IN THE MATTER OF AN APPEAL PURSUANT TO SUBSECTION 45(1) OF *The Regional Health Services Act* AND SUBSECTION 8(1) OF *The Practitioner Staff Appeals Regulations* WITH RESPECT TO A DECISION OF THE BOARD OF THE PRAIRIE NORTH REGIONAL HEALTH AUTHORITY CONCERNING DR. THOMAS BLACKWELL AND DR. MORLEY KUTZNER

BETWEEN:

DR. MORLEY KUTZNER and DR. THOMAS BLACKWELL

APPELLANTS

AND:

PRAIRIE NORTH REGIONAL HEALTH AUTHORITY

RESPONDENT

AND:

DR. PATRICK O'KEEFE

PROPOSED INTERVENOR

INTERIM DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL

AT A HEARING HELD ON NOVEMBER 19, 2007 IN SASKATOON, SASKATCHEWAN BEFORE:

CATHERINE M. KNOX, Tribunal Chairperson
LORETTA ELFORD, Tribunal Member
DR. JIM WILSON, Tribunal Member

Richard M. Elson appeared and acted on behalf of the Appellants
Chris C. Boychuk appeared and acted on behalf of the Respondent
Brian J. Scherman Q.C. appeared and acted on behalf of the Proposed Intervenor

A. INTRODUCTION

This is an appeal by Dr. Morley Kutzner and Dr. Thomas Blackwell, the Appellants, pursuant to subsection 45(1) of *The Regional Health Services Act* ("the Act") of a decision of the Prairie North Regional Health Authority ("PNRHA"), the Respondent, communicated to the Appellants through their legal counsel by letter dated August 9, 2007, from the legal counsel of the PNRHA. The letter describes the steps taken by the PNHRA to re-allocate operating room time among the Appellants and the Proposed Intervenor, thus reducing the operating room time allocated to the Appellants, and concludes by stating that "the Health Region is content to leave this operational decision, as is its usual practice, in the hands of its administrative staff". A copy of the letter is attached to this decision as Appendix A.

As a result of receiving this letter, the Appellants each filed a Notice of Appeal with the Practitioner Staff Appeals Tribunal ("the Tribunal"). Dr. Kutzner's Notice of Appeal was dated August 20, 2007 and was received by the Tribunal on August 22, 2007. Dr. Blackwell's Notice of Appeal was dated August 20, 2007 and was received by the Tribunal on August 22, 2007. In each case, the Appellants set out the factual context and described their grounds of appeal as follows:

> "a. The Board's decision, and that of its administrative and management staff, was made without any basis in law or in fact and without the due process expressly provided for in the Medical Staff Bylaws of the Respondent; and
>
> "b. The Board's decision, and that of its administrative and management staff, was made for the purpose of accommodating the arrival of a new member of the medical staff, and, as such, was made without any evidentiary foundation".

The appellants each requested the following relief:

> "An order to set aside the decision of the Board, and that of its administrative and management staff, to reduce the privileges of the Appellant by reducing his operating room time".

A copy of each of the Notices of Appeal filed with the Tribunal is attached as Appendix B and C respectively to this decision.

A hearing was convened before the Tribunal on November 19, 2007, at which time the parties raised two preliminary issues. The first of these was whether or not Dr. Patrick

O'Keefe should be added as an intervenor and the second was whether the Tribunal had jurisdiction to proceed to hear these appeals. This decision addresses these preliminary issues.

B. FACTS

The events that led to these appeals being filed are not in dispute.

Drs. Blackwell and Kutzner are not residents of the health region served by the PNRHA, but have provided medical services on a consulting or visiting basis for many years. For that purpose they have been granted hospital privileges in hospitals in Battleford and Lloydminster, respectively.

Dr. Kutzner's hospital privileges are broader in scope than the privileges he actually exercises, which he has limited to performing cataract surgeries. Dr. Blackwell's privileges are for the performance of cataract surgeries only. Cataract surgeries are the most remunerative aspects of ophthalmology practice.

In early 2007, PNRHA recruited the services of a full-time resident ophthalmologist, Dr. Patrick O'Keefe. On March 12, 2007, David Fan, the Chief Executive Officer of PNRHA, sent a letter to each of Drs. Blackwell and Kutzner advising them of the fact that Dr. O'Keefe would be locating his practice in the region. The letter to Dr. Blackwell states that Dr. O'Keefe was recruited to replace Dr. Wood who retired in 2006 and, as a result, operating room time would be re-allocated.

Dr. O'Keefe did in fact relocate to Battleford in June 2007 and set up his practice there. His decision to relocate was based in part on his understanding that PNRHA would give him priority in the allocation of operating room time. In fact, he thought all operating room time would be allocated to him and the visiting ophthalmologists would be allocated no operating room time for the reason that he was providing a full range of ophthalmology services to the health region and they were not. However, he discovered after he arrived in Battleford that the operating room time allocated to Drs. Blackwell and Kutzner was reduced, not eliminated. He was not happy with that resolution, but was prepared to accept it.

Dr. Blackwell's lawyer wrote to Mr. Fan on May 3, 2007 stating his position that a removal of Dr. Blackwell's operating room time allocation would effectively push him out of the region and was tantamount to a reduction or revocation of his privileges as visiting staff, and that he had been denied due process.

The lawyer for PNRHA replied on May 17, 2007. The letter confirms that the region

would not be reallocating all of Dr. Blackwell's operating room time, but would be reallocating some of it to accommodate Dr. O'Keefe. The letter also refers to the fact that Dr. Blackwell's appointment was up for renewal, and notes that the decision about whether or not he should be reappointed will be up to the Board. The letter goes on to state, "The administration of the Health Region takes the position that the resource allocation is a legitimate issue to be considered in Dr. Blackwell's application for reappointment".

In a subsequent letter from the lawyer for PNRHA to the lawyer for Dr. Blackwell, dated June 8, 2007, Dr. Blackwell was notified that his operating room time allocation for the 2008-2009 fiscal year would be one day every six months, or two days per year rather than 12.

Dr. Blackwell's lawyer then wrote to the Chair of the Board of PNRHA, by letter dated August 1, 2007, taking the position that the decision to reallocate operating room time was a decision that could only be made by the Board and asking the Board to review the administration's actions, to allow submissions to be made to the Board on Dr. Blackwell's behalf, and then to either confirm or rescind the administration's decision.

Legal counsel for PNRHA replied to this letter by letter dated August 9, 2007, taking the position that it was inappropriate to characterize the reallocation of operating room time as a "suspension, alteration or reduction" of a physician's privileges. The letter goes on to provide the rationale for the reallocation decision, which the administration took in its view of the best interests of the people served by the region. The letter concludes by saying, "the Health Region is content to leave this operational decision, as it is its usual practice, in the hands of the administrative staff".

Dr. Kutzner received a letter from David Fan dated May 15, 2007 in which he confirmed proposed changes to the access to operating time and asked about his willingness to accept the reallocation of operating room time. He was also asked to accept expanded consultation referrals on ophthalmology conditions.

Dr. Kutzner's lawyer wrote to David Fan on June 6, 2007 requesting clarification of the proposal set out by Mr. Fan.

The lawyer for PNRHA replied on June 8, 2007. The letter confirmed that commencing on August 1, 2007 Dr. Kutzner would be allocated one cataract surgery day (14 cataracts) every second month until further notice.

Dr. Kutzner's lawyer then wrote to the Chair of the Board of PNRHA, by letter dated August 1, 2007, taking the same position as he had in respect of Dr. Blackwell, that the

decision to reallocate operating room time could only be made by the Board. He asked the Board to review the administration's action, to allow submissions to be made to the Board on Dr. Kutzner's behalf and then to either rescind or confirm the administration's decision.

Legal counsel for PNRHA replied to this letter by the same letter sent regarding Dr. Blackwell, dated August 9, 2007, as he identified the issue to be the same. In essence, he confirmed the Board's position that the matter was an operational decision to be addressed by administration staff also applied to Dr. Kutzner.

C. ISSUES

The Respondent and the Proposed Intervenor take the position that the Tribunal has no jurisdiction to hear these appeals because the Tribunal is created by statute and so its authority and jurisdiction is limited by the statute that creates it. The jurisdictional issue thus identified is whether the Tribunal has jurisdiction to review the decision that resulted in the reallocation of operating room time to Drs. Blackwell and Kutzner.

There are two aspects to the jurisdictional question. The first is the question of whether the notice of appeal was filed too late and the second is the question of whether the issue in dispute here is one in respect of which an appeal is possible.

D. STATUTORY FRAMEWORK

Appeals to the Tribunal are provided for by section 45 of *The Regional Health Services Act*:

> ***Appeals – decisions re practitioner staff***
> ***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.

(2) Subject to the regulations, a tribunal may determine its own procedures for the hearing of an appeal pursuant to subsection (1).

(3) For the purposes of hearing an appeal pursuant to subsection (1), the members of a tribunal have the powers conferred on commissioners by The Public Inquiries Act.

(4) A decision of a tribunal may be appealed to a judge of the Court of Queen's Bench on a question of law or jurisdiction within 30 days after the date of the tribunal's decision.

The details of the composition of the Tribunal and the process to be followed on appeals are set out in *The Practitioner Staff Appeals Regulations*. The pertinent provisions of these regulations are the following:

Commencement of appeal
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.

10(2) On the written request of an appellant or a respondent or on its own motion, the tribunal may extend the time for doing any thing pursuant to these regulations other than the time for commencing an appeal pursuant to subsection 8(1).

Note that the term “board” as used in the regulations has a defined meaning:

> *(c)* ***“board”*** *means:*
> *(i) a regional health authority; or*
> *(ii) the board of directors of a prescribed affiliate;*

In other words, the “board” for the purposes of these regulations is the regional health authority.

The regulations also provide for the manner of service of documents that are required to be served:

> ***Service of documents***
> ***16****(1) Any document that is required to be served or filed pursuant to these regulations may be served or filed personally or by registered mail.*
>
> *(2) Service of a document on the tribunal may be effected by service on the chairperson or the registrar.*
>
> *(3) Service of a document on a board may be effected by service on the chief executive officer of the board or, in the absence of the chief executive officer, on any other person employed in the head office of the board.*
>
> *(4) A document sent by registered mail is deemed to have been served on the seventh day following the date of its mailing, unless the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the document or received it at a later date.*

The Regional Health Services Act also establishes the health regions and the regional health authorities that govern them. Subsections 8(1) to (8) of the Act provide as follows:

> ***Status and composition of regional health authority***
> ***16****(1) A regional health authority is a not-for-profit corporation.*
>
> *(2) The Financial Administration Act, 1993 does not apply to a regional health authority.*
>
> *(3) Subject to subsection (6), a regional health authority consists of not more than 12 members appointed by the Lieutenant Governor in Council.*

(4) The members of the regional health authority constitute the board of the regional health authority.

(5) The board is responsible for administering the affairs and conducting the business of the regional health authority.

(6) Members appointed pursuant to subsection (3) shall meet any prescribed qualifications.

(7) Each member of a regional health authority is appointed at pleasure and holds office for a term of not more than three years and thereafter until the member is reappointed or a successor is appointed.

(8) If a member of a regional health authority dies or resigns, the person ceases to be a member on the date of death or on the day on which the resignation is received by the minister, as the case may be.

Regional health authorities are also required to adopt bylaws in relation to certain matters, as set out in section 43 of the *Act*:

Practitioner staff bylaws
43 *Every regional health authority and every affiliate prescribed for the purposes of this section shall make bylaws governing the practitioner staff, including bylaws:*

(a) respecting the appointment, reappointment and termination of appointment of persons to the practitioner staff and the suspension of persons appointed to the practitioner staff;

(a.1) respecting the disciplining of members of the practitioner staff;

(a.2) respecting the granting of privileges to members of the practitioner staff, including the amending, suspending and revoking of privileges granted;

(b) governing the classification and organization of the practitioner staff;

(c) governing the appointment of committees and officers of the

practitioner staff and prescribing their duties;

(d) respecting any other prescribed matter.

E. ANALYSIS

Issue 1: Was the notice of appeal served within the 30-day period provided for by subsection 8(1) of the regulations?

As noted above, subsection 8(1) requires that an appeal to the Tribunal must be served "within 30 days after the day on which the practitioner is served with a copy of the decision" appealed from. The Tribunal is expressly precluded from extending the time provided for the serving of an appeal by subsection 10(2) of the regulations.

PNRHA argues that the "decision" appealed from in this case is the decision communicated to legal counsel for the appellants contained in the letter from its legal counsel dated June 8, 2007. In Dr. Blackwell's case, the June 8 letter to his lawyer said that he would be allocated no further operating room time in the 2007-2008 fiscal year and that his operating room time allocation in the 2008-2009 fiscal year would be one day every six months. In Dr. Kutzner's case, the June 8 letter said that commencing August 1, 2007 he would be allocated one cataract surgery day (14 cataracts) every second month until further notice.

The Notice of Appeal was served on August 22, 2007, which is certainly more than 30 days after June 8. PNRHA also argues that while section 16 of the regulations provides for the service of documents that are required to be served by personal service or registered mail, the use of the word "may" is permissive and any other mode of service is also available, including service on legal counsel for the party. In other words, the June 8 letter to Dr. Blackwell's lawyer is service on Dr. Blackwell. The Tribunal does not agree.

The use of the term "may" in section 16 is, as *The Interpretation Act, 1995* provides, "permissive and empowering"[1] This means not that the parties may do whatever they want as to service of documents, but they are permitted and authorized to serve documents either personally or by registered mail. The practice of lawyers accepting service of documents is one provided for under The Rules of the Court of Queen's Bench where an action has been commenced and the lawyer is on the court record as representing a party.[2] It is not a method typically used to commence an action, and,

[1] S.S.1995, cI-11.2, clause 27(3)(b).
[2] See Rule 26.

where personal service is required, as in a divorce proceeding, a lawyer may not accept service on behalf of a client, even where the lawyer has been acting for the person in preliminary proceedings prior to the commencement of the action.

In any event, the question of service does not arise with respect to the decision that is under appeal, as the regulations only apply to appeal proceedings once they are commenced. Furthermore, Dr. Blackwell and Dr. Kutzner argue that the decision they are appealing is the decision of the board of the regional health authority that was communicated to their counsel by letter dated August 9, 2007, wherein legal counsel writes on behalf of the region. The letter concludes that the "Health Region is content to leave this operational decision . . . in the hands of its administrative staff".

The use of the terms "board", "health region", "region" and "regional health authority" in these various letters is somewhat ambiguous because of the use of these terms in the *Act* and regulations. The *Act* creates health regions, which are geographic areas[3], to be governed by a regional health authority, which is in essence a board of directors. Subsection 16(1) of the *Act* describes the regional health authority as a "not-for-profit corporation," subsection 16(3) says that a regional health authority consists of a number of "members," and subsection 16(4) says that those members constitute the "board of the regional health authority". The regulations define the word "board" to mean "the regional health authority". The Tribunal concludes from this that the regional health authority is the corporate entity that is managed and directed by its members who collectively constitute its board.

Thus, it would appear that the "board" made a decision that was communicated through its lawyer to counsel for Dr. Blackwell and Dr. Kutzner in the August 9, 2007 letter in effect confirming decisions that were made by administration to allocate operating room time in a particular way. Alternatively, the letter may be characterized as saying that in the view of the board the allocation of operating room time is an administrative decision. In either case, if the decision of the Board in coming to this conclusion, however characterized, is a decision of a type described in section 45 of the *Act*, then it is subject to appeal. In addition, a decision involving matters that are subject to appeal under section 45 cannot be delegated to someone other than the Board, which would have the inappropriate consequence of depriving a practitioner of a clear right of appeal by virtue of the fact that the Board simply allowed someone else to make the decision.

In the Tribunal's opinion, therefore, the focus of the inquiry must be on the decision that

[3] See section 13 of the *Act*, which amalgamates the specified former health districts to create health regions. The health districts were established under the authority of subsection 3(2) of *The Health Districts Act*, S.S. 1993, c.H-0.01,which permitted the Lieutenant Governor in Council to make an order establishing an "area" in the province as a health district.

the Board did make, and not the decision made by the administration. Seen in that light, the notice of appeal was served within the 30-day time limit provided for in the regulations, although the question remains whether or not the decision the Board has made is one described in section 45.

In the alternative, the Tribunal is of the view that the right of appeal is granted by the statute with respect to a decision of the "regional health authority" and there is no authority in the Act to make regulation to affect the scope of the right of appeal by referring to a decision of the "board" rather than the regional health authority. Thus, to the extent that subsection 8(1) of *The Practitioner Staff Appeals Regulations* purports to limit a right of appeal to the Tribunal to decisions made by the "board" rather than by the "regional health authority" as the Act provides, it is *ultra vires*.

Issue 2: Is the decision of the Board of the regional health authority that was communicated to Dr. Blackwell's and Dr. Kutzner's lawyer in the August 9, 2007 letter a decision that can be appealed under section 45 of the *Act*?

Subsection 45(1) provides for appeals to be taken to the Tribunal from decisions relating to appointment (including reappointment, suspension or termination) and discipline of and the granting of privileges (including amendment, suspension or revocation) to the practitioner staff of a regional health authority. All parties agree that the matter in dispute is not one relating to discipline.

PNRHA argues that the granting of privileges entitles a physician to certain rights to use its facilities, programs and services, but not to any allocation of any specific resource, such as operating room time. Thus, it concludes that a reallocation of operating room time is not a grant or alteration of a grant of "privileges" and therefore any decision in this regard is not subject to appeal to the Tribunal. In other words, PNRHA's position is that the privileges that Drs. Blackwell and Kutzner have is access to the operating room for the purpose of cataract surgeries and, as long as they have some access for that purpose, their privileges have not been affected. Since the purposes for which they have access has not been changed, there is nothing that can be appealed to the Tribunal. PNRHA points to the application for privileges that each originally made, and that has been renewed regularly since first granted, unchanged.

The Tribunal understands from the submissions made by counsel for PNRHA, that it has adopted a model or standard bylaw recommended by Saskatchewan Health, which contains a definition of "privileges" that is as follows:

> 3(p) "privileges" means the authority granted by the Board in accordance

> with these bylaws to a physician, chiropractor or dentist to admit, register, diagnose, treat or discharge patients in respect of a facility, program or service operated or delivered by the regional health authority

The term "privileges" is not defined in either the *Act* or the regulations. PNRHA therefore argues that the definition to be applied in determining the meaning of subsection 45(1), is the definition contained in this bylaw. The Tribunal does not have a complete copy of the bylaw from which this quoted extract is taken, but surmises from the fact that the provision is a definition that it is included in the document in order to give some clarity or certainty to the use of the terms contained in the document, that is in the bylaw in which the definition is located. It is usual for these provisions to begin "in this Act" or "in these regulations" or, as in this case, "in this (or perhaps these) bylaws". The purpose of this statement in a definition is to indicate that these are the definitions to be given to the listed terms in the document to which they are attached. In other words, a definition of a term for its use in a bylaw is not necessarily the definition to be given to the term as it is used in the Act.

However, unless there is specific authority provided in the Act to define its terms in some other place by some entity other than the Legislature, there is no authority to define. The word means what it means, and that is ultimately a matter to be determined by a court. Saskatchewan statutes have innumerable provisions that do provide the authority to define "any word or expression that is used in this Act but not defined in this Act". It is commonly included in general provisions to make regulations and, in fact, it is included in the list of powers to make regulations that is contained in *The Regional Health Services Act*.[4] Thus, because the definition of "privileges" apparently contained in the PNRHA bylaws is not made by the Lieutenant Governor in Council, as the *Act* requires, it cannot be a definition of the word as used in the *Act.*

The Attending Health Professionals Regulations[5], which are regulations made pursuant to the authority of *The Regional Health Services Act* that authorize certain health care professionals, including physicians, to admit persons to certain facilities operated by a health region as in-patients, to register persons as out-patients, to attend, diagnose or treat a person so admitted or registered in a facility, or to discharge such persons from the facility.[6] These regulations contain a definition of "privileges" as follows:

> *(i) "privileges" means, in relation to a facility, the authority granted by a board to a physician, chiropractor, dentist, midwife or nurse practitioner to admit,*

[4] Clause 64(a).
[5] R.R.S., R-8.2 Reg 4.
[6] *Ibid*,s.5.

register, diagnose, treat or discharge patients in that facility.[7]

As is typical, the section in which this definition is contained begins with the words "In these regulations". In other words, this definition of "privileges" is deigned for use in these regulations only and does not purport to be a definition of "privileges" for all purposes. Definition of words and terms defined for use in a single statute or set of regulations are normally included to achieve one or both of two objectives: either to provide a specific, technical meaning to the word or phrase or to define a concept to allow for ease of reference throughout the legislation to the concept defined. In this case, the term "privileges" is given a meaning that specifically relates to the purpose for which these regulations were enacted. The regulations prohibit anyone from admitting, registering, attending, diagnosing, treating or discharging persons in facilities unless they have been granted privileges by the board of the regional health authority to do so, and then they may do so only within the scope of what has been granted to them in this regard by the board. However, these regulations do not define the term "privileges" for the purpose of determining the scope of a physician's right of appeal, which is provided by subsection 45(1) of the Act, although one might conclude that the term "privileges" when used in the Act includes at least these things.

Most terms used in legislation are not defined, and in such cases it is necessary to interpret them. In doing so, the courts typically adopt what has been called the "modern rule" of statutory interpretation. This rule or approach to interpreting statutes was first articulated by Elmer Driedger:

> . . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[8]

It requires a reading of the words of the statute in the entire context of the legislative framework in which they occur and in the context of the purpose for which the legislation was enacted, having regard to presumptions about interpretation and extrinsic sources of information. Professor Driedger's approach was radical in its time because it contrasted with previous approaches to statutory interpretation that emphasized only one facet of this interpretive exercise, at the expense of all others. Driedger advocated an holistic understanding of the text of the law in the context of the reason for its enactment and the purpose it was intended to achieve. Professor Ruth Sullivan has elaborated upon this concept in her subsequent edition of Driedger's classic work. To the core of the concept articulated by Driedger she adds the notion that the task of the court is to adopt an interpretation that is appropriate, and she describes an appropriate interpretation as

[7] *Ibid,*clause 2i.
[8] E.A. Driedger, *The Construction of Statutes*, Second Edition, (Toronto: Butterworths, 1983) p. 87.

follows:

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[9]

In other words, an appropriate interpretation is one that the words of the statute can bear, that realizes the purpose for which the words were enacted and that is fair. I think this also means that the specific meaning of a word used in a statute cannot be determined in a vacuum. The task in this case is to determine what the word "privileges" means in the context of subsection 45(1) of the *Act* and the purpose for which the Legislature created the Tribunal.

The notion of "privileges" is a common one in the medical context. The Legislature's use of the word without defining it in setting out the scope of the Tribunal's jurisdiction to hear appeals from medical practitioners implies that the meaning to be given to it is the meaning that is understood in the medical context. For that reason, it is important to examine this context.

As was observed by counsel for the parties at the initial hearing in this matter, there is a paucity of cases relating to this issue. Although not in precisely the same circumstance as the present case and dealing with the previous statutory mechanisms prior to the enactment of *The Regional Health Services Act*, the case of *Saskatoon District Health Board v. Rosen* provides a general description of the legislative purpose then, which in the Tribunal's view is also pertinent now:

> A review of the statutory framework reveals that medical doctors in this province cannot practice medicine in a hospital unless they are members of the medical-dental staff of the hospital and hold privileges to perform the specific kinds of medical services that they provide in their medical practice. The chambers judge summed up the legislative framework as follows:
>
> > [28] . . .The legislative framework is designed to provide hospital boards with the authority to grant, vary and to rescind hospital privileges and to appoint and to remove doctors to and from the medical staff. The Medical-Dental Staff Bylaws authorized and mandated by statute and regulation set out how disciplinary matters involving doctors are to be handled.

[9] Ruth Sullivan, *Driedger on the Construction of Statutes,*Third Edition,(Toronto: Butterworths, 1994) p. 131.

> This legislative framework establishes the mechanisms or procedures that must be followed to ensure that the decisions of hospital boards are made in a fair and responsible manner. A physician can complain to the Minister of Health if his or her appointment to the medical staff has been affected in certain prescribed ways and the appeal procedure is set out. (See ss. 25, 26, 27 and 28 of the Act and ss. 3, 38, 39 and 40 of the Regulations).[10]

While the mechanisms have certainly been changed by the enactment of *The Regional Services Act*, the essential objective of subsection 45(1) and its predecessors is as the Court of Appeal described it, "to establish the mechanisms or procedures that must be followed to ensure that the decisions of hospital boards [now regional health authorities] are made in a fair and responsible manner".

In the *Rosen* case the Court of Appeal went on to conclude that the termination of a doctor's contract with a physicians' group employed in the hospital was necessarily connected to the removal of his privileges:

> The Board contends that it did not modify the description of Dr. Rosen's hospital privileges and as a result it is not obliged to follow the statutory procedures set out in the Bylaws. As the chambers judge properly noted, the procedural safeguards in the Bylaw are not conditional on a modification of the hospital privileges. They apply to physicians who are members of the medical-dental staff who are subjects being disciplined by the Board or its representatives. The second and more fundamental reason that the contention is flawed is that the Board has in fact modified Dr. Rosen's hospital privileges by terminating his contract.[11]

In the Tribunal's view, this present case is analogous. In *Rosen*, the board argued that it did not alter his privileges, it terminated his contract of employment. In this case, the board argues that it did not alter the privileges that Drs. Blackwell and Kutzner had in terms of what they were permitted to do in the hospitals in Battleford and Lloydminster, it only altered the times when they were able to exercise those privileges. In the Tribunal's opinion, the nature and scope of the privileges granted cannot be isolated from the ability to exercise them, and, in fact, the application for privileges reflects that understanding.

Dr. Kutzner's application for privileges states, "I . . . wish to apply for the privilege of performing the following procedures within the Lloydminster Hospital as indicated in the

[10] *Saskatoon District Health Board v. Rosen*,[2001]S.J. No.457 (SkCA), at para 15.
[11] *Ibid*, at para.50.

attached list".[12] Dr. Blackwell's application is similar and the privileges he has been granted, based on his application, are restricted to the performance of cataract surgeries.[10] This application is not just for permission to perform certain medical procedures, but also to perform them in the facilities of the regional health authority identified.

All parties agree that the regional health authority cannot use the allocation of operating room time as a means of circumventing the provisions of the *Act* and regulations relating to amending or revoking privileges. This means, for example, that PNRHA cannot reduce the access to operating room time to zero and then claim that this is simply an allocation of resources, rather than an amendment of privileges. In the Tribunal's opinion, this is an acknowledgment of the intrinsic link between the privilege granted to perform certain medical services and the actual access to the facility in order to perform them. Privileges without access are obviously meaningless.

One of the arguments that has been made in support of the notion that privileges are distinct from access is a floodgates argument: if this appeal is permitted there will be a larger number of appeals possible. This is true. However, just because appeals are technically possible doesn't mean that they actually occur. Many, perhaps most, appeals that are possible don't occur because they are not likely to be successful. This assessment is made on a case by case basis by the parties involved who weigh the cost of proceeding against the benefit of potential success. But the right of appeal itself is not limited on the basis that the appellate body would then have too much work to do. In the same manner, the jurisdiction of the Court of Appeal for Saskatchewan is not limited on the basis that if every decision from the Court of Queen's Bench is possible to be appealed that the Court of Appeal will be inundated with appeals. In fact, every decision of the Court of Queen's Bench is appealable, but most of them are not actually appealed.

Counsel for Drs. Blackwell and Kutzner has also referred to the case of *Bieko v. Hotel Dieu Hospital St. Catharines.*[11] In that case, the allocation of operating room time to ophthalmology was the subject of a civil claim in the Ontario courts. Morawetz, J. held that the Ontario *Public Hospitals Act* established "a comprehensive code under which the hospital determines privileges for a member of staff"[12] and therefore the court had no jurisdiction to deal with the issue. He said that section 36 of that Act established the basis on which the board can determine hospital privileges and as a result, he said, "it follows that issues relating to privilege are determined in accordance with the provisions of ss. 36-43" of the Act. Section 36 of the Ontario Act is as follows:

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[12] Exhibit A to the affidavit of David Fan.
[10] Exhibit D to the affidavit of David Fan.
[11] [2007]O.J. No. 331 (OntSCJ), upheld on appeal at [2007] O.J. No. 4785 (OntCA).
[12] *Ibid,*at para.45.

Powers of board re medical staff
36. The board may,

> (a) appoint physicians to a group of the medical staff of the hospital established by the by-laws;
>
> (b) determine the hospital privileges to be attached to the appointment of a member of the staff; and
>
> (c) revoke or suspend the appointment of or refuse to reappoint a member of the medical staff.

Morawetz, J, did not engage in a discussion about whether the reduction of allocation of operating room time to ophthalmology was an alteration of privileges, but he proceeded on the assumption that it is.

Counsel for PNRHA argues that the Ontario legislation is significantly different from the Saskatchewan legislation and therefore the decision in *Beiko* is not applicable in Saskatchewan. The Tribunal must disagree. The right to appeal in Ontario is set out in section 41 of the Ontario Act:

Reasons and appeal
41. (1) Any,

> (a) applicant for appointment or reappointment to the medical staff of a hospital who was a party to a proceeding before the board and who considers himself or herself aggrieved by a decision of the board not to appoint or not to reappoint him or her to the medical staff; or
>
> (b) member of the medical staff of a hospital who considers himself or herself aggrieved by any decision revoking or suspending his or her appointment to the medical staff or under section 34 or the by-laws ***cancelling, suspending or substantially altering his or her hospital privileges***,

is entitled to,

> (c) written reasons for the decision if a request is received by the board, person or body making the decision within seven days of the receipt by the applicant or member of a notice of the decision; and

> (d) a hearing before the Appeal Board if a written request is received by the Appeal Board and the board, person or body making the decision within seven days of the receipt by the applicant or member of the written reasons for the decision.

The Saskatchewan Act provides for an appeal with respect to the granting of privileges "or the amending, suspending or revoking or privileges" that have been granted. The Ontario legislation limits appeals in the case of alteration of privileges to cases where the privileges are "substantially altered" while the Saskatchewan legislation contains no such limitation, providing for an appeal where they are "amended" regardless of the extent. In *Beiko* the trial level court held that the reduction in the allocation of operating room time to the ophthalmology practice group was a "substantial alteration" of privileges.[13] The Court of Appeal summed up the situation as follows:

> The motion judge reviewed the *PHA* [*Public Hospitals Act*] in detail and concluded that the legislature had established "a comprehensive code under which the hospital determines privileges for a member of staff." He then found, again following a careful review of the record, that "[i]n the circumstances of this case, the allocation of OR time is a matter of privilege which was determined under the regime set out in the Act." In our view, these conclusions are unassailable and fit comfortably within the analytical framework set out in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. The appellants' complaint is about their access to the respondents' operating rooms. ***The essence of this complaint is about an alteration in the crucial professional privilege the appellants enjoy at the hospital***. As such, their complaint is amenable to the statutory review and appeal regime established by the *PHA*.[14] [emphasis added]

The "crucial professional privilege" to which the Court of Appeal is referring in the passage emphasized above is the allocation of operating room time. It would therefore follow that a change in allocation of operating room time would also be an "amendment" of privileges, and an appeal would lie under the Saskatchewan legislation.

Counsel for the PNRHA also argues that the decision in *Beiko* doesn't decide the jurisdictional issue of whether there has been a substantial alteration of privileges, that this question must go to the Ontario appeal board, which will then decide it, and in so doing that board could determine that the particular allocation of operating room time did not amount to a substantial alteration of privileges. Whether or not this argument is correct, in Saskatchewan there is no requirement that the alteration in privileges be "substantial". In other words, the jurisdictional issue here is simply whether the

[13] *Ibid*, at para.55.
[14] *Supra*, note 8, at para.4.

privileges have been changed. Since, as is set out above, the Tribunal has concluded that privileges are the combination of permitted procedures and the access to perform them, the privileges of Drs. Blackwell and Kutzner have been changed and the Tribunal has jurisdiction to consider their appeal.

F. DECISION

In summary, it is the decision of the Tribunal that it has jurisdiction to hear the appeals of Drs. Kutzner and Blackwell from the decision of the Prairie North Regional Health Authority communicated to them through their legal counsel by letter dated August 9, 2007 from legal counsel for the Authority.

As the application by Dr. O'Keefe to be added as an intervenor was not opposed, and as the Tribunal has the authority to determine its own hearing procedures, it is the decision of the Tribunal that Dr. O'Keefe be added as an intervenor in this appeal proceeding with the ability to participate fully in the proceedings.

Practitioner Staff Appeals Tribunal

Dated at the City of Saskatoon, in the Province of Saskatchewan this 16th day of June, 2008

Original signed by

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Catherine M. Knox, Chair

Dated at the City of Saskatoon, in the Province of Saskatchewan this 24th day of June, 2008

Original signed by

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Dr. Jim Wilson, Member

Dated at the City of Regina, in the Province of Saskatchewan this 16th day of June, 2008

Original signed by

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Loretta Elford, Member