HEALTH SERVICES APPEAL AND REVIEW BOARD

Annual Report

Fiscal Period April 1, 2003 to March 31, 2005

Ontario

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

July 26, 2005

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 fifth Annual Report for the fiscal years 2003/2004 and 2004/2005.

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

c: Abby Katz Starr, Registrar, Health Services Appeal and Review Board

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Ontario

September 22, 2005

Ms Beverly 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 2003/2004 and 2004/2005 fiscal years.

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 Appeal 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 2003/04 and 2004/05, there continues to be an equivalent of 4.8 full-time staff dedicated to the Appeal Board plus the following breakdown of shared administrative services to the Appeal Board which include approximately .4 of the Registrar/Chief Operating Officer's time, .5 in total of the two positions that process financial transactions, .2 of the System's Officer, .3 of the Secretary and Receptionist, and .5 of the File Clerk's time respectively. The total staff salaries and wages totalled approximately 335,843 for the 2003/04 fiscal year and 343,844 for the 2004/05 fiscal year. Increases in salary include relevant merit increases applied to staff salaries and increases resulting from collective bargaining.

The Financial Performance Chart (2003/04 and 2004/05) as seen on page 14 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 in 2003/04, expenditures decreased from the previous year due to stringent controllership strategies. In 2004/05, increases in costs were due to the complexity of cases heard, thus resulting in an increase in time spent in writing decisions.

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

Enclosure

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CHAIR'S MESSAGE

The last two fiscal years have been extremely challenging ones for the Health Services Appeal and Review Board. The number of appeals filed with the Appeal Board has grown: 375 new appeals in 2003-2004 to 435 new appeals in 2004-2005. Several of these appeals raised complex legal and medical issues for the Appeal Board.

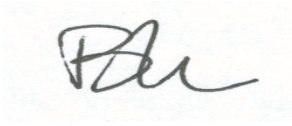
Many of these appeals are heard during the one week of 'regular' sittings of the Appeal Board each month. The Appeal Board continues to hear appeals scheduled for the regular sittings within a reasonable time, despite the growth in the number of requests for hearing by the Board.

Some of the requests for hearing are matters that cannot be heard during the regular sittings of the Appeal Board. Generally, this is because they raise more complicated issues that cannot be resolved in the course of a one and one-half hour hearing that is available during the regular sittings. In those cases, the Appeal Board conducts pre-hearing conferences with the parties in an attempt to make the hearing as expeditious, cost-effective and, of course, as fair as possible. In 2003/2004 the Appeal Board conducted 273 pre-hearing conferences. In 2004/ 2005 that number jumped to 432.

With the increased numbers and the increased complexity of the issues being considered by the Appeal Board, it is vital that the Appeal Board be accessible to parties. To this end, the Appeal Board continues to maintain a website with important information about proceedings before the Board. Although the website does not yet include a database of its issued decisions, I am committed to making this information available once all concerns about privacy of personal information have been resolved.

The increased number and increased complexity of hearings also demands more time from Board staff and Appeal Board members. It is important to recruit skilled and capable members who understand both the legal and medical issues considered by the Appeal Board. I am monitoring closely any delays in getting a matter on to a hearing or in deciding an appeal. It may be that the number of appeals before the Appeal Board grows to the extent that it is necessary for the Appeal Board to hear more appeals in a month. This will require significant additional resources for both new Appeal Board members and Board staff.

Despite the ever-growing workload for the members and staff of the Appeal Board, the record demonstrates that the Appeal Board continues to conduct fair, cost-effective and expeditious hearings and issue meaningful and thoughtful reasons for its decisions. For this, I am extremely grateful to the members of the Appeal Board and the staff of the Health Boards Secretariat.



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 Act*.[1] The Appeal Board has a review and appeal mandate under fourteen different statutes. These are:

- *The Ambulance Act*
- *The Charitable Institutions Act*
- *The Commitment to the Future of Medicare Act*[2]
- *The Healing Arts Radiation Protection Act*
- *The Health Facilities Special Orders Act*
- *The Health Insurance Act*[3]
- *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*

JURISDICTION

(i) The Appeals Heard by the Appeal Board

Although the Appeal Board has jurisdiction to hear appeals and consider reviews under fourteen different statutes, the majority of cases considered by the Appeal Board are proceedings under the *Health Insurance Act,* the *Long-Term Care Act*, the *Health Protection and Promotion Act* and the *Independent Health Facilities Act.* The following sections highlight the proceedings under these statutes. For more detail on the kinds of issues that arise under these statutes, the reader is referred to the section of this Annual Report entitled "case reports".

Health Insurance Act

It has been the case for many years, and continues to be the case, that most of the appeals heard by the Appeal Board are proceedings under the *Health Insurance Act.* Under this Act, the Appeal Board hears the following broad categories of appeals:

- respecting insured services (subscriber appeals)

1-3 See EndNotes

- respecting OHIP eligibility (eligibility appeals)
- respecting directions of the Medical Review Committee (MRC) or Practitioner Review Committee (PRC) respecting payments by OHIP in respect of insured services (MRC/PRC appeals)
- respecting determinations by the Medical Eligibility Committee regarding approval for special procedures (MEC appeals)

The largest number of appeals under the *Health Insurance Act* is in the subscriber appeal category. Most often the issue in these appeals is whether a treatment provided out of the country is an insured service under the *Health Insurance Act.* The Appeal Board has noted an appreciable increase in these types of appeals in the last few years. Many of these appeals are heard during the regular sittings of the Appeal Board referred to above.

In recent years, as I have noted in past Annual Reports, these appeals are becoming increasingly complex and require much more than two hours to hear from all the witnesses and the parties. 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.

Another material change to the Appeal Board's work is in the area of MRC appeals. We have noted that the work of the MRC has been suspended pending the outcome of a review of best practices by Mr. Justice Peter Cory. Despite this change, there remain a number of appeals from decisions of the MRC yet to be heard by the Appeal Board. These appeals are extremely complex and highly litigated. They require enormous resources of the Appeal Board to manage the files and to hear and decide the interlocutory motions and then to make a decision on the merits.

In the past two fiscal years the Appeal Board has issued two decisions on the merits in appeals from the MRC. In addition, the Appeal Board has issued lengthy and complex reasons on two separate procedural motions in MRC appeals brought by seven physicians and practitioners[1].

[1] Appeal Board File #03-HIA-0050, interlocutory decisions issued in May 2004 and December 2004

Long-Term Care Act

The Appeal Board continues to hear many appeals under the *Long-Term Care Act*. The broad issue for the Appeal Board in a proceeding under this Act is to hear appeals from approved agencies 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. 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 16 matters that proceeded to a hearing in 2003-2004 and 2004-2005, 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
- 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. This is a jurisdiction that the Appeal Board exercises carefully in the interests of finality and fairness.

Health Protection and Promotion Act

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. After a hearing, the Appeal Board can do one of the following:

- confirm the Order of the Medical Officer of Health
- alter the Order
- rescind the Order

The Appeal Board is required to hold a hearing within 15 days after it receives notice in writing requiring the hearing. As it does under the *Long-Term Care Act*, the practice of the Appeal Board is to immediately convene a telephone pre-hearing conference in the proceeding. The person conducting the pre-hearing 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.

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

The following decisions by the Director of Independent Health Facilities (the "Director") may be appealed to the Appeal Board:

- refusal to issue a license
- refusal to amend the limitations of a license
- refusing to renew a license
- revoking, suspending a license

The Appeal Board may confirm the Director's refusal to issue a license or direct the Director to issue the license or amend the limitations.

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*.

CORE ACTIVITIES OF THE APPEAL BOARD

The core activities of the Appeal Board in meeting its mandate to conduct hearings or reviews under the fourteen statutes can be conveniently stated:

- communicate with the parties to the proceeding before the hearing begins
- run a fair, efficient and cost-effective pre-hearing process
- convene a fair, efficient and cost-effective hearing within a reasonable time
- issue decisions with cogent and meaningful reasons within a reasonable time

1. Communicating with Parties

The Appeal Board communicates fairly and adequately with parties to any proceeding before it. As part of its commitment to keeping its proceedings accessible to parties without the need for counsel, the Appeal Board is committed to the following undertakings:

- a website for the Appeal Board (www.hsarb.on.ca)
- plain language writing style in letters, forms and brochures
- plain language writing style in decisions of the Appeal Board

Website

The Appeal Board has maintained a website for several years (www.hsarb.on.ca). The following information is available to the public via that website:

- all past Annual Reports of the Appeal Board
- all the information that is included in the pamphlets 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 website and, in particular, a link to the Ontario Health Insurance Plan (OHIP) website

For some time, the Appeal Board has been committed to providing copies of its decisions on its website. Because of limited resources, the Appeal Board has been able to post on the website only recent decisions of the Appeal Board that are of broad general interest. The Appeal Board is anxious to extend the reach of its website to include access to all past decisions of the Board; accordingly, as soon as all privacy issues associated with doing so have been resolved to the satisfaction of the Appeal Board, decisions of the Appeal Board will be published on its website.

There is a link to the Appeal Board website from the Ministry of Health website

(www.moh.gov.on.ca); however, there is not a plain link to the Appeal Board from the website of OHIP. Because many of the decisions appealed to the Board originate with the General Manager of OHIP, it would improve access to the Appeal Board if there were such a link. Using appropriate avenues of communication, the Appeal Board staff will urge OHIP to include such a link on its website.

Parties are able to download copies of forms from the website but not able to file those same documents electronically. While the Appeal Board may not have sufficient resources to do so in the next fiscal year, when such resources are available, the Appeal Board is committed to enabling electronic filing as a way of making its proceedings more immediately accessible to people across the province.

Finally, much of the website is directed to proceedings under the *Health Insurance Act.* 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.

Plain language writing style

It is a fundamental principle of the Appeal Board that its communications – letters, decisions, and hearings – be accessible to all parties. Accordingly, the Appeal Board retained the services of a decision–writing consultant to train members on plain language and more effective writing style. In addition, members of the Appeal Board regularly attend a more general writing workshop sponsored by the Society of Ontario Adjudicators and Regulators.

Rules of Practice, Guidelines and Practice Directions

An important feature of a fair, efficient and cost-effective proceeding is comprehensive, written rules of practice and procedure. Since 1995, the Appeal Board has had a set of rules governing practice and procedure. 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 on the Appeal Board's website, www.hsarb.on.ca and can be downloaded from that site.

In 2003/2004, the Appeal Board began 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. This process of reviewing the rules continues today.

2. Efficient and Cost-Effective Pre-hearing Process

In recent years the Appeal Board has made increasing use of pre-hearings in its proceedings. A pre-hearing is always convened in proceedings under the *Long-Term Care Act*, the *Health Protection and Promotion Act* and any other proceeding where the Appeal Board determines that a pre-hearing might assist in the most just and cost-effective resolution of the matter.

The number of pre-hearings has increased by almost 100% during the last two fiscal years. In 2002/2003, there were 237 pre-hearings conducted by the Appeal Board and that number grew to 432 in 2004/2005.

The Appeal Board has the authority (under the *Statutory Powers Procedure Act* and in the Rules of Practice and Procedure of the Appeal Board) to assign a person who is not a member of the Appeal Board to conduct pre-hearings. The Appeal Board has retained a former Vice-Chair of the Appeal Board to do so. Now one person guides a proceeding through the entire pre-hearing process resulting in greater efficiencies for the Appeal Board and the parties. A second benefit of using one person for all pre-hearings is the growing expertise that person gains. The Appeal Board has found that this process has greatly increased the efficiencies and cost-effectiveness of the proceedings for the parties and the Appeal Board.

3. Fair, Efficient and Cost-Effective Hearings

Despite the increased complexity of many appeals and the increasing need for pre-hearings, the Appeal Board continues to hear many appeals during its 'regular sittings'. At those hearings, the Appeal Board hears several appeals in a day. This continues to be a most efficient way to conduct many of the proceedings before the Appeal Board.

Increasingly, however, there are matters that cannot be conducted in one or two hours during the week of regular sittings. In an effort to ensure that those proceedings continue in the most efficient way, the Appeal Board convenes a pre-hearing to resolve any procedural issues and, perhaps, narrow the issues for the hearing, in advance of a panel convening to hear the appeal. These pre-hearings are conducted by telephone before a former member of the Appeal Board who is well-versed in Appeal Board proceedings.

The Appeal Board endeavours to schedule as many hearings as possible in each month and to ensure that matters are heard within a reasonable time. There is a concern that the backlog of cases may grow with the increased caseload; for this reason, the Appeal Board continues to monitor the average time for cases to be scheduled. If it is necessary and there are sufficient resources, the Appeal Board will increase its capacity to hear more appeals in a month.

4. Timely Decisions with Comprehensive Reasons

The Appeal Board endeavours to issue decisions with comprehensive written reasons as quickly as possible after the conclusion of the hearing. With more members on the Appeal Board, particularly those with past experience as adjudicators and decision-writers, the Appeal Board will continue with this effort.

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 fiscal years 2003/2004 and 2004/2005, counsel to the Appeal Board conducted in house training for Appeal Board members on the following topics:

2003/2004

- Summons
- Approved Agencies under the *Long Term Care Act*
- Oath
- Credibility (Megen v. Ont. Racing Commission)
- Experimental v. Generally Accepted as Appropriate
- Interest Awards by HSARB
- Protection of Privacy Legislation
- Section 14 – *Health Insurance Act*
- *Immigration Act*
- Proceeding When a Party Fails to Appear

2004/2005

- Converting Oral Hearing to Written at the Hearing
- Missionary Exemption under Section 1.1 of Reg. 552
- Section 16 of the *Statutory Powers Procedure Act*
- Ability of Appeal Board to Order an Interim Stay
- French Language Services
- Appeal Board's Charter Jurisdiction
- Expert Witnesses
- *Res Judicata*
- Production of Member's Hearing Notes
- Dismissing an Appeal When a Party Does not Attend for a Hearing
- Equitable Estoppel
- Estates as Parties

(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 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 is invited to attend an annual roundtable of twenty-five judges, administrative tribunal chairs, and academics from across Canada to discuss issues of interest to both courts and adjudicative tribunals.

MEMBERS OF THE APPEAL BOARD

The Ministry of Health Appeal and Review Boards Act (the "*Review Boards Act*") sets out the minimum requirements for membership in the Appeal Board:

- No fewer than twelve members
- No more than three physician members
- One member designated by the Lieutenant Governor-in-Council to be Chair of the Appeal Board
- Two members designated by the Lieutenant Governor-in-Council to be Vice-Chairs of the Appeal Board

The Appeal Board is committed to recruiting talented and dedicated individuals to serve as members of the Appeal Board and it has been enormously successful in this task. Given the complexity of the appeals in recent years, it is appropriate to recruit more than the usual number of lawyers in order to have a Vice-Chair with a legal background preside at all hearings. At the moment, there are only two physicians serving on the Appeal Board; however, the Appeal Board Chair is committed to working with the Minister to find an appropriate candidate to serve as the third physician member of the Appeal Board.

The demands on the Appeal Board have increased steadily over the last few years; 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 several more days in the month for hearing and writing commitments. The current complement of Appeal Board members is able to meet this increased commitment.

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 may be appropriate to increase the number of members appointed to the Appeal Board.

The Appeal Board remains committed to working with the Minister to find appropriate candidates for appointment to the Appeal Board. In particular, the Appeal Board seeks experienced adjudicators and decision-writers as well as legally qualified medical practitioners (to the statutory maximum of three).

The increased number and complexity of appeals to the Board also brings increased demands on staff. Currently, the Appeal Board has two dedicated staff members who are able to meet the current demands of the Appeal Board. The Appeal Board continues to monitor the demands on staff and, when necessary and as resources permit, will increase the number of staff to ensure that the Appeal Board continues to hear appeals within a reasonable time.
The following is a list of the members of the Appeal Board as of March 2005:

Marla Burstyn – is a lawyer who practiced in the area of insurance defense litigation. She is a Vice-Chair of the Appeal Board designated by the Chair of the Appeal Board. Ms Burstyn was appointed to the Appeal Board in November 2004

May Cohen – is a retired family physician. After twenty years in private family practice in Toronto she joined the faculty of McMaster University , Hamilton, in the Department of Family Medicine from which she retired with the rank of Professor Emeritus. She joined the Appeal Board in April 2003 .

Elizabeth Elstner – is a lawyer and formerly a member of the Assessment Review Board. She was also a member of the Grand River Hospital Ethics Committee for six years. She was reappointed to the Appeal Board for a second three-year term in November 2004.

Soraya Farha – is a lawyer who appeared before a number of administrative tribunals. She is a Vice-Chair of the Appeal Board designated by the Chair of the Appeal Board.

Richard Hasselback – is a medical oncologist, formerly with the Princess Margaret Hospital in Toronto and now doing out-patient consulting in the Breast Centre at Women's College Hospital. He is serving his first term on the Appeal Board.

Beverly Harris – is a lawyer who, before joining the Appeal Board, practiced in the area of administrative law. Ms Harris has been Chair of the Appeal Board since 1998. She is also currently the Chair of the Board of Governors of Wilfrid Laurier University.

Judith Hinchman – is a lawyer who is a Vice-Chair of the Appeal Board designated by the Lieutenant Governor-in-Council. For the past decade, Ms Hinchman has been an active member of the non-profit sector, serving on several boards and co-founding the Regent Park School of Music - serving as its first President and Board Chair.

Michele Lawford – is a lawyer who practiced in the area of administrative law and health law. She is a Vice-Chair of the Appeal Board designated by the Chair of the Appeal Board and has been a member of the Appeal Board for four years.

Lillie Lum – is a professor of nursing and health policy and management at York University. She is also a member of the Ontario Review Board. Dr. Lum has served on the Appeal Board for seven years.

Christine Moss – is a management consultant specializing in the area of health policy. She is a Vice-Chair of the Appeal Board appointed by the Chair of the Appeal Board.

Liz Mullan – is the President of a performance management consulting firm. She is also an occupational therapist with an academic appointment at the University of Toronto. Ms Mullan is serving her first term on the Appeal Board.

Elaine Shin – is a lawyer who practiced before a variety of health professional regulatory tribunals. She is also a former physiotherapist. Ms Shin is a Vice-Chair of the Appeal Board appointed by the Lieutenant Governor-in-Council.

Jay Yedvab – was a hospital administrator in the United States and Canada. Following his retirement, he served for eight years on the Ontario Consent and Capacity Board. This is his first term on the Appeal Board.

Two members of the Appeal Board were not re-appointed to the Appeal Board in 2004/2005:

John Anderson – practiced as a family physician for ten years, twenty-six years as an Emergency Room and Urgent Care physician and ten years as an Ontario Coroner. He worked in the field of child sexual abuse for twenty years. Dr. Anderson served on the Appeal Board for one three-year term.

Brock Grant - Brock Grant is a lawyer and management consultant specializing in the areas of human rights, strategic and operational planning, risk management, governance, organizational development and alternative service delivery. He served as a Vice-Chair of the Appeal Board for one three-year term.

The following members were appointed to serve until December 2006 on the Transitional Physician Audit Panel of the Health Services Appeal and Review Board. Under the terms of the *Health Insurance Act,* these members may not otherwise be members of the Appeal Board.

Leslie Dizgun – is a lawyer practicing in Toronto.

Paul Freedman – is a physician practicing in Toronto.

Norbert Kerenyi – is a physician practicing in Toronto.

Nelly Wing-Kwong Ng – is a physician practicing in Toronto.

HEALTH SERVICES APPEAL AND REVIEW BOARD

Fiscal Years 2003/2004 and 2004/2005 Financial Performance					
DESCRIPTION	2000/01	2001/02	2002/03	2003/04	2004/05
PER DIEM HONARARIA [2] * all figures in dollars					
Attendance at Proceedings	75,900	70,400	97,150	81,950	144,100
Preparation for Proceedings	29,700	26,125	38,100	33,825	39,786
Decision Writing	50,188	48,325	42,425	68,525	75,438
Board Business Meetings			11,575	12,975	17,650
Board Administration	24,675	18,575	25,888	26,499	25,500
Travel[3]	32,478	32,136	54,641	36,155	27,391
Education	8,137	10,266	7,185	9,158	7,540
PROCEEDINGS: RELATED EXPENSES					
Court Reporting Services	13,336	21,446	26,767	30,900	16,428
OTHER EXPENSES					
Independent Legal Services	131,223	117,224	153,575	109,838	130,842
Consulting[4]	44,898	17,873	23,661	7,793	0
Sundry[5]	7,684	19,313	25,184	29,047	28,017
Administration[6]				29,848	32,448
Total	418,219	381,683	506,151	476,523	545,140

[2] General Member = $200; Vice-Chair = $250; Chair = $350
(increase in hearings from 2003 to 2005 and the complexity of cases has resulted in the increase in time spent in writing decisions)

[3] Members are appointed on a province-wide basis
(in 02/03 a 10-day hearing was held in Northern Ontario in regard to the smoking decision which resulted in an increase in travel costs for that year)

[4] Organizational and Technology review and development and hosting a website

[5] Language, sign interpretation, assistive listening devices, translation, printing, copying, lease of computers

[6] Mailing, telephone, teleconference, office supplies

HEALTH SERVICES APPEAL AND REVIEW BOARD

	Item	Apr. 1, 2000 to Mar. 31, 2001	Apr. 1, 2001 to Mar. 31, 2002	Apr. 1, 2002 to Mar. 31, 2003	Apr. 1, 2003 to Mar. 31, 2004	Apr. 1, 2004 to Mar. 31, 2005
A	Appeals Brought Forward from Previous Year	169	184	210	195	235
B	Total # of Appeals Received in Year	299	322	306	375	435
C	**Total # of Appeals in Hand** (Total of A+B)	468	506	516	570	670
D	# of Appeals Heard by Appeal Board	152	147	177	230	196
E	# of Appeals Withdrawn or Abandoned	132	149	144	105	152
	Appeals (not heard) Outstanding as of End of Period (Total of C-D+E)	184**	210**	195**	235**	322**
	# of Member Days	462	441	531	690	588
	# of PHCs/Motions	95	186	237	273	432
	# of Member Days for PHCs/Motions* **	47.5	93	118.5	136.5	216

Statistical Summary for 5-Year Period

Notes:

** 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 memorandum.

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
Angela Cornacchia	Board Administrative Assistant (from September 2003 to present)
Malini Kamalendaran[3]	Coordinator, Business Operations (to October 2003)
Chris Nieckarz[3]	Coordinator, Business Operations (from July 2004 to present)
Gabriel Fahel[4]	Financial Coordinator
Denise Higgins[5]	Secretary to the Chair
Therese McGuirk[6]	Receptionist/Word Processor
Tess Lipana[7]	File Clerk
Mathanan Kailas[8]	Systems Officer

1 Provides services to 3 other tribunals
2 Provides service to OHCAP Review Committee as well
3 to 7 Provides services to 3 other tribunals
8 Provides services to 4 other tribunals

CASE REPORTS

In the past year the Appeal Board has considered several cases of particular importance to the Appeal Board's jurisprudence. Following are some representative decisions of the Appeal Board. 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 from the Appeal Board.

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.*

VD v OHIP (File # 03-HIA-0124) issued March 2003

VD sought payment for **metal on metal hip resurfacing surgery**, an alternative to conventional total hip replacement. The Appeal Board considered an argument that hip resurfacing surgery is experimental treatment and found that, at the material time, it was not. The Appeal Board also found that metal on metal hip resurfacing is generally accepted in Ontario for a person in VD's medical condition. After reviewing the evidence comparing conventional total hip replacement and metal on metal hip resurfacing, the Appeal Board found that an identical or equivalent treatment was not, at that time, available in Ontario.

AM v OHIP (File # 02-HIA-0205) issued July 2003

AM sought approval for **bariatric surgery** to be performed out of the province. The Appeal Board found there was a delay in obtaining that surgery in Ontario; however, the delay would not lead to death or "medically significant irreversible tissue damage" in this case. The appeal was denied.

Excluded Treatments (section 24 of Regulation 552)

Some treatments have been specifically excluded as insured services of OHIP, pursuant to section 24 of Regulation 552 under the Act. Following are summaries of some appeals that raise that issue.

GL et al v OHIP (File # 01 HIA 0154) issued September 2003

GL was treated for cancer in 1994. Advised of the risk of infertility as a result of the treatments, GL banked sperm in 1994. Several years later, in 2001, GL and his wife enrolled in a hospital **IVF/ICSI** program an infertility program. Section 24 provides that IVF is an insured service of

OHIP only under certain very specific conditions. After a hearing, the Appeal Board found that neither IVF nor ICSI were insured services of OHIP in the particular circumstances of this case.

GL requested a review of the Appeal Board's decision. The request for review was considered by a Vice-Chair of the Appeal Board who had not participated in the original decision of the Appeal Board. In support of the request for review, GL relied on earlier decisions of the Appeal Board with, he argued, remarkably similar facts.

The Vice-Chair reviewed the earlier decisions and noted that previous decisions of the Appeal Board are not binding upon the Appeal Board; however, there is value in consistency amongst decision of the Appeal Board. On this basis, the Vice-Chair concluded that it was advisable to review this decision.

The Vice-Chair devoted considerable attention to a review of all the earlier decisions of the Appeal Board on the question of whether IVF is an insured service of OHIP. She concluded that the decision of the Appeal Board in this case was consistent with earlier cases with similar fact situations. Accordingly, the review was refused.

Estate of TM v OHIP (File # 04 HIA 0008) issued February 2005

The Appellant was diagnosed with acute myeloblastic leukemia and, after treatment in Ontario, decided to participate in a Phase II **clinical trial** of a drug being conducted at Sloan Kettering Hospital in New York City.

Section 24 provides that treatment that is "generally accepted within Ontario as experimental" is not an insured service of OHIP. The Appeal Board heard evidence from a physician at Sloan Kettering Hospital about the nature of the trial being conducted. The panel concluded that the efficacy of the drug was still being tested, thus, it was still an 'experimental' treatment. As such, it was not an insured service of OHIP.

Treatments not Listed in the Schedule of Benefits

Section 37 of Regulation 552 provides that only those services listed in the Schedule of Benefits of Physician services are insured services of OHIP. Following are summaries of some appeals that raise that issue.

***IR v OHIP (File 03-HIA-0080)* issued September 2003**

The Appellant, IR, asked the Appeal Board to order OHIP to pay the cost of **visudyne treatment for macular degeneration**. The Schedule of Benefits provides that visudyne therapy is an insured treatment only when it is used to treat "primarily classic" form of Age Related Macular Degeneration. IR suffered from "occult" form of Macular Degeneration. The appeal was denied.

***DC v OHIP (File 03-HIA-0141)* issued January 2004**

DC sought various **reconstructive surgeries**. OHIP refused to pay for those surgeries. This decision considers several different aspects of the "cosmetic surgery" services that may, in some circumstances, be insured services of OHIP. The Appeal Board found, in the circumstances of this particular case, the surgeries are insured services of OHIP.

Requests for Payment not Submitted in Time

***RF v OHIP (File # 02-HIA-0121)* issued September 2003**

RF suffered a medical emergency while on holidays and was hospitalized. On his return to Ontario, he pursued his private insurer for some months for payment of the hospital bills. Upon being refused by the private insurer, RF turned to OHIP for payment.

The Act provides that claims for payment must be submitted within six months. RF submitted his claims well after that time. The Appeal Board was persuaded that there were well-documented reasons why RF did not apply to OHIP within six months and, on this basis, found that there were exceptional circumstances allowing the Appeal Board to entertain the claim.

Emergency Treatment

The Act provides that a small portion of the cost of emergency treatment out of the country will be paid to an insured person. The condition and the treatment must meet the conditions set out in the Regulation. The summaries below highlight some of the issues that arise in these appeals.

AA v OHIP (File # 02-HIA-0142) issued November 2003

In this appeal, AA went into labour during a visit to family in Detroit and delivered her baby in hospital there. The Appeal Board found that delivery at full term, after the date of delivery estimated by a doctor is an expected event. As the regulation requires the treatment to be "unexpected", this was 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.

***JAD v OHIP* (File # 04-HIA-0090) September 2004**

Under the terms of the Act, a new resident of Ontario must wait three months before being enrolled in the Plan. JAD appealed to the Board asking the panel to exempt her from the requirement to wait three months because, during the three month waiting period, she delivered a baby in Ontario.

The Appeal Board reviewed the exemptions to the three-month wait and concluded JAD did not qualify for any of them. The Appeal Board has no discretion to extend the exemptions for compassionate reasons.

GW v OHIP (File # 04-HIA-0153) issued September 2004

Regulation 552 requires that, among other things, a person be physically present in Ontario

for much of the year in order to qualify for OHIP. There are some specific exemptions to that requirement found in subsections 1.1(3)(4)(5) and (6).

GW had been living out of the province for much of the preceding five years while he worked in Portugal and had been exempted from the requirement to reside in Ontario under the terms of an employment exemption under section 1.1. The employment exemption is permitted for no more than five years.

As GW expected to spend eighteen more months in Portugal before retiring to Ontario, he requested that the Appeal Board extend the benefit of a "once in a lifetime" exemption under subsection 1.1(6) to him.

The Panel reviewed the language of section 1.1 and found that the subsection (6) exemption was available to GW in the circumstances of this case. The appeal was allowed.

Appeals from the Medical Review Committee

There is a right of appeal from a Direction of the Medical Review Committee (the "MRC") to the Health Services Appeal and Review Board. In the last two fiscal years, the Appeal Board has been called upon to decide a number of issues - both procedural and substantive - in relation to these proceedings.

Dr. L v OHIP (File # 01-HIA-0147) issued July 2003

Dr. L is a pediatric respirologist practicing in London, Ontario. His claims for a payment for general assessments were reviewed by OHIP and the MRC who found he had not performed all the constituent elements required by the Schedule of Benefits. The Appeal Board interpreted the Schedule of Benefits in a realistic and flexible manner that took into consideration the medically appropriate examination in the circumstances. The Appeal Board found that Dr. L had met the requirements of the Schedule of Benefits and allowed the appeal.

OHIP appealed this decision to the Divisional Court. The Court applied the standard of review of "reasonableness" and, in view of the considerable evidence heard by the Appeal Board, found that the decision was reasonable. The Divisional Court dismissed the appeal.

Long-Term Care Act (LTCA) Decisions

IB v Ottawa Community Care Access Centre **(File # LT 7106)**

IB appealed a decision of the CCAC eliminating certain housekeeping services from his plan of service. The Appeal Board convened a two-day hearing in Ottawa to hear evidence and argument from IB, staff of the CCAC and counsel for both parties. The Appeal Board found IB's needs had not changed; therefore, it was not open to the CCAC to eliminate services from his plan of service.

Section 23 of the Act requires the CCAC to provide services outlined in the plan of service "within a time that is reasonable in the circumstances" and, if a service is not immediately

available, the CCAC shall place the person on a waiting list. In view of these provisions, the Appeal Board found that it was appropriate to put IB on a waiting list for those services in his plan of service that were not immediately available.

Health Protection and Promotion Act Decisions

DRP et al v the Medical Officer of Health for the Northwestern Health Unit (File # HP7117 et al)

This is an appeal from an Order of the Medical Officer of Health requiring the owners and operators of various hospitality establishments in the Health Unit to ensure that their businesses were rendered entirely "smoke-free" by prohibiting smoking on the premises.

The Appeal Board heard ten days of evidence and argument on this appeal. The first day of the hearing was conducted by teleconference call on January 28, 2003. At that time, the Appeal Board granted an interim stay of all nineteen of the Respondent's Orders until the hearing continued in Thunder Bay two weeks later, on February 13, 2003.

In Thunder Bay, the Appeal Board heard *viva voce* evidence and argument respecting the Appellants' request, pursuant to section 44(3) of the Act, for a stay of the Orders until the proceeding had been disposed of. The Appeal Board found that the balance of convenience favoured continuing the interim stay until the proceedings were disposed of and granted the Appellants' request for a stay.

The hearing continued for eight more days of evidence and argument. The panel of the Appeal Board attended for three of those days in Kenora and the balance of the hearing days were convened in Toronto with a videoconference link to Dryden and Kenora, where interested members of the public could attend to observe the proceedings.

The Appeal Board found that, in issuing the Orders under section 13 of the *Health Protection and Promotion Act,* the Medical Officer of Health had exceeded his jurisdiction in this case. The Appeal Board rescinded the Orders in question.

This decision is the subject of a judicial review application by the Attorney-General for Ontario and, as of the end of March 2005, had not yet been heard by the Divisional Court.

End Notes

[1] The *Ministry of Health Appeal and Review Boards Act* was amended to include section 6(3):

(3) Despite subsection (2), the Board shall not inquire into or make a decision concerning the constitutional validity of a provision of an Act or a regulation.

Prior to this amendment the Appeal Board had ruled that it had the necessary jurisdiction to consider the constitutional validity of an Act or regulation. At that time, there had been a number of appeals to the Board that raised the constitutional validity of the Schedule of Benefits, among other things. For example, several appeals challenged a provision in the Schedule of Benefits providing that mastectomies were insured services only when performed on a woman. These appeals did not proceed to a hearing before the Appeal Board; however, as a result of pre-hearing conferences conducted by a member of the Appeal Board, the General Manager of OHIP reconsidered its position with respect to "male mastectomies" and paid for those services in certain cases.

It is indeed regrettable that this venue is no longer available to Appellants wishing to challenge the constitutional validity of statutes and regulations within the Appeal Board's jurisdiction. As the Appeal Board noted in its decision in L.H. v OHIP (File S.6492), the Appeal Board is particularly well-equipped to consider constitutional issues arising out of the legislation it considers. In addition, proceedings before the Appeal Board are a cost-effective and efficient alternative to court proceedings. By depriving parties of this venue, we are concerned that some parties may effectively be deprived of their right to challenge the constitutional validity of legislation.

[2] The *Health Care Accessibility Act* gave physicians a right of review from a decision of the General Manager of OHIP that he or she had received a payment not authorized by the Act. This review was conducted entirely in writing and by one member of the Appeal Board.

Legislation to repeal the *Health Care Accessibility Act* was given Royal assent in June 2004. The Act was replaced by the *Commitment to the Future of Medicare Act, 2004* (CFMA). Among other things, the CFMA provides that a physician, practitioner and any other person is entitled to a review of the issue of whether he, she or it received an unauthorized payment.

The review continues to be in writing, conducted by one member of the Appeal Board, and not subject to *Statutory Powers Procedure Act.*

One review was commenced under the *Health Care Accessibility Act* in 2004. Because it was not completed before the date of repeal, the review was continued under the CFMA.

[3] Legislation amending the *Health Insurance Act* and the *Ministry of Health Appeal and Review Boards Act* was introduced in June 2004 and proclaimed in September 2004. By these amendments, the Medical Review Committee was temporarily abolished and a panel of the Health Services Appeal and Review Board, the

Transitional Physician Audit Panel (the "Panel"), was created in its place.

Pursuant to section 18.0.1 of the *Health Insurance* Act, the Panel is charged with reviewing the following matters:

18.0.1(3) Upon the request of a physician, [the Panel] is authorized to review the following matters in relation to that physician:

1. a decision of the General Manager to refuse to pay for a service, or to pay a reduced amount for a service under subsection 18(2)
2. a decision of the General Manager to require reimbursement of an amount paid for a service under subsection 18(5)

The Panel is comprised of members of the Appeal Board who are specified in the *Ministry of Health Appeal and Review Boards Act.* Briefly stated, the Lieutenant Governor-in-Council shall appoint no fewer than six legally qualified medical practitioners and three members of the Law Society of Upper Canada to serve as members of the Panel. Members of the Panel shall not otherwise sit as members of the Appeal Board.

By the end of March 2005, ninety-nine physicians had filed requests for review by the Panel. Although the Panel had not yet convened any hearings, the Appeal Board had convened pre-hearing conferences to prepare the proceedings for a full hearing of the matters.