C.A. No. 105832

NOVA SCOTIA COURT OF APPEAL

Cite as: Colchester Regional Hospital Commssion v. Shephard, 1995 NSCA 97

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
THE COLCHESTER REGIONAL HOSPITAL COMMISSION	)	R. Malcolm MacLeod and Peter M. Rogers for the Appellant
Appellant	)	
- and -	)	
DR. KENNETH B. SHEPHARD	)	C. Peter McLellan, Q.C. for the Respondent
Respondent	)	
	)	Appeal Heard: November 28, 1994
	)	Judgment Delivered: January 10, 1995

THE COURT: The appeal is allowed and the decision of the trial judge is set aside as per reasons for judgment of Chipman, J.A.; Freeman and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the Colchester Regional Hospital Commission (the "Board") from a decision in the Supreme Court awarding damages to the respondent

as a result of two suspensions and a non-renewal of privileges of the respondent as a staff physician at the hospital. The respondent cross-appeals relating to a third suspension and the quantum of damages awarded.

The respondent graduated from Dalhousie University with an M.D. in 1959. During his subsequent internships at the Victoria General Hospital and in Fredericton and Saint John, he had training in anesthesia. He was duly licensed by the Medical Council of Canada to practice medicine in the Province of Nova Scotia. In June of 1959 he commenced a general practice in Truro. In that year, he was granted Associate Staff Membership at the Colchester Hospital, the predecessor to the appellant. By 1961, he was an active member of the hospital staff. He had full privileges to practice medicine within the bounds of what he and his peers considered to be his competence. His privileges were for surgery, minor medicine, anesthesia and obstetrics. The respondent had no post graduate or specialist training in anesthesia. It was not then required by the hospital for staff privileges in that field. In the following years the respondent built a general practice with emphasis on anesthesia and in due course it grew to occupy over 50% of his practice. All of the respondent's anesthesia was carried out at the hospital and prior to the coming into effect of MSI he was paid by the patient. After that, he billed MSI directly. He was thus at no time on the hospital's payroll.

Due to a change in the hospital bylaws in 1974, persons wishing to provide major anesthetic services at the hospital were required to have specialist training. A "grandfather" clause permitted those such as the respondent who were already providing major anesthesia to continue to do so without receiving specialist accreditation.

The bylaws of the hospital in effect until November 1989 were enacted on May 6, 1950. They were passed pursuant to the **Colchester Hospital Commission Act**, S.N.S. 1950, c. 98. Section 8 of the **Act** (as amended) empowered the Board as

follows:

> "8 The Commission shall have full power and control of the operation and management of the Hospital and any training school in connection therewith, and of all other matters incidental thereto, and control of the medical staff of the Hospital, and including but not so as to restrict the generality of the foregoing, may make bylaws, rules and regulations deemed necessary for the control, operation and management of the Hospital and medical staff and respecting the duties and powers of the Commission and of the various officers thereof."

The bylaws provided **inter alia** for the appointment of an Administrator whose powers included:

> ". . . He shall act as the duly authorized representative of the Board in all matters in which the Board has not formally designated some other person for that specific purpose."

By Article III, the bylaws provided for membership in the medical staff. Appointments were to be made by the Board after recommendation of the Medical Advisory Committee, and were to be for a period of one year or until the next annual meeting of the medical staff when reappointment was required. It was provided that the hospital privileges of a member of the medical staff could be suspended by the Board on the recommendation of the Medical Advisory Committee.

This, in summary, was the regime in place when the first suspension of the respondent's privileges took place on July 7, 1989.

On July 6, 1989, Dr. Michael W. Cook, a surgeon on the staff of the hospital, wrote the Administrator:

> "As you know, over the years it has been my practice not to use Dr. Ken Shephard's services for anaesthesia. On the 26th of June, Mrs. [S.M.] presented in labour. She had had a previous caesarean section and required a repeat section, although there was no fetal distress. The conduct of the anaesthetics for this case has reinforced my desire not to use Dr. Shephard's anaesthetics services under any circumstances, either emergent or elective and I would request that you ensure that your anaesthetics scheduling will comply with this request. I would suggest independent assessment of this case and any others that you feel

appropriate, with regard to my request."

On the evening of July 6, 1989, the respondent did not attend at the hospital in response to a call to administer an anesthetic.

On July 7, 1989 Dr. Stephen M. Owen, an obstetrician on the staff, wrote Dr. Carl Giffin, Chief of Staff:

> "I would like to formally bring to your attention two episodes in the last 2 weeks which have raised concerns about the anesthetic coverage for Obstetrics.
>
> On the evening of Monday, the 21st of June, following Cesarean section delivery, Dr. Shephard was involved in the resuscitation of the newborn. He experienced considerable difficulty in performing the resuscitation, the method of which was felt to be inappropriate. The family physician at that time had to break scrub from assisting at the section and take over the resuscitation following which the baby responded well.
>
> On the night of the 6th of July, Dr. Shephard was on call for Obstetric anesthesia. He was called at approximately 10:50 p.m. to come in to provide anesthesia for a Cesarean section. After talking to Dr. Shephard in making the request for anesthesia, Dr. Isabel Corbett was extremely concerned about his fitness and ability to provide anesthesia. These concerns were relayed to me immediately on my arrival at the hospital. The decision was made at that time to wait until Dr. Shephard arrived at the hospital and make further assessment at that time. He was seen to drive up to the hospital at approximately 11:20. After a few minutes, having been seen to be walking unsteadily around the vehicle, he got back into the car and drove away in a very erratic manner. There was no communication from Dr. Shephard at that time. After a further 10 minutes elapsed time, Dr. Ben Karrel was contacted and agreed to come in to provide the anesthesia for the section. At approximately 11:50, Dr. Shephard called the hospital with the information that he had been involved in a car accident and would not be coming into the hospital to provide the anesthesia. The infant, delivered at the time of the Cesarean section, was found to be grossly meconium stained with cord complications and it is my opinion that if Dr. Karrel had not been available to provide anesthesia, transfer of the mother to Halifax would have resulted in a stillborn infant.
>
> If Obstetrics is to be provided at the Colchester Regional Hospital, it is mandatory that there be adequate anesthetic coverage and response to Obstetric emergencies. If there

> are times when this coverage cannot be guaranteed, then I would recommend that the Case Room be closed for those time periods. There is considerable concern that Dr. Shephard is not able to provide this coverage due to possible impairment. This situation needs to be further explored and resolved with some urgency and I would be grateful for your attention to this matter."

On July 7, 1989 the Administrator by letter purported to suspend the respondent saying:

> "I hereby inform you that I am suspending your hospital privileges effective immediately. I am taking this action in response to reports that I have received today from both the Chief of Staff and the Director of Nursing, regarding your unavailability for anesthesia last evening, 6 July 1989, when you were called to provide emergency anesthesia for a caesarian section on patient Mrs. [S.B.]. A short time later you were observed on hospital property acting in an unusual and erratic manner. Your conduct last evening appears to have placed an expectant mother and infant at risk. I believe this to be a serious situation warranting your suspension and requiring a prompt investigation.
>
> Therefore, I am asking the Credentials Committee to investigate this matter pursuant to Article XII, Section 5A "Investigation and Hearing" of our revised bylaws. I am enclosing a copy of this section of the bylaws."

As a result, the respondent appeared before the Credentials Committee. It recommended that he be reinstated immediately with privileges in general medicine, psychiatry, minor surgery, minor anesthesia and obstetrics, but that his privileges in major anesthesia and major surgical procedures remain in abeyance temporarily. It was noted that the respondent might have a chemical dependency problem and it was recommended that he be seen in the Professional Support Committee Program of the Nova Scotia Medical Society. It was recommended that the privileges in abeyance be reinstated on the recommendation of the Credentials Committee as soon as a report from a Professional Support Committee Program clarified the position. At a joint meeting of the Medical Advisory Committee and Credentials Committee on July 12,

1989, it was resolved that the respondent's privileges be reinstated in full immediately. It was also resolved that the Administrator, the Chief of Staff, the Director of Nursing and the President of the Medial Staff, after consultation with the Chief of Anesthesia and members of the Anesthesia Department invite an outside impartial group of medical consultants to review the operation of the O.R., including anesthesia and surgery.

On July 13, 1989, the Board accepted the Medical Advisory Committee's recommendation and reinstated the respondent's privileges in full. A letter from counsel for the respondent to counsel for the hospital dated July 31, 1989 recited this decision and concluded:

> "Dr. Shephard and I anticipate the matter has now been finalized."

On July 17, 1989, Dr. Cook wrote the Administrator:

> ". . . I had written a letter to the Administrator of the hospital on the 6th of July, indicating that I would no longer be using the anesthetic services of Dr. Ken Shephard. The Credentials Committee had recommended that his anesthetic privileges not be reinstated pending results of a further investigation and I concur with those recommendations fully. As of Friday evening I was expected to provide emergency coverage and to do this using an anesthesiologist who I indicated to you I will not work with.
>
> I have obtained advice [that] if I use the services of an anesthesiologist whose competence I question, and the patient came to harm, then I would be held accountable by law for this injury. I will not allow myself to be put in the situation by the hospital. I reiterate that I will not use Dr. Shephard's anesthetic services in the Colchester Hospital and henceforth on any weekend when no other anesthesiologist is available I will not be available to provide consultation service in the emergency department of the hospital."

In October 1989, three outside medical consultants attended at the hospital and conducted an investigation. Their report, known as the O.R. Review, was presented to the Board. The report stated that while there was no evidence suggesting

the respondent was incompetent, there was a lack of confidence on the part of some respecting his ability to provide epidural anesthesia for obstetrical delivery. The report continued:

> "Accordingly, to clear up this matter and also to help Dr. Shephard decide his best future course of action with regard to continuing to practice anesthesia, an evaluation of his clinical anesthetic practice should be carried out. In addition, he should acquire the skills of epidural anesthesia. We believe an evaluation could be done in an appropriate university or teaching hospital where he could be observed at work and a decision made as to his skills both technically and with respect to judgment. A finding that he was competent would boost his position in the hospital, improve his morale, and acceptability to his colleagues who have been most critical. We estimate that it would take four - six weeks to complete an evaluation."

November 14, 1989 was the effective date of new bylaws of the hospital. The Board created under the **Act** as amended is known as the Colchester Regional Hospital Commission. It had the powers set out in s. 8 quoted above. Provision is made for the appointment of an Administrator who is responsible for the general administration, organization and management of the hospital subject only to such policies as may be adopted and such orders as may be issued by the Board. Specifically, the Administrator shall:

> "(h) Discuss with the Chief of the Medical Staff, report to the Board, if necessary, respecting any failure of any member of the Medical Staff to act in accordance with the Medical Staff bylaws, provincial laws, or regulations, or accepted medical standards."

Article X to XII deal with the medical staff, its purpose and membership. The following are material provisions:

> "Article X <u>The Medical Staff</u>
>
> 1. The Board shall appoint such medical practitioners as it sees fit to the medical staff of the hospital and shall see that they are organized in such a manner as to secure the best possible results. In the professional care

of patients, the attending physicians appointed to the medical staff shall have full authority subject only to the by-laws of the hospital and the regulations thereunder and such policies as may be adopted by the Board and/or the medical staff.

Article XII Membership

. . .

3. Medical Staff Privileges: Terms of Appointment

1) All appointments will be for a period of one year or until the annual meeting of the Board, whichever comes first.

2) All appointments to the medical staff must be reconfirmed annually in the manner as prescribed by the Board.

. . .

5) The Administrator, upon receipt from the applicant of the application or reapplication form together with all supporting evidence, shall refer the matter to the Credentials Committee of the Medical Staff for consideration within one week after receipt thereof."

Subsequent provisions require the Credentials Committee to review an application or reapplication and make a recommendation to the Medical Advisory Committee which shall consider the same and make a recommendation to the Board:

11) The Board shall receive and consider the report and recommendation of the Medical Advisory Committee and shall accept, reject, or defer any application or reapplication or alternatively, the Board may, through the Administrator, resubmit the application or reapplication for further consideration to the Medical Advisory Committee and the Credentials Committee."

The bylaws then provide that the Administrator shall advise the physician the reasons for a decision at variance with the application. The physician may, within

ten days, request a hearing either in person or represented by counsel:

". . .

> 16) Where a hearing is held . . . the Board shall reconsider its decision at its next regular meeting, or at a special meeting, and may make such investigations or seek such further advice it deems advisable and shall render a decision in writing to the medical practitioner with a copy to the Medical Advisory Committee within sixty (60) days of the request being made. Such decision of the Board shall be final."

The bylaws also provide that the Medical Advisory Committee may recommend the suspension of admitting or full privileges in various cases. Article XII further provides:

> 4. Suspension of Privileges
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> . . .
>
> 3) The Board may, with good cause, suspend, vary, or revoke medical staff appointments without prior reference to or recommendation from any person or committee.
>
> . . .
>
> 5. Complaints, Investigation and Discipline
>
> . . .
>
> 2) The Administrator or the Chief of the Medical Staff may at any time, with just cause, suspend, vary or reduce the hospital privileges of any physician, subject to the physician having the right to appeal as provided for herein."

Upon a suspension of privileges, the bylaws set out a number of rules which apply, including that the physician shall be notified as soon as practicable of the suspension and the reasons therefor and that the Credentials Committee shall be notified and shall proceed with an investigation and report to the Medical Advisory

Committee. The Medical Advisory Committee shall then, before reporting to the Board, hold a hearing at which the physician whose privileges have been suspended may attend with or without counsel. The Medical Advisory Committee shall upon the completion of these steps make a recommendation to the Board. Upon receiving a recommendation from the Medical Advisory Committee the physician shall be notified by the Board of the right to a hearing respecting any matters referred in the recommendation from the Medical Advisory Committee. Article XII Section 5B(1) requires that if requested by the physician, the Board shall conduct a hearing within 30 days of the request. If no hearing is requested, the Board "may implement the recommendations or a part thereof". If a hearing is requested, the Board may hear such evidence as it deems fit and may establish its own procedures. The bylaws provide that the decision of the Board following such hearing "shall be final".

The objective of the bylaws read as a whole is clearly that members of the medical staff are responsible for ensuring patients of the hospital the best quality care and that the final authority in the hospital in this and other respects rests with the Board.

The O.R. Review Committee met on January 4, 1990, and discussed the O.R. Report prepared in October 1989. Dr. Henry Bland of the Nova Scotia Department of Health and Fitness appeared as a guest. He reported that he had been advised by Dr. Charles Hope of the Victoria General Hospital respecting clinical evaluation of the anesthetist. Dr. Hope advised that four weeks would be a reasonable length of time to perform an evaluation, and said that only senior persons with a wide general range of experience would be used for such a process.

At the meeting, Dr. Bland made the following observation:

> "In regard to financial support, Dr. Bland commented that 'that Board will have to bite the bullet and cover these expenses.' In addition, he cautioned that the hospital must 'get on with this and not let the grass grow under its feet because, if the physician is incompetent, there may be further problems to deal with.' "

It was agreed by the Committee that the Administrator would recommend to the Board that Drs. Curtis, Giffin and Smith meet with the respondent and ask him if he would undertake the clinical evaluation of competence and obtain training in epidural anesthesia. Further, it was agreed to recommend that the hospital provide financial support for this training/evaluation in an amount not to exceed $5,000.

On January 31, 1990 the Administrator wrote the respondent stating that the Board had received the report of the O.R. consultants regarding the O.R. Review of the hospital. The Board noted two recommendations in the report that had been made respecting the respondent. The first dealt with professional evaluation of his alleged alcohol/drug dependency. The Board noted with pleasure that he had voluntarily registered with the Medical Society of Nova Scotia's program and was currently participating in it and cooperating fully. The second dealt with the concerns regarding clinical competency and the recommendation that the respondent undergo an evaluation:

> "I wish to confirm that the Board of the hospital fully supports the consultants' recommendations and wishes to formerly ask you to undertake four weeks of assessment in anesthesia under the auspices of Dr. Charles Hope, Chairman of the Anesthesia Department Dalhousie University for the purpose of (a) having an evaluation of your clinical anesthetic practice carried out; (b) acquiring the skills of epidural anesthesia.
>
> The hospital is prepared to provide financial support in an amount not to exceed $5,000 to cover your expenses related to this four week period of assessment."

The letter said that the Board required an answer by Tuesday, February 6th. By letter of February 12, 1990 the respondent wrote the Administrator:

> "At present I am involved in ongoing medical consultations. At this point in time I am unable to acquiesce in your request. This position is based on current medical problems and I am accepting the advice I have received.
>
> Further contact will be made re this matter on the advice of

my physicians."

On February 20, 1990 the Administrator wrote the respondent with reference to a meeting of the Board held the previous evening. After referring to the O.R. report, the letter advised that the Board was not insisting on further epidural training but that the competence assessment was an immediate and major concern. The letter stated that the Board had deferred its decision respecting his privileges until its meeting of February 22, 1990. The respondent was requested to deliver in writing prior to that meeting an indication of his willingness to undergo as soon as practicable a competence assessment as contemplated by the O.R. report at a mutually agreed upon accredited teaching centre. The Board's offer of financial assistance still stood.

On February 26 the respondent met with the Chairman of the Board. Solicitors representing the parties were present. The appellant's solicitor observed that Dr. Hope had a personality that was "the antitheses" of that of the respondent. It was agreed that the respondent would provide a letter from his physician explaining why he could not undergo a competency assessment.

Another meeting was held a few days later on a Friday. At this time the respondent did not produce the letter respecting his medical condition, making the observation that the hospital was not running a kindergarten and it was not necessary for him to have a letter. At this meeting the respondent did indicate a willingness to consider a competency assessment and attempt it as soon as arrangements could be made with Dr. Campbell in Toronto.

On March 9, 1990 the respondent's solicitor wrote the solicitor representing the hospital advising that his client was not willing to consider a professional competence assessment as contemplated by the O.R. report, but was willing to undertake an evaluation and assessment as discussed at the meeting the previous Friday.

On April 2, 1990, the Administrator wrote the respondent pointing out that it had been a month since he had agreed to make arrangements for a clinical evaluation at a Toronto teaching hospital. There had apparently been some difficulties in making this arrangement and Dr. David Smith, Chief of Anesthesia, had suggested as an alternative that an evaluation be performed at the Halifax Infirmary. The letter advised that the Board expected these arrangements to be in place before April 6. Failure to do so would result in the Board considering the immediate suspension of the respondent's privileges.

Further correspondence ensued between the respondent and the chair of the Board. The respondent telephoned the chair of the Board on April 18. He indicated that the Canadian Medical Protective Association considered the O.R. Review could not be carried out. He indicated that his health would not stand having an evaluation in Halifax. He advised that if the Board proceeded he would take court action.

On April 19, 1990 the Administrator advised that he was directed by the Executive Committee of the Board to suspend the respondent's privileges immediately because of his refusal to undertake an evaluation as recommended by the O.R. Review report of October 1989. The letter indicated that his privileges would be reinstated immediately upon his successful completion of an evaluation and that the hospital was willing to assist in making arrangements for the evaluation and to provide financial assistance. Pursuant to the hospital bylaws, the matter was referred to the Credentials Committee.

Following a recommendation of the Credentials Committee and with the concurrence of the Medical Advisory Committee, the respondent's privileges were reinstated by the Board on April 26, 1990. The Credentials Committee suggested that a hearing be held by the Medical Advisory Committee to inquire into the merits of the suspension.

The Medical Advisory Committee held a hearing on June 6, 7 and 13. It lasted over 20 hours. Both the respondent and the hospital were represented by counsel and other counsel acted as advisor to the Committee. Dr. Bland testified that the O.R. Review reached serious recommendations in response to what appeared to be a serious situation. Dr. Hope told the Committee that a program of competency assessment was available in Halifax. Indeed he outlined some of the specifics of the program indicating that it would take more than two weeks to complete. Over the last ten to 11 years, there had been seven physicians subjected to an evaluation or assessment of competence. Dr. Smith observed that several colleagues with whom he had met had expressed concern about the standard of the respondent's work; "that's an ongoing problem". Dr. Campbell testified that the O.R. Review raised a concern regarding a possible lack of skill or competence.

The Committee expressed the opinion that as a result of Dr. Blands' comment as recorded in the O.R. Review Committee Minutes of January 4, 1990 that "perhaps the Board was unduly influenced by Dr. Bland's threats".

The respondent maintained that the competency assessment was "ill-defined".

In its report following this hearing, the Committee concluded that in general the Board did have the power to demand a competency assessment when concerned about the capability of a staff member. However, the Committee concluded that the nature and extent of the proposed evaluation was not clear and that there was insufficient evidence to conclude that the respondent refused to take it. The Committee did feel that the respondent should be required to undergo an assessment of competence in anesthesia and arrangements for the assessment should be under the supervision of the Chief of Anesthsia of the hospital.

The report of the O.R. Committee was received by the Board. On June

29, 1990 the Administrator wrote the respondent advising that the Board had reviewed the Medical Advisory Committee report. Enclosed was a copy of a resolution of the Board of its intention not to renew his anesthesia privileges at the next annual reapplication for privileges unless, in the meantime, he had undergone an assessment of his competence in anesthesia at an appropriate university teaching hospital and that the Board had received written advice from the assessor that he was competent. It was further resolved that the Administrator be instructed upon the expiration of the respondent's appeal period to provide Dr. David Smith with a copy of the Medical Advisory Committee report and request him to supervise the medical arrangements for the assessment and to report periodically to Dr. Carl Giffin, Chief of the Medical Staff.

The Administrator's letter continued that he had been instructed to advise the respondent of his right to appeal within ten days pursuant to Article XII, paragraph 5B of the bylaws. The letter reasserted the Board's intention with respect to the respondent's anesthesia privileges at the next reapplication.

The letter reaffirmed the Board's willingness to reimburse the respondent for reasonable expenses including lost income. The letter concluded that there appeared to be no evidence of the respondent having attended the Dalhousie Continuing Medical Educational Courses in anesthesia at the Victoria General Hospital or Infirmary in July 1985 as required by the Medical Advisory Committee and confirmed in correspondence of December 1984.

In response to this letter, counsel for the respondent advised counsel for the hospital that Dr. Shephard did not wish to request a hearing and inquired whether any action had been taken save for that set out in the letter of June 29. The respondent's assertion that the assessment was "ill-defined" must be judged in the context of this decision.

On September 28, 1990 Dr. Smith wrote Dr. Hope asking if the

assessment required of the respondent could be carried out under the umbrella of the Dalhousie Program of Anesthesia. The letter reviewed some of the history of the problems that had developed between the hospital and the respondent.

On November 6, 1990, Dr. Hope wrote Dr. Smith in reply saying that before he could define the content of any reassessment process for the respondent, he would require eight items of information. He did go on to give a general description of the type of assessment program which could be tailored for the respondent commencing in the first week of 1991 for a four week period.

Dr. Hope testified at the trial. He had in previous years been involved in a number of competency assessments. He was prepared to arrange one for the respondent. He would be involved personally if the respondent wished, but normally he would only exercise a supervisory role. There were 56 anesthetists teaching at hospitals in Halifax upon whom he could draw. They were available to participate in the program. Dr. Hope also indicated that he would have tried to arrange a program for the respondent in Saint John, New Brunswick.

Nothing in the cross-examination of Dr. Hope supported the respondent's expressed suspicions of Dr. Hope's fairness in overseeing an assessment. Dr. Hope had only a passing acquaintance with the respondent prior to the question of an assessment before him being raised. Dr. Smith testified that there had never been any indication of antipathy on Dr. Hope's part towards the respondent. He did, however, admit on cross-examination that he had told the respondent to stay away from Dr. Hope because he himself had, during his residency, found Dr. Hope to have an "intimidating dominant personality".

The respondent did not place before the Board at its hearings any convincing reason why he mistrusted Dr. Hope.

On January 23, 1991 the Credentials Committee held its annual meeting.

The minutes recite much activity on the Committee's part during the year. The Committee forwarded to the Board a list of physicians and the privileges recommended for each for the forthcoming year. The respondent was included in this list. No explanation was provided why the Board should not maintain the position it had taken respecting the respondent at its meeting of June 28, 1990.

On February 13, the Medical Advisory Committee approved of the recommendation of the Credentials Committee noting that with respect to the respondent "this was passed unanimously by the entire Medical Staff and Dr. Shephard has performed satisfactorily for the past six to eight months".

On March 6, the Board held a meeting for the purpose of considering the respondent's application for a renewal of his privileges. The meeting lasted at least two hours at the conclusion of which it was resolved not to approve of his application.

On March 7, 1991 the Administrator advised the respondent that the Board, at its meeting held on March 6, did not approve of his 1991 reapplication for anesthesia privileges. This decision was made in accordance with its previous motions passed on June 28, 1990 and subsequently outlined in correspondence to the respondent of June 29, 1990. The letter continued:

> "In light of the Board not receiving evidence indicating that you underwent an assessment of competence in anesthesia at an appropriate university teaching hospital; and the Board not receiving written advice from the assessor that you are competent to render the anesthesia services which are presently performed by the hospital; the Board felt it was necessary to take this action. (I have enclosed a copy of the Board's motion)."

The letter concluded by pointing out that in accordance with Article XII of the bylaws, the respondent was entitled to request a hearing before the Board within ten days.

Towards the end of March, 1991, 41 physicians on the hospital staff signed a memorandum constituting a motion of censure of the administration for not

renewing the respondent's privileges. In the opinion of these physicians, the respondent was qualified and competent to hold his anesthetic privileges.

Dr. Michael Cook wrote the Board on March 26, 1991 indicating that all of the members of the Department of Surgery were now comfortable with the respondent's anesthetic service and supported continuation of his privileges. I will refer to this letter later. Dr. David Aylmer, now Chief of Anesthesia, wrote on March 27 asking the Board to reconsider its rescinding of the respondent's privileges and suggesting that he take a continuing education course such as the McGill annual refresher course in anesthesia.

On March 28, 1991 a special Board meeting was held to hear the respondent's appeal from the decision of March 6, 1991 not to renew the anesthesia privileges. The respondent and the Board were represented by counsel and witnesses were heard. The respondent testified. He stated that he was not aware of any place where he could take a competency assessment course. When asked if he had taken such a course to date, he said he had attempted to work towards investigating a competency program. He said that Saint John indicated "they could set one up but could not issue any certificate of competency". He stated that his colleagues warned him not to investigate any such program in Halifax. St. John's, Newfoundland "had never done this", but they would consider it and it would likely take two years to develop. Ontario was not feasible because he did not have an Ontario license. The respondent had a great sense of distrust with Halifax and stated that he was faced with something impossible to do. The respondent was questioned at length with respect to the difficulties which had developed between the hospital and himself. His counsel spoke strongly on his behalf.

The matter was adjourned until April 2. The Board then met for two and one-half hours. After discussion, it was resolved that the Board uphold its motion not

to approve the respondent's 1991 reapplication for anesthetic privileges. The respondent was so advised by the Administrator by letter dated April 3, 1991.

On April 12, 1991 the respondent commenced proceedings in the Supreme Court with reference to the suspensions on July 7, 1989 and April 19, 1990 and the Board's decision on May 7, 1991 not to renew privileges. The respondent claimed an order of **certiorari** quashing the non-renewal decision and an order of **mandamus** requiring that he be reinstated. A claim for damages resulting from the two suspensions and the non-renewal of privileges was also advanced.

On May 1, 1991 Nathanson, J. in chambers granted an interim injunction requiring the hospital to reinstate the respondent's privileges. On September 17, 1991 this Court refused the appellant's application for leave to appeal this decision.

In the summer and fall of 1991 three incidents involving the respondent occurred, one of which was the unexpected death of an apparently healthy patient while under anesthesia. Dr. Hamilton, an independent physician had been commissioned to investigate this matter. While he made no specific finding respecting the respondent's competence, he made a number of criticisms of the standard of care received by the patient. Criticism of the respondent related to his record-keeping and the performance of the resuscitation effort. Dr. Hamilton concluded:

> "Although I cannot say whether a more appropriate resuscitative management would have altered the outcome, it is my strong opinion that a relatively healthy man having an elective procedure, who is alive twenty-five minutes previously, deserves the absolute best efforts at resuscitation. [He] did not receive this."

On December 6, 1991 Dr. David Aylmer wrote the Chief of the Medical Staff respecting Dr. Hamilton's report and a letter from Dr. Owen regarding a case of obstetric anesthesia:

> "From these documents I am forced to conclude that Dr. Shephard is not maintaining basic anaesthetics skills as

> regards record keeping, A.C.L.S. [Advanced Cardiac Life Support] standards, and standard precautions to prevent regurgitation and aspiration of gastric contents in women undergoing caesarean section.
>
> I have no recourse but to recommend that Dr. Shephard's privileges in anaesthesia be withdrawn now, and that he not be considered for reinstatement of same until such time as he has successfully completed a review/refresher of his anaesthetics practice, and that he also become certified in A.C.L.S."

On December 9, 1991, the Administrator purported to suspend the respondent's anesthesia privileges. He wrote:

> "On July 18, 1991, [L.M.] died in the Operating Room of our hospital. An outside consultant, Dr. K. Hamilton, conducted an investigation of this incident and submitted a report. The report indicates that an inappropriate standard of care was provided to this patient by you as the anaesthetist. A copy of that report is attached.
>
> In addition, Dr. S. Owen, Chief of Obstetrics and Gynecology, has written a letter of complaint to Dr. D. Aylmer, Chief of Anaesthesia, regarding your anaesthetics care of a woman on November 25, 1991 during a Caesarean section procedure. A copy of that letter is attached for your information.
>
> In connection with these two incidents I have received a copy of a letter from Dr. Aylmer to Dr. C. Giffin, Chief of Staff, dated December 6, 1991 and I enclose it. This letter recommends that your anaesthesia privileges be withdrawn and that a review and courses be taken. Dr. Giffin has informed me that he supports Dr. Aylmer's recommendation.
>
> A third Operating Room incident has come to my attention, which has been reported by Nursing and raises concerns about the anaesthetics care given by you to [D.A.A.] on December 2, 1991 when this patient, in preparation for surgery in the Operating Room, had to be reintubated and then defibrillated with the aid of the emergency cart. The surgical procedure was cancelled and Ms. [A.] was taken to the Recovery Room and then transferred to the Intensive Care Unit. This incident raises concerns about both your intubation and monitoring of the patient.
>
> Therefore, I must advise you that your anaesthesia privileges are suspended, effective immediately. In making this decision I have consulted with the Chief of Staff and the

Chief of Anaesthesia.

. . ."

On December 8, the Medical Staff Executive of the hospital met and decided that the respondent should have until noon December 9 to agree to undergo a period of retraining and upgrading. On the same day the respondent did agree in principle to retraining and upgrading.

The Credentials Committee met on December 10, 1991 and recommended that the respondent be reinstated, and that he should have the opportunity to undergo retraining and upgrading.

In accordance with the bylaws, the Medical Advisory Committee convened. It unanimously agreed that the suspension be rescinded and that the respondent be given an opportunity within one week to withdraw his privileges. These would be reinstated upon completion of a six week training program in Saint John, New Brunswick, or a six week supervisory in Truro. The respondent should be compensated financially for his loss of earnings.

The Administrator wrote the respondent on January 24 enclosing a copy of the Medical Advisory Committee Report and advised him of his right to a hearing which the respondent could request within ten days. The respondent agreed with the Medical Advisory Committee report and did not request a hearing. He so advised the Board by a letter from his solicitor dated January 28, 1992.

The Board nevertheless proceeded to hold a hearing on February 13, 1992 at which the respondent and his counsel were in attendance. The hospital was represented by counsel as was the Board. The Board concluded, following this hearing, that the respondent's anesthesia privileges should continue to be suspended until he underwent a training/refresher course in anesthesia satisfactory to Dr. Aylmer and Dr. Hope. Upon receipt of a report by them that the course was successfully

completed, the respondent's anesthesia privileges would be automatically reinstated.

Following the Board's decision, there was sporadic communication and correspondence between the respondent and Drs. Hope and Aylmer regarding this course. Late in the evening of March 31, 1992, Dr. Shephard telephoned Dr. Aylmer at home and spoke about the requirement to undertake a training/refresher course. He took the position that evidence given by Dr. Hope at the Medical Advisory Committee hearing had been discredited. This was evidence to the effect that based on the Hamilton Report, Dr. Owen's letter and statements from nurses, there would be grave concern about the standard of care given by the respondent and that Dr. Aylmer had no option but to recommend withdrawal of his privileges.

Over the ensuing months, Dr. Aylmer and Dr. Hope discussed on several occasions the details of a training/refresher course. Dr. Aylmer wrote the respondent on August 5 about the general design of the course that he and Dr. Hope thought appropriate. He requested that the respondent contact him so that mutually satisfactory arrangements could be made.

The respondent replied by letter dated September 23, 1992 strongly expressing misgivings about the program suggested by Drs. Hope and Aylmer. Without suggesting a meeting date, he indicated that he would anticipate having "some medical colleagues" present at their meetings.

Dr. Hope wrote the respondent on December 7 enclosing an outline of an assessment and continuing education program asking him to contact Dr. Aylmer to set up a meeting.

The respondent next replied by letter dated January 21, 1993 in which he again insisted that he would bring medical colleagues to any meeting related to a training/refresher course. Dr. Aylmer replied by letter dated February 9, 1993 that the business of the intended meeting was not pertinent to others but that they would be

pleased to meet the respondent alone as stated in Dr. Hope's letter of December 7, 1992. The respondent never replied to this correspondence, never took any further initiatives respecting the training/refresher course and never took such a course.

Prior to the trial, the respondent's Statement of Claim was amended to include a claim based on the third suspension by the Board.

This matter was tried in Truro over a period of seven days in January 1994 and the trial judge, by decision dated May 12, 1994, observed that the respondent was no longer seeking an order for reinstatement of his privileges but seeking only damages for what he considered were three wrongful suspensions and one wrongful failure to renew his privileges.

The trial judge, after reviewing the evidence and the bylaws, concluded that the first two suspensions in 1989 and 1990 and the non-renewal of privileges in 1991 were not justified but that the final suspension was. In particular the trial judge emphasized that there was nothing in the hospital bylaws which would require a doctor to undergo a competency evaluation or would authorize the Board to suspend for failure to do so. The trial judge drew a distinction between the duty of the Board in the case of granting privileges in the first instance and in the case of an application for renewal. In the latter case, it was exercising a judicial or **quasi-**judicial function requiring a hearing to ensure that the principles of natural justice were not violated. Although reinstatement was no longer sought, the case warranted an award of damages for breach of contract. On this footing, he assessed damages for lost earnings during the first two suspensions and the non-renewal of privileges in the total amount of $21,210.00. The costs to the respondent of counsel to challenge the actions of the Board totalled $47,362.69. The trial judge held that these expenses were incurred prior to the action and should be recovered, making a total of $68,572.69.

The Board appeals to this Court on a number of grounds. The respondent

cross-appeals, alleging error with respect to the damages and the third suspension. All of these grounds raise two broad issues:

1) whether the hospital was in breach of any duty to the respondent in ordering the suspensions and non-renewal of privileges;

2) whether, if the hospital breached any duty to the respondent, a cause of action for damages arose as a result; and if so, what damages are recoverable.

FIRST ISSUE:

The trial judge referred to the fact that there was no privative clause in the bylaws. I agree. The reference in the bylaws to the Board's decisions as being "final" are not a privative or finality clause that would limit the supervisory role of the courts. Nothing in the **Act** either expressly or by implication authorizes the Board to restrict judicial review of its decisions. In enacting that clause of the bylaws, I do not think the Board attempted to do so. I interpret the reference in the bylaws to finality as indicating the end of the process as far as the hospital is concerned. It is but a reflection of the Board's role as the body ultimately responsible for the decisions made at the hospital.

The trial judge took the view that the court should adopt the notion of curial deference in reviewing decisions of the Board. He stated that the court should be loathe to quash a decision of the Board unless it was patently unreasonable. He adopted this standard of review in dealing with the issues before him.

I do not believe the reviewing power of this Court is restricted to setting aside the Board's decision only when it is patently unreasonable. Where, as here, there is no privative clause courts have shown curial deference to certain specialized tribunals when interpreting their own constituent legislation. However, if the tribunal does not have such special expertise, curial deference extends to findings of fact only, not to questions of law even when they relate to the enabling legislation. See **Canada**

(A.G.) v. Mossop, [1993] 1 S.C.R. 554.

In exercising the normal supervisory role, courts have shown deference to administrative tribunals to the extent that their special expertise warrants. See **Pezim v. British Columbia (Superintendent of Brokers)**, [1994] 2 S.C.R. 557 at 589-591. Some deference should extend to the opinion of the tribunal in matters relating to its expertise where that opinion is formed on the basis of facts found by it, as opposed to questions of law. Thus, a judgment call by a hospital board reached on the basis of its expertise in dealings with matters of hospital administration deserves respect. This Court should be slow to assume the functions of the Board when it has not erred in law. However, the Board has no such expertise in the matter of interpretation of its constituent legislation as would warrant any deference in that respect. See **Canada (A.G.) v. A.F.P.C.**, [1993] 1 S.C.R. 941 at 961 referring to **Fraser v. P.S.S.R. Boar**, [1985] 2 S.C.R. 455 at 464-5.

With these thoughts in mind, I will consider the actions of the Board respecting the respondent's privileges.

(1) First Suspension - July 7, 1989:

Under the bylaws then in effect, there was no express power given to the Administrator to suspend a member of the medical staff. I do not think such a power can be said to arise by implication. However, the privileges were soon restored after input was received from the Credentials Committee and the Medical Advisory Committee. The respondent's counsel wrote appellant's counsel stating that he considered matters to have been finalized. On the argument before us, counsel conceded that little now turned on the first suspension. It need be considered no further.

(2) Second Suspension - April 19, 1990:

Counsel did not dispute that this suspension was an action taken by the

Board. A number of concerns had, by the time of this suspension, emanated from the investigation following the first suspension. The O.R. Review prepared by three outside consultants recommended an evaluation of the respondent's competence. A hospital board faced with such a recommendation would, in my opinion, be remiss if it were not to give the most considered attention to it.

The trial judge resolved this issue on the basis of his conclusion that there was nothing in the bylaws that required a member of the medical staff to undergo a competency assessment and nothing that would authorize the Board to suspend for failure to do so. The trial judge found that the evidence revealed that even if the respondent agreed to undertake a competence assessment, there was no review program in place in Atlantic Canada and it was unclear what a review would involve or what form it would take. He said that it was not clear from the evidence why the Board continued to insist on a competency assessment.

With deference, I take a different view of the Board's position under the legislation and a different view of what the uncontradicted evidence clearly reveals respecting the availability of a competence review.

The legislation defining the powers of the Board is clear. The Board has the "control of the medical staff of the Hospital" and the power to make bylaws necessary for exercising that control. With these sweeping powers go a very grave responsibility - the charge of the welfare of those patients who entrust themselves to the hospital's care. In my opinion, the power of suspension given to the Board under Article XII 4(3) of the bylaws "with good cause" is a valid exercise of those delegated legislative powers.

I cannot emphasize too strongly the heavy burden that falls upon a body entrusted with the responsibility of providing medical care to the public. True, the Board is composed almost wholly of lay persons. They must obviously rely on medical advice

received through the Credentials Committee, the Medical Advisory Committee and other staff physicians. However, the final responsibility is that of the Board members, and notwithstanding the professional advice given to them, the burden of decision is theirs. They must exercise a thoughtful, independent judgment and not act as a mere rubber stamp.

In my opinion, control of the medical staff vests the Board with the power and imposes upon it the responsibility of taking all reasonable measures to ensure the competency of those working in the hospital under its control. This includes the power to evaluate the medical staff and insist that it meet all reasonable standards of competence that it may impose. The term "good cause" as a basis for suspension must be defined with reference to the duty of the Board in carrying out its responsibilities as I have outlined.

Did the Board act reasonably in the discharge of these powers and obligations respecting the respondent's second suspension? Did it have "good cause"?

While there was no review process actually in place in Atlantic Canada, Dr. Bland's report to the O.R. Review Committee indicated that Dr. Hope at the Victoria General Hospital would tailor an assessment program with experienced persons. On January 31, 1990 the Board, through the Administrator, specifically asked the respondent to undertake the program and offered financial support. By his response of February 12, 1990 the respondent declined, basing his refusal on "current medical problems". These were never substantiated. The hospital restated its position on February 20 and the respondent, through counsel, again refused to accede. While there were a number of meetings and communications whereby the respondent gave qualified agreement to being evaluated, the bottom line is that he disagreed with and refused to accept the requirement imposed by the Board.

At this point, I am unable to agree that the evidence supports the

conclusion that no program was available or that the hospital's requests were unreasonable. The program could be tailored for the respondent. The respondent was not cooperating. The trial judge stated that he was satisfied that "during the first two suspensions Mr. Brown and the hospital acted as they did, not because there was evidence of incompetence". In my respectful opinion, the trial judge has overlooked the O.R. Review recommendations, coupled with the information disclosed to the Board in the letters of July 6 and July 7, 1989 which I have set out. I believe the Board was correct in taking this material seriously and calling upon the respondent to demonstrate his competence, and then to suspend on a second occasion in the face of the lack of satisfactory response from him. I believe the Board would have been remiss had it not adopted this course. Without in any way suggesting that the respondent did, in fact, lack competence, I am of the opinion that the Board was not shown to have erred in suspending the respondent for his refusal to demonstrate competence. It had good cause to require this.

In any event, within one week the Board restored the respondent's privileges on the understanding that the Medical Advisory Committee would meet to inquire into the merits of the suspension. In June of 1990, the Medical Advisory Committee reported as I have indicated. Thus, at this point, the Board was in possession not only of its various concerns respecting the respondent's competence, but the opinion of the Medical Advisory Committee that the respondent should be required to undergo an assessment of competence and that arrangements for the assessment should be under the supervision of the Chief of Anesthesia. The Chief of Anesthesia at that time was Dr. David Smith.

3. Refusal of Renewal of Privileges - March 7, 1991:

Immediately upon the receipt of the recommendation of the Medical Advisory Committee in June 1990, the Board notified the respondent of its resolution

that his privileges would not be renewed unless, in the meantime, he underwent an assessment at an appropriate university teaching hospital and that the Board had received written advice that he was competent. Dr. Smith would receive a copy of the Medical Advisory Committee's report and would be requested to supervise the arrangements for the same. Financial support was indicated. The Administrator drew to the respondent's attention his right of appeal within ten days pursuant to Article XII, paragraph 5B of the bylaws. The respondent did not appeal. His testimony was that Dr. David Smith advised him that the matter would be addressed in the fall. I have referred to the correspondence between Dr. Smith and Dr. Hope dated September 28 and November 6.

The respondent clearly had a mistrust of Dr. Hope. I can find no valid reason set out in any of the material which the respondent placed before the Board in support of this position. The real basis of the respondent's fear appears to be that he might not pass the competence assessment. This conclusion is fortified by the failure of the respondent to initiate the development of an alternative program either in Halifax without personal involvement of Dr. Hope or in Saint John, New Brunswick. This fear of undergoing an assessment must have been obvious to the Board and in my view gave it additional grounds for concern.

It is apparent that the respondent simply did not take any initiative to proceed with a competency evaluation. He did nothing. By March of 1991, the Board was faced with this situation, together with the blanket recommendation of the Credentials Committee of his continued privileges with a notation that he had performed satisfactorily for the past six to eight months.

In accordance with the Board's previous resolution, it refused to approve a renewal of the respondent's privileges. He was advised of this on March 7 and availed himself of his right to an appeal hearing before the Board. This was held on

March 28 and I have set out in some detail the nature of the proceedings. The trial judge dealt with two objections of the respondent respecting the hearing of March 28, 1991. They related to the fact that Dr. Cook and the administrator appeared before the Board in the absence of the respondent. The trial judge disposed of these objections on the ground that anything said on these occasions was not adverse to the respondent and had no bearing on the outcome. The respondent has not cross-appealed from the trial judge's decision on this point.

The repeated endorsement of the respondent by the Credentials Committee and the Medical Advisory Committee cannot be lightly dismissed. However the latter committee, after its lengthy hearing, recommended that the respondent be assessed for competence in anesthesia. Having been directed by the Board to undergo such assessment, the respondent did not do so. To recap, the Board also had within its knowledge the following:

a) An incident reported in 1984 where the respondent was alleged to have been incapable of intubating a pregnant woman being prepared for a cesarian section. Following this he agreed to take a refresher program and it had not been shown to the satisfaction of the Board that he had done so.

b) The incidents reported in July of 1989.

c) Dr. Henry Bland's concerns arising out of the O.R. Review and his opinion that the Board must address the issue or face problems later.

d) The fact that the respondent did not possess educational qualifications conforming to the present standards at the hospital which had been in place since 1974.

I emphasize that the Board was not substituting its own medical judgment for that of the doctors who supported the renewal of the respondent's credentials. It was not asserting that the respondent was incompetent. It differed from the doctors not

on a matter of medical expertise, but of evaluation of all the evidence laid before it, of which it was perfectly capable. It only required that, in the face of disturbing occurrences and the respondent's unwillingness to be assessed, that this be done by appropriate experts in the field of anesthesia. This was a reasonable and correct response.

The Board was continually taking legal advice in connection with its various decisions. This supports an inference that it was acting in good faith.

The trial judge's assessment of the Board's actions in not renewing privileges is coloured by his erroneous conclusion that it did not have the right to demand the assessment. His statements that the Board's reason for insisting on a competency assessment is not clear from the evidence, is not in my opinion correct.

There was a change in attitude by Dr. Cook, the author of the letter of July 6, 1989. On March 21, 1991 in an endeavour to save the respondent's privileges he wrote the Board:

> "I would like to present a statement from the Department of Surgery, concerning the anaesthetics service provided by Dr. Ken Shephard, specifically, during the year 1990 and the first quarter of 1991.
>
> During this time period Dr. Shephard has provided anaesthetics service to all members of the Department of Surgery without exception. He has provided this service willingly and there have been no untoward incidents reported. It would seem that all members of the Department of Surgery are now comfortable with Dr. Shephard's anaesthetics service and would support again the motions of the Advisory Committee and the general medical staff that his anaesthetics privileges continue.
>
> In accord with the previous recommendations of the O. R. Review Committee, we would like to suggest that Dr. Shephard's attendance at the McGill refresher course for anaesthesia in June of 1991 be viewed as a reasonable educational experience and that his anaesthetics privileges be reinstated until course attendance and without condition after its successful completion."

In my view there is insufficient information in this letter to explain why Dr. Cook resiled from his earlier position, and nothing which would erase from the mind of a reasonable Board member the very real concerns raised by his earlier correspondence.

To repeat, the Board had information which would put reasonable persons on enquiry. The respondent's reluctance and refusals could only have heightened the concern. The decision to refuse the renewal of the respondent's credentials was correct.

On May 1, 1991 the respondent was reinstated by an order of Nathanson, J. "subject only to suspension of such anesthesia privileges in accordance with the bylaws of the Colchester Regional Hospital Commission".

4. Third Suspension - December 8, 1991:

The Administrator had the power to suspend for just cause under the new bylaws. The triggering events were disturbing occurrences followed by the report of Dr. Hamilton and the letter of Dr. David Aylmer. The Board adopted the action of the Administrator in suspending the respondent. Between the suspension and such adoption the respondent was willing to refrain from exercising his privileges.

The trial judge found that the final revocation of privileges was not improper. I agree with this finding. It had abundant support in the evidence.

The Credentials Committee, upon investigating the third suspension, did find that at least two of the three complaints giving rise to it were well-founded. However, it considered that the Administrator acted with undue haste. It recommended that the respondent's suspension be revoked and that he be given a reasonable time to respond to the recommendations of the Medical executive.

The Medical Advisory Committee recommended that the respondent be allowed to sign a voluntary withdrawal of his privileges revocable upon completion of

a training program.

At its meeting of February 13, 1992 the Board accepted the Medical Advisory Committee's recommendations in principle as far as further training was concerned but did not agree that the privileges should be reinstated. Reinstatement was contingent upon the respondent undergoing a training/refresher course in anesthesia satisfactory to Dr. Aylmer and Dr. Hope. Evidence that the course was successfully completed was required.

The respondent took the position that the Board should not have held the hearing on February 13 because "no hearing had been requested by the respondent". I have already referred to Article XII Section 5B(1) which requires that if requested by the physician the Board shall conduct a hearing within 30 days of the request. If no request for a hearing is received, the Board "may implement the recommendations or a part thereof". The recommendations referred to are those of the Medical Advisory Committee.

In my opinion, the respondent's objection is not well-founded. While it is true that the respondent did not request a hearing, the respondent through counsel advised on January 28 that he wished to be advised of the meeting of the Board at which the report of the Medical Advisory Committee was considered and further, the opportunity to appear at that meeting. The respondent was so advised and took advantage of the opportunity to appear.

In my opinion the Board had the right to proceed with this hearing. Under the bylaws, it was empowered but not obligated to implement the recommendation of the Medical Advisory Committee. The trial judge was correct in concluding that under the bylaws the Board was not bound by the recommendations of the Medical Advisory Committee. As he said, the fact that the respondent was afforded an opportunity to participate did not prejudice him. There was nothing in the bylaws to restrict the Board

in terms of the process that it must adopt in reaching its final determination.

In my opinion, the three incidents giving rise to the suspension and the recommendations of Drs. Owen, Aylmer and Giffin left the Board with no choice. The evidence of the subsequent communications between the respondent and Drs. Aylmer and Hope, which I have already set out, point to no other conclusion then that the respondent has so far not been willing to meet the condition attached by the Board to the renewal of his privileges. While Drs. Aylmer and Hope did not proceed rapidly, neither did the respondent. Clearly had he been at all anxious to undergo the type of course/assessment that they had in mind, he could have moved to speed things up. He did not.

The correctness of the Board's decision on the occasion of the third suspension is beyond challenge.

The appellant tendered an expert opinion at trial by Dr. J. Price, M.D., F.R.C.P.C., F.F.A.R.C.S.I., dated May 19, 1993. This opinion reviewed the three incidents in 1991. It concluded:

> "SUMMARY: From my examination of the material submitted, I must conclude that the standard of anaesthesia practiced by Dr. Shephard as demonstrated by these records and information is not acceptable in Canada.
>
> There is evidence of serious errors in judgement in not using the available monitors and inappropriate actions were taken when faced with untoward events such as hypoxia and cardiac arrhythmias."

The respondent testified in rebuttal in which he contradicted some of the observations in the report. The trial judge made no resolution of the conflict thus arising and, in my opinion, it is not necessary for this Court to attempt to do so. The expression of such an opinion by an expert may well be relied on by the Board in further justification for maintaining the suspension after the Board has become aware of the opinion. This opinion is of no relevance in judging the Board's conduct at times prior

to its date. I express no opinion on the respondent's competence as it is not necessary to do so.

Malice or bad faith on the Board's part was alleged in the Statement of Claim but not found by the trial judge or raised in this Court. On an entire review of the record and after hearing argument of counsel, I am satisfied that neither bad faith nor malice were shown.

SECOND ISSUE:

Whether any right of damages arises by reason of the Board's actions must first be considered on the footing whether there was any contractual relationship between the Board and the respondent. The trial judge, without making an analysis of the relationship between the parties, assumed that there was, and awarded damages on the basis of a breach of contract.

In my opinion, the status of the respondent as a member of the medical staff of the appellant does not give rise to a contractual relationship. I am not prepared to accept the argument that by implication there is a contract that in consideration of the provision of facilities and personnel by the hospital, the respondent was to provide anesthesia services there. There is nothing in the bylaws which points to a contractual relationship. There is no obligation on a staff member to actually perform duties pursuant to membership in the medical staff of the hospital. It is merely a privilege given to the staff member which may, at such member's option, never be exercised. The member must apply yearly for a renewal of privileges. There is no obligation on the member's part to reapply or even continue working throughout the balance of any year after appointment.

The respondent referred to the cases of **Abouna v. Foothills Provincial General Hospital Board** (1978), 2 W.W.R. 130 (Alta. C.A.); and **Pilotte v. Bellchasse Hospital Corporation**, [1975] 2 S.C.R. 454.

In the former case, the court found that the hospital board had wrongfully revoked the privileges of a doctor on the medical staff. The Alberta Court of Appeal found that there was a contractual relationship between the parties and on that basis, damages for breach of contract were assessed. I have indicated in my view there is no contractual relationship here. Similarly, in **Pilotte, supra**, the hospital board had failed to follow hearing requirements of the **Quebec Hospital Act** regulations in terminating a doctor's privileges. Reference was also made to a contract between Pilotte and the Bellchasse Hospital. A review of the decision of the Supreme Court of Canada suggests that damages were awarded as a result of the breach of these regulations and the effect thereof under the laws of Quebec. These cases are not authority for the proposition that hospital privileges in and of themselves give rise to a contractual relationship between a hospital and a member of its medical staff. Nor are they authority for the proposition that at common law a cause of action arises from the mere failure of a tribunal such as the Board to make a correct decision in the exercise of its **quasi**-judicial or judicial powers to deny privileges.

There is therefore no basis for assessing damages for breach of contract.

It remains to consider whether damages may be awarded against a statutory body on any other ground to a person suffering loss or injury resulting from an error or otherwise in the discharge of its functions.

The privilege of membership in the medical staff in this case is, in my opinion, analogous to the type of licensing which a professional body accords to its members pursuant to legislative authority to do so.

It is generally accepted that initially, there is no obligation upon a hospital to admit an applicant to its medial staff. This is generally considered to be an administrative action by the hospital board for which no reason need be given and no appeal allowed unless specifically authorized by legislation. However, the decision of

a hospital board relating to reappointment or variation or termination of privileges or appointment is a judicial or **quasi-**judicial function requiring a hearing to ensure that the principles of nature justice are not violated. See the decision of this Court in **Aucoin v. Sacred Heart Hospital** (1991), 106 N.S.R. (2d) 389.

In **Harris v. The Law Society of Alberta**, [1936] S.C.R. 88, the Supreme Court of Canada found that an order of the benchers of the Law Society of Alberta striking the appellant's name from the rolls was null and void. An error in the discipline process had been committed whereby the committee making the recommendation to the convocation of benchers for disbarment was not the official discipline committee as was required to be maintained under the **Alberta Legal Profession Act**. Hearings had been held and the special committee reported to the benchers. The appellant was found guilty of improper professional conduct and his name struck from the rolls. He did not appeal at that time although he made several applications for reinstatement. He found out later that the committee before which he appeared was not the official discipline committee. He commenced an action against the Law Society of Alberta alleging that his name had been wrongly struck from the rolls. He sought a declaration that he was still a member of the Society and claimed damages.

The Supreme Court of Canada concluded that the order striking the appellant's name off the rolls was void. As to the claim for damages, the act of the benchers was found to have been done in good faith. Such circumstances would not entail liability for damages. Duff, C.J. concurring in the judgment of Rinfret, J. on behalf of the other members of the court said at p. 93 with respect to the claim for damages:

> "The determination of that branch of the appeal is, I think, governed by the decision in **Partridge's** case. ...The appeal failed.
>
> . . .
>
> The facts reported were that Partridge's diploma had been withdrawn by the Royal College of Surgeons in Ireland on

> the ground that, in violation of an undertaking by him, he had resorted to advertising. On this report the Council directed the name to be erased.
>
> The Council, before directing the erasure of Partridge's name, did not call upon him or give him an opportunity for an explanation and did not find that any of the conditions had arisen under which alone they were entitled to take such action.
>
> In these circumstances, as already mentioned, it was held that Partridge's name had been erased without legal authority, and a mandamus requiring its restoration was granted.
>
> Partridge then brought an action for damages against the Council, alleging that they had unlawfully and maliciously removed his name from the register. The trial judge, Huddleston B., acquitted the Council of the charge of malice and dismissed the action. The Court of Appeal (**Partridge v. The General Council of Medical Education**) (1) dismissed the appeal from this judgment on the ground that, since the power to erase a name from the register under section 13 was not a ministerial but a judicial power, and the Council having intended to act, and believed they were acting, in exercise of their powers under the statute, no action would lie in the absence of malice. The Master of the Rolls said: (2)
>
> > 'It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the Act, if it can be shewn that they were acting merely ministerially * * * They seem to me all to shew that such an action as this cannot be maintained except where the duty intended to be exercised is only ministerial.'"

Duff, J. observed that the error made in the **Partridge** case was one of fact not law, but that he could not find any distinction in substance between that situation and the one before the court. The benchers had obviously acted under an erroneous view of either of the facts or the law - probably as to the facts. They had, Duff, C.J. observed, "acted in entire good faith". The error of substance was in not giving the appellant a hearing before all the benchers at convocation which error was a natural

consequence of the assumption that the committee hearing the application was invested with the functions of the Discipline Committee. In the absence of malicious action no damages could be awarded.

Rinfret, J. said at p. 105:

> "Like the trial judge, we are convinced, upon all the circumstances disclosed in the record, that the benchers honestly believed they were adopting the report of a properly constituted committee; they "were intending in what they did to do what they were entitled to do, viz., to perform the public duties imposed upon them by the Act." They gave the order in what they **bona fide** believed to be the exercise of a judicial discretion, and they, or the Law Society which they represent, are not subject to an action in damages, because the report which they adopted as the foundation of their order happened, without their actual knowledge, to lack authority and validity. On this point, this case comes within the rule laid down in **Partridge v. General Council of Medical Education** (1890) 25 Q.B.D. 90."

So in **Roncarelli v. Duplessis** (1959), 16 D.L.R. (2d) 689 a liquor licensing commission with a discretionary power to issue and cancel licenses cancelled Roncarelli's license on grounds extraneous to the objects and purposes of the **Act**. The defendant who was Premier of the province and who had ordered the commission to withdraw the privileges because of activities of the plaintiff for acting as bondsman for Jehovah Witnesses was held liable in damages. Bad faith or malice was the basis of the cause of action for damages.

In **Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg** (1970), 22 D.L.R. (3d) 470, the Supreme Court of Canada affirmed that where a municipality exercises administrative or administerial powers, it may incur liability in contract and tort, including liability for negligence. Where it is exercising legislative or **quasi-**judicial powers it, no less than a provincial legislature or Parliament of Canada, may act beyond its powers in the ultimate view of a court. However, in such a case it would be incorrect to say that it owed a duty of care giving rise to liability in damages for its breach. Where the municipality failed to abide by the requirements of

natural justice in the holding of a public hearing in connection with a rezoning, its failure may make its ultimate decisions vulnerable to be set aside but no right to damages for negligence flows to any adversely effected person.

In that case a builder spent money in reliance of a bylaw and ultimately suffered loss when the bylaw was successfully attacked by the ratepayers and declared invalid. In holding that there was no cause of action for damages, Laskin, J. speaking for the court said at p. 477:

> ". . . Beyond this, I would adapt to the present case what the late Mr. Justice Jackson said in dissent in **Dalehite v. U.S.** (1953), 346 U.S. 15 at p. 59 (a case concerned with the **Federal Tort Claims Act**, 1946, of the United States), as follows:
>
> > 'When a [municipality] exerts governmental authority in a manner which legally binds one or many, [it] is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such [municipality] shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits.'"
>
> And at p. 478, Laskin, J. said:
>
> "Moreover, even if the **quasi**-judicial function be taken in isolation, I cannot agree that the defendant in holding a public hearing as required by statute comes under a private tort duty, in bringing it on and in carrying it to a conclusion, to use due care to see that the dictates of natural justice are observed. Its failure in this respect may make its ultimate decision vulnerable, but no right to damages for negligence flows to any adversely affected person, albeit private property values are diminished or expense is incurred without recoverable benefit. If, instead of rezoning the land involved herein to enhance its development value, the defendant had rezoned so as to reduce its value and the owners had sold it thereafter, could it be successfully contended, when the rezoning by-law was declared invalid on the same ground as By-law 177, that the owners were entitled to recoup their losses from the municipality? I think not, because the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a

> private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees."

See also **Mallet v. Savoie et al** (1988), 34 Admin. L.R. 135 (N.B.Q.B.).

In **Brown v. Waterloo Regional Board of Commissioners of Police** (1983), 150 D.L.R. (3d) 729 (Ont. C.A.), a police officer had been dismissed by the statutory body with whom he had a contract. After dealing with amounts paid to him representing damages for breach of his contract, the Ontario Court of Appeal addressed a claim for mental distress at p. 736.

> "In the present case, any right that the respondent had to continue the performance of his duties as chief of police was not a right arising out of any contractual arrangement he had with the board, but was, rather, a right that he had by virtue of his office. The power of the board to dismiss or suspend him was governed by the code established by the **Police Act** and regulations. By s. 17(1) of the **Police Act**:
>
> > 17(1) . . . the board is responsible for the policing and maintenance of law and order in the municipality and the members of the police force are subject to the government of the board and shall obey its lawful directions.
>
> Clearly therefore the board was acting within its statutory authority when it decided to dismiss the respondent, and, when that decision was set aside, to deny him the opportunity to perform the duties of chief of police.
>
> Even though a decision by a public body is set aside on judicial review, no cause of action for damages accrues to a person aggrieved by the decision, if the decision-maker has acted in good faith and within its statutory authority. The mere invalidity of the decision is not the test of liability: see **Wellbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg**, [1971] S.C.R. 957, 22 D.L.R. (3d) 470, [1972] 3 W.W.R. 433.
>
> In the present case, the trial judge made the following finding of fact, at pp. 295-6 O.R., p. 68 D.L.R.:
>
> > Even though the board may have acted in a harsh manner and with little consideration for the feelings and reputation of Chief Brown, I am not convinced that it bore Chief Brown any

> ill will. Nor am I satisfied that the board purposely intended to trample on his legal rights despite the fact it departed from the proper legal procedure in its attempt to discharge him. I think that the board was needlessly tough and not very considerate but I cannot say it acted in bad faith or that it was so callous as to merit condemnation by an award of punitive damages. There were a lot of errors made on both sides (and by others) in this matter, but I do not see any villains. In my view, each individual was doing his duty as he saw it. In a sense, all the actors in this sad drama have been victims of circumstances.
>
> These findings, although made in the context of a claim for punitive damages, are sufficient to relieve the board from liability for any damages resulting from the board's actions in attempting to dismiss the respondent, and in refusing to permit the respondent to perform the usual duties of a chief of police.
>
> In that respect, the board was not acting beyond its statutory authority, or maliciously. No claim for damages of any kind can arise in the circumstances of this case from the fact that the board proceeded in the wrong way to perform its statutory duty.
>
> The board was in breach of its contract with the respondent when it refused to pay him his proper salary and allowances. But the terms of that contract did not touch on the respondent's statutory rights and duties. The decision of the board to interfere with those rights and duties was not in itself compensable, and cannot be made compensable by tying it to the breach of contract."

The point was made in argument before this Court that some distinction ought to be drawn between a body exercising judicial and **quasi-**judicial functions which acts solely in that respect and a body which exercises such functions as incidental only to a commercial activity such as that carried out by the Board. The Board is a body corporate with many functions, some legislative (as when it enacts bylaws), some commercial (as when it makes contracts) and some **quasi**-judicial or judicial (as in the activities at issue here). In its commercial functions, it may well incur liability in contract tort or otherwise just as any private corporation might. I see no reason in policy why

there should be a distinction from the cases dealing with other bodies where the function or activity upon which liability is sought to be based is the judicial or **quasi**-judicial function.

The situation is, as I have said, most analogous to that of a governing body which has the power to make decisions respecting the right to practice of members of a trade or profession. In the context of the appellant, the Board had that power respecting the respondent. It had no broader power over his ability to carry on his general practice outside the hospital, nor did it have any control or power over his application for privileges at a hospital elsewhere. It is true that the Board's actions might have influenced his attaining privileges elsewhere but in the absence of malice that has no bearing.

The actions of the Board which are at issue in this matter were things done in its judicial or **quasi**-judicial capacity. In my opinion, the principles of natural justice were not violated by the Board in its dealings with the respondent. He was at all material times given adequate opportunity to be heard. The first two suspensions were promptly reinstated upon representation being made on his behalf. The non-renewal of privileges and the third suspension were confirmed by appeal hearings at which the respondent took part and was given the fullest opportunity to be heard. No malice or bad faith was involved at any stage of the proceedings.

It is not necessary to explore the extent to which damages could be awarded. In my opinion, the trial judge had no power to do so.

I would allow the appeal and set aside the decision of the trial judge. I would propose that the order be withheld for two weeks in order to give the parties an opportunity to send written representations to the Court on the issue of costs, both at trial and of this appeal.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.

C.A. No. 105832

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
THE COLCHESTER REGIONAL HOSPITAL COMMISSION	)	R. Malcolm MacLeod and Peter M. Rogers for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
DR. KENNETH B. SHEPHARD	)	C. Peter McLellan, Q.C. for the Respondent
Respondent	)	
	)	
	)	Appeal Heard: November 28, 1994
	)	
	)	Judgment Delivered: February 2, 1995

THE COURT: Further to the judgment of this Court dated January 10, 1995, we fix the costs as per the attached.

BY THE COURT:

Further to the judgment of this Court dated January 10, 1995, the Court has now received submissions from the parties on costs.

On consideration, the Court fixes the amount involved for the purpose of the costs at trial at $170,000 and orders that the costs are to be calculated by the application of Scale 3. The appellant will recover from the respondent the costs of trial so fixed, plus disbursements to be taxed and the costs of appeal at 40% of the trial costs, plus disbursements to be taxed.

Chipman, J.A.

Roscoe, J.A.

Freeman, J.A.