IN THE MATTER OF AN APPEAL
TO THE HOSPITAL APPEAL BOARD

BETWEEN:

JOANNE DAVIAU

APPELLANT

AND:

ST. JOSEPH'S HOSPITAL

RESPONDENT

Counsel for the Appellant: Jennifer Millbank

Counsel for the Respondent: John Dives

REASONS ON STAY DECISION

[1] On June 9, 2008, the Hospital Appeal Board issued its Decision on the Appellant's application for a stay of the Decision of the Board of Director's of St. Joseph's Hospital on May 15, 2008, revoking the Appellant's midwifery privileges effective May 31, 2008. The material part of the Decision, which provided that Reasons would follow, is as follows:

> It is ordered that the Decision of the Board of Directors of St. Joseph's Hospital on May 15, 2008, revoking the Appellant's privileges effective May 31, 2008, be stayed pending the conclusion of the within Appeal, on the following terms:

1. The Appellant shall restrict her practice of midwifery to persons residing within the geographical boundaries of Local Health Area 71;

2. Within 30 days hereof, and within each succeeding 30 day period thereafter, the Appellant shall meet and review with a member of the Department of Obstetrics of St. Joseph's Hospital her client charts in relation to St. Joseph's Hospital's resources, bylaws, local community rules and policies.

   The Parties are at liberty to apply for further directions as may be required.

[2] For the purpose of providing a factual framework for the Decision findings are made, however this in no way pre-determines those matters to be considered and decided by a panel of the Hospital Appeal Board on a full hearing of the Appeal.

BACKGROUND

[3] The Appellant is a registered midwife with a practice in the Comox Valley. She has been in a midwife for twenty-one years and involved in midwifery in the Comox Valley for 10 years. She has attended hundreds of deliveries. Recently, she received her Masters of Midwifery from Thames Valley University and is currently a student mentor for the University of British Columbia Midwifery Program. She is a former editor of the journal of the Midwives Association of British Columbia, *BC Midwife*, and has recently been involved in projects with the Canadian Midwifery Regulators Consortium regarding a national assessment strategy for midwives and standardization.

[4] In 1996, the College of Midwives of British Columbia ("College") was constituted as the professional regulatory body for midwives in British Columbia. The midwives' scope of practice is regulated by the College. Since 1998, midwifery services have been paid for under the Medical Services Plan. A midwife facilitated birth may occur in a home setting or, pursuant to a grant of privileges, at hospitals in British Columbia. Midwives

are obliged to transfer patient care to a physician in situations where the mother or the baby is at risk. Without privileges, a midwife would be without internal hospital status necessary to the provision of primary client care in a hospital setting.

[5] From 1992 to 2000, the Appellant practiced with another local midwife who is the current head of midwifery at the Hospital. According to the Appellant, their partnership "did not end amicably." Since that time the Appellant has operated as a sole practitioner. Two other midwives currently operate in the Comox area. They are both members of the head of midwifery's practice group. According to the Appellant, none of the other midwives in the Comox area have agreed to provide, or do provide, call coverage or back up for the Appellant in circumstances in which she is, for some reason, unable to attend to a patient in a timely manner. This may occur where the Appellant is not proximate to the patient, or the concurrent needs of more than one patient prevent her from attending both.

[6] The Appellant first obtained privileges at the Hospital in June 1998, at which time she agreed to abide by the Hospital's Code of Conduct which provides that "for good patient care…all personnel involved in health care delivery communicate and relate to one another in a professional and appropriate manner." She accepted that "peer review will include appropriate assessments of her relationship with peers and her relationship with other health care workers." At various times since then, concerns have been raised by the Appellant's colleagues, physicians and medical staff at the Hospital with respect to the Appellant's collegiality and level of communication regarding her patient care. In one incident a physician complained of a "complete lack of courtesy and professionalism with respect to communicating patient status to a consulting physician" in an incident involving an at home VBAC (vaginal birth after caesarean section).

[7] In 2003, the Appellant sought a leave of absence from practice in the Comox Valley and, notwithstanding having been advised by the Hospital that her "application for leave of absence would be dependent on her securing an alternative (licensed) substitute to take care of her practice." No licensed substitute was apparently arranged for. Concerns were raised with respect to the Appellant's availability to her patients in the Comox Valley during her period of residency in Victoria in the absence of a licensed locum. In May 2004, the Hospital Credentials Committee granted the Appellant a leave of absence until June 15, 2004. The Hospital expressed the view that, in attempting to service her clients while residing in Victoria, the Appellant contravened s.75.01 of the Hospital's By-laws which provides:

> 75.01 active Midwifery Staff
>
> a. The Active Midwifery Staff shall consist of staff midwives *who are resident and engaged in the practice of midwifery within Local Health Area 71 and able to attend their patients at the Hospital promptly when needed.*
>
> b. Members of the Active Midwifery Staff shall
> i) Attend Meetings of the Department of Obstetrics;
> ii) Attend Meetings of the Midwifery staff;
> iii) Sit on the committees the members are assigned to by the Executive of the Medical Staff
>
> (emphasis added)

[8] On June 14, 2004, the President, Medical Staff, of the Hospital wrote to the Appellant to advise her that her active privileges were reinstated until July 31, 2004 after which her application for continued privileges would be considered by the Credentials Committee. In his letter, the President, Medical Staff, advised the Appellant of "widespread misgivings of your returning to practice here" and informed her that a Special Committee had been instructed to deal with the issues concerning her future. His letter further stated:

> The reinstatement of these privileges makes the assumption that you are living in the community as there is a requirement to be within 20 minute [sic] call of the Hospital.

> It is also a requirement that you attend the meetings of the Midwifery Staff and appropriate Obstetrical meetings.

[9] The Special Committee met with the Appellant on July 30, 2004 to air stated concerns with respect to her being reinstated to active privileges and facilitate a decision on the Appellant's application. One of the concerns raised related to the Appellant's behaviour and interactions with nurses and colleagues. The resulting minutes of the meeting of the Special Committee of the Medical Executive/Obstetrics/Midwifery Departments, states in point:

> There were numerous issues with her manner and the way she conducts herself at work with respect to behaviour and interactions with nurses and colleagues. She is not considered to be a team player…There were no formal complaints in her file, only correspondence referring to general attitude concerns from colleagues and nursing staff…
>
> **……..**
>
> Joanne's perceptions of her actions and how they affect colleagues is quite different than how her colleagues perceive them to be. She does not perform in the manner that the Department requires considering the size of the community. The group of midwives operate with unwritten policy within the community but Joanne does not always follow, e.g. VBACs are not performed at home by midwives although Joanne ignored this policy…
>
> The administration would like to see full cooperation within the group of midwives. Joanne has not contributed to this at times in the past…

[10] Following the meeting of the Special Committee on July 30, 2004, the Appellant was granted probationary privileges to December 31, 2004. Following a further meeting of the Committee on October 25, 2004 to address a continuation of the grant of probationary privileges, the Appellant wrote to the Hospital midwifery staff as follows:

> As requested by the midwifery staff, I am writing this letter and would like to reiterate the following. I

> recognize that past communications regarding certain issues may not have always met the expectations of the midwifery staff and that in future I will try to ensure that communications are clear. I would hope that in future if concerns arise, that there be timely, clear communications and that transparent processes from all parties involved can be expected.
>
> I have every intention of working collaboratively with colleagues and all health care professionals and look forward to positive work and relationships.

[11] In 2005, the Appellant was returned to active midwifery privileges at the Hospital. However, following which, in the Appellant's own words:

> My relationship with the Hospital has been steadily deteriorating over the last few years, and [the head of midwifery] and my other colleagues have been frequently making vague and unsubstantiated allegations of impropriety on my part. When I try to address these, I find that they are groundless or based on inaccurate facts where I don't have the opportunity to address the substance of them all. Unfortunately, after the passage of a period of time, and a failure by the Hospital to deal with these in timely, fair, and evidence-based fashion, these vague allegations are treated as fact and, for internal Hospital purposes, become a part of the "record."

[12] In July 2007, a meeting occurred between a committee of the Hospital, the Appellant and her legal counsel to discuss two incidents involving level of care issues. Subsequently, on July 17, 2007, that Committee made a series of recommendations to the Chair of the Hospital Credentials Committee, including:

> 1. That the College of Midwives of British Columbia be asked to assess Joanne Daviau's midwifery practices and assure the Board of Directors of St. Joseph's General Hospital that she meets all the standards of practice set out by the College;

> 2. That the Credentials Committee recommend to the Board of Directors that Joanne Daviau's privileges be placed on probationary status…

[13] Subsequently, by letter dated July 20, 2007, Dr. Fockler, Medical Director for the Hospital, wrote to the Registrar of the College of Midwives of British Columbia to request a formal inquiry by the College into the Appellant's practice. In that letter, "significant concerns," were raised with respect to the Appellant. The letter said in part:

> The largest concern, however, remains further complaints of Joanne's lack of compliance with the College of Midwives' standards of practice. "The Midwife shall collaborate with other health professionals and when the client's conditions or needs exceed the midwife's scope of practice, shall consult with and refer to a physician. It is the midwife's responsibility to initiate a consultation within an appropriate time period after detecting any indication for consultation."
>
> **……….**
>
> The issue of safe practice and protection of the public falls under the jurisdiction of the College of Midwives. I would therefore ask the College to undertake an investigation of the practice of Joanne Daviau… Does she notify the Hospital of all labours which she is supervising at home "when the labour is established and when the baby is delivered?" Does she send the send the Hospital copies of prenatal records when her client is at 36 weeks gestation on all her clients that are requesting home births? Does she work within the guidelines of the Hospital and not attempt to manage VBACs at home? Does she show judgment and not accept client for home birth if the client has unacceptable risks…?

[14] Upon receipt of the letter to the Credentials Committee dated July 17, 2007, and of Dr. Fockler's letter to the College dated July 20, 2007, the Appellant, through her counsel, Jennifer Millbank, forcefully communicated her position citing "egregious breach of the principles of fundamental justice"

in the Committee's putting the Appellant's "professional standing in jeopardy based on an *ex post facto* determination of…standards." Those concerns were later amplified in a comprehensive letter by Ms. Millbank to the College dated August 17, 2007. In it, the Appellant characterized certain findings underlying Dr. Fockler's letter to the College as being inaccurate, and advanced the view that the process by which Dr. Fockler reached his conclusions, was unfair:

> Dr. Fockler alleges that Ms. Daviau has "breached policies," for example, regarding conducting VBACs at home or maintaining a 20 minute distance from the Hospital for home births…[A]t the time of the alleged incidents, none of these policies were written down. It cannot be fair to say that Ms. Daviau broke a rule based on an *ex post facto* or "after the fact" determination of what that rule or "local standard" might be. Furthermore, a review of the practices of other midwives in the area which show, that they, at one time or another, have conducted themselves in the same manner as Ms. Daviau, and these "rules" are being selectively applied to Ms. Daviau.
>
> Although Dr. Fockler has included the minutes of the Special Committee Meeting on July 30, 2004 (attachment 13), he failed to include page 2 which states:
>
> > The group of midwives [in the Comox area] operate with unwritten policies within the committee but Joanne does not always follow, e.g. VBACs are not performed by midwives although Joanne ignored this policy.
> >
> > (full copy of minutes attached to this letter)
>
> How can Ms. Daviau be criticized for not following a "policy" that does not exist?
>
> **……**
>
> The letters from Ocean Grove Midwifery Care…are rife with inaccuracies. Ms. Daviau always forwards records as required…
>
> **……**

> There are a number of matters on which neither I nor Ms. Daviau have commented, for example, Ms. Daviau's leave of absence in Victoria, or generalized issues of poor communication, which Ms. Daviau vigorously denies. If the College requires specific commentary on anything, Ms. Daviau will provide it…

[15] The College undertook an investigation into the allegations contained in Dr. Fockler's letter dated July 20, 2007. Unfortunately, the results of that investigation and the decision of the College were not communicated to the Appellant and the Hospital until much later April 24, 2008. At some risk of over generalization, the College decided that the Appellant's level of care was not shown to be unsatisfactory and determined that no further action was warranted by the College. The College's decision was informed by representations by the Appellant.

[16] Throughout 2007, and prior to the receipt of the College's decision, matters appear to have further deteriorated between the Appellant and the Hospital. On October 11, 2007, the Hospital's acting Medical Director informed counsel for the Appellant that, a recommendation to place the Appellant on probation having been made, the Appellant's privileges would be determined by the Credentials Committee when privileges for medical staff were renewed. In the meantime, on December 13, 2007, the acting Medical Director of the Hospital wrote to the Appellant regarding the "20 Minute Rule":

> On November 03, 2007, at 15:30 hours our labour and delivery received a phone call from you informing them that you had completed a home delivery for a client with the initials E.M. You had not previously informed the delivery room that active labour was established as required by our Hospital. I have attached the standard from the College of Midwives and draw your attention to the first bullet of 7.4.3 which states: "the midwife will notify Hospital staff when active labour is established and the planned home delivery is underway."

> I also understand that you have been attending deliveries in Campbell River. I remind you of the Department of Obstetrics Policy as recorded in the minutes of June 7, 2002 requiring an availability of 20 minutes for in hospital deliveries.
>
> I am writing to inform you that St. Joseph's expects members of the Medical Staff to comply with the standards of practice required by their Colleges and Departments. Any departure from these standards may be considered a cause for discipline up to and including suspension or revocation of privileges…

[17] That letter drew the charge from counsel for the Appellant, that the facts on which the acting Hospital Director's letter was based were not accurate. Appellant's counsel challenged the application of the rule requiring an "availability of 20 minutes for in Hospital deliveries" on the basis that other midwives with privileges at St. Joseph's do not themselves "live within 20 minutes of the Hospital." Counsel for the Appellant wrote on December 20, 2007 to the Hospital, in part:

> Please clarify: do you expect that all clients of Ms. Daviau and the other practicing midwives live within 20 minutes of the Hospital? This can be the only conclusion from your letter, and if this is the case, it would be impossible for any midwife to maintain a practice in a rural area such as Comox… [F]or the record, Ms. Daviau has attended approximately four deliveries in Campbell River in the last ten years. I am unaware of any rule, from the College of Midwives of British Columbia or otherwise, which precludes her from doing so.

[18] On April 8, 2008, the Credentials Committee finally met and deferred consideration of the Hospital's recommendation to place the Appellant on probationary status until a special meeting of the Credentials Committee on April 23, 2008. The Appellant was invited by the Hospital to attend that meeting "to allow you to address the Committee's concerns with respect to your availability, collegiality, and level of care which have caused enough

concern with the Committee to discuss your Hospital privileges and the possible restriction of those privileges." That letter stated in part:

> The Credentials Committee will make a recommendation to the Medical Advisory Committee which in turn makes a recommendation to the hospital Board after this meeting. It is the Board which will make any decision as to your privileges.

[19] At the meeting of the Credentials Committee on April 23, 2008, the Appellant attended with Ms. Millbank. Following submissions by Ms. Millbank, and the Appellant's submissions on her own behalf, the Credentials Committee resolved to recommend to the Hospital Medical Advisory Committee that, "due to a long standing pattern of disregard for community standards and unacceptable levels of collegiality, availability, and continued concerns regarding the level of care, Joanne Daviau's privileges not be recommended for renewal."

[20] The next day, on April 24, 2008, the Hospital received by fax, the decision of the College flowing out of the initial complaint, communicated by Dr. Fockler almost 9 months earlier, on July 20, 2007.

[21] On May 7, 2008, the Appellant was advised in writing of the Credentials Committee recommendation to the Medical Advisory Committee and that the Medical Advisory Committee would meet on May 13, 2008 to consider the recommendation. The Appellant was invited to attend the meeting of the Medical Advisory Committee with legal representation.

[22] At the meeting of the Medical Advisory Committee on May 13, 2008, the Medical Advisory Committee was advised by legal counsel, John Dives. The Appellant was represented at the meeting by Ms. Millbank. The recommendations of the Credentials Committee were aired and representations were made on behalf of the Hospital and the Appellant. The

representations squarely addressed By-law 75.01(a) and the 20 minute "rule of thumb."

[23] Following *in camera* deliberations, the Medical Advisory Committee determined to recommend to the Board of Directors of the Hospital the termination of the Appellant's privileges two days hence on May 15, 2008. Before the Board of Directors, Dr. Fockler presented a written statement outlining information said to relate to the history of dealings involving the Hospital, the Appellant and her colleagues. At that meeting, the Board of Directors received advice from the legal counsel, John Dives, and the Appellant was represented by Ms. Millbank. According to Mr. Dives, he advised the Board of Directors that, as he understood it, the recommendation of the Medical Advisory Committee was not based upon concerns about the Appellant's quality of care. Further, according to Mr. Dives, following submissions by the parties on the process before the Medical Advisory Committee, Ms. Millbank made "a lengthy submission about Ms. Daviau's quality of care, the process before the College, the high regard her patients have for her, her complaints about the "20 Minute Rule" and her complaints that she is forced to be a sole practitioner because the other midwives "don't like her."

[24] By May 15, 2008, it was known that the Hospital had appealed the decision of the College. According to Mr. Dives, he advised the Board of Directors at that meeting "that the question for the Board was whether a sole practitioner midwife, without coverage due to collegiality and communication issues, could provide the sort of midwifery practice within their community and hospital thought appropriate, and that they should assume for the purpose of their deliberations that Ms. Daviau was perfectly competent and they should not make a decision which was based upon any concerns about competence."

[25] The Board of Directors on May 15, 2008 decided to revoke the Appellant's privileges. From that decision, the Appellant filed her Notice of Appeal to the Hospital Appeal Board on June 1, 2008 seeking the following relief:

> 1. Reinstatement of Ms. Daviau's privileges
>
> 2. A stay of the decision of the Board of Directors to revoke Ms. Daviau's privileges and the extension of Ms. Daviau's privileges pending the outcome of this hearing before the Hospital Appeal Board.
>
> 3. A declaration that the "20 Minute Rule" respecting availability cannot be a basis for the revocation of Ms. Daviau's privileges insofar as the content of that rule is not sufficiently known, written down, or promulgated with sufficient certainty, and that Ms. Daviau's numerous requests for clarification of that rule, so called, were not responded to by the Respondent.
>
> 4. A declaration that Ms. Daviau was denied procedural fairness at each stage of the internal Hospital processes respecting her privileges in particular the Case Review dated July 13, 2007, the Credentials Committee meeting dated April 23, 2008, the Medical Advisory Committee meeting dated Ma, 13, 2008, and the Board of Directors meeting dated May 15, 2008, and that the revocation of Ms. Daviau's privileges was motivated by bias, bad faith, irrelevant considerations, and that it was discriminatory.
>
> 5. An order that Ms. Sheila Jager be precluded from sitting on the panel that hears the appeal.

[26] On May 30, 2008, Ms. Millbank advised the Acting Registrar of the Hospital Appeal Board of the Appellant's intention to bring an appeal from the Decision of the Board of Directors of the Hospital of May 15, 2008. In her letter, Ms. Millbank advised that on May 29, 2008, the Appellant had sought

and obtained an order of the British Columbia Supreme Court granting the Appellant an "interim injunction to extend Ms. Daviau's privileges until midnight of June 10, 2008." At the request of counsel for the Appellant and Respondent, respectively, a pre-hearing conference was conducted herein by telephone. At that time, directions were made to counsel for the timing and exchange of written submissions and evidence on the within application by the Appellant for an order staying the Decision of the Board of Directors pending the conclusion of the Appellant's appeal herein.

ISSUE

[27] The sole issue arising on this application is whether the Hospital Appeal Board should grant a stay of the Decision of the Board of Directors of the Hospital pending the conclusion of the within Appeal, and if so, on what terms, if any.

RELEVANT LAW

[28] Pursuant to s.46(4.2) of the *Hospital Act* RSBC 1996 c. 200, the Hospital Appeal Board has the authority under s.25 of the *Administrative Tribunals Act* SBC 2004 c. 45 to order a stay of the decision under Appeal. Section 25 of the *Administrative Tribunals Act*, provides as follows:

> 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.

[29] The test set out in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, 111 DLR (4th) 385 (S.C.C.) applies to applications for a stay before the Hospital Appeal Board. That test requires the Applicant for a stay to demonstrate the following:

1. There is a serious issue to be tried;
2. Irreparable harm will result if the stay is not granted;
3. The balance of convenience favours granting the stay

[30] The onus is on the applicant to establish why a stay ought to be granted.

DISCUSSION AND ANALYSIS

1. Whether there is a serious question to be tried

[31] In *RJR-MacDonald, supra,* the court stated as follows:

> What then are the indicators of "the serious question to be tried?" There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[32] There, the Court stated that whether this aspect of the test has been satisfied should be determined on the basis of common sense and limited review of the case on its merits. The Court also stated that, unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, the inquiry generally should proceed onto the next stage of the test. This is particularly apt, having regard to the *de novo* nature of the Hospital Appeal Board's appellate jurisdiction. *Ng v. Richmond Health Services Society,* Hospital Appeal Board decision February 6, 2003, *Hicks v. West Coast General Hospital,* [1993] B.C.J. No. 107 (S.C.C.); *Cimolai v. Children's and Women's Health Centre of British Columbia*, [2002] B.C.J. No. 490 (S.C.C.) and *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266 (C.A.) at p. 273. Section.46 of the *Hospital Act* states:

> A Hospital Appeal Board may affirm, vary, reverse or substitute its own decision or that of a board of management on the terms and conditions it considers appropriate.

[33] Section 8(8) of the *Hospital Act Regulation*, BC Reg 121/97 states that:

> An appeal to the Hospital Appeal Board is a new hearing of the subject matter of the appeal.

[34] I am satisfied on balance that the Appellant has met the first stage of the test.

2. Whether irreparable harm will result if the stay is not granted

[35] As stated in *RJR-MacDonald, supra,* at p. 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the association's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> **……**
>
> Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision…; where one party will suffer permanent market loss or irrevocable damage to its business reputation…

[36] The Applicant has addressed the issue of irreparable harm in her affidavit sworn herein on June 4, 2008, under the heading "Impact on Practice and Current Clients":

> 42. I have a strong relationship with all of these women. They trust me and they are vulnerable. Pregnant women put a great deal of thought and care into choosing their maternity care provider. They have specifically chosen me as

> their care giver and some of them are repeat clients. I am fluent in French and one of the women in my care does not understand English very well. She advised me and I believe that she chose me as her maternity care provider because I am fluent in French.
>
> 43. If I do not have privileges during the time that it will take for the hearing and rendering of the decision on Appeal, even if I win at that Appeal, my practice will be devastated. Even if I win, it will take me months, if not years, to get my practice to the level it is at now.
>
> 44. My income will also be dramatically reduced with adverse effects on my family.
>
> 45. I am also very concerned about my reputation in the community. If I have to tell my current clients and prospective clients who come to me looking for maternity care that I do not have privileges, it is my fear that they will conclude that my practice is below standards. I fear that my practice will never recover from the stigma of this…
>
> **……..**
>
> 47. It is my opinion that the women who are currently in my care will be devastated. I am very concerned about the negative effect that this will have on them and their families including their unborn children. Even if I am eventually successful in this appeal, women currently in my care will have been compelled by circumstances beyond their control to obtain maternity care and have their baby with a person who was not their choice.

[37] Whether or not the Appellant's continuing right to conduct home births will ameliorate the negative economic consequences of refusing a stay, nevertheless it is reasonable to conclude that the Appellant, in the circumstances here, will suffer irreparable harm to her reputation and professional standing in the absence of a stay. It may be reasonably assumed that women considering a choice of midwives will, in an abundance

of caution, seek to obtain one with local hospital privileges. It is further reasonable to conclude that, in the circumstances here, the loss of privileges will likely have a palpable effect on the Appellant's professional reputation and standing with the College, as well as with those professional institutions and organizations in which she is an active contributor and participant.

[38] I am satisfied, on balance, that the Appellant has met the second stage of the test.

3. The Balance of Convenience

[39] This branch of the test requires that the Hospital Appeal Board determine which party will suffer the greatest harm from the granting or denial of the stay application. The public interest is one factor which may be taken into account at this stage of the analysis. Further, the imposition of terms or conditions in any order granting a stay may also be taken into a court in determining the balance of convenience.

[40] On this stage of the test, it is significant that, before making their decision, the Board of Directors were advised by Mr. Dives, as he puts it, in his affidavit sworn in the injunction proceedings in the Supreme Court of British Columbia on May 28, 2008, as follows:

> I advised them [the Board of Directors] that the question for the Board was whether a sole practitioner midwife without coverage due to collegiality and communication issues could provide the sort of midwifery practice which their community and hospital thought appropriate, and that they should assume for the purpose of their deliberations that Ms. Daviau was perfectly competent and that they should not make a decision which was based upon any concerns about competence. I advised them that there was no dispute that Ms. Daviau was not able to get coverage from the other midwives and so even if she if she no longer took on patients in Campbell River or other locations more than 20 minutes from the Hospital, she could not attend two of her patients promptly if they

> both went into labour, particularly if one or both was a home birth.
>
> (words in parenthesis added)

[41] It is reasonable to conclude, on balance, that having regard to Mr. Dives' advice, the decision of the Board of Directors may not have been based upon concerns with respect to the Appellant's core competency as a midwife. Instead, the Board was directed in a consideration of concerns with respect to her failure to properly communicate, and encourage collegiality, with her peers and other members of the Hospital staff and attending physicians, deemed appropriate by the Hospital to ensure an appropriate level of coverage and care for patients requiring Hospital services.

[42] It is instructive in determining this application that both the Appellant and the Respondent are in agreement with a term of any stay order that the Appellant restrict her practice of midwifery to persons residing within the geographical boundaries of Local Health Area 71. In addition, the Hospital as a term of any stay order, seeks a further condition that the Appellant submit her charts monthly for their review by a staff member of the Department of Obstetrics of the Hospital. In this way, the Hospital seeks to become aware of the Appellant's patients and how and when they may present to the Hospital for care. To that extent, concerns respecting the level of communication between the Appellant and the Hospital, and potential coverage issues, might be dealt with in the interest of the patients under the Appellant's care. I have concluded, on balance, that the periodic chart review proposed by the Hospital is, in my view, a useful method by which to address, pending the conclusion of the Appeal, some of those concerns which may have animated the Decision appealed from.

[43] I am not persuaded that the Appellant's concerns that the proposed chart reviews are a form of evidence gathering adverse to her interests. The information in the charts may well, in any event, become evidence before the Hospital Appeal Board where, on the hearing of the Appeal, the Appellant

may be questioned by counsel for the Hospital. In this manner they will become evidence for the consideration of the panel in any event. If the charts are not ultimately introduced, or questioned upon, no adverse effect on the Appellant can have occurred. The communication process proposed, will instead seek to facilitate timely dialogue on matters which may affect patient care and the proper functioning of the midwife-patient-Hospital relationship. Furthermore, it remains for determination on the Appeal hearing whether the facts warrant the concern raised by the Appellant and I am not in a position to weigh them and ought not to do so at this stage insofar as they are inextricably bound up with the issues for determination on the Appeal.

[44] I have concluded that in the circumstances here, that the balance of convenience favours the issuance of a stay on the terms proposed on behalf of the Hospital.

DECISION

[45] For the foregoing reasons, I have decided that the Appellant has met the burden of proof for a stay, however that the stay be subject to the terms proposed by the Hospital. It is ordered that the Decision of the Board of Directors of St. Joseph's Hospital on May 15, 2008, revoking the Appellant's privileges effective May 31, 2008, be stayed pending the conclusion of the within Appeal, on terms that:

1. The Appellant shall restrict her practice of midwifery to persons residing within the geographical boundaries of Local Health Area 71;
2. Within 30 days hereof, and within each succeeding 30 day period thereafter, the Appellant shall meet and review with a member of the Department of Obstetrics of St. Joseph's Hospital her client charts in relation to St. Joseph's Hospital's resources, bylaws, local community rules and policies.

[46] It is further ordered that the parties be at liberty to apply for further directions as may be required. Those directions may relate to a variation of the terms of the stay order and with respect to the timing of proceedings and the hearing of the Appeal.

DATED at Vancouver, British Columbia this 10th day of June, 2008

Derek A. Brindle Q.C

Chair, Hospital Appeal Board