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DECISION NO. HAB-HA-22-A001(a)

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

BETWEEN:	Dr. Saraswathi Vedam	**APPELLANT**
AND:	Provincial Health Services 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 June 1, 2022	
APPEARING:	For the Appellant: Jennifer Brun, Counsel	
	For the Respondent: Alexis Kerr, Counsel Kieran Siddall, Counsel	

Application for Interim Stay

***NOTE TO READERS – This is not the original version of this decision. This is a revised version which excludes confidential personal information and information that may be protected under section 51 of the *Evidence Act* ***

The Application

[1] On February 22, 2022, the Appellant filed a Notice of Appeal with the Hospital Appeal Board (the "HAB") appealing the Decision of the Board of Directors of the Provincial Health Services Authority ("PHSA") made on November 26, 2021 (the "Decision") revoking her medical staff appointment and privileges at B.C. Women's Hospital and Health Centre ("BCWHHC"). The Decision stated that the Appellant's medical staff appointment and privileges would be cancelled effective December 1, 2021. 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 (the "Stay Application"). 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 May 26, 2022. Subsequently, the HAB provided an opportunity for the parties to provide supplemental written submissions which closed on June 3, 2022.

Background

[2] The Appellant has been registered as a midwife with the British Columbia College of Nurses and Midwifes ("BCCNM", known prior to September 1, 2020 as the College of Midwives of British Columbia) since 2007. She has attended, acted as second attendant, and supervised midwives and health professional trainees, including in the medical midwifery and nursing fields, at over two thousand deliveries.

[3] The Appellant is a Professor of Midwifery and Lead Investigator at the Birth Place Lab at the University of British Columbia. From 2007-2012, she served as the Director of the Division of Midwifery at UBC. From 1985 to 2007, the Appellant was a nurse registered with various licensing bodies in the United States. In 2019, the Appellant obtained her Doctorate in transdisciplinary collaboration from the Faculty of Medicine, University of Sydney, Australia.

[4] The scope of midwifery practice is regulated by the BCCNM under the *Midwives Regulation*, B.C. Reg 281/2008, pursuant to the *Health Professions Act*, RSBC 1996, c 183 (the "*HPA*"). The BCCNM sets bylaws, standards and policies related to the scope of practice of registered midwives. To provide intrapartum care, which are services during labour and delivery, a midwife must have hospital privileges or a delineated plan for transfer of care to a qualified practitioner with privileges. Privileges are the permit to practice in a facility and involve an appointment to the Medical Staff of a facility. Without hospital privileges that include the ability to provide inpatient intrapartum care, a midwife's license to practice midwifery is limited to antepartum (pre-natal) and postpartum services.

[5] Pursuant to the BCCNM's policy on active practice requirements, a midwife must provide midwifery care during labour and birth, as principal midwife, for at least ten births occurring in a hospital and ten occurring in an out-of-hospital setting. The BCCNM provides for a rolling three-year period to maintain these currency requirements.

[6] The Appellant has had active medical staff privileges at BCWHHC since 2007. She has also held active medical staff privileges at Richmond Hospital since 2009 or 2010.

[7] In December 2018, an incident occurred at BCWHHC during the labour and delivery of one of the Appellant's midwifery patients resulting in an unexpected still birth (the "Incident"). Labour commenced as an at home birth, and the patient was eventually admitted to BCWHHC for prolonged second stage and consultation for augmentation of labour. The specific facts regarding the circumstances and obligations of all those involved in that case are the subject of the appeal before the HAB, and, therefore, the Panel does not make any findings in that regard and simply notes the Incident as it relates to the subsequent events and cancellation of the Appellant's privileges.

The Timeline

[8] The Incident initiated a Critical Patient Safety Event Review (the "Review") which was conducted by the Department Head of Midwifery at BCWHHC in January

2019. The Appellant agreed to a voluntary leave in relation to her privileges at BCWHHC pending the completion of the Review. It appears that this Review was completed in February 2019, and it is unclear whether the report from that Review was ever provided to the Appellant. An external review of the Appellant's practice then followed. The Appellant remained on voluntary leave pending the completion of the external review which was not completed until August 2019, and which she says the results were not communicated to her until May 2020. In correspondence in March 2020, BCWHHC requested that the Appellant's voluntary leave be continued until the external report was completed which it anticipated would be by early April 2020. The Appellant understood from BCWHHC that if she did not agree to her continued voluntary leave, they would seek an urgent application to suspend her privileges.

[9] PHSA started the process of review of the Appellant's privileges pursuant to the provisions of the Medical Staff Bylaws (the "Bylaws"), which involved a Medical Advisory Subcommittee holding an investigation meeting in July 2020 and ultimately making a recommendation on October 9, 2020 to the Medical Advisory Committee ("MAC") to revoke the Appellant's privileges at BCWHHC. The MAC made its recommendation on November 5, 2020 to the PHSA Board to revoke the Appellant's privileges at BCWHHC. The PHSA Board was set to consider the revocation of the Appellant's privileges in February 2021, but was delayed due to an expert report filed by the Appellant in February 2021. This expert report was reviewed by the MAC in July 2021, and the MAC decided to maintain its recommendation to revoke the privileges of the Appellant. The PHSA Board held a hearing regarding the revocation of the Appellant's privileges in October and November 2021, and made its decision to revoke the Appellant's privileges on November 26, 2021 effective December 1, 2021. It took PHSA approximately ten months to consider the expert report of the Appellant and in the end the MAC recommendation to the PHSA Board did not change.

[10] From the Incident in December 2018 until the PHSA Board decision to revoke the Appellant's privileges on November 26, 2021, the Appellant remained on voluntary leave. This delay is significant. PHSA has argued that the delay falls at the feet of the Appellant as she voluntarily agreed to the leave pending the results of the investigation. The Appellant says that she never contemplated that this process would take almost three years to complete. The Appellant says that she decided to cooperate in good faith with the investigatory process of PHSA as she determined that it would be less time consuming and reputationally harmful to her than ending her voluntary leave and facing an urgent interim suspension of her privileges.

[11] While there were some delays by each party leading to the ultimate decision to revoke the Appellant's privileges, on the material before me on this preliminary application it appears that PHSA was the party that was effectively in control of the process, and the Appellant had a belief that cooperating with the investigation and providing her information would potentially lead to the resumption of her privileges at BCWHHC without further appeal proceedings. There is a significant power imbalance between the Appellant and PHSA, and the Appellant appears to have taken steps to cooperate in good faith with all investigations conducted by PHSA. The delay in completing the required steps in the PHSA Medical Staff Bylaws and

Rules appears on the material before me to lie primarily with PHSA. Three years to complete a cooperative investigatory process appears on its face and the material before me to be unusually lengthy. PHSA says that the Appellant could have ended her voluntary leave at any time which would have required some action by PHSA to suspend her privileges which would have led to this application being brought much sooner. To attribute the delays to the Appellant's voluntary leave and cooperation seems unreasonable, particularly given the inherent power imbalance.

[12] The practical effect of these lengthy delays by PHSA in dealing with this matter are that the Appellant is running afoul of the currency requirements set out by the BCCNM. Whether this was intended or not, its effect is significant on the Appellant. The HAB recently noted in *Puchala v Northern Health Authority,* HAB-HA-20-A001(c), at paragraph 210 that "[t]he right of a practitioner to appeal from a denial of privileges would be rendered meaningless if the time taken by the process ultimately results in the appellant no longer being qualified to practice."

[13] Parallel to the investigation by PHSA, an inquiry committee of the BCCNM conducted an investigation into the practice of the Appellant pursuant to section 33 of the *HPA*. This investigation arose out of the same December 2018 Incident that is referred to in this appeal. As part of that investigation, the BCCNM took steps on January 21, 2019 to temporarily restrict the Appellant's license to practice to antepartum and postpartum care only. These temporary restrictions were replaced by the terms of a consent agreement between the Appellant and the BCCNM dated September 14, 2020 (the "Consent Agreement").

[14] The Consent Agreement provided terms including an agreed upon supervision plan and satisfactory review of record keeping practices. The principal supervisor under the Consent Agreement noted that the Appellant completed all requirements for antenatal supervision and debriefs in the first three months as noted on March 19, 2021, and completed all requirements for supervision of home births as a primary and home births as a second attendant as noted on May 25, 2021. The principal supervisor also noted that she had opportunities to observe ICDs, documentation and management of both postdates and labour dystocia cases and the Appellant met all standards and no concerns were identified.

[15] The Appellant notes that one of the required courses that was part of the Consent Agreement was not offered in the last two years and she has signed up for it in June 2022. It is worth noting that one of the activities in the Consent Agreement is to discuss with the supervisor interprofessional communication plan when consultation and referral are being considered. This interprofessional communication issue is cited as one of the reasons BCWHHC relied on in revoking the Appellant's privileges.

[16] It appears that the only other requirement for the completion of the terms of the Consent Agreement is the requirement for the principal supervisor to observe and debrief with the Appellant for three in hospital births. The Appellant cannot complete this requirement without some form of privileges at a hospital and therefore, absent a stay, cannot complete the terms of the Consent Agreement with the BCCNM.

[17] The BCCNM completed its investigation into the incident and the Appellant had completed all the terms of a remedial supervisory plan that were in her control before PHSA held a board meeting to revoke the Appellant's privileges.

The Order Sought

[18] The Appellant seeks an order for a stay of the PHSA Decision pursuant to section 46(4.2) of the *Hospital Act*, RSBC 1996, c 200 (the "*HA*") and section 25 of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "*ATA*").

The Legal Framework

[19] The parties are in agreement that the test for a stay of PHSA's Decision 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 sought by the Appellant in this application. The three part test 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.

[20] 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) where an interim stay was granted with conditions.

A. Serious Issue to be Tried

[21] 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 statue 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 desirable[1].

[22] Both parties acknowledge that the appeal is not frivolous or vexatious and the existence of a *de novo* hearing before the HAB satisfies the first part of the *RJR-MacDonald* test. While the Panel acknowledges that the BCCNM outcome is not determinative of either the PHSA or the HAB process, the fact that the Appellant's professional regulatory body reviewed the matter in similar circumstances and came to a decision that did not involve the cancellation of the Appellant's license also supports that there is a serious issue to be tried in this matter before the HAB.

B. Irreparable Harm

[1] *RJR-Macdonald* at p 337-338.

[23] 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 reputation[2].

[24] PHSA accepts that unrecoverable loss of income and damage to reputation can be irreparable harm. However, PHSA says that the Appellant has put forward no cogent evidence that she has or will suffer a loss of income, or if she has, the magnitude of the loss of income. First, the requirement for irreparable harm does not include a consideration of magnitude at this stage. PHSA acknowledges in its submissions that unprivileged midwives can maintain continuity of care for their patients, including during the intrapartum period, albeit in a modified role. The Appellant says that the existence of this modified role has an impact on the patients' selection of her as a midwife and a reduced practice level. This seems like a reasonable conclusion based on the evidence presented by the Appellant.

[25] The Appellant also notes that the HAB in *Daviau* found that (at para 37):

> It may be reasonably assumed that women considering a choice of midwives will, in an abundance of caution, seek to obtain one with local hospital privileges. It is further reasonable to conclude that, in the circumstances here, the loss of privileges will likely have a palpable effect on the Appellant's professional reputation and standing with the College, as well as with those professional institutions and organizations in which she is an active contributor and participant.

[26] The Appellant submits these comments apply directly to the circumstances in this case. As a result of PHSA's revocation of privileges, the Appellant has had her privileges restricted at Richmond Hospital, her teaching appointment at UBC suspended and her active research projects affected.

[27] I agree that the Appellant has suffered harm and will continue to suffer irreparable harm if the stay order is not granted.

[28] PHSA says that due to the delays that have already occurred, the Appellant has already suffered any harm that she claims and that the test refers to future irreparable harm if the order is not granted. The Panel is not prepared to accede to the delay claim by PHSA as it ignores the practical reality of what position the Appellant was in and her desire to cooperate with the ongoing investigation of PHSA. The power imbalance between PHSA and the Appellant at the time she took her voluntary leave was significant, and PHSA cannot use the Appellant's cooperation with the investigation as grounds to defeat her claim of irreparable

[2] *RJR-Macdonald* at p 340-341.

harm. In any event, there is ongoing irreparable harm from unrecoverable economic loss and reputational harm if the stay order is not granted.

C. Balance of Convenience

[29] As the Appellant points out in her submissions, the balance of convenience branch of the test requires a determination of which party will suffer the greatest harm from the granting or denial of the stay application. 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.[3] 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.[4]

[30] The Appellant says that the balance of convenience favours granting the stay for the following reasons:

a. The Appellant is only one of three South Asian midwives in the Lower Mainland and the only one in Metro Vancouver, and patients who seek culturally matched and equity-based midwifery care will be affected;

b. The Appellant is a clinical mentor to many practicing midwives;

c. The Appellant's ability to conduct research as a principal investigator has been adversely impacted as privileges are required for a principal investigator to be able to engage in research activities on hospital sites;

d. Previous clients will not have access to the Appellant's care for subsequent pregnancies; and

e. The PHSA Decision has caused other Hospitals, including Richmond Hospital to place similar restrictions, preventing her from mitigating her situation and maintaining her currency requirements with the BCCNM.

[31] The Appellant takes issue with the PHSA's allegations of the risk to patient safety, but says that in any event the supervised in-hospital births that are required by the BCCNM pursuant to the Consent Agreement, are sufficient to address the concerns for patient safety raised by PHSA. In addition, if that is not sufficient, the Appellant proposes a condition on her privileges which would include regular 30 day review meeting to review charting, communication and any policies and procedures of BCWHHC.

[32] PHSA says the balance of convenience favours it for the following reasons:

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[3] *RJR-Macdonald* at p 342.

[4] *RJR-Macdonald* at p 348.

a. The Appellant presents a significant risk to patient safety which has been found by the PHSA though its process leading to the Decision of the PHSA Board;
b. The risk to patient safety involves deficiencies in skill and communication and breakdowns in vital communications with team members which is demonstrated by a review of the December 2018 Incident;
c. The trust with team members has been damaged beyond repair; and
d. Due to the low number of births at BCWHHC, the birthing community at large will not be affected.

[33] The Panel asked PHSA what conditions, if any, would be appropriate if the stay were granted. PHSA submitted that the monthly chart/case review proposed by the Appellant would not address the competency issue and that PHSA has found that remediation is not possible and therefore supervision would not mitigate the concerns of PHSA. In short, the PHSA declined to provide any conditions of a stay, instead taking the position that there are no conditions that would suffice in the circumstances as the MAC had concluded that remediation could not address the significant concerns identified in the investigation.

[34] PHSA also says that even if the issues raised by the Appellant on the balance of convenience stage of the test are accepted, they do not outweigh the patient safety concerns raised by PHSA which is says should be the overriding consideration.

Birth Records and Currency Issues

[35] PHSA argues that due to the low number of births at BCWHHC, there would be little harm to the general public and essentially that there is not sufficient need for the Appellant's services at BCWHHC. The Panel accepts the Appellant's evidence that the birth records upon which the PHSA relies do not provide a complete picture of the extent of her hospital-related practice. The birth records only record the most responsible care provider, and the numbers do not include the births at Richmond Hospital or the 2018 numbers. In addition, the Panel accepts that privileges are required to provide in home intrapartum care as the primary midwife, and PHSA has not accounted for this adverse impact on the Appellant.

[36] The Appellant has raised the issue of the effect that PHSA's Decision will have on her ability to meet her currency requirements with the BCCNM. PHSA says that the Appellant already has currency issues and that there are other ways to regain currency which are dealt with through applications to the BCCNM. PHSA says that the Appellant can practice as an unprivileged midwife in a slightly modified role from a midwife with privileges. PHSA's evidence on this point is confusing as PHSA acknowledges that part of this modified role is that an unprivileged midwife could only act as a second midwife at home births.

[37] This appears to be in conflict with the active practice requirements for registered midwives with the BCCNM which requires the provision of at home births as principal midwife and in hospital births as principal midwife. While this is a

matter that is more properly sorted out in the hearing of the appeal, the characterization of an unprivileged midwife's ability to act in a slightly modified role appears on the material before me to be an overstatement. The impact on the Appellant of not being able to be the principal midwife for home-births is significant and may result in loss of registration with the BCCNM, apart from the requirements for being principal midwife for hospital births. In weighing the balance of convenience, the currency issue is critical for the Appellant.

Patient Safety Issues

[38] PHSA has raised concerns regarding the risk to patient safety if the interim stay is granted, and says that this should be the overriding consideration in this application. Although undoubtedly patient safety is a fundamental concern in cases such as this, much of the evidence to support a conclusion about the Appellant's care being a risk to patient safety is contested and has not been tested by the Appellant in a hearing before the HAB. The Panel acknowledges the caution expressed by courts about not delving too deeply into the facts and merits on an interim stay application. However some *prima facie* investigation of those facts is unavoidable given the PHSA's reliance on these facts in the balance of convenience stage of the test. It cannot be the case that a mere assertion of a risk to patient safety is sufficient to satisfy this part of the test. If that were the case, few appellants would be able to meet this burden.

The Question of Deference

[39] PHSA argues that the HAB should not conduct a reconsideration or weighing of the evidence that led to the findings in the Decision that there is a serious risk to patient safety if the Appellant is permitted to continue practicing. PHSA says that at this stage, the HAB should give deference to the Decision of the PHSA that the Appellant will pose a serious risk to patient safety if she is permitted to continue with privileges with PHSA. As noted above, although the Panel accepts that a full weighing of evidence and the merits of the case is inappropriate at this stage, if PHSA's submissions regarding deference were accepted, where privileges are affected by patient safety concerns it is difficult to envision circumstances in which the HAB could ever grant an interim stay. Ultimately, a reliance on deference to the Decision under appeal risks undermining the legislative intent behind the HAB's *de novo* jurisdiction.

[40] PHSA cites *Quaye v College of Physicians and Surgeons of the Province of Alberta*, [1998] AJ No. 1266 (AQB) to submit that the HAB should essentially give deference to the investigation and Decision made by PHSA. However, the HAB has very different jurisdiction than a court reviewing decisions of a hospital or regulatory body. The HAB is an expert tribunal, whose purpose is to provide *de novo* hearings of decisions of hospital boards. Therefore, the rationale for a court's accordance of deference is not applicable to proceedings before the HAB.

[41] PHSA also relies on *Al-Ghamdi v Alberta Health Services*, 2015 ABQB 469 (*Al-Ghamdi*), which is a case where the applicant was seeking a stay of the suspension of his privileges pending an investigation. The Court noted that it would be reluctant to interfere with the legislative structure which included an eventual

appeal to the Hospital Privileges Appeal Board[5]. Again, that situation is very different from the present matter before the HAB. The current matter is happening, not before the courts, but before the very legislative structure designed to deal with the issue. In granting the HAB *de novo* jurisdiction and the ability to make any decision the hospital board could make, the legislature did not intend that the HAB should blindly defer to the decisions being appealed before it. Therefore, the fact that the MAC or PHSA Board has come to a certain set of conclusions is not determinative, but may be one factor the HAB can take into consideration. On this application the HAB must consider the information that was presented before those bodies, but the conclusions of those bodies are not determinative of whether the HAB should grant the stay application.

[42] Because the HAB must decide these issues afresh, it follows, then, that even at this stage of the proceeding, some preliminary and *prima facie* review of the allegations of patient safety is necessary. This is particularly so given PHSA's almost exclusive reliance on patient safety concerns in the balance of convenience analysis.

The Report

[43] PHSA submits that granting the interim stay to the Appellant may unnecessarily put patient safety at risk. PHSA conducted an investigation which led to a report dated April 23, 2020 produced by the Head of the Department of Midwifery at BCWHHC (the "Report").

[44] The Report is an appropriate method of performing a Critical Patient Safety Event Review to learn from the incident and try to take steps to prevent similar circumstances from happening again. The Report notes that the purpose, when conducting any medical staff practice review, is not to assign blame but to ensure patient safety through an objective assessment of the member's practice in relation to the standards of care for their profession.

[45] PHSA relies not only on the Report itself, but also on the investigative and decision-making processes more generally. PHSA says that every stage of the process, whether in the investigatory or decision stage, the same conclusions were drawn. The difficulty with this submission is that all these processes were controlled by PHSA, and they all rely on the same underlying investigation. Although, for the purposes of this application, the Panel accepts that those initial conclusions were made and are relevant to the analysis, relying on the multiplicity of decisions based on the same underlying investigatory findings is a form of boot-strapping which does not advance PHSA's argument.

[46] Conclusions regarding the reliability and accuracy of the Report and regarding any risks to patient safety more generally are beyond the scope of this application. Those will undoubtedly form a central role in the hearing on the merits. Suffice it to say at this stage in the proceedings that the Appellant takes issue with

[5] *Al-Ghamdi* at para 82.

the Report and with at least some of the conclusions therein, and that, on the limited material before me, her objections do not appear to be without foundation.

[47] The Panel will summarize the foundation of at least some of her objections below. However, this is not intended to be an exhaustive review of the issues raised by the parties with respect to patient safety. Moreover, to be clear, the summary and analysis below is based on the limited material before the Panel and on limited submissions of the parties, and the Panel has not come to any final conclusions with respect to any of these matters.

[48] The Appellant submitted an expert report to the MAC to support her position. The MAC rejected the evidence of the Appellant's expert. The rejection of the Appellant's expert appears to be based, at least in part, on the fact that the expert did not have experience as a midwife at BCWHHC, a factor which would usually serve to *increase* an expert's independence. The Panel makes no findings with respect to the relative strength or weakness of any of these opinions, but notes only that there was indeed evidence to support the Appellant's position.

[49] PHSA appears to have placed a great amount of significance on what they viewed as the Appellant's lack of insight into her deficiencies. However, the fact that she does not agree with all of their conclusions and continues to challenge them on appeal is not sufficient, by itself, to undermine her application for a stay. The Appellant's alleged misconduct is a disputed fact in a *de novo* hearing before the HAB which the Appellant has a right to dispute. Moreover, the BCCNM Consent Agreement and the Appellant's work to meet the conditions set out therein is some evidence of her willingness to take steps to ensure similar issues do not arise in the future.

[50] PHSA notes that the Appellant raised issues of racial bias. At this stage, no determination can be made about the validity of those concerns. However, it is noted that racial biases are not always obvious, and parties need to be aware of any unconscious biases as well as system racism. In circumstances where unconscious and systemic bias exist, members of marginalized groups may be reluctant to make certain admissions for fear they will not be dealt with fairly. It does not appear that PHSA has considered this possibility when placing significant weight on the Appellant's lack of insight into her deficiencies.

[51] The BCCNM conducted its own review of the Appellant's practice as a result of the Incident. That review led to the Consent Agreement. Based on the mandate of the BCCNM, it is apparent that the BCCNM concluded that the Consent Agreement would suffice to protect the public interest. This conclusion of the BCCNM is a relevant but not determinative consideration at this stage.

[52] The above is not intended to minimize the patient safety concerns raised by the PHSA or to question the *bona fides* of those concerns. Rather, the Panel has simply attempted to address, on a *prima facie* basis only, the potential validity of the Appellant's objections in order to properly conduct the balancing exercise. This is important in order to identify whether the balance of convenience favours the granting of a stay, and whether any patient safety concerns can be mitigated by the imposition of conditions.

Trust Issues

[53] In support of its position that a stay should be refused, the PHSA also relies on the lack of trust in team members which it says would be impossible to repair. The lack of trust relates to two issues; first, the failure of the Appellant to disclose a 2018 consent agreement with the BCCNM; and second, the team members' lack of trust in the Appellant.

[54] The consent agreement that the Appellant entered into in 2018 with the BCCNM relating to an incident that occurred in 2015 at BCWHHC and of which BCWHHC was aware. PHSA says it was relying on the lack of disclosure of the 2018 consent agreement as a breakdown in trust with the Appellant and not the 2015 incident itself. The Appellant says that her application for renewal of privileges were all before she entered into the 2018 consent agreement and therefore, she never made any false submissions to PHSA. I am reluctant to make any findings of fact based on conflicting evidence on this issue and the circumstances surrounding disclosure or non-disclosure to PHSA and its effect should be determined at a full hearing of this appeal. PHSA says it involves similar circumstances, but the Appellant has not had a reasonable opportunity to respond to those issues and this is not the appropriate application to do so. Furthermore, PHSA was aware of the incident as it occurred at BCWHHC and presumably conducted any necessary investigation and proceeded to reapprove of the Appellant's privileges after the incident in 2015.

[55] Secondly, PHSA says that the trust that team members at BCWHHC have in the Appellant and which is important to the proper provision of health care has been damaged beyond repair and therefore the Appellant's stay application should not be granted. The same team's lack of trust issue was raised in *Puchala* involving a midwife working within a team environment at a hospital and was rejected as a reason to deny the granting of privileges. In *Puchala*, the HAB commented at paragraph 197 that the professionalism of the members of the obstetrical team should ensure that patient needs are addressed despite other interests or differences. In addition, at paragraph 206, the HAB stated that they were not convinced that as professional care providers working in the best interest of their patients, they will not be able to move beyond those feelings to engage professionally with Ms. Puchala. This Panel not only agrees with those comments but would go further to remind those professional care providers and the hospital that they both have obligations in the Medical Staff Bylaws and Rules to do just that. For other members of the team that are not part of the medical staff, they would have contractual obligations to comply with the above obligations and it is the responsibility of the hospital administration to supervise and enforce those obligations.

[56] Teamwork amongst medical staff should be addressed at Department meetings which all medical staff members are required to attend. Ultimately, teamwork and communication is the responsibility of all team members and all team members have responsibility when there is a breakdown.

[57] Concerns surrounding a medical staff member's skills should be dealt with on facts, not on the subtle impressions of various team members, otherwise issues of

systemic prejudice, among other concerns, may arise. Team members do not dictate who can work in a hospital, it is the hospital administration, which seeks input from medical staff members and others where appropriate, that makes those decisions which are subject to a *de novo* review by the HAB.

[58] The Chief Medical Officer of BCWHHC acknowledged that she was not suggesting that any other professionals or other staff members would behave unprofessionally in a team setting if the Appellant's application were granted. This submission recognizes PHSA's role and responsibilities regarding the team.

[59] PHSA relies on *Hutton v Grey Sisters of the Immaculate Conception of Sault Ste. Marie General Hospital*, [1997] O.J. No. 3808 to support its argument that were trust has been broken beyond repair the forceable reinsertion of an individual into that environment where close cooperation is necessary could cause irreparable harm to the provision of care by the medical group. The Court noted that at that stage, the Court would be ill equipped to design and supervise any conditions to deal with the situation. There is a key distinction between the Court's comments in *Hutton* and the HAB's jurisdiction in this matter. The HAB has the same authority as the Board of PHSA which is responsible for determining the rules and procedures and dealing with any supervision within BCWHHC. Unlike the courts, the HAB has *de novo* jurisdiction and, therefore, the responsibility to act to impose any supervision conditions that it deems necessary and appropriate. If simply raising trust issues amongst team members were sufficient to deny the HAB jurisdiction to act and impose any supervision conditions, the HAB would be relinquishing jurisdiction granted to it by legislation which would not fulfill the legislative purpose.

[60] PHSA also relies on *Quaye* and *Al-Ghamdi,* where Courts have refused to get involved in the legislative hearing or review processes which were not complete. The applicants in those cases where not seeking an interim stay before the body that either made the decision or the body where the appeal of those decisions should be heard and instead was seeking the intervention of the courts while the legislative hearing process was not complete. The HAB is in a completely different position than reviewing courts by virtue of its specific statutory framework to hear and grant interim stays and make any supervision conditions or conditions on privileges that it deems appropriate (See section 46(2) of the *HA*). The statutory framework of the HAB specifically provides that it would be the body which would make the decisions that the courts in *Quaye* and *Al-Ghamdi* stated that they were not well equipped to make. The specialized nature of the HAB and its jurisdictional mandate make it well equipped to make those decisions.

The Scott Case

[61] The HAB gave the parties an opportunity to provide any additional caselaw which may assist the Panel in weighing the balance of convenience in the specific context of the health care setting. Counsel for the Appellant referred to the BCCA decision in *Scott v College of Massage Therapists of British Columbia,* 2016 BCCA 180 (*Scott*), and provided submissions on the factors considered in that case for the interim suspension of a license to practice by the member's regulatory college. The Panel provided the Respondent the opportunity to provide written response submissions to the Appellant's submissions on the *Scott* case. The Panel also

provided the Appellant with the opportunity to make an application for any reply to the Respondent's submissions on the *Scott* case.

[62] The Appellant acknowledges that the onus of proof is different in the *Scott* case as the College has the burden to demonstrate, on a balance of probabilities, that imposing limits or conditions on the practice of a member or the suspension of a member is necessary to protect the public during the investigatory stage and before the ultimate hearing of the matter. This is an interim order under section 35 of the *HPA*. This is similar to the interim stay order that the Appellant is seeking in this matter pending the hearing of her appeal.

[63] The Appellant says that the factors considered in *Scott* are relevant factors to consider in the balance of convenience stage of the *RJR-MacDonald* case in this context. The Appellant notes the factors at paragraph 55, which include whether there is a real risk to patients and considering the impact of granting or not granting the interim orders. Finally, the court in *Scott* stated that if it decides to make an interim order it should not automatically impose an interim suspension but should first consider whether the imposition of interim conditions of practice would be sufficient and proportionate to deal with the real risk to patient safety.

[64] PHSA says that the factors the BCCA considered in *Scott* are not applicable and there is no reason to depart from the test set out in *RJR-MacDonald*. To be clear, the Panel is not departing from the test set out in *RJR-MacDonald,* but recognizes that when considering the balance of convenience stage of the test, the Supreme Court of Canada noted that the factors that must be considered will be numerous and will vary in each individual case. The *RJR-MacDonald* case specifically contemplates factors and the Panel has asked the parties if there are any specific factors other than patient safety which should be considered in assessing the balance of convenience in the health care context.

[65] PHSA also argues in its supplemental submissions on the *Scott* case that the HAB should essentially give deference to the Decisions of the PHSA bodies on an interim application such as this stay application because those bodies have fully considered the evidence and made a decision. As indicted above in these reasons, the Panel rejects that submission.

[66] The factors identified in *Scott* are very similar to the balance of convenience test in *RJR-MacDonald* and the relevant factors have been argued by the parties.

[67] The factors identified in *Scott* are summarized as follows:

a. For an order to be necessary for the protection of the public there must be a real risk to patients, colleagues or other members of the public which goes beyond an order which is merely desirable;

b. The seriousness of the risk to members of the public if the registrant were allowed to continue practicing without restrictions;

c. The seriousness of the allegations;

d. The nature of the evidence;

e. The likelihood of the alleged conduct being repeated if an interim order were not imposed;

f. The impact that any suspension or conditions will have on the practicing member; and

g. Whether there are any measures in place to protect the public.

[68] The inquiry committee of the College in *Scott* noted that although it did not have the jurisdiction to make final determinations of the facts, it must make a provisional assessment of the facts necessary to determine whether an order is necessary for the protection of the public.

[69] Apart from one issue on the standard of proof, the Court endorsed the approach taken by the original inquiry committee.

[70] The *Scott* case is instructive as it says that before outright suspension is ordered, other conditions of practice must be considered to determine if they would be sufficient to protect the public in the interim. This is the same approach that was taken by the HAB did in *Daviau*, a case involving a midwife, where the HAB granted an interim stay of the revocation of her privileges pending the hearing of the matter before HAB. The stay was granted on the conditions that the midwife was required to practice in a specified area and be subject to monthly meetings with a member of the department of obstetrics to review charts and any applicable policies and procedures.

Analysis of Balance of Convenience

[71] If a stay is not granted to the Appellant, the Panel finds that the Appellant will suffer significant irreparable harm and given the amount of time that this issue has been outstanding she may never recover economically or reputationally even if she is ultimately successful before the HAB. The delay in the PHSA making its Decision has led to serious currency issues that will most likely require a special application before the BCCNM if the stay is not granted. In addition, the Appellant is in the unique position of being one of only a few south Asian midwifes in the area to offer midwifery services and to mentor other younger medical staff from her community.

[72] Regarding the factor of a real risk to patient safety, it is difficult to conclude that there is no risk to patient safety given the circumstances of the Incident. This is a difficult factor because it can easily be elevated to the overriding consideration in the health care setting and PHSA has made that argument.

[73] However, that finding is not the end of the analysis. A key consideration in weighing the balance of convenience is which party has the ability to alleviate the risk of harm from granting or denying the stay application. PHSA has numerous tools available to it to protect the patient safety such as providing supervision or conducting ongoing documentation review and engaging in some form of progressive discipline if problematic conduct persists.

[74] It is also important to remember that this is a temporary and time limited stay that is being requested. Ultimately, the determination as to whether the Appellant is to maintain her privileges at BCWHHC will be determined on a full review of the facts.

[75] When considering the level or risk and seriousness of the harm, one has to take into account that the incident happened in a team environment where there were many other professional medical staff members who were present and voiced their concerns about the critical nature of the situation directly with the patient. The team environment itself helps alleviate the risk of harm to patients, and, further, PHSA has some ability to mitigate risk of harm as teamwork, communication and adherence to hospital protocol issues are at least partially within its control. None of the issues raised by PHSA on this application rise to a sufficient level where reinstating the Appellant's privileges on an interim basis results in an unreasonable risk to patient safety that cannot be mitigated by the actions or procedures of PHSA.

[76] In weighing the balance of convenience, the irreparable harm to the Appellant's practice by not granting the stay is significant and could significantly limit or destroy her professional practice, whereas the risk of patient safety which the Panel is prepared to accept exists at this stage, is capable of mitigation by PHSA on this time limited basis and by the imposition of conditions as addressed below.

What Conditions on the Practice of the Appellant are Necessary?

[77] It is worth noting that, despite being asked to provide input on appropriate conditions for a stay, the PHSA did not do so. As a result, the HAB does not have the benefit of the submissions of PHSA on what specific terms would be appropriate.

[78] For her part, the Appellant has acknowledged several existing conditions on her practice, and has proposed an additional condition.

[79] Existing conditions include successful completion of all aspects of the Consent Agreement, and maintaining her license to practice with the BCCNM. The Appellant notes that there can be no patient safety concerns regarding the three supervised births at hospital that are part of the supervision plan. The Panel agrees with this submission. The supervisor under the Consent Agreement must have privileges at BCWHHC and can exercise those privileges immediately should any issue arise with the Appellant's conduct during the three supervised visits. Allowing these three supervised in hospital births to be completed would likely lead to the completion of the Consent Agreement between the Appellant and the BCCNM which included a detailed supervision review of the Appellant's practice.

[80] I order that the Appellant's privileges be temporarily reinstated so that she is able to meet the above conditions to complete the Consent Agreement and maintain her license to practice with BCCNM. Once the above conditions are met, the Appellant shall continue to have her privileges at BCWHHC temporarily reinstated pending the resolution of her appeal before the HAB with the following additional conditions:

a. The Appellant and a representative of PHSA shall meet monthly or as otherwise agreed between the parties if monthly meetings are not meaningful given the number of in hospital births. These meetings shall consist of a review the Appellant's patient charts including any at home

charting as it relates to an in hospital birth for informed consent discussions, communication with hospital staff when labour commences and the identification of any risk factors or informed consent discussions on the transfer of care at the hospital and any other practice issues or issues with compliance with hospital protocols and procedures. This would provide an opportunity for PHSA to reinforce the admitting protocols and communication expected on the transfer of care.

b. The Appellant is to attend the regular Midwifery Department meetings at BCWHHC as set out in section 5.7.1 of the Medical Staff Rules of PHSA. These meetings, inter alia, provide for investigating and evaluating care provided by members for the purpose of improving care.

[81] Moreover, throughout the period of the stay, the PHSA can continue to take any other steps it deems necessary to supervise or provide oversight to the Appellant's practice, provided that such supervision and oversight does not operate to fundamentally undermine the exercise of the Appellant's privileges.

[82] The parties are at liberty to make an application before the HAB in these proceedings should there be any issue or conflict with the implementation of this order or if further practice issues are identified as part of that supervision which require a reconsideration of this interim order.

Order

[83] The HAB grants the Appellant's application for an interim stay of the PHSA Decision revoking her privileges at BCWHHC on the conditions identified above, pending the HAB releasing a decision after a full hearing of this appeal.

"Stacy Robertson"

Stacy Robertson, Chair
Hospital Appeal Board

July 26, 2022

CORRIGENDUM

Issued October 7, 2022

[1] This is a corrigendum to the Panel's Decision issued July 26, 2022 advising that paragraph [80] should read:

[80] I order that the Appellant's privileges be temporarily reinstated so that she is able to meet the above conditions to complete the Consent Agreement and maintain her license to practice with BCCNM. Once the above conditions are met, the Appellant shall continue to have her privileges at BCWHHC temporarily reinstated pending the resolution of her appeal before the HAB with the following additional conditions:

a. The Appellant and a representative of PHSA shall meet monthly or as otherwise agreed between the parties if monthly meetings are not meaningful given the number of in hospital births. These meetings shall consist of a review the Appellant's patient charts including any at home charting as it relates to an in hospital birth for informed consent discussions, communication with hospital staff when labour commences and the identification of any risk factors or informed consent discussions on the transfer of care at the hospital and any other practice issues or issues with compliance with hospital protocols and procedures. This would provide an opportunity for PHSA to reinforce the admitting protocols and communication expected on the transfer of care.

b. The Appellant is to attend the regular Midwifery Department meetings at BCWHHC as set out in section 5.7.1 of the Medical Staff Rules of PHSA. These meetings, inter alia, provide for investigating and evaluating care provided by members for the purpose of improving care.

"Stacy Robertson"

Stacy Robertson, Chair
Hospital Appeal Board