

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 SUSPENSION OF THE APPELLANT'S SURGICAL AND PROCEDURAL PRIVILEGES  
BY VIRTUE OF THE DECISION OF THE BOARD OF THE SASKATOON REGIONAL  
HEALTH AUTHORITY, DATED THE 25<sup>TH</sup> DAY OF JANUARY, 2011

BETWEEN:

DR. ROBERT TOKARYK,

APPELLANT

AND:

THE SASKATOON REGIONAL HEALTH AUTHORITY,

RESPONDENT

**DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL**

Richard W. Elson, Q.C. appeared and acted on behalf of the Appellant  
Evert Van Olst appeared and acted on behalf of the Respondent

## A. INTRODUCTION

[1] The Appellant, Dr. Robert Tokaryk, hereby appeals to the Practitioner Staff Appeals Tribunal from the 25 January, 2011 decision of the Board of the Respondent, Saskatoon Regional Health Authority (SRHA) that confirmed the 7 January 2011 decision of the Senior Medical Officer, Dr. David Poulin, to immediately suspend the Appellant's surgical and procedural privileges, pending disciplinary proceedings. The source of the Appellant's Right of Appeal and the Tribunal's jurisdiction to entertain the appeal is s.8(1) of *The Practitioner Staff Appeals Regulations* established to hear and determine appeals pursuant to s.45(1) of *The Regional Health Services Act*.

[2] In making the 25 January 2011 decision (the Decision), the Board of SRHA (the Board) held that the threshold criteria found in s.81(1) of the SRHA Practitioner Staff Bylaws (the Bylaws), regarding immediate suspension, were met. Those criteria are:

- (a) The conduct, performance or competence of [Dr. Tokaryk] exposes, or is reasonably likely to expose patient(s) or others to harm or injury, or is reasonably likely to be detrimental to the delivery of quality patient care provided by the regional health authority; . . . and
- (b) . . . immediate action must be taken to protect the patient(s) or others, or to avoid detriment to the delivery of quality patient care.

Both the decision of Dr. Poulin and the Board, in upholding his decision, were interim, preliminary steps pending further process and findings regarding the merits of issues surrounding Dr. Tokaryk's surgical competency.

[3] For the reasons provided below, we have decided to uphold the decision of the Board of the Saskatoon Regional Health Authority to impose an interim suspension of Dr. Tokaryk's surgical privileges until full competency can be determine. Recognizing the immense impact this has on Dr. Tokaryk as a plastic surgeon, it is incumbent upon the Respondent to expedite by any means possible the completion of Dr. Tokaryk's assessment to determine his ability to competently carry on surgery.

## B. FACTUAL BACKGROUND

[4] Dr. Tokaryk is 66 years of age. He graduated from the College of Medicine at the University of Saskatchewan in 1971. After one year of an otolaryngology residency and eight years of general practice, Dr. Tokaryk began his residency training in plastic surgery in 1981, attaining his Fellowship in 1984. Since that time, he has practiced as a plastic surgeon in Saskatoon on a full-time basis.

[5] In 2005, Dr. Tokaryk became increasingly aware of a right-sided hand tremor for which he was referred to Dr. Voll. At that time a diagnosis of Parkinson's Disease was made and he was initiated on medication. Accordingly to Dr. Voll, Dr. Tokaryk demonstrated good response to the treatment, with a marked lessening of motor symptoms. In 2007, his motor disability

was rated as Stage 1 on the Hoehn and Yahr Scale. Particulars and description of the scale is set out in Dr. Voll's report.

[6] Dr. Voll has continued to attend with Dr. Tokaryk since his diagnosis. In August of 2010, Dr. Voll found evidence of minor worsening of Dr. Tokaryk's disease, with a subtle increase in slowness of movement, softening of speech and tremor. The medication was increased. In his report, Dr. Voll states "Dr. Tokaryk indicated that he had no concerns regarding his ability to operate safely and I felt this to be an accurate and honest statement."

[7] In December of 2010, Dr. Voll found evidence of early bilateral motor dysfunction worse on the right, with mild bradykinesia (slowness of movement) and minor rigidity affecting the upper extremities. Dr. Voll further reported:

"There was no objective worsening of tremor and no postural instability and no evidence of cognitive difficulty. He was scored as an early Stage 2 Hoehn and Yahr. I identified no particular concerns regarding his ability to continue to operate safely."

[8] In addition to Dr. Tokaryk's neurological condition, he was diagnosed with coronary artery stenosis in October of 2009, and underwent stenting of his right coronary artery. After this procedure, Dr. Tokaryk voluntarily pared down his practice by taking only limited trauma calls and minor burn repairs. He also eliminated certain procedures such as cleft lip and palate microsurgery and minimizing breast reconstructions. He also took steps to minimize his workload by not working on Fridays and increasing his holiday time in addition to professional development days. Dr. Tokaryk has remained under the care of his cardiologist, Dr. J. Akhtar, since the stenting procedure. In late 2010, Dr. Tokaryk experienced hypertension and heart palpitations secondary to his beta blocker medication. After seeing Dr. Akhtar again, his medication was changed and his symptoms improved.

[9] Aside from Dr. Tokaryk's neurological and cardiac issues, he developed bilateral cataracts for which he underwent corrective surgery on December 19 and December 29, 2010.

[10] The first expression of concern in relation to Dr. Tokaryk's ability to competently perform surgery occurred in September, 2010 when a surgical colleague, Dr. Ulmer, contacted the Deputy Registrar of the College of Physicians and Surgeons of Saskatchewan (CPSS) to report that Dr. Tokaryk was having difficulty opening a beverage container while attending a meeting of the Medical Arts Board some days earlier. Dr. Ulmer expressed a concern that this may reflect some evidence of cognitive impairment.

[11] The next incident is reflected in a memorandum from the manager of the operating room at St. Paul's Hospital to the Head of Surgery, Dr. William Dust, dated November 5, 2010. In that note, there were expressions of concern regarding "lack of manual dexterity in a variety of tasks which result in prolonged/lengthened procedures". No other concerns or specific surgical complications were identified.

[12] The next event is described as having occurred on December 21, 2010 when Dr. Tokaryk attended to the wife of another physician, Dr. Kishore Visvanathan. Dr. Visvanathan's concerns were identified in a letter to Dr. Dust dated December 22, 2010. In that letter, Dr. Visvanathan identified an incident when Dr. Tokaryk broke sterile technique while preparing the instrument tray. The particulars of the breach are described at the end of Dr. Visvanathan's letter.

[13] On December 22, 2010, following the letter from Dr. Visvanathan, Dr. Tokaryk attended at a meeting with the Registrar of the CPSS, Dr. Dennis Kendel. The meeting had been called at Dr. Kendel's request. At the conclusion of the meeting, the College made arrangements for a referral to the Physician Health Program (PHP) "to effectively assist the CPSS in objectively assessing Dr. Tokaryk's fitness for practice at this time and on an ongoing basis." In its specific request, the CPSS asked for the PHP to arrange a neuropsychological assessment, to obtain current information about Dr. Tokaryk's health status from his family physician, neurologist, cardiologist and ophthalmologist, and to explore options for Dr. Tokaryk to undergo periodic standardized testing of fine motor skills in a simulation lab with a goal of monitoring changes in his fine motor skills secondary to his neurological disease.

On the day after the meeting, Dr. Kendel wrote an email to Brenda Senger of the Physician Health Program describing his observations of Dr. Tokaryk during the meeting on the previous day. Dr. Kendel made the following clinical observations:

When the meeting first began Bob kept his right arm under the table and gesticulated only with his left arm and hand as he spoke. After a brief period he did bring his right hand into view and did keep it above the table. I noted quite profound variance in the degree of spontaneous movement between his right hand and left hands. His left fingers flexed and extended repeatedly as one might expect when a person gesticulates with his hands during a conversation. In contrast, the fingers of his right hand remained remarkably fixed in an extended position except when he intentionally used his right hand to pick up a piece of paper.

[14] On December 28, 2010, Dr. Tokaryk attended with Dr. Vrbancic for the neuropsychological test, as requested by the College. As mentioned earlier, Dr. Vrbancic's Report is included in the material before this Tribunal. The neuropsychological summary and recommendations, contained on pages 9 and 10 of the Report read as follows:

Dr. Tokaryk was referred for a neuropsychological assessment to evaluate his current level of cognitive functioning secondary to concerns being raised to the College about his competency to practice as a plastic surgeon. Dr. Tokaryk was diagnosed with idiopathic Parkinson's Disease of the right side about six years ago and about 14 months ago had symptoms of coronary artery disease requiring right coronary artery stenting in October 2009. Most recently, he has had cataract surgery.

The current neuropsychological assessment indicates that Dr. Tokaryk is a very high functioning individual as evidenced by his superior verbal comprehension and superior

perceptual organization of information, and higher average working memory skills. His processing speed was assessed to be in the average range of ability.

On tests of achievement which correlate with achieved educational level, Dr. Tokaryk demonstrated to have high school level or above reading, spelling, and written arithmetic skills, suggesting that he is currently functioning at pre-injury levels of ability.

On specific tests of ability, he demonstrated very superior verbal and abstract reasoning and problem solving ability, and above average vocabulary skills, fund of previously acquired information and mental arithmetic. He demonstrated higher average visual scanning speed and visuo-perceptual planning, organization and sequencing.

He demonstrated average visuo-perceptual discrimination and attention to detail, visuomotor integration of information, psychomotor speed, cognitive flexibility and mental control. He also demonstrated average expressive language skills (phonemic and semantic fluency, confrontation naming).

He demonstrated lower average dominant, right-hand fine motor speed and dexterity and average left-handed fine motor speed and dexterity.

On formal assessment of his learning and memory abilities, Dr. Tokaryk demonstrated lower average to average ability, regardless of material type or complexity.

*As such, the current neuropsychological assessment findings suggest that Dr. Tokaryk Has very strong and intact cognitive skills generally, with only mild evidence of decline in processing speed and learning and memory skills relative to his other very strong abilities. The documented relative slowing on speeded and timed tasks dependent on psychomotor speed is consistent with PD but is not considered to be sufficient to interfere with Dr. Tokaryk's ability to function professionally. As already noted, he will invariably continue to be slower to compete surgical procedures, but should be able to do so competently. Further, given his very strong reasoning and executive functioning skills, Dr. Tokaryk also presents with a cognitive capacity to make sound judgments regarding his ability to function safely and effectively. Of greater potential concern is the finding of lower average learning and memory skills.*

*Dr. Tokaryk's lower average learning and memory skills are also still sufficient to allow him to practice professionally as the procedures he currently completes are highly familiar and practiced. However, his poorer learning and memory skills do suggest that he will present as more forgetful and will have to put forth more of a concerted effort to learn and retain new information. Accordingly, he is strongly encouraged to complete medical notes as soon as possible after completing a procedure, to keep detailed*

documentation and personal client information, and to be direct about his memory difficulties with his staff and assistants as they need to be a source of support and will minimize the anxiety that Dr. Tokaryk currently experiences when having to rely on his memory.

Dr. Tokaryk can be reassured that he is doing very well overall from a cognitive perspective, but does need to ensure that he obtains sufficient rest to best manage his medical difficulties, which should include restricting his medical practice as he has already done and to possibly consider further minimizing procedures that rely on sustained microsurgery and limiting the number of surgical procedures in a day. Finally, it is strongly recommended that Dr. Tokaryk undergo a repeat neuropsychological assessment in 12-16 months' time to document the course of the noted relative learning and memory difficulties. (Emphasis added)

[15] Following the neuropsychological assessment, but before the report was issued, Dr. Tokaryk and his legal counsel met with Dr. William Dust, the Head of Surgery on January 4, 2011. At that time, Dr. Dust asked Dr. Tokaryk if he would advise him by Friday, January 7, if he was willing to voluntarily cease operating.

[16] Following the release of Dr. Vrbancic's report, Dr. Poulin, wrote to Dr. Tokaryk's counsel and asked if his client would agree "... to voluntarily withdraw from performing surgery, including minor procedures performed in the Ambulatory Care Unit *until we have had a chance to fully review this matter*" (emphasis added). Following this letter, there was a telephone conversation between Dr. Poulin and Dr. Takaryk's counsel in which counsel advised that his client would not voluntarily withdraw from performing surgery.

[17] Following the telephone conversation with Dr. Tokaryk's legal counsel, Dr. Poulin issued a letter of suspension, dated January 7, 2011, in which he stipulated the reasons of suspension as follows:

- (i) Significant concerns have been expressed regarding your ability to perform surgery and procedures safely; and
- (ii) You have declined to voluntarily withdraw from performing surgery and procedures to allow time for further review of your performance and competence.

It is should be noted at the time of Dr. Poulin's suspension of Dr. Tokaryk, Dr. Poulin did not as yet have the benefit of Dr. Voll's report.

[18] In accordance with the provisions of the Bylaws, Dr. Tokaryk's immediate suspension came before the Board for a hearing. In the Decision, the Board indicated that it was satisfied on the evidence before them that it was reasonable for Dr. Poulin to conclude that there was a reasonable likelihood of possible harm to Dr. Tokaryk's patients. It was further stipulated that, as Dr. Tokaryk was not prepared to withdraw from his upcoming scheduled surgeries, there was

an immediate need for the Senior Medical Officer to take action by way of immediate suspension. In its formal Order, the Board also recommended that the Discipline Committee convene its hearing as soon as practicably possible.

[19] At the time of the hearing before this Tribunal, a hearing before the Discipline Committee had not yet been scheduled. It should also be noted that, throughout the interactions with the Respondent, Dr. Tokaryk has advised the Respondent's representatives that he is prepared to undergo an independent assessment of his surgical skills and abilities. The Respondent has agreed to this but, as at the date of the Memorandum, no such assessment has yet been conducted.

### **C. ANALYSIS**

[20] The Respondent relies on Part XV of the Bylaws, entitled "Immediate Suspension". Section 81 reads as follows:

**81 (1)** Notwithstanding anything in these Bylaws, the senior medical officer or the chief executive officer may immediately suspend the appointment of a member or the member's privileges in circumstances where in the opinion of the senior medical officer or chief executive officer:

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

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

[21] The Respondent understands that the primary purpose a professional regulation is that of public protection.

[22] After a meeting with the CPSS, Dr. Kendal, made arrangements for referral to the Physician Health Program (PHP) "to effectively assist The College of Physicians & Surgeons in objectively assessing Dr. Tokaryk's fitness for practice at this time and on an ongoing basis." In its specific request, the CPSS asked for the PHP to arrange a neuropsychological assessment, to obtain current information about Dr. Tokaryk's health status from his family physician, neurologist, cardiologist and ophthalmologist and to explore options for Dr. Tokaryk to undergo assessment of his surgical skills. This is a result of Dr. Kendal observing Dr. Tokaryk's movement patterns in relation to his Parkinson's disease, which he suspected may affect Dr. Tokaryk's

ability to do surgery. Dr. Tokaryk was able to complete and provide most of these assessments as requested prior to his suspension by Dr. Poulin, with the exception of a report from the neurologist, Dr. Voll. The report from Dr. Voll was available for the Board prior to their deliberations on the actions of Dr. Poulin.

[23] The reasons for suspension were outlined in a letter dated January 7, 2011 from Dr. Poulin as follows:

- i) significant concerns have been expressed regarding Dr. Tokaryk's ability to perform surgery and procedures safely; and
- ii) Dr. Tokaryk declined to voluntarily withdraw from performing surgeries and procedures to allow time for further review of his performance and competence.

Although many of the tests required by the CPSS had been completed, at the time of the suspension Dr. Tokaryk had not allowed very much time for arrangements to be made for surgical assessment of his skills. The Tribunal feels Dr. Tokaryk forced the issue by not volunteering to withdraw from performing surgeries until formal evaluation of his surgical skills could be carried out.

[24] After considering the results of each of the major assessments the Appellant was required to complete, from both the Appellant's and the Respondent's points of view, the Tribunal feels the temporary suspension was justified. While the results of any one assessment may speak more favourably for the Appellant, when taken as a whole, the Respondent reasonable concluded that a suspension was necessary.

[25] Legal counsel for the Appellant argues that Dr. Vrbancic's neuropsychological report was not unfavourable to Dr. Tokaryk,. Moreover, he argues that had it been unfavourable, the CPSS would already have suspended Dr. Tokaryk's operating privileges. However, attached to the affidavit of Bryan Salte, Q.C., legal counsel for the CPSS, is an email dated January 18 from Dr. Kendel to Mr. Bryan Salte. In this email, Dr. Kendel mentions not triggering the Emergency Suspension Provision as Dr. Tokaryk had given an undertaking that he would not carry on with further surgery thereby eliminating the necessity of a CPSS suspension. Moreover, the Tribunal notes that also in Dr. Vrbancic's report, she states, "that Dr. Tokaryk demonstrates lower average dominant, right hand fine motor speed and dexterity and average left handed fine motor speed and dexterity." In the same report, Dr. Tokaryk demonstrates lower average learning and memory skills. Although he would be able to practice the procedures he is quite familiar with at some point, he may become more forgetful and will have to put forth more of a concerted effort to learn and retain information. This information speaks to the reasonableness of the Board's action.

[26] Legal counsel for the Appellant points strongly to the positive report of Dr. Christopher L. Voll, a neurologist in Saskatoon, who feels that Dr. Tokaryk's Parkinson's disease would not

greatly affect his surgical abilities at this time. The Tribunal reviewed Dr. Voll's report and referred to the following statement quoted directly from the report:

"Dr. Tokaryk indicated that he had no concerns regarding his ability to operate safely and I felt this to be an accurate and honest statement."

The Tribunal feels this lends itself to more subjective evidence as opposed to objective review of Dr. Tokaryk's surgical abilities.

[27] Unfortunately, the one part of the overall assessment of Dr. Tokaryk was unable to be completed prior to the Tribunal, and which probably would have resolved all of the issues and that was observation of Dr. Tokaryk in surgery by another qualified plastic surgeon.

[28] The Appellant argued that there has been an over-abundance of caution for this suspension and that the reasons for suspension are based on anecdotal expressions of concern, that is, 'we are not sure we have a case, but we are going to suspend the physician just in case.'

[29] In contrast, the Respondent asserts that information from the nursing staff is not really anecdotal. They work side by side with Dr. Tokaryk, and probably have done so for many years, as Dr. Tokaryk is a long-time physician on staff. They are in an excellent position to notice changes in the ability of a surgeon. The Tribunal agrees with the Respondent. The Respondent also states that one must put the public interest before that of any one professional, and when there is a conflict, the public interest must come first. The Tribunal concurs.

[30] Furthermore, the Tribunal notes the following observations of Dr. Kendel's after his December 22, 2011 meeting with Dr. Tokaryk:

When the meeting first began, Bob kept his right arm under the table and gesticulated only with his left arm and hand as he spoke. After a brief period he did bring his right hand into view and did keep it above the table. I noted quite profound variance in the degree of spontaneous movement between his right hand and his left hands. His left fingers flexed and extended repeatedly as one might expect when a person gesticulates with his hands during conversation. In contrast, the fingers of his right hand remained remarkably fixed in an extended position except when he intentionally used his right hand to pick up a piece of paper.

Based on this observed difference between the abilities of the right and left hand, the Tribunal does not feel it was unreasonable for the Board to question Dr. Tokaryk's ability to do surgery.

[31] The Appellant argued that Dr. Poulin's letter of January 7, 2011 suspending Dr. Tokaryk mentioned Dr. Poulin needed more time to further review Dr. Tokaryk's performance and

competence thereby indicating that while there was a concern, Dr. Poulin did not have enough evidence to warrant a suspension. The Tribunal disagrees.

[32] Notwithstanding the complexity associated with finding a qualified assessor of Dr. Tokaryk had resulted in some delay of the assessment, the Tribunal finds that the Respondent was given little choice but to impose the suspension in light of the Appellant's ongoing surgery schedule. The Board had an obligation to act in the public interest and suspend Dr. Tokaryk as he refused to voluntarily withdrawal his surgical services.

[33] Finally, notwithstanding the complexities of setting up a proper surgical assessment of Dr. Tokaryk's plastic surgery skills, the Tribunal is concerned that at the date of the hearing, some 3 months after the initial suspension, the assessment had not been completed. We note that at the hearing, both the Board and Dr. Tokaryk were working hard to try and find somebody to complete this assessment. Nonetheless, the Tribunal feels because of the impact of this suspension on Dr. Tokaryk's practice as a surgeon, this process should be expedited.

### **Conclusions**

[34] For the reasons described above, this Tribunal has upheld the decision of the Saskatoon Regional Health Authority Board to temporarily suspend Dr. Tokaryk until a full surgical assessment has been completed by the Regional Health Authority.

Practitioners Staff Appeals Tribunal

Dated at Yorkton, Saskatchewan, this *27* day of "June, 2012.



Dr. James D. Howlett, Member

Dated at Herbert, Saskatchewan, this *27* day of June, 2012.



Dr. Suresh Kasset, Member

Mr. Darin C. Chow, Q.C. was chairman of the Tribunal proceedings, but did not participate in the decision as he was appointed to the Provincial Court of Saskatchewan before the decision was made.