DECISION NO. 2009-HPA-0045(a)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant

COMPLAINANT

AND: The College of Physicians and Surgeons of BC

COLLEGE

AND: A Physician and Surgeon

REGISTRANT

BEFORE: A Panel of the Health Professions Review Board

Gordon Stewart, Member

J. Thomas English, Q.C., Chair

Donald A. Silversides, Q.C., Member

DATE: Conducted by way of written submissions concluding on March 23, 2011

APPEARING: For the Complainant: Self-represented

For the College: Lara Zee, Counsel

For the Registrant: Terrence Robertson, Q.C., Counsel

I INTRODUCTION

[1] This is a review of two decisions made within the College of Physicians and Surgeons of BC (the “College”) arising from a January 28, 2009 complaint made to the College by the Complainant. The phrase "within the College" is intentional, as one of the issues on this review is which statutory decision-maker actually made the decisions issued “on behalf of” the Inquiry Committee in this case.

[2] The essence of the complaint to the College was that as a result of the neglect and improper care by the Registrant, the Complainant's husband died of serious respiratory illness, a complication related to another condition suffered by her husband (dermatomyositis). The original complaint alleged, in part:

If [the Registrant] had acted more responsibly, had referred [my husband] to a skin specialist in April or beginning of May, [my husband] would have received proper care
then. [The Registrant] neglected [my husband], and delayed his treatment, which caused more complications, killing him.

[3] The College’s first decision on the above complaint, dated September 3, 2009, was communicated in a four page letter to the Complainant, sent "on behalf of the Inquiry Committee" (the “First Decision”).

[4] The First Decision included a review of the complaint and the Registrant’s response, a review of the Deceased’s medical records and a summary of reports from various physicians. The First Decision concluded as follows:

The College considers your complaint to be unsustainable. We thank you for your patience with our complaint adjudication process. Although we have done our best to be fair and comprehensive in addressing your concerns, we realize that complainants are not always satisfied with our response. To this end, we have enclosed a pamphlet which provides information about the appeal process.

[5] On September 29, 2009, the Review Board received the Complainant's application to review the First Decision. The Review Board's governing Act – the Health Professions Act (the “Act”) and Rules of Practice and Procedure (the “Rules”) provide that as part of the review process, the Complainant is to receive a copy of the College record, which record the Complainant normally sees for the first time as part of our review process.

[6] After receiving the College's Record in connection with the First Decision, the Complainant raised a second allegation, made in a submission to the Review Board — namely, that the Registrant had fabricated records which were used by the College in its decision-making on the First Decision.

[7] On May 4, 2010, the Review Board issued a procedural decision adjourning the hearing to allow the College to investigate this additional allegation.

[8] On July 8, 2010, the College wrote a 5 page decision letter to the Complainant "on behalf of the Inquiry Committee" (the “Second Decision”). The Second Decision concluded as follows:

After careful review of all the available information, the Committee found this matter to be sustained. While the Committee could not conclude that [the Registrant] had fabricated the medical records, it noted that your allegations might not have arisen had he kept adequate records which properly documented the treatment recommendations and advise to [your husband] in his records rather than in yours. In this instance, the deficiency in recordkeeping clearly had significant consequences for you, your physician relationship with [the Registrant], and possibly eroded your trust in the medical profession. A record of this decision will remain permanently on [the Registrant's] College file.

The Committee further directed that these issues be dealt with remedially and directs [the Registrant] to attend the Medical Record Keeping for Physicians Course on October 13, 2010, and attend for a follow-up interview with Registrar Staff to reflect on the material learned and how he will implement it to his practice. [bold in original]
[9] Earlier in the July 8, 2010 decision, the Inquiry Committee stated that "in this case, the Committee felt that the matter was one of deficiency in record keeping and that it is unable to make any finding that [the Registrant] had fabricated the records".

[10] The Complainant is dissatisfied with this outcome, and thus the present review incorporates the Second Decision as well.

[11] The issue on the review, which was conducted by way of a written submissions process, concerns the adequacy of the investigations and the reasonableness of each disposition.

II PROCEDURAL HISTORY

[12] The original complaint was received by the College under its then governing legislation, the Medical Practitioners Act. The College transitioned to the Health Professions Act (the “Act”) on June 1, 2009.

[13] The process under the former legislation was described as follows in the College's February 3, 2009 letter to the Complainant:

Having obtained such comment and any records deemed necessary, the College may then be in a position to respond with an explanation. On occasion, it may be necessary to refer the matter on to the Quality of Medical Performance Committee of the College, although the majority of complaints are possible to resolve following a review by the Registrar staff, who are fully qualified and experienced physicians. The committee, composed of a number of physicians from various disciplines and two non-physician public members of the College Council, meets every second month, so there will be some delay in obtaining an opinion if we proceed in this way. In addition, such a review is of necessity carefully conducted, and occasionally further delayed in order to obtain an expert opinion. It is not a swift process. I want to assure you, however, that your concerns will be thoroughly reviewed, and the College will respond as quickly as possible once that review is complete.

[14] The Record shows that the College undertook most if not all of its information gathering under the former Act. Just nine days before the College transitioned to the current Act, the Deputy Registrar wrote to the Complainant as follows:

I am writing to inform you that the College has now obtained the information required to review the complaint submitted by you, received here January 28, 2009.

Complaints received by the Quality of Medical Performance Department are processed in the order of the date received, so yours will be preceded by others. Each complaint is given careful consideration, so it may be some time before yours is reviewed. Please be assured, however, that the College will communicate with you in writing when the review of the issues you brought before the College has been concluded.

[15] There having been no decision by the transition date of June 1, 2009, the College was, effective that date, governed by the new decision-making structure and process set out in the Act and in the College’s new by-laws. The College itself identified this in a July 20, 2009 letter it wrote to the Complainant:

Since the review of your complaint began, the legislation which governs the College of Physicians and Surgeons of British Columbia has been repealed, and the College now
reviews complaints under the authority of the Health Professions Act. All complaints are now reviewed by the Inquiry Committee.

This matter will be reviewed at the next meeting of the Inquiry Committee, which is scheduled for August 5, 2009.

Following this meeting the College will write again and advise you of the committee’s opinions.

III THE HEALTH PROFESSIONS ACT COMPLAINT DISPOSITION PROCESS

A. The Registrar and the Inquiry Committee

[16] In contrast to the former Medical Practitioners Act, the Act sets out a relatively detailed procedural code for the handling of complaints by health colleges. Both the College Registrar and the College Inquiry Committee have key roles to play in that process.

[17] It will at the outset be useful to describe the Registrar and the Inquiry Committee.

[18] The Registrar is not elected, and is not a member of the College Board. As made clear in s. 21(1) of the Act, the Registrar is appointed by the Board as officer of the College, and holds office at the Board’s pleasure:

21 (1) A board must appoint a registrar and may appoint one or more deputy registrars for its college, who hold office during the pleasure of the board.

[19] The Inquiry Committee, by contrast, is a specialized committee of the College, established by by-law under s. 19(1)(t) of the Act to exercise the specialized decision-making function set out in the Act relative to the complaint process. College Bylaw 1-16 provides as follows:

(1) The inquiry committee is established consisting of at least nine persons appointed by the board, at least one-third of whom must be public representatives.

(2) The committee must include the president and vice-president of the board and two appointed board members.

[20] Section 32 of the Act states as follows:

32 (1) A person who wishes to make a complaint against a registrant must deliver the complaint in writing to the registrar.

(2) As soon as practicable after receiving a complaint, the registrar must deliver to the inquiry committee a copy of the complaint, an assessment of the complaint and any recommendations of the registrar for the disposition of the complaint

(3) Despite subsection (2), the registrar, if authorized by the board, may dismiss a complaint, or request that the registrant act as described in section 36 (1), without reference to the inquiry committee if the registrar determines that the complaint

(a) is trivial, frivolous, vexatious, or made in bad faith,
(b) does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or

(c) contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

(4) If a complaint is disposed of under subsection (3), the registrar must deliver a written report to the inquiry committee about the circumstances of the disposition.

(5) A disposition under subsection (3) is considered to be a disposition by the inquiry committee unless the inquiry committee gives the registrar written direction to proceed under subsection (2).

[21] As is apparent from s. 32, the Registrar exercises a critical gate-keeping and reporting function after a complaint is received. Upon receipt of a complaint, the Registrar (who has in this College received the board authorization referred to in s. 32(3)) may address the complaint by one of two possible streams.

B. The Reporting and Recommendation stream (Stream 1)

[22] The first stream is the "reporting and recommending" stream, described in s. 32(2). In this stream, the Inquiry Committee will be the decision-maker. The Registrar’s initial task in this stream is to deliver to the Inquiry Committee a copy of the complaint, an assessment of the complaint and any recommendations for its disposition.

[23] The Registrar’s report to the Inquiry Committee is the first step. The Inquiry Committee, upon receiving a report, must then investigate the complaint in accordance with s. 33(1) of the Act, must comply with s. 33(5) and then finally may make one of the dispositions described in s. 33(6):

33 (1) If a complaint is delivered to the inquiry committee by the registrar under section 32 (2), the inquiry committee must investigate the matter raised by the complainant as soon as possible.

...  

(5) The inquiry committee must request the registrant who is the subject of an investigation under this section to provide it with any information regarding the matter that the registrant believes should be considered by the inquiry committee.

(6) After considering any information provided by the registrant, the inquiry committee may

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1 See Bylaw 4-1, Bylaws of the College of Physicians and Surgeons of British Columbia
(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

(b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,

(c) act under section 36, or

(d) direct the registrar to issue a citation under section 37.

[24] The Act is silent on the process the Registrar can follow prior to making his or her report to the Inquiry Committee.

[25] It seems to us that the Registrar must have some flexibility here, and that the Registrar is implicitly permitted to undertake those inquiries that are reasonably necessary for the purposes of preparing the Registrar's Report (the “Report”) - recognizing that upon receiving the Report, the Inquiry Committee must itself investigate the matter raised by the complaint. However, the Registrar's role in this stream is preliminary, and ought not to usurp the Inquiry Committee's investigation function which is tied to its decision-making function under s. 33.

[26] It is noted that pursuant to s.4-3 of the Bylaws that this College has adopted, the Registrar is to carry out the Inquiry Committee's investigation. However, the Act and Bylaws clearly contemplate that the investigation is to take place after the Registrar has reported and been directed to investigate by the Inquiry Committee.

[27] This is not a technicality. It ensures that the Inquiry Committee, which is accountable for making the ultimate disposition, has the opportunity not only to be briefed before the investigation, but to issue any directions it considers important regarding the investigation, including whether the Registrant should be required to attend for interview by the Inquiry Committee or the Registrar:

4-3 (1) The inquiry committee must carry out an investigation of a matter referred to it under section 33 of the Act by directing the registrar to investigate the matter.

(2) When the inquiry committee directs the registrar to investigate a matter under section 4-3(1), the registrar, or any other person designated to investigate a matter on the registrar's behalf, may

(a) as soon as practicable, require the respondent to reply to written requests for information relevant to the matter under investigation, and to submit any practice records relevant to the matter under investigation,

(b) request a written report or any other information from any registrant or other person that the registrar considers may be of assistance in reviewing the matter under investigation,

(c) meet with the complainant, the respondent and any other person the registrar may consider necessary, to discuss the matter under investigation, or
(d) attempt to resolve the complaint or other matter under investigation through alternative dispute resolution in accordance with section 4-4.

(3) The committee may require the respondent to attend for interview by the committee or the registrar.

[28] As this Review Board has pointed out in the past, the Inquiry Committee is not the Discipline Committee. However, its assessment must be sufficiently meaningful to enable it to exercise its functions. See Review Board Decision No. 2010-HPA-0003(a), November 18, 2010, College of Dental Surgeons, paras. 24-25:

[24] On one hand, it is true that the Inquiry Committee is not the Discipline Committee. The Inquiry Committee is not tasked with the type of ultimate fact finding that would happen after a Citation was issued and a hearing held before the Discipline Committee. At the same time, it may not be fully accurate to describe the Inquiry Committee as being solely a "screening" body that has no mandate to critically examine conflicting evidence. For one thing, in the Act, the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuing a Citation. It cannot do that without some provisional assessment of the facts. For another, it is difficult to see how the Inquiry Committee can decide meaningfully whether to issue a Citation without forming some provisional assessment of what took place, including whether the evidence needs to be more fully fleshed via the Citation and discipline process. In this latter regard, an analogy might be drawn to the role of Crown Counsel. While the Crown does not find facts — that is the ultimate role of the Court — it must critically examine the evidence to determine whether there is a substantial likelihood of conviction. To merely say "we cannot lay charges because there is conflicting evidence" would be wholly inadequate in many cases. While not being a final conclusion, a meaningful, albeit provisional, assessment of the evidence is required.

[25] It follows that there may be cases where an adequate investigation requires a College investigation to look into evidentiary conflicts in more detail given the nature of the complaint and all the circumstances of the investigation. There may also be cases where it would not be a reasonable outcome for an Inquiry Committee to dismiss certain complaints merely by stating "it is one person's word against another's". The Review Board must apply the statutory tests carefully and sensitively, based on the record in each case.

[29] The Act is again silent on the process the Inquiry Committee must follow after the investigation.

[30] However, it is in our view necessarily implicit that as the decision-maker accountable for the decision, the Inquiry Committee must have access to a package consisting of the pertinent investigative documents in the investigative record bearing on the review. In conjunction with this access, the Inquiry Committee, given its nature, must also be allowed to receive staff summary reports, assistance and draft recommendations and even draft reasons, with the aim of enabling the Inquiry Committee to engage in a meaningful and independent assessment of the complaint investigation.

[31] The process must ultimately serve its purpose, which is not that of a rubber stamp. In this stream, the purpose of the entire process is to ensure that the complainant ultimately has the Inquiry Committee's considered and independent judgment about which option available to it under s. 33(6) is appropriate in the
circumstances. Thus, in complaints arising under this stream, a disposition cannot be reasonable, and an investigation cannot be adequate, if the Inquiry Committee is merely approving a draft decision without any independent review of the complaint and assessment of the pertinent investigative material.

C. The Registrar's decision stream (Stream 2)

[32] Complaints are not all alike. Recognizing this, the Act in s. 32(3) provides an alternative decision-making stream in which (with approval of the Board of the College) the Registrar may independently dismiss a complaint or request that a registrant agree to take one or more of the actions set out in s. 36(1), if the Registrar determines that any of the tests in s. 32(3) is met:

\[32\] (3) Despite subsection (2), the registrar, if authorized by the board, may dismiss a complaint, or request that the registrant act as described in section 36 (1), without reference to the inquiry committee if the registrar determines that the complaint

(a) is trivial, frivolous, vexatious, or made in bad faith,

(b) does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or

(c) contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

[33] Section 32(3) does not give the Registrar complete discretion about whether to refer a complaint to the Inquiry Committee. The Registrar's ability to act independently under s. 32(3) is narrower than that of the Inquiry Committee in s. 33(6).

[34] While both the Registrar and the Inquiry Committee may find a complaint to be trivial, frivolous, vexatious or made in bad faith, only the Inquiry Committee may dismiss a complaint on the basis that "the conduct or competence to which the matter relates is satisfactory": Act, s. 33(6)(a). Further, only the Inquiry Committee may take action it considers appropriate to resolve the matter between the Complainant and the Registrant or decide whether a citation ought to be issued: s. 33(6)(b) and (d) or award costs to the College: s. 33(7).

[35] Under ss. 32(3)(b) of the Act, the Registrar may also act independently where the Inquiry Committee has no jurisdiction in a case where, even assuming all the facts are true, the subject matter of the complaint is not something the Inquiry Committee can investigate under s. 33. Finally, under s. 32(3)(c) of the Act, the Registrar may act independently where he or she is satisfied that even if the complaint is within jurisdiction and even if it were proved before a discipline committee, the outcome would not normally be more serious than a reprimand.\footnote{This conclusion is reached by examining the definition of "serious matter" in s. 26 which is a matter which, if admitted or proven would ordinarily result in an order under 39(2)(b) to (e). The only other order available under s.39(2) is (a) "reprimand the respondent" so that is the circumstance when the Registrar may act independently.}
[36] The Legislature’s decision to give the Registrar a limited right to dispose of complaints independently is consistent with the larger philosophy that complaints within jurisdiction, which are not trivial and which would, if proven or admitted, normally give rise to more than a reprimand, should be investigated and decided by the Inquiry Committee under the "reporting and recommendations" process stream in s. 32(2).

[37] This makes common sense. Only the Inquiry Committee has been authorized to assess conduct or competence as "satisfactory" (s. 33(6)(a)) on the one hand, or direct a citation to be issued on the other, s.33(6)(d). To allow a Registrar to independently exercise those judgments in the absence of those powers would improperly usurp the Inquiry Committee’s specialized role under the legislation.

[38] We note that just as the Act is silent on the process the Registrar must follow before making a report to the Inquiry Committee, the Act is silent on the process the Registrar can or must follow before making a decision under s. 32(3).

[39] In our view, it is clear that the Registrar’s process must be tied specifically to the gate-keeping function he or she has the jurisdiction to exercise under s. 32(3).

[40] Where a complaint is dismissed under ss. 32(3)(b) and (c), the Act is clear that the decision must be based on the allegations in the complaint. Subject only to following up with a complainant to clarify the allegations, it is clear that these dismissal decisions must be based solely on the allegations.

[41] For the Registrar to dismiss a complaint under s. 32(3)(a), or request that the registrant act as described in section 36(1), we think that the Registrar requires the additional flexibility to make appropriate follow-up inquiries with the complainant and registrant. In some cases for example, a complaint that does not appear “trivial, frivolous or vexatious” on its face may quickly prove to meet that test after preliminary follow-up inquiries with the complainant and registrant.

[42] It must be made clear, however, that these inquiries are not intended to usurp the investigation function which has been vested in the Inquiry Committee. If the proper disposition of the complaint requires an investigation, then the ultimate disposition of the complaint must be made within the Inquiry Committee’s mandate under Stream 1. In those cases where an informed decision cannot be made without a formal investigation – and this may include some cases that are ultimately dismissed as “trivial, frivolous or vexatious” under the Inquiry Committee’s independent power in s. 33(6)(a) - what the Registrar ought to do is write a report to the Inquiry Committee under s. 32(2), proceed with the investigation (usually under delegated authority from the Committee), and ensure that the matter is decided by the Inquiry Committee based on the investigative record and under its independent statutory authority.

[43] We note that where the Registrar decides to act independently under s. 32(3), the Act states as follows:

32 (4) If a complaint is disposed of under subsection (3), the registrar must deliver a written report to the inquiry committee about the circumstances of the disposition.

(5) A disposition under subsection (3) is considered to be a disposition by the
inquiry committee unless the inquiry committee gives the registrar written
direction to proceed under subsection (2).

[44] Section 32(4) makes clear that where the Registrar acts independently under
s. 32(3), he or she must provide a written report of the circumstances of the disposition
to the Inquiry Committee. It is important to note that even here, the Inquiry Committee
has a role to play; it is not simply a passive recipient of the report. That role, as reflected
in s. 32(5), is essentially to decide, based on the report, whether to direct that the
Registrar's disposition be treated as a report under section 32(2), and thus to proceed to
the next step of investigating the complaint under section 33(1). This only reinforces the
observation made above - that whatever preliminary inquiries the Registrar may make in
order to exercise his powers under s. 32(3), complaints requiring an "investigation
proper" are for the Inquiry Committee. Section 32(5) makes clear that before the
Registrar releases his decision, the Inquiry Committee gets the last word about whether
to direct an investigation despite what the Registrar proposes to do.

[45] If the Inquiry Committee does not direct an investigation under s. 32(5), the
disposition is "considered to be a disposition by the Inquiry Committee". To make clear
that these dispositions are reviewable by the Review Board, section 50.53(1)(c) states
as follows:

50.53 (1) The review board has the following powers and duties:

(c) on application by a complainant under section 50.6, to review a
disposition of a complaint made by the inquiry committee under
section 32(3), 33(6)(a) to (c) or 37.1. [emphasis added]

D. The need for clarity regarding the basis for the disposition

[46] While ss. 32(5) and 50.53(1)(c) of the Act ensure that a Registrar’s decisions are
reviewable by the Review Board, Colleges must take care to ensure that the legal status
of the decision being “considered” to be an Inquiry Committee decision does not
mislead, obscure or mask the specific legal basis on which the disposition was made.
Clarity about the basis on which the disposition was made is essential for the parties
and the Review Board in addressing the issues on a review as set out in s. 50.6(5) of
the Act, and the question as to what remedy is appropriate, under s. 50.6(8) of the Act:

50.6 (5) On receipt of an application under subsection (1), the review board must
conduct a review of the disposition and must consider one or both of the
following:

(a) the adequacy of the investigation conducted respecting the complaint;

(b) the reasonableness of the disposition.

(8) On completion of its review under this section, the review board may
make an order

(a) confirming the disposition of the inquiry committee,

(b) directing the inquiry committee to make a disposition that could have
been made by the inquiry committee in the matter, or
(c) sending the matter back to the inquiry committee for reconsideration with directions.

[47] For the purposes of intelligible decision-making and meaningful Review Board review, it matters whether the complaint was dismissed under s. 32(3)(a), (b) or (c). The conclusion that a complaint was frivolous may be unreasonable and may warrant remittal to the Registrar, with or without a direction that the matter be considered by the Inquiry Committee after an investigation. The conclusion, in the very same case, that a complaint would not, if proven, have resulted in more than a reprimand may not be unreasonable, and may result in an entirely different outcome. It is important that the Registrar explain the specific basis on which a complaint was dismissed under s. 32(3).

IV THE PROCESS THAT WAS FOLLOWED IN THIS CASE

[47] For an Inquiry Committee to make a disposition under Stream 1 without any reference to the 1200 page investigative file, and based purely on a 4 page draft disposition written for the Committee, would be wholly inadequate to satisfy the test of being a reasonable disposition. Such an Inquiry Committee disposition is unreasonable if it is a rubber stamp — if it is not really a disposition of the Inquiry Committee. Such a disposition is unreasonable if it represents itself as a considered decision when in fact it was not. Such a disposition is unreasonable if the very legislative purpose in creating Stream 1 was improperly by-passed.

[48] In light of the above, and based on the Record that was filed in this matter, the Review Board wrote to the parties on March 9, 2011 and posed the following questions to the parties:

1. If the Inquiry Committee's September 3, 2009 disposition was made after reviewing only a draft decision letter and without reviewing any of the supporting material in Record #1, what was the nature of the Inquiry Committee's adjudication, and how could the Inquiry Committee have conducted an adequate investigation or rendered a reasonable disposition? This issue requires the parties to address the legal basis on which the Inquiry Committee issued its decision and the legal responsibility of an Inquiry Committee when it makes a decision under s. 33 of the Health Professions Act.

2. Was the Inquiry Committee's July 8, 2010 disposition reasonable and was its investigation adequate based on the information from Record #2 which was placed before the Inquiry Committee in support of that disposition?

3. If the Review Board finds that a remedy ought to be granted in respect of one or both of the issues raised above, what remedy should the Review Board grant pursuant to s. 50.6(8) of the Health Professions Act?

V THE SEPTEMBER 3, 2009 DISPOSITION

[49] The College submitted that the Inquiry Committee's first disposition - the September 3, 2009 disposition — was in fact a Registrar's disposition under s. 32(3). We agree, on a review of the record and in light of the submissions that have now been made on this point, that this was in fact a Stream 2 disposition. This conclusion finds support at Tab 36 of the Record is the "Minute" of the Inquiry Committee's August 5, 2009 meeting. That Minute states:
Proposed disposition pursuant to section 32(3) of the Health Professions Act (the "HPA").

The Panel reviewed the adjudication by the Registrar Staff for the above complaint and concurred with the proposed disposition for the purpose of section 32(5) of the Act.

NOT SUSTAINED

[50] This Stream 2 disposition involved more information gathering by the Registrar than should take place as discussed above. As noted above, that information gathering occurred under the former Act. Thus, it was already in the Registrar's possession when the new legislation came into force on June 1, 2009.

[51] That this was a Stream 2 disposition was frankly difficult to detect given the language of the decision letter, and various early submissions of the College which conveyed the contrary impression that this was an independent decision of the Inquiry Committee under Stream 1. For example, on September 3, 2009, a Doctor wrote a second and shorter letter "on behalf of the Inquiry Committee" — this one solely to the Registrant. This letter states: "Enclosed is a copy of the correspondence from the Inquiry Committee to [the Complainant] which outlines the opinions of the committee in this matter." The College's April 8, 2010 Statement of Points to the Review Board states: "the complaint was adjudicated by the Inquiry Committee at its meeting on August 5, 2009" (para. 14) and refers to the Inquiry Committee's "review and adjudication": para. 26. In its recent submission, the College has fairly conceded that there was "...a lack of clarity on the College's part in identifying the September 3, 2009 disposition as a Section 32(3) Disposition and we apologize for the resulting confusion."

[52] The fact that this was a section 32(3) disposition does not resolve whether the disposition was reasonable. To answer the latter question, we must address what precisely that September 3, 2009 disposition was. As noted, 32(3)(a), (b) and (c) reflect very different grounds for dismissal.

[53] Unfortunately, neither the September 3, 2009 letter, nor the August 5, 2009 minutes, nor anything in the College's subsequent submissions either before or after our May 2011 letter, tracks the language of s. 32(3), or offers an explanation of the basis on which the complaint was dismissed under s. 32(3). We are thus left to draw an inference from the September 3, 2009 decision, which unfortunately does not track the language used in any of the subsections of s. 32(3):

The College considers your complaint to be unsustainable.

[54] In order for the Registrar to have jurisdiction to dismiss the complaint the Registrar has to rely on one of the grounds set forth in s.32(3). These grounds, as they apply to the complaint are:

(a) the complaint is “trivial, frivolous, vexatious or made in bad faith.” Clearly given the extensive background set forth in the record, the nature of the complaint and the investigation that followed, this ground was not relied upon for the dismissal;

(b) the complaint “does not contain allegations, that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under
section 33(4)." If proven there are matters set forth in s.33(4) which are applicable to the conduct complained about;

(c) the complaint "contains allegations, that if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33(4)." Again if proven, the conduct complained about would result in more than a reprimand.

[55] Since none of the prerequisites in s.32(3)(a) to (c) existed, the Registrar did not have jurisdiction to dismiss the complaint. A disposition made without authority is by definition unreasonable. A decision made outside of one’s lawful mandate falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law”, as set out in Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 47.

[56] The Inquiry Committee under s. 33(6)(a) may dismiss it if it is of the view “that the conduct or competence to which the matter relates is satisfactory”. This may have been the ground relied upon erroneously by the Registrar as he states at page 3 of the September 3, 2009 disposition. “After careful review of the extensive documentation, the College is not critical of the [Registrant] in this circumstance.”

[57] This was a case where the complaint ought to have been referred to the Inquiry Committee for its own independent review of the key documents and a determination on the merits. The fact that the Inquiry Committee later “approved” the letter does not save the matter as it did not have any of the investigative information available and it was not treated as a “Stream 1” matter, pursuant to which it may possibly have judged very differently.

VI THE JULY 8, 2010 DISPOSITION

[58] In contrast to the September 3, 2009 disposition, the July 8, 2010 disposition, which addressed the "fabricating records" complaint, was a Stream 1 disposition by the Inquiry Committee. The allegation was that the Registrant falsified the medical records of the Deceased at a later date to cover up for the fact that he had not referred the Deceased to emergency on May 17, 2008 as he claimed.

[59] With regard to this disposition, the College specifies that this was an Inquiry Committee disposition made under s. 33(6)(b) of the Act:

33 (6) After considering any information provided by the registrant, the inquiry committee may

(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

(b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,

(c) act under section 36, or

(d) direct the registrar to issue a citation under section 37.
[60] For convenient reference, the Inquiry Committee’s disposition is reproduced again below:

After careful review of all the available information, the Committee found this matter to be sustained. While the Committee could not conclude that [the Registrant] had fabricated the medical records, it is noted that your allegations might not have arisen had he kept adequate records which properly documented the treatment recommendations and advice to [your husband] in his records rather than in yours. In this instance, the deficiency in recordkeeping clearly had significant consequences for you, your physician relationship with [the Registrant], and possibly eroded your trust in the medical profession. A record of this decision will remain permanently on [the Registrant's] College file.

The Committee further directed that these issues be dealt with remedially and directs [the Registrant] to attend the Medical Record Keeping for Physicians Course on October 13, 2010, and attend for a follow-up interview with Registrar Staff to reflect on the material learned and how he will implement it to his practice. [bold in original]

[61] The Investigative Record pertaining to this part of the complaint consists of 316 pages (pp. 161-477). Pages 299-450 were placed before the Inquiry Committee.

[62] The portions of the Record that were not placed before the Inquiry Committee either pertain to the First Decision under review, or are repetitive of other material that was placed before the Inquiry Committee. In our view, the material that was placed before the Inquiry Committee was sufficient to remove any suggestion that its second decision was a rubber stamp, and was not made independently.

[63] This of course does not answer the question whether the investigation was adequate or the disposition reasonable.

A. Adequacy of the Investigation

[64] The Inquiry Committee obtained and reviewed Medical Service Plan (MSP) records for the Complainant and the Deceased.

[65] The Inquiry Committee also obtained the Registrant’s medical records in respect of the Deceased and the Complainant and compared these documents to the MSP records.

[66] The staff of the Registrar interviewed the Registrant but the Complainant declined to meet in person regarding this complaint.

[67] On a review of the MSP and the Registrant’s records, it was apparent that the Deceased and the Complainant commonly visited the Registrant together. The Registrant's records also show that it was common for the Registrant to make notes about the Deceased in the Complainant's chart.

[68] The Registrant’s notes that the Complainant should take the Deceased to Emergency on May 17, 2008 were entered in the Complainant's chart. The Inquiry Committee found:

...it was not apparent that... (these notes)...were added at a later time.
[69] The Registrant did make "late date" entries about attending Emergency in the Deceased's chart for May 2008 at the January 17, 2009 family meeting, attended by the Complainant and two other family members. Late dating of entries in medical records is deemed acceptable within the medical community, provided that such entries are appropriately dated and recorded.

[70] The Inquiry Committee found that the Registrant had not fabricated or falsified medical records but that his record keeping was deficient. It found that he should have made notations regarding the Deceased in the Deceased's file rather than in his spouse's (the Complainant's) file.

[71] In October 2010, at the close of submissions, the Complainant alleged that two witnesses to the January 17, 2009 family meeting heard the Registrant admit that he had not referred the Deceased to emergency on May 17, 2008. The Complainant did not bring this to the College's attention when given the opportunity.

[72] This new allegation was made at the deadline for final written submissions in this review. The College did not have an opportunity to investigate this allegation, nor did it have this information when it conducted its investigation into the falsification of records. The Complainant has not provided statements from the witnesses themselves.

[73] In the circumstances, we consider that the Inquiry Committee took appropriate and adequate steps to investigate the complainant's allegation, which, repeated for clarity, is that the Registrant falsified the medical records of the Deceased at a later date to cover up for the fact that he had not referred the Deceased to emergency on May 17, 2008 as he claimed. The essential component of this complaint is the allegation of falsification of records as a cover-up, not the failure to refer to emergency. The Inquiry Committee's investigation focused on the paper and electronic trail of documents that would provide evidence to confirm or refute this allegation.

[74] The evidence of witnesses who, in the account of events as described by the complainant, would not be able to shed light on the question of falsification of medical records, would not be of critical importance to the Inquiry Committee in addressing this allegation. On this basis, we do not find that the College's investigation into this question was rendered inadequate by the lack of an interview with the two witnesses.

B. Was the Inquiry Committee’s disposition regarding the falsification allegation reasonable?

[75] With respect to the reasonableness of the disposition, the law has been well established and articulated in previous Review Board decisions. As per the Review Board's decision 2009-HPA-0001(a);0002(a);0003(a);0004(a) at paragraphs [90], [91], and [92]:

[90] The Legislature's choice of the word "reasonable" cannot have been accidental, particularly when it has been employed in a Board whose statutory role has been described as that of "review" (and mainly a review on the record) rather than appeal. "Reasonableness" is a term of art in administrative law. In Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12 at para. 59, the Supreme Court of Canada described the reasonableness standard this way:
Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[91] In Dunsmuir v. New Brunswick, 2008 SCC 9 at paras. 47 and 49, the Supreme Court of Canada had earlier stated as follows:

"Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law....

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, 'Establishing the Standard of Review: The Struggle for Complexity?' (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[92] In our view, these passages reflect the approach the Review Board should take in reviewing the reasonableness of an inquiry committee's disposition. While the Review Board's application of the test will necessarily reflect its expertise as a specialized administrative tribunal rather than a Court, the Review Board's focus is nonetheless not to step into the shoes of the Inquiry Committee, but rather to determine whether the Inquiry Committee's disposition falls within the range of acceptable and rational solutions, and is, viewed in the context of the whole record, sufficiently justified, transparent and intelligible to be sustained.

[76] We are of the view that the decision reached by the Inquiry Committee, based upon rational, relevant documentary evidence, was "within a range of possible, acceptable outcomes" and therefore was a reasonable disposition.
VII DECISIONS

[77] For the reasons given above and pursuant to s.50.6(8):

(a) the September 3, 2009 Disposition is sent back to the Inquiry Committee for reconsideration with the direction to make a disposition under s. 33(6) and, prior to making that disposition, to review the allegations made by the Complainant in the proceeding and conduct any additional investigations that it considers necessary to ensure compliance with the Act.

(b) the July 8, 2010 Disposition is confirmed.

[78] In making this decision, we have considered all of the evidence and submissions before us, whether or not specifically reiterated in these reasons.

“Gordon Stewart”

Gordon Stewart, Member
Health Professions Review Board

“J. Thomas English”

J. Thomas English, Q.C., Chair
Health Professions Review Board

“Donald A. Silversides”

Donald A. Silversides, Q.C., Member
Health Professions Review Board

June 23, 2011