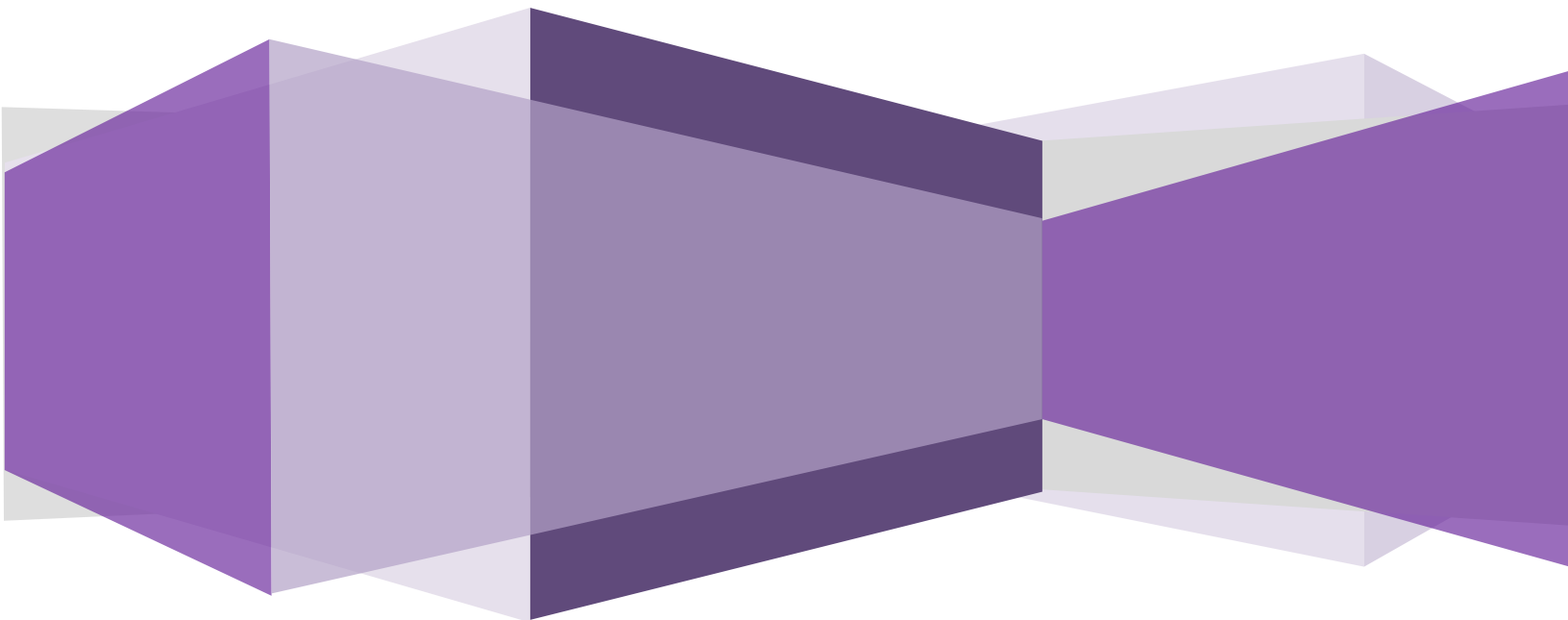




Hospital Appeal Board

2020-2021 Annual Report

Covering the reporting period from
April 01, 2020 – March 31, 2021





Hospital Appeal Board

Fourth Floor, 747 Fort Street, Victoria BC V8W 3E9

Tel: (250) 387-3464
info@bchab.ca

Fax: (250) 356-9923
www.hab.gov.bc.ca

January 21, 2022

The Honourable David Eby
Ministry of Attorney General
Room 232, Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Attorney General:

Re: Hospital Appeal Board 2020-2021 Annual Report

On behalf of the Hospital Appeal Board, I respectfully submit the Annual Report of the Hospital Appeal Board for the period April 1, 2020 to March 31, 2021.

Sincerely,

Stacy F. Robertson
Chair, Hospital Appeal Board

Enclosure

Message from the Chair

I am pleased to submit the Annual Report of the Hospital Appeal Board (the “Board” or “HAB”) for the fiscal year beginning April 1, 2020 and ending March 31, 2021. This report is submitted pursuant to section 59.2 of the *Administrative Tribunals Act*.

This reporting period saw many changes occur within the Board’s operations and within the tribunal sector as a whole in British Columbia. The continuation and intensification of the COVID-19 pandemic challenged the justice sector to adapt and step up to meet the legal and practical needs of British Columbians. The unique challenges posed by the pandemic simultaneously kept people apart from each other, and brought us closer together through our shared desire to keep each other safe and work through to a “new normal”.

With respect to the Board, this reporting period brought several changes to the Board’s Membership.

First, one of our longest serving members, Dr. Paul Champion, stepped down from the Board in September of 2020. Dr. Champion was first appointed to the Board in 2009, and served as our medical expert on many appeals. He brought a wealth of experience to his role as a member, both in terms of medical expertise, and in terms of experience with hospital governance. Dr. Champion’s practical approach to evaluating complex appeals, and his wry sense of humour will be missed by all who had the privilege of working with him.

Second, in addition to saying farewell, the Board welcomed a new member, Dr. Anita Molzahn, to its ranks. Dr. Molzahn is a retired nurse, professor and academic administrator who has served in senior academic administrative roles for almost three decades. She is a fellow of the Canadian Academy of Health Sciences and a Member of the Order of Canada.

On behalf of the staff and membership of the Board, I would like to thank Dr. Champion for his significant contributions to the Board, and I would like to welcome Dr. Molzahn to the membership.

Appeals during Reporting Period

Section 59.2(a) of the *Administrative Tribunals Act* requires the Board to provide a review of its operations during the preceding reporting period. During this reporting period, three new appeals were filed with the Board. Further details in relation to these appeals are provided later in this report pursuant to section 59.2(c) of the *Administrative Tribunals Act*.

An additional three appeal matters that were carried over from the previous reporting period were also considered during this period. Out of the six total appeals which were before the Board during this reporting period, no appeals were closed, though a final decision on the merits of one appeal was issued in this reporting period¹. Six appeals remained outstanding at the close of this reporting period.

During this reporting period, there was one application filed in the BC Supreme Court for Judicial review of a decision issued by the HAB in this reporting period. A decision upholding the HAB's decision was issued by the BC Supreme Court shortly after the close of this reporting period.

Forecast of workload for the next reporting year and trends noted

Section 59.2(f) of the *Administrative Tribunals Act* requires the Board to provide a forecast of the workload for the succeeding reporting period. The HAB's workload for the 2021/2022 reporting period is expected remain consistent with the past few years which has seen an increase from approximately 1-2 appeals per year to approximately 2- 4 new appeals filed per year. While the number of appeals is increasing slightly, the real increase in past and projected workload flows from the increased complexity and length of hearings.

Section 59.2(g) of the *Administrative Tribunals Act* requires the Board to report any trends or special problems it foresees.

Trends

The only trend that we have identified in this reporting period, as with the previous reporting period, is the increase in the complexity and length of appeals over the past several years. In response to this trend, the Board commenced targeted recruitment of legally and medically trained individuals with extensive administrative law experience to fill the Board's vacant positions. Recruitment for vacant positions was ongoing at the close of this reporting period, and the Board will report more fully on its membership in the next reporting period.

Special Problems

The Board has identified two special problems in this reporting cycle: the Board's ability to schedule and hold timely hearings of increasingly complex appeals; and the inconsistency of the funding model for the Board.

Timeliness

The Board has found it difficult at times over the past several years to provide timely hearings for the number of increasingly long and complex appeals.

¹ The HAB does not calculate the date of file closure as the date of issuance of the final decision unless there are no post-decision matters which require attention (e.g. costs applications).

As discussed in earlier annual reports, it has been difficult for the Board to recruit and retain members who are available to sit on hearings that take place over several weeks (up to 5 weeks at times). With senior counsel routinely representing both parties to an appeal lasting anywhere from 2-5 weeks and involving complex evidentiary rulings and pre-hearing, intra-hearing and post-hearing applications, it has been particularly difficult to find board members with availability and the legal expertise to chair panels.

The membership of the Board consists largely of experienced health care practitioners, administrators and lawyers who have busy practices and who often find it difficult and financially impractical to set aside large periods of time for attendance at hearings. These individuals are selected for membership on the Board on the basis of their expertise and high standing in their respective fields.

In order to maintain the high calibre of the professionals who currently sit on the Board, it may be necessary to provide greater incentives for members attending lengthy hearings; for example, greater overall member compensation, particularly for Panel chairs who are tasked with adjudicating complex legal issues²; and also, financial compensation for hearings which are cancelled last-minute.

Funding

The second special problem the Board has identified in this reporting cycle is the inconsistent funding model for the Board. Historically, the appeals would only take a day or two to resolve and there were only one or two appeals a year at the Board and some years there were no active appeals before the Board. It was historically difficult to forecast budget requirements because of the variance in appeals being filed. However, that paradigm has shifted as the appeals are now scheduled for two weeks or more and there are always several active appeals that carry over from year to year. Given this new more consistent appeal flow, it may be easier to forecast the Board's budgetary requirements and obtain more consistent funding.

Plans for improving the Board's operations

Finally, section 59.2(h) of the *Administrative Tribunals Act* requires the Board to report its plans for improving operations in the future. During this reporting period, the appeals office cluster responsible for providing administrative support to the Board continued its in-depth review of service delivery which has resulted in several organizational realignments within the cluster. Registry staff have been increased, providing greater case management capacity for all the tribunals within the cluster, including the HAB. Notably, in June 2020, the Tribunal Cluster

² Low per diem compensation creates a disincentive for Members with other employment to sit on long hearings as it removes the ability for them to earn significant portions of their regular income. For example, a lawyer who may bill 300-500 dollars per hour in her legal practice must give up five weeks of pay with compensation of \$450 a day instead.

welcomed a new Vice Chair of Service Delivery³, who has been providing administrative support with respect to cluster wide service-delivery initiatives.

Service delivery will continue to be reviewed over the next reporting period, and further technological and organizational change is expected to occur. The Board will continue to capitalize on technological improvements over the next reporting period.

COVID-19 and Pandemic Response

During the reporting period, the COVID-19 pandemic and resultant state of emergency in British Columbia continued and intensified. In response to the pandemic, the Board operated with the guidance of the Provincial Health Officer, and within the framework of its business continuity plan (BCP). The Board's BCP focusses on ensuring ongoing service delivery to the users of the Board, while maintaining health and safety of Board staff and members.

By April 2020, staff members supporting the board and the broader tribunal cluster were working almost exclusively from home, and this method of operation continued throughout the reporting period. Because the tribunal cluster employed a remote work program prior to the onset of the pandemic, this transition was seamless and did not result in any service disruption. Although the physical Board office limited public access on several occasions, the Board continued to conduct business and appeals were processed electronically and/or via mail.

As reported in the last fiscal period, as a result of restrictions on in-person meetings and the province-wide mandate for appropriate social distancing, the Board shifted its operations from primarily paper-based to primarily electronic. Although prior to the onset of the pandemic hearings were almost exclusively conducted in-person, through the course of this reporting period the Board was able to effectively transition to the use of video-conferencing technology. This transition resulted in some initial delay, mainly because previously scheduled in-person hearings had to be temporarily adjourned, however by the close of the reporting period the Board had developed proficiency with the new technology and any technology-occasioned delay issues were remedied. As will be reported on more fully in the next reporting period, the transition to video-conferencing for oral hearings has proved beneficial to the Board's operations; improving timeliness, flexibility and access to the Board's process.

Thanks to the dedication and flexibility of staff in the tribunal cluster, and to the adaptability of Board members to a new way of working and interacting, the Board did not suffer significant service disruptions or adverse health consequences related to the pandemic during this reporting period. I would, again, like to take this opportunity to extend my sincere thanks to all the

³ The Vice Chair Service Delivery is cross-appointed, by OIC, to the Environmental Appeal Board, Forest Appeals Commission, and Oil and Gas Appeal Tribunal, and is not a member of the HAB. However, this position assists with oversight of registry functioning for the tribunal cluster overall.

individuals in the cluster who have worked hard to keep the Board open and accessible to the public it serves. This pandemic has continued for longer than most of us expected, and your work as government employees and appointees has been consistent, professional, adaptive, and exceptional.

At the time of publication of this report the pandemic remains ongoing, and the Board continues to adapt to ever changing circumstances. As such, the Board will report on additional pandemic-related measures and outcomes in the next reporting period.

A handwritten signature in black ink, appearing to read 'Stacy F. Robertson', with a long horizontal flourish extending to the right.

Stacy F. Robertson
Chair, Hospital Appeal Board

Mandate

The Hospital Appeal Board is a quasi-judicial administrative tribunal continued under section 46 of the *Hospital Act*. The Board's purpose is to provide a specialized, independent, accessible and cost-effective avenue of appeal, as an alternative to the court process, for health practitioners (doctors, dentists, midwives and nurse practitioners) who disagree with a decision of a hospital's board of management regarding hospital privileges.

The Board hears appeals filed by the prescribed health practitioners from:

- a decision of a hospital's board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practice in a hospital; or
- the failure or refusal of a hospital's board of management to consider and decide on an application for a permit in a timely manner.

The Board generally holds 1-2 full, oral, court-like hearings per year. In most cases, a panel of three members hears the merits of each appeal. Each appeal usually also involves a number of preliminary issues and rulings made either by the Board Chair or the Panel Chair designated to hear the appeal.

Appeals are conducted as a "hearing de novo", which requires the Board to hold a new hearing in the full sense with witnesses, substantial documentary evidence and oral argument. Consequently, hearings can vary widely in length depending on the complexity of the issues under appeal and the amount and kind of evidence to be adduced, with some taking several days or in some cases many weeks to complete. Parties to the proceedings are almost always represented by experienced legal counsel.

The Board has broad remedial authority, and may affirm, vary, reverse, or substitute its own decision for that of a hospital board of management on the terms and conditions it considers appropriate. After a hearing, the Board issues detailed written reasons for its decision which are made available to the public on the Board's website.

For further information please see the board's website at www.hab.gov.bc.ca

Board Membership

Under section 46(4) and (4.1) of the *Hospital Act* the minister **must** appoint 10 members of the Hospital Appeal Board as follows:

- a) one member designated as the chair;
- b) one member designated as the vice-chair;
- c) one member selected from among 3 or more individuals nominated by the College of Physicians and Surgeons;
- d) one member selected from among 3 or more individuals nominated by the College of Dental Surgeons of British Columbia;
- e) one member selected from among 3 or more individuals nominated by the British Columbia College of Nurses and Midwives;
- f) one member selected from among 3 or more individuals nominated by the British Columbia Medical Association [now known as Doctors of BC]; and
- g) four other members selected after a merit based process.

Through this reporting period, the Board membership consisted of the following members:

<i>BOARD MEMBER</i>	<i>ROLE</i>	<i>INITIAL APPOINTMENT</i>	<i>TERM EXPIRY</i>
Stacy Frank Robertson	Chair	October 28, 2014	December 31, 2023
Dr. Paul Champion (Doctors of BC Nominee ⁴)	Member	October 20, 2009	September 28, 2020
Dr. R. Alan Meakes (Doctors of BC Nominee)	Member	June 30, 2019	June 30, 2021
Dr. Douglas H. Blackman (College of Physicians and Surgeons of BC Nominee)	Member	February 20, 2012	May 31, 2021
Dr. Kevin Doyle (College of Dental Surgeons of BC Nominee)	Member	October 28, 2014	December 31, 2024
Sandra J. Pullin (BC College of Nurses and Midwives Nominee)	Member	December 31, 2019	December 31, 2021
Darlene Kolybabi	Member	November 6, 2018	November 06, 2020

⁴ Dr. Champion was the DBC Nominee until June 30, 2019, at which time Dr. Meakes was appointed as the DBC Nominee. Dr. Champion's term was then extended by the Chair pursuant to section 7 of the *Administrative Tribunals Act*.

Lorraine Unruh	Member	October 28, 2014	December 31, 2024
Cheryl Vickers	Member	March 1, 2016	March 11, 2024
Anita E. Molzahn	Member	February 1, 2021	February 1, 2023

BIOGRAPHIES FOR THE BOARD MEMBERSHIP DURING THE REPORTING PERIOD:

STACY FRANK ROBERTSON (CHAIR) Stacy Robertson is currently Senior Enforcement Counsel at the Investment Industry Regulatory Organization of Canada in Vancouver, B.C., which regulates professional discipline for registered securities industry individuals and firms. Previously he worked at several Vancouver based firms practicing in the areas of insurance, construction, employment, labour and administrative law. He has appeared before all courts in B.C. and before the B.C. Labour Relations Board, the Canadian Industrial Relations Board and the B.C. Securities Commission. He is currently the Chair of the Hospital Appeal Board of B.C. He has served as a panel member on the Employment Assistance Appeal Tribunal and the Eligibility Appeals Committee for B.C. School Sport. He holds a Bachelor of Law from the University of New Brunswick, a Bachelor of Commerce from McMaster University and a diploma from Moscow State University in Political History of Russia and the U.S.S.R. He is active in his community including community sports organizations.

DR. PAUL CHAMPION Dr. Paul Champion is a retired physician, registered in British Columbia, whose specialist qualification was the FRCP(C) Internal Medicine and in Respiriology. He holds the title of Prof. Emeritus Clinical Medicine at the University of British Columbia. Dr. Champion held consulting privileges at the BC Cancer Agency, the GF Strong Rehabilitation Unit and with the BC C.D.C Tb Service up until his retirement. In addition, he was the Medical Director at Vancouver General Hospital Medical Bronchoscopy Program. Dr. Champion holds his Bachelor of Medicine and Bachelor of Surgery from London and his Doctor of Philosophy from the Netherlands. Dr. Champion is currently a Trustee for the Gabriola Volunteer Fire Department and Rescue Services and also a Director of the Gabriola Community Health Centre Foundation.

DR. R. ALAN MEAKES Dr. Meakes is a now-retired physician with experience in general and specialty practice, including Family Medicine, General Internal Medicine and Anesthesiology. Additionally, he has had an extensive career in administrative aspects of medicine, including military field medicine and hospital care. Born and raised in Victoria, BC with an ambition to be a physician since childhood, he has practiced medicine in Manitoba, Alberta and Europe (Germany) as a military medical officer prior to relocating to his home city, where he was hired in 1983 as Director of Intensive Care for the Royal Jubilee Hospital in addition to clinical services in Anesthesia. He has significant experience in both clinical and administrative care as it pertains to urban hospitals and has served on numerous committees, both local and provincial, in the roles of Director of Critical Care Services and Executive Medical Director for what is now Island Health. His medical career has involved regular teaching and training of nurses, respiratory therapists and medical Interns/Residents. He continues to reside in Victoria, BC.

DR. DOUGLAS BLACKMAN Dr. Douglas Blackman is the former Senior Deputy Registrar and Deputy Registrar with the College of Physicians and Surgeons of BC. Previously, he had private practices in Prince George

and Victoria. Dr. Blackman is the Past President of the Federation of Medical Regulatory Authorities of Canada. He holds his Medical Doctorate from the University of British Columbia.

DR. KEVIN DOYLE Dr. Kevin Doyle received his degree of Doctor of Dental Medicine from the University of British Columbia and has been in private practice since 1980. He holds an undergraduate Bachelor of Science degree in Chemistry from the University of Victoria. He is a Fellow of the American College of Dentists, the International College of Dentists, and the Pierre Fauchard Academy. He is an Assessment Evaluator and Assessment Invigilator for the National Dental Examining Board of Canada. He has served as an examiner for the National Dental Examining Board of Canada and the College of Dental Surgeons of British Columbia. He actively participated in the transition of the *Dentists Act* to the *Health Professions Act* as Chairperson for the College of Dental Surgeons of BC Quality Assurance Committee. He holds a Graduate Certificate in Evidence Based Health Care from the University of Oxford and has held past appointments as Reviewer for the Cochrane Oral Health Group, Council member on the Canadian Collaboration on Clinical Practice Guidelines (CCCPG) and Chairperson of the Guideline Advisory Committee of the CCCPG.

SANDRA J. PULLIN Sandra Pullin has been a practicing midwife since 1978. It has been her life's passion. She has always wanted to improve the lives of women and this was her path. Ms. Pullin spent the first twenty years of her career in Edmonton where she was part of the regulation of midwifery in that province. She moved with her family to Nanaimo on Vancouver Island in 1998 and has been serving the families of that area since. In August of 2018, Ms. Pullin closed her practice and has been traveling and doing locums since. She has spent time working as a midwife in Nunavut, Uganda and Haiti for short terms. She plans on working with Doctors Without Borders in the coming years. Ms. Pullin has a husband and two children who have supported her through this journey and she is looking forward to the grandchildren to come.

DARLENE (DEANIE) LYNN KOLYBABI Deanie has experience working in the broadcast industry. She also has experience working in the not-for-profit sector. Kolybabi acted as Executive Director of the National Aboriginal Achievement Foundation, EAGLE (Environmental-Aboriginal Guardianship through Law & Education), and Kla-how-eya Aboriginal Cultural Centre. Further, she is a charter Board Director with Healthy Aboriginal Network, and a founding member of SABAR (Strategic Alliance of Broadcasters for Aboriginal Reflection). More recently, Ms. Kolybabi served on the Board of Directors of the Fraser Health Authority (FHA), during which time she also served as Chair of the Governance & Human Resources Committee as well as serving on the Finance Committee, the Access & Flow Committee and the Quality & Performance Committee.

LORRAINE UNRUH Lorraine Unruh has an extensive background in hospital administration and retired in 2012 as the Acute Area Director for the South Okanagan Hospitals (Penticton, Summerland, Oliver, Princeton, and Keremeos). She is currently a Board Member of the Health Professions Review Board. Active in her community, she is a Board Member of the South Okanagan Medical Foundation. Lorraine Unruh holds a Diploma of Nursing, a Bachelor of Science in Nursing and a Master of Arts degree in Organizational Leadership.

CHERYL VICKERS Cheryl is a lawyer whose practice focusses on dispute resolution, including mediation and arbitration, administrative law, and real property assessment law. Cheryl chaired BC's Property Assessment

Appeal Board from 2003 to 2015, and served as Vice-Chair from 1995-2003. Since 2007, Cheryl has chaired BC's Surface Rights Board, a tribunal exercising jurisdiction under the *Petroleum and Natural Gas Act* and other statutes to resolve surface lease and right of way disputes between landowners and the holders of subsurface rights. From March 2013 to April 2014, Cheryl served as Acting Chair of BC's new Civil Resolution Tribunal, assisting with the development of Canada's first on-line tribunal to help citizens resolve strata and small claims disputes. Cheryl was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and served for many years as a member of that organization's Board of Directors, including as its President from 2004-2006. She assisted with curriculum development for BCCAT courses to offer training to appointees of quasi-judicial boards and tribunals and is an instructor of the Foundations of Administrative Justice for Administrative Decision Makers and Foundations of Administrative Justice for Staff courses, as well as the Decision Writing and Hearing Skills Workshops. Cheryl has presented at conferences of the British Columbia Council of Administrative Tribunals, the Council of Canadian Administrative Tribunals, the Continuing Legal Education Society, the Canadian Property Tax Association and the Appraisal Institute of Canada on a variety of subjects. She serves on the editorial boards of two CLE Practice Manuals – *Real Property Assessment* and *Administrative Law*. In October 2009, Cheryl received BCCAT's Recognition Award for outstanding contribution to administrative justice.

DR. ANITA MOLZAHN Dr. Anita Molzahn is a retired nurse, professor, and academic administrator. She served as Dean, Faculty of Nursing at the University of Alberta (2008-2017) and as Dean, Faculty of Human and Social Development (1996-2003) and Director of the School of Nursing (1992-1996) at the University of Victoria. Her education includes a diploma in nursing from the Royal Alexandra Hospital in Edmonton and a BScN, MN and PhD (Sociology) from the University of Alberta. She is a Fellow of the Canadian Academy of Health Sciences and a Member of the Order of Canada. Dr. Molzahn's research focuses on quality of life, particularly in relation to chronic illness. She was the Canadian principal investigator in the WHOQOL Group, a WHO international research group that developed and tested a series of measures of quality of life, including the WHOQOL-100, WHOQOLBREF, and WHOQOL-OLD. Dr. Molzahn has served on academic and community boards and committees for various organizations including the Canadian Academy of Health Sciences, VID Specialized University in Norway, Canadian Association of Schools of Nursing, Michael Smith Foundation for Health Research, and the Kidney Foundation of Canada.

Operations

Effective December 1, 2004, the administrative support functions of the HAB were consolidated with the Environmental Appeal Board/Forest Appeals Commission Appeals Office (Appeals Office) in Victoria.

In addition to the HAB, the Appeals Office provides administrative support to five other adjudicative tribunals. This clustering of the administrative support for eight independent appellate tribunals has been done to assist government in achieving economic and program delivery efficiencies by allowing greater access to resources while, at the same time, reducing administration and operating costs. The additional tribunals include the:

- Community Care and Assisted Living Appeal Board;
- Health Professions Review Board;
- Financial Services Tribunal;
- Industry Training Appeal Board; and,
- Oil and Gas Appeal Tribunal.

This move has resulted in significant savings to government for the operation of the HAB through a shared services cluster approach which takes advantage of synergy and assists government in achieving economic and program delivery efficiencies. This arrangement has been in operation for 15 years now and has proven to be a very effective and efficient means for providing administrative support to the HAB, which in turn enables the HAB to effectively and efficiently fulfill its appellate mandate to the public.

Effective April 1, 2017, host Ministry responsibilities for administration of the Hospital Appeal Board (including budget oversight and member appointments, human resources, facilities, and records supports, etc.) were transferred to the Attorney General as part of the Tribunal Transformation Initiative.

Contact Information

MAILING ADDRESS: Hospital Appeal Board
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

LOCATION: 4th Floor, 747 Fort Street
Victoria BC V8W 3E9

TELEPHONE: 250 387-3464

FAX: 250 356-9923

EMAIL: info@bchab.ca

WEBSITE: <http://www.HAB.gov.bc.ca/>

Appeal Activity and Decisions Issued

APPEALS FILED

During this reporting period, three new appeals were filed. Additionally, there were three appeals which were carried over from the previous reporting period. The new appeals are described below. All of the six matters before the board during this reporting period remained outstanding at the close of this reporting period, although the final decision on the merits of one of the appeals was issued during this reporting period⁵.

HAB-HA-20-A002 BY A PHYSICIAN, FILED MAY 29, 2020– Appeal by a Physician from the March 2, 2020 decision of the Board of Directors of the Interior Health Authority (“IHA”) to change his Hospital Privileges from the Active category to the Provisional category, and requiring him to follow a remediation plan.

HAB-HA-20-A003 BY A PHYSICIAN, FILED DECEMBER 8, 2020– Appeal by a Physician from the September 11, 2020 decision of the Board of Directors of the Interior Health Authority (“IHA”) regarding his application for Active Medical Staff Privileges.

HAB-HA-21-A001 BY A PHYSICIAN, FILED FEBRUARY 11, 2021 – Appeal by a Physician from the January 8, 2021 decision of the Board of Directors of Northern Health Authority (“NHA”) to deny her application for Active Medical Staff Privileges.

BOARD DECISIONS

The Board issued six decisions during this reporting period consisting of: one final decision on the merits of an appeal, four preliminary decisions, and one post-hearing decision. Each of the final, preliminary and post-hearing decisions is summarized below.

FINAL DECISION ON THE MERITS

2018-HA-002(f)

Decision Date:	August 20, 2020
Appellant:	Dr. Andrew Campbell
Respondent:	Provincial Health Services Authority (“PHSA”)
Issues:	Whether termination of Appellant’s Clinical Services Contract amounted to a revocation of privileges, and if so, what remedy was appropriate.
Background:	The Appellant was a pediatric cardiothoracic surgeon who had privileges at the BC Children’s Hospital (“BCCH”) and worked under a Clinical Services Contract (the

⁵ The HAB does not calculate the date of file closure as the date of issuance of the final decision unless there are no post-decision matters which require attention (e.g. costs applications).

“Contract”). In March of 2017, BCCH gave the Appellant written notice of the without cause termination of the Contract, with termination scheduled to take effect 12 months later. In March of 2018 the Contract was terminated and the Appellant was not allocated any further cases. The Appellant alleged that the Respondent constructively revoked his hospital privileges when it terminated his Contract. The Respondent maintained the Appellant’s privileges remained intact despite the termination of the Contract, and therefore there had been no modification, refusal, suspension or revocation of the Appellant’s privileges.

Disposition:

The Board first determined that it had the jurisdiction pursuant to sections 46(1)–(3.1) of the *Hospital Act* to consider the threshold question of whether the Appellant’s privileges had been modified, suspended or revoked. The Board then reviewed case law from British Columbia and other jurisdictions concerning the content of privileges, and considered that the content of privileges will be highly contextual. The Board observed that the content of privileges will vary based on different hospital settings and specialties. The assessment will be based on the privileging documents, the hospital bylaws and the effect of any contractual provisions, the resources typically employed in the specific type of practice under consideration, and that historical practice of the physician and the hospital under consideration.

To determine if the Appellant’s privileges had been modified or revoked, the Board took into account the Appellant’s appointment and reappointment for privileges, the Medical Staff Bylaws, the effect of the Contract on the Medical Staff Bylaws and case allocation, the nature of pediatric cardiac surgical practice, the historical practice at BCCH, and cases on modification and revocation of privileges. Weighing those factors together, the Board concluded that case allocation decisions made by the Department Head resulted in a modification of the Appellant’s privileges over time. Further, the termination of the Contract effectively terminated the Appellant’s ability to exercise his privileges and his appointment to the medical staff became meaningless. The Board found that the termination thus constructively revoked the Appellant’s permit to practice.

The Board went on to consider the issue of remedy. The Board found that it had a broad, remedial jurisdiction pursuant to section 46(1) of the *Hospital Act*, which allowed it to substitute its own decision for any decision that the board of management could make regarding privileges. It therefore found that it had the jurisdiction to grant the remedy of a fair and equitable case-allocation sought in the appeal because that decision could be made by a board of management.

Appeal Decision: <http://www.hab.gov.bc.ca/2005.asp>

PRELIMINARY AND POST-HEARING DECISIONS

HAB-HA-20-A001(a) (February 02, 2021) – The Appellant, a Midwife, appealed the decision of the Northern Health Authority (“NHA”) Board of Directors denying her application for appointment to the Northern Health Medical Staff. Prior to the commencement of the hearing, the Appellant applied to the Board for production by NHA of documents pertaining to a Midwifery Review

commissioned by NHA, and for a summons compelling the consultant engaged by NHA to conduct the Midwifery Review to attend the upcoming hearing. The Board held that the Appellant had not established that there were any existing documents pertaining to the Midwifery Review that were relevant to the issues in the appeal, and therefore dismissed the Appellant's disclosure application. The Board also dismissed the Appellant's request for a summons because the potential harm to the consultant which could arise from sharing raw data collected in confidence for the purposes of the review, outweighed the potential benefit to the Appellant which might arise if the consultant's evidence were to be relevant and of assistance.

Preliminary Decision: <http://www.hab.gov.bc.ca/preliminary.asp>

HAB-HA-20-A001(b) (February 24, 2021) – The Appellant, a Midwife, appealed the decision of the Northern Health Authority (“NHA”) Board of Directors denying her application for appointment to the Northern Health Medical Staff. Prior to the hearing of the matter, the Respondent applied for an adjournment on the basis that the volume of documents disclosed by the Appellant in close proximity to the hearing date prejudiced the Respondent's ability to prepare for the hearing. The Board ultimately granted the adjournment. The Board acknowledged that the adjournment would pose a hardship to the Appellant, but the Board agreed with the Respondent that the volume of documents disclosed so close to the commencement of the hearing prejudiced the Respondent's ability to adequately prepare and respond.

Preliminary Decision: <http://www.hab.gov.bc.ca/preliminary.asp>

2018-HA-002(e) (June 16, 2020) – The Appellant, a physician, appealed the decision of the Provincial Health Services Association (“PHSA”) to terminate his contract for services, which he said resulted in a modification of his privileges. During the course of the hearing, the Respondent brought an application for an order that one of the members of the three-person Panel hearing the appeal be recused from the appeal on the basis of reasonable apprehension of bias. The application arose out of comments the Panel member had made during the course of questions he posed to the Appellant and other witnesses during the hearing. The Panel reviewed the case law on reasonable apprehension of bias in BC and found that there is a strong presumption of impartiality that is not easily displaced and, therefore, a finding of reasonable apprehension of bias requires a real likelihood or probability of bias and individual comments cannot be seen in isolation. The Panel commented that it is common in administrative proceedings for Panel members to have an opportunity to ask questions or seek clarification of the testimony of witnesses, and that as a matter of fairness, subsequent to Panel questions the parties are provided with an opportunity to ask any additional questions or clarifications arising from Panel questions. The Panel considered the impugned comments of the Panel member and held that they did not meet the high threshold required to establish a reasonable apprehension of bias. In particular, the Panel held that the Panel member's comments did not indicate that he was closed to persuasion or that he had prematurely made his mind up about the disposition of the appeal.

Preliminary Decision: <http://www.hab.gov.bc.ca/preliminary.asp>

2018-HA-002(g) (November 25, 2020) – The Appellant, a physician, appealed the decision of the Provincial Health Services Association (“PHSA”) to terminate his contract for services, which he said resulted in a modification of his privileges. After the issuance of the final decision in the appeal, the Appellant applied to the Board for “clarification” on the terms and conditions of the Board’s Order. The Respondent argued the Board was *functus officio* and that no clarification was required in any event. The Board held there was no need to clarify its Order.

Preliminary Decision: <http://www.hab.gov.bc.ca/preliminary.asp>

2019-HA-001(a) (February 05, 2021) – The Appellant, a physician, appealed the decision of the Board of Directors of the Vancouver Island Health Authority (“VIHA”) to revoke his privileges as a member of the VIHA Medical Staff. This decision disposed of two separate preliminary applications which were filed in close proximity.

First, the Respondent applied to the Board for an order summarily dismissing the appeal on the basis of mootness. The Respondent argued that the Appellant’s lack of currency with his professional regulator meant that he was not eligible for privileges, such that his Appeal to the Board was moot. The Board dismissed the application. The Board referenced the bylaws and held that the bylaws “clearly contemplate a process to regain currency” and therefore the currency issue was not determinative of the appeal.

Second, the Appellant applied to the Board for a right of sur-reply with an additional supporting affidavit. The Appellant’s sur-reply asked for portions of the Respondent’s reply submissions to be struck. The Respondent objected to the Board accepting the sur-reply on the basis that the Appellant did not follow proper procedure in submitting it. The Respondent further argued that the sur-reply had “tainted the entire application process”. The Board ultimately allowed the sur-reply and held that it satisfied the requirements of the Board in terms of notice and content. In doing so, the Board emphasised the importance of substance over technicality in administrative proceedings.

Matters Outstanding at end of Period

There were six matters outstanding at the end of this reporting period, though the final decision on the merits of one of the appeals was issued during this reporting period⁶.

Performance Indicators and Timelines

Section 59.2(b) and (d) of the *Administrative Tribunals Act* requires the Board to report on performance indicators, and provide details of the time from filing to decision of matters disposed of by the Board in the reporting period.

The appeal process, although very similar to a court process, has been designed to be faster and more efficient and cost-effective than if these important and complex matters were heard by the court. Appeals are full “hearings de novo” and are primarily conducted in person with a three person panel. During the course of an appeal the Board often deals with a number of complex preliminary issues, including legal challenges to the Board’s jurisdiction as well as document disclosure and evidentiary issues.

The Board generally tries to have an individual with legal training act as panel chair, who may, when delegated by the Chair, determine any interim or preliminary issues in the appeal. The Board then assigns two additional panelists for the hearing who have medical and/or hospital administrative experience to ensure the appropriate expertise on the panel to deal with the issues arising on the merits of the appeal.

The Board’s Practice Directive #1, which is available on the Board’s website, sets the timeframes the Board will target for 1) completion of hearings, and 2) issuing a final decision with reasons.

With respect to completion of hearings, the Directive provides that the Board is committed to providing a fair, timely and effective appeal for practitioners, and that appeals will be processed as quickly as practicable. The Directive sets different timeframes for hearings of 2 days or less, 3-5 days, and 6 days or more. For matters where the total number of hearing days required to complete the matter is 6 or more, the Board will attempt to complete the hearing within 9 months for the date the Notice of Appeal is received by the Board.

⁶ The HAB does not calculate the date of file closure as the date of issuance of the decision on the merits of the appeal unless there are no post-decision matters which require attention (e.g. costs applications).

With respect to issuance of final decisions, the Directive says that the Board will endeavour to issue a copy of the final decision or order, including written reasons, to each party within a range of three to nine months from the close of the hearing, depending on the length of the hearing. For matters where the hearing requires six or more days to complete, the decision will generally be issued within nine months of the conclusion of the hearing.

With respect to the final decision on the merits which was issued during this reporting period, the number of days between the filing of the Notice of Appeal and the completion of the hearing was 581 (19 months and 2 days). The number of days between the close of submissions and the issuance of the final decision was 307 days (10 months and 2 days). The Board did not meet the targets set out in its Directive with respect to completion of hearing or issuance of final decision for this appeal, mainly due to the complexity and novelty of the appeal. The oral component of the hearing of the appeal required 30 hearing days and resulted in 11 written preliminary decisions. The hearing spanned five months from May 2019, to October 2019.

With respect to the five preliminary decisions issued by the Board during this reporting period, the average time between the close of submissions⁷ and the issuance of a decision was 32 days. The longest time between the close of submissions and the issuance of the preliminary decision was 102 days, and the shortest time was 1 day.

Finally, section 59.2(e) of the *Administrative Tribunals Act* requires the Board to report the results of any surveys carried out by the Board during the reporting period. The Hospital Appeal Board did not conduct any surveys during this reporting period.

Judicial Review of HAB Decisions

There were no decisions rendered by the Supreme Court of British Columbia (the “BCSC”) on judicial review of any HAB decisions issued in this reporting period. There was one application for Judicial Review of a HAB decision which remained outstanding before the BCSC as of the close of this reporting period. A decision upholding the HAB’s decision was issued shortly after the close of this reporting period⁸ and will be reported on in the next fiscal cycle.

⁷ These preliminary decisions were determined on the basis of both written and oral submissions.

⁸ *Provincial Health Services Authority v. Campbell*, 2021 BCSC 823, issued April 30, 2021.

Statement of Financial Performance

(For the fiscal year ended March 31, 2021)

In fiscal year 2020/2021, the HAB incurred expenses of \$150,908 as detailed below in this six-year chart. The expenses incurred in this reporting period were primarily comprised of board member fees and expenses.

<i>Direct Expenses</i>	2015/2016 \$	2016/2017 \$	2017/2018 \$	2018/2019 \$	2019/2020 \$	2020/2021 \$
Salaries and Benefits	0	0	0	0	0	0
Board Member Fees & Expenses	20,163	168,560	20,735	39,255	86,000	72,217
Professional Services	753	29,163	11,942	7,550	18,900	67,620
Office and venue Expenses	688	41,115	5,905	8,478	26,259	11,072
Other	30	30	0	0	0	0
Total HAB Expenses	\$21,634	\$238,868	\$38,582	\$55,283	\$131,159	\$150,908