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Private Practice, Public Operating Rooms, and Hospital Privileges: The Ontario Court of Appeal Clarifies Section 44 of the Public Hospitals Act

When a healthcare professional is faced with revocation of their hospital privileges, the consequences can be significant. Many specialties depend upon systems, infrastructure, and support that can be found only within a hospital environment. A professional's loss of their privileges may therefore effectively prevent them from sustaining their practice. Legal proceedings, including applications for judicial review, can often ensue.

In *Abbott v London Health Sciences Centre*, the Court of Appeal for Ontario considered the case of a group of dental surgeons (the "Dental Surgeons") whose privileges were revoked by the London Health Sciences Centre ("LHSC") after LHSC decided to cease permitting the use of its operating rooms in the Dental Surgeons' private practice. In dismissing the Dental Surgeons' appeal, the Court provided guidance on the discretion of Ontario public hospitals to allocate resources for the provision of healthcare services, and the rights of healthcare professionals impacted by those decisions.

Factual Overview

In this case, LHSC's Board of Directors decided to terminate the Dental Surgeons' use of its operating rooms for their private dental surgery practice. LHSC determined that permitting the use of its operating rooms in this way was inconsistent with the Hospital's accountabilities within the provincial healthcare system. The OR time previously occupied by the Dental Surgeons' private practice could be more appropriately used, in the view of LHSC's Board, for surgeries conducted by staff oral surgeons. Unlike LHSC's staff oral surgeons, the private practice Dental Surgeons were not required to treat patients admitted to LHSC other than their own private patients. Furthermore, they did not perform on-call shifts for the Department of Dentistry, nor did all of them hold academic appointments at the medical school with which LHSC was affiliated. They billed the Ontario Health Insurance Plan or their

own patients directly for their procedures, and they did not reimburse LHSC for the use of its OR, staff, equipment, or supplies.

Having considered these factors, LHSC's Board decided that the Hospital would no longer permit the use of its operating rooms for the Dental Surgeons' private practice and revoked the Dental Surgeons' privileges at LHSC. Despite the Dental Surgeons having provided written submissions opposing this decision, they were not offered a hearing, and their submissions were not considered when the Board made its decision.

The Dental Surgeons sought judicial review before Ontario's Divisional Court, arguing that LHSC was required to provide them with a hearing before discontinuing their service and revoking their privileges. After the Divisional Court denied the Dental Surgeons' application, they appealed to the Court of Appeal.

The Court dismissed the Dental Surgeons' appeal, holding that LHSC's Board had no obligation to provide them with a hearing before it decided to cease offering their service. Having done so, the Board was entitled to revoke the Dental Surgeons' privileges without a hearing pursuant to section 44 of the *Public Hospitals Act* (the "*PHA*").

Statutory Context: The *Public Hospitals Act*

Physicians and dentists practising in Ontario public hospitals are not employees. Instead, they practise as independent professionals, to whom hospitals grant "privileges" to admit patients and provide care. Sections 36 to 43 of the *PHA* establish the statutory framework governing the granting and, if necessary, the suspension or revocation of privileges by public hospitals. Under this legislation, a hospital's board of directors are responsible for making these decisions. In general, any member of the hospital's privileged staff whose privileges are revoked or suspended by the board is entitled to a hearing. The *PHA* establishes comprehensive rights of appeal from such decisions to an independent tribunal (the Health Professions Appeal and Review Board) and subsequently to the courts.

The issue in the *Abbott* case was an important statutory exception to these rights of procedural fairness. Section 44 of the *PHA* states that a hospital's board may revoke the appointment of "any physician" if,

a. the hospital has determined that it will no longer offer a service to the public; and

b. the physician's privileges relate exclusively to the provision of that service.

In these circumstances, subsection 44(3) of the *PHA* permits the Board to revoke a physician's privileges without holding a hearing, and the *PHA* provides no right of appeal from such a decision.

The Dental Surgeons' Argument

In *Abbott*, the Dental Surgeons argued that, notwithstanding section 44 of the *PHA*, LHSC improperly discontinued the service of private dental surgery in its operating rooms and their privileges should not have been revoked. They raised the following arguments:

a. The "no hearing" provision in subsection 44(3) of the *PHA* applies only to the revocation of hospital privileges. They argued that this provision does not authorize a hospital to cease offering services without first hearing submissions from the professionals who may be impacted by that decision. Rather, in making this "threshold determination" it was argued that the Board had to consider submissions from the affected Dental Surgeons.

b. The phrase, "cease to provide a service", in section 44 of the *PHA* refers only to the termination of an entire service, such as the cancellation of all dentistry or oral surgery. In this case, LHSC had decided to discontinue only the private surgery practice of the Dental Surgeons, while permitting the conduct of oral surgeries by other staff physicians. The Dental Surgeons argued that this failed to comply with the *PHA*;

c. Section 44 of the *PHA* applies only to the privileges of "any physician." Given that they were dentists, and not physicians, the Dental Surgeons argued that this provision did not apply to them.

The Court of Appeal's Decision

The Court of Appeal unanimously dismissed the Dental Surgeons' appeal.

The Court rejected the Dental Surgeons' argument that the subsection 44(3) applies only to the revocation of individual privileges and not to the "threshold" determination of whether to cease providing a service, as defined by subsection 44(1.2). The Court reasoned that requiring a hearing on the threshold question of whether to discontinue a service would create an "unlikely mismatch" that the legislature could not have intended. For example, if the Dental Surgeons' proposed interpretation were accepted, a hospital board would remain exempt from needing to hold a hearing on decisions such as the wholesale closure of a hospital, but it would be required to hold a hearing for narrower and less intrusive decisions, such as ceasing to

provide a particular service. The Court deemed this mismatch illogical.

Second, the Court rejected the appellants' narrow interpretation of the term, "service" as used in section 44 of the *PHA*. The Court identified no case law or other authority which supported the Dental Surgeons' proposition that the term "service" must be read to mean an "entire" service (e.g., all dentistry or all oral surgery performed at a hospital). There were found to be important differences in the scheduling and prioritization of patients between the Dental Surgeons' private practice and that of LHSC's staff oral surgeons. These differences justified treating the Dental Surgeons' private practice as its own "service," separate and distinguishable from the oral surgery services offered by LHSC's staff oral surgeons.

Lastly, the Court also made a finding about the scope and application of subsection 44(2) of the *PHA* to dentists and oral surgeons. Although, on its face, subsection 44(2) permits a hospital to revoke the privileges of "any physician," the Court confirmed that an extended meaning should be given to this language when considered within its broader regulatory context. The Court determined that, when read together, the *PHA*, the Hospital Management Regulation under the *PHA*, and the *Medicine Act* support an interpretation of the term "physician" that includes members of the Royal College of Dental Surgeons in this specific statutory context. As a result, subsection 44(2) of the *PHA* permitted the revocation of the Dental Surgeons' privileges without a hearing, despite their not being members of the College of Physicians and Surgeons.

Key Takeaways for Healthcare Professionals

The Court of Appeal's decision in *Abbott v London Health Sciences Centre* demonstrates that hospital boards have a large degree of discretion to make resourcing decisions. These decisions can have significant implications for healthcare professionals who practise in affected specialties. Where the privileges of a physician or dentist relate exclusively to a service that has been discontinued, *Abbott* illustrates that these professionals may have limited procedural recourse if the hospital elects to terminate their privileges.