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**IN THE MATTER OF DR. DAVID R. ELLIS**

**and**

**THE CENTRAL VANCOUVER ISLAND HEALTH REGION**

**Application for an Interim Injunction**

**BEFORE:** Gordon R. Armour )  
Chair )

Lori Messer ) Heard at Vancouver, B.C.  
Member ) January 16, 2001

Lorraine Grant )  
Member )

Peter M. Willcock  
Penny A. Washington

Counsel for the Appellant  
Counsel for the Respondent

**REASONS FOR DECISION**

On November 21, 2000, the Appellant filed an appeal to the Hospital Appeal Board of British Columbia from the decision of the Regional Board of the Central Vancouver Island Health Region of September 23, 2000:

- Terminating his privileges at Nanaimo Regional General Hospital (NRGH) effective October 1, 2001; and
- Directing that elective operating room time shall only be allocated to the Appellant at facilities in the Central Vancouver Island Health Region other than NRGH after January 1, 2001.

On December 14, 2000, counsel for the Appellant applied to the Board for an application directing the Central Vancouver Island Health Region to continue his elective operating room time at Nanaimo pending the outcome of the hearing of the appeal.

If granted, this request for "interim relief" would require the Board to effectively "stay" the Region's decision to move his privileges to Ladysmith pending our final decision.

In considering the request, the Board directed that counsel address the issue of the jurisdiction of the Board to grant the request.

## DECISION

Unlike other statutes that confer explicit power upon administrative tribunals the power to stay a decision pending appeal, there is no express power in the *Hospital Act*, R.S.B.C. 1996, c. 200.

To determine whether a particular power exists in administrative law, the language, purpose and overall context of the legislation must be closely considered:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory tribunals through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes: *Bell Canada v. CRTC*, [1989] 1 S.C.R. 1722 at para. 50.

The Appellant's submission recognizes that there is no express power to grant interim relief, but relies on the broad language of s. 46(2) of the *Hospital Act*:

46(2) A hospital appeal board may affirm, vary, reverse, or substitute its own decision for that of a board of management on the terms and conditions it considers appropriate.

The Appellant argues that the Board "should interpret its powers so it may effect the purpose of the legislature in creating the particular power in its entire context". The argument is along these lines: (a) the purpose of the Act is to give practitioners effective appeals; (b) without such a power, the Board would be unable to avoid the passage of time from eroding the Board's ability to give a meaningful remedy in due course; and (c) section 46(2) should therefore be interpreted broadly so that it even applies to the stage before a final decision is made.

As noted above, Courts have been willing to recognize that even though an administrative tribunal does not have express power over a matter, that power can be "necessarily implicit" from the legislation. However, a high threshold must be crossed before the courts will "imply" an interim power that is substantive and coercive in nature: see for example *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724.

In *Bell Canada* above, the Court was prepared to imply a CRTC power to order Bell Canada to give ratepayers a one time credit to remedy interim rate orders that it determined after a final hearing were too high. Critical to that conclusion, however, was that the CRTC had the express statutory

power to issue interim orders. At para. 23 of the judgment, the Court states:

Were it not for the fact that the appellant has the power to make interim orders, one might say the appellant's powers in this area are limited only by the time it takes to process applications, prepare for hearings and analyze evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

The reluctance to imply interim injunctive power into an administrative statute is also reflected in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626. A key issue in that case was whether the Federal Court of Canada had the power to "stay" hate messages pending an appeal by the Human Rights Tribunal. While the Court ultimately answered the question "yes" based on the *Federal Court Act*, it rejected the argument that this power could be inferred from the administrative scheme in the *Human Rights Act*. At para. 16 the Court states:

In my opinion, the standard for finding an implied power in the existing jurisprudence is actually much more stringent. An injunctive power has only been implied where that power is actually necessary for the administration of the terms of the legislation; coherence, logicity or desirability are not sufficient... [emphasis added]

The Court makes clear that such a power will be "actually necessary" where the failure to grant a stay would render the appeal itself "nugatory":

It cannot be said that the other remedies contained in the Human Rights Act would be rendered "nugatory" in the absence of an injunctive power in the Federal Court. Failing that, no such power can be implied into the scheme of the Act.

If the *Human Rights Act* conferred no such jurisdiction on the Federal Court, none was given to the Tribunal either.

In *Ewachniuk v. Law Society of British Columbia*, [1998] B.C.J. No. 372 (C.A.) at para. 48 Finch J.A. stated that "...courts should be slow to infer a legislative intention which has not been expressed, but they may do so where the expressed statutory purpose would be defeated by the failure to draw the inference".

Based on this caselaw, the test for whether the Board has the jurisdiction to grant the Appellant's request for a stay is whether our appellate role would be "defeated" and rendered "nugatory" by the failure to have such a power. We would answer that question "no".

Unlike many other appellate bodies that have a limited appeal role, the Hospital Appeal Board conducts appeals *de novo*. If the appeal is allowed, the Board has full discretion to grant a remedy substituting its judgment for that of the Region and grant whatever regulatory remedy it considers just and appropriate to the Appellant. The remedy may not, because of the passage of time, put the appellant in exactly the same position he would have been in had a stay been granted, but certainly the remedy will be effective. The Board is not limited in granting the Appellant a remedy where, for example, the Region has made other arrangements in the meantime. Those other arrangements would clearly be subject to what the Board decides on this appeal. In particularly urgent cases, the Board makes every effort to hear appeals as quickly as possible.

It is further the opinion of this Board that in order to responsibly carry out its mandate under the *Hospital Act* and Hospital Act Regulations, it can only vary or reverse a decision of the Central Vancouver Island Health Region's Board of Management after it has conducted a hearing *de novo*. Due diligence on the part of the Board can only be served once the Board has had the opportunity to fully examine all of the evidence pertaining to the appeal before it. A variance in the decision of the Board of Management must come only after a full *de novo* hearing, otherwise it could create chaos and a systematic undermining of the health authorities.

The decision of this Board is that it is not within its jurisdiction to grant the relief requested.

This Board would note that the Appellant is not without remedy. The law is clear that where interim relief is unavailable in a statutory scheme, it may be granted by the Supreme Court of British Columbia: *Canadian Pacific Ltd. v. Brotherhood of Maintenance of Way Employees*, [1996] 2 S.C.R. 495.

The Hospital Appeal Board of BC denies the request for Interim relief pending the hearing of the appeal.

Dated at Burnaby, British Columbia this 19<sup>th</sup> day of January, 2001.

Gordon Armour  
Chair

Lori Messer  
Member

Lorraine Grant  
Member