

Key decisions in 2020 impacting hospital privileges and the conduct of administrative proceedings

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Authors: [Aislinn E. Reid](#), [Hannah Kingdom](#)

As we enter another year of unique challenges for hospitals and health care organizations, we review below key decisions made in 2020 which impact hospital privileges and the conduct of administrative proceedings moving forward.

Given that the [emergency credentialing order](#) is no longer in place, hospitals must now return to normal practices for their credentialing cycles. In so doing, hospitals should be mindful of the following points highlighted in recent decisions reviewed below:

- inappropriate conduct alone may be sufficient to revoke privileges;
- a pattern of unacceptable behaviour jeopardizes patient safety and quality of care;
- new applications for appointment must be carefully considered and any indication of conduct concerns or disciplinary action should be investigated;
- trust and confidence among health care team members are necessary components of the delivery of safe and quality patient care; and
- judicial review of ongoing proceedings before the Health Professions Appeal and Review Board (the HPARB) is not available absent exceptional circumstances.

Inappropriate conduct alone can result in revocation of privileges

In *Tenn-Lyn, M.D. v. Trillium Health Partners and Talwar v. Grand River Hospital St. Mary's General Hospital*, the HPARB affirmed decisions of hospital boards to deny physicians' reappointment on the basis of complaints about conduct with colleagues and patients, even though the physicians' clinical knowledge met or exceeded requirements. These decisions follow the Divisional Court of Ontario's 2017 decision in *Gupta v. William Osler Health System*, in which the court made it clear that even where a physician's competence is not in question, misconduct may result in revocation of privileges or a refusal to reappoint a physician.

In *Tenn-Lyn*, the HPARB found that the hospital board's decision was appropriate, and confirmed that even where a physician's competence is not in issue, conduct is relevant and can lead to a decision not to appoint or reappoint a physician. The HPARB reaffirmed that past conduct of a physician can justify revocation of privileges. The HPARB also found that Dr. Tenn-Lyn's failure to improve and her pattern of behaviour were a risk to patient safety and jeopardized patient care, noting that teamwork in a hospital setting is a fundamental necessity for patient welfare.

In *Talwar*, the HPARB confirmed the non-renewal of Dr. Talwar's privileges based on his pattern of disruptive behaviour (including a series of complaints regarding his colleagues

and hospital staff and administration), and the fact that there was no indication that his conduct could be remediated. Despite concerns raised regarding Dr. Talwar's clinical skills, the HPARB noted that he had practiced for many years with few adverse incidents. Dr. Talwar's conduct nevertheless led to a complete breakdown in the necessary trust and confidence that must exist among physician colleagues in order to deliver effective patient care.

Divisional Court affirms the HPARB's powers to control its process

The Divisional Court of Ontario dismissed a physician's application for judicial review of an HPARB decision on a motion brought prior to the commencement of the HPARB appeal.^[1] The Court held that the motion was premature.

In its decision, the Court made it clear that absent exceptional circumstances, the court will not interfere with an ongoing HPARB (or other) administrative proceeding. Exceptional circumstances include where there is a fundamental failing of justice or a serious legal error that would make the administrative process inherently unfair. Without these exceptional circumstances, parties cannot proceed to the court system until they have concluded the administrative process.

The Court also highlighted the HPARB's very broad mandate and powers to conduct the appeal and control its process, noting that if the alleged conflict of interest became manifest at the HPARB appeal, the HPARB could revisit its ruling.

For more information on any of the issues discussed above, or on other health-related matters, please contact one of the authors.

[1] 2019 ONSC 5427