CV 05558

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE MEDICAL PROFESSION ACT,
R.S.N.W.T. 1988, c. M-9

UMATHEVAN VISWALINGAM, MEDICAL PRACTITIONER,
OF FORT SMITH, NORTHWEST TERRITORIES

BETWEEN:

UMATHEVAN VISWALINGAM

Appellant

- and -

**MINISTER OF HEALTH OF THE
GOVERNMENT OF THE NORTHWEST TERRITORIES**

Respondent

Appeal of decision by a medical Board of Inquiry

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on April 23rd and May 17th, 1996.

Reasons filed: June 3, 1996

Counsel for the Appellant: Earl D. Johnson, Q.C.

Counsel for the Respondent: Debra Bulmer

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REASONS FOR JUDGMENT

1 The appellant, a licensed medical practitioner, appeals the decision of a board of inquiry which found him to be incapable of practising medicine and suspended his right to practise medicine until he completes an education and skill enhancement programme prescribed by the board. This court has the statutory power to quash, alter or confirm this decision.

2 It is necessary to set out in some detail the applicable provisions of the governing statute.

3 The Medical Profession Act, R.S.N.W.T. 1988, c. M-9, regulates the practice of medicine in this jurisdiction. It contains a self-governing mechanism for the medical profession through boards of inquiry:

> 21. (1) There is established a board called the Board of Inquiry, which may, in addition to any inquiry commenced under this Act concerning the improper conduct of a medical practitioner, investigate any matter referred to the Board of Inquiry by the Minister.
>
> (2) A medical practitioner shall be appointed by the Minister as President of the Board of Inquiry for a term not exceeding two years, and that person may be reappointed for additional two-year terms in the discretion of the Minister.
>
> (3) The Minister shall, from time to time as required for the purposes of this Act, appoint not less that two and not more than four persons as members of the Board of Inquiry in addition to the President.

4 In addition to investigating "any matter" referred by the Minister of Health, the Board of Inquiry also has power to investigate complaints referred to it:

> 24. Any person may lodge with the President a written complaint against a medical practitioner.
>
> 25. (1) The President, after reviewing a complaint, shall either
> (a) dismiss the complaint, if the President is of the opinion that the conduct in question does not amount to improper conduct; or
> (b) refer the complaint to the Board of Inquiry.
>
> ...
>
> 26. (1) On receiving a complaint under section 24, or on having a matter referred by the Minister, the Board of Inquiry, on the appointments being made under section 21, shall with all due dispatch conduct a hearing investigating the matter.

5 The Board of Inquiry is required to provide notice of the hearing setting out the "substance of the charge against the medical practitioner or a statement of the subject-matter of the investigation": s.26(3) of the Act. It must conduct its proceedings in accordance with the rules of natural justice: s.36. The Board is given a broad range of options in penalties and sanctions: s.38. It may order the payment of fines, the suspension or cancellation of a practitioner's right to practise medicine, or impose conditions attaching to the right to practise.

6 The Act also contains an itemization of what constitutes "improper conduct". Among the items enumerated is if the person "is incapable of practising or is unfit to practise medicine or is suffering from an ailment either organic or mental that might, if the person continues to practise, constitute a danger to the public": s.20(b).

7 In this case, the Minister of Health, pursuant to s.21(1) of the Act, requested an investigation by the Board into the appellant's fitness to practise medicine. The appellant at the time was employed as a staff physician at the Fort Smith Health Centre. A peer review of the medical services at the Centre had raised concerns about the appellant's standard of practise. As a result of this peer review, the appellant had been suspended from his duties at the Health Centre which then prompted the appellant to institute litigation against his employer (the Government of the Northwest Territories).

8 On September 21, 1992, the Board of Inquiry issued a notice of hearing to the appellant. That notice specified the subject-matter of the investigation:

> The Board of Inquiry shall hear evidence regarding the allegations that you, being a medical practitioner licensed under the Medical Profession Act, are guilty of improper conduct pursuant to section 20(b) of the Act, in that you are incapable of practising or unfit to practise medicine or are suffering from an ailment either organic or mental that might, if you continue to practise, constitute a danger to the public.

9 The notice then went on to set forth, as it was phrased therein, "particulars of the allegations". These consisted of five specific patient items and a general allegation of "burn out". These "particulars" came from the peer review conducted previously.

10 Subsequent to issuance of the notice, the appellant and the government settled his litigation. Part of the settlement agreement was the appellant's undertaking to undergo a professional competency review and psychiatric assessment at McMaster University. The agreement provided as well that the assessment results be placed before the Board of Inquiry:

> The solicitors for the Health Centre and Dr. Viswalingam will make a joint recommendation to the Board of Inquiry established pursuant to the Medical Profession Act, R.S.N.W.T. 1988, c. M-8 (the "medical Board of Inquiry") that the medical Board of Inquiry accept the McMaster assessment for its purposes. The parties acknowledge that the medical Board of Inquiry is an independent statutory tribunal and cannot be bound by either the solicitors' recommendation or the McMaster assessment. The parties further agree that any party shall be free to make whatever submissions and to call whatever additional evidence before the medical Board of Inquiry it sees fit.

11 The Board of Inquiry hearing was delayed and, once started, adjourned several times. On one of the first adjournment requests, the Board stipulated, among other things, that the assessments which the parties had agreed to will be conducted and that the "assessments will include expert opinion on the issues before the Board as well as medical and psychiatric opinion regarding the competency of Dr. Viswalingam to practise medicine."

12 The relevance of the McMaster assessments to the issues before the Board was recognized by all parties. On June 24, 1993, counsel for the appellant (not the same counsel as on this appeal) wrote to the Board chairman saying "we agree that the McMaster Report will be admissible". On July 13, 1993, appellant's counsel again wrote to the chairman. In justifying his request for a further adjournment, he wrote:

> 1. Without the McMaster assessment, it may be impossible for the Board to ascertain Dr. Viswalingam's current level of professional competence and current psychological state.
>
> 2. The McMaster assessment will specifically deal with the allegations that are put forth as particulars of Dr. Viswalingam's supposed incompetence. Its conclusions will:
>
> (a) provide evidence that will assist the Board — in fact, without the McMaster report it is hard to see how there could be any reliable independent evidence with respect to the psychological/addiction matters that the Board is to canvass;
>
> (b) determine whether expert witnesses need to be called on behalf of Dr. Viswalingam;
>
> (c) enable us to properly cross-examine any expert witnesses called by the complainant, and thus make a full answer and defense.

13 The Board of Inquiry hearing eventually commenced on June 13, 1994. Witnesses were called. The appellant was represented by counsel as was the Minister of Health. The Minister's counsel led the questioning of the witnesses. At the end of that day counsel for the Minister indicated that she did not propose to call any further witnesses. The Board reconvened on August 8, 1994. In between the two hearings, the parties received the McMaster assessment report. It was entered as an exhibit at the August 8th hearing. It was referred to by appellant's counsel.

14 At one point appellant's counsel put the report directly to the appellant during his testimony before the Board:

> Q Now, Mr. Chairman, and members of the Board, perhaps I should just make a statement here. I have talked to Ms. Gullberg about this, and if we can get this on the record it will be helpful to you.
>
> I understand, Dr. Viswalingam, that regardless of the outcome of these proceedings, you are committed to following the recommendations of the McMaster report, is that correct?
>
> A Hmm hmm.

Q Yes?

A Yes.

15 In submissions to the Board at the end of the hearing, appellant's counsel (Mr. Willis) and the Minister's counsel (Ms. Gullberg) also addressed the question of how the Board can use the assessment report:

> MR. WILLIS: Well, again confirming our discussion off the record, it would appear that should the decision be — go against Dr. Viswalingam, that essentially, my friend and I are both agreeing that the — an appropriate disposition would be simply to make his practice subject to the carrying out of the McMaster recommendations, as monitored by Dr. Morse.
>
> MS. GULLBERG: I believe the Board has some latitude to be as specific as they want. I don't have trouble with that. They may want something a little more concrete.

16 On November 7, 1994, the Board issued its decision. It found that the specific items noted as "particulars" in the notice of hearing were not established in the evidence. It went on, however, to accept the McMaster assessment report as evidence of the ability and fitness of the appellant to practise medicine. It accepted the report's recommendation as to the need for an education and skill enhancement programme. The Board concluded therefore that the appellant was incapable of practising medicine without individualized professional education and supervision. It then ordered that the appellant's licence to practise medicine be subject to completion of a detailed programme as set forth by the Board.

17 The appellant appeals on two grounds:

(1) the Board erred in finding him guilty of improper conduct due to incompetence having expressly exonerated him with respect to the particular charges set out in the notice of hearing; and,

(2) the Board erred by imposing conditions which were not workable.

18 In considering these grounds, it is necessary to keep in mind that, while the statute provides a wide scope to an appellate judge, it is not an unfettered scope. Judicial authority has long recognized a doctrine of curial deference for the decisions of a professional disciplinary body. Even a general appeal power gives no warrant to retry discipline cases. An appeal is not a hearing *de novo*. Especially when dealing with questions of standards and conduct peculiar to a profession, courts acknowledge the greater and more intimate familiarity with such issues possessed by members of that profession: Re Ringrose & College of Physicians and Surgeons of Alberta (No. 2), [1978] 2 W.W.R. 534 (Alta. C.A.).

19 The importance of peer review has been stressed in many cases. In Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, Iacobucci J. stated (at page 890):

> To my mind, a large part of effective self-governance depends upon the concept of peer review. If an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential. It is entirely appropriate that an individual whose conduct is to be judged should be assessed by a group of his or her peers who are themselves subject to the rules and standards that are being enforced.

20 Counsel for the appellant argues at this hearing that the Board could only use the McMaster assessment report for purpose of its investigation into the specific charges

noted in the notice of hearing. In essence, this argument comes down to saying that the subject-matter of the Board's inquiry is limited to the specific charges and cannot be expanded to a general competency review. By relying on the assessment report, it is argued the Board went into an area for which the appellant had no notice and no opportunity to defend himself. Thus there is a breach of natural justice.

21 There is no dispute that the appellant had to receive notice of the allegations against him. The statute requires it and the rules of natural justice require it. But, in my opinion, the appellant did receive notice.

22 The Act provides for two methods by which a Board of Inquiry can be launched. One, as here, is a referral by the Minister. Another is by a complaint. The referral in this case was to investigate allegations that the appellant was incapable or unfit to practise medicine. The subject-matter of the inquiry was the appellant's fitness. There were particular charges within that subject but there was no doubt as to the nature of the inquiry. It was the appellant's fitness in general to practise medicine that was to be investigated. This was recognized by the appellant's counsel both in his written and oral submissions to the Board when he referred to the relevance, and indeed the importance, of the McMaster assessment with respect to that issue.

23 This point is reinforced by the acknowledgement by the appellant's counsel that the Board must consider present fitness and not past incidents. In his communication of June 24, 1993, to the Board's chairman, counsel wrote:

> The allegations are restricted to s.20(b) of the Act, which is entirely in the present tense. Thus what is relevant is Dr. Viswalingam's

> competence and health *as at the date of the hearing.* What is alleged to have occurred in the past is only relevant, it is submitted, in respect of inferences it permits about Dr. Viswalingam's *present* competence and *present* health. (emphasis in original)

24 The parties agreed to put the McMaster assessment report before the Board. Evidence was led and submissions were made with respect to it. Everyone recognized it as the most helpful evidence available. In my opinion, there was no lack of notice or failure of natural justice.

25 The appellant's argument may have substance if the subject-matter of the inquiry was a discrete complaint of a specific nature. In such a case the Board of Inquiry may not be permitted to embark on a wide-ranging investigation of the practitioner's competence. That was the situation in Barsoum v. Pape, [1988] N.W.T.R. 368 (S.C.). But here the statute provides for a matter to be referred by the Minister directly to a Board of Inquiry. The matter that was referred was the question of the appellant's fitness based on concerns raised by the earlier peer review. The fact that the particularized allegations were not proven does not restrict the Board from examining the general subject referred to it. The appellant was aware of that and recognized that the particular charges set out in the notice were merely items from which inferences could be drawn in the investigation of his current fitness.

26 In my opinion, having regard to the serious public interest in the competence of medical professionals, the Board was entitled to use all relevant evidence. Even if I were to hold, on some technical basis, that there was some breach of natural justice, I would have no alternative but to send the matter back for a new inquiry. I would not be in a

position to determine the appellant's fitness to practise medicine. If there were a new inquiry, it seems to me that they would obviously look to the McMaster assessment report as reliable evidence. In such case I am convinced, in the absence of evidence showing bias or incompetence on the part of the Board members (and none is suggested here), that a new Board would likely come to the same conclusion. There is no point to the exercise.

27 With respect to the second ground, it is not my role, nor within my ability, to pass judgment on the specific conditions imposed by the Board. These are clearly within the province of skilled professionals. If the conditions are, as alleged, unworkable then the appropriate course is to seek reconsideration by the Board. This is not a legal issue. There is no evidence that the conditions were arbitrarily or capriciously imposed. I will therefore defer to the expertise of the Board on this point.

28 For these reasons, the appeal is dismissed. Costs may be spoken to if necessary.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 3rd day of June, 1996

Counsel for the Appellant: Earl D. Johnson, Q.C.

Counsel for the Respondent: Debra Bulmer

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