



Hospital Appeal Board

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DECISION NO. HAB-HA-22-A002(a)

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

BETWEEN:	Dr. Christopher McCollister	APPELLANT
AND:	Vancouver Island Health Authority	RESPONDENT
BEFORE:	A Panel of the Hospital Appeal Board Stacy Robertson, Chair	
DATE:	Conducted by way of written submissions and videoconference hearing concluding on December 15, 2022	
APPEARING:	For the Appellant: Lee C. Turner, Counsel For the Respondent: Alexis Kerr, Counsel Melissa Perry, Counsel	

Application for Interim Stay

The Application

[1] On August 23, 2022, the Appellant, Dr. Christopher McCollister, filed a Notice of Appeal with the Hospital Appeal Board (the "HAB") appealing the Decision of the Board of Directors of the Vancouver Island Health Authority ("VIHA") made on May 25, 2022 (the "Decision") revoking his medical staff appointment and privileges at West Coast General Hospital ("WCGH") effective February 10, 2022.

[2] The VIHA Board of Directors made an initial decision to cancel the privileges of the Appellant at WCGH on February 17, 2022. The Appellant appealed the initial decision, and the VIHA Board of Directors affirmed their decision to cancel the privileges of the Appellant effective February 10, 2022 in the May 25, 2022 Decision.

[3] The Appellant's Notice of Appeal included a request for an interim stay of the Decision pending the hearing of the appeal before the HAB, and the Appellant's application for a stay (the "Stay Application") was filed on November 17, 2022. A schedule for the exchange of submissions was set by the HAB and the Appellant's Stay Application was heard orally by the HAB on December 15, 2022.

Background

[4] Dr. McCollister is a pediatric generalist whose practice in Port Alberni, B.C. is primarily community-based, seeing non-urgent or emergent pediatric patients, either in a hospital-based community clinic or in his private office.

[5] Dr. McCollister has held hospital privileges at WCGH since 1997. There have been no allegations of any patient concerns or quality of care issues regarding Dr. McCollister.

[6] Prior to the spring/summer of 2021, WCGH provided space for a pediatric clinic. However, due to the need to expand other clinical services, the pediatric clinic at WCGH was closed at that time and the local pediatricians set up a private office-based clinic in the community.

[7] On October 14, 2021, British Columbia's Provincial Health Officer, Dr. Bonnie Henry ("PHO") issued an order titled *Hospital and Community (Health Care and Other Services) Covid 19 Vaccination Status Information and Preventative Measures*. This order was revised on October 21, 2021, November 9, 2021, November 18, 2021 and September 12, 2022 (as amended, the "Order").

[8] The Order requires that a health authority must not permit an unvaccinated health member with facility privileges to work or exercise their facility privileges in a facility after October 25, 2021, unless that health member is in compliance with one of the subsections on the timelines for becoming fully vaccinated, or has an exemption and is in compliance with the terms of the exemption. An exemption can only be granted under the *Public Health Act* on the basis of a medical deferral to a vaccination, which permits a person to work, despite not being vaccinated.

[9] The effect of the Order on Dr. McCollister was that he could either get vaccinated, seek an exemption from vaccination, or not work in WCGH to exercise his privileges. The parties are agreed that Dr. McCollister did not seek an exemption and was not vaccinated. The parties are also in agreement that Dr. McCollister has not exercised his privileges at WCGH since October 26, 2021. Therefore, Dr. McCollister is not in breach of the Order.

[10] There is no dispute between the parties that Dr. McCollister can practice as a pediatric generalist in his office-based clinic and be in compliance with the Order. The Order only covers a hospital-based practice, for which privileges are necessary.

[11] On February 17, 2022, the VIHA Board of Directors made an initial decision to cancel the privileges of the Appellant at WCGH. After the Appellant appealed the initial decision, on May 25, 2022, the VIHA Board of Directors affirmed their decision to cancel the privileges of the Appellant effective February 10, 2022.

[12] In his Notice of Appeal, the Appellant says that VIHA did not have grounds to terminate his privileges at WCGH pursuant to Article 12.1.1 of the VIHA's Medical Staff Bylaws and section 6 of the *Hospital Act* Regulations. The Appellant further says that even if there were the necessary grounds to invoke discipline, it was not appropriate for the VIHA Board of Directors to exercise its discretion to cancel the privileges of the Appellant.

The Order Sought

[13] The Appellant seeks an order for an interim stay of the VIHA Board of Directors' Decision, pending a decision on the merits of the Appellant's appeal before the Hospital Appeal Board.

The Legal Framework

[14] Pursuant to section 46(4.2) of the *Hospital Act*, RSBC 1996, c 200 and section 25 of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "ATA"), the HAB has the authority to grant an interim stay of the decision under appeal.

[15] The parties are in agreement that the test for a stay set out in the case of *RJR-MacDonald Inc. v Canada (A.G.)*, [1994] 1 SCR 311 ("*RJR-MacDonald*") is applicable to the HAB and the stay order of the VIHA Board of Director's Decision sought by the Appellant in this application.

[16] The three-part test set out in *RJR-MacDonald* requires the applicant to satisfy the HAB that:

- A. There is a serious issue to be tried;
- B. The applicant would suffer irreparable harm if a stay is not granted; and
- C. The balance of convenience favours the granting of a stay.

[17] This test has been applied by the HAB in several cases including *Dr. C. v X, a Health Authority*, HAB (June 5, 2009), where an interim stay was refused, and *Daviau v St. Joseph's Hospital*, HAB (June 10, 2008) and *Vedam v. Provincial Health Services Authority*, HAB-HA-22-A001(a) where interim stays were granted with conditions.

Analysis

[18] Below, I will address each aspect of the *RJR-MacDonald* test as it applies to this Stay Application.

A. Serious Issue to be Tried

[19] As stated in *RJR-MacDonald*, there are no specific requirements that must be met in order to satisfy the "serious issue" test. The Supreme Court of Canada has said: "The threshold is a low one." Whether this aspect of the test has been satisfied should be determined on the basis of common sense and limited review of the case on its merits. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, the inquiry should generally proceed onto the next stage of the test. A prolonged examination of the merits is generally neither necessary nor desirable¹.

[20] The Appellant says that the *de novo* nature of the hearing before the HAB satisfies the serious issue to be tried test. The issue in question is whether the

¹ *RJR-Macdonald* at p 337-338.

termination of the Appellant's privileges at WCGH was an appropriate response to the Appellant's unvaccinated status and inability to exercise his privileges by virtue of the PHO Order.

[21] The Respondent says that the appeal is frivolous because there is no remedy for the Appellant which would allow him to exercise his privileges at WCGH while the PHO Order is still in full effect. Further, the Respondent says that the Appellant has not suffered any economic harm as a result of the termination of privileges at WCGH, and therefore there is no serious issue to be tried.

[22] The Appellant notes that this case is not about the Appellant returning to practice at WCGH as a result of the outcome of this appeal, but rather is about the effect of a termination of privileges on his ability to return to practice at WCGH should the PHO Order be changed to allow him to do so. The Appellant says that if his privileges are terminated and the Order is changed allowing him to practice in a hospital setting, then he would have to reapply for active privileges, whereas if his privileges were simply suspended or he was on a leave of absence until the Order allowed him to practice in a hospital setting, he could immediately return to work in the hospital if the Order was changed without having to reapply for active privileges.

[23] The Appellant has raised two issues in this appeal. The first is whether there were grounds for any discipline against the Appellant pursuant to VIHA's Medical Staff Bylaws. This issue involves the interpretation of the effect of the Order on Article 14.1.1 of VIHA's Medical Staff Bylaws and section 6 of the *Hospital Act* Regulations. The Respondent did not respond to this issue in its response to the stay application, but focused on the fact that the Appellant would not have a practical remedy to his appeal even if he was successful on either of the two issues in the appeal as neither would allow him to return to work at WCGH until the Order is amended.

[24] The Respondent's focus on whether the Appellant has a practical remedy misconceives the nature of an appeal to the HAB as opposed to a cause of action in a civil proceeding. Provable damages and particularly monetary damages are not necessary for an appeal to the HAB to be successful.

[25] The second issue that the Appellant has raised is whether the termination of privileges was an appropriate exercise of discretion for any breach of VIHA's Medical Staff Bylaws by the Appellant. The HAB does not have jurisdiction to award damages but can reverse the discipline taken by VIHA Board or impose a lesser sanction than termination of the Appellant's privileges such as a suspension or even a leave of absence. This would be a practical remedy for the Appellant even if it would not mean that the Appellant would be able to return to work while the Order is still in its current effect.

[26] Whether the consequence of the Appellant's unvaccinated status results in a termination of privileges or a suspension or an indefinite leave of absence is not frivolous and satisfies the serious issue to be tried in the first part of the test for an interim stay.

B. Irreparable Harm

[27] The issue to be decided at this stage of the test is whether a refusal to grant interim relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision is decided in favour of the applicant. Irreparable in this context refers to the nature of the harm suffered rather than its magnitude. It is harm that cannot be quantified in monetary terms or cured through a money judgement because one party cannot collect damages from the other party or where the applicant would be put out of business or will suffer permanent market loss or irrevocable damage to its reputation².

[28] The Respondent says that the Appellant will not suffer irreparable harm if the stay is not granted because the Appellant cannot return to work or otherwise exercise his privileges at WCGH, regardless of the outcome of the Stay Application. The Appellant accepts that he currently cannot work or exercise his privileges at WCGH and that will not change unless there is a change to the PHO Order.

[29] The Appellant says that the termination of privileges may result in the termination of his license to practice medicine, which is governed by the College of Physicians and Surgeons of British Columbia ("CPSBC"), which would result in irreparable harm due to the unrecoverable loss of income from his private practice.

[30] The affidavit evidence of the Deputy Registrar of the CPSBC³ is that the termination of privileges resulting from being unvaccinated is simply noted on a physician's file and no investigation is commenced by them that would lead to any further disciplinary action by the CPSBC. The Appellant says this is no guarantee that the CPSBC will not take any disciplinary action, but I find that the Deputy Registrar of the CPSBC has provided a clear statement of the position taken by the CPSBC regarding unvaccinated members given the current information and regulatory framework. The CPSBC cannot predict or prevent any further steps the government may take in relation to the practicing status of unvaccinated members. In that regard, the Appellant notes that the Minister of Health for B.C. has stated that work is being done with the various professional medical colleges to make vaccination for COVID-19 a condition of licensing. If that were to come to pass, the CPSBC and the VIHA would be bound by any such regulatory requirement imposed by government. The concern that the Appellant may have his license terminated by the CPSBC under the current regulatory regime is not substantiated by the evidence.

[31] The Respondent notes that the Appellant's MSP billings have increased since he stopped working at the WCGH and, therefore, the Appellant has not suffered any economic harm. The Respondent also relies upon several cases seeking an interlocutory injunction staying the effect of mandatory vaccination policies affecting federal employees and suppliers to the federal government. The cases find that the loss of income resulting from an individual's decision to remain unvaccinated against COVID-19 does not constitute irreparable harm. The harm flows from being terminated which can be compensated in money damages and is

² *RJR-Macdonald* at p 340-341.

³ 1st Affidavit of GK sworn November 30, 2022.

therefore, not irreparable (see *Wojdan v. Canada (AG)* 2021 FC 1341 and *Lavergne-Poitras v. Canada (AG)* 2021 FC 1232).

[32] The Appellant acknowledges that he has mitigated any loss of income from the inability to exercise his privileges at WCGH but says that there is the damage to his reputation by the fact of the termination of his privileges at WCGH and relies upon the case of *Harrison v. Orillia Soldiers' Memorial Hospital*, 2006 CanLII (ONSCDC), where damage to the reputation of a physician with privileges was recognized as irreparable harm. The Appellant submits that the cases cited by the Respondent do not deal with the unique circumstances of the reputational damage to a medical professional due to a termination of privileges or the special jurisdiction of the HAB as opposed to courts in civil proceedings where damages must be proven for a cause of action to exist. In *Harrison*, the issue appears to have been behavioural difficulties with the applicant, not his competency as a general surgeon. The court noted that the revocation of privileges would be irreparable harm as the inability to practice in his community would be a professional death sentence and his reputation as a practicing surgeon would be ruined.

[33] The Appellant admits that he has done public interviews about his unvaccinated status and his inability to work in the WCGH. Therefore, any damage to his reputation arising from his termination of privileges due to his unvaccinated status is, at least in part, of his own making.

[34] The damage to the Appellant's reputation resulting from a termination of privileges, as opposed to a suspension or indefinite leave of absence, may not be significant, in the unique circumstances of this case. However, I find that it is sufficient to satisfy the irreparable harm part of the test for an interim stay. This factor will also be considered under the balance of convenience stage of the test for a stay, discussed below.

C. Balance of Convenience

[35] The third and final stage of the analysis for whether or not to grant a stay is to determine which of the two parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits. There are many factors that may be considered in assessing the "balance of convenience", and the specific factors to be considered will vary from case to case.⁴ The public interest is one factor that may be taken into account at this stage of the analysis. The effect that granting or not granting a stay will have on the public interest may be relied upon by either party. Further, the imposition of terms or conditions in any order granting a stay may also be taken into account in determining the balance of convenience.⁵

[36] Under the balance of convenience branch of the test, the Appellant makes the following submissions about the efficacy of the PHO Order:

⁴ *RJR-Macdonald* at p 342.

⁵ *RJR-Macdonald* at p 348.

- a. The Government of B.C. has admitted they have no evidence to suggest that an unvaccinated physician is at greater risk of transmitting the virus to patients or colleagues than an unvaccinated physician is;
- b. There is no evidence from the Health Authority that physicians currently exercising their privileges are up to date with their booster shots; and
- c. There is evidence that the Chief Public Health Officer believes that physicians who had their vaccine more than 3-6 months ago are no longer protected from the virus.

[37] I have not considered these submissions as the HAB is not the proper forum and does not have the jurisdiction to review or alter the PHO Order or question the rationale for the PHO Order. The PHO Order is simply a fact that exists, with which both parties must comply. The Appellant's arguments regarding the efficacy and reasonableness of the PHO Order would need to be addressed through a judicial review application or other available appeal process of the PHO Order itself.

[38] The sole issue for determination on this Stay Application is whether the termination of privileges of the Appellant based on his unvaccinated status and inability to perform his duties and obligations relating to his privileges should be stayed on an interim basis pending a full hearing into the merits of the termination of his privileges by VIHA.

[39] The Respondent relies on an arbitral decision in B.C. (*Fraser Health Authority and British Columbia General Employees' Union* (April 4, 2022) CanLII 25560) finding that the refusal to attend work for provincial employees whose workplace is covered by the PHO Order requiring vaccination, is just and reasonable cause for termination. The arbitrator noted that it was not material whether the ineligibility to attend work was characterized as culpable or non-culpable. The union, on behalf of the employee, noted that there were other reasonable alternatives to termination such as an unpaid leave of absence. The arbitrator noted the evidence of administrative and operational difficulties filling temporary shifts with no end date which would be required to fill an indefinite leave of absence as opposed to filling a permanent position. The arbitrator also noted that there is no entitlement in the collective agreement or in arbitral law to an unpaid leave of absence of indefinite term where an employee is legally prohibited from working and, due to her personal choices, has no foreseeable prospect of return.

[40] The arbitrator noted that there was no expiry date for the Hospital and Community Order and stated:

"[i]t is speculative to opine when the pandemic may end and even so, it would be speculation to assume that the vaccination requirement in the Order will be lifted once the PHO determines we have moved to an endemic stage."

[41] These comments are equally applicable to the present case.

[42] The Appellant points to evidence that the pandemic is lessening and that it is likely that the PHO Order will be lifted soon as it applies to unvaccinated medical staff members exercising their privileges in a hospital or other applicable medical facilities. The Appellant submits that recent communications issued by the PHO that

COVID-19 is indistinguishable from the common cold, RSV and influenza and should be managed in a similar fashion suggests that it is likely that there will be a change in the PHO Order removing the requirement for those with privileges to be vaccinated.

[43] The Appellant has also noted a memorandum that was sent to all acute care site directors on November 15, 2022 from the Director, Infection Prevention and Control at VIHA stating that given the changing landscape it was no longer required for visitors to provide proof of vaccination for COVID-19. The Respondent notes that the direction in this memorandum was rescinded on November 17 and 19, 2022 through verbal discussions with the acute care site directors as it was not consistent with the most recent provincial guidance on visitors in acute care. It seems that the memorandum and direction to staff was sent without full consideration or approval of the senior medical leadership at VIHA.

[44] The Appellant also presented some evidence from the Minister of Health that the vaccination requirement for physicians with privileges may be extended to apply to all physicians on a permanent basis, which could potentially make any decision by VIHA irrelevant and would not assist the Appellant in returning to a hospital practice. Again, this is a speculative submission that cannot form part of the analysis in this Stay Application.

[45] The Respondent notes that PHO Order does not have an expiry date. Regarding the likelihood of an imminent change to the PHO Order's mandatory vaccination requirement, the Respondent referred to information from the PHO which still refers to a public health emergency, that the trajectory of the pandemic is still uncertain, that the spread of COVID-19 is expected to increase in the fall of 2022 and winter of 2023 and that the potential for another variant of concern to emerge remains a real concern.

[46] Without analyzing whether the evidence presented supports a conclusion that a change in the PHO Order is likely to occur in the near future or not, the current state is that the PHO Order does not have a termination date. It would be speculative to try to take into account the effect of a possible future change in the Order in this Stay Application.

[47] I find the HAB is not well positioned to speculate on the possible future changes to the PHO Order, particularly as it is not under the HAB's jurisdiction and the HAB is not the body responsible for analyzing all the relevant evidence to make or amend an order with such important consequences, not only for the Appellant, but the entire population of British Columbia. Therefore, I find that the analysis on this Stay Application must be based on the current status of the PHO Order.

[48] This case does not involve any allegations of misconduct or patient care issues by the Appellant. The evidence submitted indicates that the Appellant is a respected pediatrician in the community. However, the Respondent says that his choice to be unvaccinated has consequences pursuant to the PHO Order. Characterizing the Appellant's non-vaccination status as culpable or non-culpable is not particularly helpful to any analysis on this Stay Application. The combined effect of the Appellant's unvaccinated status and the PHO Order has consequences on the Appellant's privileges with VIHA that VIHA is required to address.

[49] The Appellant submits that the termination of his privileges at WCGH means that he is not in good standing with the CPSBC and, therefore, he would be ineligible to reapply for privileges if the Order is changed. However, the evidence of the Deputy Registrar of the CPSBC is that there is no disciplinary issue for the CPSBC regarding the Appellant's vaccination status, that nothing is done with this information other than noting it on their records and that the Appellant is in good standing with the CPSBC both internally and on the public-facing registrant directory. This issue does not impact the balance of convenience for either party, apart from allowing the Appellant to mitigate any economic losses by being able to continue to practice in his office-based practice.

[50] The Respondent says that the Appellant's absence from WCGH has caused and is continuing to cause significant operational impacts at that site. The Respondent says that there is need for three pediatricians in the community and to cover the on-call obligations for pediatricians at WCGH. With the inability of the Appellant to fulfill his on-call obligations at WCGH by virtue of the Order, there is only one pediatrician to cover all of the on-call obligations at WCGH. All parties acknowledge that one on-call pediatrician is not a sustainable model in the short term or the long term.

[51] The Respondent presented evidence similar to the evidence in the *Fraser Health Authority and British Columbia General Employees' Union* (April 4, 2022) arbitral case regarding the difficulties in trying to recruit a replacement on a temporary basis. The Respondent and Appellant both noted the difficulties in filling the one permanent position that has been posted since 2017 and is still outstanding.

[52] Given the difficulties filling a permanent position, the prospects of filling a temporary position of an indefinite time period, a less desirable position, are bleak. In fact, one of the corollary benefits of having two posted permanent positions is that the Respondent then qualifies for additional funding for rural locum physicians to cover part of the on-call and other responsibilities for a pediatrician at WCGH. The difficulty with trying to find locum coverage just for the hospital setting is that the locum is not looking after an existing practice to sustain any reasonable MSP billings and, therefore, VIHA must provide financial incentives to attract locums to provide on-call coverage at WCGH, which it only qualifies for if there is a permanent posting. With only one pediatrician with privileges at WCGH, the funding for locums to provide some relief is critical to the operation of the on-call system.

[53] The Appellant disputes whether that funding for additional locums could have come from somewhere else in the VIHA budget. If that occurred, funding would have to be taken from somewhere else within VIHA, whereas the additional funding for rural locum physicians referred to by the Respondent is a net new funding to VIHA which provides much needed relief to the one remaining pediatrician with privileges at WCGH.

[54] The Respondent also stated that if the Order changed allowing the Appellant to exercise his privileges and there was still a vacant position, then VIHA has the authority to immediately grant temporary privileges without Board approval to allow the Appellant to return to practice at WCGH while his full application for active staff privileges was processed up to the VIHA Board of Directors. This addresses

any time lag to begin treating patients in a hospital setting that the Appellant says would exist if his privileges remain terminated as opposed to suspended or as opposed to the Appellant just being placed on a leave of absence.

[55] The public interest and the needs of the patient population covered by a pediatric generalist at WCGH are served by having more pediatricians on-call, not less. If the stay is granted and the Appellant's termination of privileges is stayed, then VIHA could lose precious funding to provide some locum coverage for the one remaining pediatrician on-call at WCGH. The public interest weighs against granting the stay in these circumstances.

[56] Although I have found that the damage to the Appellant's reputation from a termination of privileges at WCGH satisfies the irreparable harm part of the test for an interim stay, the actual damage to the Appellant's reputation may be minimal. The Appellant admits that he has received referrals from the emergency department at WCGH even during the effect of the PHO Order. In addition, the VP Medicine, Quality, Research and Chief Medical Officer of VIHA has stated to the Appellant and to the VIHA Board of Directors that he did not have concerns about the quality of the Appellant's clinical care and encouraged him to apply for privileges if the Order is changed.

[57] Regarding any public reputational harm, the Appellant's own actions in publicly referring to his termination suggests that any damage to his reputation arising from his termination of privileges due to his unvaccinated status is at least partly of his own making. As the Appellant continues to maintain a busy private practice, any reputational harm appears to be minimal and unlikely to have a lasting effect if the Appellant was ultimately successful in his appeal before the HAB.

[58] I find that regardless of the outcome of this application for a stay, the Appellant still cannot exercise his privileges at WCGH, and the Appellant does not dispute this fact. This is not a case where the imposition of terms and conditions can relieve either party from the terms of the PHO Order, and neither party presented any terms or conditions on the Appellant's privileges that would alter the balance of convenience in this matter.

[59] In addition, I find that the Appellant has not suffered any loss of income during the time since his termination of privileges, as the Appellant concedes that he has mitigated any loss of income by being able to spend more time practicing at his private clinic rather than being on-call at the WCGH. Therefore, if the stay were not granted, the Appellant would not have any income loss and there would be no real change in the Appellant's ability to work at WCGH. In addition, as discussed above, the evidence before me suggests that any damage to the Appellant's reputation flowing from termination of privileges is likely minimal in the interim period and unlikely to have lasting effect if the Appellant was ultimately successful in his appeal before the HAB.

[60] However, if the stay were granted, the Respondent has established that they would have administrative and operational difficulties in finding appropriate replacement coverage for a temporary position of indefinite duration and would lose

the additional funding which is available with the posting of two permanent positions for locum assistance while VIHA seeks to fill the permanent postings.

[61] Finally, the public interest of the needs of the patient population served by pediatric physicians on-call at WCGH favours any measures to get more on-call assistance at WCGH, which weighs in favour of not granting the stay.

[62] Based on all of the above, I find that the balance of convenience favours the Respondent and not granting the stay in this matter.

Decision

[63] The HAB dismisses the Appellant's application for an interim stay of the Decision of the VIHA Board of Directors revoking his privileges at WCGH pending a full hearing of this appeal.

"Stacy Robertson"

Stacy Robertson, Chair
Hospital Appeal Board

February 3, 2023