HEALTH SERVICES APPEAL AND REVIEW BOARD

Annual Report

Fiscal Period April 1, 2002 to March 31, 2003

Health Services Appeal and Review Board

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Commission d'appel et de révision des services de santé

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Ontario

December 15, 2003

The Honourable George Smitherman
Minister of Health and Long-Term Care
80 Grosvenor Street
10th Floor, Hepburn Block
Toronto, ON M7A 2C4

Dear Minister:

Re: Health Services Appeal and Review Board Annual Report

On behalf of the Health Services Appeal and Review Board, it is my pleasure to submit our fourth Annual Report for the fiscal year 2002/2003.

The Appeal Board is committed to the initiatives outlined in the report and to the excellence in service to the Ontario public. I look forward to meeting with you to discuss the work of this Appeal Board and to hear your comments.

Yours sincerely,

Beverly A. Harris
Chair
Health Services Appeal and Review Board

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Ontario

December 7, 2003

Beverly A. Harris
Chair
Health Services Appeal and Review Board
151 Bloor St. West, 9th Floor
Toronto, Ontario
M5S 2T5

Dear Ms. Harris:

I am pleased to provide you with the following Financial Report on the activities of the Health Services Appeal and Review Board (the "Appeal Board") for the 2002/2003 fiscal year.

HEALTH BOARDS SECRETARIAT

The Health Boards Secretariat (the "Secretariat") provides common administrative, operational, fiscal and case management services to three province-wide, quasi-judicial appeal and review tribunals (Health Professions Appeal and Review Board; Health Services Appeal and Review Board and the Ontario Hepatitis C Assistance Plan Review Committee). In addition, the Secretariat provides paymaster support to the Public Appointees of the 23 self-regulated health professions colleges, and in part to the Consent and Capacity Board and the Ontario Review Board.

The tribunals operate under a variety of statutes, to adjudicate issues relating to:

- public environment and communicable disease hazards
- safety of medical and other health services and professional services
- the right of health professionals to practice generally and physicians' hospital privileges
- health facility licensing
- eligibility for and provision of insured health services to Ontario residents; and
- access to long-term care facilities and services
- public safety and the public interest in the regulation and practice of regulated health professionals

In summary, the Ministry through the Secretariat provides case management, scheduling, facilities, and corporate administration and financial services to the Appeal Board.

The Appeal Board is a quasi-judicial tribunal originally established under the Ministry of Health Appeal and Review Boards Act, 1998, as the Health Services Board and as a result of the Red Tape Reduction Act (1998) became the Health Services Appeal and Review Board. The Appeal Board conducts hearings/ reviews under 14 Acts, and may involve the General Manager of OHIP respecting eligibility, payments for insured services and practitioner billings. Other areas of appeals include community placements services

(CCACs) regarding eligibility for a placement in a long-term care facility; long term care service provision within the community; health facility licensing; municipal health boards' compliance with mandatory programs; and public health officials regarding community health hazards and communicable diseases.

Financial Data:

For the fiscal year 2002/03, there was the equivalent of 4.8 full-time staff (an increase of 1 FTE), dedicated to the Appeal Board plus approximately 1/2 of the Registrar/Chief Operating Officer's time, 1/3 of the Finance staff, 1/2 of the System's Officer and File Clerk, and 1/3 of the Receptionist and Secretary's time respectively. The total staff salaries and wages amounted to approximately $364,746. This represents an increase of $60,267 from the previous fiscal year, and includes the relevant merit increases applied to staff salaries, increases resulting from recent collective bargaining, as well as salary for staff on sick leave plus the new Case Management Coordinator position.

The Financial Performance Chart (02/03) as seen on page 17 presents the Appeal Board's specific expenditures from the Secretariat's "Other Direct Operating Expenditures" (ODOE) allocation. Although the number of hearings and pre-hearings increased by almost 35% from the previous year, costs actually decreased primarily due to minimal consulting services employed.

Limitations:

As you are aware, the Appeal Board's budget is wholly contained within the overall Branch budget of the Secretariat. In addition, the Ministry operates on a fiscal year (April 1 to March 31) rather than a calendar year basis. As a result, there are several limitations respecting the financial data provided. More specifically, the Appeal Board's annual allocation, which is included in the ministry's annual Business Plan and Estimates Report to the Legislature, is established through internal Branch and Ministry processes and is based on experience during the past fiscal year and the Secretariat's best estimate of cost pressures for the forthcoming fiscal year.

In addition, the Appeal Board's share of common Secretariat operating costs, such as, human resources, general printing/photocopying and financial services, is not easily identified within the overall Secretariat budget. Thus, for example, data on staff salaries are estimates based on the annual salaries of staff directly assigned to Appeal Board functions and an approximate proportion of the time of other key administrative staff, namely the Registrar/Chief Operating Officer and the Deputy Registrar. Facility costs such as office and internal hearing room space and utilities and significant printing costs are not identifiable. However, these costs are incorporated into the Ministry's overall budget, which is reported annually to the Legislature.

I trust that the above information is of assistance to you.

Yours truly,

Abby Katz Starr
Chief Operating Officer
Health Boards Secretariat
Registrar, Health Services Appeal and Review Board

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CHAIR'S MESSAGE

Appeals by individuals, unrepresented by counsel, who challenge decisions of the General Manager of the Ontario Health Insurance Plan are a core part of the Appeal Board's work. Ensuring that those unrepresented Appellants have convenient and easy to understand access to the Appeal Board is vital to the Appeal Board. Over the years, and continuing in this fiscal year, the Appeal Board has made significant improvements in this access.

Increasingly, however, the challenges for the Appeal Board lie not with these Health Insurance Act appeals but with appeals under other statutes in the Appeal Board's jurisdiction: appeals by physicians from the decisions of the Medical Review Committee, appeals under the Health Protection and Promotion Act, appeals under the Long-Term Care Act. While the subject-matter is diverse, there is one common theme: the hearings are longer, more complicated and more sophisticated than the appeals that, traditionally, have been the work of the Appeal Board.

These hearings present special challenges for the Appeal Board. They are far more time-consuming for both staff and Appeal Board members. They require several hearing days in a row. They often require hearings in locations outside of the Appeal Board's hearing room in Toronto. They require significant time for deliberation and writing.

With the current number of members, and the part-time nature of the appointments, these hearings challenge the Appeal Board. While, in my view, there is great value to the Appeal Board and to the public in having part-time members on the tribunal, we urgently require more members and, in particular, more experienced adjudicators with time to devote to the work of the Appeal Board. This is the single most important challenge for the Appeal Board in the forthcoming year and one I am most committed to resolving.

In the meantime, the staff and members of the Appeal Board continue to work diligently and give generously of their time. Because of them, we continue to hear appeals in a timely fashion and issue decisions with thoughtful, comprehensive reasons. My deepest thanks to you all.

Beverly A. Harris

Chair, Health Services Appeal and Review Board

JURISDICTION OF THE APPEAL BOARD

The Health Services Appeal and Review Board (the Appeal Board) is an independent quasi-judicial tribunal created by the *Ministry of Health Appeal and Review Boards Ac*t. The Appeal Board has a review and appeal mandate under fourteen different statutes. These are:

- *The Ambulance Act*
- *The Charitable Institutions Act*
- *The Healing Arts Radiation Protection Act*
- *The Health Care Accessibility Act*
- *The Health Facilities Special Orders Act*
- *The Health Insurance Act*
- *The Health Protection and Promotion Act*
- *The Homes for the Aged and Rest Homes Act*
- *The Immunization of School Pupils Act*
- *The Independent Health Facilities Act*
- *The Laboratory and Specimen Collection Centre Licensing Act*
- *The Long-Term Care Act*
- *The Nursing Homes Act*
- *The Private Hospitals Act*

In the 2001-2002 Annual Report, the Appeal Board reported that in a recent decision, the Appeal Board ruled that it had the necessary jurisdiction to consider constitutional challenges to its enabling legislation. In 2002, the *Ministry of Health Appeal and Review Boards Act* was amended by the Legislature to provide that the Appeal Board "shall not inquire or make a decision concerning the constitutional validity of a provision of an Act or regulation".

The bulk of the Appeal Board's work involves hearing appeals under the *Health Insurance Act*, the *Long-Term Care Act*, the *Health Protection and Promotion Act*, and the *Independent Health Facilities Act*. In the following section, there is a brief discussion of the Appeal Board's jurisdiction under those statutes.

Health Insurance Act

Most of the appeals heard by the Appeal Board are appeals under the *Health Insurance Act*. Under this Act, the Appeal Board hears appeals from decisions of the General Manager of the Ontario Health Insurance Plan (OHIP) respecting OHIP eligibility and coverage (eligibility and subscriber appeals). The Appeal Board also hears appeals from directions of the Medical Review Committee or Practitioner Review Committee respecting payments by OHIP in respect of insured services. Finally, the Appeal Board hears appeals from determinations by the Medical Eligibility Committee regarding approval for special procedures.

Eligibility and Subscriber Appeals

Most of the appeals before the Appeal Board under the *Health Insurance Act* relate to questions of whether treatments are insured services of OHIP. Many of these appeals are initiated by patients who are unrepresented by counsel. They are, generally, scheduled during one week each month which the Appeal Board refers to as its "regular sittings". For most of these appeals, the Appeal Board is able to hear and decide the appeal within a short period of time.

In recent years, the Appeal Board has heard an ever increasing number of *Health Insurance Act* appeals that cannot be heard during the regular sittings. Most often, these cases raise the question of whether treatment provided outside of the country is an insured service of OHIP under section 28.4 of Regulation 552 (a provision that allows for full funding of the treatment). The issues raised in these matters are, generally, more sophisticated and complex. The patients in those cases are often represented by counsel. The time to bring an appeal to a hearing, the time to hear the appeal and the time to decide the appeal lengthens in these proceedings. Of necessity, these appeals (which often last several days) are scheduled in weeks outside the regular sittings of the Appeal Board.

MRC Appeals

Also beyond the capacity of the regular sittings of the Appeal Board are the appeals from decisions of the Medical Review Committee. The Appeal Board is finding that, in the past, where these appeals often settled before a hearing, they now proceed to a hearing. As with the more complex subscriber appeals, these appeals are considerably more complex than the regular sittings appeals. Consequently, they require considerably more resources from both staff and the Appeal Board.

Remedies

After a hearing, the Appeal Board has the authority to order the General Manager to take such action as the Appeal Board considers the General Manager should take in accordance with the Act or the regulations. A final decision of the Appeal Board is subject to appeal to the Divisional Court, pursuant to section 24 of the Act. The Appeal Board has the power to reconsider any of its decisions. It exercises this jurisdiction carefully balancing the interests of finality and fairness.

Long-Term Care Act

In addition to its jurisdiction to hear appeals under the *Health Insurance Act*, the Appeal Board also has jurisdiction under the *Long-Term Care Act* to hear appeals from decisions of approved agencies under the Long- Term Care Act respecting:

- eligibility for community service;
- excluding a particular community service from a plan of service;
- the amount of any particular community service, and;
- terminating the provision of service.

The Appeal Board is required to "promptly" appoint a time and place for a hearing and, in any event, the hearing shall begin within 30 days unless the parties agree to a postponement.

Within a very short time after the request for hearing is filed with the Appeal Board, the Appeal Board convenes a pre-hearing conference before a member of the Appeal Board who has developed expertise under the *Long-Term Care Act*. The member works with the parties to narrow the issues before the matter proceeds to a hearing before a panel of the Appeal Board. The Appeal Board has found that this approach provides efficient and inexpensive access to the Appeal Board and, in many cases, the matter is resolved to the satisfaction of all the parties.

Some matters are not resolved in this way and the Appeal Board endeavours to convene a hearing quickly and efficiently. These appeals are *hearings de novo* before the Appeal Board. The Appeal Board hears evidence about the patient's requirements, capacity and preferences, in accordance with section 22 of the *Long-Term Care Act*. Of the 12 matters that proceeded to a hearing in the past year, the Appeal Board has found them to be longer than most *Health Insurance Act* hearings and, thus, more demanding of Appeal Board and Appeal Board staff resources.

After a hearing, the Appeal Board's authority under the *Long-Term Care Act* is to affirm the decision of the approved agency, rescind the decision and refer it back to the approved agency or rescind the decision and substitute its opinion for that of the approved agency. The decision of the Appeal Board is final and cannot be appealed to Divisional Court; however, the Appeal Board does have the power to review its own decisions. Again, this is a jurisdiction that the Appeal Board exercises carefully in the interests of finality and fairness.

Health Protection and Promotion Act

Pursuant to section 44(5) of the *Health Protection and Promotion Act*, the Appeal Board is required to hold a hearing within 15 days after the Appeal Board receives notice in writing requiring the hearing. Orders by medical officers of health or public health inspectors respecting action to be taken in respect of a health hazard (section 13) or in respect of a communicable disease (sections 22 and 37) can be appealed to the Appeal Board. The Appeal Board's authority, pursuant to section 44(4), is to confirm, alter or rescind the Order of the medical officer of health or the public health inspector. The Appeal Board may also substitute its finding for

that of the medical officer of health or public health inspector who made the Order.

As with the *Long-Term Care Act* appeals, the practice of the Appeal Board is to convene a pre-hearing conference before an experienced Vice-Chair of the Appeal Board. As appropriate, the Vice-Chair works with the parties to narrow the issues and determine any procedural issues before the matter is heard by a panel of the Appeal Board. With Health Protection appeals, too, those matters that proceed to a hearing tend to be more complex and time consuming than typical *Health Insurance Act* appeals.

As with the *Health Insurance Act* appeals, final decisions of the Appeal Board may be appealed to the Divisional Court. The Appeal Board has the same power to reconsider its final decision under this Act.

Independent Health Facilities Act

Decisions by the Director of Independent Health Facilities (the "Director") refusing to issue a license or amend the limitations of a license issued under this Act may be appealed to the Appeal Board. The Appeal Board may confirm the Director's refusal to issue a license or direct the Director to issue the license. In the case of refusals to amend limitations on a license, the Appeal Board may confirm the refusal, direct the Director to make all or part of the amendments, or direct the Director to make all or part of the amendments provided certain conditions are satisfied by the Applicant.

Pursuant to section 18, the Director may revoke, suspend or refuse to renew a license under certain circumstances. This decision of the Director is also subject to appeal to the Appeal Board.

Decisions of the Appeal Board may be appealed to the Divisional Court on a question of law alone. The Appeal Board has jurisdiction to reconsider final decisions under the *Independent Health Facilities Act*.

ACCOMPLISHMENTS OF THE PAST YEAR AND COMMITMENTS FOR THE FUTURE

CHALLENGES AND GOALS

As it has for the past two years, the Appeal Board continues to face three key challenges in its work as an adjudicative tribunal:

- the increased number of appeals to the Appeal Board, particularly, the increased number of appeals under statutes other than the *Health Insurance Act;*
- the increased complexity of the appeals to the Appeal Board under the *Health Insurance Act* and other statutes within its jurisdiction;
- the incompleteness of its communication materials.

In meeting these challenges, the Appeal Board continues to be guided by two important goals: timeliness and accessibility in all parts of the hearing process and in all hearings before the Appeal Board. Below I summarize the work of the Appeal Board in the past year, and our aspirations for the future year, that are directed to meeting these goals and challenges.

Improved Access to the Appeal Board

(i) Web-site for the Health Services Appeal and Review Board

I am extremely pleased to report that, since November 2002, the Health Services Appeal and Review Board has been operating a website in both official languages at www.hsarb.on.ca. Anyone appealing a decision under the *Health Insurance Act* is directed to the website for further information about our proceedings. Further, both pamphlets that are distributed by the Appeal Board refer the reader to the website.

The Appeal Board web-site is consistent in appearance with other Ministry of Health and Long-Term Care tribunals. Through the web-site, we are broadcasting, more widely and in a popular format, information about the Appeal Board in general and proceedings before the Appeal Board, in particular, under the *Health Insurance Act*.

Included on the web-site is:

- all past Annual Reports of the Appeal Board;
- all the information that is included in the pamphlet published by the Appeal Board;
- the Rules of Practice and Procedure of the Appeal Board;
- links to the fourteen statutes under which the Appeal Board has jurisdiction and the Statutory Powers Procedure Act;
- copies of forms that may be required to be filed in proceedings under the *Health Insurance Act*;

- a link to the Ministry of Health and Long-Term Care web-site and, in particular, a link to the OHIP website.

With appropriate resources, the Appeal Board expects to enhance the website by adding information about proceedings under all the other statutes within its jurisdiction, with particular priority being given to the *Health Protection and Promotion Act* and the *Long-Term Care Act* proceedings. Further, the Appeal Board expects to include full text of all decisions on its website.

(ii) Pamphlet Describing the Appeal Board

Since 2001, the Appeal Board has been issuing a pamphlet describing the proceedings to every appellant in a *Health Insurance Act* appeal. The pamphlet is written in easy to understand, non-technical language. It is written in a format that attempts to identify questions that someone new to the processes of an administrative tribunal, and this tribunal in particular, may ask.

In 2002, the Appeal Board added the complete text of the pamphlet to its website, www.hsarb.on.ca, in a section called "frequently asked questions".

The Appeal Board remains committed to updating and improving the pamphlet and the website as circumstances demand in the future. In particular, with appropriate funding, the Appeal Board intends to publish pamphlets that describe proceedings under every other statute in which it has jurisdiction. Again, as with the website, the Appeal Board will give particular priority to proceedings under the *Health Protection and Promotion Act* and the *Long-Term Care Act*.

Rules of Practice, Guidelines and Practice Directions

Since 1995, the Appeal Board has had an extensive set of rules governing practice and procedure. The Appeal Board continually reviews the Rules to ensure that they accurately reflect legislative requirements, the Appeal Board's process and the changing needs of the public that the Appeal Board serves.

The Rules are extensive. They cover all aspects of procedure before the Appeal Board including, motions, adjournments, notices of constitutional question, requests for restricted access to a file, and reviews of Appeal Board decisions.

Hard copies of the Rules are not distributed to every party to proceedings before the Appeal Board; however, their existence is brought to the attention of every party. Copies are available from the Appeal Board without charge on request. In addition, the Rules are found in their entirety at the Appeal Board's website, www.hsarb.on.ca and can be downloaded from that site.

In 2003-2004, the Appeal Board will begin a review of the Rules of Practice and Procedure in an effort to make the Rules even more accessible to non-represented parties to Appeal Board proceedings. The Appeal Board will consider drafting practice directions to accompany the Rules which will explain and expand on the Rules.

Timely Decisions

The Appeal Board remains committed to issuing decisions and comprehensive

written reasons within three months from the end of a hearing. I have noted that there are an ever-increasing number of more complex appeals under the *Health Insurance Act* and other statutes. The Appeal Board endeavours to issue a decision in these more complex proceedings, too, within a very short time after the hearing concludes. Comprehensive written reasons follow the decision. In this way, the Appeal Board ensures that members of the public participating in a hearing continue to have timely decisions in their appeals and full and complete reasons for that decision.

Education

(i) In-house Learning Programs

The Appeal Board continues to be deeply committed to in-house training for members of the Appeal Board. The Appeal Board devotes a significant portion of every monthly meeting to legal training. In the past year, counsel to the Appeal Board conducted in-house training for Appeal Board members on the following topics:

- Appeal Board's power to issue summons
- Conduct of a hearing part I
- Disclosure
- Conduct of a hearing part II
- Written reasons – analysis of the Cassie Gray decision of the Ontario Court of Appeal
- Rule 21 – reviews of Appeal Board decisions
- Section 1.1(6) of the *Health Insurance Act*
- Interest payable on orders of the Appeal Board
- Government Efficiency Act, 2002
- *Long-Term Care Act* remedies
- Hearings de novo under the *Long-Term Care Act*

(ii) External Training

As part of its commitment to adjudicator training, the Appeal Board has sent members to the following programs organized by the Society of Ontario Adjudicators and Regulators (SOAR), the annual Conference of Ontario Boards and Agencies (COBA), the Ontario Bar Association (OBA) and Management Board Secretariat.

- Effective Decision Writing
- Five Day Adjudicator Training Course
- The "Hearing from Hell"
- New Developments in Administrative Law
- Management Innovation

- Pilot Orientation for New Appointees

The Chair is a member of the Canadian Council of Administrative Tribunals, the Canadian Institute of Administrative Justice, the Circle of Chairs (Ontario) and a member of the Board of the Society of Ontario Adjudicators and Regulators (SOAR).

As a member of the Canadian Institute of Administrative Justice (CIAJ), the Chair was invited to attend a roundtable of twenty-five judges, administrative tribunal chairs, and academics from across Canada to engage in "dialogue between the courts and tribunals".

Increased Board Membership and Staffing

The demands on the Appeal Board have increased steadily over the last few years and so, too, have the demands on members of the Appeal Board. While three years ago it was appropriate to expect a part-time member of the Appeal Board to devote two or three days a month to the work of the Appeal Board, it is becoming important that more and more members of the Appeal Board be available many more days in the month for hearing and writing commitments.

Part-time members bring an important and valuable dimension to the deliberations of the Appeal Board. Rather than change the nature of the appointment to a full-time appointment, it would be appropriate to increase the number of members appointed to the Appeal Board.

With more members, the Appeal Board can continue to offer just, expeditious and cost-effective resolution to appeals. In particular, the Appeal Board will be able to continue to hear matters in a short period and issue timely decisions. Without more members, these important goals are in jeopardy.

The Appeal Board remains committed to working with the Minister to find appropriate candidates for appointment to the Appeal Board.

CASE REPORTS

In the past year, the Appeal Board has considered several cases of particular importance to the Appeal Board's jurisprudence. Those decisions are summarized briefly below. Comments on the importance of these decisions are also included.

Out of Country Services

The majority of appeals to the Appeal Board relate to services performed out of the country and a determination of whether they are insured services of OHIP pursuant to section 28.4 of Regulation 552 under the *Health Insurance Act*. Briefly stated, a service performed out of the country is an insured service of OHIP under the Act if it meets the following conditions:

1. the treatment is generally accepted as appropriate for a person in the Appellant's medical circumstances; and
2. the treatment is not available in Ontario; or

3. there is a delay in getting the same treatment in Ontario that would lead to death or medically significant tissue damage.

Following are some representative decisions of the Appeal Board decided under that section of the Regulation. The summaries are, by necessity, brief. For a more complete explanation of the Appeal Board's reasons, readers are encouraged to request a copy of the full decision of the Appeal Board.

A. F. v OHIP

In this appeal, Mr. F had been assessed by specialists for possible cadaveric liver transplantation in Ontario and denied that service in Ontario. He proceeded to have a liver transplant from a live person who was related to the Appellant (LRLT). The surgery was performed in England.

The question of adult-to-adult LRLT raises a number of complex and controversial issues regarding donor selection criteria, appropriate standards of medical practice and the socio-political climate in the health care delivery system. After three days of evidence and argument and many more days of deliberations, a majority of the three-member panel of the Appeal Board found that LRLT is not generally accepted in Ontario as appropriate for a person in Mr. F's circumstances, thus, the surgery is not an insured service of OHIP. The third member of the panel dissented finding that adult LRLT is generally accepted as appropriate for a person in Mr. F's medical circumstances; however, regrettably, LRLT was not available in Ontario and because of long waiting lists, neither was cadaveric transplant available. Thus, the service was an insured service of OHIP under the *Health Insurance Act*.

The decision is an important one in the Appeal Board's jurisprudence because of the difficult medical and ethical issues that were before the Appeal Board. This case illustrates the point that appeals to the Health Services Appeal and Review Board in recent years are becoming increasingly complex and sophisticated.

G. F. v OHIP

The Appellant, G.F., was a resident of Thunder Bay, Ontario with a significant history for breast cancer. She discovered a lump in her breast in May, 2001 and, after examination by local physicians over the next few months, was told to "wait and see". Not satisfied with waiting for a lump to "grow or change", Ms F arranged, with the help of her family physician, to be examined at the nearby Mayo Clinic, in Rochester, Minnesota.

The panel of the Appeal Board was not persuaded on the evidence before them that physicians in Ontario thought the service performed at the Mayo Clinic was appropriate. Indeed, in the panel's view, the evidence suggested the contrary; namely, that the "wait and see" approach was considered appropriate in Ontario for a person in the Appellant's circumstances.

D. and M. A. v OHIP

In this proceeding, the Appellants were advised by their son, a holistic health researcher, consultant and nutritional strategist living in Los Angeles, to undergo CT scans of their hearts. Mr. and Mrs. A followed his advice and went to Buffalo,

New York to have CT scans of their hearts.

OHIP submitted scientific literature for the Appeal Board's review in this proceeding. After reviewing the literature, the Appeal Board was satisfied that CT scan of the heart is a controversial diagnostic test and its use is still being investigated. The panel concluded that CT scan of the heart is not generally accepted as appropriate for a person in the Appellant's medical condition; thus, it is not an insured service of OHIP under the Act.

A. C. v OHIP

In this proceeding, the Appellant suffers from debilitating shoulder pain and sought payment for the cost of thermal capsulorrhaphy at the Hospital for Special Surgery in New York City. Evidence before the Appeal Board included letters from two Ontario physicians and extracts from scientific papers commenting on the surgery. The evidence on whether the treatment was "generally accepted as appropriate" was conflicting; however, the panel found the evidence from a Toronto specialist that he has "abandoned the technique" for the very condition that Ms C presented with, to be compelling evidence. The Appeal Board found the surgery is not an insured service of OHIP under the Act.

The Appellant requested a review of the decision which was refused by a Vice-Chair of the Appeal Board.

R. H. v OHIP

Mr. H travelled to the Mayo Clinic after seeing more than sixty doctors over the course of a year in an effort to get a diagnosis for chest pain. The Appeal Board agreed that evaluation at the Mayo Clinic under the circumstances was appropriate; however, the panel found that any delay associated with getting the same evaluation in Ontario would not lead to death or medically significant tissue damage. Accordingly, the panel found the services at the Mayo Clinic were not insured services of OHIP under the *Health Insurance Act*.

P. A. v OHIP

Mr. A suffered from significant back pain and required an MRI. He was told that it would be at least 15 weeks before he could get an MRI in Ontario. Faced with this news, Mr. A arranged to have an MRI done in Kenmore, New York.

The primary issue for the Appeal Board was whether the 60 week delay in having an MRI would lead to death or medically significant tissue damage for this patient. The Appeal Board found that it would not, thus, the appeal was denied.

C. F. v OHIP

In January 1999, Mr. F was diagnosed with cancer of the rectum. Unable to get timely pre-operative radiation and chemotherapy in Ontario, Mr. F was treated in California. These services were found by OHIP to be insured services of the Plan.

Towards the end of his treatment in California, Mr. F began investigating surgery for the cancer. The evidence before the Appeal Board was that it was critical to have surgery within a certain window of time after completing pre-operative radi-

ation and chemotherapy. It became apparent that surgery would not be available in Ontario within that window of time. Thus, the Appeal Board was persuaded that there was a delay in obtaining surgery in Ontario that would lead to death or medically significant tissue damage. The appeal was allowed.

G. C. v OHIP

Mr. C suffered from post-traumatic stress disorder. His psychotherapist recommended that Mr. C seek treatment at the Life Healing Center of Santa Fe.

Under section 28.4 of Regulation 552 under the Act, certain services performed out of the country will be insured services of OHIP. To qualify, among other conditions, the services must be rendered at a hospital or health facility. The Appeal Board heard evidence from the Appellant about the nature of the treatment provided at the Center. The treatment was, by and large, provided by social workers and other therapists in group and individual settings. The Appeal Board found that the Center is not a hospital or health facility, thus, the treatment performed at the facility is not an insured service of OHIP.

P.G. v OHIP

The Appeal Board heard three days of evidence in this appeal, including several days of expert testimony about "repeat myocardial revascularization surgery" (redo surgery). The evidence before the Appeal Board was that Mr. G had been examined by several Ontario cardiac surgeons on several different occasions and none of them had been willing to proceed with re-do surgery for this man who had had bypass surgery several years before. His Ontario cardiologist, on the other hand, supported his decision to have redo surgery at the Cleveland Clinic.

The Appellant argued that the Cleveland Clinic is vastly more experienced in performing re-do surgery, particularly in difficult cases like Mr. G's; thus, the surgery was not available in Ontario and ought to be an insured service of OHIP. The Appeal Board found, based on the weight of opinion from Ontario physicians, that re-do surgery was not "generally accepted as appropriate for a person in Mr. G's medical circumstances; thus, it was not an insured service of OHIP.

Experimental Treatment

Section 24 of Regulation 552 under the *Health Insurance Act* provides that treatment that is "generally accepted within Ontario as experimental" is not an insured service of OHIP. In many appeals the Appeal Board must consider not only if the service is an insured out of country service under section 28.4 of the Regulation but, also, whether the service is considered in Ontario to be experimental, thus, not an insured service of OHIP for that reason.

The summaries below illustrate some of the fact situations where the Appeal Board has been called upon to consider if a treatment is experimental.

G. T. v OHIP

Mr. T traveled to Greece for treatment of spastic tetraparesis in Multiple Sclerosis. The drug used in the treatment has been indicated for use in some patients with prostate cancer and leukemia. The evidence before the Appeal Board at the hear-

ing was that its use in connection with Multiple Sclerosis was the subject of small, early phase clinical trials.

The Appeal Board found the treatment is "generally accepted within Ontario as experimental"; thus, pursuant to section 24(1) of Regulation 552 under the Act, it is not an insured service of OHIP.

Eligibility Appeals

There are a variety of issues that come up in appeals by individuals who are denied insurance under OHIP. Most frequently, in the past year, the issue was whether a person qualifies for one of several exemptions to the requirement that, to be insured, one must reside in Ontario for 153 days in a twelve-month period.

V.A. v OHIP

Ms A was a resident of Toronto who left Ontario to attend Simon Fraser University in British Columbia for three years. While in British Columbia, Ms A was considered an insured person under OHIP pursuant to a reciprocal billing arrangement between Ontario and British Columbia. Very shortly after her return from British Columbia, Ms A. again left Ontario to study in England.

Regulation 552 under the Act provides that, among other requirements, to be an insured person of OHIP, one must "be present in Ontario for at least 153 days in any twelve month period". There are a number of exceptions to this requirement that are set out in the regulation. Included among those exceptions is one for people who leave Ontario for "education" and another for people who leave Ontario for "extended vacation or any other reason". The Appeal Board was satisfied that Ms. A did not qualify for the education exemption on the grounds that she had not met the condition of being "present in Ontario for at least 153 days for at least two consecutive 12-month periods immediately before leaving" for England. The precondition for the "extended vacation or any other reason" exemption is slightly different: one must have "previously" met the requirement of being present in Ontario for 153 days for two consecutive 12-month periods. The Appeal Board gave meaning to this different language and found that the Appellant – who had lived in Ontario for 19 years until leaving for three years of school in British Columbia – had "previously" met the residency requirements. The Appeal Board applied the exemption to Ms. A and extended her OHIP coverage in accordance with the legislation.

E.W. v OHIP

Ms W was a new immigrant to Ontario. She applied for landed status near the end of August 2000. In September, 2000 she suffered a miscarriage and required medical treatment.

Regulation 552 provides that a person who is a resident (which includes a person who has "submitted an application for landing but has not yet been granted landing" pursuant to section 1.1 of Regulation 552), is eligible to be enrolled as an insured person three months after the date he became a resident. Ms W asked that the Appeal Board change the date she became an insured person (to late November, 2000). The Appeal Board reviewed the exemptions to the three month

waiting period that are set out in the Regulation. As the panel was satisfied that none of the exemptions applied in this case, the appeal was refused.

Long-Term Care Act (LTCA) Decisions

T.R. v OHIP and CCAC Niagara

Mr. R is a quadriplegic as a result of a car accident. He seeks the services of Registered Massage therapist (RMT) to be paid for either by OHIP, under the *Health Insurance Act* or by the local CCAC under the *Long-Term Care Act*. The Appeal Board conducted the hearing in Niagara Falls, Ontario.

Counsel for the Appellant argued that RMT services are included in physiotherapy services which are listed as professional services under the LTCA. The panel heard evidence that the deep muscle massage required by the Appellant is beyond the scope of practice of physiotherapists; therefore, the service is not a professional service under the LTCA.

M.L. v CCAC of London and Middlesex

This is a decision on a motion brought by the Respondent asking the Appeal Board to determine if the CCAC or the Ministry of Health and Long-Term Care (the "Ministry") have an obligation to provide ML with service in excess of the maximum number of hours specified in a regulation to the LTCA. The Appellant alleged that there was an agreement between the CCAC and ML's family that predated the regulation that provided that ML would receive 234 hours of service in a month (well above the regulated maximum of 60 hours in a month).

The Appeal Board found that the Regulation was validly enacted, thus, any agreement to provide service in excess of the maximum was no longer valid.

MEMBERS OF THE APPEAL BOARD

Five members of the Appeal Board completed their second terms in 2002-2003. Of these five, only one member was reappointed. In addition, one member of the Appeal Board whose first term ended in 2002-2003 was reappointed for a further three year term. In addition, one new member was appointed to the Appeal Board in 2002 –2003.

The following is a list of the members of the Appeal Board as of March 2002.

John Anderson – is a physician practicing in Windsor. He has been a member of the Appeal Board for one year.

Barbara Collins – is Vice President, Planning, at a public hospital. She is also a Vice Chair of the Appeal Board. She has been a member of the Appeal Board for five years.

Elizabeth Elstner – is a lawyer and formerly a member of the Assessment Review Board. She has been a member of the Appeal Board for one year.

Brock Grant – is a lawyer consulting in the area of human rights. He has been a member of the Appeal Board for one year.

Beverly Harris – is Chair of the Appeal Board. She is a lawyer residing in Kitchener and has been a member of the Appeal Board for seven years.

Judith Hinchman – is a lawyer who is a Vice-Chair of the Appeal Board and has been a member of the Appeal Board for four years.

Lillie Lum – is a nurse and professor at Ryerson University. She has been a member of the Appeal Board for four years.

Dr. Kenneth Melvin – is a cardiologist practicing in Toronto who has been a member of the Appeal Board for six years.

Kathleen Osborne – is a lawyer with a private consulting practice in Toronto. She is a Vice-Chair of the Appeal Board and has been a member of the Appeal Board for one year.

Christine Moss – is a management consultant residing in Toronto. She is also a Vice-Chair of the Appeal Board and has been a member of the Appeal Board for four years.

Bonnie Patrick – is a lawyer practicing in Windsor and a Vice-Chair of the Appeal Board. She has been a member of the Appeal Board for six years.

Elaine Shin – is a former physiotherapist and a lawyer practicing in Toronto. She is a Vice-Chair of the Appeal Board and has been a member of the Appeal Board for one year.

Michele Lawford – is a lawyer practicing in Toronto and has been a member of the Appeal Board for four years. She is presently on a leave of absence.

The following four members of the Appeal Board completed their second terms on the Appeal Board and were not re-appointed:

Dr. Barbara Birchwood – is a physician living in Toronto. Dr. Birchwood was first appointed to the Appeal Board in February, 2000. As one of only three physicians on the Appeal Board, Dr. Birchwood brought an important dimension to the proceedings of the tribunal.

Sandra Meyrick – Ms Meyrick is a lawyer practicing in Toronto. In 1996 Ms Meyrick was appointed to the Health Services Appeal Board, one of several tribunals amalgamated to become the Health Services Appeal and Review Board. As a Vice-Chair of the Appeal Board, Ms Meyrick presided over many hearings and pre-hearings of the Appeal Board.

Thomas Kelsey – is a lawyer practicing family law in Toronto. Mr. Kelsey was first appointed to the Health Services Appeal Board, a predecessor to the Appeal Board, in 1994. When that tribunal was amalgamated with others to form the Health Services Appeal and Review Board, Mr. Kelsey was appointed by the Lieutenant Governor-in-Council to be one of two Vice-Chairs of the Appeal Board.

Edward Takacs – is president and chief executive officer of a public hospital in Aliston, Ontario. As a non-lawyer and non-physician member of the Appeal Board with significant public hospital experience, Mr. Takacs brought an important dimension to the proceedings of the Tribunal. He was a member of the Appeal Board for three years.

HEALTH SERVICES APPEAL & REVIEW BOARD

Fiscal Year 2002/2003 Financial Performance

DESCRIPTION	2000/01	2001/02	2002/03
	all figures in dollars		
PER DIEM HONARARIA[1]			
Attendance at Proceedings	75,900	70,400	97,150
Preparation for Proceedings	29,700	26,125	38,100
Decision Writing	50,188	48,325	42,425
Board Business Meetings			11,575
Board Administration	24,675	18,575	25,888
Travel[2]	32,478	32,136	54,641
Education	8,137	10,266	7,185
PROCEEDINGS: RELATED EXPENSES			
Court Reporting Services	13,336	21,446	26,767
OTHER EXPENSES			
Independent Legal Services	131,223	117,224	153,575
Consulting[3]	44,898	17,873	23,661
Sundry[4]	7,684	19,313	25,184
Total	418,219	381,683	506,151

[1]General Member = $200; Vice-Chair = $250; Chair=$350

[2]Members are appointed on a province-wide basis

[3]Organizational and technology review and development and hosting a website

[4]Mailing, language, sign interpretation, assistive listening devices, translation, printing, lease of computers etc. not previously tracked

Statistical Summary for Period April 1, 2000 to March 31, 2001 & April 1, 2001 to March 31, 2002 and April 1, 2002 to March 31, 2003

Item	April 1, 2000 To March 31, 2001	April 1, 2001 To March 31, 2002	April 1, 2002 To March 31, 2003
Appeals Brought Forward From Previous Year	169	184	210
Total # of Appeals Received in Year	299	322	306
Total # of Appeals in Hand	**468**	**506**	**516**
# of Appeals Heard by Appeal Board	152	147	177
# of Appeals Withdrawn or Abandoned	132	149	144
Appeals (not heard) Outstanding as of end of period	**184****	**210****	**195****
# of Member Days	462	441	531
# of PHCs ***	95	186	237

** This number also includes appeals where there has been no activity and the Appeal Board is following up with the appellants to determine whether they wish to continue or withdraw their appeal.

*** Each PHC requires about one half day to conduct and to write the corresponding memo.

HEALTH SERVICES APPEAL AND REVIEW BOARD STAFF

Staff:

Abby Katz Starr[1]	Registrar/COO
Rafia Sheikh[2]	Deputy Registrar – HSARB
Natalya Demyanenko	Case Management Coordinator
Patricia Godden	Case Officer
Rohini Kumara	Case Officer
Vincci Kan[3]	Board Administrative Assistant (Acting)
Malini Kamalendaran[4]	Coord., Business Operations
Gabriel Fahel[5]	Financial Assistant
Denise Higgins[6]	Secretary to the Chair
Therese McGuirk[7]	Receptionist/Word Processor
Tess Lipana[8]	File Clerk
Mathanan Kailas[9]	Systems Officer

[1] Provides services to 3 other tribunals

[2] Provides service to OHCAP Review Committee as well

[3] Staff on acting assignment

[4 to 8] Provides services to 3 other tribunals

[9] Provides services to 4 other tribunals