Hospital Appeal Board

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DECISION NO. 2018-HA-002(b)

In the matter of an appeal under section 46 of the *Hospital Act*, RSBC 1996, c 200.

BETWEEN:	Dr. Andrew Campbell	**APPELLANT**
AND:	Provincial Health Services Authority	**RESPONDENT**
BEFORE:	A Panel of the Hospital Appeal Board, Stacy Robertson, Panel Chair	
DATE:	Conducted by way of written and oral submissions concluding on November 21, 2018	
APPEARING:	For the Appellant:	Nevin Fishman, Counsel Susan Precious, Counsel
	For the Respondent:	Penny Washington, Counsel Ryan Berger, Counsel Kayla Strong, Counsel

Preliminary Decision on Stay Application

BACKGROUND

[1] This is an appeal brought by Dr. Andrew Campbell from what he describes as the constructive dismissal or modification of his privileges at BC Children's Hospital which is operated by the Provincial Health Services Authority ("PHSA"). Dr. Campbell had a contract for services with the PHSA to provide cardiac surgical and other related services at BC Children's Hospital (the "Contract").

[2] PHSA terminated the Contract on March 14, 2018, pursuant to a 12 month notice provision in the Contract. PHSA argues that throughout the 12 month notice period and continuing to the present, it has renewed and continued to maintain Dr. Campbell's privileges, which privileges, it says, exist apart from his Contract.

[3] Dr. Campbell has commenced arbitration proceedings against PHSA and others pursuant to an arbitration provision in the Contract. Those proceedings are at an early stage, and responses to the statement of claim have not yet been filed.

[4] The Respondent raised a preliminary objection that the Hospital Appeal Board ("HAB") has no jurisdiction to hear Dr. Campbell's appeal because the appeal only concerns the status of his privileges, which PHSA says remain unchanged despite

the termination of the Contract. The HAB Chair dismissed the Respondent's jurisdictional application on the basis that the jurisdiction question was one of mixed fact and law which should only be decided upon a full consideration of the evidence on the appeal.

[5] The Respondent then brought this preliminary application seeking a temporary stay of these appeal proceedings pending the resolution of the arbitration between the parties.

[6] The Respondent says that the HAB has jurisdiction to grant the stay, and should grant a stay until the resolution of the arbitration proceedings on the basis that the resolution of the arbitration may either lead to a resolution of the privileges issue altogether, or move the issues in this HAB hearing substantially forward, resulting in cost savings and judicial economy.

[7] The Appellant questions whether the HAB has the jurisdiction to grant a stay apart from granting a stay of a decision under appeal. If there is jurisdiction to grant a stay pending resolution of related proceedings, then the Appellant argues that such power should be exercised with great caution and that the prejudice to the Appellant should weigh heavily against the granting of such a stay.

JURISDICTION TO GRANT A TEMPORARY STAY

[8] Both parties acknowledge that there are no HAB cases which address the issue of whether to order a temporary stay of HAB proceedings pending the outcome of other, related proceedings. Further, neither party provided me with any other administrative body cases on point.

[9] The Respondent argues that there is statutory and common law authority supporting the HAB's jurisdiction to grant a stay of proceedings pending the resolution of related proceedings. The Respondent argues that the HAB's statutory jurisdiction to order a stay is found in section 46(3) of the *Hospital Act*, RSBC 1996, c 200 (the "*Act*") which states:

> The Hospital Appeal Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this section and to make any order permitted to be made.

[10] The Respondent also argues that Rule 4(7)(c) of the HAB Rules of Practice and Procedure support this statutory authority. Rule 4(7)(c) states:

> (7) Notice is required for any pre-hearing applications, including but not limited to applications involving the following matters:
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> ...
>
> c) requests for a stay of the proceedings or the decision under appeal;

[11] The Appellant argues that on a proper reading of Rule 4(7)(c), it only applies to applications for a stay of the decision under appeal, and does not apply to a stay of related proceedings that are not before or under appeal to the HAB. There may be merit to this interpretation but Rules of Practice and Procedure generally do not

provide substantive rights; they simply provide the path and framework to exercise substantive rights. Therefore, I find that I do not need to rely on the Rules of Practice and Procedure to find the jurisdiction to grant the stay requested. I find that section 46(3) of the *Act* provides the statutory authority to grant a temporary stay of this appeal pending resolution of related proceedings.

[12] I also accept that in the absence of a specific rule to the contrary, the general common law rule that tribunals are considered masters of their own house regarding procedural issues, provides the necessary jurisdiction to grant a temporary stay. The discretion to exercise that jurisdiction must be done in accordance with the rules of natural justice[1]. A permanent stay may take on a very different analysis but as the Respondent is only seeking a temporary stay, I will make no further comment on the jurisdiction to grant a permanent stay.

MERITS OF STAY APPLICATION

[13] There are many cases which have come before the HAB[2] where the HAB has found the jurisdiction to grant a stay of the decision being appealed pending resolution of the appeal before the HAB. However, that jurisdiction has always been exercised cautiously, with a stay being actually granted in only one case (*Daviau*). It is accepted that the test in *RJR-MacDonald Inc. v Canada (Attorney General)* [1994] 1 SCR 311, applies to those types of stay applications, but the *RJR-MacDonald* test is not well suited to the stay sought in the present circumstances.

[14] The Court in *Peh v Strata Plan LMS 3837,* 2008 BCSC 291(*Peh*), provided some useful principles on the application of a stay generally (at paras 61-62):

a. The burden is on the applicant to demonstrate that in all the circumstances a stay is appropriate;

b. It is a matter of discretion that will depend on the individual facts of each case;

c. Jurisdiction to exercise a stay should be exercised cautiously after a consideration of all relevant factors, including the benefits of granting a stay and the possible prejudice that would be suffered or incurred by the parties if a stay is granted or refused; and

d. Balancing the interests of the parties.

[15] Further, the Court in *Conseil Scolaire Francophone de la Colombie-Britannique v British Columbia (Education)*, 2013 BCSC 751 (*Conseil Scolaire*), provided some relevant factors to consider when a stay of proceedings is being sought. These factors include the applicable parts of the *RJR-MacDonald* test concerning weighing the harm and the balance of convenience.

[16] The relevant factors from *Conseil Scolaire* are as follows (at paras 32-33):

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[1] See *Prassad v. Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560, at p 568-569.

[2] See for example: *Daviau v St. Joseph's Hospital* (June 10, 2008) (*Daviau*), *Dr. C. v X, a Health Authority* (June 5, 2009) and *Dr. Butler v Vancouver Coastal Health Authority*, Decision No. 2015-HA-003(a), December 9, 2015).

a. Whether the related pleadings will have a material impact on the issues that arise in the case, or whether the result in the related proceedings could effectively resolve the litigation;

b. Whether the stay will promote judicial economy and efficiency by avoiding unnecessary and costly additional expenditures of judicial and legal resources;

c. Whether the stay sought is temporary or permanent;

d. The length of delay caused by the temporary stay relative to the length of time of the litigation in general;

e. The risk of inconsistent results; and

f. Other factors, including fairness and prejudice, the balance of convenience, and the appropriate conduct of the parties.

[17] In addition to these factors, is a consideration of the nature of the evidence admissible under section 51 of the *Evidence Act*, RSBC 1996 c 124 ("*Evidence Act*"), in HAB proceedings as opposed to other proceedings.

[18] Court cases applying the *Conseil Scolaire* factors rely on section 8 of the *Law and Equity Act*, RSBC 1996 c 253, and the inherent jurisdiction of superior courts for their jurisdiction to grant a stay. Neither of these grounds of jurisdiction applies to the HAB, which, as detailed above, relies upon the jurisdiction of section 46(3) of the *Act* and the common law applicable to administrative tribunals. Regardless of the basis of the jurisdiction to grant a stay, the factors in *Conseil Scolaire* are appropriate to consider in this stay application. In assessing each of the factors, the benefits of granting the stay must be weighed against the deleterious effects of granting a stay.

[19] The first factor to consider is whether the related proceedings will have a material impact on the issues that arise in the case, or whether the result in the related proceedings could effectively resolve the litigation. On this point, the parties agree that the issue of patient allocation and reasons for that allocation is a key issue in both the arbitration proceedings and these proceedings. However, the parties also agree that the relief sought in the arbitration proceedings – contract damages – cannot be obtained in these proceedings, and the relief sought in these proceedings – restoration of meaningful privileges – cannot be obtained in the arbitration proceedings.

[20] The fact that different remedies are exclusively sought in each proceeding creates a substantial impediment to any stay, even a temporary stay. While some of the underlying factual findings may be similar in the two proceedings, the parties, claims and relief sought are different. The arbitration proceedings involve parties in addition to the PHSA and BC Children's Hospital, and include claims of inducing breach of contract. The Respondent conceded, rightfully so in my opinion, that any findings in the arbitration proceedings would not bind the HAB in these proceedings. That is not to say that the resolution of the arbitration proceedings might not result in some negotiated resolution of the HAB proceedings, but that possibility alone is not sufficient to grant a stay in these circumstances.

[21] It is possible that the Appellant could be successful on the arbitration and unsuccessful before the HAB, or unsuccessful on the arbitration and successful

before the HAB. The arbitrator could find that the Respondent properly terminated Appellant's Contract pursuant to the notice provision, but such a finding would not advance these proceedings in any meaningful way. Apart from background about how the privileges were exercised at BC Children's Hospital, the contractual provisions are generally irrelevant to whether Dr. Campbell's privileges were significantly modified. What appears to be relevant is what the content of the privileges are, including whether those privileges include any patient allocation, and whether there has been a significant change or alteration of those privileges.

[22] In *Ainsworth Lumber Co. v Attorney General (Canada),* 2001 BCCA 105 (*Ainsworth*), the Court granted a temporary stay of proceedings involving an action for negligent misrepresentation because if the related Tax Court proceedings had been successful, then the negligent misrepresentation action would have been largely resolved. If the Tax Court proceedings had been unsuccessful, then the negligent misrepresentation action would have been able to continue as it was based on negligent misrepresentations that led to a denial of a tax benefit sought in the Tax Court. That is not the case in the present situation where each action will have to proceed regardless of the outcome of the other, as both actions are seeking remedies exclusive to their separate forums.

[23] In *Peh*, the Court granted a stay of an action brought by one plaintiff group because their legitimacy to bring the action was being questioned in another proceeding. The resolution of that issue may have resolved the related proceedings, at least on a technical basis, but again, that is not the case in the present situation.

[24] The issue of the admissibility of evidence under section 51 of the *Evidence Act* was also raised by the parties. Section 51 of the *Evidence Act* makes certain testimony and documents in relation to medical staff committees inadmissible in any legal proceeding. However, hospital boards of management and the HAB are exempted from the operation of section 51, and can receive such evidence[3]. The effect of this exemption is that different documents and testimony might be available at each of the separate proceedings at issue in the present matter.

[25] While I agree that there is some risk of inconsistent findings of fact between the arbitration proceedings and the HAB proceedings, this inconsistency may largely turn on the different types of evidence that may be admissible in each proceeding.

[26] The BC Court of Appeal recognized in *Garber v Canada (Attorney General),* 2015 BCCA 385 (*Garber*), that there was a risk of inconsistent results. Nevertheless, the Court upheld the dismissal of the application for a temporary stay because the possibility of inconsistent results was only one of the *Conseil Scolaire* factors to consider, and it was outweighed by the other factors[4].

[27] Another factor I must consider is the length of delay caused by the stay, relative to the length of time of the litigation in general. The arbitration proceedings are at a nascent stage. An amended Statement of Claim has been filed and no Response has been filed in those proceedings. No document production or examinations for discovery have been completed or scheduled, although it is not

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[3] See section 51(5)(a) of the *Evidence Act* and section 46.1(6) of the *Act*

[4] *Garber* at para 21.

clear if any examinations for discovery are contemplated as the arbitration proceedings are private. It is unclear how long the arbitration process will take, but it is fair to say it is just beginning. To delay this proceeding until the completion of the arbitration proceedings, in light of my finding above that there will be little, if any, savings in time and resources, would result in an undue delay for the Appellant.

[28] This is not a situation similar to that in *Ainsworth,* where the related proceedings were close to completion and the parties were simply waiting for the release of a written decision which would largely resolve the issue of the remedy in the related proceedings. Rather, the present situation is more similar to *Conseil Scolaire* and *Garber*, where the Courts found that the related proceedings could result in numerous appeals and that the evidence presented in the two related proceedings might be different. These findings led the Courts in those cases to hold that the delay which would be caused by the issuance of a stay was too great and the savings of judicial economy too little.

[29] Another factor I must consider is whether the stay will promote judicial economy and efficiency. It is difficult to make a finding at this point that there would be any significant savings of judicial or other legal resources by granting a stay. Resolution of one of the proceedings will not effectively resolve the other, and may not even substantially advance the other given the different remedies sought, the different evidentiary standards to be met, and the non-binding nature of the outcome of each proceeding on the other.

DECISION

[30] Taking into account the *Conseil Scolaire* factors and the additional evidentiary concerns unique to HAB hearings, I dismiss the Respondent's application for a temporary stay of these proceedings.

"Stacy Robertson"

Stacy Robertson
Panel Chair, Hospital Appeal Board

November 30, 2018