RE: THE MATTER OF AN APPEAL PURSUANT TO
S. 45(1) OF THE REGIONAL HEALTH SERVICES ACT AND S. 8(1) OF
THE PRACTITIONER STAFF APPEALS REGULATIONS WITH RESPECT TO
THE DENIAL OF THE APPELLANT'S APPLICATION FOR PRIVILEGES
BEFORE THE BOARD OF THE SASKATOON REGIONAL HEALTH AUTHORITY

BETWEEN:

DR. J. G. van der MERWE,

APPELLANT

AND:

REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY,

RESPONDENT

DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL

David Thera appeared and acted on behalf of the Appellant

Brenda Hildebrandt, Q.C. appeared and acted on behalf of the Respondent

A. INTRODUCTION

1. This is an appeal by Dr. J. G. van der Merwe, pursuant to Section 45(1) of The Regional Health Services Act ("the Act") of a decision of the Regina Qu'Appelle Regional Health Authority (hereinafter sometimes referred to as "the Authority"), dated April 29, 2010, whereby the Board of the Authority, although restoring Dr. van der Merwe's privileges (which had been suspended by one of the senior medical officers of the Authority on April 12, 2010), did so subject to the following terms and conditions:

> "(i) Dr. van der Merwe present himself for random blood and urine screening immediately upon the demand of the SMOs and that he present himself at the place designated by the SMOs for such screening.
>
> (ii) Dr. van der Merwe discontinue the use of his high dose of Fentanyl technique and only administer narcotics in accordance with the guidelines and practices of the Region's Department of Anesthesiology.
>
> (iii) Dr. van der Merwe will not take any on-call/emergent cases unless authorized by the SMOs.
>
> (iv) He continue his participation in the Physician Support Program offered by the SMA;
>
> (v) He comply with any directions or orders of the SMOs with respect to the monitoring of administration of narcotics including accounting for any "waste" narcotics."

2. Specifically, the Notice of Appeal dated May 21, 2010 stipulates that Dr. van der Merwe appeals the decision of the Authority with respect to the following:

> "a. Confirming, or in the alternative failing to overturn the immediate suspension of the Appellant's privileges which was imposed by the Senior Medical Officer on April 12, 2010;
>
> b. Imposing conditions upon Dr. van der Merwe's restoral of privileges, or in the alternative, the nature of those conditions."

3. The Notice of Appeal also sets out the grounds of appeal:

"a. There was no evidence or insufficient evidence before the Senior Medical Officer or the Board of a reasonable likelihood of harm or injury or that immediate action had to be taken;

b. The Senior Medical Officer failed to consider or implement alternate measures which would have addressed their concerns;

c. The Senior Medical Officer failed to investigate their concerns adequately and failed to give the Appellant an adequate opportunity to respond before issuing the suspension;

d. The conditions imposed upon the Appellant by the Board went beyond what was reasonably necessary or appropriate in the circumstances."

4. Finally, the Notice of Appeal requests the following relief:

"a. An order quashing the decision of the Board and quashing the immediate suspension imposed by the Senior Medical Officer;

b. In addition or in the alternative, an order quashing or varying the conditions imposed in the Board's decision;

c. Such further and other relief as counsel may request and this Honourable Tribunal may allow."

B. JURISDICTION OF THE TRIBUNAL AND THE NATURE OF THE APPEAL

5. The jurisdiction of this tribunal is derived, in part, from Section 45(1) of the Act which provides:

> "**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."

6. There were no objections by either party to this appeal as to the jurisdiction of the Tribunal to hear this matter.

7. Pursuant to Section 64 of the Act, the Practitioner Staff Appeals Regulations ("the Regulations") were enacted which provide, inter alia:

> "**8**(1) A practitioner who is aggrieved by a decision of a board with respect to a matter set out in subsection 45(1) of the Act may appeal that decision to the tribunal by serving a notice of appeal on the tribunal and a copy of the notice of appeal on the respondent within 30 days after the day on which the practitioner is served with a copy of the decision."
>
> .....
>
> "**11**(1) An appeal to the tribunal shall be conducted as a hearing *de novo*.
>
> (2) At a hearing, the appellant and the respondent have the right to appear before the tribunal and may, at their own expense, be represented by counsel."
>
> .....
>
> "**12**(1) At a hearing, the tribunal may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence."

8. In a previous decision before this tribunal (Dr. Charles Smith and the Saskatoon Regional Health Authority, November 2006), it was concluded that the nature of the appeal before it pursuant to these Regulations involved deciding the matter "afresh" on the evidence presented to it at the appeal hearing; that is, the Tribunal's role was "to make a determination of whether the Board's decision was right or wrong based upon the evidence presented" at the appeal hearing.

C. EVIDENCE BEFORE THE TRIBUNAL

9. At the appeal hearing, both counsel for Dr. van der Merwe and the Authority submitted the following documentary evidence to be considered by the tribunal:

(1) Letter of Suspension dated April 12, 2010 from Dr. J. Dobson to Dr. van der Merwe.

(2) Letter dated April 20, 2010 from Dr. J. Dobson to Dr. van der Merwe advising him that the Authority's Board would review the said suspension and of his right to make representations to the Board.

(3) A document entitled Report and Recommendation of Senior Medical Officers regarding the Immediate Suspension of Dr. J. G. van der Merwe dated April

22, 2010, which was presented to the Board of the Regina Qu'Appelle Regional Health Authority at or before the hearing which occurred on April 26, 2010.

(4) Decision of the Board of the Regina Qu'Appelle Health Region dated April 29, 2010.

(5) E-mail from Dr. van der Merwe to Dr. Giesinger dated April 11, 2010.

(6) Undated letter from Ms. Brenda Senger of the Saskatchewan Medical Association to Dr. van der Merwe.

After the appeal hearing of December 13, 2010, counsel for Dr. van der Merwe requested that the appeal be "reopened" to allow him to place before the Tribunal an additional document and to make submissions with respect to the same. The Tribunal heard submissions from both counsel on February 3, 2011, on the issue of whether it should permit the document to be submitted and concluded it would do so based upon the following:

(1) The document in question was not in the possession of Mr. Thera at the time of the appeal hearing, but was in the possession of the Authority.

(2) Mr. Thera's contention that the document was relevant and may have an influence on the Tribunal in its consideration of the evidence in this appeal.

(3) The concession by counsel for the Authority that there was no prejudice to the Authority in permitting the reopening of the appeal for this purpose, provided that she would be permitted to make further submissions to the Tribunal regarding this document.

Accordingly, the additional documentary evidence was submitted to be considered by the Tribunal:

- E-mail from Dr. Brownbridge to Dr. Giesinger dated March 22, 2010.

Further submissions were also made by both counsel with respect to this additional document on February 11, 2011.

In addition to the above noted documents, counsel for Dr. van der Merwe provided written submissions on behalf of his client together with a number of additional documents attached thereto. Counsel for the Authority also provided written submissions and both counsel

provided supplemental written submissions. There was no viva voce evidence presented by either party.

D. EVIDENCE/FACTS

10. Events leading up to and including the decision made by the Board of the Regina Qu'Appelle Regional Health Authority are not, for the most part, in dispute and are (together with the relevant provisions of the Regina Qu'Appelle Regional Health Authority Practitioner Staff Bylaws) as follows.

11. Dr. van der Merwe is a member of the Active Medical Staff in the Department of Anesthesiology at the Regina Qu'Appelle Regional Health Authority.

12. In the latter part of February 2010 a concern regarding the dosage of Fentanyl administered by Dr. van der Merwe to a particular patient during a tracheostomy procedure was drawn to the attention of Dr. Carolyn Giesinger, Head of the Department of Anesthesiology. Dr. Giesinger, in turn, drew the matter to the attention of Dr. C. Vuksic, a Senior Medical Officer of the Authority.

13. Dr. Giesinger also conducted a review of several other recent tracheostomy cases in which Dr. van der Merwe had been the anesthesiologist.

14. A meeting between Dr. Giesinger, Dr. Vuksic and Dr. van der Merwe was held on March 2, 2010 at which time concerns were drawn to the attention of Dr. van der Merwe. These concerns were described in a letter dated March 2, 2010 addressed to Dr. van der Merwe from Dr. Giesinger:

> "As discussed in our meeting today, a concern was brought to my attention regarding the dosage of Fentanyl in a recent tracheostomy case (Patient No. 1037432, February 15, 2010). As the nature of the concern raises possibilities regarding compromised patient safety, in light of the high dosage for this type of procedure, and/or physician narcotic use, other similar situations require examination.
>
> From a brief review, it appears that there is a pattern in your practice of high dosages of Fentanyl in ICU patients undergoing tracheostomy procedures. Further, the general trend is one of increasingly higher dosages. For example, I note the following cases:

November 3, 2009:	Patient No. 1183990, 1500 micrograms Fentanyl
November 15, 2009:	Patient No. 0920765, 2000 micrograms Fentanyl
December 15, 2009:	Patient No. 0793585, 2485 micrograms Fentanyl
December 24, 2009:	Patient No. 1190462, 2250 micrograms Fentanyl
February 15, 2010:	Patient No. 1037432, 3750 micrograms Fentanyl

As you can appreciate, the Region has an obligation to look into such matters. In light of this, and in keeping with the Region's practice, we are notifying you of the concern in accordance with section 75(3) of the Practitioner Staff Bylaws. Given the serious nature of this matter, we felt it important to meet with you initially. However, we are also requesting that you review the health records in question, as well as your Fentanyl prescribing practice, and provide a written response. Your input is of assistance to us in considering this matter.

Please provide your written response, addressed to my attention, to the Medical Administration Office noted below, by March 8, 2010."

15. From notes of the meeting of March 2, 2010, Drs. Vuksic and Giesinger raised concerns that what they perceived as high levels of Fentanyl used by Dr. van der Merwe on the five patients described in the letter:

- was not supported by the literature
- may be putting patients at risk of harm
- may indicate a possibility that not all of the Fentanyl was being used for the patients and may have been diverted by Dr. van der Merwe for his own use

16. From those same notes of the meeting, Dr. van der Merwe:

- took the position that the literature did support his use of Fentanyl as used in these cases and that he would obtain literature to support his position in that regard
- questioned whether any harm had come to any of the patients
- denied narcotic use on his part and offered to take a blood test for the detection of narcotics

17. Dr. van der Merwe provided a written response to the letter of March 2, 2010 in a letter dated March 12, 2010 in which:

- he maintained that his Fentanyl prescribing practice was sound
- denied that there was any trend of increasing dosages of Fentanyl in the five cases brought to his attention; dosage is determined by what is appropriate in any individual case.

- agreed to review any literature or guidelines recommended by Dr. Giesinger and also agreed to follow any recommendations made by the Department.

18. In a Report dated April 22, 2010, signed by the Senior Medical Officers of the Authority, Drs. Vuksic and Dobson, and presented to the Board at the Review Hearing on April 26, 2010, it was noted:

> "As Dr. van der Merwe, shortly following the March 2, 2010 meeting, had previously planned a reduced workload and no participation in call coverage in order to have additional time to prepare for his upcoming Royal College examinations, immediate action by way of suspension at that time did not appear necessary".

19. Dr. Brownbridge, an anesthesiologist and intensivist with the Saskatoon Health Authority, was retained to review the five tracheostomy cases. In reply to an inquiry from Dr. Giesinger about Dr. van der Merwe's response to the Authority's letter of March 2, 2010, Dr. Brownbridge wrote the following in an e-mail dated March 22, 2010:

> "Interesting!
>
> You have a problem on your hands, his statements are theoretical and have not been proven by practice or literature.
>
> All I can say is that we have abandoned high dose opiates in the cardiac arena because we have shown that they make no difference as compared to a more balanced anesthesia and in face inhalational anesthetics have been shown to be cardio-protective.
>
> I too do not like to use vasopressors when I do not have to use them but to say that an opiate technique is more hemodynamically stable is becoming an outdated view in my opinion.
>
> Opiates drop the blood pressure as well as you and I can attest to and the degree of drop depends on the catecholamine drive of the patient.
>
> I certainly do not consider it a standard anesthetic for tracheotomies.
>
> The question is does he truly believe this or is he misappropriating the Fentanyl? The answer comes in his other practice patterns, he would not be simply getting drugs from rare tracheotomies he has administered anesthetics for, his use of other opiates would be high if he had a problem. I have not reviewed his other practice patters (sic) so cannot comment.

If this is simply an eclectic pattern of practice, probably it can be overlooked if the rest of his practice is not so far outside the norm and his trach patient anesthetics do not interfere with weaning and assessment of neurological function."

20. According to submissions from counsel for the Authority, Dr. Brownbridge subsequently provided his "report" to Dr. Giesinger in an undated letter, in which he stated the following:

> " Thank you for asking me to review these five charts for an assessment of anesthetic care. It became obvious very early that it was the choice of anesthetic and quantity that was of interest. I have arranged the five patients from the earliest date of procedure to the latest date of the procedure. There appears to be a trend of escalating doses of Fentanyl administered.
>
> I have attempted to find literature to support this large dose technique of Fentanyl for tracheostomies and have not been successful. Studies comparing conventional surgical versus percutaneous tracheostomy suggest doses of 1-8 mcg/kg of Fentanyl. My observation of other colleagues and my own practice suggests that by far, a balanced anesthetic is usually administered in low doses. A conventional anesthetic for a tracheostomy includes a small dose of midazolam (1-2 mg), opiate equivalent of 1-4 mcg/kg of fentanyl and a relatively large dose of muscle relaxant. Inhalational anesthetic or propofol are added as tolerated by the patient.
>
> My experience with ICU patients undergoing tracheostomies is they usually do not tolerate large doses of anesthetic because they are relatively intravascularly volume depleted and they have a high intrinsic or extrinsic catecholamine (administered inotropes) output and any attenuation in this output usually requires addition or escalation of vasopressor support for hypotension. Fentanyl can be a hemodynamically stable anesthetic in the setting of minimal catecholamine drive; my thirteen years of experience as an ICU attending suggests to me that most ICU patients do not have a minimal catecholamine drive.
>
> If a high dose opiate technique is felt to be indicated today, some anesthesiologists would elect to use Remifentanil, a newer ultra short acting opiate. Large dose of opiates would not likely be used event for highly stimulating procedures such as a thoracotomy or CABG surgery in today's practice. If it was to be used, it would likely be administered over an operative procedure lasting four to six hours and not a half to one hour procedure.
>
> Accordingly to the documentation, none of these very ill patients including one who had just had dialysis with 1600 mls of fluid removed had any hemodynamic deterioration in response to large doses of opiate and other anesthetic agents which were significant in amount intra-operatively.
>
> ...

In conclusion, the amount of opiates in my opinion would not routinely be administered for a tracheostomy procedure. The escalation in opiates administered over the five tracheostomy procedures is a concerning trend. The lack of hemodynamic changes that would be expected to this large dose of opiates in this patient population either did not occur or was not documented. The expected need for treatment of hypotension did not occur or was not documented. (Only Pt#5 required vasopressor support post-op and not intra-op) One patient was documented as spontaneously breathing shortly after returning from the OR.

I have never seen anesthetic records documenting this large dose of Fentanyl in my colleagues or scientific literature supporting these large doses of Fentanyl for a tracheostomy procedure in nearly twenty years of practice. Further, it is my opinion there are enough irregularities in prescribing practices, absence of hemodynamic changes and documentation of lack of excessive sedation that further investigation of this anesthesiologist is warranted."

21. According to the Report dated April 22, 2010, Dr. van der Merwe returned to work on April 9, 2010. A copy of Dr. Brownbridge's Report was provided to him on that date and a meeting was requested by Dr. Giesinger to discuss the matter further the next day (ie April 10, 2010). Dr. van der Merwe was also advised that he could attend with his lawyer.

22. By e-mail dated April 11, 2010 Dr. van der Merwe notified Dr. Giesinger that his lawyer's earliest availability would be April 14, 2010.

23. According to the Report dated April 22, 2010, both Drs. Vuksic and Dobson had concerns:

- that Dr. van der Merwe's regular workload was resuming
- that he would be providing call coverage starting April 13, 2010
- about patient safety
- about Dr. van der Merwe's well-being.

Accordingly, both doctors believed that immediate action was "mandated".

24. Section 86(1)(2)(3) of the Bylaws provide as follows:

"(1) Notwithstanding anything in these Bylaws, the Senior Medical Officer or the Chief Executive Officer may immediately suspend the appointment of a member or the member's privileges in circumstances where in the opinion of the Senior Medical Officer or Chief Executive Officer:

(a) the conduct, performance or competence of a member exposes, or is reasonably likely to expose patient(s)/client(s)/resident(s) or others to harm or injury, or is reasonably likely to be detrimental to the delivery of quality patient/client/resident care provided by the regional health authority; and

(b) immediate action must be taken to protect the patient(s)/client(s)/resident(s) or others, or to avoid detriment to the delivery of quality patient/client/resident care.

(2) The Senior Medical Officer or the Chief Executive Officer shall immediately advise the member of the suspension.

(3) Within forty-eight (48) hours of the immediate suspension, the Senior Medical Officer or Chief Executive Officer who suspended the member shall provide the member with written reasons for the suspension, which shall constitute a referral under clause 75(5)(d)."

(Section 75(5)(d) of the Bylaws provides that a Senior Medical Officer may refer the complaint to the Discipline Committee of the Authority, which in turn, shall conduct a hearing into the matter).

25. In a meeting on April 12, 2010 Dr. Dobson met with Dr. van der Merwe to advise him of the immediate suspension of his appointment and privileges with the Authority. A letter dated April 12, 2010 was given to Dr. van der Merwe which set out the reasons for the suspension:

> "Please be advised that, pursuant to section 86 of the Regina Qu'Appelle Regional Health Authority Practitioner Staff Bylaws, your appointment and privileges with the Regina Qu'Appelle Health Region are suspended, effective immediately. The reasons for the suspension are as follows:
>
> 1. In each of the following cases, you prescribed excessively high doses of Fentanyl in ICU patients undergoing tracheostomy procedures:
>
> November 3, 2009: Patient No. 1183998, 1500 micrograms Fentanyl
> November 15, 2009: Patient No. 0920765, 2000 micrograms Fentanyl
> December 15, 2009: Patient No. 0793585, 2485 or 2250 micrograms Fentanyl
> December 24, 2009: Patient No. 1190462, 2250 micrograms Fentanyl
> February 15, 2010: Patient No. 1037432, 3750 micrograms Fentanyl
>
> Such high dosages of Fentanyl are not in accordance with acceptable anesthetic practice, are reasonably likely to compromise patient safety, and constitute conduct subject to discipline as outlined in subsections

74(1) and 74(2)(d) of the Regina Qu'Appelle Regional Health Authority Practitioner Staff Bylaws.

2. The pattern of increasingly higher dosages of Fentanyl demonstrated in the above five cases, as well as the absence of hemodynamic changes and the expected depth and duration of sedation attendant with the administration of such a large amount of opiates, are indicative of narcotic diversion and/or use on your part. Such is not only detrimental to patient safety, but also to your own safety, and further constitutes conduct subject to discipline pursuant to subsections 74(1), 74(2)(a)(i), 74(2)(b), 74(2)(c) and 74(2)(d) of the Practitioner Staff Bylaws.

3. In light of the above, your conduct, performance and competence is reasonably likely to expose patients and/or yourself to harm, and is reasonably likely to be detrimental to the delivery of quality patient care.

4. Further, as you are intending to resume an increased workload and participation in call coverage for anesthesia, effective tomorrow, thereby increasing the risk to patients and/or yourself, immediate action is required.

Please note that, in accordance with subsection 86(3) and 86(5), these matters are being referred to the Discipline Committee and the College of Physicians and Surgeons will be notified of the suspension.

Finally, in keeping with section 87 of the Practitioner Staff Bylaws, you will be provided with notice of the board meeting at which this suspension will be reviewed."

Also given to Dr. van der Merwe with the letter describing the reasons for his suspension was a cover letter, dated April 12th. This letter was signed by Dr. J. Dobson, the senior medical officer, and she made the following statement:

> "It had been our hope that at the meeting planned for today, we could explore with you possible alternate means of insuring patient safety, addressing the personal and profession risk to you. However, given your position, we have no alternative but to proceed with imposition of the immediate suspension."

26. Section 86(5) of the Bylaws further provides:

"(5) The Senior Medical Officer or the Chief Executive Officer shall also notify the College of the suspension."

27. Pursuant to Section 86(5) of the Bylaws, a letter dated April 12, 2010 was forwarded to Dr. Kendel of the College of Physicians and Surgeons of Saskatchewan advising the College of the suspension of Dr. van der Merwe's appointment and privileges.

28. Dr. Kendel met with Dr. van der Merwe and his counsel on April 13, 2010. In a "Memo to File", Dr. Kendel notes as follows:

> "He [Dr. van der Merwe] advised me that he will be asking the RQRHA to allow him to resume practice under some conditions or controls that might offer adequate public protection. I advise [sic] him that my preference would be that he not resume practice until he's undergone the health assessment and the CPSS has had adequate opportunity to review the report from that assessment."

29. Sections 87, 89 and 90 of the Bylaws provide as follows:

> "87. Setting Board Hearing
> The Chief Executive Officer shall set a date for a hearing by the Board, to be held within fourteen (14) days from the date of the immediate suspension made pursuant to section 86, to review the immediate suspension of appointment or privileges.
>
> 89. Board Proceedings
> (1) The parties before the Board are the member, the Senior Medical Officer and or the Chief Executive Officer, and such other persons as the Board may specify.
>
> (2) Subject to subsection 94(2), the member appearing before the Board shall be afforded an opportunity to examine any written or documentary evidence that will be produced to the Board.
>
> ...
>
> (4) The Board shall consider the written reasons the Senior Medical Officer or Chief Executive Officer provided to the member. Where through error or inadvertence, certain reasons have been omitted in the report delivered to the member, the Board may consider those reasons only if those reasons are given by the Senior Medical Officer or Chief Executive Officer in writing to both the member and the Board and the member is given a reasonable time to review the reasons and to prepare a case to meet those additional reasons.
>
> ...
>
> 90. Board Decision
> (1) Upon consideration of the report and recommendations of the Senior Medical Officer or Chief Executive Officer, including reasons

therefore, and the representations of the member, if any, the Board may, without limitation:

(a) overturn the immediate suspension of appointment or privileges;

(b) confirm the immediate suspension of appointment or privileges for a specified period of time; or

(c) confirm the immediate suspension of appointment or privileges and refer the matter to the Discipline Committee."

30. The Board of the Regina Qu'Appelle Regional Health Authority held the hearing contemplated by section 87 of the Bylaws on April 26, 2010. Dr. van der Merwe was present and was represented by his lawyer, David Thera. Drs. Vuksic and Dobson were represented by legal counsel as well, namely, Brenda Hildebrandt.

31. In its Decision dated April 29, 2010, the Board made two conclusions. Firstly, it concluded that Dr. Dobson's actions in suspending Dr. van der Merwe's appointment and privileges on April 12, 2010, were appropriate in the circumstances:

"26. The Board is satisfied that the investigation carried out by the SMOs into the concerns raised brought to Dr. Giesinger's attention was wholly appropriate. Further, based on the information available to Drs. Dobson and Vuksic on the 12th of April, 2010, particularly the conclusions contained in the written report of Dr. Brownbridge and informed by Drs. Giesinger and Dobson's own training and experiences as anesthetists, that Dr. Dobson was fully justified in reaching the opinion that:

(a) the conduct of Dr. van der Merwe was reasonably likely to expose patients to harm or was reasonably likely to be detrimental to the delivery of quality patient care by the Region; and

(b) Immediate action was required to protect the Region's patients or to avoid a detriment to the delivery of quality patient care.

27. Accordingly, the Board is not prepared to overturn the decision made by Dr. Dobson on 12 April 2010. However, for the reasons set out below and with the benefit of the representation of the parties, the Board is of the view that Dr. van der Merwe's privileges may be restored on the conditions set out below."

32. Secondly, the Board also concluded that the suspension of Dr. van der Merwe's appointment and privileges should be lifted but that conditions should be imposed upon him:

> "30. Upon hearing the representations of the parties and considering the documentary evidence presented, the Board was not satisfied that it was established that Dr. van der Merwe was likely suffering from a substance abuse problem or that he was diverting Fentanyl for his own use. Although there is significant evidence that the Fentanyl technique being used by Dr. van der Merwe was not appropriate for these patients, it is difficult for the Board to make a determination on this issue given its lack of clinical expertise. This is a matter that is appropriately dealt with through a hearing before the Discipline Committee. Also, the Discipline Committee would be in a better position to assess whether, given the conditions of the five patients, it was likely that Dr. van der Merwe was diverting some of the narcotic.
>
> 31. In relation to the clinical concerns, Dr. van der Merwe has agreed not to use the Fentanyl technique that he administered on the five patients and to strictly follow the practices adopted by his colleagues in the Department of Anesthesiology. In order to address the concern of addiction, Dr. van der Merwe has also offered to undergo random drug/urine screening on demand. The suggestion of the SMOs was that Dr. van der Merwe take an educational leave until the hearing before the Discipline Committee has been completed.
>
> 32. The Board is of the view that the conditions suggested by Dr. van der Merwe are not wholly adequate to address the legitimate concerns raised by the SMOs. The return of his privileges should be subject to additional conditions in order to ensure patient safety pending a hearing before the Discipline Committee.
>
> The members of the Board hearing this matter unanimously decide as follows:
>
> a. The issues raised by Dr. Dobson in her suspension letter of 12 April 2010 are referred to the Discipline Committee for hearing and report in accordance with the Bylaws unless an earlier resolution is reached to the satisfaction of the SMOs;
>
> b. The immediate suspension of Dr. van der Merwe is lifted as of the date of this decision and his privileges are restored subject to the following terms and conditions:
>
> (i) Dr. van der Merwe present himself for random blood and urine screening immediately upon the demand of the SMOs and that he present himself at the place designated by the SMOs for such screening;

(ii) Dr. van der Merwe discontinue the use of his high dose of Fentanyl technique and only administer narcotics in accordance with the guidelines and practices of the Region's Department of Anesthesiology.

(iii) Dr. van der Merwe will not take any on-call/emergent cases unless authorized by the SMOs;

(iv) He continue his participation in the Physician Support Program offered by the SMA;

(v) He comply with any directions or orders of the SMOs with respect to the monitoring of administration of narcotics including accounting for any "waste" narcotics."

E. ANALYSIS/DECISION (MAJORITY)

33. The first matter appealed by Dr. van der Merwe is the confirmation by the Board in its decision of the immediate suspension of his privileges by the Senior Medical Officers on April 12, 2010. The basis for this portion of his appeal is set out in the first three grounds of appeal. The first ground of appeal is:

> "There was no evidence or insufficient evidence before the Senior Medical Officer or the Board of a reasonable likelihood of harm or injury of that immediate action had to be taken."

As set out previously, Section 86(1) of the Practitioner Staff Bylaws gives the authority to the Senior Medical Officer to immediately suspend the privileges of a physician where, in the opinion of the Senior Medical Officer: (a) the conduct, performance or competence of that doctor exposes, or is relatively likely to expose, patients or others to harm or injury or is reasonably likely to be detrimental to the delivery of quality patient care provided by the Authority, and; (b) immediate action must be taken to protect the patients or others or to avoid detriment to the delivery of quality patient care.

34. Was there sufficient evidence before the Senior Medical Officers (and the Board, when they reviewed the suspension) to conclude the above?

35. Some of the evidence before the Senior Medical Officers and the Board was as follows:

- Dr. Giesinger, the head of the Department of Anesthesiology, reviewed several recent tracheostomy cases of Dr. van der Merwe and discovered a pattern of increasingly higher dosages of the narcotic Fentanyl being administered by him to his patients over a four month period and communicated her concerns about this practice to one of the Senior Medical Officers.

When Dr. Giesinger and Dr. Vuksic initially met with Dr. van der Merwe to discuss the same and advise him that the medical literature did not support dosages at the level being administered by him for these types of procedures, Dr. van der Merwe maintained that the literature did support his practice. During this meeting Dr. van der Merwe asked Dr. Vuksic to do a blood test for narcotics now and any time randomly in the future. He also would submit to search of his briefcase and personal effects. Dr. van der Merwe at this meeting asked if any harm had come to any of the patients, and the answer was no. Also, at this initial meeting, no staff complaints were brought up suggesting that Dr. van der Merwe during his daily work was affected by intoxication of any kind.

- In a letter forwarded to Dr. Giesinger, dated March 12th, 2010 after this first meeting, Dr. van der Merwe continued to maintain that his Fentanyl prescribing practice was sound. He did disagree that there was a trend in the five cases feeling that dosages determined by what is appropriate for any individual case. He also stated quite clearly the following:

  "as for ICU patients, I am experienced in alternative methods and will gladly accept any technique you recommend to our Department."

  He also states: "Of course, I am quite prepared to review any literature or guidelines that you wish to refer to and, as I said, to follow any recommendations you make to our Department."

- When Dr. Giesinger retained Dr. Brownbridge to review the recent cases of Dr. van der Merwe, Dr. Brownbridge concluded that the amount of opiates administered in those cases would not routinely be administered for a tracheostomy procedure, that he had not seen anesthetic records documenting such large doses of Fentanyl in his colleagues' records nor had he come across any scientific literature supporting such large doses of Fentanyl for tracheostomy procedures. Furthermore, he expressed concern about the "lack of excessive sedation" in the patients who had received the said dosages, (which we as a Tribunal interpret as an implication that the patients may not have received the amounts of Fentanyl that was recorded in the patient records). As stated in the Facts, the Tribunal was apprised after the formal hearing of an email from Dr. Brownbridge, probably detailing his initial response to the Regina Qu'Appelle request for an external review. Dr. Brownbridge's formal review letter is not dated. The email is dated Monday, March 22nd, 2010. In this email, he states: "If this is simply an eclectic pattern of practice, probably it can be overlooked if the rest of his practice is not so far outside the norm and his trach-patient anaesthetics do not interfere with weaning and assessment of neurological function."

- Dr. van der Merwe, who had previously been away from work studying for a set of specialty exams, had just returned to work and would be providing on-call services commencing April 13, 2010.

36. Given the above, the majority of this Tribunal has concluded that there was insufficient evidence before the Senior Medical Officers and the Board to support the opinion of the two Senior Medical Officers that the performance/conduct of Dr. van der Merwe, in prescribing increasing dosages of Fentanyl, was exposing or was relatively likely to expose patient to harm. We have also concluded that given Dr. van der Merwe's co-operative statements from the beginning to undergo random drug screening and to limit his practice strictly to the recommendations of the Department, that an alternative regular work load could be worked out with the Senior Medical Officers, putting in place safeguards, such as the Board has recommended. As indicated in the covering letter to Dr. van der Merwe, dated

April 12th, 2010, the Senior Medical Officers did consider alternative approaches, but never discussed the options with Dr. van der Merwe.

37. The second and third grounds of appeal are:

> "The Senior Medical Officer failed to consider or implement alternate measures which would have addressed their concerns" and "The Senior Medical Officer failed to investigate their concerns adequately and failed to give the Appellant an adequate opportunity to respond before issuing the suspension."

The Act contemplates and the Regulations explicitly state that a doctor who is aggrieved by a decision of a board may appeal that decision to this Tribunal. The wording chosen by Appellant's counsel with respect to these grounds of appeal focuses on a failure of the Senior Medical Officer – not the Board – in failing to consider or implement alternative measures or to adequately investigate. It does not, in other words, specifically point to any errors or mistakes on the part of the Board, which after conducting its review concluded that the Senior Medical Officers were justified in reaching the opinion that they did in suspending Dr. van der Merwe.

38. Notwithstanding our concerns with respect to how these grounds of appeal are set out in the Notice of Appeal, this is an appeal de novo and Appellant's counsel has appealed that portion of the decision of the Board upholding the decision of the Senior Medical Officers and, accordingly, we shall address these two grounds.

39. With respect to the second ground of appeal, Appellant's counsel, at the appeal hearing and in his written submissions, submitted that the Senior Medical Officers "...had a duty to consider and implement alternate measures short of a suspension" and that they failed to consider any measures which might have reasonably guaranteed patient safety other than Dr. van de Merwe's immediate suspension. The various measures which should have been considered, counsel submitted, included "supervision, surveillance, monitoring drug wastage,

referral to the Physician Support Program, and random and frequent drug screens while on duty". These measures, he further contended "should have been sufficient to alleviate any potential safety concerns."

40. With respect to the third ground of appeal, Appellant's counsel, in his written Brief of Law, submitted that the Senior Medical Officers failed to investigate the matter properly and failed to give Dr. van der Merwe an adequate opportunity to respond when they:

- Failed to conduct a toxicology screen on Dr. van der Merwe at or shortly after the March 2, 2010, meeting in which Dr. van der Merwe made the offer to subject himself to the same;
- Failed to search his briefcase and personal effects at the same time;
- Failed to give Dr. van der Merwe a reasonable opportunity to review and respond to Dr. Brownbridge's report;
- Failed to obtain a second opinion from an anesthesiologist "who had a similar background to Dr. van der Merwe and was familiar with the Fentanyl technique";
- Failed to look into whether Dr. van der Merwe fit the profile of someone who might be diverting medication;
- Failed to seek advice from the Physician's Support Program or any other expert with respect to the steps which could be taken to confirm whether Dr. van der Merwe was diverting Fentanyl.

41. Part VIII of the Bylaws, entitled "Discipline" provides the process to be followed when a complaint is made against a physician respecting a wide variety of conduct ("conduct subject to discipline" – which ranges from conduct which exposes patients to harm to conduct that is reasonably likely to constitute abuse to conduct that is contrary to the policies and procedures of the regional health authority) described in Section 74 of the Bylaws. It provides that the physician shall be advised of the nature of the complaint and be given a reasonable opportunity to present relevant information on his or her own behalf (see Section 75(3) of the Bylaws). It also provides that the Senior Medical Officer may, in consultation with the Department Head, determine whether a further inquiry or investigation is necessary

and may make such inquiry and investigation as deemed necessary (see Section 75 (4) of the Bylaws). Finally, it gives the Senior Medical Office and Department Head the power to dismiss the complaint, reprimand the physician, utilize an alternative dispute resolution process or refer the matter to the Discipline Committee (see Section 75(5) of the Bylaws).

42. Part IX of the Bylaws, entitled "Immediate Suspension", on the other hand, sets out the conditions under which a Senior Medical Officer can, at any time, immediately suspend a physician or his or her privileges. As noted previously, Section 86 provides that in very limited circumstances – where a Senior Medical Officer has formed the opinion that a physician's conduct, performance or competence exposes or is likely to expose a patient to harm or injury or is likely to be reasonably likely to be detrimental to the delivery of quality patient care and immediate action must be taken to protect patients or avoid detriment to the delivery of quality patient care – the Senior Medical Officer can act immediately and impose the a suspension.

In such extraordinary circumstances, the Bylaws provide that the physician shall be entitled to a hearing before the Board within 14 days of the immediate suspension (see Section 87 of the Bylaws) and is to be provided the reasons for the immediate suspension, the right to examine any written information or reports in relation to the suspension, and the right to make representations before the Board (see Section 88 of the Bylaws).

43. Section 86 of the Bylaws, however, does not impose upon the Senior Medical Officer any of the obligations found in Section 75 of the Bylaws (eg. The obligation to advise the physician of the nature of the complaint, the obligation to provide the physician with the right to a reasonable opportunity to present relevant information on his or her behalf) prior the making his or her decision with respect to the physician's conduct.

44. The majority of this Tribunal believes that Section 86 of the Bylaws is a severe measure and should not be implemented without careful consideration of all steps which might be taken to avoid the use of this extreme power.

45. The majority of the Tribunal agrees with the Appellant's counsel that the Senior Medical Officer overlooked some steps which could have been explored prior to delivering the suspension.

The following, for example, are chronologically steps that the Senior Medical Officers failed to consider prior to the suspension.

- In notes of the initial meeting of Dr. van der Merwe with the Senior Medical Officers, Dr. van der Merwe consented to a toxicology screen as well as a personal search for medication and drugs. Also, pointed out was the fact of no harm to any patients as a result of the unusual technique used by Dr. van der Merwe.

- In Dr. van der Merwe's response in a letter of March 12, 2010, to the initial March 2, 2010 meeting, Dr. van der Merwe states quite clearly that he will gladly accept any technique recommended to the Department. He also was willing to review any literature recommended to him by Dr. Giesinger, and again stated he would follow any recommendations made as far as his clinical practice was concerned. Even though, Dr. van der Merwe left open the fact he felt the Fentanyl technique was useful, he was quite prepared to stop it and use whatever technique the Department Head wished him to use. The majority of the Tribunal agrees discussion of technical issues would be resolved by the Disciplinary Hearing.

- Dr. Brownbridge did send an email to Dr. Giesinger summarizing his initial thoughts on the five Fentanyl cases he was asked for an opinion on. In this email, he feels if the five cases are an isolated event, probably it can be overlooked if the rest of his practice is not so far outside the norm and his trach patient anesthetics do not interfere with the weaning of assessment of neurological function. His formal report was not dated, and the Tribunal acknowledges this.

- On Friday afternoon, April 9th, 2010, Dr. van der Merwe was provided with a letter requesting a meeting with him on April 12th, 2010 at 1700 hours. Enclosed with this

letter was a copy of Dr. Brownbridge's formal report, the first time Dr. van der Merwe had seen this material. This letter simply stated that if Dr. van der Merwe was going to bring legal counsel, they would like to know in advance of the meeting on April 12th, 2010. Dr. van der Merwe sent an email stating that he would be unable to attend because he was not able to obtain legal counsel by the Monday. The April 9th letter by no means outlined the same things that the cover letter of April 12th did. In other words, the majority of the Tribunal feels the April 9th letter should have more directly outlined the seriousness of the meeting of April 12th. This should have included the reason for urgency connected to Dr. van der Merwe participating in on-call work on April 13th, 2010. If Dr. van der Merwe was notified suspension was pending on April 12th, he may have been able to urgently obtain counsel. For example, when the suspension was delivered to Dr. van der Merwe on April 12th, 2010, he had legal counsel by April 13th, 2010.

- In the cover letter, dated April 12th, 2010, to the formal suspension letter, it seems evident to the Tribunal that because Dr. van der Merwe wished to obtain counsel and cancel the meeting, all consideration of alternate means of insuring patient safety and addressing personal and professional risk were simply taken off the table. Even though Dr. van der Merwe was advised he could obtain legal counsel by letter to him on April 9th, the opportunity to do so was actually denied to him by time frame, and for whatever reason, the exploration of alternate means of insuring patient safety was taken off the table.

- The majority of this Tribunal also feels that whether Dr. van der Merwe was going to be suspended or allowed to respond to the Fentanyl complaint that during the initial March 2nd meeting and given the nature of the complaint facing the Senior Medical Officers, Dr. van der Merwe should have been referred immediately to the Physician Support Program for examination and determination whether he was indeed using drugs. That determination may have given the Senior Medical Officers more confidence to explore alternate means of ensuring patient safety without going to the severe steps of suspension.

All of the above suggests to the majority of the Tribunal that the Senior Medical Officers missed a number of opportunities to set up alternate means of insuring patient safety and addressing the personal and professional risk to Dr. van der Merwe prior to the severe measure of suspending the physician. Accordingly, the majority of the Tribunal supports Dr. van der Merwe's appeal that the Board's decision to support the suspension by the Senior Medical Officers was not correct.

46. The second matter appealed by Dr. van der Merwe concerned the imposing of conditions upon his restoral of privileges and the nature of those conditions. The basis for this portion of the appeal is set out in the fourth ground of appeal, which is:

> "The conditions imposed upon the Appellant by the Board went beyond what was reasonably necessary or appropriate in the circumstances."

In its decision, the Board noted the following:

> "The parties have both agreed that the Board has the discretion to lift the suspension of Dr. van der Merwe while attaching conditions to the exercise of his privileges. The Board is satisfied that it is proper to do so in this case and that conditions can be attached that adequately protect the Region's patients and the delivery of quality patient care.
> ……..
>
> 31. In relation to the clinical concerns, Dr. van der Merwe has agreed not touse the Fentanyl technique that he administered on the five patients and to strictly follow the practices adopted by his colleagues in the Department of Anesthesiology. In order to address the concern of addiction, Dr. van der Merwe has also offered to undergo random drug/urine screening on demand. The suggestion of the SMOs was that Dr. van der Merwe take an educational leave until the hearing before the Discipline Committee has been completed.
>
> 32. The Board is of the view that the conditions suggested by Dr. van der Merwe are not wholly adequate to address the legitimate concerns raised by the SMOs. The return of his privileges should be subject to additional conditions in order to ensure patient safety pending a hearing before the Discipline Committee.

The members of the Board hearing this matter unanimously decide as follows:

(a) The issues raised by Dr. Dobson in her suspension letter to 12 April 2010 referred to the Discipline Committee for hearing and report inaccordance with the Bylaws unless an earlier resolution is reached to the satisfaction of the SMOs;

(b) The immediate suspension of Dr. van der Merwe is lifted as of the date of this decision and his privileges are restored subject to the following terms and conditions:

(i) Dr. van der Merwe present himself for random blood and urine Screening immediately upon the demand of the SMOs and that he present himself at the place designated by the SMOs for such screening;

(ii) Dr. van der Merwe discontinue the use of his high dose of Fentanyl technique and only administer narcotics in accordance with the Guideline and practices of the Region's Department of Anesthesiology:

(iii) Dr. van der Merwe will not take any on-call/emergent cases unless authorized by the SMOs;

(iv) He continue his participation in the Physician Support Program offered by the SMA;

(v) He comply with any directions or orders of the SMOs with respect to Monitoring of administration of narcotics including accounting for any "waste" narcotics;

(c) The conditions shall remain in place until the Board receives the report of the Discipline Committee or the parties have reached a resolution satisfactory to the SMOs.

(d) Both parties shall have leave, on notice to the other party, to return the matter before the Board to make application for amendment or alternation to the above conditions.

47 Dr. van der Merwe and his counsel have, in their submissions at the hearing and in Written Brief of Law, concentrated on whether the conditions imposed upon Dr. van der Merwe upon the restoral of his privileges go beyond what was reasonably necessary or appropriate in the circumstances.

48 This Tribunal has concluded that the conditions did not go beyond what was reasonable or appropriate in the circumstances.

49. The first two conditions – that Dr. van der Merwe present himself for random blood and urine screening and that he discontinue the use of his high dose of Fentanyl technique – were conditions that Dr. van der Merwe agreed to do at or before the review hearing of the Board. Accordingly, this Tribunal does not accept that these two conditions are unreasonable or inappropriate given Dr. van der Merwe's consent to the same.

50. As to the three remaining conditions, the Board noted that while there was significant evidence that the Fentanyl technique used by DR. van der Merwe was not appropriate for the patients (whose records had been reviewed by Dr. Giesinger and Dr. Brownbridge) it was difficult for the Board to make a determination of that issue given its lack of clinical expertise. Furthermore, the Board concluded that the Discipline Committee could better hear and determine that matter. But until that determination was made, the Board held that in view of the "legitimate concerns raised by the SMOs" concerning Dr. van der Merwe's clinical practice, the remaining conditions were necessary to "ensure patient safety pending a hearing before the Discipline Committee".

51. Given the evidence before the Board – the concerns about Dr. van der Merwe's clinical practice by the Head of the Department of Anesthesiology, the two Senior Medical Officers and the report of Dr. Brownbridge – it does not seem unreasonable to this Tribunal that these additional three conditions concerning his clinical practice were imposed upon Dr. van der Merwe in order to ensure patient safety and, accordingly, we find that they were reasonable and appropriate in the circumstances.

F. ANALYSIS/DECISION (DISSENTING/MINORITY)

52. With respect, I disagree with the decision reached by my fellow Tribunal members in overturning the Board's confirmation of the Senior Medical Officer's decision to

immediately suspend the privileges of Dr. van der Merwe on April 12, 2010. I shall provide my analysis and conclusions following the same format as my fellow Tribunal members.

53. The first matter appealed by Dr. van der Merwe is the confirmation by the Board in its decision of the immediate suspension of his privileges by the Senior Medical Officers on April 12, 2010. The basis for this portion of his appeal is set out in the first three grounds of appeal.

The first ground of appeal is:

> "There was no evidence or insufficient evidence before the Senior Medical Officer or the Board of a reasonable likelihood of harm or injury or that immediate action had to be taken."

As set out previously, Section 86(1) of the Practitioner Staff Bylaws gives the authority to the Senior Medical Officer to immediately suspend the privileges of a physician where, in the opinion of the Senior Medical Officer: (a) the conduct, performance or competence of that doctor exposes, or is relatively likely to expose, patients or others to harm or injury or is reasonably likely to be detrimental to the delivery of quality patient care provided by the Authority, and; (b) immediate action must be taken to protect the patients or others or to avoid detriment to the delivery of quality patient care.

54. Was there sufficient evidence before the Senior Medical Officers (and the Board, when they reviewed the suspension) to conclude the above?

55. Some of the evidence before the Senior Medical Officers and the Board was as follows:

- Dr. Giesinger, the head of the Department of Anesthesiology, reviewed several recent tracheostomy cases of Dr. van der Merwe and discovered a pattern of increasingly higher dosages of the narcotic Fentanyl being administered by him to his patients over a four month period and communicated her concerns about this practice to one of the Senior Medical Officers.
- When Dr. Giesinger and Dr. Vuksic initially met with Dr. van der Merwe to discuss the same and advise him that the medical literature did not support dosages at the

level being administered by him for these types of procedures, Dr. van der Merwe maintained that the literature did support his practice.

- In a letter forwarded to Dr. Giesinger after this first meeting, Dr. van der Merwe continued to maintain that his Fentanyl prescribing practice was sound.

- When Dr. Giesinger retained Dr. Brownbridge to review the recent cases of Dr. van der Merwe, Dr. Brownbridge concluded that the amount of opiates administered in those cases would not routinely be administered for a tracheostomy procedure, that he had not seen anesthetic records documenting such large doses of Fentanyl in his colleagues' records nor had he come across any scientific literature supporting such large doses of Fentanyl for tracheostomy procedures. Furthermore, he expressed concern about the "lack of excessive sedation" in the patients who had received the said dosages, (which we as a Tribunal interpret as an implication that the patients may not have received the amounts of Fentanyl that was recorded in the patient records).

- Dr. van der Merwe, who had previously been away from work studying for a set of specialty exams, had just returned to work and would be providing on-call services commencing April 13, 2010.

56. Given the above, I have concluded that there was sufficient evidence before the Senior Medical Officers and the Board to support the opinion of the two Senior Medical Officers that the performance/conduct of Dr. van der Merwe, in prescribing increasing dosages of Fentanyl, was exposing or was relatively likely to expose patients to harm. I have also concluded that the resumption of Dr. van der Merwe's regular work load (and his providing on-call coverage) prior to his availability for a second meeting with the Senior Medical Officers was also sufficient to support their conclusion that immediate action had to be taken to avoid detriment to the delivery of quality patient care.

57. The second and third grounds of appeal are:

> "The Senior Medical Officer failed to consider or implement alternate measures which would have addressed their concerns" and

> "The Senior Medical Officer failed to investigate their concerns adequately and failed to give the Appellant an adequate opportunity to respond before issuing the suspension."

The *Act* contemplates and the Regulations explicitly state that a doctor who is aggrieved by a decision of a board may appeal that decision to this Tribunal. The wording chosen by Appellant's counsel with respect to these grounds of appeal focuses on a failure of the Senior Medical Officer - not the Board - in failing to consider or implement alternative measures or to adequately investigate. It does not, in other words, specifically point to any errors or mistakes on the part of the Board, which after conducting its review concluded that the Senior Medical Officers were justified in reaching the opinion that they did in suspending Dr. van der Merwe.

58. Notwithstanding my concerns with respect to how these grounds of appeal are set out in the Notice of Appeal, this is an appeal de novo and Appellant's counsel has appealed that portion of the decision of the Board upholding the decision of the Senior Medical Officers and, accordingly, I shall address these two grounds.

59. With respect to the second ground of appeal, Appellant's counsel, at the appeal hearing and in his written submissions, submitted that the Senior Medical Officers "…had a duty to consider and implement alternate measures short of a suspension" and that they failed to consider any measures which might have reasonably guaranteed patient safety other than Dr. van der Merwe's immediate suspension. The various measures which should have been considered, counsel submitted, included "supervision, surveillance, monitoring drug wastage, referral to the Physician Support Program, and random and frequent drug screens while on duty". These measures, he further contended "should have been sufficient to alleviate any potential safety concerns."

60. With respect to the third ground of appeal, Appellant's counsel, in his written Brief of Law, submitted that the Senior Medical Officers failed to investigate the matter properly and failed to give Dr. van der Merwe an adequate opportunity to respond when they:

- failed to conduct a toxicology screen on Dr. van der Merwe at or shortly after the March 2, 2010, meeting in which Dr. van der Merwe made the offer to subject himself to the same;
- failed to search his briefcase and personal effects at the same time;
- failed to give Dr. van der Merwe a reasonable opportunity to review and respond to Dr. Brownbridge's report;
- failed to obtain a second opinion from an anesthesiologist "who had a similar background to Dr. van der Merwe and was familiar with the Fentanyl technique";
- failed to look into whether Dr. van der Merwe fit the profile of someone who might be diverting medication;
- failed to seek advice from the Physician's Support Program or any other expert with respect to the steps which could be taken to confirm whether Dr. van der Merwe was diverting Fentanyl.

61. Part VIII of the Bylaws, entitled "Discipline" provides the process to be followed when a complaint is made against a physician respecting a wide variety of conduct ("conduct subject to discipline" - which ranges from conduct which exposes patients to harm to conduct that is reasonably likely to constitute abuse to conduct that is contrary to the policies and procedures of the regional health authority) described in Section 74 of the Bylaws. It provides that the physician shall be advised of the nature of the complaint and be given a reasonable opportunity to present relevant information on his or her own behalf (see Section 75(3) of the Bylaws). It also provides that the Senior Medical Officer may, in consultation with the Department Head, determine whether a further inquiry or investigation is necessary and may make such inquiry and investigation as deemed necessary (see Section 75(4) of the Bylaws). Finally, it gives the Senior Medical Office and Department Head the power to dismiss the complaint, reprimand the physician, utilize an alternative dispute resolution process or refer the matter to the Discipline Committee (see Section 75(5) of the Bylaw).

62. Part IX of the Bylaws, entitled "Immediate Suspension", on the other hand, sets out the conditions under which a Senior Medical Officer can, at any time, immediately suspend a

physician or his or her privileges. As noted previously, Section 86 provides that in very limited circumstances - where a Senior Medical Officer has formed the opinion that a physician's conduct, performance or competence exposes or is likely to expose a patient to harm or injury or is likely to be reasonably likely to be detrimental to the delivery of quality patient care and immediate action must be taken to protect patients or avoid detriment to the delivery of quality patient care - the Senior Medical Officer can act immediately and impose the a suspension.

In such extraordinary circumstances, the Bylaws provide that the physician shall be entitled to a hearing before the Board within 14 days of the immediate suspension (see Section 87 of the Bylaws) and is to be provided the reasons for the immediate suspension, the right to examine any written information or reports in relation to the suspension, and the right to make representations before the Board (see Section 88 of the Bylaws).

63. Section 86 of the Bylaws, however, does not impose upon the Senior Medical Officer any of the obligations found in Section 75 of the Bylaws (eg. the obligation to advise the physician of the nature of the complaint, the obligation to provide the physician with the right to a reasonable opportunity to present relevant information on his or her behalf) prior to making his or her decision with respect to the physician's conduct.

64. While I accept that the Senior Medical Officer cannot act capriciously or arbitrarily when exercising his or her powers pursuant to Section 86, the obligations suggested by Appellant's counsel - to conduct an investigation in a certain manner or to consider alternative measures - are not a prerequisite to taking the steps outlined in Section 86.

65. Notwithstanding the lack of any obligation on the Senior Medical Officer to investigate the complaint that was made against Dr. van der Merwe in a certain manner or to consider alternative measures or to provide Dr. van der Merwe with a further opportunity to respond prior to the Senior Medical Officer acting pursuant to Section 86 of the Bylaws, I am satisfied that all of these steps were nevertheless taken.

The following, for example, was carried out as part of an investigation by the Senior Medical Officers:

- The Senior Medical Officers received the results of a review conducted by Dr. Giesinger, the head of the Department of Anesthesiology, of several recent tracheostomy cases of Dr. van der Merwe.
- The Senior Medical Officers appear to have checked the literature concerning the use of Fentanyl in the dosages prescribed by Dr. van der Merwe insofar as one of the Senior Medical Officers confronted him on March 2, 2010, and advised him that such usage was not supported by the literature.
- Dr. Brownbridge, an anesthesiologist from the Saskatoon Health Authority, was retained to review the recent tracheostomy cases of Dr. van der Merwe and provide an opinion.

I have concluded that the Board, in its decision, was correct when it concluded that the investigation carried out by the Senior Medical Officers into the concerns brought to Dr. Giesinger's attention "was wholly appropriate".

With respect to the issue of Dr. van der Merwe's opportunity to respond:

- Dr. van der Merwe met with Dr. Vuksic and Dr. Giesinger on March 2, 2010, and was advised both verbally and in writing as to the specific concerns of the Senior Medical Officer and was also provided an opportunity to address those concerns. At the time, he took the position that his practice (i.e. prescribing the dosages of Fentanyl) was sound and supported by the literature.
- Dr. van der Merwe was also provided the further opportunity to provide a written response to the concerns of the Senior Medical Officer and did so in the letter dated March 12, 2010, in which he continued to maintain that his Fentanyl prescribing practice was sound.
- Finally, the Senior Medical Officer ensured that Dr. van der Merwe was provided with a copy of Dr. Brownbridge's report on April 9, 2010, and requested a meeting with him to discuss the matter further.

I have concluded that the Senior Medical Officers provided adequate opportunity to Dr. van der Merwe to address their concerns and to provide his version of events. Accordingly, I

support the Board's conclusion that the investigation by the Senior Medical Officers was adequate.

G. CONCLUSION

66. By majority decision of this Tribunal, that portion of the decision of the Board of the Regina Qu'Appelle Health Region (i.e. the Authority) dated April 29, 2010, confirming the immediate suspension of Dr. van der Merwe's privileges by the Senior Medical Officer on April 12, 2010, is hereby quashed. The Board's decision to allow Dr. van der Merwe to continue practicing with the conditions described in its decision is hereby confirmed.

DATED this 18 day of August, 2011.

Practitioner Staff Appeals Tribunal

Dr. Robert Weiler, Member

Dr. James Howlett, Member

DISSENT

For the reasons provided above, I dissent from the majority decision of the Tribunal and I would have confirmed the entire decision of the Board of the Regina Qu'Appelle Health Region (i.e. the Authority) dated April 29, 2010.

Dirk Silversides, Chair