

## Divisional Court releases precedent-setting decision regarding hospital privileges

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On July 18, 2022, the Divisional Court released its decision in *Kadri v. Windsor Regional Hospital* (the Decision),<sup>[1]</sup> representing a complete victory for Osler's client, Windsor Regional Hospital (WRH or the Hospital).

In a precedent-setting decision for hospital privileges cases, the Divisional Court made multiple key findings which emphasize that non-compliance with hospital policy justifies the revocation of physician privileges. Among much else, and as set out further below, the Divisional Court held that:

1. "No proper health care system could run on the basis that where a doctor does not agree with hospital policy, he or she is free to act on his or her view of how things should be done";<sup>[2]</sup>
2. "On its face, behaviour directed at, having the object of, or effecting the disruption and undermining of established hospital policy by a physician, (a member of its Professional Staff) must be enough to withdraw his or her privileges";<sup>[3]</sup> and
3. "The undermining and disrupting the staff is enough to support a decision to refuse the renewal of a physician's privileges".<sup>[4]</sup>

Citing the bard himself, the Divisional Court held that "It is the actions, the conduct and behaviour of Dr. Albert Kadri in response to the new Model of Care which were the cause of his loss of privileges. The loss of his privileges was not the result of a new Model of Care ...To borrow from Shakespeare, Dr. Albert Kadri was hoist by 'his own petard', that is to say, by his own conduct."<sup>[5]</sup>

### Act 1: The Hospital Board Hearing

The Shakespearean reference is apt; the Decision is the latest in a years-long dispute and multiple proceedings regarding Dr. Kadri's privileges at WRH.

In 2017, following the recommendations of an external review endorsed by the Ontario Renal Network, WRH implemented a new Model of Care for the Hospital's Renal Program (the Model of Care). In large part because of his own financial motivations, Dr. Kadri objected to the Model of Care and undertook a campaign to resist and disrupt the implementation of the Model of Care, which the Divisional Court found amounted to a "complete and abject refusal by Dr. Albert Kadri to accept what was, by the time they were sent, the established policy of

the Windsor Regional Hospital".<sup>[6]</sup>

In response to this disruptive conduct, on January 15, 2019, the WRH Board of the Directions adopted the recommendations of the Medical Advisory Committee (the MAC) that Dr. Kadri's application to the Active Staff Category of the Professional Staff be refused/denied, that his privileges at WRH be revoked, and that the immediate mid-term suspension of his privileges continue pending the exhaustion of his rights of appeal under the PHA (the Board Decision).

## Act 2: The HPARB Appeal

The Health Professions Appeal and Review Board (HPARB) conducted a hearing *de novo* spanning 37 days, beginning on November 21, 2019 and ending on January 21, 2021. After reviewing the testimony of 48 witnesses and thousands of pages of documentary evidence, the HPARB issued its decision on July 6, 2021 (the HPARB Decision).<sup>[7]</sup> The HPARB found that the behaviour, actions and conduct of Dr. Kadri justified the suspension and revocation of his privileges and that, as a result of that behaviour and those actions and conduct, he did not meet the qualifications and criteria for reappointment to the Professional Staff of the Windsor Regional Hospital.<sup>[8]</sup>

## Act 3: The Divisional Court Appeal

Dr. Kadri appealed the HPARB Decision to the Divisional Court, with his submissions focusing largely on what he said was a failure of the HPARB to consider the relative benefits of the Model of Care and his theory that the Model of Care was implemented in bad faith.

The Divisional Court wholly rejected these arguments, finding the matter in issue was "not the choice of model of care made by the hospital, the means of its selection or implementation. The issue is the behaviour of Dr. Albert Kadri and whether it justified the revocation of his privileges."<sup>[9]</sup>

The Divisional Court found that there was no evidence to support Dr. Kadri's allegations of bad faith, and that those allegations were a collateral attack on the Model of Care.<sup>[10]</sup>

The Court also rejected Dr. Kadri's argument that his "ethical" motivations for resisting Hospital policy were relevant, finding that "no health care system could run on the basis that where a doctor does not agree with hospital policy, he or she is free to act on his or her own view, ethical or otherwise, of how things should be done".<sup>[11]</sup> The Court firmly rejected the contention that "the hospital provides infrastructure so physicians can do whatever they believe is appropriate".<sup>[12]</sup>

Having squarely determined that the matter in issue was Dr. Kadri's conduct, the Divisional Court considered whether that conduct could justify a revocation of his privileges. The Court found definitively that it could, finding, among other things, that:

1. Dr. Kadri "worked openly and vociferously against [the Model of Care's] implementation, to the detriment of the hospital and the efforts of its staff to work within the framework that had been set to benefit and help its patients";<sup>[13]</sup>
2. "[T]he conduct and behaviour of Dr. Albert Kadri was such that it would, by its nature, be disruptive of the efforts to implement the new Model of Care and of a type that Dr. Albert

Kadri, as a senior and experienced member of the professional staff, would have known would be disruptive. This would support a finding that these actions were intended to undermine the efforts of the Windsor Regional Hospital and its staff".<sup>[14]</sup> and

3. "The presence of, or potential for, harm to patients from the behaviour of Dr. Albert Kadri is self-evident. Stress and confusion in the staff inherently put the patients at risk, not just the patients of Dr. Kadri but all the patients served by that staff".<sup>[15]</sup>

The Divisional Court concluded that "On its face, behaviour directed at, having the object of, or effecting the disruption and undermining of established hospital policy by a physician, (a member of its Professional Staff) must be enough to withdraw his or her privileges".<sup>[16]</sup> The Court reasoned that it is "fundamental to a physician's association with any hospital" that he or she be required to "adhere to its 'rules, regulations, vision and strategic plan'", without which " facility could not operate much less to the best advantage of its patients".<sup>[17]</sup>

## Conclusion

The Decision provides the clearest guidance from the Divisional Court to date on several key issues in physician privileging, including that: (1) the proper scope of the inquiry is the physician's conduct itself and the motivation for that conduct is irrelevant; (2) resisting or disrupting hospital policy is, on its own, enough to justify a revocation of privileges; (3) if a physician disagrees with hospital policy, their recourse is to practice elsewhere, not undermine the policy; (4) when considering harm to patients, the proper focus is not only on the physician's patients, but all patients in a system; and (5) undermining and disrupting hospital staff is enough to support a decision to refuse the renewal of a physician's privileges.

Osler was counsel to WRH for each of the proceedings referenced above. Although Dr. Kadri may seek leave from the Court of Appeal for Ontario to appeal the Decision, we do not expect any leave motion to succeed.

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[1] *Kadri v Windsor Regional Hospital*, 2022 ONSC 4016 (Div Ct) [Decision].

[2] *Decision* at paras 49, 58.

[3] *Decision* at para 67.

[4] *Decision* at para 127.

[5] *Decision* at para 116.

[6] *Decision* at para 29.

[7] *Kadri v Windsor Regional Hospital*, 2021 CanLII 57862 (ON HPARB) [HPARB Decision].

[8] *HPARB Decision* at paras 131 – 133.

[9] *Decision* at para 59.

[10] *Decision* at paras. 66 and 116.

[11] *Decision* at para 58.

[12] *Decision* at para 49.

[13] *Decision* at para 49.

[14] *Decision* at para 107.

[15] *Decision* at para 128.

[16] *Decision* at para 67.

[17] *Decision* at para 67.