Hospital Appeal Board

Citation:	*Dr. Malvinder Hoonjan v. Interior Health Authority*, 2024 BCHAB 1
Decision No.:	HAB-HA-20-A003(e)
Decision Date:	2024-06-26
Method of Hearing:	Conducted by way of written submissions concluding on November 30, 2023
Decision Type:	Decision on Costs of Application
Panel:	Stacy F. Robertson, Panel Chair Dr. R. Alan Meakes, Panel Member Dr. Ailve McNestry, Panel Member
Appealed Under:	Section 46 of the *Hospital Act,* RSBC 1996, c 200

Between:

Dr. Malvinder Hoonjan

Appellant

And:

Interior Health Authority

Respondent

Appearing on Behalf of the Parties:

For the Appellant:	Susan Precious, Counsel
For the Respondent:	Alexis Kerr, Counsel

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Decision on Costs of Application

HISTORY OF PROCEEDINGS

[1] On December 7, 2022, the Hospital Appeal Board ("HAB") released its decision on the merits of Dr. Malvinder Hoonjan's appeal, referred to as the Merits Decision (*Dr. Malvinder Hoonjan v. Interior Health Authority*, 2022 BCHAB 4).

[2] In the Merits Decision, the HAB panel granted the appeal and ordered that the Appellant be granted active medical staff privileges by Interior Health Authority ("IHA") as a vitreo-retinal surgeon at Kelowna General Hospital ("KGH") with equal access to operating room ("OR") time as the other two vitreo-retinal surgeons at KGH.

[3] Given the passage of time for the resolution of the appeal, some currency issues arose for the Appellant. As part of the Merits Decision, the panel ordered the parties to work together to prepare a reintroduction plan for the Appellant and further ordered that IHA must accommodate the Appellant to successfully achieve any reintroduction to his surgical practice.

[4] The parties were unable to reach an agreed upon reintroduction plan and the Appellant brought an application for the HAB's directions and further orders. After receiving written submissions from both parties, the panel held an oral hearing on March 3, 2023, and issued an order by way of a letter ruling the same day (the "March 3, 2023 Order"). The March 3, 2023 Order, which addressed the reintroduction of the Appellant, relied heavily on another vitreo-retinal surgeon to act as a mentor to determine a reasonable and appropriate reintroduction plan for the Appellant. The panel left a lot of the details of what would be required to reintroduce the Appellant to a full vitreo-retinal surgical practice to the mentor, and also made some orders for immediate and necessary actions by IHA, including granting OR time and active medical staff privileges so the reintroduction plan could be implemented. IHA was also ordered to pay certain costs associated with the reintroduction plan.

[5] Time was of the essence when the March 3, 2023 Order was given, and the panel was focussed on getting the reintroduction plan moving. Accordingly, the panel reserved any ruling on the costs of the application. On October 30, 2023, the panel released its decision on the costs associated with the Appellant's application leading to the March 3, 2023 Order and granted the Appellant $10,000 in costs (the "First Costs Order").

[6] However, before the First Costs Order was issued, the Appellant made another application to the HAB regarding difficulties implementing the March 3, 2023 Order. After receiving written submissions from both parties, the panel held an oral hearing on July 27, 2023, and gave oral orders and brief oral reasons the same day (the "July 27, 2023 Order"). These oral orders and reasons were put into a written decision format and released on September 13, 2023 (*Dr. Malvinder Hoonjan v Interior Health Authority*, 2023 BCHAB 3). The July 27, 2023 Order dealt with further difficulties the parties experienced trying to work

together and with the mentor. It was clear that the mentor was not able to perform the role contemplated by the March 3, 2023 Order, despite the fact that both parties did not object to him having that role at the March 3, 2023 hearing. In its written decision, the panel noted that neither party sought costs of the application that led to the July 27, 2023 Order and the subsequent September 13, 2023, written decision, and therefore no costs were ordered in relation to the July 27, 2023 Order by the panel.

[7] On August 31, 2023, the Appellant sought an order for the production of the transcript of the July 27, 2023, oral reasons and orders that were made at that hearing, and also sought leave to make submissions on costs. Pursuant to the HAB's Practice Directives, the parties were at liberty to request the transcript at any time and accordingly an order was unnecessary. This panel provided the transcript of the July 27, 2023 oral reasons and orders and also released the written decision to the parties on September 13, 2023. The only issue that the Appellant continued to seek leave to argue was the issue of costs for the time period following the July 27, 2023 Order. In a letter dated September 29, 2023, the panel granted leave to the parties to make submissions on costs for the time period following the July 27, 2023 Order. The parties exchanged several submissions in this regard which completed on November 30, 2023. This decision is for the Appellant's application for costs of this proceeding following the July 27, 2023 Order to November 30, 2023.

[8] This panel released the First Costs Order on October 30, 2023, and in it granted the Appellant $10,000 in costs against IHA for IHA's misconduct from the release of the Merits Decision on December 7, 2022, to the March 3, 2023 Order. At paragraph 62 of the First Costs Order (*Dr. Malvinder Hoonjan v Interior Health Authority*, 2023 BCHAB 4), this panel found that IHA's misconduct represented a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision, and that IHA's conduct was deserving of rebuke through an award of costs.

[9] This panel has made it abundantly clear that IHA is responsible for any decline in the Appellant's skills and the existence of any currency issues, and that as a result of that responsibility, IHA had to accommodate the Appellant to arrive at a reasonable and workable reintroduction plan.

[10] In addition to the Appellant's application for costs of this proceeding for the period following the July 27, 2023 Order, the Appellant also sought leave to rely on two complaints made to the College of Physicians and Surgeons of British Columbia (the "College") which were referred to by IHA in its submissions. Finally, the Appellant sought leave to make additional submissions and object to the introduction of an affidavit by IHA and supplemental arguments made by IHA.

[11] In accordance with the principles of procedural fairness, the panel accepted further submissions on every issue that each party raised including the sur-reply of IHA dated November 21, 2023, the Appellant's further reply dated November 21, 2023, and IHA's further reply dated November 30, 2023. Each party had a full opportunity to respond to all submissions made by the other party.

THE ADMISSIBILITY OF THE COMPLAINTS TO THE COLLEGE

[12] In a letter dated November 3, 2023, the Appellant sought directions from the HAB on the use of two complaints made to the College ("College Complaints") about the Appellant. In a letter to the parties dated November 6, 2023, the panel gave directions that the Appellant could refer to the College Complaints in their submissions and the panel would rule on its admissibility as part of its decision on the Appellant's costs application.

[13] The Appellant submits that the College Complaints contains many errors, omissions, inconsistencies, and statements based on hearsay information. IHA submits that the College Complaints are inadmissible under section 53 of the *Health Professions Act*, RSBC 1996, c 183 ("*HPA*").

[14] IHA relies on an affidavit of the College's Deputy Registrar and Chief Legal Counsel, regarding the submission that the College Complaints are inadmissible pursuant to the provisions of the *HPA*. To the extent that this affidavit is simply giving argument on the interpretation of legislative provisions, it is inadmissible and will not be considered by this panel. The interpretation of legislative provisions is a question of law and should be addressed in counsel's argument, not affidavit evidence.

[15] This panel notes that:

a. It was IHA that first raised the issue of the College Complaints in its affidavit material and IHA relies on the existence of the College Complaints in its submissions;

b. The proceedings before the HAB are confidential pursuant to section 46(4.2)(d)(vii) of the *Hospital Act*, RSBC 1996, c 200;

c. The issues raised by the College Complaints are similar to the issues resulting in this panel's decisions in this matter and may represent a collateral attack on this panel's findings and decisions;

d. IHA has not taken any appeals or judicial reviews of the HAB's decisions in this proceeding;

e. The College Complaints were provided to the Appellant without any conditions or restrictions; and

f. The College Complaints make no reference to the background of the HAB proceedings or decisions made by the HAB.

[16] This panel may disagree with the submissions of IHA regarding the admissibility of the College Complaints, however, it finds that it is not necessary to make any findings on the admissibility of the College Complaints because the content of the College Complaints is not relevant to these proceedings. It is for the College to determine the accuracy and efficacy of the College Complaints, not this panel. This panel must decide on whether the conduct of IHA is deserving of an award of costs and the actions surrounding the

submission of the College Complaints by IHA medical staff members, rather than its specific content, are relevant to that determination.

THE PARTIES' POSITIONS ON COSTS

[17] In the First Costs Order the panel noted that even though it specifically notified the parties in writing and at the hearing that they were considering making an award of costs, neither party provided any substantive submissions on costs.

[18] Midway through receiving submissions in this application, the panel issued written reasons for its First Costs Order on October 30, 2023. Because this was part way through the parties' schedule for the exchange of submissions, the panel specifically notified the parties on November 6, 2023, that the parties could provide additional submissions on costs in light of the panel's written reasons for the First Costs Order.

[19] The panel provided this opportunity in recognition that the panel's First Costs Order set out a novel test and analytical framework for ordering costs in an administrative proceeding. To the panel's surprise, neither party provided any submissions, either factual or legal, addressing the new test. The parties had addressed the legal and factual issues related to an award of costs in their submissions, however, given the new legal formulation of the test in the First Costs Order, those submissions were not particularly helpful.

LAW ON COSTS

[20] In the First Costs Order (*Dr. Malvinder Hoonjan v Interior Health Authority*, 2023 BCHAB 4), this panel examined the law surrounding its jurisdiction to make an award of costs and the test to be applied. At paragraph 28 this panel noted:

> … the HAB may exercise its discretion to award costs against one of the parties to the appeal in special circumstances where a party's conduct markedly falls below the standards to be expected in the underlying process, or the appeal itself, and where an award of costs would further the aims and purposes of the legislative framework that created and governs the HAB. This is the test that this panel applied to the facts in this matter.

[21] The First Costs Order confirms the jurisdiction of the HAB to make a costs award against one of the parties to the proceedings. That jurisdiction, which is found in section 47 of the *Administrative Tribunals Act*, SBC 2004, c 45 ("*ATA*"), only permits an award of costs to part, but not all, of the costs of a party. This section of the *ATA* specifically applies to the HAB pursuant to section 46(4.2)(g) of the *Hospital Act*. In the First Costs Order this panel ordered costs up to a fixed maximum for only the portion of the Appellant's costs incurred for the application that resulted in the March 3, 2023 Order. In this application, the Appellant is seeking their costs incurred for the time period after the July 27, 2023 Order

to November 30, 2023. This complies with the statutory jurisdiction of the HAB to make an award of costs in this matter.

[22] The First Costs Order stated that special circumstances must exist which means that the standard civil litigation principle that costs automatically follow the event would not apply to HAB proceedings. This panel then provided some guidance on what special circumstances would justify an award of costs. The panel specifically moved away from previous administrative cases that relied on whether the party had acted in good or bad faith. This panel made a conscious decision to move away from any determination of a parties' intention, which is difficult to assess, and instead focussed on the actual conduct and consequences of any actions of a party. The panel notes that section 47(1)(c) of the *ATA* makes reference to the conduct of a party that is improper, vexatious, frivolous or abusive, however that is only in relation to the tribunal's jurisdiction to make an award of the costs of the actual tribunal, not the parties. That provision does not diminish the jurisdiction set out in section 47 of the *ATA* to make an award of part of the costs of a party.

[23] The panel in the First Costs Order defined special circumstances as:

a. Where a party's conduct markedly falls below the standards to be expected in the underlying process or the appeal itself; and

b. Where an award of costs would further the aims and purposes of the legislative framework that created and governs the HAB.

[24] This is the legal test that this panel will apply to this application for costs.

THE PARTIES' CONDUCT AFTER THE JULY 27, 2023 ORDER

[25] The test for costs in this proceeding requires the panel to examine the conduct of IHA and determine whether any such conduct falls markedly below the standards to be expected in the circumstances and whether an award of costs would further the aims and purposes of the legislative framework.

A. July 27, 2023 Order that the Appellant be granted full privileges

[26] The Appellant says that the privileging documents provided to him after the July 27, 2023 Order contained a notation that they were granted pursuant to the order of the HAB and were without prejudice to the right of IHA to apply for judicial review of the HAB decision.

[27] IHA says that it would have been unfair to the Appellant not to inform him that his privileges were subject to any appeal or judicial review which IHA may bring.

[28] This panel finds that the notation of the right of judicial review on the privileging documents is in violation of the HAB's order for privileges to be granted without

restrictions or conditions. Of course, IHA has its legal rights to seek a judicial review of the decision but putting this in the privileging documents is unnecessary and represents an implied threat that there were in fact conditions or restrictions on the privileges. This addendum should not have been on the privileging document and represents a marked departure from the standard to be expected in those circumstances. It indicates that IHA continued to treat the Appellant's reintroduction into a full surgical practice as a legal conflict rather than the introduction of a new colleague.

B. Meetings within IHA to implement the July 27, 2023 Order

[29] IHA says that they had two meetings to discuss the July 27, 2023 Order and its implementation. In the first meeting, Dr. A, the Executive Medical Director of IHA Clinical Operations South, advised Dr. B of the July 27, 2023 Order. Dr. B serves as the head of the KGH Division of Ophthalmology ("the Division") and is a practicing vitreo-retinal surgeon at KGH. In these reasons, Dr. B will be referred to as the Division Head. In this meeting however, it does not appear that Dr. A informed the Division Head of the basis on which the July 27, 2023 Order was made, such as a positive statement regarding the competency of the Appellant provided by Dr. [S], a vitreo-retinal surgeon in Toronto with whom the Appellant completed multiple surgeries in April and May 2023. The Division Head was left with the impression that there were no such statements and proceeded to update the rest of the Division based on this erroneous position.

[30] There was a second meeting on August 15, 2023, convened by Dr. A, and attended by senior medical leadership, including the Division Head, for the purpose of discussing the next steps to reintegrate the Appellant back into his full vitreo-retinal surgical practice. The August 15, 2023, meeting appears to have been more about the personal liability of senior medical leaders under the March 3, 2023 Order rather than any concern for the reintegration of the Appellant.

[31] The Appellant was not advised of, or invited to, the August 15, 2023, meeting and in fact he was never invited to any meeting with IHA senior medical leaders about his reintegration. This failure to reach out to the Appellant is what supported the First Costs Order against IHA. Senior medical leadership at the August 15, 2023, meeting asked those in attendance what supports they needed to move forward with implementing the July 27, 2023 Order. While this is a reasonable planning measure it is astonishing that IHA never scheduled a meeting with both the Division Head and the Appellant and others to discuss what supports the Appellant might need to move forward with the July 27, 2023 Order. While the senior medical leadership was planning what to do with the Appellant, the Appellant was left to navigate his reintegration on his own without any support from IHA whatsoever. This lack of meeting with the Appellant or including him in any planning represented conduct that was a marked departure from the standard expected in the circumstances and represents an ongoing failure of IHA in this matter. This panel in its decisions and orders has stated that IHA must work collaboratively with the Appellant on

his reintegration and IHA has failed to do so at almost every turn in these lengthy proceedings despite having stated that they accept the panel's orders.

[32] The Division Head, after his initial meeting with Dr. A, about the implementation of the July 27, 2023 Order, sent a communication to the other members of the Division where he provided some but not all of the facts surrounding the July 27, 2023 Order. For instance, the Division Head was not aware at that time that Dr. [S] had provided a statement regarding the Appellant's surgical competence. As the Appellant was not aware of or invited to participate in any of these communications, he could not reasonably respond to or deal with any of the other Division members misconceptions or concerns. This situation represents the underlying problem of having Division communications without the Appellant present. The Appellant was a full member of the Division after the July 27, 2023 Order and should have been included on all communications related to the Division. It is a dysfunctional way for a division to operate and represents a marked departure from the standard of conduct that would be expected in the circumstances.

C. July 27, 2023 Order for immediate access to OR days

[33] The Appellant notes that the July 27, 2023 Order ordered that the Appellant be granted immediate unsupervised OR access and full medical staff privileges without conditions or restrictions. The Appellant says that all of his OR days (notably the August 4, 11, 18 and September 1, 2023 dates) were cancelled until September 8, 2023.

[34] This panel finds that the delay in scheduling the OR days for the Appellant are not in accordance with the July 27, 2023 Order of this panel and is a marked departure from the standard to be expected in those circumstances. If IHA wanted to delay the OR time of the Appellant, they could have sought a judicial review and a stay of the HAB's decision. That course was available to them, but they did not take that action. The delays in the scheduling of OR time in the absence of that action is a marked departure from the standard to be expected in the circumstances. This matter had been going on for several years and this panel repeatedly noted that time was of the essence and the OR dates as ordered by this panel were critical to the Appellant resuming his practice.

[35] IHA notes several operational reasons why particular days were not scheduled but in these particular circumstances and history of this case, IHA owed the Appellant more accommodation in relation to scheduling OR days. The scheduling of OR time is emblematic of IHAs failure to properly appreciate and implement the HABs orders from an operational perspective. Senior medical leadership should have stepped in and made sure that the Appellant obtained his OR days, but as noted above, they did not take the Appellant's circumstances into account in their reintegration meetings.

[36] After learning of some OR booking issues encountered by the Appellant, Dr. A made some comments at the August 15, 2023, meeting that going forward, in the event of any staffing shortages, the Appellant's OR time was not to be disproportionately impacted. This limited instruction, after a number of cancellations had already occurred, does not go

far enough to accommodate the Appellant in these circumstances; and instead, it should have been done immediately after the July 27, 2023 Order so that the Appellant's OR days were not cancelled up to September 8, 2023. This is another example of why it should have been standard procedure to meet with the Appellant immediately after the July 27, 2023 Order to coordinate and work towards a full integration of the Appellant.

[37] In one OR scheduling instance, IHA says there was an honest oversight relating to the booking process. Again, in the circumstances of this matter and given that time was of the essence and that there were multiple applications before the HAB, no proactive steps were taken by senior medical leadership to ensure that oversights and challenges were anticipated and avoided. In another OR cancellation for September 1, 2023, IHA admits there was some confusion regarding communications that led to the cancellation and that this faulty communication was not the fault of the Appellant. This cancellation was a lack of communication which falls directly on IHA. This is unacceptable in these circumstances. It is apparent that there was not proactive direction from senior medical leadership to ensure that the HAB's orders relating to the Appellant were implemented.

D. IHA's proposal for supervision and attestation of the Appellant's competency

[38] Shortly after the July 27, 2023 Order, the Division Head reached out to the Appellant to discuss his reintroduction. The Division Head suggested some reasonable assistance and guidance to support the Appellant's reintroduction. However, where this conduct fell markedly below what is to be expected is that the Division Head made the plan contingent on the Appellant signing on to it as a formal document, which would detract from what the HAB ordered in the July 27, 2023 Order. This is entirely inappropriate and is a collateral attack on the jurisdiction of the HAB. Every single item that the Division Head proposed could have been offered to the Appellant without a signed plan which is what should have been done shortly after the Merits Decision on December 7, 2022. The type of assistance and supervision proposed by the Division Head, but on a non disciplinary or formal attestation basis, is exactly the type of accommodation that this panel would have expected IHA to engage in from the very beginning. Other than the proposal by the Division Head, which was flawed because it relied on a signed proposal, including an attestation by the surgical mentor previously contemplated by the HAB and whom this panel had released from such obligation because of other issues, no one from IHA offered the Appellant any substantial assistance to accommodate his reintroduction.

[39] The panel notes that the part of the proposal where other members of the Division were to supervise the Appellant is something that the Division Head specifically refused to do in an earlier part of this proceeding. To be clear what was asked of other members of the Division in an earlier application was to have the Appellant scrub into their surgeries and observe and regain some knowledge. The plan to supervise is a step beyond what was previously proposed but may have been reasonable without the attestation part of the plan. Any supervision should be offered in a learning and development context, without

any disciplinary context. The Appellant was rightfully concerned that any supervision and/or attestations were just an excuse to commence new disciplinary issues. These concerns were justified given his past treatment by IHA. When the Appellant refused to agree to the plan which would detract his hard-fought rights before the HAB, the plan was revoked by the Division Head, who apparently had submitted the plan as an all or nothing offer.

E. College complaint

[40] There is some conflicting evidence about when the Appellant was told by the Division Head that he would be filing a complaint with the College. Dr. C, another member of the Division, indicated in a text message on August 25, 2023, that the Division Head had already told the Appellant about this College complaint, whereas the Division Head himself indicated that he had not told the Appellant that he was filing it. Apart from the conflicting evidence about when the Appellant was told about the filing of the College complaint, it was clear that the Appellant was told about the intention to file a complaint before it was filed and while there was still time for the Appellant to reconsider the Division Head's proposal. The Division Head says that he was trying not to link the proposal with the filing of the complaint because he did not want it to seem like a threat, but that is exactly what a reasonable person would have taken away from the circumstances. The Division Head agreed not to file the complaint while the Appellant spoke with the surgical mentor who was involved with the attestation component of the proposal. It is a reasonable conclusion that the Division Head agreed to delay the filing of the complaint while the Appellant spoke with the surgical mentor because if the Appellant agreed to the proposal, then the complaint would not be filed.

[41] In addition to the above evidence, the Appellant stated that the Division Head told him that he would refrain from reporting him to the College if he agreed to the plan which including supervision and an attestation component by the surgical mentor. This was received by the Appellant as an ultimatum. Where there is any conflict in the evidence on this point this panel accepts the evidence of the Appellant over the Division Head. There is no other way to take these circumstances other than, if the Appellant accepted the proposal, then the Division Head would not file the complaint. It is irrelevant whether the Division Head intended or considered it a threat, it was presented to the Appellant in a way that linked the two. The relevant fact is that this put a lot of pressure on the Appellant to either accept the proposal which went against what this panel had granted him or face a complaint to the College by a colleague. The linking of the two is a marked departure of what would be expected in the circumstances.

[42] Both the Division Head and IHA say that the Division Head did not submit the College complaint in his capacity as Division Head at KGH. The problem with this submission is that saying it is so does not make it so, and there are multiple facts which refute this assertion. The Division Head was negotiating with the Appellant to accept a reintroduction plan which detracted from what the Appellant had obtained in these HAB

proceedings. He was doing this negotiating as a Division Head within IHA. Whether or not IHA was aware of the Division Head's efforts is not relevant. The Division Head was acting with ostensible and perhaps even actual authority to enter into those negotiations on behalf of IHA. Then, once there was a linkage between accepting the plan or the filing of the College complaint, there was again ostensible or actual authority on behalf of IHA to not file the College complaint. In addition, the Division Head signed the College complaint with his IHA title being the head of the KGH Division of Ophthalmology, which while not conclusive, is an additional factor in favour of a finding that the Division Head was acting with ostensible authority on behalf of IHA in making his proposal to the Appellant and filing the College complaint. Throughout the entire process after the July 27, 2023 Order, the Appellant only had communications with the Division Head in his capacity as head of the Division and did not have any relevant communication with any other senior medical leadership at IHA. It was clear to the Appellant, and to any reasonable observer, that the Division Head was acting on behalf of IHA in his negotiations with the Appellant which included filing or not filing the College complaint.

[43] The Law Society of British Columbia's Code of Professional Conduct for British Columbia, Rule 3.2-5, specifically prohibits using the threat of making a complaint to a regulatory authority in an attempt to gain an advantage for a client. These rules are applicable to lawyers, rather than to physicians, however the principle behind the rule is clear: you cannot use the pressure of a regulatory complaint to gain an advantage in another circumstance. Whether or not the Division Head intended to put pressure on the Appellant to accept the proposal or else he would make a complaint, that is what actually occurred, and it is a marked departure of the standard to be expected in the circumstances.

F. Observation of and assistance to the Appellant in the OR

[44] The Division Head observed the Appellant in some of his first surgical days after the July 27, 2023 Order. The Division Head's observations are somewhat instructive on the process of reintegration but cannot be used to determine any competency as the issues were never put through the formal review process where the Appellant would get a chance to respond. The panel finds this to be part of the teaching and reintegration process and should not be part of any disciplinary process while IHA is implementing this panel's orders. The Appellant has always been open to reintegration and ongoing training, but he was reluctant to any attestation process where IHA could simply turn it into a disciplinary process. If this panel has not been clear enough in its previous decisions, let it be clear now: the reintegration process which was required as a result of the failures of IHA should not be turned into a disciplinary process. If shortcomings are detected, then additional training should be approached in a collaborative way including the Appellant in any such discussions.

[45] During one of the Division Head's OR observations on September 15, 2023, he noted a problem that the Appellant encountered during the procedure. The Division Head

also noted that it was obvious to him that the Appellant also noted the problem and that the Appellant adequately dealt with the problem in the same way the Division Head would have done. In a discussion after the procedure, the Division Head made a technical suggestion to the Appellant which the Appellant found to be reasonable. This is the type of reasonable interaction that this panel expected from the very beginning of the implementation phase of this matter.

[46] The Division Head noted in his affidavit that he has made a point of being present and available during the Appellant's OR days so that he would be in a position to support him as and when needed. He further stated that he is not there to supervise or assess the Appellant's skillset but to offer any support or assistance that is needed. This statement is what this panel would have expected immediately after the December 7, 2022, Merits Decision and the implementation of a reintroduction plan. The length of time and number of applications before the HAB to get to this simple reintroduction process that Division Head is now supporting is troubling.

[47] In relation to another procedure on September 22, 2023, the Appellant asked the Division Head for assistance which was provided. Both surgeons scrubbed in for the procedure and the outcome was acceptable to both surgeons. There were several other procedures detailed in the evidence which represented an acceptable peer to peer interaction between the Appellant and the Division Head where both parties agreed on the decisions made in the procedure. The Division Head noted that it is not uncommon for ophthalmologists to learn different techniques from one another in the OR. I commend the Division Head on this approach and his approach generally after September 2023 and cannot help but wonder how much further reintegrated the Appellant would have been had this approach been taken earlier, and how much conflict between the parties could have been avoided.

CONCLUSION

[48] The following comments made in the First Costs Order (*Dr. Malvinder Hoonjan v Interior Health Authority*, 2023 BCHAB 4) by this panel are equally applicable in this application:

> [54] It is troubling that IH believes the reason for the Appellant's currency issues is irrelevant. The panel directed that IH specifically must accommodate the Appellant in his reintroduction plan because IH is the reason for the Appellant's currency issues. To accomplish this, IH was required to take steps beyond what is normal. The findings in the Merits Decision against IH cannot be ignored in the implementation process.
>
> [55] While IH says it accepts the Merits Decision, their actions during the 60 days afterwards show no evidence of responsibility towards the Appellant's situation or compassion for its wrongful treatment of the Appellant which led to the underlying

appeal. In addition, IH's handling of the reintroduction shows a lack of respect for this panel's orders and reasons in the Merits Decision.

[56] Paragraph 86 of the Merits Decision refers to the Medical Staff Bylaws and its subordinate Medical Staff Rules as a social contract between the medical practitioner and the Health Authority. The use of the term social contract is purposeful and recognizes that both parties owe duties to the other. The framework of the HAB and the appeal process must be taken into account including that the parties may have an ongoing relationship after a successful appeal which requires them to work together and move beyond whatever dispute led to proceedings before the HAB. This does not mean the parties may ignore specific findings, but that the parties must remove any biases, or other improper motivations, and work towards fulfilling the orders and directions of the HAB.

[57] The HAB has jurisdiction to make any decision that the Board of Directors of IH can make regarding the privileging regime. Therefore, the orders and directions in the Merits Decision must be treated the same as if the direction came from the Chair of the Board of Directors and implemented by the President and CEO of the IH. The failure of IH to respond appropriately to the terms and conditions in the Merits Decision is largely the failure of the IH Board to whom the senior medical leadership are responsible.

[58] Parties must have some faith that when an administrative appeal comes before the HAB, and the HAB makes an order or direction, that the parties will work with diligence and reason to comply and to implement the order in a reasonably fair manner. While the HAB is available to deal with disputes along the way towards implementation, both parties must make a reasonable attempt at implementation before the assistance of the HAB is sought. As detailed above there were many steps the IH could have taken within the 60 day deadline, or the agreed upon extension, and they failed to take any of those steps.

[49] This panel has repeatedly noted that time is of the essence in this matter given the currency issues that the Appellant had to deal with. This panel also has repeatedly noted that all the Appellant's currency issues are the fault of IHA, and their misconduct related to the Appellant on multiple issues. It is particularly instructive that the Division Head, who had also worked with the Appellant at Royal Inland Hospital in Kamloops ("RIH"), stated in his sworn affidavit that it was his opinion that both the Appellant and himself should have had their privileges transferred to KGH when the retinal program moved there from RIH. There is also evidence that the Division Head acknowledged that the Appellant's currency issues were not his own fault. The panel has repeatedly noted that IHA had an obligation to work with the Appellant to complete a reintroduction process for the Appellant. IHA has failed to do so and has never adequately grappled with the difficulties being encountered by the Appellant and sought ways to proactively address those difficulties. IHA's treatment of the Appellant is simply appalling.

[50] The IHA senior medical leadership has failed to give any guidance or instructions to its staff to accommodate the reintroduction of the Appellant. IHA cannot then claim that other staff are acting without any authority when they take specific actions which affect the reintroduction of the Appellant. IHA has completely failed in its obligation to accommodate the reintroduction of the Appellant. The First Costs Order discussed IHA's duty in this respect, and this panel finds that IHA's duty to accommodate the full reintroduction of the Appellant continues up to and beyond the July 27, 2023 Order.

[51] IHA did not give the Division Head any guidance on how he was supposed to deal with the Appellant's perceived currency issues. IHA did not appear to share with the Division Head the experiences the Appellant had with Dr. [S] in Toronto, and the other surgical experiences that the Appellant had submitted to the HAB at various hearings, including his observership and training in Calgary. This experience is listed in the written reasons for the July 27, 2023 Order, and IHA could have requested more details if it wished, either when the July 27, 2023 Order was delivered orally or when it was subsequently published in writing. IHA did not share that the Appellant received licensure in Ontario to work with Dr. [S], or that Dr. [S] provided a signed statement that the Appellant demonstrated a good skill set as a surgeon and that he is a competent ophthalmic and retinal surgeon. In his affidavit the Division Head stated that he was not aware of Dr. [S]'s attestation as to the Appellant's competence. This is astonishing as this evidence was a key finding in the July 27, 2023 Order in which IHA was a party. This finding was clear in the oral reasons delivered on July 27, 2023 and IHA was not required to wait for a transcript or the written reasons to share this information with the appropriate medical staff including the Division Head. This failure to share this information with the Division Head and other staff members led to a misapprehension of the currency issues with the Appellant.

[52] To be clear, and this panel has said this multiple times in these proceedings: the currency issues of the Appellant are the fault of IHA and IHA must work with the Appellant to fix those issues in a way that does not involve disciplinary action as the sole or preferable tool. When the Division Head took an active role in the Appellant's surgical practice after September 2023, several good outcomes resulted. First, the Division Head was more aware of the Appellant's skill set and could offer professional suggestions and learning opportunities. Secondly, in this panel's view, the Division Head could base his opinion of the Appellant's currency issues on observed facts rather than hearsay and perception. A review of the limited surgical cases referenced in these proceedings after September 2023 involving both the Division Head and the Appellant demonstrate two competent professionals working together for the best outcome of the patients.

[53] In light of this panel's multiple findings that IHA's conduct after the July 27, 2023 Order fell markedly below the standard to be expected in this matter, this panel finds that an award of costs is justified. In addition, an award of costs would further the aims and purposes of the legislative framework of the HAB which provides that the HAB can act in place of the Board of Directors to remedy any privileging issue that is properly before the HAB. This power requires the Board of Directors and senior medical leadership to act

reasonably to implement the orders of the Board of Directors as articulated by the HAB. This did not occur in the circumstances before the HAB in this application and this justifies an award of costs against IHA.

QUANTUM OF COSTS

[54] The Appellant seeks $20,000 in lump sum costs incurred since the July 27, 2023 Order. IHA argues that there is no bill of costs or statement of account for the relevant period to justify this amount. The Appellant provided further submissions from counsel that the actual legal costs incurred from July 27, 2023, to November 13, 2023, totalled $43,264, which did not include any disbursements incurred on behalf of the Appellant. This panel accepts that those costs were incurred as submitted by counsel for the Appellant. IHA further submits that if they are successful on some points of the submissions, such as the admissibility of the College Complaints, the award of costs should take that into account. First, the affidavits submitted by IHA regarding legal interpretation were improper and were simply argument in the guise of evidence. While this panel did not make any findings on the admissibility of the College Complaints, the submissions of the Appellant were helpful in assessing the conduct of IHA in the circumstances.

[55] This panel finds it necessary to make an order for costs against IHA to send an appropriate message that conduct which delays or obfuscates the implementation of an HAB order will not be tolerated. An award of costs should not be punitive, and this panel finds that an award of $20,000 in lump sum costs against IHA, sends the appropriate message without becoming punitive. This figure represents less than 50% of the actual legal costs incurred by the Appellant for the limited period of time applicable to this application.

ORDER

[56] This panel orders that IHA pay the actual costs of the Appellant from the July 27, 2023 Order to November 30, 2023, up to a cap of $20,000.

"Stacy Robertson"

Stacy F. Robertson, Panel Chair
Hospital Appeal Board

"Dr. Ailve McNestry"

Dr. Ailve McNestry, Panel Member
Hospital Appeal Board

"Dr. R. Alan Meakes"

Dr. R. Alan Meakes, Panel Member
Hospital Appeal Board