

*Case Name:*  
**Pratt v. Fraser Health Authority (c.o.b. Burnaby  
Hospital)**

**Between**  
**Dr. A. William Pratt, Dr. Laurence D. Daitz,**  
**Dr. Patrick P.R. Saunders, Dr. Norman H. Hwang,**  
**Dr. Donald C. Matheson, Dr. Kelvin R. Finlay,**  
**Dr. Harjinder S. Dhaliwal, and Dr. Michael J. Boyd,**  
**Petitioners, and**  
**Fraser Health Authority operating as Burnaby**  
**Hospital, Respondent**

[2007] B.C.J. No. 2565

2007 BCSC 1731

163 A.C.W.S. (3d) 646

Docket: S076823

Registry: Vancouver

British Columbia Supreme Court  
Vancouver, British Columbia

**T.M. McEwan J.**

Heard: November 7-9, 2007.  
Judgment: November 30, 2007.

(30 paras.)

*Administrative law -- Judicial review and statutory appeal -- Jurisdiction of the court to review -- When available -- Matters not subject to review -- Application for judicial review by doctors at a hospital of recommendations made with regards to a prospective doctor by the hospitals credentials committee -- Application dismissed -- The Court did not have supervisory jurisdiction over the recommendations of advisory bodies.*

*Health law -- Hospitals and health care facilities -- Administration -- Application for judicial review by doctors at a hospital of recommendations made with regards to a prospective doctor by the hospitals credentials committee -- Application dismissed -- The Court did not have supervisory jurisdiction over the recommendations of advisory bodies.*

Application to set aside recommendations made by the Credentials Committee and the Local Medical Advisory Committee at the Burnaby Hospital -- The applicants were ophthalmologists and members of the Division of Ophthalmology in the Department of Surgery in the Hospital -- They, along with other physicians with operating privileges in the hospital, were members of the medical staff -- Dr. Kherani was an ophthalmologist and a member of the College of Physicians and Surgeons of British Columbia -- She has sought an appointment to the medical staff at the Hospital, in the Division of Ophthalmology, since 2004 -- Her appointment has recently been recommended by the Board of the FHA by the committees at the hospital -- The applicants sought judicial review of these recommendations -- At the time of the hearing the Board of the Hospital had not made a decision to accept or reject the recommendations that Dr. Kherani be granted hospital privileges -- The Hospital submitted that the application was premature, since no decision has been made, and that the applicants, in any event, lacked standing and should not be granted standing -- HELD: Application dismissed -- The Court did not have supervisory jurisdiction over the recommendations of advisory bodies.

**Statutes, Regulations and Rules Cited:**

Hospital Act, s. 46

Hospital Act Regulations, B.C. Reg. 121/97, s. 8

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

**Counsel:**

Counsel for Petitioners: S.K. Gudmundseth Q.C. and J.L. Gartner.

Counsel for Respondent: G. Allison.

Counsel for Dr. Femida Kherani: J.H. MacMaster and S.M. Precious.

Counsel for Dr. Kam Mohaseb: A. Breen.

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**Reasons for Judgment**

**1 T.M. McEWAN J.:**-- The petitioners are ophthalmologists and members of the Division of Ophthalmology in the Department of Surgery in Burnaby Hospital. They, along with other physicians with operating privileges in the hospital, are members of the medical staff.

**2** The hospital is operated by the Fraser Health Authority (the "FHA").

**3** Dr. Femida Kherani is an ophthalmologist and a member of the College of Physicians and Surgeons of British Columbia. She has been seeking an appointment to the medical staff at Burnaby Hospital, in the Division of Ophthalmology since 2004. Her appointment has recently been recommended by the Board of the FHA by the Credentials Committee and the Local Medical Advisory Committee (the "LMAC") at the hospital. The petitioners seek judicial review of these recommendations.

4 At the commencement of the hearing I permitted Dr. Kherani to be joined as a respondent, as a person whose interests may be directly affected by the outcome of the petition. The other parties consented.

5 There is a considerable amount of material before the court. Reduced to its simplest terms, the petition seeks that the recommendations of the two named committees to be set aside and that the process set out in the *Hospital Act Regulations*, B.C. Reg. 121/97 (the "*Regulations*"), the Medical Staff By-Laws, the Burnaby Hospital Medical Staff Rules and the Department of Surgery's "MD Hearing Process" be followed in the manner they submit they should have been. At the time of the hearing the Board of the FHA had not made a decision to accept or reject the recommendations that Dr. Kherani be granted hospital privileges.

6 The FHA submits, among other things, that the petition is premature, since no decision has been made, and that the petitioners, in any event, lack standing and should not be granted standing.

7 Dr. Kherani, for her part, submits that the petitioners have no standing and that the court has no jurisdiction to hear the matter.

8 The FHA and Dr. Kherani both submit that should the court move past their objections based on standing and jurisdiction, the decisions of the committees are not in any event patently unreasonable.

9 The petitioners submit that:

- 1 In the ordinary course, following a job posting, a hiring division or department reviews the applications, makes a short list, interviews the short-listed candidates and selects its preferred candidate. The division then makes its recommendation regarding its selected candidate to the LMAC as required by s. 8 of the *Hospital Act Regulations*. Prior to consideration of the recommendation by the LMAC, the Credentials Committee reviews the application to ensure that the applicant is properly accredited. The LMAC considers the recommendations of the Division and makes its recommendation regarding whether to recommend the candidate to the Health Authority Medical Advisory Committee ("HAMAC"). The HAMAC then considers the application for any impact the recommendation may have on regional issues and forwards the recommendations to the Fraser Health Authority Board (the "FHA Board"), which determines whether to accept the recommended application for hospital privileges.

10 The statutory and regulatory regime the petitioners invoke include the *Hospital Act Regulations*, s. 8:

2 **Applications for permits to practise in a hospital**

- 3 8 (1) An application by a duly qualified medical practitioner, dentist or midwife for a permit to practise medicine, dentistry or midwifery in a hospital, or for the renewal of the permit, must be made in writing to the administrator of the hospital.

- (2) 1 The administrator must

- (a) 1 promptly direct the application referred to in subsection (1) to the credentials committee or other appropriate body of the medical staff, and
  - (b) 1 report the receipt of the application to the hospital's board at its next meeting.
- (3) 1 Within 60 days after the date that the credentials committee or other appropriate body receives an application under subsection (2), it must consider the application and report in writing its recommendations regarding the application to the medical advisory committee or other executive body of the medical staff, and that respective medical advisory committee or other executive body must
- (a) 2 consider the application and the report of the credentials committee or other appropriate body, and
  - (b) 2 notify the hospital's board in writing of its recommendations regarding the application.

**11** This is refined further in the Medical Staff By-Laws for the FHA as follows:

**4      **Criteria for Membership****

5      3.2.1 Only an applicant licensed to practice medicine and a member in good standing of the College of Physicians and Surgeons of B.C., or licensed to practice dentistry and a member in good standing of the College of Dental Surgeons of B.C., or licensed to practice midwifery and a registrant in good standing of the College of Midwives of B.C. is eligible to be a member of and appointed to the medical staff.

6      3.2.2 The applicant must:

- 1. 1 demonstrate the ability to provide patient care at an appropriate level of quality and efficiency;
- 2. 1 have adequate training and experience for the privileges requested;
- 3. 1 produce evidence of current membership in the Canadian Medical Protective Association (CMPA) or professional liability insurance coverage in the category appropriate to the practice of the member of the medical staff, which is subject to approval by the Board of Directors;
- 4. 1 demonstrate the ability to communicate and work with colleagues and staff in a cooperative and professional manner;
- 5. 1 provide documentation of experience and competence from any previous hospital/facility appointments.

7 3.2.3 The applicant must agree to be governed by the requirements set out in these Bylaws, the medical staff Rules, and policies, and, where applicable, affiliation agreements.

8 3.2.4 The applicant must disclose any physical or mental impairment that affects or may affect the proper exercise by the applicant of the necessary skill, ability and judgment to deliver appropriate patient care.

9 3.2.5 The Board of Directors may establish further criteria for membership from time to time consistent with 3.1.2.

10 ...

### 11 **Procedure for Appointment**

12 4.1.1 Applicants who express in writing the intention to apply for appointment to the medical staff must be provided with a copy of the Hospital Act and the Regulations and a copy of the medical staff Bylaws and Rules.

13 4.1.2 Applicants for appointment to the medical staff must submit to the office of the CEO one original written application on a specified form together with the documents and information detailed in section 4.1.3.

12 The process is set out in the By-Laws in the following terms:

### 14 **Process for Application**

15 4.3.1 The CEO will refer the original completed application promptly to the Credentials Committee and/or such other committee, as described in Medical Staff Rules.

16 4.3.2 Each completed application shall be investigated in accordance with the criteria for membership on the medical staff as set out in Section 3.2, and in consideration of the medical human resource requirements of, and the impact that granting privileges would have on, the facilities and programs of the health authority.

17 4.3.3 Within 60 days after the date that the Credentials Committee, or such other committee, received the application, it shall report its recommendation to the HAMAC, which in turn shall notify the Board of Directors of its recommendations regarding the application.

18 4.3.4 In the case of a recommendation for medical staff membership, the HAMAC must specify the membership category and the privileges it recommends for the applicant.

19 4.3.5 The Board of Directors shall review the application, consider the recommendations of the HAMAC, make a decision and notify the applicant and the

medical staff in writing within 120 days after the receipt of the completed application by the CEO.

- 20 4.3.6 If the Board of Directors appoints the applicant to the medical staff, the Board of Directors must specify the membership category and the privileges granted to the applicant.
- 21 4.3.7 The HAMAC must be advised of the action taken by the Board of Directors at the next regular meeting of the HAMAC.
- 22 4.3.8 If the Board of Directors fails to make a decision within 120 days of receipt of the completed application by the CEO, or rejects the application, the applicant may appeal to the Board of Directors for a hearing. The Board of Directors must hear and consider the matter and advise the applicant in writing of its decision by registered mail within 30 days after the date of the hearing.

**13** The By-Laws provide that every member of the medical staff shall have his or her appointment and privileges renewed annually or otherwise as determined by the Board of the FHA.

**14** The By-Laws are further refined by Medical Staff Rules and Regulations "for the proper conduct of [the] work, which are not inconsistent with [the] ... By-Laws or in contravention of provincial law or regulations". These include the following:

#### PROCESS FOR ADDING MEMBERS TO THE ACTIVE AND ASSOCIATE MEDICAL STAFF CONSISTENT WITH THE MEDICAL STAFF BYLAWS

- 23 23.1 The hospital Medical Manpower Plan must be reviewed and updated at least annually by each Department and approved by the MAC and the Board through a recommendation of the Manpower Committee.
  - 24 23.2 No application to the Medical Staff will be considered unless the Medical Manpower Plan has stated such a need.
- 15** There is a further protocol called the "MD Hiring Process". It is in the following cryptic form:
- 1. 1 Needs assessment at Department of Origin
  - 2. Impact Analysis through appropriate Program Team
    - 3. 1 Executive review based on Impact Analysis
    - 4. 1 HR for ad placement, with specified closing date
    - 5. 1 After closing date, C.V.'s back to MD representatives (from Dept. of Origin) for review and shortlist
    - 6. 1 Unsuccessful applicants contacted (form letter)
    - 7. 1 Interviews with shortlist candidates
    - 8. 1 Unsuccessful applicants contacted (form letter) and successful physician candidate offered position; if accepts, application given/completed
    - 9. 1 Application review and interview with Credentials Committee

10. 1 Applicant contacted regarding success of above. Recommendation to LMAC with minutes to HAMAC and referral to FHA Board of Trustees

**16** The petitioners submit that the process leading to the recommendation that privileges be extended to Dr. Kherani departed from this scheme. Rather than submitting her applications to the Division (that is, in effect, the petitioners), the Administrator, Dr. Compagna, gave them to a Selection Committee which included the petitioners Dr. Finlay, Dr. Saunders and Dr. Boyd (of the Division), and two others, one a general practitioner and the other a lay person, the head of the Burnaby Hospital Foundation. This Committee created a sub-list that did not include Dr. Kherani. She was deemed to be a sub-specialist and the need was characterized as a need for a general ophthalmologist. I pause to say that there is significant conflict in the materials over whether this was a valid characterization of Dr. Kherani's qualifications.

**17** After making this short list Dr. Compagna directed the Selection Committee to add Dr. Kherani to the short list. There is some suggestion that this may have been influenced by the fact that Dr. Kherani had a pending appeal before the Hospital Appeal Board regarding an earlier application for privileges.

**18** The petitioners Saunders, Boyd and Finlay attended the Credentials Committee review of the shortlisted candidates, which included Dr. Kherani and another candidate that the Division ultimately preferred. The Division met with Dr. Compagna to discuss the apparent changes in the hiring process, particularly the creation of the Selection Committee. They say they were told the Division's preference would carry the most weight when the Credentials Committee made its selection. The Division put forward the name of the other candidate in a letter to the Selection Committee.

**19** The Credentials Committee met without any members of the Division or the Department of Surgery present. One had disqualified himself on the basis of a conflict of interest. Dr. Finlay, who would have attended, was out of the country. The Credentials Committee refused to postpone its meeting to accommodate him. A "scoring tool" of dubious value, from the petitioners' perspective, was used at the Credentials Committee. The outcome is described in the petitioners' submission in a manner that frames its objection succinctly:

25 In the result, the Credentials Committee did not accept the recommendation of the Division to select Dr. Mohaseb. Instead, the Credentials Committee made its own selection and substituted Dr. Kherani as their recommended candidate for the general ophthalmologist position.

1 [from the petitioners' submission]

**20** The LMAC then met on September 4, 2007 to consider the recommendation. Dr. Finlay attended this meeting. There is significant overlap in the membership of the Credentials Committee and the LMAC. The LMAC accepted the recommendation of the Credentials Committee. In doing so, the petitioners submit they were essentially approving their own previous recommendation.

**21** The petitioners then instituted these proceedings. It must be emphasized that at that time no decision had been made respecting whether or not Dr. Kherani would be granted privileges. The Board of the FHA did, in fact, approve Dr. Kherani's application for privileges on November 8, 2007, but after submissions had concluded in this proceeding. It was conceded that had the decision

gone the other way, the questions submitted to this court would have been moot. As matters have unfolded the first remaining issue is whether the petitioners' position is tenable.

**22** The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "*JRPA*") provides a mechanism for review of a "statutory power of decision" that is defined as follows:

26 "statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing

(a) 3 the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

(b) 3 the eligibility of a person to receive, or to continue to continue to receive, a benefit or licence, whether or not he is legally entitled to it,

27 and includes the powers of the Provincial Court;

28 "statutory power" means a power or right conferred by an enactment

(a) 4 to make a regulation, rule, bylaw or order,

(b) 4 to exercise a statutory power of decision,

(c) 1 to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

(d) 1 to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or

(e) 1 to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

29 "tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

**23** The petitioners submit that the "decisions" of the Credentials Committee and the LMAC were so flawed that they ought to be "quashed".

**24** The basis upon which the recommendations of these Committees are said to be the exercise of a statutory power of decision is that the Credentials Committee and the Medical Advisory Committee are specifically mentioned in s. 8.9 of the *Regulations*. It is clear from a review of the *Hospital Act* and the various rungs of Regulations, By-Laws and Rules that the governance of hospitals is highly articulated. The petitioners further submit that because the Committee exercise a statutory power which may affect rights or privileges, its recommendations are reviewable.

**25** The question of whether or not that is so has a larger context that must be borne in mind. The question of whether a particular doctor is granted privileges in a hospital may be of crucial importance to candidates for those positions. This is recognized specifically in the *Hospital Act*, which provides, in s. 46, a broad appeal process:

30 **Hospital Appeal Board**

- 31 46 (1) The Hospital Appeal Board, consisting of the members appointed under subsection (4), is continued for the purpose of providing practitioners appeals from
- (a) 5 a decision of a board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practise in a hospital, or
  - (b) 5 the failure or refusal of a board of management to consider and decide on an application for a permit.
- (1.1) 1 and (1.2) [Repealed 2004-45-102.1]
- (2) 2 The Hospital Appeal Board may affirm, vary, reverse or substitute its own decision for that of a board of management on the terms and conditions it considers appropriate.
- (2.1) 1 A practitioner may appeal to the Hospital Appeal Board if
- (a) 6 the practitioner is dissatisfied with the decision of a hospital's board, or
  - (b) 6 a hospital's board fails to notify the practitioner of its decision within the prescribed time.
- (2.2) 1 A practitioner who wishes to appeal under subsection (2.1) is not required to first proceed by way of an application to the hospital's board.
- (2.3) 1 An appeal to the Hospital Appeal Board is a new hearing.
- (3) 2 The Hospital Appeal Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this section and to make any order permitted to be made.
- (3.1) 1 A decision or order of the Hospital Appeal Board under this Act on a matter in respect of which the Hospital Appeal Board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

**26** The petitioners submit that while the decision to grant or withhold privileges from a doctor is subject to this appeal process - a process which is protected by a strong privative clause - the intermediate recommendations of committees informing such decisions are subject to judicial review. Inasmuch as it also appears that the only persons who could initiate the appeal process are practitioners affected by a decision of the Board, the petitioners must also posit a broader concept of standing at the intermediate stages of the process than is afforded following a decision.

**27** The relative roles of Boards and the Medical Advisory Committee that informs them on the matter of the selection of medical staff was considered in *Sheriton v. North York General Hospital*, unreported, Dec. 6, 1973, a decision of the Ontario Hospital Appeal Board (quoted, with approval, in Sharpe, *The Law and Medicine in Canada*, Toronto, Butterworths 1987):

- 32 The selection of the medical staff is the single most important exercise of the authority of a Board of Governors of a public hospital ... The recommendation of

the Medical Advisory Committee to the Board of Governors to accept or refuse an application arises from a professional medical evaluation of how well the attributes of the applicant will satisfy the requirements of the hospital. The Board of Governors of a public hospital must question and test the value judgment thoroughly in the light of its objectives to meet the health care demands of its community and always be satisfied that the applicant has been dealt with fairly and justly.

33 ... a Board of Governors must not permit itself to become the rubber stamp of approval for proposals made by its Medical Advisory Committee. No member of a Board of Governors ought to feel uneasy or embarrassed to question the basis of a proposal of the medical staff. Every Board member owes a duty to his community to require that the advisors of his Board demonstrate that they have given full and fair consideration to the issues, and that their recommendations support the established policies and objectives of that hospital. A Board is in breach of its trust to the public if, for selfish motives, it permits any individual or group involved with the operation to its hospital to deviate from those objectives or distort those policies.

28 The essence of the argument before the court is that the petitioners' expectation that the recommendation of the Division of Ophthalmology would be accepted and passed on by the Credentials Committee and the LMAC has not come to pass. I do not see how such an expectation can be enforced.

29 A process providing for review and recommendation to a body having the jurisdiction to make the actual decision is not in my view the exercise of a "statutory power of decision", notwithstanding the mention of such bodies in the *Regulations*. It is not the jurisdiction of this court under the *JRPA*, or otherwise, to supervise the manner in which purely advisory decisions are made or forwarded to the Board. Inasmuch as appeals from the Board on such matters are heard *de novo*, it would be rather anomalous if rulings of this court on process, made prior to the decision of the Board, could be swept away in the reconsideration; worse yet the prospect of such rulings fettering the fresh look contemplated in the legislation defining the appeal process. None of the authorities cited by the petitioners, properly understood, stand for the proposition that the court has supervisory jurisdiction over the recommendations of advisory bodies.

30 The petition is accordingly dismissed.

T.M. McEWAN J.

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