

HOSPITAL APPEAL BOARD

BETWEEN:	Dr. Vinod C. Tawar	APPELLANT
AND:	Mission Memorial Hospital	RESPONDENT

Members of the Panel:

Gordon R. Armour, Chair

Gayle Raphanel, Member

Norah Andrew, Member

Counsel for the Appellant: D. Ross McGowan
Ladner Downs

Counsel for the Respondent: Ms. Penny Washington
Bull, Housser & Tupper

Heard at Vancouver, British Columbia, June 23, 24 25, and August 11, 12, 1997

REASONS FOR JUDGMENT

This is an appeal of the decision of the Board of Trustees (the Board) of the Mission Memorial Hospital (the Hospital) on July 10, 1996, that the Appellant's "application for admitting privileges and appointment to the Medical [staff], be rejected". The Appellant sought an order that the Hospital Appeal Board reverse the decision of the Board and grant the Appellant status as a probationary member of the Medical Staff of the Hospital, together with all rights and responsibilities as are applicable to such position.

Authority of the Board

The Hospital Act was amended by the *Miscellaneous Statutes Act, 1996 S.B. C 1996, c. 13 (sections 9-15)*, which was proclaimed into force on April 15, 1997. Section 14 of the Act repealed and replaced section 37.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 the 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.

I. Submission of the Appellant

The grounds on which the appeal is based are:

- (a) the Board erred in failing to act judicially and failing to adhere to the principles of natural justice and fairness of process, particulars of which include:
 - (i) failing to give timely prior notice and particulars of allegations of incompetence and matters to be addressed and considered by the Board during the hearing, including failing or refusing to provide copies of the memorandum and letters pertinent to those allegations until the hearing before the Board;
 - (ii) allowing into evidence, and relying upon, statements of hearsay or double hearsay with respect to those allegations and matters, in circumstances which rendered the statements vague, immune from challenge by examination of witnesses, vulnerable to bias and unreliable;
 - (iii) placing any or excess reliance upon statements and innuendo without any primary supporting documentary evidence or oral testimony, or with insufficient evidence in support of such statements and innuendo;
 - (iv) failing to place any or sufficient reliance upon primary and documentary and oral testimony presented on behalf of the Appellant; and
 - (v) failing to provide a full and adequate hearing and opportunity to respond to the allegations, challenge hearsay or double hearsay innuendo by cross-examination, present rebuttal evidence, or provide full oral submissions on the allegations and matters considered by the Board;
- (b) the Board further erred in failing to consider or place sufficient weight upon primary evidence confirming:
 - (i) The Appellant's successful completion of an internship at the University of Saskatchewan, with an above average standing;
 - (ii) The Appellant's record of good standing with the Colleges of Physicians & Surgeons in the Provinces of Saskatchewan, Manitoba and British Columbia; and
 - (iii) The Appellant's good professional reputation in the medical community, as evidenced by the numerous letters of

recommendation and oral testimony given by Doctors and Medical Staff with whom he has directly worked.

II. Submission of the Respondent

- (a) It is the position of the Respondent that the Hospital dealt with the Appellant's application fairly and in accordance with the procedures set out in the Hospital Act Regulations.
- (b) The Appellant has had, since September, 1995, notice of the concerns about his application for privileges and was given ample opportunity to respond to those concerns.
- (c) The Respondent takes the position that the issue on this appeal is not due process, but whether the Appellant is an inappropriate member of the medical staff of the Respondent. The Respondent has the obligation, through its Board of Trustees, of meeting the needs of the community it serves by ensuring, in its appointment of medical staff, that a high standard of patient care will be provided.
- (d) It is submitted that the Appellant is not entitled as of right to practice medicine at the Hospital, but that obtaining a permit to practice medicine is a privilege. The Board of Trustees of the respondent has the discretion to consider, whether in the circumstances pertaining to its facility and the community, that privilege ought to be granted in the case of an applicant.
- (e) It is well established that Hospital boards, and the Medical Appeal Board, ought to have regard to whether the applicant is a person who, not only in terms of qualification and skills, but character and personality as well. is someone who should be on the medical staff. The duty of the Respondent's Board of Trustees was to consider what was in the best interests of the particular Hospital and the community it serves, not whether the skill and knowledge of the Appellant were adequate in other hospitals.
- (f) While there was evidence before the Board of Trustees in support of the Appellant's application, relating to both his competence and professional ethics, it is submitted that there was sufficient negative information from various sources to raise serious doubt as to whether the Appellant is an appropriate member of the staff of this Hospital.

III. Background

The Appellant began practicing medicine late in his life. He is currently 53 years old, and has been practicing only since 1993. He obtained a BSC from the University of Bombay in 1964. Shortly thereafter he came to Canada to work and continue his studies in the area of Pharmacology, obtaining a scholarship to the University of Manitoba to complete his Masters in 1969. Upon completion of his Masters, he worked as a toxicologist at St. Boniface Hospital in Winnipeg. While at St. Boniface he decided to pursue a medical degree. He first tried to obtain admission to the school of Medicine in 1974, but was declined. In 1980 he resigned from St.

Boniface to obtain additional courses at the University of Manitoba. In 1981 the Appellant was admitted to South Western University in the Philippines and completed his medical degree in 1985. He returned to Canada and enrolled at McGill University to complete his electives and to pursue opportunities to obtain an internship position. He found it difficult to obtain an internship, so returned to work as a research consultant at Douglas Hospital in Montreal. In 1990, the Appellant joined the Canadian Armed Forces. The Forces sponsored him for an internship program through the University of Saskatchewan with Pasqua Hospital in Regina. The internship at Pasqua did not proceed as he had hoped and he did not complete this program. He later gained acceptance to an internship program at Saskatoon City Hospital. The Appellant continued as member of the Canadian Armed Forces after completion of his internship and was required to practice firstly, in Manitoba, and later in British Columbia. During his vacation time and on weekends, the Appellant took the opportunity to work locums with other practitioners. In 1995, the Appellant began to seek an opportunity to obtain a private practice of his own in British Columbia. He spent time in the Okanagan early in 1995, during which time he undertook a number of locum positions. By August, 1995, he had negotiated to purchase the practice of Dr. K in Mission. He first applied for associate privileges at the Hospital on August 3, 1995, on the same date that he had agreed to purchase the medical practice in Mission.

In the process of reviewing the Appellant's application for privileges, the Chief of the Medical Staff at the Hospital, received certain unfavorable references, and discussed these with the Appellant on September 12, 1995. On September 20, 1995, the Appellant met with the Chief of the Medical Staff and the Chief Executive Officer of the Hospital. As a result of that meeting, the Appellant indicated that he would withdraw his application for privileges, and did so on September 21, 1995. On March 18, 1996, the Appellant re-activated his application for privileges. His application was for both basic privileges and general practice for certain specialist and advanced practices in obstetrics. The Appellant and his counsel made submissions before the Board on June 27, 1996. The Board subsequently reconvened on July 10, 1996 and decided to deny the Appellant's application.

IV. Issues

What relevance do the rights of the individual physician have to the question of granting admitting privileges?

Counsel for the Appellant argues that in the consideration of the granting of admitting privileges, the Hospital Appeal Board has two tasks: (1) to determine the best interests of the public as consumers of hospital facilities and (2) to deal with the rights of the individual physician. This panel is cognizant of the rights of the physician as outlined in the *Medical Practitioners Act* Section 80. However that section of the Act does not define the practice of a physician within the confines of a hospital. Section 7 (1) of the *Hospital Act Regulations* provide:

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;
- (ii) the College of Dental Surgeons of British Columbia;
- (iii) the College of Midwives of British Columbia, and

(b) holds a valid permit, issued by the hospital's board, to practice in the hospital. (emphasis added)

With regard to Section 7, (1), (a) of the *Hospital Act Regulations* and the provision of a Certificate of Good Standing; this panel has heard numerous references to an investigation underway by the College of Physicians and Surgeons of British Columbia stemming from complaints received by the College of the Appellant's practice. Evidence before this panel indicates that as of April 28, 1995, the Appellant received a certificate of standing from the College indicating that the Appellant:

- has not been the subject of an investigation by the College;
- is not the subject of a disciplinary proceeding; and that
- is currently in good standing.

This is the certificate that accompanied the Appellant's application for admitting privileges on August 3, 1995; the application that he subsequently withdrew on September 21, 1995. Previously it has been indicated that the Appellant re-activated his application for privileges on March 18, 1996. This panel has received no evidence of that privilege application with accompanying documentation. There is no evidence before this panel that the Appellant was in good standing or had any indication in his College certification that he was or was not under investigation. Similarly, no evidence before this panel indicates that at the time of the hearing was there any evidence that a certificate of good standing as issued by the College, would indicate any investigation by the College. On the evidence before it, this panel can draw no conclusions as to whether the Appellant currently or at the time of the hearing, met the qualifications under the *Hospital Act*.

With regard to any argument as to whether the individual rights of a physician automatically dictate that he or she should be granted hospital privileges, this panel concurs with previous rulings on the difference between "right" and "privilege".

In *Henderson vs. Johnston* [1959] S.C.R. beginning at page number 658, the judgment delivered stated;

They claim that as members of the medical profession in good standing, they have an absolute right to attend their patients in private or semi-private rooms in the hospital and that no power is vested in the Board to limit this right. This is the substantial point of the attack on the

first bylaw. The issues in this branch of the case are therefore very narrow. They amount to no more than a bald assertion of a right and denial of the Board's power to regulate in anyway the matters in controversy for it is undisputed that, beyond this, no practitioner has been denied anything – whether right or privilege – in connection with his practice in the hospital. The claim is unsupported by authority and I am satisfied that there is no such absolute right as the one asserted. No common law or statutory origin was suggested and it cannot come from any statutory or other recognition of professional status. The right of entry into the hospital and the right to use the facilities there provided, in the exercise of the profession of these appellants, must be found in the regulations of the hospital authority for, apart from them, it has no independent existence.

Any argument that a physician should, by the fact that he or she has opened an office practice, should therefore be granted access to treat his or her patients in a hospital is not supported by this panel. The board of trustees of a hospital, or this board acting in their place, has no authority with respect to a medical practitioner opening an office practice. Any argument to support the proposition that a governing board should automatically grant privileges to physicians to treat patients in a hospital in order to assure the continuity of care to patients served by that physician, is not supported. Further to the concerns that the absence of hospital privileges "isolates" a physician from his professional colleagues and may have detrimental outcomes on the quality of patient care delivered by that physician, this panel agrees that it is preferable to have the physician actively involved in medical staff activities. It must be noted that this active interaction between physicians can be accomplished without the granting of active admitting privileges to the hospital. The Medical Staff Bylaws for Mission Memorial Hospital provide for two categories within its Medical Staff that would allow for the collegial interaction without the provision of admitting privileges; these categories being that of Honorary and Courtesy privileges.

The question of continuity of care for patients has been referred to on a number of occasions. It has never been specifically argued as to whether the appropriate "continuity of care" issue should refer exclusively to the continuation of the best or most appropriate level of care being provided to patients or whether this refers to the care giver. Certainly in the area of referral to specialist services the continuation of the care giver is severed in favour of the best or more appropriate level of care. This panel can only conclude that individuals and agencies coupled with the delivery of quality medical care to patients, must strive for the best or most appropriate care for the patient even if it requires the transfer to other care givers.

What deference should this panel place on allegations of procedural unfairness of the application review process that was applied to the Appellant's privilege application?

Counsel for the Appellant has indicated that the process that was undertaken by the Board of Trustees of Mission Memorial Hospital failed to adhere to the principles of natural justice. It was the position of the Respondent that the Hospital dealt with the Appellant's application fairly and in accordance with the procedures set out in the *Hospital Act Regulations*. Further it is submitted by the Respondent, that as proceedings before the Hospital Appeal Board are de novo, any issues of lack of due process are not determinative of the issues in this matter.

In review of Section 8(8) of the *Hospital Act Regulations*,

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

agrees with the submission of the counsel for the respondent in her submission that:

that as the proceedings for the Medical Appeal Board are in the nature of de novo proceedings, any issues of lack of due process are not determinative of the issues in this matter.

It is for these reasons that the Hospital Appeal Board dismisses any consideration of the appeal based on the procedures undertaken by the Board of Trustees of Missions Memorial Hospital in the consideration of the granting of privileges in regard to the application of the Appellant, as without substance.

Does the Appellant meet the stated criteria for membership and privileges at Mission Memorial?

Counsel for the Appellant states that "the standard which is to be applied in deciding whether admitting privileges will be granted must be clearly stated and the evidence must be evaluated against that standard".

The Mission Statement of the Medical Staff Bylaws of Mission Memorial Hospital state, "The medical staff will endeavor to provide service to their patients by demonstrating clinical and interpersonal excellence in a compassionate, cooperative, respectful manner." It further states in Article II (2.3) "to ensure that all patients admitted to the hospital or treated in an out-patient or emergency service or department of the hospital, shall receive the best possible care and that the quality of this care be regularly monitored by a Quality Improvement Program".

Counsel for the Appellant suggests that the Appellant has a commendable academic record, solid clinical skills and a history of providing quality patient care. Various references were supplied in evidence to support these statements. It is worth noting that many of these references were as a result of academic studies while in training, and that such an environment tends to be well controlled with a considerable support network in place. A more relevant demonstration of clinical skills, would more importantly consider a physician's ability to deliver quality care, under stressful conditions such as an office practice or on call in a hospital

emergency room situation. To this end, this panel is sufficiently concerned with evidence before it pertaining to incidents that occurred while the Appellant was undertaking locum services in the Okanogan.

With respect to the evidence before this panel regarding the cases relating to immunotherapy, this panel finds Dr. J to be a totally credible witness as to evidence supporting the concerns that, we understand, have led to a complaint to the College of Physicians and Surgeons. As this does raise concern as to professional ability of the Appellant in these instances, this panel shall leave any further issues regarding these cases to the College dealing with the complaints filed, as this is a issue of patient care delivered outside of a hospital and therefore outside of this panel's mandate. However, the evidence does raise concerns regarding "unsupervised" delivery of care to patients, as it did for the Hospital at first instance.

Similarly, we find the evidence presented by Ms L regarding the intubation of a patient in the emergency department of Penticton Regional Hospital to be completely credible. Further, this case does raise concerns regarding the quality of care and judgment by the Appellant, the physician involved with this patient. It is of further concern to this panel that the Appellant failed to alert appropriate specialists readily available within the hospital. As this is a case of the delivery of care within a hospital, and there was the opportunity to consult or receive additional support in the care of the patient, it does raise concerns as to the appropriateness of the Appellant receiving privileges that may place him in a similar situation.

Are there safeguards in the granting of privileges that allow for close supervision of new medical staff members?

Counsel for the Appellant quite correctly states that "appointment as a provisional member of the Medical Staff at Mission Memorial is for one year only, and each physician must re-apply every year. Renewal is not automatic". This of course is not an issue that is unique to Mission Memorial Hospital; in fact that is exactly as the majority of hospitals deal with first time appointments to medical staff, whether newly out of medical school or those that could be considered "seasoned" physicians who have practiced for many years. The fact that hospital deal with first time appointments in this manner strongly supports the guidelines produced for hospitals related to the "Granting of Privileges". Part III, section 1.4 of that document states:

Although the Hospital Act Regulations require that the procedure for new and renewal applicants be the same, certain aspects of the procedure demand specific consideration depending on whether the application is for initial or renewed hospital privileges.

The evaluation process for initial appointments places special emphasis on external data sources and information supplied by the applicant. New medical staff members are admitted to provisional membership, usually for the first year, during which time the medical staff monitors the performance carefully. The Board must

assure itself that a formal monitoring system is established and that it is being implemented.¹

This proviso is also contained within the Medical Staff Bylaws of Mission Memorial Hospital. It is the concern of this panel that the need for close monitoring of the Appellant's work within the hospital is beyond the scope of the supervision and monitoring normally given to provisional appointees.

Are there safeguards that the H.A.B. may impose on a physician and/or the hospital in respect of the granting of admitting privileges?

Counsel for the Appellant in his submission to this panel suggests:

To the extent that Mission Memorial Hospital continues to have any concerns regarding the Appellant's level of skill and knowledge, it may be appropriate to set up some form of mentorship program in which the Appellant's work is supervised directly for a period of time. This could both assist the Appellant in honing his skills, and serve to allay Mission Memorial's concerns. If Mission Memorial is unwilling or unable to initiate this mentorship on its own, Dr. L, a long established and senior member of the profession, has offered to fulfill this role.

Alternately, the Appellant has proposed a voluntary, temporary restriction to admitting privileges which further addresses the substantiated concerns raised by the Hospital. Specifically, the Appellant is "prepared to voluntarily adopt restrictions and conditions on admitting privileges to obstetrics and E.R."

The setting up of mentoring programs for physicians more appropriately belongs under the purview of a teaching facility. This panel has no intention of imposing such conditions on Mission Memorial Hospital, conditions that it feels are absolutely inappropriate. With regard to the offer from Dr. L to act in a mentorship role, this would require that Dr. L have appropriate privileges at Mission Memorial Hospital, which he does not. Secondly, whether Dr. L is involved or not, the primary responsibility for admitting privileges lies with the board of Mission Memorial Hospital and such responsibilities can not be abrogated by this board imposing safeguards through the external use of other physicians.

It is important to also note that this panel has heard evidence from the Appellant with regard to the need for hospital privileges to assure the "continuity of care" for his patients; while on the other hand he suggests that he is willing to sacrifice this continuity of care by voluntarily restricting care, that he would be able to provide to them in a hospital setting.

The evidence before this panel to date, demonstrates that the Appellant does require further training and supervision in some critical care areas. As well, it is evident that providing the Appellant with privileges at Mission Memorial Hospital

¹ Granting of Privileges, Part III, Appointment/Reappointment Process, jointly prepared by the BC Health Association, College of Physicians and Surgeons of BC, and BC Medical Association.

through a supervised mentorship or substantial restriction is not the appropriate remedy in this case.

Decision

In concluding the hearing into this appeal, it is important to note that this panel has heard evidence regarding an investigation into the Appellant's practice that is underway by the College of Physicians and Surgeons of BC. In this regard there have been submissions from both counsel as to the appropriateness or not, of adjourning the hearing pending the outcome of the investigation by the College. There also existed some confusion as to whether substantial information from the College investigation would be made available to the Hospital and indeed this panel; and, what weight, if any, would this additional information have on the outcome of the hearing. This panel, indicated at the time of final argument that it felt that there was sufficient evidence before it to render a decision in this case. It did, adjourn the application so that either counsel could apply to make further representation to the panel, if counsel felt such further representation would be necessary. While counsel have both applied for an opportunity to make further submissions, this panel is of the view that further submissions will not alter this decision or the integrity of its decision-making process. Further, after conclusion of the hearing of this appeal, this panel became aware of correspondence directed to it from a patient supporting the granting of privileges to the Appellant. This panel considers that correspondence, and the manner in which it was delivered, to be inappropriate and therefore places no weight what-so-ever in this correspondence or on any details relative to the College investigation.

This panel is sufficiently concerned that the skills and abilities that the Appellant has to offer to Mission Memorial Hospital as a member of the Medical Staff are not in keeping with the desired qualities sought by Mission Memorial Hospital. The fact that the Appellant purchased an existing office practice in which the patients were served by a physician that had privileges at the hospital; does not require this panel to automatically grant the Appellant the same. The fact that the Appellant has a large number of patients in his office practice, does not impact on our decision to deny the Appellant admitting privileges at Mission Memorial Hospital. This panel heard no evidence regarding the inability of his patients to receive hospital services when so required.

For these reasons and those identified previously, this panel denies the appeal.

Dated this 16th day of December 1997.

Gordon Armour

Gayle Raphanel

Norah Andrew