

CANADA / JUDGMENT

# Provincial Health Services Authority v. Campbell

2020 BCSC 2073

COURT

Supreme Court of British Columbia

DECIDED

11 December 2020

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2020 BCSC 2073 Provincial Health Services Authority v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Provincial Health Services Authority v. Campbell,

2020 BCSC 2073

Date: 20201211

Docket: S2010159

Registry: Vancouver

In the Matter of the Judicial Procedure Act, R.S.B.C. 1996, c. 241

Between:

Provincial Health Services Authority

Petitioner

And

Dr. Andrew Campbell

Respondent

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

K.E. Siddall

N. Lapper

Counsel for the Respondent:

N.L. Fishman

A. Sharon

Place and Date of Hearing:

Vancouver, B.C.

December 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

## **December 11, 2020**

- [1] THE COURT: I would like to thank all counsel for their thorough and well-presented submissions, without which, I would have been in a great deal of difficulty.

## **introduction**

- [2] In these proceedings, the petitioner, Provincial Health Services Authority (the "PHSA") seeks judicial review of the decision of the Hospital Appeal Board (the "HAB") dated August 20, 2020 ("Decision") in respect of the respondent, Dr. Andrew Campbell's reinstatement as a surgeon at the British Columbia Children's Hospital ("BCCH").
- [3] Before me is an application by the PHSA for an interim order staying the Decision until the final disposition of the judicial review.

## **background**

- [4] PHSA is a health authority responsible for managing the quality, coordination, and accessibility of highly specialized health care facilities and programs in the Province of British Columbia, including the BCCH.
- [5] The respondent is a physician specializing in pediatric cardiothoracic surgery. He joined BCCH in that capacity in 2004. He received full privileges at the BCCH in March 2006.
- [6] In July 2010, Dr. Sanjiv Gandhi joined the BCCH as the head of the pediatric cardiovascular and thoracic surgery division.
- [7] Dr. Gandhi and the respondent were the only surgeons at BCCH with expertise in heart surgery.

- [8] The evidence is overwhelming that Dr. Gandhi and the respondent did not get along and that, by 2017, their working relationship had become completely dysfunctional.
- [9] On March 14, 2017, BCCH provided the respondent with 12 months working notice of the without-cause termination of his clinical services contract. However, his privileges at the BCCH were not terminated and have been renewed each year since, other than for the year 2020.
- [10] In November 2017, the respondent requested that the PHSA Board of Directors convene a hearing to consider whether the termination of his contract had or would result in modification, suspension, or revocation of his privileges. The PHSA Board declined to do so. Instead, it confirmed that the termination of the respondent's contract was an operational decision delegated to the BCCH's administration and that the respondent's privileges had not been modified, revoked, or suspended. The respondent's final day of work at the BCCH was on March 14, 2018.
- [11] As a result of the termination of the respondent's clinical services contract, Dr. Gandhi became the only pediatric cardiothoracic surgeon practicing at the BCCH.
- [12] On March 15, 2018, the day following his last day of work, the respondent filed a notice of appeal to the HAB pursuant to s. 46 of the Hospital Act, R.S.B.C. 1996, c. 200, appealing the decision of the PHSA board.
- [13] Pending the outcome of the appeal, the respondent has been working at a hospital in Muscat, Oman in order to maintain his skills and competence in his specialty.
- [14] The hearing of the appeal by the HAB was conducted by way of an oral hearing and written submissions. The hearing concluded on October 18, 2019. At the hearing, the PHSA did not take issue with the respondent's skill or competence but, rather, maintained that the HAB did not have jurisdiction to hear the appeal because the respondent's hospital privileges remained intact and had not been modified, refused, suspended, or revoked. This position necessitated an analysis by the HAB of what constitutes privileges and whether a permit to practice in a hospital carries with it a right to be given reasonable access to, and fair allocation of, patients amongst physicians in the applicable area of specialty.
- [15] On August 20, 2020, the HAB released the Decision. It is 66 pages in length and consists of 328 paragraphs of single-spaced text. The HAB acknowledged the appeal before it raised novel and significant issues with respect to both the nature and scope of privileges and the jurisdiction of the HAB. It ultimately determined that the respondent's privileges at BCCH, which the HAB found included an entitlement to "a fair and equitable allocation of patients", had been modified and revoked.

[16] The HAB concluded that the PHSA's Board had authority over any decision affecting privileges as well as the authority to direct case allocation to specific physicians. As a result, the HAB ordered, inter alia, that within 60 days of the Decision, PHSA restore meaningful access to the respondent's privileges by providing him with fair and equitable case allocation of patients in accordance with the process set out at paragraphs 305 to 309, inclusive, of the Decision, which provide, in relevant part, as follows:

307 As the Panel has noted above in the Currency of Skills section, Dr. G. [Dr. G. Sanjiv Gandhi] as Division Head, has the responsibility to determine the current skills and competence of Dr. Campbell and it seems to us that scrubbing in for surgeries with Dr. Campbell for whatever period of time Dr. G. determines is necessary to be comfortable with Dr. Campbell's skills and competence is appropriate unless Dr. G. can come up with another viable process which meets the terms of this decision. Until Dr. G., as Division Head, is comfortable with Dr. Campbell's skills, he needs to scrub into the surgery with Dr. Campbell. This re-acquaintance process should not be too lengthy or used to marginalize Dr. Campbell again. This process should be reviewed by the Head of Surgery and if there are ongoing issues outside of the normal process that would be put in place for fellows or locums then a remedial plan needs to be developed by the Head of Surgery in conjunction with the Division Head and the Cardiac Sciences Program.

308 If there are insufficient cases to meet the required level of open or closed or complex neonates or index cases then the Division needs to institute the same procedures that are utilized in IWK Children's Hospital in Halifax or at Sick Kids Hospital in Toronto, where two surgeons scrub in for the procedures to ensure both maintain their skills. Dr. G. said he did not have any problem scrubbing in with Dr. Campbell and Dr. Campbell gave evidence that he was willing to scrub in with Dr. G., particularly with Norwoods, but also with other procedures.

[17] The PHSA commenced these proceedings on October 13, 2020, seeking judicial review of the Decision. It also filed the notice of application currently before me on that same date. The delay in the hearing of this application from October 13 to today was brought about in large part by:

- 1) Dr. Gandhi advising the BCCH that he refused to participate in any way with the supervision of the respondent and that, if the respondent returned to the BCCH, he (Dr. Gandhi) would go on a leave of absence;
- 2) the PHSA seeking the assistance of an outside practising pediatric surgical expert to develop and implement the process of determining the respondent's skills and competence as contemplated by paragraph 307 of the decision; and
- 3) a request of the HAB by the respondent that it clarify its order.

[18] The evidence shows that several pediatric cardiothoracic surgeons from other hospitals in Canada, including Edmonton, Toronto, Montreal and Halifax, are willing to travel to BCCH to assist with the respondent's "reacquaintance process" but none are able to do so on a continuous basis. The process would necessarily require week-to-week locums.

[19] The HAB order has yet to be implemented.

[20] The respondent has now advised that he intends to return to the BCCH on Monday, December 14 (three days from now) to recommence his practice there. By letter dated November 25, 2020 from counsel for the respondent to counsel for the PHSA, the PHSA was informed as follows:

Dr. Campbell will be ending his temporary leave of absence and returning to BCCH the morning of Monday, December 14, 2020. He will attend the CATH a.k.a. surgical conference that afternoon. We expect that all elements of the order, in particular the one specified above, will be implemented and set in place for his return. Please note that on October 29, 2020, the HAB's order was filed with the court. It has the same force and effect, and all proceedings may be taken on it as if it were a judgment of the court.

[21] The respondent has not provided any clinical services at BCCH since March 14, 2018. Accordingly, his qualifications upon return to practice must be assessed. Indeed, Dr. Erik D. Skarsgard, the head of surgery at BCCH, has deposed that, given the circumstances of the respondent, a full evaluation of his current skills and competency will be required to confirm if he meets the threshold for pediatric cardiothoracic surgery.

[22] There is evidence before me of significant concerns having been expressed by each of the nine cardiologists at BCCH who practices there and who refers patients to the cardiothoracic surgeons at BCCH.

[23] Upon being informed of the respondent's intention to return to his BCCH practice on December 14, 2020, Dr. Gandhi confirmed his intention not to return to the BCCH campus in that event because:

- 1) he feels it would be unethical and immoral for him to participate in the implementation of the HAB's order;
- 2) he fears for his personal safety as a result of the respondent's past history of threatening behaviour;
- 3) the irreconcilable breakdown in his relationship with the respondent; and
- 4) the toxic work environment that would invariably result.

[24] In light of the forgoing, the PHSA rescheduled its stay application for hearing today. The hearing of the petition itself (i.e., the judicial review of the Decision) is now scheduled for January 28 and 29, 2021.

[25] It is common ground that, because the respondent has not practised at BCCH since March 2018, his privileges must be reviewed by the BCCH independent of the decision of the HAB in order for him to be able to practice at BCCH.

## analysis

- [26] The state of affairs before the court today is very unfortunate. The Decision mandated that the PHSA develop and implement an assessment process for the respondent as part of his return to work at BCCH, including, if necessary, a remedial plan developed in conjunction with the head of surgery and the cardiac sciences program.
- [27] The PHSA has been put in an untenable position as a result of the behaviour of both Dr. Gandhi and the respondent. The court is faced with having to decide, at least on a temporary basis, between infants at BCCH with life-threatening heart conditions having available to them and: (i) the skills of a highly specialized cardiovascular thoracic surgeon in the form of Dr. Gandhi, who has been the head of the department for ten years and who has spearheaded the development of a respected heart surgery and transplant program at BCCH on the one hand, or (ii) cardiac vascular thoracic surgery services provided by the respondent, who does not have the full complement of surgical expertise that Dr. Gandhi has (particularly heart transplant expertise), although the respondent's services will be supervised, at least on a temporary basis, by a highly trained locum.
- [28] I accept that the PHSA has done and is continuing to do its best to deal with the unexpected and unfortunate circumstances it finds itself faced with by Dr. Gandhi taking the position he is taking. I also accept the evidence of Dr. Skarsgard that Dr. Rebeyka's availability as a locum cannot reasonably start until February 1, 2020 for the reasons deposed to by Dr. Skarsgard in his affidavits.
- [29] The fundamental question regarding whether a stay of a decision should be granted pending final determination of a judicial review pursuant to s. 10 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 is whether granting the stay would be just and equitable in all of the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at para. 25.
- [30] In considering whether a stay is appropriate, the court must consider:
- a) whether on the merits there is a serious question to be tried;
  - b) whether the applicant for the stay will suffer irreparable harm if the stay is not granted; and
  - c) whether the balance of convenience favours the stay being granted.
- See: *Beach Place Ventures Ltd. v. British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327, at para. 36.
- [31] These three considerations are not "independent hurdles" that must be surpassed but, rather, are seen as evidence directed at the central issue of the relative risks of harm to the parties from granting or withholding the relief sought. The relative positions of the parties will usually carry the day: *Edward Jones v. Voldeng*, 2012 BCCA 295, at paras. 19 and 24.
- [32] I have considered each of the three factors I am required to consider.

- [33] The threshold to be met regarding the question of whether there is a serious question to be tried was recently set out in *Njoroge v. British Columbia (Human Rights Tribunal)*, 2020 BCSC 1723, at para. 19. Here, the petition raises novel and significant issues in respect of both the nature and scope of hospital privileges and the purpose of jurisdiction of the HAB. Neither issue has previously been addressed by the courts of this province. I am persuaded that the issues raised by the petition engage potential implications that go well beyond the circumstances of the parties in this case. In my view, the PHSA has met the threshold of establishing a serious issue to be tried.
- [34] The evidence of irreparable harm is compelling. The tenor of the evidence makes it clear that if the respondent attends the BCCH campus on Monday as he says he will, and if Dr. Gandhi responds by leaving the campus, as he says he will, there will be immediate and irreparable harm to the cardiothoracic surgery services being provided at the BCCH, which could potentially result in devastating consequences for children with heart disease who are both scheduled for surgery or will require it on an emergency basis.
- [35] Although there are five potential proctors available by way of short-term locums to supervise the respondent's return to practice, they will have to travel, as I have said, from Edmonton, Toronto, Montreal and/or Halifax. I accept Dr. Skarsgard's evidence that this patchwork of potential locums will be destabilizing for both parents and their families, will result in uncertainty in clinical coverage, and will disrupt the continuity of care with corresponding safety implications and unnecessary anxiety to the patients.
- [36] Given this extremely unfortunate and untenable situation, the balance of convenience favours the status quo.

## conclusion

[37] The application by the PHSA for a stay of the Decision is granted.

[38] Costs will be in the cause.

"G.C. Weatherill J."

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