

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  
RESPONDENT'S DECISION TO REDUCE THE AMOUNT OF OPERATING ROOM HOURS ALLOCATED TO  
THE APPELLANT

BETWEEN:

DR. MORLEY KUTZNER,

APPELLANT

AND

THE PRAIRIE NORTH REGIONAL HEALTH AUTHORITY

RESPONDENT

**DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL**

Richard W. Elson, Q.C. appeared and acted on behalf of the Appellant  
Christopher C. Boychuk, Q.C. appeared and acted on behalf of the Respondent

## **A. INTRODUCTION**

- (1) The Appellant, Dr. Morley Kutzner is an ophthalmologist and a visiting member of the practitioner staff of the Respondent, Prairie North Regional Health Authority (PNRHA). Relying on s. 45(1)(c) of *The Regional Health Services Act*, S.S. 2002, c.R-8.2 (*the Act*), Dr. Kutzner appeals the Respondent's 2007 decision to reduce his allocation of operating room (OR) time in Lloydminster, Saskatchewan.
- (2) To accommodate a resident, full-time ophthalmologist, the PNRHA reduced Dr. Kutzner's allocated OR time from 2 surgical days per calendar month to 1 surgical day every second month, i.e. from 24 to 6 surgical days per year. The PNRHA asserts "that the resource allocation decision is one that could be made by senior administration of Prairie North without any requirement or any further process. Further, the position was that the nature of the decision did not require Board approval."
- (3) Dr. Kutzner appeals the reduction in OR time on the grounds that the decision constitutes a constructive amendment to his privileges. The PNRHA argues that the decision to reallocate the OR time did not constitute an amendment to Dr. Kutzner's privileges and that the Tribunal does not have jurisdiction to alter the PNRHA decision to reallocate OR time. If, however, the Tribunal determines that it has jurisdiction to hear this appeal, the PNRHA asserts that the Tribunal should not interfere with the PNRHA's decision.
- (4) For the reasons provided below, the Tribunal has found that it lacks jurisdiction to hear this appeal. The Respondent's decision to reduce Dr. Kutzner's OR time was not an amendment of privileges within the meaning of s.45(1)(c) of (*the Act*) and therefore, is not reviewable by the Tribunal.

## **B. FACTUAL BACKGROUND**

- (5) Dr. Kutzner has been qualified as a specialist in Ophthalmology since 1982. Until the early 1990's Dr. Kutzner had a general ophthalmology practice which included strabismus, eyelids, glaucoma, trauma, and cataract surgery. In the early 1990's Dr. Kutzner's practice evolved into predominantly glaucoma and cataract procedures. In 2000, Dr. Kutzner began to specialize almost exclusively in cataract surgery after completing extra training in the treatment of cataracts. Subsequently, Dr. Kutzner began teaching cataract surgery at the University of Alberta in the Ophthalmic Residency Program. He continues to hold the formal position of Associate Clinical Professor of Ophthalmology. Dr. Kutzner's primary practice is out of the Royal Alexandra Hospital in Edmonton as a clinical, surgical, and teaching Ophthalmologist. In addition to his visiting practitioner status with the PNRHA, he also holds staff appointments in Alberta at Lamont Health Care Centre, Alberta Surgical Centre in Edmonton, Fort Saskatchewan Health Centre, and Cold Lake Health Care Centre.
- (6) In 1993, Dr. Kutzner was granted hospital privileges in Lloydminster, Saskatchewan and was authorized to perform the following procedures:
- (a) Chalazion excision
  - (b) Removal of foreign body embedded in cornea
  - (c) Suturing of lid wounds, entropion, ectropion
  - (d) Cataract surgery
  - (e) Glaucoma procedures.

(7) From 1993 to 2007, Dr. Kutzner was allocated all of the OR time scheduled for eye surgery as he was the only practitioner providing eye surgery in Lloydminster. The total amount of time formally scheduled for Ophthalmology has remained constant at approximately 20 or 21 surgical days per year. Occasionally and particularly in recent times, extra time has been given for ophthalmology surgery when time otherwise allocated to other surgical specialties could not be assigned.

(8) In 2005, there were three ophthalmologists working within the PNHRA – Dr. Kutzner's visiting practice in Lloydminster, Dr. Blackwell's visiting practice in North Battleford, and Dr. Wood conducting a non-surgical practice in North Battleford.

(9) In 2005, Dr. Wood advised the CEO of PNRHA, Mr. David Fan, that he would be retiring from practice in the summer of 2006. The PNRHA wished to recruit an ophthalmologist who would live within its geographic limits. Mr. Fan, thus, began recruitment efforts for such an ophthalmologist. Dr. Kutzner testified that he first learned of the PNRHA's recruitment activity informally. He was formally advised of this activity in mid-to-late February, 2007.

(10) The PNRHA's recruitment efforts were unsuccessful until late 2006. Dr. Patrick O'Keeffe, just completing a residency program in Ophthalmology at the University of Western Ontario, was contacted by Mr. Fan in November, 2006 regarding an interest in setting up a general ophthalmology practice in North Battleford. Dr. O'Keeffe was interested in the proposal but was concerned about the amount of OR time he would have available to him in both North Battleford and Lloydminster. Dr. O'Keeffe advised Mr. Fan of his equipment requirements as well as the fact that he would require regular access to the OR in both North Battleford and Lloydminster as a condition of establishing a practice in the Health Region. Dr. O'Keeffe testified that he applied for medical staff privileges only after Mr. Fan left him with the impression that all the formally scheduled OR time for eye surgery in the Health Region would be allotted to him.

(11) While in discussions with Dr. O'Keeffe, Mr. Fan requested direction from the Medical Advisory Committee (MAC) in Lloydminster and Dr. Mark Chapelski, Lloydminster's Chief of Staff. The MAC members felt that a full ophthalmology service would be very beneficial. The minutes of the February 6, 2007 MAC meeting state:

That Dr. Chapelski speak to Dr. O'Keeffe to see if he is willing to come to Lloydminster with Dr. Kutzner maintaining his cataract practice in Lloydminster and see if it affects the potential practice here for a six month trial. If this is not acceptable, Dr. Chapelski will speak to Dr. Kutzner and see if he is willing to share full ophthalmology service, not cataracts exclusively. If Dr. Kutzner is not agreeable to sharing a full scope of practice, then subsequently we will express gratitude for the past service provided and request that he finish up his wait list in six months as we need full ophthalmology services.

(12) In March 2007, Dr. Kutzner met with Mr. Fan to discuss the MAC proposals. An equal sharing of the OR time in Lloydminster was offered to Dr. Kutzner on the basis that he would provide additional clinical services in Lloydminster and share a portion of the on-call with Dr. O'Keeffe. Dr. Kutzner was not prepared to expand his practice in Lloydminster beyond that of cataract surgeries. As a result, Mr. Fan advised Dr. Kutzner that due to funding implications, options available to the Health Region may be limited.

(13) After much discussion and correspondence between Mr. Fan and Dr. Chapelski, Dr. Kutzner, and Dr. O'Keeffe, Mr. Fan ultimately decided to reallocate some of Dr. Kutzner's OR time in Lloydminster to Dr. O'Keeffe. Of the two surgical days per month allocated by the PNRHA for eye surgery, Dr. Kutzner was allocated one day every second month; the balance was allocated to Dr. O'Keeffe.

(14) On August 1, 2007, Dr. Kutzner wrote to the Board of the PNRHA and asked for a review of Mr. Fan's decision. He also requested an opportunity to make submissions to the Board. Dr. Kutzner was advised in a letter dated August 9, 2007 of the Board's position that the allocation of OR time was an operational one left to the administration and management team of the PNRHA. As such, the Board was unwilling to review the decision.

(15) Since August 1, 2007, the scheduled allocation of OR time has been carried out as stated above. Both Dr. O'Keeffe and Dr. Kutzner conduct clinics and perform cataract surgery on their allotted days. Additional OR days are allocated as they become available.

(16) In his Notice of Appeal dated August 20, 2007, Dr. Kutzner appealed the Respondent's decision to not review the reallocation of OR time pursuant to s.8(1) of the *Practitioner Staff Appeals Regulations* and s. 45(1) of the *Act* to the *Regional Health Services Act*. The grounds for his appeal are:

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

(17) A hearing of the Practitioner Staff Appeals Tribunal was held in November 2007. Two preliminary issues were brought to the hearing. First, the Tribunal was asked to determine whether Dr. Patrick O'Keeffe should be added as an intervener and second, whether the Tribunal had jurisdiction to proceed to hear the appeal. The Tribunal granted Dr. O'Keeffe intervener status and he continued to have status in this hearing. The Tribunal rendered an interim decision that it did have jurisdiction to hear Dr. Kutzner's appeal.

(18) This interim decision was subsequently appealed by the Respondent to the Court of Queen's Bench. The Court of Queen's Bench upheld the decision of the Tribunal. The Respondent further appealed the interim decision to the Saskatchewan Court of Appeal. The Court of Appeal set aside the Queen's Bench Court decision stating that:

the notion of privileges does not carry with it an entitlement to any specific allocation of facilities or resources, including operating room time, and that not every change to health district resource allocations is an amendment, suspension or revocation of privileges".

However, "the concept of privileges is not wholly or completely disconnected from any consideration of access to health district facilities and services". The appeal of Dr. Kutzner and Dr. Blackwell, an

original co-appellant, was remitted back to the Tribunal for reconsideration. Dr. Blackwell has dropped further legal action. The present decision arises from the rehearing of Dr. Kutzner's appeal.

## C. ANALYSIS

### Jurisdiction

(19) The Tribunal, in reaching its decision, is aided by the Court of Appeal's earlier decision in this case. Richards, J.A. explains "it is often an exercise in false economy to separate out a "jurisdictional" issue on the theory that it should be dealt with separately from the balance of the proceedings." In this case, the Tribunal's jurisdiction depends on our factual determination of whether the PNRHA's decision to reallocate OR time to Dr. O'Keeffe amounted to amending, suspending or revoking of Dr. Kutzner's privileges as contemplated by s.45(1)(c) of *the Act*.

### Main Appeal

(20) The earlier Court of Appeal decision also explains how "privileges" should be understood in s.45(1)(c). While "every change made to a physician's allocation of operating room time" will not fall within the scope of s.45(1)(c), privileges are not "wholly and completely disconnected from any consideration of access to health district facilities and services." The Tribunal therefore, must consider the "combined effect of all relevant factors" in reaching its decision. Richards, J.A. outlines three factors that most commonly need to be considered. These factors are the significance, duration, and reach of the change in question.

#### i. Significance

(21) To understand significance, Richards, J.A. states that "The closer a change comes to wholly denying a physician the right to perform a specific procedure or specific procedures, the more it will tend to assume the character of an amendment, suspension, or revocation of his or her privilege".

(22) In considering the significance of the decision to reduce Dr. Kutzner's OR time, it is important to recall that Dr. Kutzner was offered a reduction of his OR time by one-half provided he expand his duties to the same as Dr. O'Keeffe, including on call duties. His original application for privileges included all these expanded duties, yet he chose only to do cataract surgery. Dr. Kutzner declined to accept this 50/50 reallocation and subsequently his OR allocation was reduced to one-quarter of his original OR time. Dr. Kutzner was not prepared to accept any alteration in his OR time leaving the PNRHA no other acceptable options as an increase in funding for cataract surgery was not possible from Saskatchewan Health. This 50/50 proposal (and ultimately the 25/75 allocation) still provided Dr. Kutzner with *some* access to resources and facilities. That said, the reduced OR time did significantly increase the wait time for surgery by Dr. Kutzner's patients. Patients, however, do have choices. If they require cataract surgery to be done in Lloydminster, they can choose to wait to see Dr. Kutzner or choose to see Dr. O'Keeffe sooner. If they insist on seeing Dr. Kutzner but don't wish to wait, they can book their surgery at one of Dr. Kutzner's other locations in Alberta.



(23) The Court of Appeal acknowledged that there may be other relevant factors that should be considered in the Tribunal's decision to determine whether there has been an amendment of privileges. The significance of this change to Dr. Kutzner must be considered in parallel with the benefits to the patients of the Health Region. Without an ophthalmologist residing in the Health Region, all patients requiring ophthalmology services other than cataract surgery have to travel outside the Health Region. As a result of the reallocation of OR time to Dr. O'Keeffe, the Health Region now offers the regular services of a full time ophthalmologist including surgery, clinics, and on-call services for a full suite of ophthalmological issues.

(24) Nothing on the record suggest that the Respondent's decision to reallocate Dr. Kutzner's OR time was motivated by anything other than the needs of the Health Region. In these circumstances, it would be unfair to allow Dr. Kutzner to rely on the significance factor to overturn the Respondent's decision particularly as Dr. Kutzner could have minimized the significance of change in OR time on his ability to exercise his privileges. To hold otherwise, in the absence of any evidence of bad faith on the part of the PNRHA, would be an inappropriate interference with the day-to-day operation of the Health Region by the Tribunal.

## **ii. Duration**

(25) Richards, J.A. suggested that the duration of the change may be relevant to determining whether privileges have been amended, suspended or revoked. A decision of a temporary nature would be less likely to fall within this Tribunal's jurisdiction. As there is no evidence of a time limit to the Respondent's decision to reduce Dr. Kutzner's OR Time, it is presumed that the change is permanent. As Dr. Kutzner still has some ability to perform surgery in the Health Region, duration is not a sufficient factor to rely on to assert that the requirements of s.45(1)(c) have been met.

## **iii. Reach**

(26) The Court of Appeal describes this final factor as follows:  
A reduction in access to facilities or services that reflects a broad attempt on the part of a health district to reduce expenditures will generally tend to have less of a flavour of a suspension, revocation, or amendment of privileges than will a change targeted at a particular physician.

(27) In this particular case it would appear that Dr. Kutzner's OR time was specifically targeted. In looking at the circumstances surrounding the reallocation of Dr. Kutzner's OR time, however, one must realize that Dr. Kutzner was the only ophthalmologist working in Lloydminster at that time so only his OR time could be reallocated. Dr. Kutzner was not targeted but in fact was given fair consideration for his past service. Despite receiving the MAC's recommendation that Dr. O'Keeffe receive all of the OR time, Mr. Fan felt that in recognition of his past service, Dr. Kutzner should be allowed 25% of the OR time in spite of his unwillingness to accept the 50/50 OR arrangement with expanded duties.

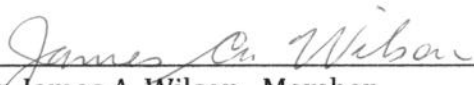
#### **D. CONCLUSION**

(28) The Tribunal considered the factors relevant to a determination of whether a reallocation of limited resources would constitute an amendment, suspension or revocation of privileges and in doing so arrived at its decision based on the merits of the case.

(29) The Tribunal finds Dr. Kutzner's privileges were not amended, suspended, or revoked in a manner contemplated by s. 45(11)(c) of *the Act*. As a result, this Tribunal does not have jurisdiction to review the Respondent's decision to reallocate OR time for cataract surgery in the Lloydminster Hospital.

Practitioner Staff Appeals Tribunal

Dated at Saskatoon, Saskatchewan, this 21 day of August, 2012

  
Dr. James A. Wilson, Member

Dated at Yorkton, Saskatchewan, this 23 day of August, 2012

  
Dr. James D. Howlett, Member

Mr. Darin C. Chow, Q.C. was chairman of the Tribunal proceedings, but did not participate in the decision.