

## Letters of Reference to Remain Confidential

WILLIAM D.T. CARTER

ntario's highest court, the Court of Appeal has affirmed the public interest in having medical staff appointments made on the basis of the best information available. This information includes peer review information from colleagues whose letters of reference are to be treated as "confidential" and will not be made the subject of disclosure for the purpose of private civil proceedings such as an action for damages for defamation, even if the contents of the reference letters are uncomplimentary and result in the doctor, who is applying for medical staff appointment, being turned down.

In reaching this conclusion, the Court of Appeal was dealing with the case of Dr. Straka, an anaesthetist who had applied for active staff appointment at the Humber River Regional Hospital. As part of the process he was asked to provide names of colleagues familiar with his experience and standard of practice so that the Humber Hospital could obtain from these sources letters of reference which would enable the Hospital to fully evaluate the skills, character, etc. of the candidate. Such letters were meant to be "objective and forthright" and would be "held in the strictest confidence."

Although Dr. Straka was advised that the letters of reference supplied in his case were "negative" and would stand in the way of his appointment to the active staff, he accepted a locum tenens position and did not seek a hearing before the Humber Board of Directors, as he was entitled to do. After

commencing his practice as a locum tenens he brought court proceedings against Humber River Regional Hospital seeking disclosure and production of the "negative letters of reference" with the express intention of suing their authors for defamation.

In denying Dr. Straka's request, the Court reviewed the common law rules for the assertion of a successful claim for privilege, including the community interest in maintaining a relationship of trust between referees and the boards of public hospitals, and the negative effect of candor if reference letters were disclosed at large. Mr. Justice Morden speaking for the court said, "I have little difficulty concluding that members of the public would have a vital interest in the integrity and thoroughness of the methods hospital boards use in deciding whom to appoint to what positions in their medical staffs. The lives and health of members of the public is directly affected."

The decision still leaves it open for physicians to challenge unfavourable reference letters during the course of the medical staff appointment process. The usual route, outlined in the Public Hospitals Act involves a hearing before the board with a statutory right to review at the Health Professions Appeal and Review Board. In this setting, referees may have their opinions tested and challenged without the threat of defamation proceedings. Disclosure in this context may be necessary to ensure that the aggrieved applicant has a fair opportunity to contradict or explain unfavourable evaluations. Reference letters disclosed in the course of a hearing before a hospital board would be subject to the limitation that they could not be used for any other or "collateral" purpose, such as Dr. Straka was attempting.

William Carter is a senior member of Borden Ladner Gervais LLP's Toronto Health Care Law Group. He can be reached at 416-367-6173.