

DECISION NO. 2010-HPA-0071 (a)

In the matter of an application under section 50.6 and 50.61 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 Chiropractors of BC **COLLEGE**

AND: A Chiropractor **REGISTRANT**

BEFORE: J. Thomas English, Q.C., Chair

DATE: Conducted by way of written submissions concluding on
December 10, 2010

APPEARING: For the Complainant: Jennifer Harry, Counsel

For the College: Donald B. Lebens, Counsel

For the Registrant: Self-represented

PRELIMINARY DECISION ON JURISDICTION AND STANDING DECISION ON SECTION 31(1)(f) OF THE *ADMINISTRATIVE TRIBUNAL ACT* ("ATA")

I DECISIONS

A. ON JURISDICTION AND STANDING

[1] Upon considering the Complainant's application for review dated April 6, 2010 (the "Application") seeking a review under s. 50.53(1) (c) and 50.6 of the *Health Professions Act* (the "Act") and considering the submissions of counsel on behalf of the College and the Registrant that the Health Professions Review Board (the "Review Board") lacks jurisdiction to consider the Application and that the Complainant lacks standing to make the Application, it is my decision that the Review Board does have jurisdiction to review the Application and, therefore, the Application is accepted for review. In addition, it is my decision that the Complainant, a Medical Health Officer, has standing to make the Application.

B. ON SECTION 31(1)(f) OF THE ATA

[2] For the reasons that follow, it is my decision that the Application be dismissed under s. 31(1)(f) of the *Administrative Tribunals Act* (the "ATA") because there is no reasonable prospect the application will succeed.

II INTRODUCTION – PRELIMINARY DECISION

[3] The matters that the Complainant seeks to have reviewed by the Review Board derived from a series of articles in a local newspaper written by the Registrant dealing with the subject of immunization. The Complainant considered the commentary in the articles by the Registrant to be in violation of the rules and regulations governing the conduct of members of the College, and launched a complaint with the College.

[4] The College concluded that the articles were not in violation of the rules and regulations of the College and decided to take no further action in the matter.

[5] The Complainant applied to the Review Board for a review of the decision of the College and requested the following:

- (a) That the College be required to develop standards of professional conduct on public communications.
- (b) That the College be expected to develop an explicit professional code of conduct on immunization consistent with the [policies of the] Canadian College of Chiropractors and with the Province of British Columbia.

[6] On October 7, 2010, the Review Board wrote to the parties requesting that the parties make submissions on the question of whether or not the Review Board has jurisdiction over, or ought to consider, the Application.

III ISSUES

[7] The issues to be determined at this preliminary stage are (a) whether the Application discloses a matter that is within the jurisdiction of the Review Board; (b) whether the Complainant, a Medical Health Officer, has standing to make the Application, and (c) whether the Application should be accepted for review or dismissed summarily.

IV RELEVANT LEGISLATION

[8] The provisions of the Act that are relevant to the issue of jurisdiction and standing are set out below:

Powers and duties of review board

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;

Complaints to be made to registrar for delivery

- 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).

Investigations by inquiry committee

- 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.
- (2) If a registrant fails to authorize a criminal record check under the *Criminal Records Review Act* or the deputy registrar under that Act has determined that the registrant presents a risk of physical or sexual abuse to children and that determination has not been overturned by the registrar under that Act, the inquiry committee must take the failure or the determination into account, investigate the matter and decide whether to impose limits or conditions on the practice of the designated health profession by the registrant or whether to suspend or cancel the registration of the registrant.
- (3) A registrant against whom action has been taken under subsection (2) may appeal the decision to the Supreme Court and, for those purposes, the provisions of section 40 respecting an appeal from a decision of the discipline committee apply to an appeal under this section.
- (4) The inquiry committee may, on its own motion, investigate a registrant regarding any of the following matters:

- (a) a contravention of this Act, the regulations or the bylaws;
 - (a.1) a conviction for an indictable offence;
- (b) a failure to comply with a standard, limit or condition imposed under this Act;
- (c) professional misconduct or unprofessional conduct;
 - (c.1) [Repealed 2008-29-34.]
- (d) competence to practice the designated health profession;
- (e) a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to practice the designated health profession.

(4.1) The inquiry committee must not act under subsection (6) (b), (c) or (d) on the basis of subsection (4) (a.1) if the inquiry committee is satisfied that the nature of the offence or the circumstances under which it was committed do not give rise to concerns about the registrant's competence or fitness to practice the designated health profession.

(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

- (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.

(7) If the inquiry committee acts under subsection (6) (b) to (d), it may award costs to the college against the registrant, based on the tariff of costs established under section 19 (1) (v.1).

Notice of disposition

34 If the inquiry committee disposes of a matter under section 32 (5) or 33 (6) (a) or (b), the inquiry committee must, within 30 days of disposition, deliver to the complainant, if any, a written summary of the disposition advising the complainant of the right to apply for a review by the review board under section 50.6.

Reprimand or remedial action by consent

- 36** (1) In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:
- (a) undertake not to repeat the conduct to which the matter relates;
 - (b) undertake to take educational courses specified by the inquiry committee;
 - (c) consent to a reprimand;
 - (d) undertake or consent to any other action specified by the inquiry committee.
- (1.1) If a consent or undertaking given under subsection (1) relates to a complaint made under section 32 (1), the inquiry committee must, within 30 days of the consent or undertaking being given, deliver to the complainant a written summary of the consent or undertaking advising the complainant of the right to apply for a review by the review board under section 50.6.
- (2) If a registrant refuses to give an undertaking or consent requested under subsection (1), or if a registrant fails to comply with an undertaking or consent given in response to a request under subsection (1), the inquiry committee may direct the registrar to issue a citation for a hearing by the discipline committee regarding the matter.

Citation for hearing by discipline committee

- 37** (1) The registrant may give the inquiry committee a written proposal at any time before the commencement of a hearing under section 38
- (a) admitting the nature of the complaint or other matter that is to be the subject of the hearing,
 - (b) consenting to the making of an order under section 39 (2) or (8) as set out in the proposal,
 - (c) consenting to indemnify the college for the investigation under section 33 in an amount not to exceed the costs for the inquiry calculated under the tariff of costs established under section 19 (1) (v.1), and
 - (d) if the registrant gives the proposal to the inquiry committee less than 7 days before the hearing is scheduled to commence, consenting to indemnify the college for preparing for the hearing in an amount not to exceed the costs of preparing for the hearing calculated under the tariff of costs established under section 19 (1) (w.1).
- (2) The inquiry committee may accept or reject a proposal received under subsection (1) based on the investigations described in section 33 respecting the complaint.
- (3) If the inquiry committee accepts a proposal received under subsection (1),

(a) the inquiry committee must make an order consistent with the proposal, and the order is considered to be an order of the discipline committee made under section 39, and

(b) [Repealed 2008-29-38.]

(c) section 38 does not apply to the citation.

(4) If the inquiry committee rejects a proposal received under subsection (1),

(a) a hearing of the citation must proceed as though the proposal had not been made, and

(b) the discipline committee must not consider the admission described in subsection (1) (a) or the consent described in subsection (1) (b) in determining the matter or in making an order under section 39.

(5) If the hearing under section 38 has commenced

(a) the registrant may give to the inquiry committee a written proposal

- (i) described in subsection (1) (a) to (c), and
- (ii) consenting to indemnify the college for preparing for and conducting the hearing in an amount not to exceed the costs of preparing for and conducting the hearing calculated under the tariff of costs established under section 19 (1) (w.1), and

(b) the inquiry committee may accept or reject the proposal in its discretion.

(6) If the inquiry committee accepts a proposal under subsection (5), it must make an order consistent with the proposal, the order is considered to be an order of the discipline committee made under section 39, and section 38 has no further application to the complaint or matter that is the subject of the hearing.

(6.1) Section 39 (3) (a) to (c) applies to an order made under this section as if the order had been made by the discipline committee.

(7) Subsection (4) applies if the inquiry committee rejects a proposal received under subsection (5).

[9] The following provision of the ATA is relevant to the issue of dismissal:

Summary Dismissal

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(f) there is no reasonable prospect the application will succeed; ...

V DISCUSSION AND ANALYSIS

A. JURISDICTION

[10] The Complainant, who is a Medical Health Officer with the Interior Health Authority, in his application for review expressed his concerns in the following verbatim quote:

Namely, the provision of immunization is a professional act which has been supported by the Canadian Chiropractors Association and further adopted by the BC Chiropractic Association. Widespread public communication which is inconsistent with professional expectations and provincial direction, and which can influence individual health decisions without assessment of the individual health circumstances is unprofessional conduct.

The decision of the Inquiry Committee suggested the actions of [the Registrant] are not contrary to the rules and regulations regarding the members of the College, however, fail to address whether such College rules should have been inclusion of actions directed through mass communications. Beyond vague wording, the lack of explicit explanation is a significant oversight in the expectations of the complainant for rationale in conjunction with the original complaint. The decision of the inquiry committee suggests that no further investigation into the professional conduct related to multiple public communications by [the Registrant] has been undertaken despite the complaint that the issues of concern extended back well before the issuance of one article related to H1N1 and related to persistent and recurrent unprofessional behaviour.

...

There have been prior articles published in the same newspaper which have previously illicit responses as well regarding concerns about what [the Registrant] has opined on immunization. A proper investigation by the College should have obtained and reviewed the entire practice of communications regarding public statements on immunization made by [the Registrant]. The material provided from the College did not provide to myself as the complainant as to what actions were undertaken to adequately review [the Registrant's] practice, however merely suggests that his comments related to H1N1 were reviewed which was not the sole concern expressed in the original complaint.

Also attached is one communication previously provided by the BC College of Chiropractors relative to their acknowledged position of support on immunization and would appear to be in opposition to [the Registrant's] public position.

The College being remiss in its professional duties in providing standards for professional conduct, and the College being remiss in its investigation and disposition of complaints raise questions of the ability to adequately adjudicate on the professional conduct of a member of the College who knowingly and repeatedly has put members of the BC public at risk. To this end, the actions of the inquiry committee is requested to be review, in addition the actions of the College in failing to undertake its duties under the intent of the Health Professions Act now must come under question.

[11] On the issue of jurisdiction, counsel for the Complainant stated as follows:

We submit that whether an appropriate process is followed for making the decision and whether a full rationale is given for a decision are both fundamental to whether a

decision-making process is fair and the decision a fully considered one. Fairness is of course one of the fundamental principles of administrative law. The application is squarely within the jurisdiction of the tribunal within the meaning of subsection 31(1) of the *Administrative Tribunals Act*.

[12] On the other hand, counsel for the College argued on the jurisdictional issue that:

38. In its review of complaint dispositions, the Board has no jurisdiction over the College as a whole and no authority to review College standards or compel the College to create new standards or amend those already in existence.

39. The creation of College standards, and in particular, standards concerning the practice of the profession and ethics for registrants, lies with the College Board, subject to the oversight to the Minister of Health.

HPA, s. 19

40. Further, the Review Board has made clear that its review authority should be restricted to the complaints of individual patients in relation to services provided to them by a health care professional, and should not be drawn into the consideration of a “larger systemic health care issue”.

As I stated above, individual patients who have a concern about the services of a professional provided to them may make a complaint to a college and may seek a review of the College’s disposition of their complaint to the Review Board. While I appreciate the Complainant’s concerns regarding extra-billing as a larger systemic health care issue, such systemic issues are not within the intent or focus of the Review Board which was set up to provide individual members of the public with an independent forum to seek redress about their concerns about an individual registrant of a health profession or about access to the profession as a registrant of a college.

HPRB, Decision No. 2010-HPA-0073(a) paragraph 20

41. While the Review Application ostensibly involves a concern with a single registrant, it is not founded on the complaint of an individual patient and has no relationship to the provision of health care services. Moreover, in its demand for revision of the College’s policy concerning communication with the public, and in particular communications with the public on the issue of immunization, the Review Application shifts beyond any individual concern into a “larger systemic health care issue”.

[13] In my opinion, the argument advanced by the College raises a fundamental issue as to the scope of the jurisdiction of the Review Board under the Act. The conflicting positions are:

- (a) the jurisdiction of the Review Board on reviews is limited to situations where there is an individual and a complaint is made in respect of the health services provided to that individual by a registrant; or
- (b) the jurisdiction of the Review Board is that if a complaint is within the mandate of the inquiry committee to consider, it is within the Review Board’s jurisdiction to entertain by way of an application for review.

[14] In my opinion, the symmetry between the inquiry committee's jurisdiction and the jurisdiction of the Review Board is made clear in the following:

- (a) The Act uses the same term – “complainant” – in the sections governing the inquiry committee and in the sections governing the Review Board: see ss. 33 and 50.6. There is a presumption that the same words in the same statute mean the same thing. The Legislature could easily have defined “complainant” in a more limited way for purposes of Part 4.2, as it has done in other legislation: see *Berg v. Rynveld*, [2006] B.C.J. No. 1027 (C.A.). It has not done so here.
- (b) The Act has, in other sections, expressly chosen to limit the role of complainants. For example, in a discipline hearing, only the respondent and college are parties, while the complainant's role is more limited: ss. 38(2), (2.1). Clearly, the legislature can limit the role of complainants in the Act. It did not do so in Part 4.2.
- (c) The Review Board's statutory responsibility is to review the inquiry committee decisions expressly listed in s. 50.53(1)(c):

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;

- (d) There is no limitation on the listed inquiry committee dispositions the Review Board has a duty to review. To the contrary, the legislature has plainly given the Review Board the mandate to review all such dispositions in accordance with applications made under Part 4.2 of the Act by a person whose complaint gave rise to them.
- (e) On May 7, 2008, on Second Reading in Hansard, Minister Abbot stated as follows regarding the purpose of the HPRB, which statements support the indications of legislative intent listed above:

The review board will have the power to review and take over inquiries that are not completed by the college within a specified time period. The review board will also be able to review the decision on how to resolve a complaint if it is anything less than a full disciplinary hearing.

- (f) While in practice most complaints will arise from the patient-registrant relationship, the reality is that some complaints under s. 32(1) raise legitimate complaint issues for an inquiry committee outside of that relationship.
- (g) For example, a person may file a complaint about the criminal activity of a professional that is incompatible with the person being licensed as a professional. Or a person may become aware of misconduct that the patient is not prepared to complain about, for example, because the patient is receiving illicit drugs or is engaged in a personal relationship with the registrant. These complaints may have serious implications for public protection. While the legislature could have excluded these from the mandate of the Review Board, it is understandable that the legislature chose not to

exclude these from the Review Board's mandate simply because of the identity of the person who brought the complaint to the College's attention.

Accordingly, if a complaint is within the mandate of the inquiry committee to consider, it is within the Review Board's jurisdiction to entertain by way of an application for review.

B. STANDING

[15] The Complainant is a Medical Health Officer ("MHO") with the Interior Health Authority, a statutory officer designated to that post by Cabinet Order under s. 71 of the new Public Health Act, S.B.C. 2008, c. 28:

71 (1) On the recommendation of the provincial health officer, the Lieutenant Governor in Council may by order designate a person as a medical health officer if the person is a medical practitioner who

(a) is a Fellow of the Royal College of Physicians and Surgeons of Canada and holds a certificate in community medicine; or

(b) in the opinion of the provincial health officer, has sufficient training, knowledge, skills and experience to exercise the powers and perform the duties of a medical health officer.

[16] The Ministry has described the new *Public Health Act* as follows:

A new Public Health Act has been created to address current and emerging public health issues including new challenges in communicable disease prevention and control (e.g. SARS, pandemic influenza), health promotion and health protection, chronic disease and injury prevention, poisonings and bioterrorism threats.

[17] The statutory role of Medical Health Officers under the *Public Health Act* includes advising and reporting to government authorities and the public on public health issues. Public vaccination is one of the issues medical health officers often comment on publicly.

[18] In summary, the submission of the College regarding standing was as follows:

(a) The MHO has no standing to commence a review

(b) Reviews should be limited to members of the public

(c) He is not a member of the public

(d) He is a government body, and he has other means to advance his concerns.

[19] To determine if there are any limitations as to who may make an application it is helpful to review the applicable legislation. Pursuant to s. 32(1) a person who wishes to make a complaint against a registrant must deliver the complaint to the registrar of the applicable college. A "person" is defined in s.29 of the Interpretation Act, R.S.B.C. 1996 c.238 as follows:

"Person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to the law.

[20] Accordingly, almost every type of entity may make a complaint. The Act does not expressly in Part 4.2 limit a “person” to a patient or persons in close proximity to a patient. I am of the view that there are no express limitations in the Act on who can make a complaint under s.50.6 and thus the Complainant has standing.

C. NO REASONABLE PROSPECT OF SUCCESS

[21] Once filed, it is open to the Review Board, if it perceives it has sufficient facts, to dismiss an application if it is of the view there is no reasonable prospect of success: s. 31(1)(f) ATA.

[22] The Review Board’s remedial jurisdiction is limited to reviewing those orders the inquiry committee can make: s.50(8). The Review Board has no power over the College apart from the Review Board’s authority to review the work of the inquiry committee.

[23] To the extent that the Application sought systemic remedies such as orders requiring the College to develop standards of professional conduct on public communications and a code of conduct regarding immunization, the Review Board has no jurisdiction to grant such remedies. The Complainant has in fact conceded this in reply and has abandoned these grounds.

[24] Therefore, the only part of the Application that remains live is the objection that the inquiry committee failed in process and substance in considering the Complainant’s complaint that the Registrant was “acting outside the scope of his permissible practice” as a chiropractor.

[25] This allegation has no reasonable prospect of success. It is based on the false premise that the newspaper articles were part of the scope of chiropractic practice. As noted by the College, the registrant was not practicing chiropractic in making public comments on immunization. Public comment on immunization is not part of the chiropractic practice regulated by the College. An inquiry committee cannot find misconduct with respect to conduct the College does not regulate to begin with.

[26] Unless and until the College chooses to regulate this area, which it has not, chiropractors remain free to express their opinions about matters of public concern, along with all other Canadian citizens. The Registrant was not purporting to give chiropractic advice in his newspaper articles, and was not purporting to practice medicine.

[27] The issue raised by the Complainant is an issue of policy for the College as a whole. It is not an issue for the inquiry committee or the Review Board.

[28] Since the complaint, properly understood, did not in this case speak to any of the matters regulated by the College as contemplated in s.33(4) of the Act, the inquiry committee had no mandate to grant any of the remedies requested and properly dismissed the complaint. Since the Review Board’s mandate is no greater than that of the inquiry committee, it is clear that under s.31(1)(f) the Application must be summarily dismissed.

VI CONCLUSION

[29] In making this decision, I have considered all of the submissions before me, whether or not specifically reiterated herein.

[30] For the reasons given above, the Complainant has standing to make the Application, the Review Board has jurisdiction to hear it, and the Application is summarily dismissed pursuant to s.31(1)(f) of the ATA as having no reasonable prospect of success.

“J. Thomas English, Q.C.”

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

January 18, 2011