February 28, 2007

Linda P. Lamoureux
Chair, Health Professions Appeal and Review Board
151 Bloor Street West, 9th Floor
Toronto, ON M5S 2T5

Dear Ms. Lamoureux,

Re: Draft Rules of Practice of the Health Professions Appeal and Review Board

Further to the request for input from the Ontario Bar Association, please be advised that we have received comment from our Administrative Law Section, Civil Litigation Section and Alternative Dispute Resolution Section on the draft Rules of Practice of the Health Professions Appeal and Review Board.

We would qualify our comments stating that we are not in a position to provide expert comments on practice before the Board and how the Rules might affect this, we were, however, impressed with the drafting and structure of the Rules. The Board appears to have given serious consideration to the types of proceedings it handles and has drafted provisions which are tailored to the different kinds of disputes. This is a constructive approach to take where a tribunal must handle a variety of proceedings.

The introductory and definition sections are particularly valuable in providing context for understanding the different proceedings and the fact that different Parts of the Rules govern different proceedings.

Below are the comments offered by our practice Sections:

General Matters:

Rule 11:
On the issue of the claim for economic loss - this is potentially very dangerous because the Members of the Board are not all lawyers, there is no outlined basis, nor are there guidelines for the awarding of what amounts to damages.

Complaint Reviews:

Rule 14:
On the issue of the Board combining or splitting matters, there is the risk of creating a procedurally and even substantively unfair, unjust process.

Registration Reviews and Hearings:

Rule 21:
In the remainder of cases relating to registration, the applicant requests and is entitled to a full open hearing with the parties appearing before the Board. There is a Pre-Hearing process which is essentially the same as a Pre-Review conference.

There seems to be a review on the "circumstances" forming the basis of a request for a Registration Hearing to be closed to the public. This appears to be a process which occurs before the hearing but it is not entirely clear.

In these kinds of situations, we see cost-effective settlement advantages in having a case referred to mediation prior to proceeding to a Hearing. It is recommended that the Rules incorporate a provision empowering the Conference Facilitator to order the parties to attend a mediation session prior to being able to proceed to the Hearing.

Rule 22:
There is a list of the factors typically considered under the SPPA in closing a hearing. It is not clear whether the Rule 22 factors are intended to be incorporated in Rule 21.2. Are different criteria applied if a request is made pre-hearing or is Rule 21.2 intended to apply to different proceedings?

Rule 23:
In applications relating to registration, approximately one-half of the applicants request a Review of the decision. This process is similar to a Complaint Review and there is no hearing.

In these cases where there is no hearing, the insertion of a formal mediation process would not be cost-effective.

Appeals under the Public Hospitals Act:

Rule 26:
Under the Public Hospitals Act, physicians may appeal decisions of a hospital appeal board to the Board. The appeal process includes a Pre-Hearing Conference, and a full and open hearing before the Board.

In cases where mediation is recommended or ordered, it is suggested that the parties have an option of jointly choosing a Mediator, selecting one from an approved roster of mediators, or selecting one which is approved by the Conference Facilitator. In the case where the parties jointly select a mediator, the parties should share the mediator's usual fees. In a case where the mediator is selected from a roster or is approved by the Conference Facilitator, the cost of the mediation should be subject to a tariff.

It is again recommended that the Rules incorporate a provision empowering the Conference Facilitator to order the parties to attend a mediation session prior to being able to proceed to the Hearing.

In Rule 26, the use of the term "request" may create confusion, as the Rule is subtitled "Making a Request or Request" and speaks of requests, written requests and requests for requests. "Request" seems to be used in both its everyday meaning and its defined meaning. It is not clear what this provision is intended to address.

Expert Witnesses

Rule 28:
The rule states that a party must submit an expert report at least 10 days before a hearing, but it appears that a party intending to call an expert witness to respond to that report must also submit a report at least 10 days prior to the hearing. These time frames could create confusion.

General

On page 28, Rule 20.2.1, the following appears: “(1) exis10ence”. This seems to be a common error in the print-out, and appears in several places. Possibly a computerized search could double check for "10" buried in the middle of words.

On behalf of our 17,000 Members, I would like to thank you for the opportunity to provide our comments. We look forward to continuing to work with you and your colleagues in the future.

Sincerely,

J.S.A. (Steve) Pengelly, B.A., LL.B.
Executive Director
Ontario Bar Association