IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Horne v. Capital District Health Authority, 2005 NSSC 41

Date: 20050223
Docket: S.H. No. 214181
Registry: Halifax

Between:

Dr Gabrielle Horne

Applicant

v.

Capital District Health Authority and Queen Elizabeth II Health Sciences Centre

Respondents

Judge:	The Honourable Justice Donald M. Hall
Heard:	September 8, 2004, in Halifax, Nova Scotia
Counsel:	Ronald E. Pizzo, Esq., counsel for the applicant Kathryn Raymond, counsel for the respondents

Hall, J.:

[1] The applicant, Dr. Gabrielle Horne, has applied for the following relief as set out in the Originating Notice (Application *Inter Partes)*:

1. An Order in the nature of Declaration, declaring that "Minutes of Settlement", dated June 6, 2003 and signed by the Capital District Health Authority, Dalhousie University and Dr. Horne is a legally binding agreement, binding upon the parties to that Agreement;

2. An Order in the nature of Declaration declaring that the Respondents are in breach of the Minutes of Settlement and further declaring a reversal of the variation of Dr. Horne's privileges;

3. An Order in the nature of *certiorari* to set aside proceedings regarding Dr. Horne's privileges before the Capital District Health Authority Privileges Review Committee (the "PRC") for reason that the PRC lacks jurisdiction to consider any further action regarding Dr. Horne's privileges as that matter is now settled by the terms of the "Minutes of Settlement";

4. An Order in the nature of Mandamus to order the immediate restoration of Dr. Horne as an attending physician in the Queen Elizabeth II Health Sciences Centre, Division of Cardiology, Heart Function Clinic in accordance with the terms of the "Minutes of Settlement".

In response to the application the respondents filed a return pursuant to **Civil Procedure Rule** 56.08 consisting of nine volumes of printed material.

[2] The principal issues raised on this application are the following:

1. Did the Chief Executive Officer (herein “the CEO”) of the Capital District Health Authority (herein “Capital Health”) have actual authority to negotiate the purported settlement on behalf of Capital Health?

2. Does the Board of Directors of Capital Health have the ultimate authority and responsibility respecting the granting of physicians' hospital privileges and if so, does it have authority to delegate this authority to one of its officers such as its CEO? and

3. If the CEO did not have actual authority to enter into the settlement agreement on behalf of Capital Health, did he have the ostensible or apparent authority to do so?

[3] There seems to be no dispute as to the factual situation. Dr. Horne is employed as an Assistant Professor of Medicine in the Dalhousie University Faculty of Medicine. She is also a staff cardiologist at the Queen Elizabeth II Health Sciences Centre, (herein "the Q.E.II"), being employed in the Cardiology Division which is under the authority of the Department of Medicine. She began her employment at the Q.E.II in 1998. As well, she is engaged in medical research in the cardiology field. In order for her to carry on her research it is necessary for her to have access to various clinics including the Congestive Heart Failure Clinic and the Adult Congenital Heart Clinic. Her hospital privileges had enabled her to work in these clinics at the Q.E. II.

[4] Capital Health is a body corporate created under the provisions of the Health Authorities Act, Chapter 6, SNS 2000, with responsibility for managing health services in the health district that includes the locations of the Nova Scotia Hospital, the Issac Walton Killam Health Centre and the Queen

Elizabeth II Health Sciences Centre, the administration and management of which is vested in a board of directors (herein 'the Board") appointed by the Minister of Health of the Province of Nova Scotia (herein "the Minister").

[5] The Q.E.II is a body corporate incorporated under the provisions of the Queen Elizabeth II Health Sciences Centre Act, Chapter 15, S.N.S. 1995 - 96, amended Chapter 6, S.N.S 2000, for the purpose of operating hospitals and health related facilities including Camphill Medical Centre and the Victoria General Hospital and is under the management of a board of directors. The members of the board of the Q.E.II are the same persons as appointed to the board for Capital Health.

[6] Dr. Elizabeth Ann Cowden is head of the Department of Medicine in the faculty of Medicine at Dalhousie University and is also District Chief Department of Medicine of Capital Health.

[7] Apparently there had been conflicts or problems in the Cardiology Division of the Q.E.II involving Dr. Horne. In order to bring the matter to a head Dr. Cowden met with Dr. Horne, the result of which meeting is set forth in a letter that Dr. Cowden wrote to Dr. Horne under date of October 21, 2002. In that letter Dr. Cowden expressed concern with respect to Dr. Horne's lack

of collegiality and the effect of her conduct on patient safety and advised Dr. Horne of a variation in her hospital privileges. The letter stated in part:

> In view of the concern for patient safety, emanating from the data before me, your clinical duties are being reallocated as follows:
>
> > i. You will cease participation in those clinical services where team care is the existent model; specifically, the congestive heart failure clinic, the adult heart clinic, effective immediately.
> >
> > ii. To ensure maintenance of the core cardiology skills and clinical deliverables required of a 0.25 clinical FTE, you will continue to provide consultant secondary care, and will work with Dr. Blair O'Neill to develop an alternate ambulatory clinic for cardiac consultative service.

[8] A protracted process of negotiations between counsel for the parties, the members of the medical staff and administration officials with a view to resolving issues respecting Dr. Horne's hospital privileges followed.

[9] As required by s. 8 of the Medical Staff (Disciplinary) By-laws, the District Medical Advisory Committee (herein the District MAC) was advised of the variation. The District MAC completed an investigation and submitted its report and recommendations to the Privilege Review Committee (herein “the PRC”) and others as required by ss 8.5 of the By-laws. The District MAC is a committee of the Board established to advise the Board on matters concerning the provision of quality patient care, teaching and research as

prescribed by the mandate of Capital Health. The PRC is a committee of the Board charged with responsibility to investigate applications and issues respecting member physicians hospital privileges referred to it by the District MAC and to make recommendations to the Board respecting such matters. The District MAC and the PRC maintain that only the Board has authority to grant or vary hospital privileges of a physician after the process provided for in the Medical Staff By-laws and the Medical Staff (Disciplinary) By-laws has been complied with and a recommendation from the PRC has been received by the Board. In its report to the PRC the District MAC did not support the allegation that Dr. Horne's conduct was putting patients' safety at risk but acknowledged that her lack of collegiality required remedial action.

[10] The matter was not resolved and in an effort to bring the dispute to a conclusion counsel for the parties arranged for a mediator to be engaged to assist in the process. The person engaged was Mr. Martin Teplitsky, Q.C., who has a national reputation as a mediator and arbitrator.

[11] The parties met with the mediator on June 6, 2003. Participants in the meeting included Dr. Horne and her counsel Mr. Pizzo, Mr. Donald Ford, CEO and President of Capital Health and the Q.E.II, along with Capital

Health's in house counsel, Ms. Nancy Milford and Jill Taylor, Dr. Cowden and Dalhousie University representatives, Dr. Sanuel S. Scully, Vice President Academic and Provo of the University with counsel Karen Crombie.

[12] It appeared that after a day of negotiations the parties present reachED agreement on the appropriate disposition of the matter. A document entitled "Minutes of Settlement" was drafted by counsel for Capital Health and the University. It was then signed by Dr. Horne, Mr. Ford, on behalf of Capital Health and Ms. Crombie, on behalf of the University. The University participated in the proceedings apparently due to the provisions of an affiliation agreement between the University and Capital Health respecting professional staff who are mutually employed. The document recited that:

> The parties have entered into mediation with the intention of reaching a consensual settlement of their dispute regarding variation of the Hospital Privileges granted, to Dr. Horne, by Capital Health pursuant to Section 23 of the *Health Authorities Act* S.N.S. 2000, C. 6, S. 1, and the resulting Capital Health Medical Staff Bylaws

[13] It provided that Dr. Horne would return to the Heart Function Clinic as an attending physician and set forth several provisions and conditions to facilitate her return.. Apparently Dr. Horne had abandoned her request to

return to the Adult Congenital Heart Disease Clinic. The final paragraph of the document stated in part:

> The parties agree that this is a full and final settlement of this matter and that neither party shall take any action against the other.

[14] Following the mediation all persons concerned with the process appear to have made a sincere effort to implement the terms of the agreement so that Dr. Horne's privileges in the Heart Function Clinic could be reinstated. The District MAC and the PRC were kept informed of developments through Ms. Raymond. Unfortunately disagreements arose over interpretation of some of the terms of the agreement, particularly with respect to the role of the “mentors”. There was also a concern with respect to confidentiality. Relations between the parties seem to have become strained as time went on and questions arose on each side as to the motives, sincerity and determination of the other in regard to implementing the agreement.

[15] In the end, efforts to implement the agreement were essentially terminated when Ms. Milford advised Ms. Raymond by letter dated November 12, 2003, that the parties had not been able to resolve the “mentor” issue and requested that the PRC proceed with its investigation. Despite this, Ms.

Raymond continued to urge counsel to try to resolve their differences and agree on a proposed settlement or course of action to put before the PRC.

[16] Further negotiations followed in an effort to bring the matter to a mutually satisfactory conclusion but without success. As a result, Mr. Pizzo initiated this application claiming the relief set forth above. Despite that action the parties continued discussions in an effort to bring the matter to a conclusion without the necessity of a full hearing before the Board.

[17] Mr. Pizzo on behalf of Dr. Horne takes the position that the CEO had the authority, actual or ostensible, to negotiate a settlement on behalf of Capital Health and that the settlement of June 6, 2003, as set out in the minutes of settlement is a binding agreement, binding on the parties and ought to be enforced. He maintains that the agreement is a complete settlement of all issues between the parties and that Dr. Horne's privileges should be reinstated as set forth in the agreement without further reference to the District MAC, the PRC or the Board.

[18] Ms. Raymond, who represents the District MAC, the PRC and the Board, maintains that the agreement is not binding because the CEO had no actual authority nor ostensible authority to sign such an agreement on behalf of Capital Health. She says that it is mandatory that the process set forth in the

by-laws be complied with. Since this was not done the purported agreement is of no force and effect.

[19] The pertinent provisions of the applicable legislation and by-laws are reproduced here in some detail to assist in understanding the rather complex process that applies to the variation of a physician's hospital privileges:

Health Authorities Act:

10(1) The administration, management, general direction and control of the affairs of a district health authority are vested in a board of directors for that authority appointed by the Minister.

22 (1) The Minister shall make by-laws with respect to the conduct and management of the affairs of a district health authority including, without limiting the generality of the foregoing, by-laws

(a) respecting the appointment, removal, functions and duties of officers, agents and servants of the authority;

(b) establishing standing and special committees of the board of directors;

23 The Minister shall make by-laws

(a) respecting the granting, variation, suspension and revocation of medical staff privileges;

24(1) Subject to the approval of the Minister, a district health authority may make by-laws respecting medical staff including, without limiting the generality of the foregoing, by-laws respecting

(a) the membership of a medical advisory committee;

(b) categories of physician privileges;

(c) the duties and functions of senior medical officers appointed by the authority; and

(d) the rules and regulations governing medical staff.

(2) Where there is a conflict between by-laws made pursuant to Section 23 and by-laws made pursuant to subsection (1), those made pursuant to Section 23 prevail.

Corporate By-laws:

2.1 In accordance with the Act, the Board shall determine the policies and procedures of the DHA and shall assume responsibility for guiding the affairs of the DHA.

6.2 The Board shall be responsible for making all appointments and re-appointments to the Medical Staff and imposing conditions on appointments, subject to decisions made by the Provincial Appeals Board.

6.3 The Board, through the CEO, shall be responsible for ensuring the appointment of competent and motivated personnel including administrative, nursing, technical, and support staff.

6.4 The Board in discharging the responsibilities as defined in subsection 6.2 shall:

6.4.1 ensure that the safety and interests of patients and other recipients of services is a prime concern;

6.4.2 ensure the ongoing evaluation of programs and services of the DHA in terms of their effectiveness and efficiency; and

6.4.3 may request recommendations from the CEO, or any other competent authority within or outside the health district.

8.1 The Board shall appoint a CEO who shall:

8.1.1 be accountable for the overall management of all aspects of the DHA's operation, in accordance with the policies established by the Board under the terms of the Act;

8.1.4 ensure the compliance with the bylaws and policies of the Board by all DHA staff and Medical Staff;

8.1.9 hire, discharge, manage, and direct all employees of the DHA, including the senior staff;

Medical Staff By-laws Part A General:

6.1 The District Chief of Staff (VP Medicine) shall be appointed by the CEO following consultation with the District MAC and shall be responsible to the Board through the CEO.

7.1 The District MAC is a committee of the Board established to advise the Board on matters concerning the provision of quality patient care, teaching and research as prescribed by the mandate of Capital Health.

7.8 District MAC shall:

> 7.8.1 be responsible for the ethical conduct and professional practice of the members of the District Medical Staff;
>
> 7.8.2 be responsible for the supervision, quality, organization and delivery of all services provided by the Medical Staff including patient care, teaching and research;
>
> 7.8.4 make recommendations to Capital Health's Privileges Review Committee concerning appointments, reappointments, discipline, and privileges of the Medical Staff;

Medical Staff (Disciplinary) By-laws:

5.1 The Board may appoint new members in its sole and absolute discretion to the Medical Staff of the DHA in the manner provided for in these bylaws.

6.1 Notwithstanding any other provisions in these bylaws, a CEO, a District Chief of Staff or a Site-based Medical Leader, after gathering such information as he or she deems appropriate in the circumstances, may grant temporary privileges when

> 6.1.1 a hospital site requires extra members on a temporary basis;
>
> 6.1.2 a member requests a replacement for a short period of time, or
>
> 6.1.3 a specialist who does not have privileges within the district is required to consult on a particular patient.

8.1 The CEO, the Site Manager, the Site-based Medical leader, the District Chief of Staff, or the District Department Chief (but not their designates) may suspend or vary the privileges of any member of the Medical Staff at any time where the member has been found to have engaged in conduct which

8.1.1 exposes or is reasonably likely to expose patients, Medical Staff, employees or the public to harm or injury at any hospital site in the district, or

8.1.2 is adversely impacting or is reasonably likely to adversely impact the delivery of patient care at any hospital site in the district.

8.3 If anyone, other than the CEO, suspends or varies privileges pursuant to subsection 8.1, that person shall obtain the approval of the CEO or the CEO's designate within 1 working day from the suspension or variation and if such approval is not obtained, such suspension or variation of privileges shall lapse.

8.4 Notwithstanding subsection 8.1, the CEO may temporarily reinstate, with or without conditions, privileges of a member of the Medical Staff, pending the outcome of action being taken under section 8 if, in the opinion of the CEO, after consultation with the District Chief of Staff, the circumstances warrant it.

8.5 The District MAC shall conduct any investigations it deems necessary and submit its recommendation and any submissions that the District MAC received pursuant to clause 8.2.2 to

8.5.1 the CEO,

8.5.2 the District Chief of Staff,

8.5.3 the member, and

8.5.4 the PRC

within 10 days of receiving and/or hearing the member's written and/or oral submissions pursuant to clause 8.2.2, or within 10 days of the member waiving the right to make such submissions; and

8.6 The PRC shall make a recommendation pursuant to subsection 8.11 within 10 days of receiving the submissions of the CEO, the District Chief of Staff or the member pursuant to subsections 8.7 and 8.8.

8.7 The CEO and the District Chief of Staff may make written submissions to the PRC and, with the consent of the PRC, may make oral submissions and both forms of submissions shall be made within 10 days of receiving notice or such other period as the PRC in its discretion may deem appropriate.

8.9 After the District MAC refers a matter to the PRC pursuant to subsection 8.5, the PRC may, at any time prior to the PRC making a recommendation pursuant to subsection

8.11, negotiate, either directly or through counsel, a Proposed Agreement with the member.

8.11

8.11.1 The PRC shall, subject to final approval by the Board, and

8.11.1.1 subject to a CEO or member seeking a hearing before the Board pursuant to clause 8.12.1; and

8.11.1.2 subject to a member seeking an appeal or a hearing before the Provincial Appeal Board pursuant to subsections 8.16 or 8.17,

make a recommendation with respect to the member's appointment and privileges and inform the member and the CEO of such recommendation.

8.11.2 In making a recommendation pursuant to clause 8.11.1, the PRC may determine that there shall be no variation, suspension or revocation of the member's privileges, that a Proposed Agreement shall take effect, or that there shall be a variation, suspension or revocation of the member's privileges.

8.12

8.12.1 Within 10 days of receiving the PRC's recommendation pursuant to subsection 8.11, the CEO or the member may give notice of intention to proceed to a hearing before the Board.

8.12.2 In the event that the Board does not receive notice pursuant to clause 8.12.1, then the PRC shall forward its recommendation or the settlement agreement to the Board who shall, without having a hearing, make a final determination with respect to the matter, subject to the member's right to a hearing by the Provincial Appeal Board pursuant to subsection 8.17, and the Board shall inform the member and the CEO within 10 days of such determination.

[20] The first question to be determined is whether the CEO had actual authority to enter into the agreement in question on behalf of Capital Health. The authority and functions of the CEO and the limits on that authority are established by the provisions of the **Health Authorities Act** and the various

by-laws applicable to Capital Health. By virtue of s. 10 of the **Health Authorities Act,** the management and control of Capital Health are vested in the board of directors appointed by the Minister. Under s. 23 of the **Health Authorities Act** the Minister is obliged to make by-laws respecting the granting, variation, suspension and revocation of medical staff privileges among other things. Under ss. 2.1 of the Corporate By-laws of Capital Health, the Board is obliged to determine matters of policies and procedures and is responsible for guiding the affairs of Capital Health. Under ss. 6.2 the Board is responsible ". . . for making all appointments including reappointments to the medical staff and imposing conditions on such appointments" and is responsible "through the CEO . . . for ensuring the appointment of competent and motivated personnel including administrative, nursing, technical and support staff". Under s. 5B of the general Medical Staff By-laws, the CEO, as well as the District Chief of Staff, who is also the Vice President, Medicine, may grant temporary privileges to a member of the medical staff in special circumstances for a period not exceeding thirty days.

[21] The Medical Staff (Disciplinary) By-laws for Capital Health and all other district health authorities in this Province were made by the Minister

pursuant to s. 23 of the **Health Authorities Act**. It is to be noted that the medical staff by-laws are in two parts with the disciplinary part being made by the Minister and the other part, entitled simply Medical Staff By-laws, being made by Capital Health, but subject to approval the Minister. Under s. 5 the Board is authorized to appoint new members to its medical staff and may renew, extend and so forth the contracts of medical staff members who were on staff at the time of the coming into force of the **Health Authorities Act.** Under s. 6 the CEO as well as certain other senior officials may grant temporary privileges as noted above in s. 5B of the general Medical Staff By-laws.

[22] As stated above, Dr. Horne's privileges were varied by the District Department Chief, Dr. Cowden, under s. 8.1 of the Medical Staff (Disciplinary) By-laws. Section 8 sets out the procedure or process that is to be followed in dealing with the variation of a physician's hospital privileges. When such a variation occurs the matter is to be referred to the District MAC which shall conduct an investigation and submit its recommendation to the PRC and others including the CEO. Under ss. 8.3 the approval of the CEO to the variation is required within one working day, otherwise the variation lapses. The CEO under ss 8.4 may temporarily reinstate the

physician's privileges pending the outcome of action under s. 8. The CEO along with others is entitled to receive the recommendations of the District MAC pursuant to ss. 8.5 and of the PRC pursuant to ss. 8.11. The CEO may also make submissions to the PRC under ss. 8.7 and under ss. 8.12 and may require a hearing before the Board.

[23] Although the CEO has a significant role to play in the process, the process ultimately leads to a decision by the Board, as it is the Board and the Board alone that has the authority and obligation to make the final decision on such matters as variation of a physician's hospital privileges. From the foregoing it is apparent that the CEO has no authority under the statutes and by-laws to grant, revoke or vary medical staff privileges other than in very limited circumstances and for limited periods of time.

[24] This brings us to the question of whether the Board has the power to delegate its authority to appoint members to the medical staff and fix the terms of their hospital privileges.

[25] The **Health authorities Act** provides by s. 23(a) that the Minister shall make by-laws respecting "the granting, variation, suspension and revocation of medical staff privileges". In the Medical Staff (Disciplinary) By-laws made by the Minister pursuant to s. 23 of the Act, it is provided that the

Board may appoint members to the medical staff and charges the Board with responsibility respecting the granting, variation suspension and revocation of medical staff privileges. Similarly, the Corporate By-laws, approved by the Minister, provided that "the Board shall be responsible for making all appointments and re-appointments to the medical staff and imposing conditions on appointments . . . ." Thus, it is apparent that the Minister has delegated authority respecting medical staff privileges to the Board. That this is a delegated responsibility is confirmed by the comments of Chipman, J.A., in **Shephard v. Colchester Regional Hospital Commission** [1995] 137 N.S.R.(2d) 81 at paragraph 86 where he said:

> 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*. (Emphasis added).

[26] No provision was made authorizing the Board to sub-delegate this responsibility. Applying the *maxim delegare non potest delegare* (a delegate cannot delegate), a person to whom powers have been delegated may not delegate them to another. Accordingly, the Board, being itself a delegate, did not have the power to delegate its authority over medical staff privileges

to the CEO. This is not to say, however, that the Board could not have authorized the CEO to negotiate a settlement on its behalf but any settlement negotiated would have to be subsequently approved by the Board.

[27] In any event, there is no evidence that the Board specifically authorized the CEO to negotiate a settlement on behalf of the Board in this instance, even if the Board is empowered to delegate such authority. Indeed, Ms. Raymond informed the Court that the matter has never been before the Board. Accordingly, it must be concluded that Mr. Ford, the CEO, did not have actual authority to negotiate the settlement agreement on behalf of Capital Health.

[28] This brings us to the second part of the "authority" issue, that is, whether the CEO had ostensible or apparent authority to negotiate the settlement and bind Capital Health despite the fact that the Board does not have power to delegate its authority respecting medical staff privileges. Under the common law principle of agency, a principal may be bound by the acts of his or her agent under circumstances where the agent has the ostensible or apparent authority to act and bind the principal. This is usually referred to as the doctrine of "agency by estoppel". In order for the doctrine to arise three requirements must exist. First, there must be a representation or holding out

by the principal by a statement or conduct indicating the agent's authority to act for him or her; second, there must be a reliance on the representation by the third party; and third, there must have been an alteration to the third party's position as a result of the reliance. (See Friedman, **The Law of Agency,** 7th Edition, Chapter 6).

[29] In this case such a representation would have had to have come from the Board since the Board is responsible for the management and control of the affairs of Capital Health. No evidence has been presented, however, as to any representation having been made by the Board to the effect that the CEO was authorized to negotiate settlements respecting privileges with members of the medical staff. As well, no evidence was presented as to the CEO having on other occasions performed such a function on behalf of the Board. Nor was any evidence presented of other conduct by the Board from which a holding out of authority could be inferred. That being the case, I fail to see how it can be said that the CEO had the apparent or ostensible authority to negotiate the settlement agreement in question.

[30] I have reached this conclusion despite the fact that Capital Health's counsel, Nancy Milford and Jill Taylor, participated in the mediation proceeding with

Mr. Teplitsky and drafted the settlement agreement document which provided for Mr. Ford as CEO to sign on behalf of Capital Health.

[31] From correspondence that passed between Ms. Milford and Ms. Raymond, however, both before and after the mediation meeting with Mr. Teplitsky, it is abundantly clear that Ms. Milford understood and intended that the agreement was to be only a proposal that it was hoped would form the basis of a "proposed agreement" that the PRC would present to the Board pursuant to ss. 8.9 and 8.11 of the Medical Staff (Disciplinary) By-laws. Copies of this correspondence was forwarded to Dr. Horne's counsel.

[32] Of particular note is a letter from Ms. Raymond to Ms. Milford and Mr. Pizzo dated April 29, 2003, wherein she pointed out to counsel for the participants, Ms. Milford and Mr. Pizzo, her position that under the by-laws the process had to be followed and that no binding decisions could be made except by the Board after the PRC had completed its investigation and submitted its recommendation. Her letter stated in part:

> Of primary concern is the need to confirm that you have both expressed a preference to secure the assistance of a mediator for purposes of your own discussions, to determine whether it is possible for Dr. Horne and administration to reach agreement on a proposal to take to the Privileges Review Committee. It is agreed by all that the use of a mediator is for your own private purposes and is not in anyway intended to usurp the role and authority of the Privileges Review Committee as the body responsible for determining whether it will support and

> recommend a Proposed Agreement, or for otherwise reviewing this matter pursuant to the Bylaws. The Privileges Review Committee will not be a party to any of your discussions with a mediator. The mediator will hve no authority to make a binding agreement between Dr. Horne and the administration. It can only facilitate discussion.

[33] In a follow-up letter she requested a response from Mr. Pizzo but none was forthcoming.

[34] It is significant, in my view, that Ms. Raymond's letter makes reference to the fact that "It is agreed by all that the use of the mediator is . . . not in anyway, intended to usurp the role and authority of the Privileges Review Committee . . . ." She further noted that "The mediator will have no authority to make a binding agreement . . . ." No objection to this position was taken by Dr. Horne or her counsel at the time.

[35] In a letter dated May 9, 2003, which was copied to Mr. Pizzo, Ms. Milford confirmed that she agreed to the correctness of Ms. Raymond's position.

[36] Admittedly as Mr. Pizzo pointed out in his submission, it is not for Ms. Raymond or the PRC to dictate what other counsel and officers of Capital Health may or may not do. However, it did bring to the notice of the participating parties that there may be a question as to the authority of the CEO and Ms. Milford as well as Dr. Cowden, to negotiate a final settlement on behalf of Capital Health, particularly as a result of her reference to the provisions in the by-laws. It seems to me, therefore, that the parties ought

to have clearly established the authority of the CEO and Ms. Milford to negotiate a settlement on behalf of Capital Health unless they accepted that it was merely a binding agreement between them as to the terms that would be presented to the PRC to form the basis of a proposed agreement under ss. 8.9 and 8.11. In other words, that neither the CEO nor Dr. Horne would oppose any recommendation of the PRC that contained the terms of the settlement agreement. Otherwise, it is difficult to understand, why language such as "the parties agree that this is a full and final settlement of this matter" was included in the document.

[37] It is noted that immediately following the mediation Ms. Milford forwarded a copy of the agreement to Ms. Raymond stating in a covering letter dated June 9, 2003:

> We are pleased to report to you that we have Minutes of Settlement arising from a recent mediation among Dr. Horne, Capital Health and Dalhousie University. The parties to the Minutes of Settlement would like this document put forth to the Privileges Review Committee for its consideration as a Proposed Settlement pursuant to s. 8.9 of the Capital Health's Medical Staff Bylaws.

[38] In a further letter from Ms. Milford to Ms. Raymond dated June 16, 2003, Ms. Milford stated:

> Further to my letter to you dated June 9 (attached for your ease in reference), Capital Health recognizes that the Privileges Review Committee's consideration

> of this matter may take some time. As such, we are seeking the PRC's permission to proceed with the implementation of the terms of the Minutes of Settlement on an interim basis.
>
> Please be assured, this is not an attempt to usurp the authority of the PRC to accept or reject the Minutes of Settlement, but rather an attempt to resume operations in the interim.

Both of the foregoing letters were copied to Mr. Pizzo.

[39] It appears that the position stated by Ms. Raymond and confirmed by Ms. Milford, as to the status of the mediated agreement at first was not challenged by counsel for Dr. Horne. In fact, it appears that Mr. Pizzo first raised the point of the agreement being a binding contract in his letter to Ms. Raymond dated August 18. 2003. It is apparent, therefore, that initially all parties accepted or at least acquiesced in Ms. Raymond's stated position and proceeded with implementation of the agreement while keeping the PRC informed through Ms. Raymond.

[40] It is also significant, in my opinion, that under ss. 5.18 of the Medical Staff (Disciplinary) By-laws, on appointment to the medical staff a physician is required "to agree in writing to abide by the by-laws and the rules and

regulations of the DHA. . . .". The Return also indicates that through correspondence prior to the mediation there was considerable discussion and references to the by-laws by counsel. It is significant, as well, that all persons involved in this process were high calibre professionals and not just ordinary folk. Thus, it is reasonable to infer that both Dr. Horne and her counsel were well aware of the limits placed on the CEO's authority by the by-laws in matters concerning physicians' privileges.

[41] Mr. Pizzo made reference to the fact that no affidavits were submitted on the part of Capital Health. It does seem to me that it would have been helpful to the court and all concerned if there had been affidavits from the participants in the mediation proceeding providing information as to what was said and done in the course of that proceeding, particularly, in respect to the capacity to act of the participants and their view of their authority and the status of the mediated minutes of settlement. Whether this proceeding is to be treated as a judicial review or an ordinary application (inter partes), affidavits ought to have been filed. The **Civil Procedure Rules** direct that affidavits should be filed in support of ordinary applications. This is also so in the case of applications for an order in the nature of *certiorari*. As the late Chief Justice

Cowan stated in **Heritage Trust et al v. Provincial Planning Appeal Board et al** (1982) 50 N.S.R.(2d) 352 at paragraph 223:

> . . . In the ordinary case, where an order in the nature of *certiorari* to quash an order or decision of a board such as the Provincial Planning Appeal Board is made, the application should be by originating notice (application inter partes) since the error alleged by the applicant should be an error which appears on the face of the record, which is returned by the board as a result of the notice endorsed on the originating notice (application inter partes) as required by the rules. It is usual to have affidavits setting out the basis upon which the application is made and the proceeding comes on for hearing in chambers, with no oral evidence unless the presiding judge permits oral evidence to supplement the affidavits, or on cross-examination of a deponent.

[42] The only affidavit presented on this application was that of Dr. Horne. Other than that the evidence before me had to be gleaned from the nine volumes of material making up the return for the purposes of a judicial review, which was an onerous and time consuming task. I assume, however, that since there were no objections from counsel, that the Return may be treated as evidence for all purposes of this application.

[43] The burden is on the applicant in an application such as this to establish his or her case on a balance of probabilities. In this application the burden is on Dr. Horne to establish on a balance of probabilities that the purported settlement agreement is binding on Capital Health. In order to do so she had to establish, at least on a *prima facie* basis, that Mr. Ford, the CEO of Capital Health had actual or ostensible authority to execute the agreement on

behalf of Capital Health. For the reasons stated above, I feel compelled to conclude that she has failed to meet that burden. As a result it is not necessary to consider the remedies sought in the application and the application is dismissed.

[44] I regret that I have had to come to this conclusion as it appears to me that the matter has been going on for an unduly lengthy period of time which undoubtedly is involving great expense to the public and Dr. Horne, as well as hardship and stress for all. It must be acknowledged, however, that the time frames provided for in the by-laws were waived by the parties in the hope that a settlement could be reached, which turned out to be in vain.

[45] As I indicated during the hearing of the application I was having some difficulty in sorting out which counsel, Ms. Raymond or Ms. Milford, was representing Capital Health, especially so because I was informed that the matter had never been before Capital Health's governing body, its Board of Directors. Ms. Milford, its Risk Management Director and counsel, appeared at first to have taken the position that the negotiated settlement was a binding agreement while Ms. Raymond took the position that no settlement could be reached until after the PRC had completed its investigation and made its recommendation to the Board. Indeed it appeared

that two opposing factions were at odds in the bosom of Capital Health. On further reference to the Return, however, it appeared that Ms. Milford has adopted Ms. Raymond's position. This confusion would not have arisen had appropriate affidavits been filed.

[46] A final comment. It seems that Capital Health administration through the CEO has resiled from its former supportive position respecting implementation of the impugned settlement agreement, apparently because of perceived new issues with Dr. Horne. It should be recognized that if new concerns arose after the formation of the agreement, Dr. Horne’s privileges could again have been varied or suspended under s. 8 of the Medical Staff (Disciplinary) By-laws, re-triggering the privileges review process.

[47] I will hear the parties as to costs if they wish.

Donald M. Hall, J.