

MATERIAL FOR
FRIDAY 10:45 a.m.
PROGRAMME

"ACCESS TO TRADITIONAL REMEDIES"

- Claude R. Thomson, Q.C.
Me. Michel Robert, c.r.

SUMMARY OF FACTS

The Hospital Procedures Act is a statute enacted to promote the central regulation of medical procedures performed in public hospitals. Pursuant to this Act, each public hospital is required to appoint a Procedures Committee. This Committee reviews on a regular basis the medical procedures being performed within the hospital and has the discretion to refer questionable procedures to the Hospital Procedures Board.

The Hospital Procedures Board, as established under the Act, is bound by the statute to review all matters referred to it by a Procedures Committee. The Act requires the Board to hold a hearing, to which the Hospital Procedures Committee and any licenced physicians in the Province that might be affected by the Board's decision with respect to a particular procedure can be made parties, on ex parte application. Where a large number of physicians are potentially affected, the practice before the Board has been to grant party status to the Procedures Branch of the College of Physicians, which then represents the interests of all physicians potentially affected.

The Hospital Procedures Act sets out a code of procedure for the Hospital Procedures Board at the hearing which it is required to hold. In particular, the following sections should be noted:

Section 53

Any licenced physician in the Province or any group of licenced physicians, may apply to the Hospital Procedures Board, prior to the commencement of a hearing, for status as a party to participate in a hearing.

Section 54

Parties to a hearing before the Hospital Procedures Board shall have the right to be represented by counsel and to participate fully in the hearing, subject to the discretion of the Board to limit the scope of its inquiry with respect to any particular medical procedure under consideration.

Section 66

A decision by the Hospital Procedures Board under Sections 53 and 54 is final, conclusive and, subject to Section 67, shall not be open to appeal, question or review in any court of law and no court of law shall consider an application that requires it to review the conduct or jurisdiction of the Hospital Appeal Board.

Section 67

Section 66 shall not be construed so as to prevent a court of law from entertaining an application, by way of appeal or review, solely on the ground that the Hospital Procedures Board has grossly abused its function pursuant to this Act so as to infringe or deny rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms, Constitution Act, 1981.

Joseph Wright is a physician at the Northern General Hospital. Dr. Wright recently became a Canadian citizen. Dr. Wright is a pioneer in the field of research relating to a breathing disease known as oxosis. He had developed a drug known as tyenomum for use in treating this disease. Several other physicians in the Province began to use the drug tyenomum in the treatment of oxosis and various other diseases. The drug has been found to have general ameliorative properties, much like aspirin.

Recently, there has been a growing concern regarding the side-effects of tyenomum. As a result, the Procedures Committee at the Northern General Hospital, along with several other hospitals in the Province, requested that the Hospital Procedures Board consider this procedure. The Board was immediately faced with a flood of applications for party status at the hearing. The Board met and heard submissions regarding the granting of party status at the pending hearing. The Board decided that in order to conduct the hearing in a proper and workable manner, representation would be granted to the College of Physicians to represent all concerned physicians. This decision was made notwithstanding the request by Dr. Wright for separate party status. Dr. Wright had argued that he had a special interest and concern and that he could not be effectively and properly represented at the hearing by counsel for the College.

The hearing proceeded notwithstanding Dr. Wright's objections and Dr. Wright was called as a witness by counsel for the College. Dr. Wright was asked to produce certain records relating to his research. Dr. Wright indicated that he would be willing to do so, but his research was conducted pursuant to a government contract which stipulated that only the Minister of Health could release such records, in accordance with the Research Act of the Province. Dr. Wright went further in his evidence to indicate that he could not properly explain the nature of the treatment procedure involving tyenomum without these results. Counsel for the College asked the Board to issue a subpoena to require the Minister of Health, or his representative, to attend and give evidence and to bring the research results. The Board indicated that as a matter of policy it would not issue such a subpoena.

The hearing continued and the Board subsequently released short reasons for its decision. In essence, the Board decided to prohibit the use of this treatment procedure in public hospitals on the grounds that the procedure involved an unnecessary risk and that more conventional and tested procedures were available, so as to render the use of tyenomum dangerous at this time. The Board indicated in its reasons that it was satisfied, on all the evidence, that it understood the procedure and the related research. In particular, the Board referred to its earlier ruling wherein it refused to subpoena

the Minister of Health and stated that after hearing all the evidence, it had become even more evident that subpoenaing the Minister was unnecessary.

Dr. Wright and the College of Physicians brought applications in the Divisional Court. Dr. Wright's counsel, in his application, included the grounds for review set out in the application by counsel on behalf of the College of Physicians relating to the refusal to subpoena the Minister of Health or his representative.

The Notice of Application for Judicial Review and relief pursuant to the Canadian Charter of Rights and Freedoms follows.

IN THE SUPREME COURT OF THE PROVINCE

(IN THE DIVISIONAL COURT)

IN THE MATTER OF the Judicial
Review Procedure Act,
1980;

AND IN THE MATTER OF the Hospital
Procedures Act, 1980;

AND IN THE MATTER OF the Canadian
Charter of Rights and Freedoms,
Constitution Act, 1981;

AND IN THE MATTER OF a Decision of the
Hospital Procedures Board, dated
June 20, 1982, denying
Joseph Wright status as a party
before a Hearing of the Hospital
Procedures Board that commenced on
July 4, 1982;

AND IN THE MATTER OF a Decision of
the Hospital Procedures Board, dated
July 6, 1982, refusing to subpoena
the Minister of Health of the Province,
or his representative, to bring to
the Hearing certain documents in his
control relating to the drug tyenomum;

AND IN THE MATTER OF a Decision of
the Hospital Procedures Board, dated
August 15, 1982, purporting to prohibit
the use of medical procedures involving
tyenomum in public hospitals in the Province.

B E T W E E N:

JOSEPH WRIGHT

Applicant

- and -

THE HOSPITAL PROCEDURES BOARD
FOR THE PROVINCE

Respondent

NOTICE OF APPLICATION FOR JUDICIAL
REVIEW AND ENFORCEMENT OF GUARANTEED
RIGHTS AND FREEDOMS UNDER THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

TAKE NOTICE that the Divisional Court will be moved at the City of Toronto on a date to be fixed by the Court, for an Order to quash the decision of the Hospital Procedures Board, dated August 15, 1982, or in the alternative, for a Declaratory Order declaring the Applicant's right to continue conducting medical procedures using the drug tyenomum, or in the alternative, for such further and other Order as may seem just, and for an Order granting such remedy as the Court considers appropriate and just in the circumstances as a result of the infringement and denial of the Applicant's rights and freedoms as guaranteed by the Canadian Charter of Rights and Freedoms, upon the following grounds:

- a) The Hospital Procedures Board erred in denying the Applicant party status at the Hearing relating to the medical procedures involving the drug tyenomum, given the particular interest and concern of the Applicant with regard to the said procedure;
- b) The Hospital Procedures Board erred in refusing to subpoena the Minister of Health, or his representative, to bring relevant records relating to research conducted on the medical procedures involving the drug tyenomum, contrary to the provisions of the Statutory Powers Procedure Act, the rules of natural justice and the duty to act fairly, the Board having exercised its statutory power of decision without the benefit of highly relevant

research results and having refused, as a matter of policy, to issue a subpoena;

- c) The effect of the actions of the Hospital Procedures Board was to go beyond reasonable limits in limiting the Applicant's right to pursue the gaining of his livelihood in the Province pursuant to Section 6(2)(b) of the Canadian Charter of Rights and Freedoms;
- d) The action of the Hospital Procedures Board further had the effect of unreasonably limiting the Applicant's right to life liberty and security of the person by denying him the opportunity to participate in the said Hearing as a party, by refusing to subpoena all relevant material for its consideration and by effectively denying him the opportunity to carry on the work to which he has devoted his career and from which he earns his livelihood.

AND TAKE NOTICE that in support of such application will be read the Affidavit of Joseph Wright, the exhibits therein referred to and such further and other material as counsel may advise;

AND TAKE NOTICE that if you wish to oppose this application, you shall file an Appearance on or before the date upon which the application is returnable;

AND TAKE NOTICE that in default of filing an Appearance, you may not be entitled to file any material on the motion.

DATED at the City in the Province this 22nd day of October, 1982 by Messrs. Cambridge & Oxford, Barristers & Solicitors, 997 University Street, City, Province, Solicitors for the Applicant.

TO: THE HOSPITAL PROCEDURES BOARD

AND TO: THE ATTORNEY-GENERAL FOR THE PROVINCE

IN THE SUPREME COURT OF the Province

(IN THE DIVISIONAL COURT)

IN THE MATTER OF the Judicial Review
Procedure Act, 1980;

AND IN THE MATTER OF the Hospital
Procedures Act, 1980;

AND IN THE MATTER OF the Canadian
Charter of Rights and Freedoms,
Constitution Act, 1981;

AND IN THE MATTER OF a Decision of the
Hospital Procedures Board, dated
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CHARTER OF RIGHTS AND FREEDOMS

CAMBRIDGE & OXFORD,
Barristers & Solicitors,
997 University Street,
City, Province.

Solicitors for the Applicant.