CITATION: West Grey (Mun.) v. South Bruce Grey Health Centre, 2025 ONSC 3193 (Brampton)
DIVISIONAL COURT FILE NO.: DC-24-00000035-0000
DATE: 20250529

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Stevenson SFJ, D.L. Corbett and M.G. Emery JJ.

B E T W E E N :	)	
	)	
Corporation of the Municipality of West Grey	)	*John F. Rook*, *David N. Vaillancourt and Ardita Sinojmeri*, for the Responding Party
Applicant / Responding Party	)	
	)	
- and -	)	
	)	
South Bruce Grey Health Centre	)	*Adam Stephens* and *Madeleine Dusseault,* for the Moving Party
Respondent / Moving Party	)	
	)	
- and -	)	
	)	
Attorney General for Ontario	)	*Susan Keenan,* for the Attorney General
	)	
Intervenor	)	**HEARD at Toronto:** November 13, 2024

REASONS FOR DECISION

Stevenson SFJ and Emery J:

[1] The applicant Corporation of the Municipality of West Grey ("West Grey") has brought an application in which it seeks judicial review of a decision made by South Bruce Grey Hospital Centre ("SBGHC") to relocate 10 inpatient hospital beds from its site in Durham to its sites in Kincardine and Walkerton (**"**the Decision**"**). West Grey seeks an order in the nature of *certiorari* to quash the Decision. It also seeks an order in the nature of *mandamus* compelling SBGHC to relocate the 10 inpatient beds moved to Kincardine and Walkerton back to its Durham hospital campus.

[2] SBGHC brings this motion for an order dismissing the Application for Judicial Review. SBGHC submits that the Decision is not amenable to judicial review and that this Court does not

have jurisdiction to hear the application. The Attorney General intervenes in support of the SBGHC position that the Decision is not subject to judicial review.

[3] For the reasons set out below, the motion is granted and the application is dismissed. The Decision was made by a private not-for-profit corporation that controls its internal management and allocation of resources to meet the performance standards expected of it as a public hospital. The Decision is not sufficiently of a public character to make it subject to judicial review.

BACKGROUND

[4] SBGHC is a multi-site public hospital with sites in Durham, Walkerton, Kincardine, and Chesley. It was formed in January 1998 when four public hospital corporations amalgamated to form SBGHC. At the time, there was concern at political levels that there would be closures of rural hospitals and there was a need to improve efficiencies. Since then, SBGHC has operated as a private corporation governed by its Board of Directors under the corporation's by-laws, the Ontario *Not-for-Profit Corporations Act* 2010, S.O. 2010, c. 15, (the "*ONCA*") and the *Public Hospitals Act* R.S.O. 1990, c. P.40, (the "*PHA*")

[5] Pursuant to ss. 1 and 12 of the *PHA* and ss. 2 and 4 of *Regulation 965 – Hospital Management,* a public hospital is governed and managed by a board of directors, which passes by-laws to provide for the management and administration of the hospital. The directors on SBGHC's Board of Directors are appointed or elected in accordance with SBGHC's by-laws.

[6] The provision of health services by SBGHC is highly regulated as it is for all public hospitals. They are subject to statutes and related regulations including the *PHA,* the *Connecting Care Act, 2019, the Excellent Care for All Act, 2010,* and the *Broader Public Sector Accountability Act, 2010.*

[7] SBGHC has filed two affidavits of Nancy Shaw giving factual background as context for this motion. Ms. Shaw has been the President and Chief Executive Officer of SGBHA since 2023. Ms. Shaw states that she has over 30 years of health care experience, 17 of them in hospital leadership roles. Ms. Shaw explained in her affidavit dated September 11, 2024 that public hospitals are funded by the government of Ontario from the top down to operational levels. The Minister of Health receives the financial appropriations from the government. The Minister of Health enters an accountability agreement with Ontario Health, which is a separate government agency, and it is Ontario Health that determines how funds are to be allocated between hospitals.

[8] Ms. Shaw further explained that Ontario Health will enter a contract with a given hospital known as a Hospital Service Accountability Agreement (an "HSAA"). It is the HSAA for a hospital that sets out the terms and conditions on which Ontario Health provides funding to that hospital. A hospital is therefore accountable to Ontario Health through an HSSA for efficient planning, which it must use to balance its budget and meet the performance standards expected of it.

[9] SBGHC has entered an HSAA with Ontario Health and must report to Ontario Health on its financial performance and its ability to meet various performance standards. However, SBGHC states that it operates independently with no day-to-day oversight by the Ministry of Health or by Ontario Health. It is the position of SBGHC and the Ministry of the Attorney General that SBGHC is solely responsible for its day-to-day management of its hospital sites, including the allocation of resources, without administrative control by any Ministry or agency.

THE IMPUGNED DECISION

[10] SBGHC had been experiencing a shortage of nurses at its four sites prior to 2024. These shortages led to 96 emergency department closures at its Durham site from April 1, 2023, to March 31, 2024. In March 2024, SBGHC decided to reduce emergency department hours at the Durham site from 24-hour coverage to the hours between 7 a.m. to 5 p.m.

[11] In April 2024, the nursing vacancy rate at the Durham site increased to 48%. On April 22, 2024, SBGHC's Board of Directors decided to relocate 10 inpatient beds at the Durham site to its sites in Kincardine and Walkerton, effective June 3, 2024. Patients from the Durham area needing inpatient care are now redirected to the nearest hospital site, approximately 30 kilometres away.

[12] SBGHC contends that it made this Decision to ensure that sufficient nurses are available to staff the emergency department at its Durham site. With the relocation of the inpatient beds from Durham to two of SBGHC's other sites, the same number of inpatient beds are still available at locations of the hospital where more nurses are available. SBGHC asserts that the timing of the relocation of the inpatient beds was due to the requirement in the nurses' collective bargaining agreement that summer schedules be posted by April 30th.

Position of SBGHC

[13] It is SBGHC's position that judicial review is not available to West Grey as this Court has no jurisdiction to review any decision outside the public law sphere pursuant to s. 2(1) of the *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1 (the "*JRPA*"). SBGHC submits that the Decision to transfer inpatient beds is not an exercise of state authority as the Decision in not of a sufficiently public character to bring it within the jurisdiction of this court.

[14] SBGHC submits that the decision to relocate inpatient beds from its Durham site was an operational decision of a private corporation. SBGHC asserts that this Decision is within the discretion of SBGHC's Board of Directors, and the Board was not required to obtain the approval of the Minister of Health or Ontario Health to make it. SBGHC further contends that s. 6.1 of the HSAA is not engaged. Section 6.1 provides that the hospital shall not transfer the provision of services if it would result in the hospital being unable to achieve its performance standards. SBGHC takes this position because its internal decision did not result in SBGHC's inability to achieve the performance standards described in the Schedules to the HSAA or the HSSA Indicator Technical Specifications. It contends that the performance standards are assessed at the level of the total SBGHC entity and that SBGHC is still able to offer the same number of inpatient beds at its other sites.

[15] It is SBGHC's position that there are no statutes or regulations that govern how internal decisions of an operational nature are made. It submits that SBGHC must meet certain standards under the HSAA, but it is up to the Board of Directors to determine how to achieve those standards independently of the Ministry of Health and Ontario Health.

[16] SBGHC also asserts that, given its Board's broad power and discretion to manage its own internal operations as a private corporation, it was not required to obtain the approval of the Minister of Health or Ontario Health with respect to the decision to move inpatient beds. It informed the Minister of Health and Ontario Health after the decision was made, as required. As such, this was a decision of a private corporation that is not subject to judicial review.

Position of the intervenor

[17] The Ministry of the Attorney General agrees with SBGHC that internal management and operational decisions made by the Board of Directors of a hospital corporation are not subject to judicial review. It submits that decisions of this nature are not exercises of state authority nor sufficiently public in nature to come within the scope of judicial review.

[18] The Ministry of the Attorney General submits that the Ministry of Health and Ontario Health provide oversight and funding, but they do not control the internal operations and day-to-day decision making of the hospitals as private corporations. The directors are not government employees or appointees. Hospitals are not Crown corporations or agencies established through legislation. The Ministry of the Attorney General submits that the Decision to move inpatient beds was not required by any legislation, regulation or government policy. The Decision of SBGHC's Board of Directors did not require the Ministry of Health's approval. It is the Ministry's position that the Decision of SBGHC as a private corporation was not an exercise of state power and not sufficiently public to come within the scope of judicial review. The Ministry submits that the motion by SBGHC should be granted, and the Application be dismissed.

Position of West Grey

[19] The primary affidavit filed in response to the motion was sworn by Dr. Mary Pillisch. Dr. Pillisch is a family physician at the Durham Medical Centre, with privileges to practice at the SGBHC. In her affidavit, Dr. Pillisch states that the Durham hospital is the only hospital in the Municipality of West Grey. She states that it plays a critical role in providing primary and emergency care to the municipality and surrounding area. Dr. Pillisch describes how the Durham hospital had a 24-hour emergency department and 10 inpatient beds before the decisions were made to shorten the emergency department hours and to relocate the inpatient beds.

[20] Four out of five doctors from the Clinic, including Dr. Pillisch, practice at the Durham hospital. Physicians from the clinic cover approximately 40% of the shifts at the hospital. The remaining 60% of the shifts are covered by locum physicians from outside the community.

[21] Dr. Pillisch states that SGBHC did not consult with physicians who staff the Durham hospital before the announcement was made in respect of the Decision.

[22] West Grey submits that SBGHC is a public decision maker and that the Decision to relocate the inpatient beds was a public decision that is subject to judicial review. West Grey submits that the Decision flows from the statutory requirements of the *Connecting Care Act, 2019* and that SBGHC is regulated, funded and overseen by the province. West Grey contends that these facts make the Decision an exercise of state power and sufficiently public to come within the scope of judicial review.

[23] It is West Grey's position that the Decision will have a profound impact on the local community and could lead to the closure of the Durham hospital. The Decision has led to a reduction in quality care for members of the community, many of whom are elderly. Dr. Pillisch has deposed that the Decision has resulted in one physician at the hospital announcing his departure by the end of 2024, and locum physicians refusing to staff further shifts beyond present commitments. It has also resulted in two out of town physicians who were contemplating a relocation to the community to cease relocation discussions. The Decision has therefore had a profound effect on the retention and recruitment of physicians to the Durham clinic and hospital. West Grey asserts that the Decision has resulted in a complete transformation of the Durham hospital which is a matter of great public importance.

[24] West Grey submits that under the *PHA* and its *Hospital Management* Regulation, the government has comprehensive control over hospital operations. Additionally, under the provisions of the *Connecting Care Act, 2019,* West Grey contends that the Ministry of Health controls funding and integration. It further submits that the HSAA imposes obligations on SBGHC to provide hospital services in accordance with policies of the Ministry of Health and requires robust reporting by SBGHC.

[25] As evidence of government involvement in the Decision of SBGHC, West Grey asserts that SBGHC was required to report each of the emergency department closures to Ontario Health. West Grey submits that Ontario Health was working closely with SBGHC to address the ongoing staffing and operational issues at the Durham location before the Decision.

[26] Taking all the evidence on record into consideration, West Grey asserts that the Decision was an exercise of state authority of a sufficiently public nature to bring it into the realm of public law and within the jurisdiction of this Court.

ANALYSIS

Basis for judicial review

[27] The jurisdiction of the Divisional Court to grant public law remedies is set out in s. 2(1) of the *JRPA*:

> 2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

[28] The Divisional Court is a statutory court, without inherent jurisdiction. The court has no jurisdiction to grant certiorari or mandamus aside from the powers provided in s. 2(1): see *Beaucage v. Metis Nation of Ontario*, 2019 ONSC 633, at para. 22.

[29] The purpose of judicial review is to ensure the legality of decisions made by the state. This purpose has been described by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 ("*Wall*") as the means by which the courts are able to supervise the use of state power and to ensure those individuals exercising authority in government do not overstep their legal authority. The Supreme Court defined judicial review as a public law remedy in these terms:

> [14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament" but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[30] The Supreme Court in *Wall* confirmed that judicial review is only available where two fundamental conditions are present: first, where there is an exercise of state authority, and second, where that exercise of state authority is of a sufficiently public character. Justice Rowe stated in *Wall* that even public bodies make some decisions that are private in nature and that such a decision is therefore not subject to judicial review. Judicial review enables the court to protect the rule of law by ensuring that the exercise of state power is based on a legal source: *Khorsand v. Toronto Police Services Board*, 2024 ONCA 597, at para. 63.

Decision of a public authority or private entity

[31] In keeping with the principles in *Wall* on the availability of judicial review as a public law remedy, the first condition requires that the decision under review must be an exercise of state authority.

[32] Counsel for West Grey referred to the recent decision of the Nova Scotia Court of Appeal in *Nova Scotia Health Authority v. Finkle and West*, 2024 NSCA 87 on the availability of judicial review of decisions made in the field of health care management.

[33] The issue before the Court of Appeal in *Finkle* turned on whether the Nova Scotia Health Authority ("NSHA") was acting under legislative authority when it acted on the hospital's recommendation to sanction two doctors. If it had that legislative connection, its decision was of a public nature and was therefore judicially reviewable. The Court held that the NSHA was established under the *Health Authorities Act* and that it was therefore established as the "provincial health authority." The Court held that sanctioning the doctors was not the exercise of a private power stemming from an employment relationship, as they were not employed by the NSHA. Instead, their hospital privileges were suspended by the NSHA as the public body enabled by statute to grant those privileges. The power to grant privileges and to take them away was therefore statutory, derived from the *Health Authorities Act* and its regulations.

[34] West Grey raises s. 30 of the *Connecting Care Act, 2019* as the legislative "nexus" that establishes the obligation of SBGHC to consult with Ontario Health about decisions for the allocation of resources. Section 30 reads as follows:

> INTEGRATION
>
> Identifying integration opportunities
>
> 30 The Agency and each health service provider and integrated care delivery system shall separately and in conjunction with each other identify opportunities to integrate the services of the health system to provide appropriate, co-ordinated, effective and efficient services.

[35] It is clear from the language of s. 30 that the legislation requires Ontario Health and each hospital to identify opportunities for the integration of health-related services. The *Connecting Care Act, 2019* does not provide that the transfer of hospital services from one hospital site to another in a health network constitutes an integration under the *Act*. The decision to transfer beds from Durham to other sites in the SGBHA was made on grounds particular to staffing and other operational issues, and not under s. 30 of the statute.

[36] The private nature of a hospital was examined by the Supreme Court in *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62. It was held by the majority of the court that the hospital in that case was an autonomous body. Despite providing a public service, its operation did not qualify *per se* as a government function for the purposes of the *Charter*. The Court went on to hold that the Vancouver General Hospital did not form part of the "administrative branch" of government just because it was incorporated to provide health care services to the public.

[37] The Court in *Stoffman* drew the distinction between ultimate or extraordinary decisions, and routine or regular control over functions of the hospital. There are matters that are routine or regular in nature such as policy decisions. In *Stoffman*, the renewal of admitting privileges was

controlled by the Board of the hospital and was not subject to government control, barring extraordinary circumstances.

[38] The first affidavit of Ms. Shaw was dated July 26, 2024 and describes how SGBHC was formed from the amalgamation of four hospitals pursuant to an Amalgamation Agreement dated January 1, 1998. Each of the four hospitals was a public hospital subject to the *Ontario Public Hospitals Act*. At the time, the Health Services Restructuring Commission that had been created by legislation in 1996 changed the landscape of public hospitals operating in Ontario through various mergers as well as closures to make the health care system in Ontario more efficient. Upon receiving the approval of the Minister of Health, SGBHC emerged as a private corporation governed by its own board of directors and has operated in that form for the past 26 years.

[39] From these guiding principles and the evidence given by Ms. Shaw, it is our view that SGBHC is a not-for-profit corporation having control of its own management. It is responsible for the allocation of its resources to meet the needs of the public it serves in Grey and Bruce counties.

Decision not of a sufficiently public character

[40] The Supreme Court in *Wall* recognized that private entities sometimes make decisions that have a broad impact on the public or have the appearance of a public character. The Supreme Court explained that this appearance does not transform the decision made by a private entity into an exercise of state power.

[41] Prior to *Khorsand*, the court would determine whether a matter fell within the scope of judicial review by applying the factors set out in *Air Canada v. Toronto Port Authority*, 2011 FCA 347. Those factors were set out in *Air Canada* for the court to apply when determining whether a decision was sufficiently of a public character to make it subject to judicial review:

a. The character of the matter for which judicial review is sought;

b. The nature of the decision-maker and its responsibilities;

c. The extent to which a decision is founded in, and shaped by law as opposed to private discretion;

d. The body's relationship to other statutory schemes or other parts of government;

e. The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity;

f. The suitability of public law remedies;

g. The existence of a compulsory power; and

h. An exceptional category of cases where the conduct has attained a serious public dimension.

[42] The Court of Appeal in *Khorsand* re-examined the applicability of the *Air Canada* factors when making that determination. In considering the approach for the courts to take in Ontario, Fairburn ACJO wrote that *Wall* does not preclude the use of the *Air Canada* factors for "teasing out" why the functional criteria of a decision are or are not met to determine if a decision is sufficiently public in nature. Fairburn ACJO accepted the view of the British Columbia Court of Appeal in *Strauss v. North Fraser PreTrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 that the *Air Canada* factors are merely guidelines when deciding whether a decision made by a public official or tribunal has a sufficiently public character.

[43] The Court in *Khorsand* went on to conclude that the *Air Canada* factors do not provide a strict checklist, but instead play a helpful role to focus the attention of the court and its reasoning process. However, the Associate Chief Justice emphasized that this methodology is applied in the following context:

> [75] This is all subject to one important caveat. *Wall* cautions against using the *Air Canada* factors to transform a private decision into a public one on the basis that a decision impacts or is of significant interest to a broad segment of the public. Rowe J. said the following, at paras. 20-21:
>
> > The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff v. New Democratic Party*, 2017 ONSC 3578, 28 Admin. L.R. (6th) 294 (Div. Ct.)], at para. 18; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29 (Div. Ct.)], at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.
> >
> > …
> >
> > The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body – in the sense that they have some broad import – will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue. [Emphasis added.]

> [76] This passage makes clear that it is wrong to apply the *Air Canada* factors to transform the decision of a private actor – such as a church, sports club, or other voluntary association – into a public decision. In my view, the passage also cautions against characterizing a decision of a public body as public in function simply because a broad segment of the public may be interested in or impacted by it. For instance, a government decision to enter into a contract to purchase property may be of significant interest to, and have an impact on, a broad segment of a community; however, that would not transform the contractual decision into a public one. In other words, it is important to distinguish between "public" in the generic sense and "public" in the sense that the legality of state decision making is at play.

[44] Whether the Decision is "public" in the sense it calls into question the legality of state decision making is the live issue here. The determination that a decision is sufficiently public to attract judicial review and qualify for a public law remedy depends to a large degree on the nature of the decision itself.

[45] Of the factors listed in *Air Canada*, West Grey relies on the guideline that the more suitable a decision may be for public law remedies, the more the court will be inclined to regard it as public in nature.

[46] The intervenor Attorney General supports the principle recognized by this Court in cases such as *Sprague v. Ontario (Ministry of Health)*, 2020 ONSC 2335 (Div. Ct.) and in *Wise Elephant Family Health Team v. Ontario (Minister of Health)*, 2021 ONSC 335 (Div. Ct.) that decisions of hospital boards regarding the internal allocation of resources do not involve the legality of state decision-making. In *Wise Elephant*, the Minister of Health decided to terminate a health clinic's funding agreement. This court held that the Minister's decision to terminate the funding agreement was a private contractual matter and not subject to judicial review.

[47] The decision of this court in *Sprague* dealt with a challenge to the hospital's visitor policy during the early days of the COVID-19 pandemic. This Court held that the decision was not of a sufficient public character to engage the application of public law.

[48] In *O.N.A. v. Rouge River Valley System*, 2008 CarswellOnt 6985, the hospital was a multi-site hospital operating as one corporate entity under the *PHA*. To reduce its operating deficit, the board decided to consolidate its mental health program and to close an inpatient mental health unit at one of its two sites. On a challenge of the decision, the Divisional Court held that the internal decisions of a board of a non-profit corporation seeking to address serious budgetary problems are not statutory decisions and are not subject to judicial review.

[49] The first affidavit of Nancy Shaw highlights the nature of each location of SGBHC where it provides medical services to the public. SBGHC is now a multi-site health care facility organized and operated by a board of directors who are responsible to know what resources the hospital has available to deliver that health and medical care, and to decide the best way to allocate them.

[50] The question of whether the Decision rises to the level of being sufficiently of a public character because it results in the transfer of inpatient beds within the same hospital system is, in our view, readily answered by the analysis in *Khorsand*. Despite the fact that the decision of the SGBHC will have an impact on the local community, the position taken by Dr. Pillisch that the transfer of those beds is essentially the thin edge of the wedge that presages total closure of the hospital in Durham is not supported by the record.

[51] The decision of the SGBHC to relocate the 10 beds from the Durham site to other sites in the hospital operated by SGBHC is a private decision. The Decision is not sufficiently of a public character to make it subject to judicial review under s. 2 of the *JRPA*.

CONCLUSION

[52] The motion is granted. The Application for Judicial Review is dismissed. Costs of this motion and the application are awarded to SGBHC in the amount of $50,000 on a partial indemnity scale, as agreed, payable within 30 days. There shall be no costs for or against the Attorney General of Ontario.

"Stevenson SFJ."

"M.G. Emery J."

I agree: "D.L. Corbett J."

Date: May 29, 2025

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SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Stevenson SFJ, D.L. Corbett and M.G. Emery JJ.

BETWEEN:

Corporation of the Municipality of West Grey

Applicant

– **and** –

South Bruce Grey Health Centre

Respondent

– **and** –

Attorney General for Ontario

Intervenor

REASONS FOR DECISION

Date of Release: May 29, 2025