital Appeal Board's jurisdiction will be decided upon on the hearing of the Appeal and not in advance on a preliminary and separate proceeding.

Dated: May 11, 2011

CHAIR, HOSPITAL APPEAL BOARD