HOSPITAL APPEAL BOARD

In the matter of

DR. TIMOTHY NG

And

RICHMOND HEALTH SERVICES SOCIETY
(now VANCOUVER COASTAL HEALTH AUTHORITY)

RULING ON ADMISSIBILITY OF EVIDENCE REGARDING THE ADMISSIBILITY, RELEVENCE AND EFFECT OF THE DECISION OF THE COLLEGE OF PHYSICIANS AND SURGEONS

I. Background

The Appellant is an obstetrician and gynecologist. He is appealing the decision of December 21, 2001, of the Public Administrator for the Richmond Health Services Society ("the Hospital") to revoke his hospital privileges as a member of the Provisional Active Staff at the Richmond Hospital.

This Board has conducted a full hearing into this matter. The hearing commenced in March 2002. Written submissions concluded on September 18, 2002. Since that time, the matter has been under reserve and the panel has been preparing its decision on the appeal.

II. The Request

On November 1, 2002, counsel for the Hospital wrote to the Board and attached a document purporting to be from the website of the College of Physicians and Surgeons of British Columbia ("the College"). The document is entitled "Release to the Media". The document seeks to publicize the College's decision concerning the Appellant's standing as a member of the College. It states that, following an investigation and hearing under s. 51 of the Medical Practitioners Act, the College has ordered the Appellant's name erased from the Medical Register and entered in the Temporary Register subject to conditions stated in the media release.

Counsel for Richmond Hospital has not attached the College's actual decision in the Appellant's case. However, it seeks leave to reopen its case to enter that decision into evidence. Its position is that the College's findings will be "persuasive and credible" regarding the issues of professional competence that we have to decide under s. 4.1 of the Medical Staff Bylaws. It also submits

that the College's decision should be admitted because it renders at least some of the issues before the Board moot.

III. Hospital submissions

As noted above, the Hospital submits that the decision of the College is relevant to the members of the Hospital Appeal Board who are currently deliberating in the matter of the Appellant's privileges at the Hospital and should be admitted as evidence in these proceedings.

Ms Washington cites J. Sopinka, S.N. Lederman & A.W. Bryant in *The Law of Evidence in Canada, 2d* ed. (Toronto and Vancouver, Butterworths, 1999) at 961:

> "There is, however, a discretionary power vested in the trial judge to allow a party to reopen its case to introduce evidence, notwithstanding that it may not be the proper subject of reply."

Ms Washington submits that the discretion must be exercised by the judge as he or she thinks best "for the discovery of the whole truth of the matter in issue and in an effort to ensure the proper administration of justice", and cites *S.F. Goodrich Canada Ltd. v. Mann's Garage Ltd.* (1959), 21 D.L.R. (2d) 33 (N.B.Q.B.) at 34.

Counsel for the Hospital also submits that in the case of fresh evidence being heard after the delivery of reasons for judgment but before the entering of an Order, the courts have held that the trial judge has complete discretion to direct that a case be re-opened for the purposes of hearing further evidence in order to ensure that a miscarriage of justice does not occur. In support, she cites *Insurance Corp. of British Columbia v. Dommasch,* [1978] B.C.J. No. 62 (S.C.).

In the submission of the Hospital, this Panel has the discretion to admit fresh evidence that was not available at the time of the hearing and that may be relevant to the outcome of the matters in issue.

Counsel for the Hospital argues that no amount of due diligence would have allowed the decision of the College to have been entered into evidence during the course of this hearing. The hearing of this matter concluded on September 11, 2002. Final argument for the Hospital was due on September 17, 2002, final argument on behalf of the Appellant was due September 20, 2002 and the Hospital's response was due September 25, 2002. The decision of the College was not released until October 17, 2002.

Counsel further submits that in the interests of justice the Hospital did not request that this Panel hold its proceedings in abeyance until the College had rendered its decision. There was no indication from the College when a

decision would be forthcoming, and the time available before this Panel being at a premium, it did not seem appropriate to delay the proceedings pending the outcome of the College.

The Hospital submits that the decision of the College is unquestionably relevant to the issues before this Panel. This Panel sits in the position of the Hospital Board and that Hospital Boards are required by the Hospital Act and Regulations to have regard for the standing of a physician with the College in granting privileges.

Counsel for the Hospital further submits that it would be misleading to withhold this information as Section 4.1 of the Medical Staff Bylaws requires this Panel to consider the issue of whether the Appellant has been guilty of professional incompetence. She submits as follows:

> Because section 4.1 of the Medical Staff Bylaws requires this Panel to consider the issue of whether [the Appellant] has been guilty of professional incompetence, the determination of the College as to competence will be persuasive and credible although the Panel must come to its own finding on this issue on the evidence before them. The findings of the College may assist the members of the Panel if they are struggling with this issue, and it is the responsibility of counsel to ensure that any information that may assist in a fair and just determination of these issues be brought before the Panel.

The Hospital further submits that aspects of the Appellant's case before the Hospital Appeal Board have been rendered moot by the decision of the College such that no decision of the Hospital Appeal Board is required.

The Hospital does not say that all the issues before the Hospital Appeal Board are moot. The Hospital's position is that at least the issue of remedy is now academic. Pursuant to s. 7(1)(a)(i) of The Hospital Act Regulations, B.C. Reg. 121/97 and amendments thereto a physician is not entitled to attend or treat patients in a hospital, or in any way make use of the hospital's facilities, unless he is a member in good standing of the College. The Hospital Bylaws also state in Article 3 that in order to be eligible as a member of the medical staff at the Hospital an applicant must be a member in good standing of the College.

The Hospital submits that they are not stating that the College process determines or prejudices the process before this Board. Ms Washington states that they are separate proceedings that ask different questions and consider different evidence, and on the present legislation, the two bodies could come to different findings as to competence. She further submits that it is the nature of this particular decision by the College that raises the issue of mootness.

Counsel for the Hospital submits that a finding by this Board that the Hospital made the right decision in revoking the Appellant's privileges would obviously

not alter the current situation. Counsel further submits that a finding by this Board that the Hospital made the wrong decision in revoking the Appellant's privileges would be of interest but no practical effect because it is not open to the Panel to impose a remedy, as the Appellant cannot practice within the Hospital by reason of the College's decision. Counsel suggests that it may be a long time, if ever, before he qualifies for a return to practice. Further, it is the Hospital's submission that he would have to reapply after satisfying the College's requirements, as many things may change at the Hospital and in the Department over this time, and the Hospital cannot be held hostage to such an indefinite process by a ruling, for example, that the Appellant should be reinstated once he re-qualifies. The Hospital submits “That would neither be fair nor reasonable.”

Counsel for the Hospital concludes by submitting that in certain circumstances, an adjudicative body may still decide to exercise its discretion and make a determination when an issue is moot. Generally, this discretion is exercised when it is a policy or practice of the body to do so. The reasons for exercising the discretion will vary greatly based on the decisions being made.

In the submission of the Hospital, the right to exercise that discretion and render a decision does not include the right to impose a remedy in a matter that is moot. Counsel states “The decision of the College significantly impacts the ability of this Panel to make any finding that would reinstate the Appellant's privileges as his eligibility to obtain hospital privileges has been eliminated for an indefinite period of time.”

IV. Appellant’s submissions

Mr. Hinkson’s submission is that the application by the Hospital is inappropriate, especially in light of the ruling made by the, Chair of the Hospital Appeal Board that the Hospital Appeal Board (the “Board”) hearing would be completely distinct from any parallel proceedings before the College.

> THE CHAIRPERSON. I think it's sufficient that we understand that when these types of things happen there's an automatic review by the College and that in fact that has or is going to take place, and we've been through these types of appeals before when there's been a parallel review going on, and although we’re aware of it, we haven’t allowed the fact that that is taking place to bear on our decisions. [Excerpt from the transcript of the April 24, 2002 proceedings before the Hospital Appeal Board.]

Mr. Hinkson further states that in light of this ruling, it is clear that the outcome of the College proceeding certainly should not be considered as evidence, decisive or otherwise, by this Board.

In response to the Hospital's submission on "fresh evidence", counsel for the Appellant, states that what the Hospital is asking of the Board is something quite distinct from reopening the case to allow for the introduction of fresh evidence. He points out that where a trial judge reopens a case to hear fresh evidence, such evidence is subject to certain litigation safeguards including limitations on admissibility and cross examination. Mr. Hinkson submits that in the case at hand, the Hospital seeks to enter the College's decision, not as fresh evidence that can be tested and weighed, but as a conclusion to be accepted without testing the underpinnings or process that lead to such conclusion. In the view of counsel for the Appellant, it would be inappropriate in the extreme to receive such untested evidence.

Mr. Hinkson submits that this Board has been struck to make findings on a number of issues in order to arrive at a decision on the question of whether the Appellant's privileges ought to have been revoked, including a finding as to the Appellant's competence.

Counsel for the Appellant further submits that in response to the Hospital's position that the Medical Staff Bylaws require this Panel to consider the issue of whether the Appellant has been guilty of professional incompetence, it is the Appellant's position that the College's conclusions, the basis for which is not before this Board, ought not be considered.

Counsel states that over the course of these proceedings, this Board has heard extensive evidence and has had the benefit of examination and cross-examination of witnesses by counsel, as well as the opportunity to ask further questions of the witnesses, and that this process was not engaged in by the College. Mr. Hinkson submits that it is on the basis of this evidence that this Board must reach its decisions, both on the issue of the Appellant's competency, and on the final privileges question.

Counsel for the Appellant supports the acknowledgement by the Hospital that the proceedings before the College and this Board are completely separate from each other, ask different questions, and consider different evidence. Further, he states that the College decision in no way detracts from the importance of this Board's findings, nor should the College decision influence this Board's decision. It is the position of Mr. Hinkson however, that the Hospital is asking the Board to accept the College's finding on the Appellant's competency as decisive of the privileges issue, and that this is an untenable position.

Counsel for the Appellant adds that it would be improper for this Board to accept the College's finding on this question as to do so would be an improper delegation by this Board, amounting in effect to issue estoppel.

In support of this argument, Mr. Hinkson cites *Danyluk* v, *Ainsworth, Technologies* [2001] 2 S.C.R.460.

Mr. Hinkson submits that in the case at hand, none of the preconditions as reiterated by the Supreme Court are met. He states that the issues before the Board are not the same ones that were reviewed by the College, and although both this Board and the College considered the Appellant's competency, the context and purpose of such consideration undertaken by each of these bodies were strikingly dissimilar.

He adds that the College's purpose was to make a finding on the Appellant's competency and to determine what measures could be undertaken to improve his skills, and there is no evidence before this Board as to the process followed or evidence relied upon to reach the conclusion. In contrast, this Board has the task of looking at numerous facts, including the Appellant's abilities and the working relationships between the Appellant and his colleagues at Richmond Hospital, and determining, on the basis of all the viva voce and report based evidence submitted in these proceedings, whether there are sufficient grounds to justify the termination of the Appellant's privileges at Richmond Hospital. Counsel for the Appellant states that in addition, the College hearing was not a judicial one. Finally, Mr. Hinkson submits that the requirement that the parties be the same as between the two proceedings is not met, as neither Richmond Hospital nor its privies were involved in the College proceeding. Counsel for the Appellant concluded, “this is not an appropriate situation in which to apply issue estoppel, and therefore this Board must arrive at its own conclusions on all of the issues in question”.

With regard to the Hospital submission that the College finding has the effect of making the proceedings before this Board moot, counsel for the Appellant states these claims are simply unfounded.

Counsel for the Appellant submits that due to the ongoing nature of these proceedings, the Appellant has currently been without privileges for over 1 year, and in the event this Board accepts the Hospital's argument that, as a result of the College finding, the issue of the Appellant’s privileges is moot a further delay will be incurred in that a decision by this Board to reinstate the Appellant's privileges will avoid the unnecessary delay that will result in the Appellant being required to recommence the privileges application process following the completion of his three month mentorship.

In response to the Hospital’s claim that an order by this Board to reinstate the Appellant's privileges would be akin to holding the Hospital hostage indefinitely, counsel for the Appellant submits that the College has determined that the Appellant is to undcrgo a three month “menteeship”, at the successful completion of which he will be reinstated to the permanent registry; and further, that “considering that this matter has been ongoing for over a year at this stage, requiring the Hospital to reinstate the Appellant’s privileges upon the completion of his short mentorship is hardly holding them hostage.”

V. Hospital's reply

Ms Washington submits in reply that the ruling of the Hospital Appeal Board dated April 24, 2002 does not have the effect relied on by the Appellant, in that ruling the Board stated only that no consideration would be taken of the fact that parallel proceedings were taking place at the College.

Ms Washington cites *Sabir v. Matsqui-Sumas-Abbotsford Hospital* (October 28, 1997, HAB) in support the Board hearing further evidence in this matter.

Counsel for the Hospital denies having asked the Board to accept the College's finding of the Appellant's competency as decisive of the privileges issue, rather the Hospital merely asserts that the College's decision rendered any potential remedy by the Board moot.

Ms Washington submits that at no time has the Hospital relied on the doctrine of issue estoppel.

Counsel for the Hospital states that it is not asking this Board to defer to the College on the question of competency. It is the submission of the Hospital that there is ample evidence before the Board regarding the Appellant's competence as an obstetrician, and that it is on the question of remedy that the College's decision is most important.

Counsel for the Hospital further adds that an implicit assumption was made during the hearing of evidence in this matter that the Appellant was a practitioner duly licensed to practice in any hospital in the province; evidence was led on this issue by way of introduction of the Appellant's resume. Counsel submits that as a result of the College's decision the Appellant's licensure status has changed, such that he is no longer qualified to practice in the Hospital or indeed any hospital in the province.

Finally, the Hospital disagrees that the Appellant will be eligible for an automatic reinstatement of his privileges if and when he completes the process mandated by the College. The Hospital reiterates its position that the decision of the College effectively terminated the Appellant's relationship with the Hospital, regardless of any decision of this Board, and the Board of the Hospital should have an opportunity to consider him as a new applicant with a significant finding made against him by his College.

VI. Decision

A. The Panel's April 24, 2002 ruling

The first issue the Panel must consider is whether its April 24, 2002 ruling is decisive against the Hospital's application.

We find that it is not. In review of the evidence before this Board, and review of the transcript of the hearing at that time, the April 24, 2002 ruling made was in direct response to a question put to Dr. M in regard to the process that was followed after the decision of the Board of Management to revoke the Appellant's privileges. Counsel for the Appellant is misinterpreting the ruling of the Panel in this instance. The ruling made was in direct reference to this Board placing any importance on a parallel investigation by the College on the decision that the Board would render in such an appeal. At the time of the ruling, the only information at hand was that the College was undertaking a review as a result of the requirement of the Hospital to report any change or revocation of physician privileges. The ruling did not, and does not have any bearing on the question of any change in the status of a physician with the College as to licence.

Therefore, we move to consider the Hospital's application on its merits.

B. Should the recent decision of the College be introduced as fresh evidence in this hearing?

We begin our analysis by noting that it has been well established by this Board and the courts that the Hospital Appeal Board "sits in the shoes" of the board of management of the Hospital in the determination of privileges for physicians. As noted in the Hospital Act Regulations, Section 7 (1)

> A practitioner is not entitled to attend or treat patients in a hospital or in any way make use of the hospital's facilities for his or her practice unless the practitioner
>
> > (a) is a member or registrant in good standing of one or more of the following:
> >
> > (i) the College of Physicians and Surgeons of British Columbia.

In fulfilling our mandate lawfully and realistically under the legislation, this Board considers it sufficient to know that in the appeal before us, the Appellant currently is not a member in good standing with the College of Physicians and Surgeons of British Columbia – a point which was not in issue between the parties in the latest round of submissions.

However, we are not prepared to go further and re-open the case to entertain evidence of the College's findings regarding professional competency. In our view, the Panel has ample evidence upon which we can make our own independent findings. In the case at hand, the Board has had the opportunity to hear live evidence that has been tested by cross-examination as it relates to the Standard of Care Issue. We are prepared to issue our decision based on

the evidence already before us. To admit the College's findings on that issue at this stage would require us, in fairness, to give the Appellant the opportunity to give evidence and make submissions on the weight we should give the College's findings based on its investigative process, its record and its procedure as compared with ours. That in turn would engage us in the somewhat unseemly task of commenting on the process of an independent statutory board.

In the circumstances here, the disadvantages of such a course of action in terms of assisting us in reaching a fair and proper conclusion, far outweigh the advantages, particularly given the position of both counsel that we are not bound by the College's findings. It has long been established by this Board that in consideration of the issue of physician competency, our distinct role is to consider physician competency as it relates to the standard of care as set out by a hospital's Medical Staff Bylaws, together with department Policies and Procedures. We are well satisfied that we have the evidentiary record upon which to base a proper decision on this matter.

Nor are we persuaded by the Hospital's argument that we must reopen the hearing to admit the College's decision because the issue of remedy is now academic. With regard to this argument, we make two points.

First, there is nothing that the College's decision will tell us that is not already public and uncontested by counsel – namely, that the Appellant's name has, since October 17, 2002, been removed from the Medical Register and placed on the Temporary Register.

Second, we have no way of knowing what will happen to the College's decision. It is possible that the College may change or modify it, or it may be the subject of further judicial proceedings. If the College's decision were changed or overturned at some point, it would be highly relevant to the parties to have known what the status of the Appellant's privileges would have been had he not been removed from the Register. Thus, while any order we would make would be subject to the general legislative requirement that a person must be a practitioner in good standing to practice in a hospital, we do not regard the decision we must make as being moot.

For the reasons we have given, we are not prepared to reopen the hearing to admit the College's findings, but will rather proceed with our deliberations and issue a decision as soon as possible.

"Gordon Armour"

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Gordon Armour (for the Panel)
Chair, Hospital Appeal Board

Dated: November 27, 2002, Williams Lake, British Columbia