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CASE SUMMARY: IT'S ALL IN THE CONTEXT: THE CONTENT OF HOSPITAL PRIVILEGES AND ASSESSMENT OF WHAT CONSTITUTES CONSTRUCTIVE REVOCATION OF PRIVILEGES IS HIGHLY CONTEXTUAL, TO BE EXAMINED ON A CASE BY CASE BASIS

When determining the content of hospital privileges and whether they have been constructively revoked, one must consider the privileging documents, the hospital bylaws, the effect of any contractual provisions, the resources typically employed in the specific type of practice at issue, and the historical practice of the physician in the hospital under consideration.

Administrative law – Decisions reviewed – Hospital Appeal Board – Judicial review – Standard of review – Patent unreasonableness – Physicians – Hospital privileges

Provincial Health Services Authority v. Campbell, [2021] B.C.J. No. 943, 2021 BCSC 823, British Columbia Supreme Court, April 30, 2021, N.P. Kent J.

The petitioner, the Provincial Health Services Authority, is responsible for managing BC Children's Hospital (the "Hospital"). The respondent, Dr. Campbell, is a pediatric cardiothoracic surgeon who joined the Hospital's medical staff in September 2004. The Hospital is the only hospital in B.C. that performs pediatric cardiac surgeries, and Dr. Campbell is one of two surgeons in the program.

Since 2004, Dr. Campbell has been granted annual privileges entitling him to attend and treat patients in the Hospital and to use the Hospital's facilities for his practice. Dr. Campbell had also entered into several multi-year contracts with the Hospital wherein he agreed to provide clinical services primarily for pediatric patients, and the Hospital agreed to ensure there is sufficient clinical work to occupy Dr. Campbell. Those contracts allowed for either party to terminate without cause on 12 months' notice.

On March 14, 2017, the Hospital gave Dr. Campbell such notice. After that time, Dr. Campbell continued to perform surgeries at the Hospital, but the number of cases allocated to Dr. Campbell declined. After March 14, 2018, Dr. Campbell was not being allocated any new patients or operating time, was required to vacate his office at the Hospital, and no longer actively participated in the on-call rotation, rounds, or any other functions, meetings, or conferences in the Cardiac Sciences Program.

Dr. Campbell sought hearings before the Medical Advisory Council and the Hospital's Board of Management, but both refused to hear the matter on the basis that Dr. Campbell's contract was an operational management decision that did not affect his privileges. Dr. Campbell appealed that decision to the Hospital Appeal Board.

The Hospital Appeal Board found that the content of privileges and the resulting consideration of whether they have been modified or revoked is highly contextual, in considering:

a) the privileging documents;

- b) the hospital bylaws and the effect of any contractual provisions;
- c) the resources typically employed in the specific type of practice under consideration;
and
- d) the historical practice of the physician in the hospital under consideration.

The Hospital Appeal Board considered each of those factors in Dr. Campbell's case and found that Dr. Campbell could not practice his privileges for pediatric cardiac surgery in the Hospital without the Hospital allocating patients to him; that a fair and equitable allocation of patients was part of the privileges of a pediatric cardiac surgeon at the Hospital; and that the reduction of patients allocated to Dr. Campbell amounted to constructive revocation of Dr. Campbell's privileges. The Hospital Appeal Board ordered the Hospital to restore meaningful access to Dr. Campbell's privileges by providing him with fair and equitable case allocation.

The Hospital appeals that decision by way of judicial review.

In its petition, the Hospital argued the standard of review should be one of correctness, as this was a question of the Hospital Appeal Board's true jurisdiction.

The Court rejects that argument at para. 58, finding that *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 provides the Court should cease to recognize jurisdictional questions as a distinct category attracting a correctness standard of review. The Court held questions regarding the Hospital Appeal Board's jurisdiction ought to be treated like any other question of law, and be subject to the standard of patent unreasonableness prescribed by section 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"). The Court found there was nothing unreasonable or patently unreasonable about the Hospital Appeal Board's conclusions or reasons.

Regarding the remedy granted by the Hospital Appeal Board, the Hospital acknowledged the standard of review was one of patent unreasonableness pursuant to section 58(2)(a) of the ATA. The Hospital argued the remedy granted does not provide for the allowance for the advice or recommendations of the Division Head, resulting in a lack of required clinical input in the allocation decision making. The Hospital argued that is unreasonable and potentially dangerous.

The Court disagreed, finding the remedy granted does not expressly exclude the Division Head from having input into case allocation, but rather contemplates positive and supportive conduct by the Division Head in that regard. While there was an acknowledged possibility such optimism was misplaced and the two surgeons would not in fact cooperate constructively and professionally, the court found that possibility was not bound to materialize and the mere risk of those circumstances did not render the Hospital Appeal Board's decision patently unreasonable. The petition was dismissed.

This case was digested by [Mollie A. Clark](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Mollie A. Clark at mclark@harpergrey.com.