



Hospital Appeal Board

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DECISION NO. 2018-HA-002(d)

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 Cheryl Vickers, Member Dr. Paul Champion, Member	
DATE:	Conducted by way of written and oral submissions concluding on June 17, 2019	
APPEARING:	For the Appellant:	Susan Precious, Counsel Nevin Fishman, Counsel Amelia Boulton, Counsel
	For the Respondent:	Penny Washington, Counsel Kieran Siddall, Counsel Kayla Strong, Counsel

INTRODUCTION

[1] This interim decision is about whether the Hospital Appeal Board (the "HAB") can and should grant interim relief preventing the Respondent from making any further pediatric cardiac surgeon appointments pending the disposition of this appeal.

BACKGROUND

[2] The following circumstances gave rise to this issue.

[3] On the morning of May 30, 2019, during the evidentiary phase of the appeal, the Panel was advised of an unexpected family emergency for the lead counsel for the Respondent, which necessitated a request for an adjournment. Counsel for the Appellant did not oppose a brief adjournment and one was granted to the next available scheduled hearing day.

[4] In the course of scheduling dates to continue the hearing, it became evident that a more lengthy delay might be necessary due to the availability of witnesses,

counsel for the parties and the Panel. The Appellant opposed a lengthy adjournment.

[5] On June 4, 2019, the Panel requested submissions from the parties regarding any terms or conditions that should form part of any further order for an adjournment to deal with rescheduling of the hearing dates.

[6] On June 6, 2019, the parties made written and oral submissions on this issue. The Appellant argued that any adjournment should include terms and conditions to preserve the status quo pending the conclusion of the appeal, including an order preventing the Respondent from making any further pediatric cardiac appointments pending the disposition of the appeal. The Respondent argued among other things that any discretion to impose terms and conditions on an adjournment does not include “awarding injunction-like relief” to the Appellant.

[7] On June 7, 2019, the Panel further requested submissions on its authority to grant interim injunctive relief regarding the Respondent’s recruitment efforts and the effect of the HAB’s previous decision in *Sanghera v Vancouver Coastal Health Authority* (Decision No. 2017-HA-002(a)). Both parties provided further written submissions to the Panel.

[8] On July 5, 2019, the evidentiary phase of the hearing completed. At this time, the Panel set aside two dates in late September for oral presentation of final argument.

[9] The request for interim relief remains a live issue because the Respondent is actively recruiting a cardiac surgeon to whom it intends to grant hospital privileges on a full time basis. This was confirmed on May 29, 2019 during the testimony of Dr. K and by documents, including a Briefing Note summarizing recruitment efforts, which document was produced following the Panel’s May 28, 2019 production order. The documents and subsequent updates provided by the Respondent indicate that the Respondent has shortlisted candidates and is in the process of scheduling meetings with them.

[10] The Respondent emphasizes, however, that none of this is new information. The Respondent cites its opening submission which noted that there had been a vacancy in the Division, “for which the Division has actively been recruiting”, the Appellant’s own opening submission that the Respondent has “been trying to replace Dr. Campbell just as soon as they gave him notice”, and the evidence at Tabs 86 and 87 of the Joint Book of Documents.

[11] What really seemed to crystallize this as an issue was the Respondent’s June 4, 2019 oral submission that if and when that third appointment is made, it will rely on this Board’s recent decision in *Sanghera v Vancouver Coastal Health Authority* to argue that even if this appeal is allowed, “Dr. Campbell is not going to be able to displace that incumbent So when we go hire someone into the contract, yes they will be in the contract, they will be allocated cases and yes *Sanghera* says, the incumbent cannot be displaced”.

ISSUES

[12] All this gives rise to two issues.

[13] The first issue, a question of law, was framed as follows in the Panel's June 7, 2019 letter to the parties seeking further submissions:

Whether the Board has legal authority to order interim injunctive relief that would prevent the Respondent from taking action that would alter the status quo that existed at the time the appeal was filed – in this case, by ordering that the Respondent not add a third physician with active privileges pending the disposition of this appeal.

[14] The second issue, a question of discretion, is whether the Panel should grant the relief requested if it has legal authority to grant the relief.

ANALYSIS

[15] The Board's power to grant interim relief derives from section 46(4.2) of the *Hospital Act*, RSBC 1996, c 200, which incorporates by reference section 15 of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "ATA"). Section 15 of the ATA authorizes a tribunal to "make an interim order in an application".

[16] As the Panel understands the submission, the Respondent does not dispute that the Board has the power to grant an order in the nature of injunctive relief as it applies to an Appellant's privileges – for example, to order that the Appellant's privileges be restored pending the hearing of an appeal. However, it does dispute that the Board can reach beyond the Appellant to affect the privileges of another physician, or to affect the hospital's ability to make operational decisions, including making "an offer to contract with any person".

[17] Having requested and received submissions on this legal issue, the Panel has determined that it is not necessary to finally decide it. It is our view, for two reasons, that interim relief should not be granted, even if we were to determine the legal issue in favour of the Appellant.

[18] The first reason has to do with timing. While the Appellant pointed to the production of the Briefing Note and the evidence of Dr. K as prompting the application, the Respondent is correct that the fact that the Respondent has been actively recruiting a pediatric cardiac surgeon is not new information. In our view, this application for injunctive relief ought to have been made much earlier in the proceedings.

[19] The second factor is that the public interest weighs heavily in any application for injunctive relief. Whether or not this appeal is granted in the end, the public would rightly expect that this appeal process would not interfere with the delivery of cardiac surgery to sick children in the interim. While it may appear dissonant for the Respondent to argue on the one hand that the current situation does not threaten patient safety but assert at the same time that there is a pressing need to appoint an additional surgeon in place of the Appellant, we recognize that there is a difference between interim and long term planning. While it is not clear to us on the evidence why such an appointment must be made before the end of this year at which time this appeal will be decided one way or the other, we think the hospital should bear responsibility for making interim and long term planning decisions in the public interest until this appeal is finally decided.

[20] The Respondent has submitted that it "will bear any risk associated with the hiring of an additional surgeon and the consequences of any final order made by

the Panel". We take this to mean that apart from any potential civil liability that might ensue, the Respondent accepts that if the appeal is allowed, it is prepared to bear the risk of a statutory remedy issued by this Board that alters the status quo that prevails when this appeal is decided.

[21] On this issue, the Panel wishes to make clear that if this appeal is granted, the issue of remedy will naturally arise under section 46(2) of the *Hospital Act*:

(2) The Hospital Appeal Board may affirm, vary, reverse or substitute its own decision for that of a board of management on the terms and conditions it considers appropriate.

[22] If the appeal is allowed, it will be open to the parties to address both whether this case is distinguishable from *Sanghera*, and whether, even if it is not, *Sanghera* should be followed recognizing that *stare decisis* does not apply to administrative tribunals.

[23] Should the appeal be allowed, and should a new appointment be made prior to that event, the Panel would be inclined to notify that appointee so that he or she would have the opportunity to make submissions on remedy before a final order is made.

CONCLUSION

[24] For the above reasons, the application for interim injunctive relief is dismissed.

"Stacy Robertson"

Stacy Robertson, Panel Chair
Hospital Appeal Board

"Paul Champion"

Dr. Paul Champion, Member
Hospital Appeal Board

"Cheryl Vickers"

Cheryl Vickers, Member
Hospital Appeal Board

July 11, 2019