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. CHARLES SMITH,

APPELLANT

AND:

SASKATOON REGIONAL HEALTH AUTHORITY,

RESPONDENT

DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL

Gary Bainbridge appeared and acted on behalf of the Appellant

Evert Van Olst appeared and acted on behalf of the Respondent

A. INTRODUCTION

This is an appeal by Dr. Charles Smith, the Appellant, pursuant to Section 45(1) of The Regional Health Services Act ("the Act") of a decision of the Saskatoon Regional Health Authority ("SRHA"), the Respondent, made on December 15, 2005, and confirmed on February 22, 2006, denying Dr. Smith's application for a locum tenens appointment to the Medical-Dental Staff of the SRHA.

The basis for the SRHA's decision is set out in correspondence dated December 23, 2005, addressed to Dr. Smith from Darlene Eberle, the chairperson of the SRHA:

> "Based on the totality of the information we received, we have considered the potential for negative public perception of your appointment in Saskatoon and determined that your appointment would compromise the reputation, integrity and credibility of the Saskatoon Health Region and its processes for the credentialing of physicians, thereby undermining public trust and confidence.
>
> Maintaining public trust and confidence is a legitimate and essential responsibility of the Authority. This is achieved in part by ensuring that individuals are not appointed to the Medical-Dental Staff in circumstances where there is a reasonably held perception of possible malfeasance, not merely confirmation of any wrong doing. As a Regional Health Authority, we must exercise our responsibility and right to determine what level of risk is acceptable in weighing this type of decision where there is obvious uncertainty at the present time.
>
> Given that the Chief Coroner's Office of Ontario is currently investigating many of the cases you were involved in, the Saskatoon Regional Health Authority determined that that investigation provides sufficient potential for negative public perception. Therefore, your application for appointment to the Medical-Dental Staff of the Saskatoon Health Region is denied."

In correspondence dated February 22, 2006, addressed to Dr. Smith, Ms. Eberle advised him of the outcome of the Authority's reconsideration of its earlier decision (which was carried out at the request of Dr. Smith):

> "Having again considered your application for a temporary *locum tenens* appointment, the Authority remains of the view that the application must be denied for the reasons outlined in our letter to you of December 23, 2005, which we confirm.

Additionally, the continued negative media focus on you reinforces the potential for negative public perception should your appointment be granted. While we again acknowledge that the accuracy of the media reports remains unknown, we also note that you are currently not in a position to be able to respond to the allegations in a public context and, as such, we, together with the public, are left to await the results of the investigations in Ontario.

Further, your application is for a temporary *locum tenens* position. As confirmed in the materials prepared by Dr. Murray and submitted on your behalf, such was for the purpose of covering the clinical duties in Anatomic Pathology at Saskatoon City Hospital while Dr. Murray assumed the position of Acting Head of the Department of Laboratory Medicine/Pathology. The particular purpose for the contemplated appointment has now passed as Dr. Murray has concluded his position as Acting Head and a new Head will be commencing on a permanent basis shortly.

In these circumstances, the Saskatoon Regional Health Authority is of the view that it would neither be prudent nor in the advancement of public trust in the Authority to grant your application at this time."

A Notice of Appeal dated March 22, 2006, sets out Dr. Smith's grounds of appeal:

"3. THAT the appeal is taken on the following grounds:

A. The Board's decision is perverse and without evidentiary foundation having ignored or failed to consider the material evidence touching upon the application of the Appellant for Locum Surgical Pathology Privileges, more particularly as follows:

i. The Board ignored or refused to consider the recruitment needs of the Pathology Department in Saskatoon including the excessive workload, difficulty recruiting and high turnover rate of pathologists to the Region, and poor morale within the Department.

ii. The Board ignored or refused to consider the report of the Head of Pathology at City Hospital who, for a period of three months, observed and directly supervised the work of the Appellant, confirming his outstanding level of skill and standard of care in surgical pathology, his outstanding interpersonal skills with other health care providers, and his overall positive impact upon the morale within the Pathology Department;

iii. The Board ignored or refused to consider the recommendations of the Medical Advisory Board and Credentialing Committees notwithstanding that these Committees have the necessary expertise and technical knowledge to screen and assess the Appellant's qualifications and background including his history, reputation, interpersonal skills and expertise in surgical pathology, and did conduct such screening and assessment before recommending that the Board grant Locum Surgical Pathology Privileges;

B. The Board, through its representatives, recruited the Appellant to the Saskatoon Health Region to assume a position on September 7, 2005 as a surgical pathologist in Saskatoon, and thereafter refused to grant Locum Surgical Pathology Privileges notwithstanding that the Appellant is eminently qualified as a surgical pathologist;

C. The Board acted in an arbitrary fashion and without jurisdiction by relying upon inflammatory media coverage surrounding the Appellant's work in forensic pathology notwithstanding that the content of such publications is hearsay, unreliable, and unrelated to his application for Locum Surgical Pathology Privileges;

D. The Board, in focussing upon media coverage surrounding the Appellant's work in forensic pathology, ignored or disregarded its duty of fairness to evaluate the Appellant's application for Locum Surgical Pathology Privileges fairly and objectively;

E. The Board acted without jurisdiction by considering Investigatory Reports prepared by a Complaints Committee of the College of Physicians and Surgeons of Ontario in response to two complaints respecting the Appellant's work in forensic pathology (hereinafter referred to as the Reports) which Reports are prohibited from use in other proceedings pursuant to section 36(3) of *The Regulated Health Professional Act, 1991*. The Board, in disregarding the statutory prohibition on the use of the Reports, compromised the integrity of the provincial licensing system for physicians and undermined the role of the licensing body. Although the Reports concluded that there was no evidence to support disciplinary or competency proceedings and found that the Appellant had met the standard of care expected of a forensic pathologist advising a coroner's office, the Board focussed on the critique and criticisms of practise issues in forensic pathology to support its

> adverse ruling in respect to the application for Locum Surgical Pathology privileges."

In the Notice of Appeal, the following relief is sought by Dr. Smith:

> "F. THAT the Appellant requests the following relief:
>
> a) to set aside the decision of the Board and to grant the application of the Appellant for temporary locum tenens appointment to the Medical Dental Staff of the Saskatoon Health Region in the Department of Laboratory Medicine."

At the conclusion of this appeal hearing and in the brief of law submitted by Dr. Smith's counsel, the relief sought is expanded to include the following:

> "98. Accordingly, the Appellant respectfully requests the following relief:
>
> 1. That the Board's decision of December 23, 2005, as confirmed by its decision of February 22, 2006, be quashed in its entirety;
>
> 2. That the Appellant be appointed to the Saskatoon Heath Region in the same capacity, with the same privileges, and under the same locums contract (amended *mutatis mutandis*) for the balance of the one year term;
>
> 3. That the appointment shall become effective on the date the Appellant provides proof of his Saskatchewan licensure, unless otherwise agreed upon between the parties; and
>
> 4. That the Appeal Tribunal retain jurisdiction to address any issues arising from the implementation of this decision."

B. JURISDICTION OF THE TRIBUNAL

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."

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."

This is the first appeal hearing pursuant to the Regulations and accordingly the question arises as to what is contemplated by Section 11(1) of the Regulations when it directs that the appeal shall be conducted as a hearing *de novo*.

Counsel for Dr. Smith submitted that the Tribunal is to decide this matter afresh on the evidence presented to it at the appeal hearing.

Counsel for the SRHA, on the other hand, submitted in its brief of law that the Tribunal "should focus its review on the process utilized by the Board and not the merits of its decision…and determine whether the Appellant was provided with the due process envisioned by the statutory scheme and the specific Medical Staff Bylaws…..Alternatively, if the panel believes that it can address the merits of the decision, it is submitted that deference be given to the Board's decision."

On the basis of the limited case law dealing with the meaning of a *de novo* hearing, we have concluded that the approach proposed by Dr. Smith's counsel is the correct one.

In R. v. Dennis [1960] SCR 286, at p. 325, Mr. Justice Ritchie of the Supreme Court of Canada explained the difference between an appeal and an appeal *de novo*:

> "On the other hand, the distinction between "an appeal by holding a trial de novo" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right or wrong having regard to the evidence upon which it was based, ***whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence***. [emphasis added]"

This passage was adopted in Saskatchewan (dealing with an appeal to the Saskatchewan Police Commission) in Hnatchuk v. Saskatchewan Police Commission [1982] S.J No. 186 (Sask. Q.B.).

Accordingly, we have concluded that the nature of this appeal is to make a determination of whether the Board's decision was right or wrong based upon the evidence presented at this appeal hearing.

Having accepted the submission of Dr. Smith's counsel, however, we are also cognizant of the discretion given to Boards such as the SRHA Board when making decisions concerning appointments to the medical staff.

Counsel for the SRHA submitted that it is well established in law that an appointment to a medical staff is a privilege and not a right and cites M. v. Hospital Board Cereal Municipal Hospital District (1946) 3 W.W.R. 669 (Alta. Supreme Court) and Henderson v. Johnson (1959) S.C.R. 655 (S.C.C.) as support for this proposition.

Moreover, counsel cited Jain v. North and West Vancouver Hospital Society (1974) 43 D.L.R. (3rd) 291 as support for the principle that it is a matter of discretion on the part of management (or the Board, in this case) to make such an appointment. In the exercise of that discretion, the Board should not be unreasonable, arbitrary, capricious or discriminating.

Counsel for Dr. Smith, while noting that the SRHA Medical-Dental Staff Bylaws do not provide specifically that the Board has a discretion to approve or reject appointments, concedes that the Board must have some discretion. But, counsel also submits, "having discretion" does not mean that one can deny an appointment "just because" – that discretion must be exercised judicially, untainted by, for example, irrelevant considerations.

As support for this latter proposition, counsel for Dr. Smith cites Cameron v. East Prince Health Authority [1999] P.E.I.J. No. 44 (P.E.I.S.C.) in which the following summary of the law in this area was set out:

> "(v) The legal nature of patient admitting privileges
>
> ¶ 37 ***Although participation on a hospital medical staff is viewed at law as a privilege rather than a right, the interplay of interests involved creates the obligation on hospital boards to make their decisions judicially and pursuant to a fair process.***
>
> ¶ 38 Sharpe, ***The Law & Medicine in Canada*** (2nd ed.) at pp. 255-257 addresses the nature of hospital medical staff privileges and the administrative law ramifications thereof. Appreciation of the duty of a board toward an applicant and toward a board's other constituencies, and of the appropriate approach by a court on review of a board exercise of authority, involves an appreciation of the nature of hospital privileges.
>
> ¶ 39 This subject is sometimes highly controversial, because it involves not only hospitals and the medical profession, but governments, which pay for services, and citizens, who require services. Hospitals are historically and generally corporate entities, although in this province they now appear and function substantially as government agencies. Hospitals are charged with the

> responsibility of providing care to patients. In the discharge of that responsibility they feel morally and legally obligated to choose carefully those who will provide the care. A doctor licensed to practise in a province may find it difficult to accept that a license does not include the right to care for patients in hospitals financed by public funds. As well, a patient may find it incongruous that his or her doctor, who practises in the community where the hospital is located cannot continue to care for the patient once he or she enters hospital.
>
> ¶ 40 The question of whether membership on a hospital's medical staff is an absolute right has been settled before the courts. Absent statutory direction, it is not. **A hospital board has authority to exclude a practitioner if it has a good reason for doing so. But, this right is not unfettered**. [emphasis added]
>
> **…….**
>
> ¶ 44 The courts have specifically rejected as inappropriate some factors in relation to the granting of privileges. These include: age, where evidence is not adduced as to physical incapacity for the doctor to meet his or her obligations as a staff member; conduct inconsistent with the spirit of collegiality that is imperative in a hospital environment, where there was evidence that the doctor had a tendency to "go it alone" but the court found a poor standard of practice in his field was not shown; where conflicts with the doctor were handled by "corridor meetings" with no record of proceedings and no follow-up; **where there was selective consideration of documentation, particularized by giving full weight to negative comments and failing to take into account certain favourable comments and giving short shrift to the doctor's extensive training and publications.** These cases point to the need for a board as decision-making body **to adhere to the principles of fairness, to thoroughly investigate allegations, and to be directed by appropriate criteria**. [emphasis added]"

We accept the above submissions as a correct description of the law and of the limitations on the discretion of the Board when making such appointments. We also conclude that although this is an appeal *de novo* – and accordingly we are to determine this matter on the basis of the evidence before us – an important consideration when determining whether the decision of the Board was right or wrong is to take into account whether the Board properly exercised its discretion.

C. PRELIMINARY MATTERS – ADMISSIBILITY OF EVIDENCE

At the outset of this appeal hearing, Dr. Smith's counsel indicated that he objected to copies of two (2) decisions of the Complaints Committee of the Ontario College of Physicians and Surgeons being submitted as evidence at this appeal hearing by counsel for the SRHA.

As will be discussed in greater detail in the Evidence portion of this decision, copies of two (2) decisions of the Complaints Committee dealing with Dr. Smith were forwarded by individuals to the Chief of Staff of the SRHA and the Vice-President of Medical Services of the SRHA in October, 2005. Although these decisions were considered by the Board of the SRHA in its decision making process concerning Dr. Smith's appointment, counsel for Dr. Smith objected to these same decisions being considered by this Tribunal at this appeal hearing.

A final ruling on this matter was reserved pending this written decision of the Tribunal.

At the appeal hearing, counsel for Dr. Smith drew the Tribunal's attention to Section 36(3) of The Regulated Health Professions Act of Ontario, which provides:

> "**Evidence in civil proceedings**
>
> (3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*. 1991, c.18, s. 36(3); 1996, c. 1, Sched. G, s. 27 (2)."

Counsel for the SRHA submitted, and counsel for Dr. Smith conceded, this Ontario statute applies to proceedings in Ontario – not Saskatchewan.

However, as counsel for Dr. Smith noted, we have similar (although not identical) provisions in Saskatchewan contained in Sections 60(2) and 60(5) of The Medical Profession Act, 1981:

> "60(2) No witness in a legal proceeding shall be asked any question about proceedings before or by, or information or evidence given to, a committee appointed by the council for the purpose of investigating and studying matters

> relating to morbidity, mortality or the cause, prevention, treatment or incidence of disease, but the witness is not excused from answering questions or producing documents that he is otherwise bound to answer or produce."
>
> …….
>
> "(5) All proceedings of a committee described in subsection (2) shall be held *in camera*, and all information and evidence given to that committee in any proceedings shall be treated by the committee and its members as confidential, and, in any report or publication by the committee or a member of that committee relating to its investigations and studies, the names of the physicians or podiatric surgeons and patients connected in any way with the matters under investigation and study shall not be disclosed."

According to counsel for Dr. Smith, the principle of judicial comity should be applied by this Tribunal to exclude the two (2) written decisions of the Complaints Committee. Judicial comity has been defined as:

> "Principle in accordance with which courts of one state or jurisdiction give effect to laws and judicial decisions of another state out of deference and respect, not obligation."

Counsel for Dr. Smith submitted that we would expect the Ontario courts to uphold the provisions of The Medical Profession Act, 1981 in any proceedings in Ontario and we, in turn, should uphold Section 36(3) of The Regulated Health Professions Act of Ontario and not permit the decisions of the Complaints Committee of the Ontario College of Physicians and Surgeons to be used at this appeal hearing.

In response, counsel for the SRHA submitted that judicial comity refers to the "court" – not an administrative Tribunal – of one jurisdiction respecting the laws of another jurisdiction. Accordingly, the principle has no application in this circumstance.

Moreover, counsel for the SRHA drew attention to Section 12(1) of the Regulations, which provide that this Tribunal may accept any evidence that it considers appropriate and is not bound by any rules of law concerning evidence.

Finally, counsel for the SRHA submitted that no objection was made by counsel for Dr. Smith to the use of these two (2) decisions at the Board meeting of the SRHA on December 7, 2005, when the Board first heard representations from Dr. Smith's counsel as to why Dr.

Smith should be granted the appointment/privileges he was seeking (and prior to the Board voting on whether to accept or reject Dr. Smith's application).

Having made the above submissions, counsel for the SRHA voluntarily agreed to only deal with and ask questions about the disposition of each of the Complaints Committee's reports/decisions. This concession by counsel for the SRHA appeared to have lessened the concerns of Dr. Smith's counsel.

Given all of the above, this Tribunal considers that the first matter in determining whether to admit certain evidence is whether it is relevant to the case at hand. Dr. Smith's competency to practice pathology is a relevant issue in this appeal.

The second matter to determine is whether there is a clear rule which would exclude the evidence. In this case, there is no clear cut rule excluding the evidence which counsel for the SRHA wishes to introduce.

Accordingly, given our broad powers in Regulation 12(1) to accept any evidence that we consider appropriate (and without deciding whether the principle of judicial comity extends to administrative Tribunals), we have concluded that the disposition portion of each of the two (2) Complaints Committee's reports (which do not identify any of the parties to the complaint, any patient's names or the nature of the complaint) may be admitted as evidence.

D. EVIDENCE/FACTS

The evidence at this hearing consisted of the testimony of the Appellant, Dr. Smith; Dr. Henrike Rees, a pathologist employed by the SRHA; Dr. Barry Maber, a former vice-president of the SRHA; Dr. Bruce Murray, a pathologist employed by the SRHA; and Darlene Eberle, chairperson of the SRHA, together with a substantial amount of documentation submitted by both counsel.

The evidence/facts as to what occurred leading up to and including the decision made by the SRHA are not, for the most part, in dispute.

1. In June of 2005, Dr. Bruce Murray, who was at the time a pathologist employed by the SRHA, learned that he would be appointed as the acting head of the Department of Laboratory Medicine for a period of approximately one (1) year commencing July 1, 2005. Because he would be giving up performing his clinical duties in his new role, he required a pathologist to backfill his clinical duties on a temporary basis.

2. Dr. Smith, who was at the time employed at the Hospital for Sick Children in Toronto, was asked by Dr. Murray (via his wife who had met Dr. Murray at a conference) to contact him about the available position. Dr. Smith, who was the subject of some media coverage in Ontario and was interested in moving to Western Canada, contacted Dr. Murray, a former medical school classmate, by e-mail to indicate his interest in the position. In the e-mail, Dr. Smith referenced the media coverage.

3. On June 29, 2005, Dr. Smith telephoned Dr. Murray as a follow-up to the e-mail. There were some differences between Dr. Smith and Dr. Murray as to what was discussed during this call.

   Dr. Murray testified that Dr. Smith indicated a desire to leave Ontario in order to move forward in his career. He also recalls Dr. Smith indicating that he wanted to end up in British Columbia eventually, but that he wanted to practice in a "backwater" location for a time in order to get out of the "spotlight".

Dr. Smith, on the other hand, testified that returning to Saskatoon, where he attended medical school, was desirable. Dr. Smith also recalls that Dr. Murray expressed his hope that Dr. Smith would start in the locum tenens position but eventually "slide into" a permanent position as a pathologist with the SRHA in the succeeding months.

Dr. Murray did not testify as to any promises – express or implied – made to Dr. Smith about a permanent position.

What both Dr. Smith and Dr. Murray do agree upon, however, is that in this telephone conversation, they agreed to work jointly to ensure that Dr. Smith could obtain the locum tenens position. It was anticipated that Dr. Smith would commence working in his new position at the beginning of September, 2005.

4. Dr. Smith also testified that in this telephone conversation he advised Dr. Murray that complaints had been made against him to the College of Physicians and Surgeons in Ontario, but that they had been dismissed. He further advised Dr. Murray about media coverage concerning his work in a number of forensic pediatric cases.

The Coroner of Ontario had also recently indicated that there would be a review of forty-four (44) of Dr. Smith's cases in the interests of maintaining public confidence.

5. The Medical-Dental Staff Bylaws of the SRHA describe both the categories of Medical-Dental Staff appointments and the process for obtaining such appointments.

Of relevance to this appeal hearing are the following categories of appointments:

> "5.10 <u>Locum Tenens</u>
>
> A physician or dentist seeking an appointment as a locum tenens must submit a completed application at least six (6) weeks before the locum tenens begins. The applicant is eligible for an appointment only if the applicant meets the requirements of an Associate Staff Appointment."
>
> "5.5 <u>Temporary Appointment</u>
>
> 5.5.1 The Chief of Staff may, after conferring with the SDHB medical department head, grant a temporary

appointment to a physician or dentist who is not a member of the medical-dental staff of the Corporation, after verification of the applicant's licensure and proof of liability coverage from either the Canadian Medical Protective Association or an equivalent agency.

The extent and duration of a temporary appointment shall be stated, and the member of the medical-dental staff shall act under supervision of the SDHB or agency medical department head.

A temporary appointment shall be granted for a specific purpose and for a specified period of time.

5.5.2 Physicians, or Dentists requesting a temporary appointment must satisfy the requirements for appointment to the Associate staff category, except for individuals who bring special expertise in a life threatening situation and under extraordinary circumstances.

5.5.3 A temporary appointment may, subject to Section 5.5.1, be granted to a physician or dentist duly registered to practice medicine or dentistry in the Province of Saskatchewan:

- whose application for appointment is pending, and when all the necessary procedures have been completed but not yet approved by the Board;
- when the teaching aims of the SDHB medical department make such temporary privileges desirable; or
- in other circumstances where deemed appropriate.

5.5.4 All temporary appointments granted shall be reported to the Medical Advisory Committee and be presented to the Board for approval."

6. The process for obtaining appointments to the Medical-Dental Staff can be summarized as follows:

Firstly, the applicant must submit an application indicating the department that he wishes to join and the privileges that he is seeking. The application must be accompanied by three (3) character references, a certificate of good

standing from the applicant's current licensing body, proof of liability insurance and evidence of a current license with the Saskatchewan College of Physicians and Surgeons.

Secondly, upon receipt of the above described documentation, the application must be considered and recommended by the Credentialing Committee and then the Medical Advisory Committee before it is submitted to the Board of the SRHA for approval or rejection.

7. On July 11, 2005, Dr. Smith received the application forms to be completed by himself and returned to the SRHA.

8. Within one (1) week of receiving these application materials, Dr. Smith resigned his position at the Hospital for Sick Children.

9. In the Application for Appointment to the Medical-Dental Staff executed by Dr. Smith and dated July 23, 2005, Dr. Smith indicated that he was applying for membership to the Medical-Dental Staff with privileges in the Laboratory Medicine Department and for membership in the locum tenens staff category. In a separate document, Dr. Smith further indicated that he was seeking full privileges in anatomical pathology within the Department of Laboratory Medicine.

Anatomical Pathology, which includes the examination of tissues and cells, is divided into two (2) sub-categories: surgical pathology (which includes examining tumours, etc., that have been removed from a patient for diagnosis) and autopsy or forensic pathology (which includes, inter alia, examining organs from a deceased person, determining patterns of injury and determining the cause of death when death is sudden and unexpected).

Forensic pathology, as both Dr. Smith and Dr. Rees testified, requires special expertise and training. It also invites controversy insofar as it is not an exact science and because there is involvement with the legal system – the work is done at the request of a Coroner, a pathologist deals with the police and prosecutors and often the pathologist has to testify in court.

10. In addition to the said Application, Dr. Smith also provided, inter alia, to the SRHA the following:

(a) A Certificate of Professional Conduct from the College of Physicians and Surgeons of Ontario, which indicated, among other matters, the following:

"Current Referrals to the Discipline or Fitness to Practise Committees as at the Date of Issue of this Certificate: None"

"History of Discipline or Fitness to Practise Findings as Recorded on the Register: None"

(b) Proof of licensure in Saskatchewan which was provided from the College of Physicians and Surgeons of Saskatchewan, which granted an Unsupervised Locum Tenens Licence to practice in Anatomical Pathology from September 7, 2005, to September 6, 2006.

11. Effective September 6, 2005, Dr. Smith was granted a temporary appointment with the Department of Laboratory Medicine "as a locum tenens in anatomical pathology" by Dr. Conlon, the Chief of Staff. His temporary privileges were granted pending his appointment to the Medical-Dental Staff.

12. On September 7, 2005, Dr. Smith was provided with a Contract for Services (Locum) between the SRHA and himself. He signed the contract on that same date.

The Contract for Services provides, inter alia, (i) that Dr. Smith was engaged as an independent contractor to provide services in the sub-specialty of surgical histopathology of anatomic pathology; (ii) that Dr. Smith was to be duly qualified to practice in the Province of Saskatchewan; (iii) the payment for his services; and (iv) the effective date of the Agreement (September 7, 2005) and the term of the contract – a period of one (1) year unless terminated by either party on one (1) month's written notice or immediately, without notice, for just cause.

Attached to and forming part of the Contract for Service is a schedule which included the following:

> "There is no requirement or expectation by the Region for participation in the Autopsy or Cytology sub-specialty area.
>
> …….
>
> Any duties beyond those agreed to above will be undertake [sic] only by mutual agreement."

13. Dr. Smith commenced working at City Hospital in Saskatoon immediately. He acted under the supervision of Dr. Rees, the acting head of the pathology department at City Hospital. Over time, however, both Dr. Smith and Dr. Rees testified, her supervision decreased because of Dr. Smith's ability to handle his duties without supervision. Indeed, Dr. Rees testified that Dr. Smith did an excellent job in carrying out his duties, that he was an enthusiastic and productive pathologist with a good relationship with the staff at work.

14. On September 27, 2005, the Credentials Committee met and considered the application of Dr. Smith. As Dr. Maber testified, the Credentials Committee's purpose in reviewing the application was to consider and approve the applicant's professional qualifications.

15. In the latter part of September or first part of October, 2005, Dr. Maber received a letter dated September 28, 2005, from an individual who attached a decision of the Complaints Committee of the Ontario College of Physicians and Surgeons, which had investigated a complaint against Dr. Smith. Although the Committee, in its decision, concluded that Dr. Smith's overall approach in the matter under investigation was acceptable, it required Dr. Smith to attend before a panel of the Committee to be cautioned with respect to certain deficiencies in his approach to the case.

16. In the first part of October, 2005, Dr. Conlon, the Chief of Staff of the SRHA, received a letter dated September 30, 2005, from a second individual who also attached a decision of the Complaints Committee of the Ontario College of Physicians and Surgeons, which had investigated a complaint against Dr. Smith. (This was a different decision than that which had been forwarded to Dr. Maber.) Again, the Committee in this case concluded that Dr. Smith's overall approach in this

matter was acceptable but required Dr. Smith to attend before a panel of the Committee to be cautioned with respect to a number of deficiencies in his approach to the case.

17. The Board of the SRHA meets twice a month (with the exception of July and August in each year in which there are no meetings). There is an in-camera meeting of the Board in the first part of the month and a public meeting in the middle or latter part of the month.

18. At its in-camera meeting of October 5, 2005, Dr. Murray attended before the SRHA Board to discuss Dr. Smith's application for an appointment to the Medical-Dental Staff. He explained to the Board what had occurred to this point (i.e. the granting of temporary privileges, etc.).

19. On October 11, 2005, the Medical Advisory Committee ("MAC") met to consider the Credentials Committee's report and to consider the applications of various physicians, including Dr. Smith's application. In the minutes from that meeting, there is reference to the fact that the members of the MAC were aware of and sensitive to the controversy in Ontario related to Dr. Smith's forensic work but also a conclusion that his credentials were in order and that monitoring mechanisms were in place to ensure quality service in the area of adult anatomical pathology.

20. On October 18, 2005, at the Board's request, an Ethics Consultation was carried out with respect to "the process for hiring Dr. Smith as well as the pertinent questions that needed to be answered in order to justify his hiring".

A written summary of the matters considered by the ethics group was prepared by the SRHA's ethicist, Fr. Mark Miller, for the Board's consideration. It provided, in part:

> "Second, the major question that focused most of the discussion concerned the credentials of Dr. Smith, as conveyed to SHR by the Ontario College of Physicians and Surgeons, as well as any possible impediments due to unsatisfactory practice or judgement. It was noted that documentation that SHR had obtained concerning Ontario College hearings about Dr. Smith's practice were forwarded to us not by the College but by affected individuals. This raised

> significant questions about the nature of the hearings in Ontario, the consequences for Dr. Smith's practice, and SHR need to understand what was being communicated to us (and what was not). Were these 'disciplinary hearings' as we might call them in Saskatchewan or something else? As I recall, the most significant conclusion of our ethics consultation was that SHR needed to understand more clearly what the credentialing of Dr. Smith in Ontario means and why the results of the hearings were not forwarded to us.
>
> Part of the need to clarify the above question revolved around the importance of trusting Colleges of Physicians and Surgeons across Canada.
>
> Third, the scope of Dr. Smith's work in Saskatoon was clearly delineated such that it was made clear that he would not be practicing either pediatric or forensic pathology. He would be restricted to surgical pathology, for which he [sic] credentials seem to be more than adequate. Furthermore, an issue arose about oversight or mentoring of Dr. Smith. It was pointed out that he would need some guidance for the first few months because adult pathology would have different demands that [sic] pediatric pathology and this would be provided by the Pathology staff. Furthermore, the methodology of the Pathology staff is such that they work together in a complementary fashion which provides a regular dialogue with Dr. Smith in the work he is doing.
>
> Fourth and finally, the issue of public perception was raised. It was not clear to me how this aspect is weighed in the whole scheme of things. It is my own opinion that if SHR can justify its hiring of Dr. Smith, it can do so transparently and with full accountability. There was, however, the further question concerning the possibility that serious findings would become public as a result of the inquiry into the 40 or so forensic pathology cases that are currently being reviewed in Ontario; SHR would need to be prepared to deal with this situation should it arise during the coming year."

21. At the public meeting of the SRHA Board on October 19, 2005, all of the recommendations for physician appointments – with the exception of Dr. Smith – were approved by the Board. The Board, according to Ms. Eberle, required additional information and time before making the decision on whether to grant Dr. Smith the appointment he was seeking.

22. Because of a reluctance on the part of the Ontario College of Physicians and Surgeons to discuss the two decisions concerning Dr. Smith that had been forwarded to Dr. Maber and Dr. Conlon, Dr. Maber wrote to Bryan Salte, Deputy Registrar of the

College of Physicians and Surgeons of Saskatchewan on October 20, 2005, to clarify what the SRHA believed was a discrepancy that existed between the official record contained in the Certificate of Professional Conduct issued by the Ontario College of Physicians and Surgeons and the two (2) decisions of the Complaints Committee of the Ontario College received by the SRHA.

The Deputy Registrar of the Saskatchewan College of Physicians and Surgeons responded in a letter dated October 22, 2005, as follows:

> "From the material provided to me, I think that the Ontario Complaints Committee has authority that combines the authority of our Complaints Resolution Advisory Committee and our Preliminary Inquiry Committee.
>
> That is, upon completing a review of a complaint the committee can:
>
> a) Dismiss the complaint
> b) Refer the complaint for discipline or competency proceedings
> c) Provide a caution to the member
> d) Provide advice to the member
>
> If I correctly understand what was done in Ontario, the Committee, after investigating the complaint, cautioned Dr. Smith. As I understand the Ontario process, a caution is a method whereby the Committee requires a physician to attend so that the Committee can express its disapproval to the member, but it is not a matter of formal discipline and is not a finding of professional misconduct.
>
> As I understand the Ontario process, the investigation was an investigation of potential unprofessional conduct as the Committee considered whether the information provided was sufficient to result in a referral to the discipline committee for a discipline hearing. They did not do so but rather administered the caution.
>
> As I understand it, this would be the equivalent of a preliminary inquiry committee in Saskatchewan reviewing a complaint and deciding that there was insufficient evidence to justify a hearing before the discipline committee. Thus, while the media may refer to the caution as "discipline" I don't think it is accurate to so describe it. the finding in Ontario with respect to both of the complaints that I have reviewed was that they were not matters that should be referred for a discipline hearing."

23. Dr. Maber prepared a report for the Board of the SRHA prior to its November 2, 2005, meeting. After outlining a chronology of events and some key considerations for the Board, he then provided the following:

> "**A possible course of action:**
>
> The Authority can accept the recommendation of MAC, reject it entirely or vary it by substituting its own conditions such as:
>
> Approval of his appointment to the Temporary Medical Staff **subject to the following explicit conditions:**
>
> 1. The temporary appointment will not extend beyond June 30, 2006.
>
> 2. During the term of his appointment he will not be involved in any autopsy work, nor any forensic work.
>
> 3. The Authority reserves the right to review this decision should the Provincial Coroner's review in Ontario make relevant information known to the Authority before the end of Dr. Smith's term of appointment.
>
> 4. The Head of the Department will continue to be responsible for close monitoring of Dr. Smith's work as a surgical pathologist."

Dr. Maber testified at the appeal hearing that this description of a possible course of action was not meant to be a recommendation to the Board – only an option to be considered.

24. A straw vote was taken at the Board's in-camera meeting of November 2, 2005, and the results were that Dr. Smith should not be granted the appointment he was seeking.

25. The intention was to hold the formal vote at the Board's public meeting set for November 16, 2005. Prior to the meeting, however, Dr. Smith's lawyer requested an opportunity to address the Board with respect to the issue of his appointment and privileges at a date sometime after November 21, 2005.

26. On December 2, 2005, Dr. Ladham, the Chief Forensic Pathologist at the office of the Chief Coroner of Saskatchewan issued a letter addressed "To Whom It May Concern" in which he wrote the following:

> "Please be advised that Dr. Shaun Ladham, Chief Forensic Pathologist, Office of the Chief Coroner, Saskatchewan is responsible for forensic services in Saskatchewan including the allocation of forensic work to pathologists in Saskatoon. The decision as to which pathologist is involved in this service is determined by the Chief Forensic Pathologist.
>
> Because of the media controversy which is centered on Dr. C. Smith regarding his forensic services in Ontario, and the pending independent peer review of this work which will be conducted in Ontario, Dr. Smith will not be involved in the performance of any forensic autopsy examinations in Saskatchewan. This has been discussed with Dr. Smith, who has indicated that he also does not wish to participate in these examinations."

27. At its next meeting – December 7, 2005 – Dr. Smith and his lawyer appeared before the Board and were permitted to make their presentation as to why Dr. Smith should be granted the appointment/privileges that he was seeking. The Board had before it the Application of Dr. Charles Smith and all related documentation, the Contract for Service between the SRHA and Dr. Smith, the Ethical Consultation Summary, the letters from the two individuals addressed to Dr. Maber and Dr. Conlon (with the attached decisions of the Complaints Committee), the exchange of correspondence between Dr. Maber and Bryan Salte, the report prepared by Dr. Maber for the Board and assorted press articles concerning Dr. Smith.

The press articles included articles from newspapers with headlines such as:

"Pathologist's findings probed"

"Criminal cases involving pathologist face review"

"Child killer cases first under review"

"Pathologist probed in Ontario – Moves to Saskatoon"

"Shamed MD finds new job"

28. At its next meeting – December 15, 2005 – the Board voted to deny Dr. Smith's application for appointment.

29. Correspondence dated December 23, 2005, was forwarded to Dr. Smith advising Dr. Smith of the Board's decision and the reasons for its decision.

30. Dr. Smith's last day of practice in Saskatoon was December 22, 2005.

31. By letter dated January 13, 2006, Dr. Smith requested that, pursuant to Article 3.2.8 of the Medical-Dental Staff Bylaws, the Board reconsider its decision.

32. By letter dated January 23, 2006, Dr. W. T. Bingham, Acting Chair of the Medical Advisory Committee wrote Ms. Eberle to advise her that at its January 23, 2006, meeting a unanimous motion was passed by the MAC in support of Dr. Smith's appeal to the Board for a reconsideration of its decision.

33. Prior to the February Board meetings, Dr. Smith and his lawyer provided the Board with a copy of correspondence dated May 12, 2005, from Dr. James Dimmick, a Professor of Pathology and Laboratory Medicine from the University of British Columbia who had been requested by a Vice-President at the Hospital for Sick Children to conduct a review of Dr. Smith's pediatric surgical pathology cases to determine the appropriateness of diagnoses made by Dr. Smith. The letter read, in part:

> "I have completed the review of 60 surgical pathology cases that in my estimation reflect a spectrum of challenging interpretations and that have, predominantly, important implication for patient care. For each case I examined all pathology slides without knowledge of the content of Dr. Smith's report and formed a diagnostic opinion. After which, I studied the pathology report and compared my diagnosis with the reported diagnosis. On each case I scored for agreement, minor disagreements with no or minimal patient consequence, or major discordance with serious implication for patient care (as per scoring sheets provided).
>
> Of the 60 surgical pathology cases I concur with Dr. Smith's diagnoses in 57. In the remaining three we disagree in a minor way that has no negative implications for patient care.

> In general I find Dr. Smith's reports to be appropriately informative, thorough and diagnostically accurate. Extrapolating from this review, the process of which I believe to be an appropriate assessment, I conclude that his performance is at a level expected for a pediatric pathologist in a sophisticated children's hospital dealing with complex diagnostics."

34. On February 7, 2006, Dr. Smith and his lawyer made further representations to the Board. Dr. Rees also made representations to the Board in support of Dr. Smith and Dr. Murray filed written representations in support of Dr. Smith.

35. On February 22, 2006, the Board, at its public meeting, dismissed Dr. Smith's application for reconsideration.

36. Since December 22, 2005, Dr. Smith has not been able to obtain employment as a pathologist and believes that it is due to his failure to obtain the appointment to the Medical-Dental Staff at the SRHA.

E. ANALYSIS

At the outset, it should be noted that there is no concern by this Tribunal as to the fairness of the process which was followed by the Board in reaching its decision.

The Medical-Dental Staff Bylaws of the SRHA did not provide or require that Dr. Smith be provided an opportunity to make submissions to the Board with respect to his application. The Board of the SRHA, however, did provide such an opportunity to Dr. Smith (and Dr. Smith's counsel) prior to making its initial decision and prior to its reconsideration of its initial decision.

To reiterate, the role of the Tribunal in this appeal is as described in R. v. Dennis – to determine whether the decision appealed from is right or wrong based on the evidence presented at this appeal hearing.

Counsel for Dr. Smith put forward three (3) submissions as to why Dr. Smith's appointment ought to be confirmed by this Tribunal:

1) Dr. Smith fully meets all of the criteria and credentialing which the Board itself says is necessary;

2) Any concerns with respect to Dr. Smith's medical practice can be completely dealt with through the scope of his appointment and privileges; and

3) To pre-judge a professional and deny him an otherwise fully justified and routine appointment is the epitome of unfairness, and will do more harm to the reputation of the Health Region as a fair public institution than anything the Appellant has done.

We turn to each of these submissions:

1. All Criteria Met

The evidence is clear that Dr. Smith's application for appointment to the Medical-Dental Staff of the SRHA was accompanied by all of the materials described in and required by Section 3.2.1(a) of the Medical-Dental Staff Bylaws. Moreover his application was

supported by the acting head of the Department of Laboratory Medicine, Dr. Murray, and both the Credentials Committee (which assesses the qualifications of the applicant) and the MAC recommended his appointment as well.

When the MAC learned of the Board's initial rejection of Dr. Smith's application, it passed a unanimous motion in support of his appeal to the Board for a reconsideration of its decision.

There was also clear evidence that Dr. Smith's qualifications and practice in the area of surgical pathology were well regarded. For example, Dr. Dimmick's review of Dr. Smith's work (contained in his letter of May 12, 2005, addressed to the Vice-President of the Hospital for Sick Children) concluded that Dr. Smith's performance was at a level expected of a pathologist in a sophisticated children's hospital dealing with complex diagnostics.

Dr. Rees testified that the results of Dr. Dimmick's review – i.e. his concurrence with Dr. Smith in 57 of 60 surgical pathology cases – were exceptional.

At the hearing, Ms. Eberle agreed that the Board had no concerns about Dr. Smith's qualifications to practice surgical pathology.

Dr. Smith's application did, therefore, at the time of his submission of his application, meet all of the criteria necessary for his appointment. We will comment later in this decision about whether all criteria have been met as of the date of this decision.

2. **Restricted Appointment and Practice**

The second submission by counsel for Dr. Smith was that any practice concerns or concerns about potential negative publicity could have been – and in fact were – dealt with through limitations on the scope of his practice and privileges.

From the evidence, it does not appear that there were any concerns about Dr. Smith's ability to carry out his duties in the area for which he had been hired – surgical pathology; that is there were no practice concerns.

Clearly, Dr. Murray and Dr. Conlon did not have any concerns – they either arranged for or granted him a temporary appointment and privileges in September, 2005, to practice pathology.

Ms. Eberle also testified at the hearing that the Board had no concerns about Dr. Smith's ability to carry out the surgical pathology work.

There were, however, concerns by the Board as to the negative publicity associated with any appointment of Dr. Smith. This is referenced clearly in the letter of December 23, 2005, when Ms. Eberle advises Dr. Smith that they have considered the "potential for negative public perception" of his appointment.

The material before the Board at (or before) its December meetings included a "Backgrounder Document" issued by the Chief Coroner of Ontario outlining his plan to review 44 cases in which autopsies were performed or opinions given by Dr. Smith in homicides or "criminally suspicious" cases involving children.

All of these cases, however, involved forensic pathology.

The Contract for Services with the SRHA provided that Dr. Smith was retained only to provide services in the area of surgical pathology and that any duties beyond these would only be provided by mutual agreement between the two parties.

Accordingly, Dr. Smith was restricted contractually from performing in the area of forensic pathology unless the SRHA permitted it.

Moreover, counsel for Dr. Smith submits that the Board, in granting the appointment to the Medical-Dental Staff, could have limited his privileges so as to exclude any autopsy or forensic work. In support of this, counsel for Dr. Smith referred to Dr. Maber's proposal as to a possible course of action in the memorandum he prepared for the Board prior to its November 2, 2005, meeting.

Accordingly, this Tribunal agrees that any concerns about Dr. Smith's practice in the area of forensic pathology or concerns about negative publicity about him in this area of his practice

either were met by the limitations placed on him in his Contract or could be done by adding conditions to his appointment.

But, while counsel for Dr. Smith is correct in noting that the Board had already (in its Contract for Services) and could potentially (through conditions attached to the appointment) further limit Dr. Smith's ability to practice forensic pathology, this does not mean that the Board did or could have addressed its concern about what it considered potential negative publicity attached to such an appointment by limiting Dr. Smith to the area of surgical pathology only. Because of the widespread media publicity concerning Dr. Smith, the Board, it can be assumed, was concerned about Dr. Smith's employment with the SRHA in any capacity.

An important question, however, is whether the negative publicity or the potential negative publicity was or is a reasonable basis for refusing the appointment and we now turn to that aspect of the submissions by Dr. Smith's counsel.

3. **Unfairness of Board's Decision**

Counsel for Dr. Smith's third submission concerns the basic unfairness of the Board using the speculative and prejudicial notion of the potential for negative media publicity or "continued negative media focus" as the basis for denying Dr. Smith an appointment. Counsel lists three (3) main concerns with this basis for the Board's decision:

a) It undermines the Credentialing and Certificates process;

b) It violates the presumption of innocence;

c) There is no proof that the media coverage had any negative effect.

(Before dealing with each of these concerns, it should be noted that the Board does not state that negative publicity or the potential for negative public perception is the only basis for denying Dr. Smith's appointment. Rather, the Board, in its correspondence of December 23, 2005, and February 22, 2006, describes the following reasons:

- The reasonably held perception of possible malfeasance – presumably arising from the "negative media publicity" and the potential for negative public perception of Dr. Smith's appointment arising from the investigation by the Chief Coroner's Office in Ontario; and

- By February, 2006, Dr. Murray had concluded his position as Acting Head of the Department of Laboratory Medicine and the need for someone to backfill his clinical duties had passed.

We will deal with this latter reason provided by the Board after dealing with each of the concerns raised by Dr. Smith's counsel.)

a) Undermining of Credentialing and Certificate Process

Counsel for Dr. Smith submits that the Board's decision in this case creates an extremely dangerous precedent.

The Medical-Dental Staff Bylaw requires that an Applicant provide a Certificate of Good Standing from his current licensing body.

Dr. Smith provided the Certificate but the Board, according to Dr. Smith's counsel:

- did not "believe" the Ontario Certificate;

- attempted to take steps to "get the real story" on Dr. Smith;

- ignored the fact that neither the Credentials Committee nor the MAC had any concerns about Dr. Smith;

- contacted the Saskatchewan College of Physicians and Surgeons instead of the Ontario College for further information.

According to Dr. Smith's counsel, the steps taken by the SRHA undermine the whole purpose of the Certificate of Good Standing – which is a certificate which "must be given effect on its face". To not accept the same "throws the entire system of professional licensing in disarray".

With respect, we cannot agree with Dr. Smith's concerns in this regard.

The Certificate of Good Standing did, of course, indicate that Dr. Smith had not been disciplined by the Ontario College and that there were no outstanding investigations.

Unsolicited, however, members of the SRHA received copies of two (2) decisions which indicated that Dr. Smith had received a caution about his practice methods.

In attempting to determine the significance, if any, of this (as Dr. Maber did), it is difficult to conclude that the Board did not believe the contents of the Certificate or that it was trying to "get the real story". It was simply trying to get clarification as to what significance, if any, there was to the cautions given to Dr. Smith.

Dr. Maber made it quite clear in his evidence that he attempted to obtain an answer to such a question from the Ontario College but was unable to get any cooperation from that body. He turned to the Saskatchewan College of Physicians and Surgeons in order, quite reasonably, to obtain some assistance from a professional regulatory body dealing with such matters.

Finally, it should be noted that the decision of the Board does not mean that it ignored the lack of concerns expressed by the Credentials Committee or the MAC about Dr. Smith's appointment.

There can be no doubt that the Board is the party – according to the Medical-Dental Staff Bylaws – that has the responsibility for approving or rejecting a physician's application for appointment to the Medical-Dental Staff. As such, the Board is also permitted to take into account additional considerations when making its decision (i.e. considerations that the Credentials Committee or MAC did not or may not or do not take into account).

As Dr. Maber testified, the Credentials Committee is primarily concerned with the qualifications of the physician. This is not, however, the only consideration that a Board may, or should, take into account. As counsel for the SRHA pointed out in his submissions, matters such as suitability and compatibility with others within the department in which a physician seeks appointment, the availability of resources to support the type of privileges and practices proposed by the applicant, the impact on staff, any potential risk management

issues, public protection and confidence issues, the character of the individual and potential concerns regarding ethics and clinical practice are all factors that the Board may consider in reaching its determination or an appointment to the Medical-Dental Staff.

The MAC, in this case, took into account the media controversy concerning Dr. Smith in its report. But again, not only might there be other considerations taken into account by the Board, but the Board can (or it would be surprising if it didn't) disagree, from time to time, with the recommendations of either or both the Credentials Committee or the MAC. To do so does not set a dangerous precedent, nor is it unacceptable.

The more relevant questions are these: Did the Board, in not following the Credentials Committee or the MAC recommendations, have reasonable grounds for doing so? Were the additional considerations taken into account to justify its decision reasonable? Do we, as a Tribunal, believe that the publicity surrounding Dr. Smith (and any additional publicity that might occur after his appointment) serves as a basis for denying his application?

We now turn to the second concern of Dr. Smith's counsel.

b) Violates Presumption of Innocence

Counsel for Dr. Smith submits that a person is presumed innocent until proven guilty and that by stating that negative publicity is a reason for denying the appointment, the Board "is essentially stating that it believes the stories – and by implication that he must be guilty of something".

On this point, we agree with counsel for Dr. Smith.

In her correspondence of December 23, 2005, to Dr. Smith, Ms. Eberle writes that public trust and confidence is an essential responsibility of the SRHA and that this is achieved, in part, by ensuring that individuals are not appointed where there is a reasonably held perception of public malfeasance.

But surely there cannot be a reasonably held perception of possible malfeasance where a physician has not only not been charged with any criminal offence but is not the subject of any investigation by the professional body that governs his professional activities – in this

case, the Ontario College of Physicians and Surgeons. Moreover, the only two (2) times which the Board (and this Tribunal) is aware that Dr. Smith was investigated by the Ontario College of Physicians and Surgeons on the basis of a complaint, the decision of the Complaints Committee was that he had met the standard expected of him in the circumstances and the matter was not referred to a disciplinary hearing. Finally, the review initiated by the Chief Coroner in Ontario was just that – a review. It was not a criminal investigation nor was any wrongdoing alleged.

Accordingly, we, as a Tribunal, can find no basis for a conclusion that there is a "reasonably held perception of possible malfeasance" and that to have this as a reason for denying Dr. Smith's application does indeed violate the principle of presumption of innocence.

c) The Effect of the Publicity

The third and final concern of counsel for Dr. Smith is that the perceived negative perception by the public as a result of the publicity arising from the media in this case has not been proven.

Again, on this point we agree with counsel for Dr. Smith.

While conceding that negative publicity (and the perception by the public arising from it) could be a proper basis for denial of an appointment (e.g. where there is a public outcry over the appointment of a physician who has been convicted of a serious offence or a series of offences), counsel for Dr. Smith submits that the Board in this case must have more than anecdotal evidence to support a position that negative publicity justifies denying an appointment.

Counsel for Dr. Smith implied that a survey of public opinion would have been a useful tool in determining "public perception" of Dr. Smith's appointment.

Without determining whether a Board is required to conduct a survey in order to rely on "negative public perception" as the basis for its decision in these types of cases, we nevertheless note that in this case there was no evidence – no letters to the Board, no

petitions to the Board, no phone calls to the Board – to support the position that the public had any concerns about Dr. Smith's appointment.

Ms. Eberle, in her correspondence of December 23, 2005, to Dr. Smith, however, also refers to the "potential" for negative public perception of his appointment and the "potential" for negative public perception as a result of the investigation by the Chief Coroner of Ontario.

This strikes us as a more tenuous argument for the Board to make because it is making a decision on the basis of how the public could or would potentially react. This surely must require some evidence (such as letters of warning, polling or surveys) which was not forthcoming at this appeal hearing.

In summary, then, this Tribunal does regard one of the stated reasons by the SRHA for rejecting Dr. Smith's application for appointment – the potential for negative public perception – as both unfair and unreasonable in the circumstances; it not only violated the presumption of innocence which should have been afforded Dr. Smith but it was made without any evidence before the Board (or before this Tribunal at this appeal hearing) that there was any negative public perception of this appointment at the time the Board considered this matter and without evidence supporting the position that there was a "potential" for negative public perception.

Prior to completing this portion of this decision, we wish to comment briefly upon the second stated reason for denying Dr. Smith's application for appointment contained in the February 22, 2006, correspondence, namely, the return to clinical practice by Dr. Murray and therefore the elimination of the need for someone such as Dr Smith to carry on with pathology duties in the SRHA.

With respect, this strikes the Tribunal as the Board attempting, after the fact, to justify its decision.

The testimony from Dr. Smith, Dr. Rees, Dr. Murray and Dr. Maber at this appeal hearing disclosed that it is always difficult to hire well-qualified senior pathologists at the SRHA (due to a variety of reasons, including the previous shut down of the training program) and that there is a constant shortage of pathologists. Dr. Smith testified that there is a standing

advertisement for a permanent pathologist's position with the SRHA. Perhaps most convincing, however, was Dr. Murray's testimony when he indicated that when he returned to his clinical duties in January, 2006, there was still a need for more pathologists with the SRHA.

This second stated reason for denying Dr. Smith's application for appointment is therefore not credible or reasonable.

F. REMEDY

Section 14 of the Regulations provides the following:

> 14(1) Within 30 days after the completion of a hearing, the Tribunal shall make a decision:
>
> (a) confirming the decision of the Board;
>
> (b) varying the decision of the Board;
>
> (c) quashing the decision of the Board and substituting its own decision for that of the Board.

For reasons already given, this Tribunal has concluded that the decision of the SRHA was unfair, unreasonable and wrong when it denied Dr. Smith's application for appointment to the Medical-Dental Staff at its Board meeting of December 15, 2005 (for the reasons set out in its letter of December 23, 2005 to Dr. Smith) and when it dismissed Dr. Smith's application for reconsideration of its decision at its February 22, 2006, meeting (for the reasons set out in its letter of February 22, 2006, to Dr. Smith).

Accordingly, we hereby quash the SRHA Board's decision of December 23, 2005, as confirmed by its decision of February 22, 2006, insofar as it denied Dr. Smith's application for appointment to its Medical-Dental Staff.

However, this Tribunal is not willing to grant the additional remedies or relief sought by counsel for Dr. Smith, namely, his appointment to the SRHA as a member of the Medical-Dental Staff in the same capacity and under the same *locums* contract.

Dr. Smith's licence to practice from the College of Physicians and Surgeons of Saskatchewan as an unsupervised *locum tenens* expired on September 6, 2006. Accordingly, it is not only not practical for this Tribunal to include in this decision an appointment to the SRHA Medical-Dental Staff for a period of time equivalent to the remainder of the term of his *locum tenens* appointment (i.e. approximately 8 months), but Dr. Smith cannot provide one of the basic requirements of the Medical-Dental Staff Bylaws – evidence that the applicant holds a current active licence from the Saskatchewan College of Physicians and Surgeons.

In the event Dr. Smith had been currently licensed to practice in Saskatchewan, this Tribunal would have ruled that Dr. Smith be appointed to the Medical-Dental Staff.

Regardless of whether Dr. Smith was licensed or not, however, this Tribunal would have been reluctant to include in its decision that Dr. Smith be appointed "under the same *locums* contract (amended mutatis mutandis)" as requested by Dr. Smith's counsel. This Tribunal, we believe, is limited in dealing with the decision of the SRHA Board – and that Board only dealt with the granting of an appointment to the Medical-Dental Staff at its December and February meetings. Any remedy Dr. Smith might want to obtain with respect to the Contract for Services flowing from his denial of his appointment by the SRHA would have to be obtained in another forum.

G. DECISION

To summarize, we hereby quash the SRHA Board's decision of December 23, 2005, as confirmed by its decision of February 22, 2006, which denied Dr. Smith's application for appointment to the SRHA Medical-Dental Staff.

We do not, however, appoint Dr. Smith to the SRHA Medical-Dental Staff due to the impracticability of the same given that he does not currently possess a valid license to practice from the College of Physicians and Surgeons of Saskatchewan.

We do, however, want to make it clear that as part of our decision we find that Dr. Smith was eminently qualified for the appointment he was seeking and that the Board of the SRHA, in denying his appointment, acted unreasonably and unfairly towards Dr. Smith.

Dated this 27 day of November, 2006.

Practitioner Staff Appeals Tribunal

Original signed by

Dirk Silversides, Chair

Original signed by

James Howlett, Member

Original signed by

Michael Fisher, Q.C., Member