THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2010 SKCA 132 Date: 20101027

Between: Docket: 1775

Prairie North Regional Health Authority
Appellant (Appellant)

- and -

Dr. Morley Kutzner and Dr. Thomas Blackwell
Respondents (Respondents)

- and -

Dr. Patrick O'Keefe, Regina Qu'Appelle Regional Health Authority and Saskatoon Regional Health Authority
Intervenors

Coram:
Klebuc C.J.S., Lane and Richards JJ.A.

Counsel:
Christopher Boychuk for the Appellant
Richard Elson, Q.C. for the Respondents
Heather MacMillan-Brown for the Intervenor, Dr. Patrick O'Keefe
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Evert Van Olst for the Intervenor, Saskatoon Regional Health Authority

Appeal:
From: Q.B. No. 899 of 2008, J.C. of Saskatoon
Heard: February 10, 2010
Disposition: Allowed
Written Reasons: October 27, 2010
By: The Honourable Mr. Justice Richards
In Concurrence: The Honourable Chief Justice Klebuc
The Honourable Mr. Justice Lane

Richards J.A.

I. Introduction

[1] This appeal concerns the jurisdiction of the Practitioner Staff Appeals Tribunal, a board created pursuant to *The Regional Health Services Act*, S.S. 2002, c. R-8.2 (the "*Act*"). In particular, it concerns the scope of the Tribunal's authority in relation to physicians' appeals from decisions changing their allocations of operating room time.

[2] The appellant, Prairie North Regional Health Authority (the "Authority"), reduced the operating room times of the respondents, Drs. Morley Kutzner and Thomas Blackwell. The doctors appealed the Authority's decision to the Tribunal, relying on its jurisdiction to entertain appeals in relation to the amending, suspending or revoking of privileges. The Authority argued that the Tribunal had no jurisdiction to entertain the appeal because, in the Authority's view, the changes in operating room times for Drs. Kutzner and Blackwell involved no more than normal administrative-type allocations of scarce hospital resources. In a preliminary ruling, the Tribunal held that it could entertain the appeal. Its decision was upheld by a Court of Queen's Bench judge in Chambers. The Authority now asks this Court to overturn the decision of the Chambers judge.

[3] I conclude, for the reasons detailed below, that the Tribunal made a reviewable error in its interpretation of the relevant provisions of the *Act*. Specifically, it erred in concluding that any and every change to a physician's allocation of operating room time gives rise to a right of appeal. As a result,

the complaints of Drs. Kutzner and Blackwell must be remitted to the Tribunal so that it may consider them anew in light of the interpretation of the *Act* set out in these reasons.

II. Factual Background

[4] The Authority is responsible for the delivery of health services to the Prairie North Health Region and owns and operates two hospitals: Battlefords Union Hospital and Lloydminster Hospital. It was established pursuant to, and is governed by, the *Act*.

[5] The Authority has had difficulty recruiting and retaining a resident ophthalmologist to provide the full slate of medical and surgical ophthalmological services. As a result, many residents from the Health Region have been obliged to travel to centres outside the Region to receive ophthalmological care.

[6] In 2007, the Authority recruited an ophthalmologist, Dr. Patrick O'Keefe, who agreed to reside in the Health Region and to provide a full range of ophthalmic services, including surgical services. Dr. O'Keefe began his practice in North Battleford in June of 2007.

[7] Prior to Dr. O'Keefe's arrival, Drs. Kutzner and Blackwell provided limited surgical ophthalmological services to residents of the Prairie North Health Region. Dr. Kutzner's primary practice is in Edmonton, Alberta. He was appointed as a visiting member of the medical staff of the Authority in 1993 with privileges in ophthalmology, general surgery and ophthalmic

surgery, including cataract surgery. His appointment was renewed annually thereafter. Notwithstanding the scope of his privileges, the only ophthalmic services provided by Dr. Kutzner were cataract surgeries.

[8] Dr. Blackwell does not reside in the Health Region either. His primary practice is in Saskatoon. He has been a visiting member of the medical staff of the Authority since 1995. The only privileges held, or sought, by Dr. Blackwell were in relation to cataract surgery. His practice with the Authority has been restricted to surgeries of that kind.

[9] The operating room time available for cataract surgeries in the Prairie North Health Region is limited by the funding provided by the provincial government. At the time relevant to the disposition of this appeal, the Authority's budget permitted two surgical days per month at the Lloydminster Hospital and one surgical day per month at the Battlefords Union Hospital.

[10] The admission of Dr. O'Keefe to the medical staff of the Authority meant that the Authority had to make decisions as to the allocation of operating room time for cataract surgeries. Given the resources available to it, the Authority decided to reduce Dr. Kutzner's allocation from two days per month at the Lloydminster Hospital to one day every second month. The remaining cataract surgery days were allocated to Dr. O'Keefe. Dr. Blackwell's allocation of surgical days for cataract surgery for the year ending March 31, 2008 was reduced to six days out of the 12 days available at the Battlefords Union Hospital. Effective April 1, 2008, Dr. Blackwell was

allocated one surgical day every six months. The remaining days were allocated to Dr. O'Keefe.

III. The Appeals to the Tribunal

[11] Drs. Kutzner and Blackwell were unhappy with the Authority's decisions concerning their operating room time. As a result, both launched appeals to the Tribunal.

[12] The appeals were taken pursuant to s. 45(1) of *The Regional Health Services Act*. It reads as follows:

> 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) <u>the granting of privileges</u> to the person as a member of the practitioner staff, <u>or the amending, suspending or revoking of privileges</u> granted to the person.
>
> [emphasis added]

[13] The Authority argued that the Tribunal had no jurisdiction to hear the appeals. In its view, the "privileges" referred to in s. 45(1) related to the entitlement to use a health authority's facilities for particular purposes but did not comprehend the allocation of any specific access to those facilities and, in the context of this case, did not comprehend that Drs. Kutzner and Blackwell would have any specific amounts of operating room time.

[14] The Tribunal did not accept this line of argument. It said privileges are "the combination of permitted procedures and the access to perform them." The core of its reasoning is set out below:

> … In the Tribunal's opinion, the nature and scope of the privileges granted cannot be isolated from the ability to exercise them, and, in fact, the application for privileges reflects that understanding.
>
> Dr. Kutzner's application for privileges states, "I … wish to apply for the privilege of performing the following procedures within the Lloydminster Hospital as indicated in the attached list". Dr. Blackwell's application is similar and the privileges he has been granted, based on his application, are restricted to the performance of cataract surgeries. This application is not just for permission to perform certain medical procedures, but also to perform them in the facilities of the regional health authority identified.
>
> All parties agree that the regional health authority cannot use the allocation of operating room time as a means of circumventing the provisions of the *Act* and regulations relating to amending or revoking privileges. This means, for example, that PNRHA cannot reduce the access to operating room time to zero and then claim that this is simply an allocation of resources, rather than an amendment of privileges. In the Tribunal's opinion, this is an acknowledgment of the intrinsic link between the privilege granted to perform certain medical services and the actual access to the facility in order to perform them. Privileges without access are obviously meaningless.

[15] In the end, the Tribunal decided that it would hear the appeals of Drs. Kutzner and Blackwell because, in its view, their privileges had been changed. The Tribunal concluded as follows:

> … In other words, the jurisdictional issue here is simply whether the privileges have been changed. Since, as is set out above, the Tribunal has concluded that privileges are the combination of permitted procedures and the access to perform them, the privileges of Drs. Blackwell and Kutzner have been changed and the Tribunal has jurisdiction to consider their appeal.

IV. The Queen's Bench Decision

[16] The Authority appealed the Tribunal's decision to the Court of Queen's Bench pursuant to s. 43(4) of the *Act*. Its appeal was dismissed.

[17] The Chambers judge read the Tribunal's decision as saying only that it had the authority to embark on the process of considering whether the reallocation of operating room times by the Authority was an amendment of privileges within the meaning of s. 45(1) of the *Act*. He said this:

> [5] It may well be that resource allocation was an underlying issue of concern for the Authority; nonetheless, it was open to the Tribunal to conclude that the amendment, suspension or possible revocation of privileges was an issue, such that its jurisdiction to hear the appeal was engaged.
>
> [6] The Authority was constrained to agree that at some point within the spectrum of possible resource allocations, be it by board direction or administrative action, privileges previously granted may be affected. This validates the Tribunal's acceptance of jurisdiction over these particular complaints.
>
> [7] Having embarked on its inquiry, the Tribunal will be obliged to hear and consider both parties' evidence and submissions as to whether, in the case before it, this particular change in allocation of operating room time does, indeed, constitute an amendment or affecting of privileges and, if so, the remedies to be provided. Conversely, it may decide those privileges were not affected in this case.
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> …
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> [12] The Tribunal properly and correctly interpreted its true jurisdiction, the jurisdictional issue and its governing statute. Consequently, the appeal is dismissed and the matter returned to the Tribunal so that the appeal may be heard on its merits.

V. Analysis

A. Clarifying the Question Underlying This Appeal

[18] It is useful to begin the examination of the merits of this appeal by commenting on the Chambers judge's understanding of the Tribunal decision. This is important because, in my respectful view, the Chambers judge misread the decision. The Tribunal did not say merely that it had jurisdiction in the limited sense of having the authority to embark on a consideration of whether the privileges of Drs. Kutzner and Blackwell had been amended, suspended or revoked within the meaning of s. 45(1)(c) of the *Act*. Rather, it said (a) the

concept of privileges included the allocation of operating room time, (b) the allocations of operating room times for Drs. Kutzner and Blackwell had been changed, and (c) as a result, their privileges had been changed. In other words, the Tribunal made a clear decision to the effect that the privileges of Drs. Kutzner and Blackwell had been modified in a way which engaged s. 45(1)(c). Contrary to the Chambers judge's understanding of the matter, the Tribunal did not leave the final resolution of that question for another day.

[19] I also note that, during argument before this Court, there was no agreement between counsel for the Authority and Drs. Kutzner and Blackwell as to the specifics of the issue that was before the Tribunal. In order to unravel this problem, I turn first to the notices of appeal filed by Drs. Kutzner and Blackwell. Both described the grounds of appeal as follows:

> 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.

[20] The landscape mapped by these notices of appeal was obviously altered during the proceedings before the Tribunal because the Tribunal said the question before it was "whether the privileges [of Drs. Kutzner and Blackwell] had been changed." The notices of appeal to the Court of Queen's Bench and to this Court, as well as the facta filed on behalf of the Authority and the doctors in this Court, are consistent with this view of the proceedings in that they focused on the question of whether "privileges" is a concept which

takes into account a physician's access to hospital facilities and other resources.

[21] Nonetheless, in the course of oral argument in this Court, counsel for Drs. Kutzner and Blackwell appeared to move away from his factum somewhat and described the issue before the Tribunal as having been whether the Authority had done indirectly what it could not have done directly, *i.e.* whether it had reduced privileges for a reason not related to clinical care but, rather, for the purpose of accommodating Dr. O'Keefe, or fulfilling commitments made to Dr. O'Keefe. Counsel suggested that all of this had been done without consultation or compliance with the Authority's own procedural rules. For his part, counsel for the Authority took exception to all of this and said Drs. Kutzner and Blackwell have never alleged that the reduction in their operating room hours was aimed at getting them to stop practicing in the Health District or as having been otherwise based on an ulterior motive.

[22] I acknowledge the change of tack taken by Drs. Kutzner and Blackwell during oral argument, but believe I am constrained to approach this appeal in a way that reflects the Tribunal's understanding of the issues presented to it and that is consistent with the notices of appeal to the Court of Queen's Bench and this Court. As a result, the issue before the Tribunal must be taken as having been whether the Authority's decision to reduce the operating room hours for Drs. Kutzner and Blackwell amounted to amending, suspending or revoking their privileges within the meaning of s. 45(1)(c) of the *Act*. This is the sole question dealt with by the Tribunal and it is the only point considered

by the Chambers judge. If Drs. Kutzner and Blackwell have other arguments to present, they will need to consider whether it is possible to bring them forward in a new proceeding.

B. The Applicable Standard of Review

[23] The Chambers judge did not expressly indicate what standard of review he applied in assessing the Tribunal's decision. However, it appears that he used the "correctness" standard.

[24] The Authority says the correctness standard is applicable here because the question before the Tribunal was one of "pure jurisdiction." For their part, Drs. Kutzner and Blackwell say the "reasonableness" standard is appropriate.

[25] The problem of identifying the proper standard of review must be resolved by reference to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. There, the Court said administrative decisions are to be reviewed on either a correctness or a reasonableness standard. At para. 55, the Court said three factors should be considered in determining whether the reasonableness standard should be applied: the presence or absence of a privative clause, the existence of a discrete and special administrative regime with specialized decision-making and the nature of the question of law in issue. However, the Court also said that a detailed inquiry along these lines is not required in every case. In this regard, it said the questions of jurisdiction or *vires* will, by their nature, attract the correctness standard. This is the notion seized on by the Authority in pressing for the application of the correctness standard in this case.

[26] I am not persuaded by this aspect of the Authority's submissions. "Jurisdiction" is often an elusive notion. Seen most broadly, it can embrace virtually every dimension of administrative decision-making. This possibility was explained as follows by Paul Craig in *Administrative Law* (London: Sweet & Maxwell, 1983) at p. 302, as quoted by Lamer J. (as he then was) in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 at pp. 490-491:

> The enabling statute always, explicitly or implicitly, states, if X_1, X_2, X_3 exist, you may or shall do [Y_1, Y_2, Y_3].
>
> It is clear that all the "X" conditions can to some extent be categorized as prerequisites to the exercise of the "Y" powers. In my view, there is no logical reason for distinguishing between condition X_1 and condition X_2 and concluding that one is preliminary and the other is not. Thus, if all the "X" conditions are said to be preliminary, the administrative tribunal has lost the capacity to err: it can only exercise the power conferred on it by the law if it is *right* in its interpretation of what is meant by X_1, X_2 and X_3. Ultimately, the distinction between an appeal and judicial review is somewhat fine. This distinction becomes nonexistent if we also adopt the theory that the administrative tribunal cannot err as to the content of powers Y_1, Y_2 and Y_3, since it is then exercising a power that the law does not confer on it.

[27] As a result, the Supreme Court was at pains in *Dunsmuir v. New Brunswick* to emphasize that only "true" questions of jurisdiction automatically attract the correctness standard of review. Bastarache and LeBel JJ., for the majority, wrote as follows at para. 59:

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to

> 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[28] The reference made by Bastarache and LeBel JJ. to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 is telling because it was there that Dickson J. (as he then was) argued against an overly broad approach to "jurisdiction" by famously saying, at p. 233:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

[29] In my view, the Authority's argument in this case is an invitation to do precisely what the Supreme Court has counselled against. Granted, it is possible to dress up the subject matter of this appeal in a jurisdictional-type costume. However, this does not negate the fact that the root issue here is whether, on the particular facts of this case, the privileges of Drs. Kutzner and Blackwell were changed in a way amounting to their amendment, suspension or revocation. This is not the sort of discrete or preliminary issue which can properly be seen as a question of "true" jurisdiction. As the Supreme Court has directed, courts should not characterize as jurisdictional those issues which are only doubtfully or arguably so. In the result, I conclude the issue raised with the Tribunal was not jurisdictional in the required sense. See: *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273, 295 D.L.R. (4th) 609 at para. 30.

[30] However, this conclusion is not the end of the standard of review inquiry. It only means that it is necessary to engage in the extended or full standard of review analysis. As noted, this analysis involves consideration of the significance of the presence or absence of a privative clause, the particulars of the administrative regime in which the decision in issue was generated and the nature of the question in issue. I propose to very briefly consider each of these matters in turn.

[31] I turn first to the issue of a privative clause. The existence of such a clause is considered to be a strong indication that judicial review should be conducted on the basis of the reasonableness standard. See: *Dunsmuir v. New Brunswick* at para. 52. That said, the *Act* contains no privative clause to protect or shield the decisions of the Tribunal. This, however, does not necessarily indicate that the correctness standard is appropriate. See: Brown and Evans, *Judicial Review of Administrative Action in Canada*, vol. 3, looseleaf (Toronto: Canvasback Publishing, 2010) at 14:2521. A related point of more significance concerns s. 45(4) of the *Act*. It provides that questions of "law or jurisdiction" may be appealed from the Tribunal to the Court of Queen's Bench. Although the authorities are perhaps not entirely consistent on this point, in my view, the existence of this sort of right of appeal generally weighs in favour of the application of the correctness standard of review. See: *Regina (City) v. Kivela*, 2006 SKCA 38, 266 D.L.R. (4th) 319 (Sask. C.A.) at para. 43; *Cadillac Fairview Corp. v. Saskatoon (City)*, 2000 SKCA 84, [2000] 11 W.W.R. 89 at para. 26; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 27; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54,

[2004] 3 S.C.R. 152 at para. 7; Brown and Evans, *Judicial Review of Administrative Action in Canada* at 14:2522.

[32] What then of the second factor: the nature of the administrative regime and the Tribunal's expertise? There can be no doubt that the Tribunal enjoys a narrow and specialized mandate. Pursuant to s. 45(1) of the *Act*, it deals only with appointments to the practitioner staff, the discipline of members of the practitioner staff and the privileges of the practitioner staff. By virtue of s. 3 of *The Practitioner Staff Appeals Regulations*, R.R.S., c. R-8.2, Reg. 5, the Tribunal consists of a member appointed from among three persons nominated by the College of Physicians and Surgeons, one member appointed from among three persons nominated by the Saskatchewan Medical Association, one member appointed from among three persons nominated by the College of Dental Surgeons, one member appointed from among three persons nominated by The Chiropractors Association, one member appointed from among three persons nominated by the Saskatchewan Association of Health Care Organizations and two members appointed from among six persons authorized pursuant to practise law in Saskatchewan and nominated by the Law Society of Saskatchewan. The members of the Tribunal need not be medical professionals and need not to come to the Tribunal fully versed in all matters concerning practitioner staff. However, a member of the Tribunal who is initially unfamiliar with such matters will quickly develop a specialized knowledge base and a level of expertise with respect to the issues falling within the scope of the Tribunal's mandate. All of this suggests it would be appropriate to use the reasonableness standard of review in this case.

[33] Third and finally, before determining the applicable standard of review, it is necessary to consider the nature of the issue at play in this appeal. In my view, the question of whether a change in operating room hours amounts to an amendment, suspension or revocation of privileges is something that the Legislature intended to delegate to the Tribunal. It falls squarely within the scope of the Tribunal's mandate and engages its expertise. As well, determining the nature of the remedies properly awarded to a physician if an appeal be allowed would also call into play the Tribunal's specialized knowledge of the administrative side of the health care system. In short, the nature of the question in issue here tends to point toward the appropriateness of employing the reasonableness standard of review.

[34] Considering all three of the relevant factors together, I conclude that – at least in the context of this case – the appropriate standard of review is reasonableness, *i.e.* the root question in this appeal is whether the Tribunal reasonably concluded that the Authority's decision to change Drs. Kutzner and Blackwell's allocations of operating hours amounted to the amending, suspending or revoking of their privileges.

[35] As to the nature of the reasonableness standard of review, Bastarache and Lebel JJ. said this in *Dunsmuir v. New Brunswick*, at para. 47:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review,

> reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

C. The Interpretation of Section 43(1)(c)

[36] The Authority, supported by the Regina Qu'Appelle and Saskatoon Regional Health Authorities, argues that the term "privileges" mentioned in s. 43(1)(c) of the *Act* refers only to the bare grant of authority to use services or facilities, such as operating rooms, for specific purposes and does not involve any question of the actual allocation of those services or facilities. The Authority says the Tribunal and the Chambers judge erred, or acted unreasonably, in concluding otherwise.

[37] This difference of views between the Authority and Drs. Kutzner and Blackwell has arisen largely because "privileges" is not defined in the *Act* or in *The Practitioner Staff Appeals Regulations*, the regulations governing appeals to the Tribunal. Therefore, in considering the proper meaning of the term "privileges," it is necessary to give effect to the "modern principle" of statutory interpretation endorsed by the Supreme Court of Canada in *(Re) Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21:

> [21] …
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[38] In considering this approach, it is apparent that the grammatical and ordinary sense of "privileges" is of little assistance in resolving this appeal.

In the circumstances at hand, the term obviously carries a rather specialized or technical meaning which can only be discovered by examining the larger scheme of the *Act* and the broader context in which the *Act* was designed to operate.

[39] Accordingly, it is necessary to locate s. 43(1)(c) in its statutory context. On that front, it is important to note first that the *Act* contemplates the granting and variation of privileges by the boards of regional health authorities. Section 27(1) of the *Act* speaks generally to this responsibility by providing that an authority is responsible for the "planning, organizing, delivery and evaluation" of health services in its region. Section 43 is more specific. It says every authority must make bylaws governing practitioner staff, including bylaws with respect to privileges and reads as follows:

> 43. Every regional health authority and every affiliate prescribed for the purposes of this section shall make bylaws governing the practitioner staff, including bylaws:
>
> (a) respecting the appointment, reappointment and termination of appointment of persons to the practitioner staff and the suspension of persons appointed to the practitioner staff;
>
> (a.1) respecting the disciplining of members of the practitioner staff;
>
> (a.2) respecting the granting of privileges to members of the practitioner staff, including the amending, suspending and revoking of privileges granted;
>
> (b) governing the classification and organization of the practitioner staff;
>
> (c) governing the appointment of committees and officers of the practitioner staff and prescribing their duties;
>
> (d) respecting any other prescribed matter.
>
> [emphasis added]

[40] The bylaws contemplated by s. 43 have been put in place by the Authority. In this regard, we are advised by counsel that model bylaws were developed as guidelines by the Minister and that the Authority's *Practitioner Staff Bylaws* (the "*Bylaws*"), which track the model bylaws, were subsequently enacted. This is not surprising because s. 44 of the *Act* goes so far as to require that bylaws made pursuant to s. 43 must be consistent with any guidelines or directions provided by the Minister and that they must be submitted to the Minister for approval.

[41] Under the administrative scheme put in place by the *Bylaws*, the notion of the appointment of physicians to the "practitioner staff" and the grant of privileges to physicians are closely related. Section 37(1) declares that the Board has the exclusive power to appoint members to the practitioner staff and to grant privileges. Section 37(2) goes on to say a physician must hold an appointment to the staff in order to hold any privilege.

[42] As provided by s. 39 of the *Bylaws*, a physician's application for initial appointment to the practitioner staff must include an indication of the privileges that he or she requests. Pursuant to s. 47(1), the Board may appoint the applicant physician to the practitioner staff and grant privileges to the category of appointment sought and the privileges requested by the applicant, grant the appointment with the privileges considered appropriate by the Board or refuse the application for appointment. The provisions of the *Bylaws* governing reappointment are broadly similar. Each member of the practitioner staff must apply for reappointment on an annual basis. The Board may reappoint the member to the practitioner staff and grant the privileges

sought by the member, reappoint the member with the privileges considered appropriate by the board, or refuse the application for reappointment.

[43] Significantly, the *Bylaws* do contain a definition of "privileges." That definition says nothing about a physician's entitlement to access facilities or other resources. It reads as follows:

> 3. In these practitioner staff bylaws, the following definitions apply:
>
> (t) "privileges" means the authority granted by the Board in accordance with these bylaws to a physician, chiropractor, midwife, dentist or nurse practitioner to admit, register, diagnose, treat or discharge patients/clients/residents in respect of a facility, program or service operated or delivered by the regional health authority.

[44] The Tribunal dismissed this definition as having no significance. It did so on the ground that it is contained in the *Bylaws* only and does not operate in relation to the *Act* itself. In my opinion, the Tribunal erred by proceeding along this line of thinking.

[45] It is true, of course, that legislative instruments like the *Bylaws* do not directly dictate the meaning of the statute under which they are enacted. They stand "below" statutes on the ladder of legal hierarchy. However, that said, enactments of this kind can sometimes be quite useful in assessing the meaning of a statutory provision. As pointed out by Ruth Sullivan in *Sullivan on the Construction of Statutes* (Markham, Ont: LexisNexis, 2008), at p. 370, this is especially so when an Act and subordinate legislation form a complete scheme. See also: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 at para. 35; *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 26.

[46] That is the case here. As noted above, the *Bylaws* and ss. 43 and 45 of the *Act* are tightly interconnected. Section 43(a.2) requires health authorities to make bylaws concerning, among other things, the granting, amending, suspending and revoking of privileges. The *Bylaws* discharge that obligation by establishing the framework pursuant to which decisions concerning privileges are made. Section 44 then goes on to grant aggrieved physicians the right to appeal health authority decisions concerning, again among other things, the granting, amending, suspending, or revoking of privileges.

[47] Accordingly, in my view, the definition of "privileges" found in the *Bylaws* is a material factor to be considered in determining the meaning of the same term in s. 43(1)(c) of the *Act*. The *Bylaws* do not control or dictate the meaning of the *Act* but they are certainly part of the context which should be considered when construing it. The Tribunal erred in finding the definition of "privileges" in the *Bylaws* to be of no relevance whatsoever to its analysis.

[48] The Tribunal also erred by ignoring the definition of "privileges" found in *The Attending Health Professionals Regulations*, R.R.S., c. R-8.2, Reg. 4. These regulations authorize certain health care professionals, including physicians, to admit and discharge various persons to facilities operated by a health region. They define "privileges" as follows:

> 2. In these regulations:
>
> (i) "privileges" means, in relation to a facility, the authority granted by a board to a physician, chiropractor, dentist, midwife or nurse practitioner to admit, register, diagnose, treat or discharge patients in that facility.

[49] The Tribunal disregarded this definition on the basis that it purported to define "privileges" only for the purposes of *The Attending Health Professionals Regulations*. But, as was the case with the *Bylaws*, the Tribunal overlooked the fact that *The Attending Health Professionals Regulations* are part of the overall context in which s. 45(1)(c) of the *Act* must be interpreted. While these *Regulations* are not as intimately connected with ss. 43 and 45 of the *Act* as are the *Bylaws*, the Tribunal should have taken them into consideration when dealing with the problem before it.

[50] In construing s. 45(1)(c) of the *Act*, it is also useful to consider the documents dealing with the privileges granted to Drs. Kutzner and Blackwell. (I take those documents to be representative of how the health care system, as a whole, handles such matters.) They include Dr. Blackwell's June 25, 1995 application for appointment to the medical staff of the Battlefords Union Hospital. With respect to Dr. Kutzner, the record includes his application for appointment to the medical staff of the Lloydminster Hospital dated May 27, 1993, his application for privileges dated May 28, 1993 and the documents evidencing his medical staff privileges for 1993-94 and 2006-07. The latter two documents are identical (except for the dates) and read as follows:

Lloydminster Hospital
Medical Staff Privileges
1993-94

Dr. Morley Kutzner

Consulting Privileges

- Consulting Privileges in Opthalmology

General Surgery – Level I

- Incision and drainage of superficial abscess

- Lipoma & subcutaneous cysts
- Removal of superficial foreign body
- Sebaceous cysts
- Warts, moles, scars, keratosis

Ophthalmology – Level I

- Chalazion
- Removal of foreign body embedded in cornea
- Suturing of lid wounds, entropion, ectropion
- Cataract
- Glaucoma

[51] In reviewing these materials, it becomes obvious that the applications for privileges submitted by Drs. Kutzner and Blackwell contain no reference to any specific allocation of operating room time. In relevant part, they say only that the applicant wishes "…to apply for the privilege of performing the following procedures…." The forms then go on to identify the specific procedures which are the subject of the application. Similarly, the "Medical Staff Privileges" documents that formally set out the nature and scope of the privileges granted to Dr. Kutzner say nothing about operating room allocations. Thus, to the extent these documents reflect part of the context in which the *Act* was enacted and is applied, they tend to support a reading of s. 43(1)(c) to the effect that privileges do not involve any particular grant of operating room time.

[52] Another part of the background against which s. 43(1)(c) must be considered is the practical realities involved in the allocation of operating room and other hospital resources. In his affidavit, the Chief Executive Officer of the Authority indicates that allocation decisions reflect a variety of interrelated and sometimes conflicting considerations including patient needs,

the availability of funding, the availability of staff, the number of physicians with privileges and physician recruitment and retention needs. The extraordinary complexity of operating room allocation decisions is underlined and made abundantly clear in the affidavit of Mark Ogrady, the Head of the Department of Surgery for the Regina Qu'Appelle Regional Health Authority. He indicates that the Regina Qu'Appelle Regional Health Authority is faced with allocating operating room resources to some 115 physicians holding surgical privileges. His affidavit states that each operating room allocation can potentially impact 287 different physicians.

[53] This too tends to suggest that the Legislature did not intend, when enacting s. 45(1)(c), to create a regime in which each and every change to operating room allocations would give rise to a right of appeal to the Tribunal. A system of this sort would bog down the health care system by drawing the Tribunal, on an ongoing basis, into the heart of the day-to-day management of hospital resources.

[54] All of this leads to only one result. When s. 43(1)(c) is considered in light of the scheme implemented pursuant to the *Act* and the whole of the relevant legislative context, it is clear that its reference to the amending, suspending or revoking of privileges should not be read so broadly as to include each and every change made to a physician's allocation of operating room time. In my view, the Tribunal acted unreasonably in concluding otherwise and the Chambers judge erred in failing to recognize that error.

[55] In this regard, I should add that I do not find *Beiko v. Hotel Dieu Hospital St. Catharines*, 2007 CarswellOnt. 442, affirmed 2007 ONCA 860, referred to by Drs. Kutzner and Blackwell, to be especially helpful. The analysis of the term "privileges" in that case was very abbreviated and the overall legislative scheme at issue featured no definitions of the sort found in the *Bylaws* and *The Attending Health Professionals Regulations*.

[56] I should comment too on a possible argument to the effect that, in relation to the amendment, suspension or revocation of privileges, s. 45(1)(c) extends *only* to those circumstances where there has been an amendment, suspension or revocation of privileges as part of a discipline process formally conducted pursuant to Part VIII of the *Bylaws* or where privileges are formally suspended pursuant to Part IX of the *Bylaws*. Such an argument would proceed as follows. Sections 63 and 71(1) of the *Bylaws*, found in Part VIII, provide that disciplinary action may include, among other things, the amendment, suspension or revocation of privileges. Sections 76 and 79, found in Part IX, allow immediate suspension of privileges in circumstances where such action is necessary to protect patients. Thus, so the argument might go, when s. 45(1)(c) of the *Act* refers to "amending, suspending, or revoking" privileges, it should be read as referring only to appeals arising because of actions formally taken pursuant to Parts VIII and IX.

[57] In my view, this interpretational approach cannot be endorsed because it involves an overly restrictive reading of s. 45(1)(c). That provision is designed to ensure that physicians have a right to appeal whenever their privileges are amended, suspended or revoked and, as a result, it should operate regardless of whether their privileges are affected by a process expressly undertaken pursuant to Parts VIII and IX of the *Bylaws* or whether they are affected by actions taken on some other basis. In other words, the *Act* contemplates a right of appeal where, in substance, a physician's privileges are amended, suspended or revoked even if the specific concepts of "amendment", "suspension" or "revocation" are not used by the health district and even if there has been no proceeding conducted pursuant to Parts VIII or IX.

[58] Significantly, this reading of s. 45(1) appears to be mandated by its own terms. Section 45(1)(b) provides for appeals to the Tribunal from "the disciplining of [the appellant] as a member of the practitioner staff." In light of that provision, s. 45(1)(c) – which relates specifically to changes to privileges – would be redundant if it covered only sanctions imposed as a result of disciplinary proceedings. Accordingly, it would seem that, in appropriate circumstances, s. 45(1)(c) (insofar as it speaks to the amendment, suspension or revocation of privileges) extends beyond the measures imposed as a result of proceedings pursuant to Parts VIII and IX of the *Bylaws*.

[59] And where does all of this ultimately lead? First, it can be seen that the overall scheme put in place pursuant to the *Act* means 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, at the same time, it is also extremely difficult to accept the idea that the concept of privileges is wholly and completely disconnected from any consideration of access to health district facilities and services. A grant of privileges would seem to necessarily involve the idea that, subject to factors like the availability of resources and patient demand, the physician in question will have *some* access to resources and facilities. Otherwise, there would be no point in granting privileges in the first place.

[60] In sum, it is apparent that the right of appeal created by s. 43(1)(c) will be engaged in two main sorts of situations. As noted, the most obvious one is where a regional health authority formally declines to grant a physician the privileges he or she seeks or where it formally amends, suspends or revokes a physician's privileges pursuant to Parts VIII or IX of the *Bylaws*, or their equivalent in other health regions.

[61] A second general situation in which s. 45(1)(c) will be engaged is in the presumably somewhat unusual circumstance where there are no formal proceedings under Part VIII or Part IX but where a physician's allocation of facilities or resources is nonetheless changed in a way that amounts, in substance, to an amendment, suspension or revocation of the physician's privileges. As suggested above, the sorts of changes in issue here will not be those found in the mainstream of ongoing, day-to-day adjustments to the allocation of services and facilities that are made in response to considerations

like resource availability and patient demand. A grant of privileges contemplates that the physician will work in an environment where such changes occur. But, as explained above, a grant of privileges also contemplates that a physician will have *some* access to the facilities and services needed to perform those procedures in relation to which he or she has been granted privileges.

[62] Giving effect to this latter idea is not necessarily easy. In considering whether a change in operating room allocations amounts to a constructive amendment, suspension or revocation of privileges, the Tribunal will want to consider the combined effect of all relevant factors. One of these factors will certainly be the significance of the change in question. For example, a reduction in operating room time from six days a month to five-and-a-half days a month is presumably something materially different than a reduction from six days a month to one day a year. 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 privileges.

[63] A second factor the Tribunal will want to consider is the duration of the change. For instance, a reduction in operating room times which is in place for a week is not the same thing as a reduction which is permanent. The longer a change extends, the easier it will be to see it as involving a *de facto* amendment, suspension or revocation of privileges.

[64] A third factor to be considered might be the reach of the change in issue. 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 the flavour of a suspension, revocation or amendment of privileges than will a change targeted at a particular physician. By way of a concrete illustration of this idea, a decision that cuts global operating room time by a specific percentage, and which affects all surgeons in the same way, typically will have less of the character of amendment, suspension or revocation of privileges than will a decision which cuts only one physician's operating room allocation.

[65] There might well be other factors that should inform the Tribunal's decision-making on issues of this sort. The considerations noted above are merely indicators of whether the actions of a health district have, in effect, amended, changed or modified a physician's privileges given the reality that the term "privileges" does not involve any specific allocation of facilities or services but that it does contemplate, subject to the normal realities of matters like resource availability and patient demand, the allocation of some services and facilities. The three factors discussed here are not intended to represent a closed list and, obviously, they might be subject to qualification in some cases.

[66] I appreciate that this approach to s. 45(1)(c) does not involve a test which will neatly and clearly indicate at the outset, in all cases, whether a change to operating room time allocations is something the Tribunal can review by way of a physician appeal. However, it is not possible, in the

abstract, to draw a bright line precisely separating the sorts of changes which will engage s. 45 of the *Act* from those which will not. The Tribunal will need to address and consider the relevant issues in the context of the facts of specific appeals as they arise, always bearing in mind that s. 45 should not become something that draws it into the ongoing detail of the ordinary day-to-day administration of hospitals or health districts. As the Tribunal's decisions accumulate, both physicians and health authorities will develop a clearer working sense of the sorts of situations which might be expected to come within the scope of s. 45(1)(c).

[67] I note, as well, that finding a physician's privileges to have been amended, suspended or revoked is only the first stage of the inquiry the Tribunal will be obliged to make when dealing with an appeal pursuant to s. 45 of the *Act*. Assuming there is an amendment, suspension or revocation, the Tribunal will also have to determine what, if any, relief it will order. Section 14(1) of *The Practitioner Staff Appeals Regulations* says the Tribunal may either confirm the decision of the board, vary the decision of the board or quash the decision of the board and substitute its own decision. In contemplating which of these options is warranted in an individual case, the Tribunal will obviously have to take into account both the appropriateness of the health authority's decision in light of the various factors relevant to the allocation of scarce health region resources and consider the extent to which deference should be shown to the authority's decision-making in light of the overall complexity of the problems surrounding the allocation of such resources.

VI. Conclusion

[68] In my view, the Chambers judge erred by endorsing the Tribunal's interpretation of the *Act*. Section 43(1)(c) cannot be reasonably interpreted as meaning that every change to a physician's allocation of operating room time is an amendment, suspension or revocation of privileges giving rise to a right of appeal to the Tribunal.

[69] The Tribunal's conclusion that it should hear the appeals of Drs. Kutzner and Blackwell flowed directly from its interpretation of s. 43(1)(c), *i.e.* it said that the simple fact of changing the operating times allocated to Drs. Kutzner and Blackwell meant that their privileges had been modified within the meaning of s. 43(1)(c). In light of its interpretation of the *Act*, the Tribunal did not consider whether those changes amounted to an amendment, suspension or revocation of privileges in the more limited sense explained above. As a result, it is necessary to remit this matter to the Tribunal for reconsideration in light of these reasons for decision. In this regard, I suggest that the Tribunal might wish to avoid any attempt to hive off, as a free standing preliminary issue, the question of whether the changes to the operating times allocated to Drs. Kutzner and Blackwell constitute an amendment, suspension or revocation of privileges. As the proceedings to date in this appeal have shown, 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.

[70] The Authority's appeal is allowed and the decision of the Chambers judge is set aside. The appeals of Drs. Kutzner and Blackwell are remitted to

the Tribunal for reconsideration. In light of the fact that the Authority has not prevailed fully in this Court, and in light of the fact that the legislative provisions in issue here were previously untested, there will be no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 27th day of October, A.D. 2010.

"RICHARDS J.A."

RICHARDS J.A.

I concur "KLEBUC C.J.S."

KLEBUC C.J.S.

I concur "LANE J.A."

LANE J.A.