QUEEN' S BENCH FOR SASKATCHEWAN

Citation: 2014

SKQB 273

Date: 2014 08 27
Docket: Q.B.G. No. 1360 of 2012
Judicial Centre: Saskatoon

IN THE MATTER OF AN APPEAL PURSUANT TO S. 45(4)
OF *THE REGIONAL HEALTH SERVICES ACT*, S.S. 2002, c. R-8.2

BETWEEN:

SASKATOON REGIONAL HEALTH AUTHORITY

APPELLANT/RESPONDENT

- and -

DR. KIRK READY

RESPONDENT

- and -

SASKATCHEWAN MEDICAL ASSOCIATION
PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY
PRAIRIE NORTH REGIONAL HEALTH AUTHORITY

INTERVENORS

Counsel:
Evert Van Olst, Q.C. - for the Saskatoon Regional Health Authority
Michelle J.V. Ouellette, Q.C. & Elizabeth J. Ulmer - for Dr. Kirk Ready
John A. Epp - for Regina Qu' Appelle Regional Health Authority
Reynold A.J. Robertson, Q.C. & Jared D. Epp - for the Saskatchewan Medical Association
Christopher C. Boychuk, Q.C. & Sheila J. Torrance - for Prince Albert Parkland Regional Health
Authority and Prairie North Regional Health Authority

JUDGMENT
DANYLIUK J.
August 27, 2014

[1] To better organize this judgment, it has been divided into the following subsections:

Introduction

[2] The appellant, Saskatoon Regional Health Authority ("SRHA"), appeals from a decision of the Practitioners Staff Appeals Tribunal ("PAT") dated August 3, 2012 but received by SRHA August 30, 2012. This appeal centres on the PAT' s interpretation of a contract and its effects. The PAT found it had jurisdiction to hear this appeal and deal with the termination of an employment contract between Dr. Ready and SRHA. It allowed Ready' s appeal and reversed SRHA' s decision to end Ready' s employment. SRHA argues that the PAT made decisions which were incorrect and unreasonable. Dr. Ready argues the PAT decision was reasonable, and fits into the scheme created by *The Regional Health Services Act*, S.S. 2002, c. R-8.2, and the Bylaws of the SRHA. The intervenors have provided their own perspectives in an effort to assist the court.

Background Facts

Credentialing and Privileges

[3] The SRHA' s mandate, in the broadest terms, is to administer health care within a geographic region anchored by Saskatoon. *The Regional Health Services Act*, and in particular s. 27, applies.

[4] SRHA operates various health care facilities, including hospitals, within this region. Medical doctors practice within the region. If they desire to practice in SRHA facilities, those doctors must firstly obtain an appointment to SRHA' s medical staff. To obtain such an appointment they must follow the credentialing and privileging process outlined in SRHA' s Bylaws. Model bylaws were entered into through a process of negotiations, with various provincial stakeholders having a seat at the bargaining table. Section 43 of *The Regional Health Services Act* requires every health authority to make bylaws governing the practitioner staff covering, *inter alia*, the matters in issue in the within appeal. SRHA' s bylaws are consonant with the model bylaws and provide a framework for governance within this health region.

[5] Section 22 of the Bylaws creates eight separate groups within the general medical staff:

(a) associate;
(b) active;
(c) limited;
(d) assistant;
(e) visiting;
(f) temporary;
(g) resident; and

(h) training fellow.

[6] This appeal involves a pathologist. Dr. Ready was obliged to seek an appointment to SRHA's medical staff by way of application under the Bylaws. If successful his or her credentials are recognized and privileges are accorded which provide him with the right to access diagnostic facilities within SRHA, such as laboratory and radiology. This is true for any physician desirous of working within SRHA's facilities, although the precise relationship between a doctor and SRHA varies.

[7] The bylaw process for credentialing and privileging has differences amongst health regions, but generally the processes are quite similar in nature. Every health region in this province has developed its bylaws through a process of negotiation, with all interested parties at the table. The province's model bylaws are generally followed by the health regions. An accord has been reached within SRHA as to the process governing credentialing and privileging.

[8] Sections 42 to 52 of the Bylaws speak to the actual appointment process, including the work of the Credentials Committee and the Practitioner Advisory Committee. Each appointment turns on its particular facts. The Bylaws speak to the considerations for appointments and elevations in status and also set out procedures to deal with issues of a physician's performance.

[9] There are differences with the types of appointment. Section 45 of the Bylaws provides the general criteria which must be met to secure an initial appointment to any level of the SRHA's medical staff. There may also be specific criteria applicable to particular appointments. The general criteria contained in s. 45(1) to (3) are wide. Some are basic, such as obtaining licensure with Saskatchewan's College of Physicians and Surgeons. As well, the physician must demonstrate the ability to provide basic patient care; the ability to work with others collegially and professionally; the ability to relate with patients and their families; the ability to take on extra obligations; ethical character, performance and behaviour; and having obtained the appropriate insurance coverage.

[10] The department head where a doctor has been working (or wishes to work) may make recommendations as to the candidate's suitability. Irrespective of whether this actually occurs, SRHA's Credentials Committee conducts the s. 45 evaluation and makes a recommendation regarding the appointment of the candidate. The Credentials Committee deals with every application for appointment or reappointment. It is the body that makes the initial

assessment and makes a non-binding recommendation to the Practitioner Advisory Committee.

[11] The application next proceeds to the Practitioner Advisory Committee, which considers the recommendation of the Credentials Committee but also conducts an independent review of the application. It is not bound to accept the Credential Committee's recommendation. The Practitioner Advisory Committee then formulates its own recommendation to SRHA's Board, which will contain one of three things: that the application be accepted as tendered; that it be refused outright; or that it be accepted but modified in terms of the category of medical staff or privileges (s. 49). In the last case (modification) the Practitioner Advisory Committee must supply the Board with written reasons supporting its position.

[12] From there, an initial application proceeds to the Board. The Board's process is governed by ss. 50 to 52 of the Bylaws. The applicant receives 14 days' notice and a copy of the recommendation from the Practitioner Advisory Committee. A doctor/applicant may make written representations to the Board, and may appear before the Board (with or without counsel) but he or she cannot call witnesses. The Board then makes its decision to grant, refuse, or grant a modified appointment.

The Contract

[13] Separate from credentialing and privileging is the formation of a relationship between SRHA and a physician. In May 2009 SRHA and Ready entered into a contract. The most salient provisions are set out below:

(a) The contract was supplied to Dr. Ready under a cover letter dated May 29, 2009. In that letter SRHA told Dr. Ready: "The SHR Registrar's office will correspond directly with you regarding applying for membership on the SHRA Practitioner Staff and obtaining privileges."

(b) The contract was effective June 1, 2009, for a .8 position (i.e. 164.8 days of service per year, five days/week, 7.5 hours per day. Full time was 260 work days per year.

(c) Dr. Ready was to work in the division of anatomic pathology.

(d) The contract did not provide for exclusivity. Dr. Ready was free to conduct work and receive remuneration elsewhere, as long as it was outside regular hours.

(e) Dr. Ready had to hold licensure from Saskatchewan's College of Physicians and Surgeons, and also be eligible for Royal College of Canada certification in general pathology. As well, he had to maintain membership under the Bylaws and adhere to same, as well as the Rules and Regulations in force from time to time which impose obligations on medical staff.

(f) His pay was at the top level of SRHA's salary grid, plus benefits. He was to have four weeks of vacation each year.

(g) There was no set term. The contract provided that it "may be terminated by either party on three months' written notice to the other party, or immediately, without notice, for just cause". In the event of termination Dr. Ready's hospital privileges were to remain in force until the next renewal date.

[14] Dr. Ready had the qualifications called for in the contract. After one year of probation (standard) he obtained an appointment to the active medical staff. He was granted laboratory privileges. All of this was through the process set out in the Bylaws. It was expected the bulk of his work would be at St. Paul's Hospital, where the anatomy department was short-staffed. It must also be noted that of the physicians working and holding privileges within SRHA, a very small percentage have a direct employment relationship with SRHA. Traditionally within SRHA, however, pathologists have been employees.

[15] Prior to coming to Saskatoon Dr. Ready held a number of positions in the western provinces. Some were relatively senior but most were also relatively brief. In particular, there was controversy surrounding his departure from a position in the Okanagan Health Service Area (Kelowna) in 2008. He had some experience with Saskatoon insofar as he was here for a brief locum contract in 2006. He was interviewed for an anatomical pathologist position within SRHA in 2009 and was interested in same, as he had family ties in Saskatoon and had decided he wanted to come here even though he had other professional options elsewhere.

[16] During the vetting process SRHA examined his background, qualifications, credentials and compatibility, and was aware of the past issues in British Columbia. It also became aware that he instituted numerous processes to

improve quality assurance within the pathology laboratory there. This was the subject of a meeting between Dr. Ready and SRHA personnel. Ultimately senior SRHA officials recommended his hiring, even though there was recognition that he posed a risk of publicly disclosing any issues he perceived within SRHA. The official recommending Ready's appointment included the senior medical officer, SRHA's CEO, and the President and CEO of St. Paul's Hospital.

[17] His 2006 locum position was governed by a written contract. That contract also contained a termination clause which indicated expressly that SRHA was not obligated to comply with the Bylaws or any hearing affording him natural justice. In that contract Dr. Ready expressly acknowledged this and waived such rights. The 2009 contract did not contain the same language.

[18] Dr. Ready signed and entered into the contract. In the tribunal below he admitted that he was well aware of the contractual terms and that the termination clause was not new to him, as previous contracts had similar wording. In the seven months prior to the contact's start date he had not held a full-time position as a pathologist. As well, he was not keen to work as an administrator.

[19] The terms of the 2009 contract were distinct from the 2006 locum contract. The 2009 document lacked any express provisions removing the parties from the operations of the Bylaws or the requirement to afford Dr. Ready with natural justice. The intent of those two documents is obviously distinct.

Saskatoon Employment

[20] While in Saskatoon Dr. Ready was not keen to be involved with administration. He just wanted to work as a pathologist. However, by fall 2009 he accepted the directorship of residency training. Within months he resigned, with some furor and public involvement.

[21] More or less contemporaneously he became concerned with what he saw as a shortage of staff pathologists with no proper recruitment to alleviate same, and the burgeoning backlog of test results from pathology which meant patients' diagnoses were delayed. He was disgruntled or concerned with a number of things. Pathologists who were leaving SRHA were not being replaced, exacerbating the existing problems. Dr. Ready became concerned that the residency training program in general pathology was in danger of failure.

[22] One of the *sequelae* of this disenchantment was Dr. Ready's development of a different model of delivery of pathology services within SRHA, and perhaps even beyond. This would be through his corporation, Prairie

Pathology Consultants Inc., ("PPCI"). The pathologists presently working for SRHA would instead work for PPCI, which would deliver pathology services to SRHA. To his credit Dr. Ready did not attempt to conceal this plan or this corporation from SRHA. However, in the spring of 2011 SRHA indicated it had no interest in his delivery model for pathology services.

[23] By this same time Dr. Ready was unhappy with his role in SRHA, for numerous reasons. When pressed at the hearing he agreed he "was not a happy camper" . He was upset and concerned that the legal qualifications for the Medical Director of the Department of Laboratory Medicine and Pathology were not being adhered to, in that he believed a medical doctor had to fill that position under the applicable legislation and regulations. He raised this with SRHA officials and with the provincial health department but felt their response was inadequate, so he went to the media about his concerns. However, by the time he approached the media SRHA had already indicated it was looking for a different director and in fact Ready had been approached to apply. His response was that his company, PPCI, could fulfil that role but he was rebuffed. It was after this encounter that he went to the media. PPCI would afford him a change of work circumstances while allowing him to stay in Saskatoon. SRHA remained disinterested in his concept of pathology service delivery.

Termination of the Contract

[24] SRHA terminated the contract with Dr. Ready on May 30, 2011. Cause was not relied upon; however, SRHA simply paid three months' salary in lieu of the three months' notice called for by the contract. SRHA relied entirely on this provision of the written contract. It took the position that it was not required to comply with the processes set out in the Bylaws in these circumstances. Those processes would have required SRHA to give reasons for the termination of Dr. Ready' s contract, and Dr. Ready would have an opportunity to respond to the stated reasons. No cause was asserted. The issue of Ready' s communication with the media and the public was not addressed, and SRHA took the view it was not required to address same.

[25] This termination was at a meeting where senior SRHA administration personnel, including legal counsel, attended. He was verbally advised of the situation and was given a letter to like effect. He was also given a form to sign releasing SRHA from liability associated with his employment.

[26] All of this, from SRHA indicating it was uninterested in Dr. Ready' s delivery model through PPCI, to the media publishing articles on the

unqualified medical director, to Dr. Ready's termination, occurred between May 12 and 30, 2011.

[27] Dr. Ready approached the SRHA Board regarding his termination. The Board responded by letter in July 2011, indicating it would not intervene in the matter. The Board Chair indicated in his letter that the termination of Dr. Ready's contract was "an administrative and employment decision taken by the appropriate individuals" and that it "was not a matter for the Board of SRHA. It was not a matter that involved his privileges or appointment to the practitioner staff, but rather was the result of the employer's exercise of a contractual term of his employment that he agreed to."

Appeals

[28] While the Board is the "final" decision-maker, that decision is subject to two levels of appeal. The first is to the Practitioner Staff Appeals Tribunal of SRHA, which has been established pursuant to s. 45 of *The Regional Health Services Act*. The PAT is allowed to determine its own processes, and has some of the powers of a commission of inquiry under *The Public Inquiries Act, 2013*, S.S. 2013, c. P-38.01.

[29] A PAT decision may be appealed to this court on a question of law or jurisdiction within 30 days of that decision (s. 45(4)). In the case at bar, both appeals have been brought pursuant to that legislative provision.

Procedural History and Decision Appealed From

[30] Through counsel, Dr. Ready attempted to have the SRHA Board address the issue of what he termed a lack of due process. The Board responded in July 2011, demurring and indicating that the employment contract, rather than the Bylaws, governed.

[31] Ready appealed to the PAT pursuant to s. 8(1) of *The Practitioner Staff Appeals Regulations*, R.R.S. c. R-8.2 Reg. 5, (the "Regulations") and s. 45(1) of *The Regional Health Services Act*. The appeal was from the Board decision "to confirm or otherwise acquiesce" in the administration's decision to terminate SRHA's contract with Ready.

[32] The grounds of Ready's PAT appeal may be summarized as follows:

- By terminating the contract SRHA indirectly revoked Ready's privileges and terminated his appointment to the medical staff without complying with the Bylaws.

- SRHA acted arbitrarily and without jurisdiction by terminating Ready's appointment and privileges without extending to him the due process set out in the Bylaws.

- SRHA's decision was solely based on Ready's actions as a "whistleblower", which embarrassed SRHA. Such a decision cannot be made without invoking the Bylaws.

- A decision to terminate cannot be delegated and must be exercised by the Board.

- The contract cannot be considered separately from the legislation, regulations and the Bylaws. Procedural fairness was required and was totally denied.

- SRHA attempted to do indirectly what it could not do directly. This was an abuse of process and was contrary to its public duty regarding provision of health services to the public.

[33] Dr. Ready sought an order setting aside the Board's decision to terminate the employment contract, and reinstatement effective May 30, 2011.

[34] SRHA took the position that the PAT had no jurisdiction to entertain an appeal, as the contract governed Ready's employment relationship with SRHA, not the Bylaws. It was not, therefore, a matter of appointment or privileging or reappointment, thus the PAT had no ability to hear the appeal under s. 45 of *The Regional Health Services Act*. SRHA gave notice that it intended to make a preliminary motion dealing with jurisdiction.

[35] The PAT hearing was held in Saskatoon December 15, 16 and 21, 2011. A decision was rendered in August by two of three panel members, as in the interim the chair was appointed as a judge of the Provincial Court of Saskatchewan. The PAT recognized the jurisdictional issue but decided it had clear jurisdiction to hear the appeal, finding that the effect of terminating the contract was to revoke Dr. Ready's privileges. It allowed his appeal. During the hearing Dr. Ready had withdrawn his request for reinstatement, and the PAT simply quashed SRHA's decision to terminate the contract with him (para. 3).

[36] The PAT noted the differences in language between the 2006 locum contract and the 2009 employment contract. The panel relied on s. 45(1) of the *Act* to determine the question of jurisdiction. There is a finding (para. 30) that the contract termination effectively (if not expressly) terminated Dr. Ready' s privileges as well, as anatomical pathologists are not physicians who can practice outside of employment with SRHA. The PAT found s. 45(1)(a) or (c) conferred jurisdiction on it to hear the within appeal (para. 31).

[37] As to the merits of the appeal, the focus was on the manner of dismissal failing to provide Dr. Ready with any measure of procedural fairness. The parties differed over whether this was permissible, with SRHA arguing that the relationship was governed by the contract' s terms, which the doctor entered into freely.

[38] The panel considered *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190. It agreed with the ruling in that case that there is no general duty of fairness to those employees in public positions, instead focussing on the nature of the employment relationship and the terms of the contract which created same. However the PAT went on to find that just because there exists a governing employment contract, one cannot ignore any applicable statutory obligations, referring to para. 106 of *Dunsmuir* which said, *inter alia*: "A public authority cannot contract out of its statutory duties" .

[39] The PAT found that the Bylaws applied irrespective of the terms of the contract. SRHA was legally obligated to follow the Bylaws and its reliance on the termination clause of the contract was in error. It found the Bylaws were drafted in the public interest and to allow SRHA to skirt same simply by entering into a separate contract would potentially undermine the purpose and efficacy of the entire system.

Issues

[40] The issues on this appeal are:

1. What is the appropriate standard of review in this case?

2. Is the appeal moot?

3. Did the PAT err in law in finding it had jurisdiction to entertain the appeal?

4. Did the PAT err in law in determining that the termination's collateral effect on Dr. Ready's privileges required SRHA to afford him procedural fairness according to the Bylaws?

Standard of Review

1. What is the appropriate standard of review in this case?

[41] The parties differ in their views on the standard of review to apply in this case.

[42] SRHA argues that the initial question is a true issue of jurisdiction, attracting the standard of correctness. The balance of the appeal on the merits invokes the reasonableness standard. Dr. Ready argues the entire appeal is governed by reasonableness as the jurisdictional issue is not a "true" question of jurisdiction.

[43] I am of the view that SRHA's position is correct. This is a true question of jurisdiction. The issue is whether the termination of the employment contract directly or indirectly affected Dr. Ready's privileges. The notice of termination indicated on its face that there was no such direct effect and that Dr. Ready's privileges would exist for the remaining term of his contract. Thus the issue is whether there was anything falling within the ambit of s. 45 of *The Regional Health Services Act* – if not, the PAT had no jurisdiction to hear the appeal.

[44] The PAT's jurisdiction to hear any appeal is derived from s. 45 (1) of that *Act*:

> 45(1) A person who is aggrieved by a decision of a regional health authority or an affiliate made in relation to the following matters may, in accordance with the regulations, appeal the decision to a tribunal established by the regulations:
>
> (a) the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person;
>
> (b) the disciplining of the person as a member of the practitioner staff;
>
> (c) the granting of privileges to the person as a member of the practitioner staff, or the amending, suspending or revoking of privileges granted to the person.

The PAT determined it had jurisdiction under either (a) or (c).

[45] The applicable foundational decision is *Dunsmuir v. New Brunswick*, *supra*. Under the current doctrine of administrative law applicable in Canada, questions of true jurisdiction before an administrative tribunal constitute questions of law, invoking the standard of review of correctness. The actual decision of the tribunal is to be reviewed on the standard of reasonableness, and some measure of deference is generally owed to the tribunal.

[46] Here, the PAT needed to be correct on the question of jurisdiction or *vires*. Its preliminary decision, in my view, falls within the ambit contemplated by para. 59 of *Dunsmuir*:

> [59] Administrative bodies must also be correct in their determination of true questions of jurisdiction or *vires*. (. . .) "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly (. . .).
>
> [Emphasis added].

[47] The Saskatchewan Court of Appeal has issued decisions pertaining to the applicable standards to appeals taken from PAT decisions. One is *Prairie North Regional Health Authority v. Kutzner*, 2010 SKCA 132 (CanLII), 325 D.L.R. (4th) 401. In that case the PAT made a decision involving physicians' appeals from decisions which affected the amount of operating room time they were allotted. The regional health authority had reduced that time for two doctors. The doctors appealed that decision to the PAT, and the health authority argued the PAT had no jurisdiction to entertain the appeal as the matters in issue were not true issues of hospital privileges. The PAT ruled it had jurisdiction, and was upheld on an appeal to this court. The Court of Appeal allowed the appeal and remitted the matter to the PAT for a decision in light of the reasons for judgment.

[48] While Justice Richards (as he then was) acknowledged that appeals limited to questions of law and jurisdiction will very often point to use of the correctness standard, in that case other factors militating in favour of reasonableness outweighed the s. 45(4) consideration. See paras. 30 to 35. He looked at whether the "root question" of the appeal was one falling within the area of the tribunal's specialized expertise as set out in its enabling statute.

[49] This case is distinct from *Kutzner*. In *Kutzner* it could not be argued that operating room allotment was not directly within a physician's privileges. Here, it is not as clear. SRHA's argument that the relationship was governed solely by the contract, if successful, takes the quarrel out of s. 45(1).

[50] This case is closer to *Regina Qu'Appelle Regional Health Authority v. Dewar*, 2013 SKCA 3 (CanLII), 405 Sask.R. 248. There, it was held that a preliminary issue raised a true question of jurisdiction and therefore correctness applied to that issue, with reasonableness applying to the balance of the matter. The court noted that *Kutzner* does not stand for the proposition that every decision of the PAT is subject to the standard of reasonableness. While Justice Lane dissented, he and Justice Richards (writing for the majority) were of one mind on the issue of standard of review. Both agreed that the standard was correctness. This case was different from *Kutzner* in that in *Dewar*, the preliminary issue confronting the PAT was whether it even had the authority to hear the appeal. In *Kutzner* it was clear the subject-matter fell within s. 45(1).

[51] While I am being cautious in not unthinkingly branding this particular preliminary issue as one of jurisdiction, I believe it is such. The PAT was obliged to address this issue independently prior to embarking upon a consideration of the merits of the appeal. From its decision, it appears the PAT did precisely that. It deals with the jurisdictional issue in a threshold manner at paras. 29 to 31, then commences with the main appeal at para. 32. The decision on jurisdiction is discretely packaged within the PAT ruling, and appropriately so.

[52] Here, the root question driving the issue of whether privileges are affected is an issue of true jurisdiction. This is similar to *Dewar* (see paras. 23 to 25) where the jurisdictional debate had to be resolved as a "free-standing issue".

[53] It is therefore my finding that the issue of jurisdiction is a true issue of *vires* and the correctness standard applies. The balance of the appeal falls within the specialized mandate of the PAT and reasonableness applies.

Analysis

2. Is the appeal moot?

[54] Neither party nor any intervenor raised mootness, but a consideration of this doctrine arose on my own motion in my deliberations as a result of Dr. Ready's request during the PAT hearing that reinstatement be taken off the table as a remedy. That being so, was the matter rendered moot? If he is not going to

return to SRHA' s workplace, is there any point in deciding this issue in an abstract sense?

[55] This issue involves a consideration of *Borowski v. Canada (Attorney General)*,1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. Sopinka J. stated at p. 353:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> [Emphasis added]

[56] Is there a present live controversy between these parties? I think there likely is. While Dr. Ready' s livelihood is not dependent on a return to work within SRHA, both sides continue to need a resolution to this question. The interventions in this litigation are confirmative of this point. Dr. Ready continues to want his name cleared. SRHA needs to know how to structure its relationships with physicians wishing to practice within its boundaries, as do the intervening health authorities. I do not believe the matter to be moot.

3. Did the PAT err in law in finding it had jurisdiction to entertain the appeal?

[57] In his appeal to the PAT Dr. Ready claimed that jurisdiction could be found in s. 8(1) of the*Regulations*. That provision states that an appeal lies from a Board decision "with respect to a matter set out in subsection 45(1)" . Section 45(1) has three components. It is not in dispute that s. 45(1)(b) is not in issue herein. The PAT found it had jurisdiction

through the application of either s. 45(1)(a) or (c). Subsection (a) deals with a physician' s appointment, reappointment, suspension or termination of appointment to the practitioner staff. Subsection (c) deals with the granting, amending, suspending or revoking of privileges of a physician.

[58] I find the PAT to have erred in concluding it had jurisdiction to entertain the appeal.

[59] As stated, I am reviewing the PAT' s decision on jurisdiction on the standard of correctness.

[60] In*Dewar, supra*, Justice Richards wrote for the majority and at para. 25 said:

> 25 In this case, the point in issue was whether the Tribunal had the authority to entertain Dr. Dewar' s appeal. The Tribunal had to address that issue as a free-standing point before turning to the merits of Dr. Dewar' s arguments. It would seem that, if the "true question of jurisdiction" concept retains any meaning, it is engaged here. ...

The same is true here. The PAT needed to determine whether
d the authority to embark upon an inquiry on the merits prior to
hing else. The PAT did not have *Dewar* in front of it when it made
n, but it strikes me that *Dunsmuir* was already clear on this point
e PAT' s decision was threshold in nature.

Unlike*Dewar*, in this matter it is not self-evident that s. 45(1)
. There was an employment agreement separate from the regime
y the Bylaws. It is important to note that the Bylaw process covers
ng and privileging even where there is no contract. The parties
se the mechanism of a contract to govern their relationship. The
and appointment process applied by virtue of Dr. Ready' s status
cian, but they did not determine the nature of his employment
e parties at all times conducted themselves in accordance with the
nt contract, in terms of hours of work, pay, and duties. Dr. Ready
y ignore that contract when it suits him.

[63] The fact that the contract references (somewhat indirectly) the process set out in the Bylaws does not mean the contract is subordinate to same. Many professions or trades have provisions whereby an employee must hold a certain standing, and obtain and maintain same through his or her

professional organization. A journeyman plumber may need his or her interprovincial ticket. A lawyer needs academic qualifications and licensure through the governing law society. These facts do not, through some professional doctrine of transubstantiation, convert an employee bound by a contract into something else, nor are the employer's duties heightened.

[64] Dr. Ready argues that SRHA's decision to end the employment contract was a decision "in relation to" one of the enumerated matters in s. 45(1). This ignores the fact that the termination letter specifically kept Dr. Ready's hospital privileges alive. While he argues that was without meaning in terms of his ability to practice, SRHA made no decision to terminate or suspend his privileges when deciding to terminate the employment contract. Dr. Ready's argument also ignores his own plans for his corporation.

[65] While Dr. Ready places reliance on Kutzner, it is *Dewar* that is of actual assistance and application here. Dr. Ready's privileges were kept alive. He could have sought some form of alternate employment. He could have proceeded with his planned corporate venture, though that may have been ill-fated given SRHA's disinterest. Nevertheless, the effect of termination of the employment contract did not, in my view, have the corresponding effect of termination or suspension of Dr. Ready's hospital privileges. The PAT is incorrect where, at para. 30, it states that there was a*de facto* revocation of privileges. It makes this finding in the face of its express finding in the same paragraph that "Dr. Ready's privileges were not suspended with the termination" .The PAT states that Dr. Ready would not have access to the laboratories and facilities of SRHA. This ignores SRHA's express statement that his privileges remained in place, and in my view is inconsistent with the totality of the evidence. His privileges expressly included such access.

[66] I therefore determine that the PAT erred in assuming jurisdiction when it had none. SRHA's appeal must succeed on that basis.

[67] In the event this is in error, I will consider the last issue.

4. Did the PAT err in law in determining that the termination's collateral effect on Dr. Ready's privileges required SRHA to afford him procedural fairness according to the Bylaws?

[68] This aspect of the within appeal is governed by the reasonableness standard. In other words, does the PAT's decision on the "main appeal" fall within a range of possible, acceptable decisions defensible in terms of the facts and the law?

[69] I believe it does not.

[70] Amongst Dr. Ready's complaints, the PAT considered (para. 32) that he was given no notice of any complaint against him, no opportunity to appear or make submissions in response, and no reasons for the termination of the relationship. All of this ignores that Dr. Ready freely entered into the employment contract which had a three-month "ripcord" clause. Either party could terminate the contract on three months' notice, with no cause, reason or justification required. It is the employment world's equivalent of a no-fault divorce. Dr. Ready admitted at the hearing that he freely entered into the contract. It appears plain and obvious that the mutual intention of the parties when entering into this contract was to give efficacy to a clause that easily terminated the employment relationship. Dr. Ready now seeks to cloak that clause in all the procedural safeguards enshrined in the Bylaws, as it is now to his advantage. But the time for doing so is past. Had he wished to do so, that terminology ought to have been negotiated into the contract. Dr. Ready now wishes to alter the no-fault divorce terminology of his employment contract so as to oblige his employer to assert and prove fault -based grounds. That reasoning runs directly contrary to the heart of the bargain reached by the parties.

[71] Parties are free to enter into contracts. The cases are legion that state courts will enforce bargains, even improvident ones. Having entered into this bargain of his own free will, Dr. Ready cannot now seek redress by way of re-writing the terms of his employment after the fact.

[72] The PAT's decision is not justifiable. While the PAT did not have *Dewar* in front of it, much in that case is of assistance herein. In particular, at para. 48 Justice Richards J.A. concludes that the PAT's decision in that case was unreasonable in terms of its interpretation of the agreement in issue therein. That decision suggests that agreements in this context ought to be interpreted according to their own terms.

[73] Dr. Ready's position is rooted in old law, of questionable application in light of *Dunsmuir*and other cases. The PAT acknowledged (para. 34) that under *Dunsmuir* the mere fact an employee is a public

employee does not entitle him or her to guaranteed procedural fairness or any other public law remedies. The PAT acknowledged that a public employee governed by an employment contract will be dealt with according to the terms of that contract, as opposed to general principles and remedies of public law. But the PAT went on to find that case held that in the case of public employees, disputes should be resolved according to the contract' s terms and the applicable statutes and regulations, without regard for whether the employee is a public office holder.

[74] In doing so the PAT made an unreasonable interpretation of the current state of the law, one that is not justifiable. The PAT placed emphasis on para. 113 of*Dunsmuir* and the fact that statutes and regulations were referenced. While that is true, that passage uses the qualifier "applicable" in referencing statutes and regulations. The PAT assumes that s. 45(1) is applicable rather than conducting a principled analysis of whether it actually was. As well, the balance of para. 113 seems to have been ignored:

> ... A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies. [Emphasis added].

[75] The PAT also failed to reference or consider further amplification from *Dunsmuir*, as follows:

> 82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.
>
> ...
>
> 102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.
>
> 103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any

> differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. (...) In *Wells*, [Wells v. Newfoundland, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199] Major J. noted that public employment had all of the features of a contractual relationship:
>
> > A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]
>
> If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties ...

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair per se. An employer' s right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (...) It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing (...) But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

...

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority

decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. ...

[Emphasis added throughout]

[76] It is readily apparent from the PAT's decision that the tribunal continued to view this matter through a public law lens. While paying some lip service to giving effect to the contract's terms, it failed to do so. This renders the decision unjustifiable, hence unreasonable.

[77] The parties spent considerable effort on arguing whether certain cases were "dead law", notably *Knight v. Indian Head School Division No. 19,* 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, [1990] 3 W.W.R. 289, and *Rosen v. Saskatoon District Health Board*, 2001 SKCA 83 (CanLII), [2001] 10 W.W.R. 19. With respect, that determination was neither central nor necessary to the PAT reaching a decision, particularly a reasonable decision. Nor is it a requirement for me to pronounce on that matter. The applicability of *Knight* was reduced or limited in *Dunsmuir*. *Dewar* is of similar effect. The lack of reasonableness in the PAT's decision flows from a failure to properly and reasonably interpret and apply *Dunsmuir*and the cases following.

[78] The PAT's imposition of public law duties concerning one bundle of rights existing between the parties onto another bundle of rights was not justifiable. This contract was the very thing the Supreme Court must have been contemplating when *Dunsmuir* was before it. In this case the parties not only specifically addressed the prospect of termination of the employment relationship, they addressed the terms upon which either could end it. The PAT ought to have assumed that matters of procedural fairness were considered when the contract was entered into.

[79] The PAT decision was further rendered unreasonable by its finding that SRHA was not legally allowed to contract out of the Bylaws. That assumption is not disputed. But what SRHA did was not contract out of the Bylaws; rather, it entered into a contractual employment relationship which was parallel to the Bylaws. The PAT conflated the concept and process

of credentialing and privileging with that of an employment relationship. Such is not the case. From the evidence it is clear that many, many physicians have privileges but have no employment relationship with SRHA. They conduct independent practices. Privileges are a prerequisite to accessing SRHA's facilities. Privileges span an array of relationships between SRHA on the one hand and physicians on the other. At paras. 41 and 42 the PAT does exactly what *Dunsmuir*says one should no longer do: automatically import public law duties into employment contracts. This, too, is an unreasonable aspect of the PAT's decision.

Conclusion

[80] I would be remiss if I did not thank all counsel for their assistance in presenting comprehensive written materials and excellent oral advocacy.

[81] I find the PAT erred in concluding that it had jurisdiction to hear this appeal, and breached the standard of correctness in reaching this decision. Its decision must be quashed.

[82] In the event that this is incorrect and the PAT had jurisdiction, I find the PAT's decision breached the reasonableness standard. The decision did not meet all the criteria of justification, transparency, and intelligibility. It did not fall into a range of possible, acceptable decisions defensible in terms of the facts and the law. This, too, leads to the remedy of quashing the decision.

[83] Accordingly I make the following order:

1. The appeal of SRHA is allowed;

2. The decision of the Practitioner Staff Appeals Tribunal is quashed.

3. The parties have leave to speak to costs. Counsel may arrange a date for same through the local registrar.

_____ J.

R.W. DANYLIUK
