IN THE MATTER OF AN APPEAL
TO THE HOSPITAL APPEAL BOARD

BETWEEN:

DR. DARREN BEHN

APPELLANT

AND:

VANCOUVER ISLAND HEALTH AUTHORITY (VIHA)

RESPONDENT

DECISION: APPLICATION FOR COSTS

1. On May 19, 2010, the Panel rendered its decision in *Dr. Darren Behn v. Vancouver Island Health Authority*.

2. The issues before the Panel in *Behn* were as follows (para. 53):

   (a) Whether there is a need for another glaucoma subspecialist surgeon in VIHA South Island?

   (b) If there is a need, does VIHA have the resources, including funding and/or operating room time, to support the privileges of another subspecialist ophthalmologist?

   (c) If there is a need and VIHA has resources, should the need be filled following a formal selection process pursuant to VIHA's current physician recruitment policy?

3. The Panel concluded that there was a need for another glaucoma subspecialist surgeon in VIHA South Island, that VIHA had the resources to support such privileges, and that no useful purpose would be served in the circumstances by utilizing a further selection process. In the result, the Panel ordered that the Appellant's application for appointment to the active medical staff of the division of ophthalmology be effective as of May 19, 2010.

4. The Appellant is now seeking an award of costs.

Jurisdiction to award costs

5. The parties are agreed on the Hospital Appeal Board's jurisdiction to award costs.

6. In 2004, the Legislature amended the powers given to the Hospital Appeal Board (the Board) under the *Hospital Act*, R.S.B.C. 1996, c. 200, to incorporate by reference a number of statutory powers and procedures from the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (*ATA*):

> 46(4.2) Sections 1 to 20, 25 to 35, 37 to 39, 42, 44, 46.2, 47 to 56, 57, 58, 60 (a), (b) and (d) to (f) and 61 of the *Administrative Tribunals Act* apply to the Hospital Appeal Board.

7. Among the incorporated provisions is s. 47 of the *ATA*. Section 47 conferred upon the Board, for the first time, the authority to order one party to pay the costs of another party, an intervener or the Board itself:

> 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
>
> (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
>
> (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.
>
> (2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the

amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

8. The "regulations" referred to in the opening words of s. 47(1) describe regulations that may be made by the Lieutenant Governor in Council under s. 60 of the *ATA*. No such regulations have been made.

9. In the absence of regulations, the result is that an order for payment of costs is left to the discretion of the particular administrative tribunal to which s. 47 applies.

Approaches governing costs

10. Section 47 of the *ATA* was given detailed consideration in a May 2005 decision of one of the administrative tribunals to which s. 47 has been applied - the British Columbia Farm Industry Review Board (BCFIRB). The BCFIRB hears regulated marketing appeals from decisions of commodity boards under the *Natural Products Marketing Act*.

11. In its May 2005 decision *BC Vegetable Greenhouse I, L.P. v. British Columbia Vegetable Marketing Commission* (the *Vegetable Greenhouse* decision), the BCFIRB identified four unique features of s. 47:

    a) Orders for payment of costs are discretionary.

    b) Orders for payment of costs are capable of extending in favour of or against what the *ATA* separately describes as "parties" and "interveners".

    c) Orders for payment of costs against parties and interveners are limited to part of the costs incurred in connection with the application.

    d) Orders may require the payment of actual costs, but only the actual costs of the tribunal, and only where the tribunal considers that a party's conduct has been "improper, vexatious, frivolous or abusive".

12. The discretion set out in s. 47 must be exercised in a principled fashion.

13. Section 47 was incorporated by reference from the *ATA* into the governing statutes of a number of administrative tribunals. While the decisions of those other tribunals are instructive and helpful for the Hospital Appeal Board, the Panel is not bound by those decisions. Once a provision such as s. 47 finds its home within the *Hospital Act*, it must be applied in a fashion that best suits the context of the *Hospital Act* and appeals to the Hospital Appeal Board.

14. In pursuit of a principle that best suits the circumstances of the Board, there are three possible approaches the Board might adopt:

    (a) One approach is to conclude that that costs should generally be payable to the "winner" unless there is something in the circumstances that suggests that each party should bear its own costs. This is the principle that applies in most courts of law in private civil litigation, where it said that "costs follow the event": see *Hutson v. Michaels of Canada ULC*, 2009 BCSC 1587. Under this private law model, courts will ordinarily take into account factors such as the complexity of the litigation and time spent. Where a party has misconducted itself in some fashion, costs may be awarded on an increased scale.

    (b) A second approach is to conclude that costs will not follow the event (i.e., the winner does not receive his or her costs), unless there are special circumstances which warrant costs being awarded. This is the approach taken in the *Vegetable Greenhouse* decision, *supra,* and which is also the approach that British Columbia courts take on judicial review in public law cases: *Lang v. Superintendent of Motor Vehicles*, [2005] B.C.J. No. 906 (C.A.). On this approach, a costs order requires something more than a mere error of fact, law or procedure that results in an appeal being allowed. Costs are awarded against statutory decision-makers only where there has been special circumstances reflected by demonstrable misconduct, such as acting capriciously or ignoring a clear legal duty, demonstrating bias or acting improperly in the litigation.

(c) A third approach would be to apply an approach that weighs several factors "at large" in determining whether costs should be awarded in a particular case. These might include the success of a party, the conduct of the parties, the subject matter of the dispute and the reasonableness of the costs incurred.

15. This is a case in which the Board is required to address hospital privileges in relation to whether an authority has an appropriate number of physicians and specialties relative to its needs and fiscal constraints. It requires the Board to focus primarily on systemic policy questions as to the best utilization of existing funds and resources. As noted in paragraph 54 of the decision, these types of appeals require the Board to engage in a balancing of competing interests in the public interest.

16. In our opinion, the Board should reject a "costs follow the event" approach. While there are good reasons for courts to impose the discipline of costs on parties conducting private litigation against each other, the Board's mandate is different from that of a court conducting civil litigation.

17. The Board's very existence reflects a legislative judgment that there ought to be an accessible and cost effective way, as an alternative to the court process, for practitioners to resolve their disputes with health authorities regarding hospital privileges. The dispute is not between two private parties. It is between a professional who wishes to advance his or her professional interest, and a health authority required to make decisions in the public interest. The Board's *de novo* jurisdiction emphasizes that the Board's focus is not so much on whether there was an "error" below, as on what is the most appropriate outcome regarding privileges in all the circumstances. Indeed, the Board's mandate sometimes requires it to address questions which would not even be justiciable in a court of law – whether, as in this case, a hospital has an appropriate number of physicians and specialties relative to its needs and fiscal constraints. These are judgments about policy and public interest.

18. There is in this context no compelling reason to exercise the discretion in s. 47 of the *ATA* to use costs as a "discipline" that would act as a disincentive either to an appellant bringing a *bona fide* appeal, or to a public authority that is defending an appeal based on its bona fide assessment of the public interest.

19. This leaves a choice between the second and third approaches.

20. In our opinion, the second approach is preferable to the third. It is more consistent with the public law context, it provides greater certainty over an approach that can risk being somewhat arbitrary in its application, and it is still sufficiently flexible to allow the Board to find special circumstances where either party's conduct warrants it.

21. Those special circumstances may relate to the conduct of the appeal, as for example where a party has engaged in abusive or improper conduct on the appeal, taken a position that was frivolous or manifestly unfounded or unreasonably delayed or prolonged the proceeding. Alternatively, those circumstances may arise where the authority's underlying conduct as reflected in the events giving rise to appeal were manifestly unfair, biased or capricious and did not reflect good faith.

22. It must be emphasized that where a health authority has acted in good faith in the underlying events, no costs order should be made against it even if this Board differs on a matter of fact, law or policy. Nor should a costs order be made simply because the appeal reflected strong differences of position at first instance or on the appeal. The Board exists precisely because some differences cannot be consensually resolved at the hospital board level. Special circumstances should be found only where a party's conduct falls clearly below the standards to be expected in the underlying process or on the appeal itself.

23. We wish to make clear that in adopting this test, we have carefully considered s. 47(1)(c) of the *ATA*, which allows the Board to make an order that its costs and expenses be paid if the conduct of a party has been "improper, vexatious, frivolous or abusive". Section 47(1)(c) prescribes a statutory standard for the

Board to receive its actual costs. We do not read this statutory standard as fettering the Board in adopting a principled approach to costs as between the parties under ss. 47(1)(a) and (b), particularly where, as here, we find that approach most appropriate to this particular statutory context and this appeal

Application to this case

24. Turning now to the circumstances of this case. VIHA submits that it ought not to be required to pay costs for the following reasons:

(a) VIHA did not engage in improper, vexatious, frivolous or abusive conduct. There is no evidence or finding that it acted in bad faith or based its decision on irrelevant or improper factors.

(b) VIHA's position was not manifestly unfounded. Though it came to a different conclusion than the Hospital Appeal Board, the Board of VIHA appropriately relied on evidence which it believed established no need for another glaucoma subspecialty surgeon in VIHA South Island at the time in question.

(c) VIHA did not delay the proceedings. Rather, it worked cooperatively with the Appellant to narrow the issues through an agreed statement of facts, to shorten the hearing through the use of affidavit evidence and to enter a joint book of documents. Through the parties' efforts, the appeal was heard just over 9 months from the decision, during which time the Appellant was able to make use of the locum privileges accorded to him by VIHA.

(d) VIHA submits that its arguments and evidence assisted the Board in understanding the issues, including the balancing of interests required under the Medical Staff Bylaws.

25. While some of the arguments the Appellant has advanced (for example, the complexity of the case and its efforts to simplify the hearing) are more suited to a "costs follow the event" model which ought to be rejected, the Appellant has advanced two arguments that do speak to the special circumstances test as defined above. Those submissions may be summarized as follows:

    (a) VIHA raised suggestions of inappropriate personal relationships which were never borne out on the evidence. This argument alleges that VIHA made improper allegations on the appeal.

    (b) VIHA's position has been unreasonable from the outset, and this unreasonableness was compounded by VIHA's failure to (a) settle the appeal following a settlement offer by the Appellant, and (b) agree to mediation. This argument alleges that VIHA's position has been manifestly unfounded at the outset and during the appeal process.

26. While we cannot be certain precisely what the Appellant is referring to when he says that VIHA raised suggestions of inappropriate personal relationships that were not born out on the evidence this would appear to be a reference to the lobbying efforts made on behalf of the Appellant by his supporters. In our view this evidence was not led by VIHA for any improper purpose but rather to explain why it was that some of the conflicts which had developed in the department of ophthalmology, arising out of the Appellant's application for privileges, had arisen. Moreover VIHA made it clear that it regretted that the conflicts had developed and made efforts to ensure that the Appellant's application for privileges was dealt with fairly notwithstanding the conflicts. This in our view is not a special circumstance where VIHA's conduct had fallen below the standards to be expected in the underlying process or on the appeal itself.

27. With respect to the Appellant's submission that VIHA's position was unreasonable from the outset. If you accept, as we do, that VIHA's position was advanced in good faith then this argument must be rejected even though the Panel took a different view and even though the parties took different positions. In this

regard, we think it can be recognized that it is not easy for a public body to "settle" or "negotiate" its view of the public interest. To order costs, it would have to be a case where the public body acted unreasonably. In this case while we disagreed with VIHA we did not find that it had engaged in improper conduct or that it had taken a position that was frivolous or manifestly unfounded such that costs ought to be awarded against it.

Decision

28. The Appellant's application for costs is dismissed.

Dated this 31st day of December, 2010.

"William G. Hopkins"
William G. Hopkins, Panel Chair

"Dr. Paul Champion"
Dr. Paul Champion, Member

"Dr. Victor Waymouth"
Dr. Victor Waymouth, Member