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A New Era of Accountability for Hospitals and Physicians – The Impact of the *Rosenhek v. Windsor Regional Hospital* Decisions

Two recent decisions involving Dr. I.S. Rosenhek and the Windsor Regional Hospital have provided significant clarification as to the legal responsibilities of hospitals when seeking to revoke a physician's hospital privileges and the legal responsibilities of physicians in exercising such privileges. In one case, the Ontario Court of Appeal awarded \$3 million in damages to Dr. Rosenhek after finding that the Hospital acted in bad faith when it attempted to revoke his privileges in 1989. In the other case, the Health Professions Appeal and Review Board upheld the Hospital's 2009 decision to revoke Dr. Rosenhek's privileges after finding that he was acting in an ungovernable manner.

These recent decisions have raised the stakes with respect to the ramifications of inappropriate conduct on the part of both hospitals and physicians – and will have a significant impact on future hospital privileges disputes, potential legal actions against hospitals and the management of “disruptive physician behaviour.” All physicians and hospital administrators would be well advised to ensure that they are fully aware of how these cases have changed the legal landscape.

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Court of Appeal Decision: Upholding Award of Damages re Initial Revocation of Privileges

In a recent decision, the Ontario Court of Appeal upheld a lower court decision and awarded \$3 million to Dr. Rosenhek after finding that the Board of Directors (the “Board”) of the Windsor Regional Hospital (the “Hospital”) committed a bad faith exercise of a statutory public power (i.e. a “misfeasance in a public office”) when it revoked his hospital privileges in 1989¹. In reaching this finding, the Court of Appeal held that the strongest evidence of bad faith was that the Board was not acting for the public good, but rather pursuant to an improper motive, namely the resolution of long-standing interpersonal and coverage issues at the Hospital between Dr. Rosenhek and other specialists.

The Court of Appeal also relied on the following as evidence of bad faith:

- the decision of the Board was not only wrong but was completely devoid of merit, in that there were no reasonable concerns raised about Dr. Rosenhek other

¹ By way of background, the Health Professions Appeal and Review Board reversed the decision of the Board in 1994 and reinstated Dr. Rosenhek as a member of the medical staff of the Windsor Regional Hospital. Dr. Rosenhek then brought the present civil claim claiming damages for lost income.



than allegations of minor interpersonal conflicts and that he did not “fit in” at the Hospital

- there had been no recent change to Dr. Rosenhek’s conduct or behaviour and therefore no legitimate justification that warranted the *immediate* revocation of his privileges
- the failure of the Board to provide Dr. Rosenhek with an opportunity to respond to the recommendations of the Medical Advisory Committee before his privileges were revoked, thereby not affording him procedural fairness
- the failure of the Hospital to take an active role in addressing the coverage concerns faced by Dr. Rosenhek and the fact that the Chief of Staff was actually a major source of the problem

This case has confirmed that hospitals face significant civil liability if they do not act in good faith in the exercise of their statutory public powers, such as the revocation of a physician’s privileges. Although it is unclear as to which types of “statutory-based” hospital decisions this “good faith duty” may extend, there is no reason to believe that it would be restricted to privileges issues alone.

HPARB Decision:

Upholding Subsequent Revocation of Privileges

Ironically, in a separate matter involving the same parties, which was based on more recent events, the Health Professions Appeal and Review Board (“HPARB”) upheld a 2009 decision of the Board to revoke Dr. Rosenhek’s hospital privileges for repeatedly acting in a disruptive and non-collegial manner and for showing a “wanton disregard” for the rules and procedures of the Hospital, including those relating to the credentialing process. In short, although HPARB did not have any concerns regarding Dr. Rosenhek’s medical competency, it concluded that his consistent pattern of inappropriate conduct and behaviour were directly impacting patient safety and the ability of the Hospital to manage the quality of patient care. As a result, HPARB felt that Dr. Rosenhek was *ungovernable* and that the immediate revocation of his privileges was justified.

In its Decision and Reasons, HPARB provided numerous examples of inappropriate conduct and behaviour on the part of Dr. Rosenhek, including the following:

- repeatedly failing to cooperate with the Hospital, including refusing to comply with various and repeated requests to provide information critical to the credentialing process (i.e. the existence of CMPA coverage and the attainment of CME credits)
- the provision of false and misleading information to the Hospital in connection with the credentialing process, including misrepresenting himself as a Fellow of the Royal College of Physicians and Surgeons of Canada and failing to advise the



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Hospital of a referral to the Discipline Committee of the College of Physicians and Surgeons of Ontario (the “CPSO”)

- a pattern of repeated and consistently disruptive behaviour towards Hospital administration, colleagues and patients contrary to Hospital by-laws/policies and the CPSO policy “*Physician Behaviour in the Professional Environment*”. Some examples of this disruptive behaviour included being rude to nurses, demeaning other health professionals, throwing charts and being dismissive of both patients and staff
- a reluctance and occasional unwillingness to communicate and consult with colleagues regarding patient cases and complaints

This case shows that physicians who consistently act in a “disruptive” and non-collegial manner run the risk of having their privileges revoked, as such conduct will likely be found to jeopardize patient safety and the delivery of quality care.

What Does this Mean for Hospitals and Physicians?

- 1. Hospitals and hospital Boards must act in good faith when making decisions regarding physician privileges and cannot act for an improper or ulterior purpose. By failing to do so, a hospital exposes itself to significant civil liability. As stated above, this duty of good faith likely extends to hospital decisions beyond privileges matters.*
- 2. Hospitals have a fiduciary duty to ensure that they effectively credential physicians in accordance with the Public Hospitals Act and their own by-laws. In exercising this duty, considerations of patient safety and quality of care are paramount, which involve examining not only the competency of a physician but their conduct and behaviour.*
- 3. Physicians who do not act in a collegial, professional and respectful manner toward hospital administration, colleagues and patients may face an interference with their privileges.*
- 4. Both hospitals and the CPSO have become increasingly vigilant in attempting to curtail perceived “disruptive physician behaviour”, as evidenced by the introduction of new policies which exclusively focus on this issue. Physicians facing any such allegations must take them very seriously as an adverse finding may result in an interference with their privileges and/or licence to practice.*



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