

# Hospital physician appointment and appeal process prejudices patient care

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The Ontario *Public Hospitals Act* (“PHA”) entitles physicians to apply on an annual basis for appointment or reappointment to exercise privileges at a hospital. If the hospital decides against appointing or reappointing a physician, or if the hospital revokes, suspends or cancels a physician’s appointment, or to substantially alters a physician’s privileges, the physician’s rights to due process under the PHA and by-law are triggered.

Under the PHA, a physician’s rights to due process include, but are not limited to:

1. a meeting before the medical advisory committee;
2. a hospital board hearing,
3. an automatic right to appeal any board decision to the Health Professions Appeal and Review Board (“HPARB”); and
4. an automatic right to appeal any HPARB decision to the Superior Court of Justice.

The Auditor General in its 2016 Annual Report (“2016 Report”) observed that a physician’s comprehensive rights to due process have prejudiced patient care in Ontario:

“Hospital decision-making on patient care has been negatively impacted by the physician appointment and appeal process. We noted some instances where hospitals were not able to resolve human resources issues with physicians quickly because of the comprehensive legal process that the hospitals are required to follow under the Public Hospital Act. In some cases, longstanding disputes over physicians’ hospital privileges have consumed considerable hospital administration and board time that could be better spent on patient care issues.” [p.432]

The Auditor General recommended that the Ministry of Health and Long-Term Care (MOHLTC) review the PHA provisions on physician appointment and appeal.

While we strongly agree with the Auditor General’s comments above, we believe the suggested solution ignores a key contributing factor to the resources required to manage disputes relating to physician appointment and privileges: the legal assistance afforded to all Canadian physicians through the taxpayer-funded Canadian Medical Protective Association (“CMPA”). Physicians represented by CMPA-appointed counsel receive the most fulsome representation possible from the commencement of their dispute with the hospital to the final appeal without any accountability or contribution to the legal fees incurred in the dispute.

Faced with the above “legal deterrent” strategy, the hospital’s oversight of physician performance in hospitals has suffered because historically hospitals lost their willingness to

dedicate the resources (i.e. time, Chief Executive Officer, Chief of Staff, Department Chiefs, volunteer board of directors) required to hold physician accountable for performance that was not acceptable. As a result, hospitals developed cultures that tolerated performance issues that were, in our view, three deviations from the norm; performance that simply would not be tolerated from any employee working in a hospital. The findings in the Dupont/Daniel Coroner Inquest provides an extreme example of the extent that the above PHA process can have on the culture of a hospital where a physician's right to practice supersedes patient's or staff's safety concerns.

"Relevant behaviour issues and complaints were not identified during Dr. Daniel's re-appointment process at the hospital. There were multiple complaints from the nurses regarding Dr. Daniel's disruptive behaviour starting in 2000 which included damage to equipment, fracture of a nurse's left ring finger, verbal abuse, unprofessional behaviour in front of patients and refusal to work with a specific nurse. Medical staff by-laws should support a culture that does not tolerate physician disruptive behaviour and make it easy to address concerns and ensure timely resolution of the issues."

The Dupont/Daniel inquest led to amendments to the *Occupational Health and Safety Act* (Ontario) that enforced zero tolerance for workplace violence and harassment and, in addition, greater transparency for quality of care in hospitals including the reporting of critical incidents and the recent introduction of the Patient Ombudsman. While these legislative changes has motivated hospitals to more actively manage physician performance, the prohibitive cost of physician-hospital disputes persists.

The 2016 Report noted that the number of hospital proceedings involving physicians increased 87% in ten years from 285 cases in 2006 to 533 in 2015. As cited in the report, a single proceeding cost one hospital \$800,000 – the equivalent of two in-patient acute beds. We emphasize that not only did taxpayers pay for these disputes through public hospital funding, but also through taxpayer contributions to the CMPA-driven legal defence that generated these hospital costs. In fact, the 2016 Report quoted that from 2013 to 2016, taxpayers have paid \$567 million for CMPA coverage of Ontario physicians.

In our view, there are three possible solutions to the above-noted issues going forward:

1. amend the PHA to streamline the process for physician appointments/reappointments and appeals;
2. amend the Physicians Services Agreements so that physicians are accountable for a percentage of the legal fees paid to their CMPA-assigned counsel; and/or
3. develop hospital board rules compliant with the *Statutory Powers Procedure Act* (Ontario) ("SPPA") to ensure that physician-hospital proceedings are managed in a "just, expeditious and cost effective" manner.

While is open to hospitals to implement the third of these solutions immediately and without legislative amendment, to our knowledge, no Ontario hospital has thus far adopted SPPA-compliant board rules. Perhaps now, in response to the Auditor General's findings, hospitals will finally develop board rules to effectively safeguard the judicially-recognized "primary purpose" of the PHA – ensuring patient safety in the provision of hospital services (*Soremekun v. University Health Network*, 2004 CanLII 11892 (ON SCDC)), while balancing the need to securing not only a "just" proceeding but one that is equally "expeditious" and "cost effective".

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