MEDICAL APPEAL BOARD

BETWEEN:	Tracy Eugene Hicks, M.D.	APPELLANT
AND:	Langley Memorial Hospital	RESPONDENT

Members of the Panel:

M. Graham Clay, M.D., Chair
Michael D. Moscovich, M.D., Member
A. Harris G. Johnsen, LL.B., Member

Counsel for the Appellant	Christopher E. Hinkson, Q.C.
Solicitors for the Appellant	Harper, Grey & Easton
Counsel for the Respondent	Janice R. Dillon
Solicitors for the Respondent	Harris & Company

Heard at Vancouver, British Columbia, December 21 and 22, 1992 and February 17, 18 and 19, 1993.

REASONS FOR JUDGEMENT

This is an appeal from the decision of the Board of Trustees (the "Board of Trustees") of the Langley Memorial Hospital (the "Hospital") not to grant Provisional Staff privileges to the Appellant.

The Appellant obtained his M.D. from the University of Saskatchewan in 1970. Following rotating internship at the Jewish General Hospital in Montreal he did General Practice for one year. His specialty training in orthopedic surgery was primarily at the University of Alberta in Edmonton but included a six-month fellowship at the Wellesley Hospital in Toronto and a one-year fellowship in hand surgery at the University of Colorado in Denver, Colorado. He obtained his specialty certification and Fellowship in the Royal College of Physicians and surgeons of Canada in 1977. He began practise in Langley in September, 1978

after obtaining an appointment as a Visiting Consultant at the Hospital in June of that year. He had various appointments following that and was denied a request in 1979 that the privileges be changed to Active Consulting Staff. He was appointed to the Associate Staff category in 1985 and, on two occasions since then, has been denied transfer to the Active Staff.

In the period between first obtaining privileges and early 1990, there had been many problems perceived with his activities, problems which we have specifically not examined since, in the opinion of Mr. Justice Hall in his May 1992 decision "…the applicant (the Appellant) is entitled now to have his application considered on the basis of present circumstances." We recognize that the Appellant was suspended for thirty plus one days in April 1990 and, following that, reinstated on the Associate Staff for a two-year probationary period including three-monthly reviews. Conflicting evidence was given during the hearing as to whether the suspension and the probationary period were to be considered a decision of the Board of Trustees in March 1990 or a negotiated agreement between the Appellant and the Hospital. We heard evidence regarding the Appellant's behaviour between April 1990 and February 1991 when it was referred to by both counsel in attempting to determine the Appellant's suitability for an appointment. However we did not give any weight to activities before March 1990 following the instructions of Mr. Justice Hall "…that any consideration (in regard to granting of privileges) must, in the light of the earlier court decision, be considered without reference to the matters which underlay the revocation of privileges of March, 1991…" We believe that some of the prejudice which resulted in the March 1991 decision of the Board of Trustees originated from prejudices developed before March 1990.

During the hearing, there was formal argument about how much of the Appellant's behaviour prior to April 1990 should be heard. Ms. Dillon, quoting *re: Mental Hospital Board, Edmonton and Health Care Employees Union of Alberta, Local 1*, Labour Arbitration Cases, 12 L. A. C. (4th), stated that this situation is akin to one of an employee, the principles are the same and the Panel should hear of the increasing periods of discipline given the Appellant despite Mr. Hinkson's consideration that there had been a negotiated agreement in March 1990 culminating in the April suspension and the two-year probationary period which had wiped the slate clean. This Panel considers that the decision of the Board of Trustees was likely a negotiated settlement and, in any event, considers it must be bound by the direction of Mr. Justice Hall that the application of the Appellant should be treated in a manner identical to that given any other applicant and free of the baggage of previous "punishments."

On February 6, 1991, the Board of Trustees suspended the Appellant's privileges to practise at the Hospital, and revoked them on March 5, 1991. This matter was the subject of a hearing of the Medical Appeal Board held May 13, 14, 15, 16 and 17, and June 5, 1991 which resulted in a decision confirming the original decision of the Board of Trustees. The Appellant went to the Supreme Court of British Columbia where an application was brought pursuant to the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1979 c. 209 as amended; it was heard before Mr. Justice John E. Hall on January 14, 15 & 28, 1992. Mr. Justice Hall quashed the decision of the Medical Appeal Board but, considering that his decision should result in

restoration of privileges held prior to the decision of the Medical Appeal Board, did not order the Hospital to return the privileges held before February 6, 1991.

The matter of privileges was revisited before Mr. Justice Hall in Chambers on May 6, 1992 since privileges had not been given to the Appellant. It was the Hospital's contention that the Appellant's privileges on the Provisional Staff (previously called the Associate Staff) had expired at or about the time of the revocation of his privileges in March 1991 and therefore there were no privileges to restore. The position of the Hospital that renewal of privileges is not automatic is basic in their approach to the problem under consideration by the Panel. Mr. Justice Hall, after consideration, stated that the Board of Trustees had not received an application from the Appellant and therefore had not had the opportunity to consider it. As a result, the Appellant sought an application form, ultimately removing an application for renewal of privileges from material he had related to his earlier attendance at the Supreme Court and filed this with the Hospital on May 8, 1992. The application was returned to him considering that it was incomplete in as much as requests for obstetrical and anaesthetic privileges had been neither requested nor declined in the appropriate space. The fully completed form was received by the Hospital on May 14, 1992.

The application was then assessed by the Credentials Committee at three meetings in June 1992. On August 25 and 31, 1992 the Medical Advisory Committee met together with the Appellant and Mr. Hinkson, his solicitor. Following the second meeting, a vote was taken by secret ballot. The majority favoured advising the Board of Trustees that the Appellant's application not be approved. The Board of Trustees met on September 1, 1992 together with the Appellant, Mr. Hinkson and Ms. Dillon, their solicitor. Following presentation of the material from the Medical Advisory Committee, the Board of Trustees voted against giving the Appellant an appointment to the Probationary Staff of the Hospital. It is the decision of the Board of Trustees taken on September 1 which is the subject of this appeal.

In her opening remarks, Ms. Dillon stated that the Hospital takes the position that the Appellant is an applicant for privileges and bears the burden of proof that he meets the requirements needed to obtain privileges at the Hospital. She then introduced witnesses to give evidence regarding the Appellant's attitudes and manner toward others.

The first witness, Dr. A, a General Practitioner/ Anaesthetist at the Hospital since 1977, commented that the Appellant was unpredictable in his manner, made derogatory comments to the nursing staff and, on occasion, commented in an insensitive manner about her weight. While Dr. A had made no records of specific incidents or noted dates of any problems, she had brought a tape recorder into the operating room but never did use it. She also stated that the hospital administration had bought a tape recorder for the use of the nurses. Dr. A stated that the other orthopedic surgeons are all considerate and professional. In cross-examination, Dr. A was unable to identify any specific incidents where there had been difficulty since the Appellant's return to the Hospital in May 1990 and agreed that the main incident about which she complained occurred in March 1989. On

questioning from the Panel, Dr. A stated that she had an apology from the Appellant later that year.

Dr. RR, an orthopedic surgeon practising at the Hospital since January 1988, has shared calls with the Appellant. On questioning, he commented that the Appellant would sometimes see patients in the Emergency Department when not on call, creating an uncertainty as to who should be seeing patients and accepting referrals. He stated that he initially signed out to the Appellant but stopped this practice and he does no know how sharing a call schedule with the Appellant would work. When examined by the Panel, Dr. RR said that members of the orthopedic staff take call for a full week at a time with the intention that new patients in the Emergency Department be seen by the "on call" surgeon. He stated that patients were usually referred to that surgeon, particularly if it was anticipated that surgery might be needed. However, if a surgeon was in the Emergency area although not on call, he might be asked to see a patient so that the patient would be spared a wait or someone other that the person on call might also be consulted because of a patient's preference to see a particular surgeon.

Mrs. S, a nurse in the operating room complex has been at the Hospital since March 1988 working half-time. She was away from October 1989 until November 1990 but worked with the Appellant following her return. She stated that about once a month the Appellant might be difficult and perhaps find a sensitive spot in his talk with a nurse. It was her evidence that the Appellant's absence had made the suite a more pleasant place to work. On cross-examination, Mrs. S agreed that surgeons have different styles and stated that she does not dislike the Appellant personally. She was a witness to the conversation that upset Dr. A and was sure that it had taken place after November 1990. She was unable to remember any other incidents which had occurred after November 1990 and commented that the Appellant did not pick on her and could be charming at times.

Mr. DC has been employed as a nurse in the operating suite at the Hospital for thirteen years. He has had some contact with the Appellant during his work and stated that he had filed an incident report complaining about the Appellant's humiliating comments following the Appellant's returned in May 1990. Since that time, Mr. DC stated that he avoided contact with the Appellant as much as possible. In cross-examination, a copy of the incident report was filed and was shown to be dated in 1989.

Mrs. G, a nurse at the Hospital since 1983, also works in the operating room complex and has worked with the Appellant on many occasions, including the last year he was there. She related the difficulties which a nurse had in satisfying the Appellant when using a suction apparatus during an arthroscopy but could not remember any other difficulties with the Appellant during the period between May 1990 and February 1991. She was present when Dr. A was insulted. She felt that it was more pleasant in the suite with the Appellant not there. In cross-examination, Mrs. G stated that the Appellant's attitude toward her changed when she lost a large amount of weight and he had not picked on her since returning from his suspension.

In developing evidence about the Medical Staff Bylaws and the problems with disruptive physicians Ms. Dillon called Dr. K from the Hospital Care Division of the Ministry of Health and Dr. W, the Vice-president of Medical and Academic Affairs at the Vancouver General Hospital. Dr. K stated that he had reviewed and approved the Bylaws of the Medical and Dental Staff which had recently come into effect. In his opinion, a new applicant is one who is not already on the medical staff of a hospital in contrast to someone who is applying for reappointment. He stated that it is common practise to limit the length of time that a person is on provisional staff usually to one or two years and that the bylaws of many hospitals specify this length. It is usually no longer than two years.

Dr. W was qualified as an expert witness by virtue of his current position as well as a previous position as Head of the Department of Surgery at the University of Saskatchewan, his membership on the Saskatchewan Medical Commission, and his attendance at many management seminars. He was considered expert in medical administration in hospitals, including with that, a knowledge of assessment of physicians, discipline and the impact of a problem physician on an institution. He was examined by counsel for the Hospital and discussed the leadership role of physicians within hospitals. He stated that the disruptive physician may be inconsiderate of others and may have inappropriate expectations although there are different problems, depending on individual patterns of behaviour. Dr. W felt that repetitious disruptive behaviour can destroy morale. He believes that there is a threshold below which no one will make formal complaints but noted that recently nurses have become increasingly willing to report incidents. Dr. W felt that remedies are available. In cross-examination, he stated that since he has been at the Vancouver General Hospital he has never been involved in the final revocation of privileges and, while in Saskatchewan, removal of privileges was never permanent in his experience. Physicians had only been suspended. Dr. W also stated that there is no system available for physicians to file complaints although they could use the incident reports available in hospitals.

Dr. M, a Family Practitioner in Langley and on the Hospital staff, intermittently since 1985 and consistently since he established his own practice in 1987, is the current Chairman of the Medical Credentials Committee. He stated that his first involvement with the application under appeal was a telephone call from the Appellant asking whether he should be filling out a new application form or a reapplication form. He then received a letter from Mrs. Z, the President of the Hospital, stating that any questions about an application from the Appellant should be referred to her and also noted that Mrs. Z kept the original of the Appellant's application, sending him a copy. The correspondence surrounding the application together with a copy of the reapplication form were entered as exhibits. Included was a note from Administration to Dr. M stating that the application had been completed May 8, in contradiction to evidence that the Appellant's application submitted that date was returned to him for completion and returned to the Hospital, completed, on May 14.

In a conversation with the Appellant on May 29, Dr. M gave a commitment to a timely and fair process recognizing that his committee was only to deal with

credentials and report to the Medical Advisory Committee while the Board of Trustees was to make the final decision.

Dr. M completed his evidence at the second session of the hearing in February 1993, having been interrupted because of professional responsibilities. Much material was entered including two letters from the Appellant to Dr. M and a package of documents which the Appellant wished distributed to members of the Medical Credentials Committee as well as two affidavits sworn by the Appellant and one sworn by Dr. R. The matter of the Appellant's application was considered at the regular meeting of the Medical Credentials Committee held on June 15, 1992 as well as on June 22 and June 30. Dr. M had questioned the Appellant's credibility in relation to comments about his applications to the hospitals at Kitimat, Terrace and Prince Rupert so had telephoned these hospitals for information. As a result, he felt that the Appellant had been misleading in the statements made in his affidavit of April 29, 1992 concerning applications to these hospitals. In cross-examination, Dr. M said that the matter about the discrepancy between Dr. B's "pre-confession" version and the Appellant's version about the obtaining of application forms by Dr. B made in the same affidavit affected his decision to vote against the Appellant being recommended for an appointment. Dr. M had checked the Appellant's situation at the Peace Arch Hospital where he found that there were no complaints.

Dr. M attended both of the August meetings of the Medical Advisory Committee where he presented a document relaying the opinion of the Medical Credentials Committee which stated that the Committee found the Appellant's qualifications, experience and training acceptable, felt that they had acted as directed by Mr. Justice Hall by ignoring all matters up to the 1991 suspension and that previous incidents regarding personality problems "… had been dealt with at the 1990 peer review…." However the one negative comment related to credibility where discrepancies regarding statements about applications to other hospitals were noted and particularly the discrepancy between Dr. B's version and the Appellant's version of events surrounding obtaining the application form appeared pivotal. It was thought unnecessary to consider other matters, given the potential of physician job action at that time and the degree of the concerns about the Appellant's credibility.

Dr. B, a Family Practitioner on staff at the Hospital since 1978, stated that he was asked by the Appellant to obtain an application form for privileges at the Hospital and, while he did not feel comfortable obtaining the material, agreed to do so. It was his evidence that he did not answer the administrative secretary when she asked why he was obtaining the material for someone else and did not identify the other physician. Because of his discomfort about the situation, he threw the form away and told the Appellant that he was unable to obtain the forms. Dr. B stated at the hearing that he was not told by the secretary of an order from the Vice-president of Medicine that the Appellant was not to receive an application form and that, in a later telephone conversation with the Appellant, disabused the Appellant of this notion.

In cross-examination, Dr. B stated that, prior to the Appellant's suspension, he would refer to all the orthopedic surgeons, including the Appellant.

He reviewed, in some detail, the matters concerning the application form which he threw away and his discussions with Dr. R about the matter. The situation was the subject of a discussion between Dr. B and Dr. R some weeks before a telephone conversation with the Appellant which was recorded as taking place on July 2, 1992; the Appellant took notes of the conversation. While there was some difference between Dr. B's recollection and the notes that were made by the Appellant, it was clear that the matters of substance regarding Dr. B informing Dr. R of the situation were not in dispute. "Several weeks" before the conversation of July 2 but after the Appellant's affidavit sworn on April 29, 1992 (in response to the affidavit of Dr. R) Dr. B, when asked directly by Dr. R if he had obtained an application form for the Appellant, denied doing so. The next day, feeling guilty about his dishonesty, Dr. B met with Dr. R and informed him of the truth which was that he had obtained the application form, felt guilty about doing so when questioned by the Administration Secretary and threw the form away, following which he told the Appellant that he had been unable to obtain the form. He agreed that he had never given the correct version of events to the Medical Advisory Committee or to the Board of Trustees.

Mrs. RK, the Director of the operating room complex since 1988 stated in her evidence that there had been staffing problems following the Appellant's return from his suspension including an excess of sick calls and changes of room assignments. She felt that problems had developed with both morale and cohesion so that she feared it might ultimately affect patient care. She stated that all incidents were not reported and that she had relayed none to the Administration. In cross-examination, Mrs. RK said that she was unable to comment on the Appellant's involvement with inservice education for the nurses since it was arranged by the head nurse. She felt that, while there had been some improvement in the Appellant's performance after April 1990, the nurses were afraid to work with him. She could only remember two nurses of the complement of thirteen who had asked to be rescheduled because of postings with the Appellant and stated that no one, on direct questioning, had admitted that they had taken a sick day because of being assigned to a room where the Appellant would be operating. Overall, she said that working relations were good. In reply to questions from the Panel, Mrs. RK stated that the Appellant did have a significant affect on morale. Regarding incident reports, she assured the staff that something would materialize from their complaints but they stopped sending in reports after seeing no action.

Ms. C, the Chief Executive Officer of the Kitimat General Hospital for the last three years, gave evidence that the Appellant had not submitted an application to her institution although he had made inquiries. She had also been appointed the agent of both the Terrace Regional Health Care Society and the Prince Rupert Regional Hospital, carrying with her information that the Terrace Regional Health Care Society had not received an application while the Prince Rupert Regional Hospital had received an application which had been placed in the inactive file because there had been no response to requests for letters of reference. Much was made of the matters concerning admission of evidence of a collateral nature but the Panel accepted the evidence and they accepted Ms. C's appointment as the agent of the

other two institutions. However, it is the opinion of the Panel that little, if anything turned on the matters submitted regarding the applications which were or were purported to be sent to these institutions or their Credential Committee Chairmen. The Panel did not feel that issues about these matters caused concern to the members of the Panel in relation to the Appellant's credibility.

Mrs. Z, the President and Chief Executive Officer of the Hospital stated that all applications for privileges pass through her office. She considered the application of the Appellant to be complete on May 14 and stated that her next involvement with it was at the Medical Advisory Committee meeting of August 26, 1992 which she attended but where she did not take part in discussions. At the August 31st meeting of the same committee, she did discuss the matter of destruction of one ballot. The committee had decided to hold a vote by closed ballot. One of the committee members, Dr. Mc had to leave the meeting shortly before the vote was called but left his completed ballot. She chose to destroy the ballot since Dr. Mc had not attended the entire meeting.

Mrs. Z also attended the meeting of the Board of Trustees on September 1, 1992 as an ex-officio member but, since the Board of Trustees decided to hold a ballot by show of hands, the ex-officio members left the meeting before the vote. The following day, on learning of the results, she notified Mr. Hinkson that the Appellant had not received an appointment.

Mrs. Z stated that she is unaware of any notice that the Appellant was not to be allowed on the hospital grounds. As well, Mrs. Z commented that she had been appointed to her position after the Appellant's departure so had not been in the Hospital when he was on staff.

In cross-examination, Mrs. Z stated that she was aware of nine complaints having been made about another orthopedic surgeon in the last twelve months. She stated that she did not attend the meetings of the Medical Credentials Committee on June 15, 22 and 30, 1992. She did not notify either of the solicitors involved about those meetings nor did she notify the Appellant. She stated that Dr. W had visited the Hospital during the first part of July to do an operational review. He was on site for one day and submitted a report which was given to the members of the Medical Advisory Committee at their August 26th meeting. Mrs. Z agreed that some members of the Medical Advisory Committee not in attendance at the August 26th meeting were present on August 31st and voted despite not being at the earlier meeting. She recognized that Mr. Hinkson had attended a portion of the August 31st meeting and that Dr. Mc had been present at all times when Mr. Hinkson was there. While she confirmed her evidence regarding the destruction of Dr. Mc's ballot, Mrs. Z did not consider the propriety of the two members who had been absent on August 26th voting at the August 31st meeting. The vote to advise the Board of Trustees not to grant the Appellant privileges was six to five. She knew that the period from the application (May 14th) to the meeting of the Board of Trustees (September 1st) was 116 days and she could not recall such a delay for another applicant. In reexamination, Mrs. Z agreed that there was the summer vacation period to consider as well as delay due to physician action in relation to problems with the provincial government.

Dr. RM, a pathologist at the Hospital working in conjunction with a private firm supplying services to other hospitals, has been a member of the medical staff of the Hospital since 1980, usually as a Visiting Consultant although he was on the Attending Staff from 1985 to 1988 and was returned to this category in the summer of 1991. Dr. RM is the Vice-chairman of the Medical Advisory Committee and chaired the two August meetings. He stated that the Appellant's application was treated in the same manner as others. He also noted that Dr. D, the Chairman of the Medical Advisory Committee, had excluded himself because he was seen to be biased. As well, he thought that Dr. R did not attend for the same reason. A quorum was reached at the meetings. As chairman, he had decided not to vote unless required to because of a tie vote, a situation which did not develop. The Appellant and Mr. Hinkson attended both meetings. After presentation of material at the first meeting, it was felt that further information was needed as was legal advice so the second meeting was arranged with Ms. Dillon in attendance. Dr. RM stated that there was a quorum present and he was unaware of any procedural irregularities. Dr. RM attended the meeting of the Board of Trustees on September 1 only to report on the vote, after which he left the meeting. It was at that meeting that he realized, following comments by Mr. Hinkson, that, two members of the Medical Advisory Committee who had voted at the August 31st meeting had not been in attendance on August 26th.

In cross-examination, Dr. RM stated that he perceived the role of Ms. Dillon as that of the Hospital's solicitor who was there to give advice and said that she did not advocate a position. In regard to destruction of Dr. Mc's ballot, Dr. RM stated that Dr. Mc had left twenty minutes before the vote had been called but he could not remember who had suggested its destruction. He believes that there has been substantial discomfort within the Administration of the Hospital concerning the Appellant. It was Dr. RM's testimony that he understood that Dr. B had thought better of getting an application form for the Appellant and therefore did not ask for one. He "learned" this at the Medical Advisory Committee meeting while Mr. Hinkson and the Appellant were present.

Dr. R had given his testimony by deposition on December 11, 1992 since he was to be away during the first part of the hearing. It was agreed that this would constitute his testimony and cross-examination but Dr. R attended the February portion of the hearing to answer questions from Panel members. Dr. R is an employee of the Hospital in the position of Vice-president of Medicine, a position he has held since July 1990. Prior to that he had been Chief of Staff. He reviewed the matter of the category of Provisional Staff, stating that the Appellant's application would not be considered a new application but noted that the Appellant had requested consideration in that specific category. It was Dr. R's opinion that one would not expect to remain in the category of Provisional Staff for more than one year. He also reviewed the Appellant's appointment record.

In the taped testimony, Dr. R stated that, considering the differences between Dr. B's and the Appellant's perceptions regarding the request for an application form and the Appellant's applications for northern hospitals, the matter of credibility was a major consideration regarding the Appellant's application. He also said that two of the orthopedic surgeons in the hospital do not wish to work with the Appellant.

In cross-examination Dr. R agreed that the suspension of the Appellant in April 1990 and the two-year period of probation had come about by agreement between the Appellant and the Board of Trustees. He was unable to recall any complaints about the Appellant following the April 1990 suspension except one from the Head Nurse in the Emergency Department regarding lack of follow up of a patient, a matter about which no action had been taken and no comment made to the Appellant. The only other complaint was the one which lead to the Appellant's suspension in February 1991 and was the subject of the previous Medical Appeal Board hearing and the Supreme Court decision of March 2, 1992. Dr. R agreed that he knew Dr. B had requested an application form for the Appellant without indicating for whom the form was being sought. He also stated that the Appellant's application was being treated as a reapplication, at the Appellant's request, commenting that no one would suggest he should apply for Active Staff status, given his history. Dr. R was at the Medical Advisory meetings in August 1992 as an ex-officio non-voting member.

Replying to members of the Panel, Dr. R said that a departmental structure has been developing in the Hospital over the last three or four years, that the orthopedic surgeons are within the Department of Surgery and the Chief of the Department is Dr. DS. The departments have now developed to the point that any complaints about a member of medical staff will go to the Department Chief. Development of this line of authority is recent since, in the absence of a job description or remuneration, there was a reluctance on the part of the new Departmental Chiefs to become involved. Dr. R stated that, since May 1990, he is unaware of any complaints about the Appellant originating from the wards.

Mr. Hinkson then reviewed the departmental structure and introduced a question regarding nursing lines of authority. A copy of a page from the "Communications Manual of Nursing Staff" from Ward 2 North, the surgical ward, was presented. The source of the photocopied sheet was questioned and Dr. R was directed to attempt to find the source and return with it the next day. He denied instructing a nurse to tell her staff not to talk to the Appellant's lawyer.

On his return for completion of the examination, Dr. R produced the Nursing Communication Book from which the note had been copied and stated that the note had been written in the book by the Head Nurse of Ward 2 North, on instruction from her superior.

Mr. P, a solicitor practising in Surrey, has been on the Board of Trustees since 1989 and became Chairman in June 1992. He was present during discussions of the 1990 suspension of the Appellant and confirmed that the Appellant was to follow the suspension with a two-year probationary period during which no difficulties with his behaviour would be tolerated. Mr. P was unaware whether the three-monthly reviews had taken place. It was his evidence that the March 1990 meeting of the Board of Trustees had not accepted a negotiated agreement but instead placed the one month plus one day suspension to be followed by the probationary period and that the Appellant had not appealed this decision.

Mr. P attended both of the August 1992 meetings of the Medical Advisory Committee. He said nothing at the first meeting but at the second asked that the Medical Advisory Committee submit written advice for the September 1 meeting of the Board of Trustees. He was aware of the Appellant's concerns about the presence of some members at the second meeting who had not attended the first.

In cross-examination, Mr. P said he was not concerned about the potential of voting irregularities at the meeting of August 31, 1992 since the Medical Advisory Committee only advised the Board of Trustees which also obtained advice elsewhere. Regarding the April 1990 suspension, he was unaware if there was a signed agreement between the Appellant and the Hospital. Regarding his knowledge of Dr. B's role, the witness stated that to his knowledge Dr. B and the Appellant told different versions of the story; he had not been told that Dr. B had lied and that the Medical Credentials Committee were unaware of the dishonesty.

Evidence for the Appellant began with Dr. FC as the first witness. Dr. FC, a Family Practitioner on staff at the Hospital for thirty-four years, has held virtually every committee position at the Hospital at one time or another and has been a member of the Patterns of Practice Committee of the British Columbia Medical Association for over twenty years. He was pleased when the Appellant came to Langley originally since the Hospital had been served by orthopedic surgeons from New Westminster prior to that. The Appellant brought new techniques to the Hospital and taught both nurses and referring physicians, in Dr. FC's opinion. He was unable to recall any time when the Appellant had verbally abused any staff.

Dr. VP also a Family Practitioner on staff for the last fourteen years, has referred her patients to the Appellant by preference. She also stated that her husband is the Appellant's accountant and they do meet socially. Dr. VP does most of her own surgical assists and finds the atmosphere in the Appellant's operating room to be relaxed. She has not seen him belittle any nursing staff and does not consider that his behaviour is a problem.

DM, a licensed practical nurse who has worked at the Hospital either as an orderly or a practical nurse for seventeen years, appeared under subpoena. It was he who supplied the written material from the Ward 2 North Nursing Communication Book which read:

> If lawyers call you for information about [the Appellant], please do not talk to them, under any circumstances. One of the lawyers is very persistant (sic) and you may find that you have to hang up on her. If you do get called, please let me know right away – call me at home if you have to. It is very important that a) you do not speak to the lawyer and b) you let me know you have been called. Theoretically, your phone numbers should not be available to them, however, they could call the ward.

Mr. DM has known the Appellant since his arrival at the Hospital, at which time he (Mr. DM) worked as an orderly in the operating room. He was aware of the 1990 suspension and said that the Appellant was more subdued upon his return to the

Hospital in May 1990. He felt that the Appellant was very considerate of his patients and he has not observed him belittling nursing staff. In cross-examination, Mr. DM stated that he saw the notes in the Nursing Communication Book after talking to Mr. Hinkson and then told the Head Nurse that he would talk to whomever he wished, following which the Director of Nursing came to see him about the matter. Mr. DM could not remember a comment in the book in July 1992 requesting that anyone receiving a subpoena let the supervisor know; about that time the ward was the subject of a case in trial regarding an employee sexually abusing a patient.

DH, a registered nurse since 1963, and a nurse in the operating complex, also appeared under subpoena. She has often worked with the Appellant and gets along well with him. She has no criticism of him.

JC, currently a Recovery Room nurse and at the Hospital since 1976, stated that Mrs. RK had asked her, at the end of November 1992, not to talk to the Appellant's lawyer saying that the instructions had come from the Hospital's solicitor. She too has enjoyed working with the Appellant and has not seen him berate any nurses. JC last worked regularly in the operating room four years ago but does still occasionally. She also agreed that her daughter has worked for the Appellant in the past. She perceives no change in the smoothness of operations in the complex which she can relate to the Appellant's absence.

Dr. BC, a Family Practitioner for over eleven years and on staff at the Hospital, has referred patients to the Appellant and probably still would. He recalls no unhappy circumstances in the operating room in the period between May 1990 and February 1991. He does not believe that the Appellant is racist. He has referred patients to the Appellant when the Appellant is not on call if the patient had a problem with his hand that might require surgery.

MS, a registered nurse working on ward 2 North for the last fourteen years, also appeared under subpoena. She had no problem with the Appellant following his return from suspension and did not find his behaviour offensive. In fact she enjoys his sense of humour and would have no difficulty working with him. She read the entry in the Nursing Communication Book after speaking with the Appellant's lawyers and thought she might be made to feel uncomfortable if she appeared as a witness, although she did not fear for the security of her job. In cross-examination and examination by Panel members, Miss MS repeated that her anxiety about appearing related to the potential of problems with her superiors. She has experienced no repercussions.

PF, a sales representative for an orthopedic supply firm who frequently attends operative procedures in the Hospital and at other hospitals in the province, gave evidence by deposition, under subpoena. It was his evidence that the Appellant was considerate of his patients and of staff. He would take pains to explain procedures to patients and, as well, made significant efforts to teach nursing personnel about the intricacies of equipment which Mr. PF sold to the Hospital. Mr. PF had supplied some of the materials for demonstrations.

The Appellant was examined in detail by Mr. Hinkson. He reviewed his appointment record and also stated that he had Visiting Consultant status at the Peace Arch Hospital which included operating room privileges for patients who required emergency procedures. He has continued to work at the Peach Arch Hospital. He is anxious to return to the Hospital and is convinced that he cannot obtain an appointment elsewhere.

The Appellant stated that the terms of his 1990 suspension together with the probationary period had been developed by agreement through his counsel. He felt that, after his return in May 1990, he tried not to be off-hand with people and avoided any attempt to overcome any "roadblocks" alone so as not to upset anyone. The Medical Credentials Committee was to meet with him every three months but never did, despite him speaking to members three or four times.

In reply to evidence from others, the Appellant stated that he had not insulted Dr. A or any of the nurses since April 1990 and has often worked happily with Mr. DC. He considers the surgeon and the anaesthetist to be co-captains in the operating room, realizing that others involved are important members of the team.

He confirmed that when Dr. B had failed to produce an application form a Mr. Roos, one of his lawyers, did obtain a package of material from the Administration but it contained a new application form instead of a reapplication form so he took a reapplication form from copies of an exhibit used at the Supreme Court hearing. Dr. M had agreed to its use. It was the Appellant's evidence that Dr. B had stated that he had been told that no one was to receive a form that would be given to the Appellant.

Referring to the second affidavit which he had signed, the Appellant said that it was in response to Dr. R's affidavit. In it, he recounted his impression of Dr. B's attempts to get an application form as he had heard them. He also reviewed matters surrounding his comments about attempts to obtain positions at other institutions, discussions which are complicated, and which this Panel considers bear no weight on our decision.

The Appellant stated that he thought he should give some inservice talks following his April 1990 absence and gave many small ones as well as a significant one on instruments used in knee surgery. As well, at Mrs. RK's request, he prepared a new operating room booking card.

In cross-examination, Ms. Dillon explored the Appellant's reapplication form and his failure to complete it initially. It was the Appellant's evidence that he had never previously filled out a request for either obstetric or anaesthetic privileges nor did he comment on any special training required for Emergency Department privileges since that only pertained to Family Practitioners. He denied making any inappropriate comments to anaesthetists or nurses following April 1990. The Appellant felt that his style had changed as a result of the 1990 suspension and, particularly, he thought he was more helpful and considerate.

He stated that he had several conversations with Dr. M through the late spring of 1990 and took notes of some. He had two important telephone conversations with

Dr. B, one when Dr. B said he could not get the application forms and the other, which the Appellant presumed was the more accurate, when Dr. B confessed that he had not been honest initially.

It was the Appellant's opinion that the process of his latest suspension was political and motivated by Dr. D and Dr. R but certainly not based on his activities. It was only after listing the attendees, following the two Medical Advisory Committee meetings that he realized that two members who had voted were not present at the first meeting.

In response to a question from the Panel, the Appellant stated that there was a great deal of animosity between Dr. D and himself. Ms. Dillon stated that the Hospital had carefully avoided any involvement of Dr. D in the decision-making process.

In argument, counsel for the Respondent stated that the position of the Hospital was that there had been a progressive history of problems with the Appellant over the years so that another probationary period was not appropriate. She reviewed the categories of privileges as defined in the new Bylaws. In submitting material from other situations which she felt were parallel and where the burden of proof of inadequacies in an employee was much less if the employee were in a probationary period rather that being one of long-term service, she gave as the leading case *re: Cassiar Asbestos Corp. Ltd. and the United Steel Workers Local 6539,* July 25, 1975 reported in 10 L.A.C. (2d). She was unaware of any cases previously before the Medical Appeal Board where a provisional appointment status was in issue. Ms. Dillon considered it was important to consider prior conduct and felt that the Hospital is under no obligation to provide an additional probationary period. It was her contention that the Appellant is the master of his own destiny.

In regard to the Dr. B situation, Ms. Dillon stated that the testimony of Dr. B should be accepted over that of the Appellant recognizing that Dr. B's comments may put him in jeopardy. She considered that Dr. B appeared a truthful man.

It was her contention that the Appellant knew the Bylaws of the Hospital but ignored them as demonstrated by the manner in which he completed his reapplication form. As well, he also has a long history of difficult conduct. She reminded the Panel of Dr. W's testimony about disruptive physicians and how their behaviour can result in a level of tolerance so that problems miss attention. She felt that the Appellant has not improved his behaviour materially, a matter of particular importance since he was in a staff category where the duration of appointments is limited.

Mr. Hinkson began his submission by responding to Ms. Dillon's criticism of the Appellant's comments regarding the Hospital and Dr. R. It was his contention that, if there was any question regarding the Appellant, the Hospital automatically considered that the Appellant was wrong. He stated that the Appellant had not trivialized his suspension. Since the decision of Mr. Justice Hall, the Appellant has been treated badly at every turn.

He reminded the Panel of the focus demanded by the decision of Mr. Justice Hall: that the removal of privileges in February 1991 had been based on an alleged incident in December 1990 which had not been assessed by due process. Since then, the Hospital has refused to take the Appellant back on staff. He considered that since the Hospital had failed to expel the Appellant by one method it was now seeking any means to avoid granting privileges. Mr. Hinkson considered that there had been no concrete evidence of any problem with the Appellant since April 1990 but that the Hospital had come with a series of allegations and delayed handling the Appellant's application by refusing to ignore allegations of earlier problems, despite being ordered to do so by Mr. Justice Hall. He felt that the application process had been nothing better than a charade, citing as an example the return of the reapplication form because every blank had not been completed and the delay of consideration of the application by the Board of Trustees until near the expiry of the time limit defined in the *Hospital Act Regulation*s.

Mr. Hinkson stated that Dr. B should not be admired for honesty since he had only told the truth when he was "backed into a corner." He also considered that there were irregularities in the August 31, 1992 Medical Advisory Committee meeting which may well have affected the decision it reached. In commenting on the obvious polarization within the Hospital, it was Mr. Hinkson's contention that the Hospital was in a sad state when it had to remove one of the medical staff from influencing decisions because of his strong bias. As well, Mr. Hinkson suggested the note in the Nursing Communication Book was despicable and questioned the right of the Hospital to make such statements.

The matter of the discrepancy between the Appellant's and Dr. B's versions about obtaining the application form and its influence on the Medical Credentials Committee was reviewed. He stated that, while the truth may not have been available for the last meeting of the Medical Credentials Committee, it was available at the time of the meetings of the Medical Advisory Committee and Dr. R had failed to communicate it.

It was counsel's contention that the witnesses for the Hospital had offered no evidence of difficulties with the Appellant since April 1990 and that no complaints had been filed and reported to Dr. R. There was no evidence of interpersonal difficulties. In contrast, he stated to the Panel members that there had been a number of witnesses, representing a cross-section of personnel, stating positively that there were no problems at all with the Appellant.

Mr. Hinkson suggested that the reality of the situation was that there is no problem with the Appellant and the Hospital, despite looking everywhere for evidence, has demonstrated none. He requested that the Appellant be returned to the Hospital to complete his two year probationary period with a mandate to the Hospital that it cease looking for problems. The Appellant should not be answerable to either Dr. R or Dr. D but only to someone who is fair.

In response, Ms. Dillon suggested that Mr. Hinkson's argument had been filled with hyperbole. She denied that the Hospital was carrying on a vendetta and, quoting one of her witnesses, said that the Hospital's position was that there are "good

days" and "times when it was hell" with the Appellant. She felt that he should be considered a disruptive physician and felt that Mr. Hinkson's suggestion that a period of probation be considered with removal of the Vice-president of Medicine from involvement in supervision was impractical as well as inappropriate.

This Panel has considered the case with attention to the past history as presented and the strictures placed by Mr. Justice Hall that the Appellant be treated as any other physician would be.

It is our firm belief that the Appellant has been treated unfairly by the Hospital which did not approach his application in a neutral and cooperative manner or in the spirit of Mr. Justice Hall's direction. There was no reason presented for failure to return his privileges following Mr. Justice Hall's original decision except on the formality that his probationary privileges had expired by March 1991 and were not renewed. The Hospital was obstructive and clearly looking for any possible way to keep the Appellant from returning once the original decision of the Medical Appeal Board was overturned.

There has been no substantiated evidence of misconduct since April 1990 and it is clear that the three-monthly reviews mandated by what we consider an agreement between the Board of Trustees and the Appellant in March 1990 have not taken place. The responsibility for this rests with the Hospital. The issue regarding lack of credibility based on the potential of misrepresentation about applications by the Appellant to other hospitals we consider, while not collateral, to bear no material influence. Of far more importance are two situations which we find to be far from satisfactory:

1. The first is the failure of Dr. R to notify the Medical Advisory Committee of Dr. B's false statement to the Appellant which clearly resulted in the remarks placed in the Appellant's second affidavit. This is disgraceful behaviour by a physician charged with administrative responsibility. He should be neutral and honest.

2. The second concerns the comments placed in the Nursing Communication Book stating that no discussions be held with the Appellant's lawyers. Direction for this message clearly came from a higher level in the administrative hierarchy than the Head Nurse and it is an unacceptable action.

The Hospital has been at fault in not granting Active Medical Staff privileges to the Appellant in the past. If he sees "promotion" to this category as something to be avoided since responsibilities to the Hospital would be added as a result, the Hospital should not have let a major user of the facilities avoid his responsibilities. The Appellant should have not only accepted these responsibilities but actively sought them. The Hospital would have us agree that the Appellant has been on Provisional Staff or its equivalent far too long and, since they suggest that he is not suitable for Active Staff, further Provisional Staff privileges should not be granted. The Appellant has previously been appointed in categories which were acceptable to

the Hospital for indefinite periods. Since the Bylaws of the Medical and Dental Staff have been recently changed a new category, that of Provisional Staff with an entirely different connotation, has been developed and the Hospital leans on the idea that it is a time-limited category. It may be for new appointees, but when someone's long held appointment category has been "rolled into" the new category, such a stricture should not be place on the long-term appointee. Manipulation of the categories for such purposes as removal of those physicians that a hospital does not wish to keep on staff, for whatever reason, is not proper and cannot be allowed.

We believe that the Appellant's situation is not one which can be equated with the usual probationary appointment in a "job" and will not consider it in such a manner. Case law regarding employees who are on probation does not pertain in this specific case.

As a result of the actions of the Hospital and its failure to be fair in its response to the directions of Mr. Justice Hall, the Appellant has suffered greatly and wrongly. His career has been in jeopardy, his health has been damaged and his financial situation greatly impaired. There are many cases reported which recognize that removal of a person's ability to make a livelihood is a very serious decision to make and only to be made justly. The Hospital should have seen that the Appellant's privileges had been removed without cause and restored them.

The Panel directs that the Hospital appoint the Appellant to the Active Medical Staff immediately.

Dated at Vancouver, British Columbia the 10th day of March, 1993.

M. Graham Clay, M. D.

Michael D. Moscovich, M.D.

A. Harris-G. Johnsen, L.L. B.