DECISION NO. 2010-HPA-0073 (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

AND: The College of Physicians and Surgeons of British Columbia

AND: Two Physicians and Surgeons

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

DATE: Conducted by way of written submissions concluding on July 16, 2010

APPEARING:
For the Complainant: Self-represented
For the College: Lara Zee, Counsel
For the Registrant: Nevin Fishman, Counsel

PRELIMINARY ISSUE OF JURISDICTION

I DECISION

[1] Upon considering the Complainant’s application for review dated April 27, 2010 (the “Application”) seeking a review under section 50.53(1)(c) and (d) of the Health Professions Act (the “Act”) and considering the submissions of counsel on behalf of the College and the Registrants that the Health Professions Review Board (the “Review Board”) lacks jurisdiction to consider the Application, it is the Review Board’s decision that it does not have jurisdiction to review the Application and, therefore, the Application is dismissed pursuant to section 31(1)(a) of the Administrative Tribunals Act (the “ATA”).
II INTRODUCTION

[2] The matter that the Complainant seeks to have reviewed by the Review Board stems from the Complainant’s systemic concerns over what he describes as an unethical “scheme used by non-contracted private ophthalmology clinics to charge patients directly for an insured service.” The Complainant alleges that the College of Physicians and Surgeons (the “College”) is aware of this arrangement, and “appears to passively facilitate the operation of this scheme in B.C.” He urges the Review Board to accept his Application on behalf of all “patients caught in this arrangement [and who] are elderly, dependent, poorly informed, and often unwilling or unable to challenge a professional.” He states that the College’s “attempt to dismiss the complaint as a billing issue fails to address the ethical component of the matter” and that his purpose in requesting a review “is to encourage the College to alter its unnecessarily restrictive interpretation of its responsibility in order to serve and protect the public, as well as the patient.”

[3] Prior to accepting the Application, the Review Board wrote to the parties by letter dated May 20, 2010, providing an opportunity for the parties to make submissions on the question of whether or not the Review Board has jurisdiction over, or ought to consider, the Application.

III ISSUE

[4] The issue to be determined at this preliminary stage is whether the Application discloses a matter that is within the jurisdiction of the Review Board to consider and therefore whether the Application should be accepted for review or dismissed.

IV RELEVANT LEGISLATION

[5] The provisions of the Act that are relevant to this issue are set out below.

Powers and Duties of the Review Board

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

(a) on application under section 50.54(2), to review a registration decision;

(b) on application by a registrant or complainant under section 50.57(1), to review the failure, by the inquiry committee, to dispose of a complaint made under section 32(1) or an investigation under section 33(4) within the time required under section 50.55;

(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) to develop and publish guidelines and recommendations for the purpose of assisting colleges to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair.

[6] The following provision of the ATA is also relevant here:
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:

(a) The application is not within the jurisdiction of the tribunal; ...

V DISCUSSION AND ANALYSIS

[7] On April 27, 2010, the Complainant, who is a practicing ophthalmologist in BC, wrote to the Review Board asking for a review of the decision of the College issued April 14, 2010, declining to accept his complaint on the basis that it was outside of the College’s jurisdiction. In its letter the College stated that “Your concerns with respect to the billing practices of your ophthalmology colleagues are not within the scope of the College’s authority to review and adjudicate.” The College went on to advise that it “will continue to review and adjudicate complaints or concerns submitted by individual patients and will correspond with those patients directly.” The College advised the Complainant that the Ministry of Health Services (MOHS) and Medical Services Commission (MSC) are empowered under legislation to review such allegations of extra-billing.

[8] In support of his submission to the Review Board the Complainant states that:

Cataract extraction is an insured medical service for which British Columbians pay with an insurance fee. Physicians are prohibited by law from extra-billing for this service. Direct charges for any materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of an insured service are not permitted (Medicare Protection Act – sect. 17(1b)). The exception, direct sale of a lens implant from physician to patient, must be a not-for-profit transaction. (http://www.health.gov.bc.ca/msp/infoben/benefits.html#extra)

[9] His concern is that despite public insurance coverage, a large percentage of patients in the community where he practices pay for private cataract extraction where the surgeon bills the patient a thousand dollars or more per eye, in addition to the fee paid by the Medical Services Commission. He states that in BC the College and “the Government [are] well aware of the presence of this scheme” and that “the Medical Services Commission has chosen to ignore this contravention of the Canada Health Act and the B.C. Medicare Protection Act.”

[10] The Complainant alleges that the College is “responsible for the maintenance of ethical standards amongst physicians practicing in BC. There is both an ethical component as well as a commercial interest in the setting of a fee for a medical service.” He asserts that the College’s refusal to consider his complaint on the grounds that it is essentially a billing dispute fails to address the ethical component of the matter. The Complainant believes that the College is in a unique position to fully understand and appreciate the manner in which private operating rooms do business and that the College “has a role in dealing with registrants involved in an unethical scheme that willfully and systematically abuses professional privilege, betrays the trust of the patient, and violates the ethical standard of the profession.”
[11] He further asserts that regardless of the reasons the College has disposed of his complaint, the Review Board has jurisdiction to consider the Application “on the basis of both sub-sections 50.53(1)(c) in the interest of the complainant, and 50.53(1) (d) in the larger interest of the public. “

[12] The College takes the position that the complaint does not fall within the scope or authority of either the College or the Review Board to adjudicate or review and seeks a dismissal of the Application under section 31(1)(a) of the ATA. In support of its position the College submits that the Complainant is not a member of the public complaining about medical care received from a College registrant. His complaint is brought in his capacity as a physician and registrant against two other registrants who are practicing ophthalmologists in his community whom he alleges are illegally billing patients privately for cataract surgery, contrary to Provincial health care legislation.

[13] In support of its position the College points out that:

…the Canada Health Act, R.S. 1985, c. C-6 and Medicare Protection Act, R.S.B.C. 1996, c. 286 (the “MPA”) set out the framework for publically funded healthcare services within Canada and BC. The legislation does not allow for private payment of an additional fee (sometimes referred to as extra-billing) for medically necessary insured services. In other words, physicians are prohibited from accepting private payment for a publically funded procedure or extra-billing for that procedure. Both Acts define their own remedies for noncompliance. For example, a physician who direct or extra-bills may be cancelled from enrolment in the Medical Services Plan and prohibited from billing the public system at all [s. 15 of the MPA]. Under the Canada Health Act, provincial governments may be fined by the Federal government for allowing instances of private payment and may have their federal transfer payments reduced.

[14] The College asserts that it does not administer the MPA or Canada Health Act and that its duties under the Health Professions Act “do not extend to managing the provision and payment of publically funded medical services in the Province”, which powers are instead conferred under the MPA to the Medical Services Commission. It further asserts that the legislative framework under the MPA sets out a more appropriate forum than the College complaint process for regulating, reviewing and adjudicating concerns about alleged illegal billing practices of physicians practicing in BC.

[15] Counsel on behalf of the two Registrants named in the complaint takes a similar position and submits that the Application should be dismissed as outside the jurisdiction of the Review Board to address. The Registrants argue that the threshold issue raised in the complaint is one respecting billing practices for ophthalmology services and that any complaint in respect of billing practices should be directed to the Medical Services Commission (MSC), not the College or the Review Board. Both the College and the Registrants also point out that if the MSC was to conclude that certain billing practices were inappropriate, then the MSC is required to refer such suspected physician misconduct to the College, who would then conduct its own investigation to determine if disciplinary action against the registrant was warranted.

[16] In support of their position the Registrants point out that:
The MPA constitutes the MSC and empowers the MSC under s. 5(1)(c) to determine “the services rendered by an enrolled medical practitioner, or performed in an approved diagnostic facility, that are not benefits under this Act”. To avoid any doubt about the jurisdiction of the MSC, section 5(1)(j) empowers the MSC to “… determine whether a service is a benefit or whether any matter is related to the rendering of a benefit.”

Equally important are the MSC’s broad powers to investigate, and for cause, after hearing, cancel a practitioner’s enrolment. Cause is defined in section 15 to include improper billing in accordance with sections 17 or 18 of the MPA.

[17] The College concedes that its mandate and responsibilities include the review of ethical concerns involving its registrants, but suggests that these cases should be adjudicated based on specific case facts and merits. It further confirms that it will review specific complaints involving the billing practices of its registrants which may raise concerns about unprofessional or unethical conduct and that individuals with specific concerns about the conduct of their individual physicians can contact the College directly to file their complaints. However, the College maintains that it lacks jurisdiction under the Act to review the Complainant’s general concerns that his colleagues are billing privately for cataract surgery in contravention of the legislation. I agree.

[18] If any individual patient has concerns about the services rendered by a registrant, including related to any fees or charges levied for those services, he or she may make a complaint to the college and the disposition of that complaint may be reviewable by the Review Board. However, I find that the complaint in this case involves larger issues that in pith and substance are matters that ought to be determined and resolved by the MSC and the MOHS under the MPA and not under the review powers given to the Review Board under the Health Professions Act.

[19] Further, I find that this is not the type of complaint that falls within the proper focus of the complaint process set out in the Act, nor is it the proper role of the Review Board to consider this type of systemic issue, particularly where, as here, there is a more appropriate forum specifically empowered to deal with these issues. In my view jurisdiction on matters of billing rests primarily with the MSC under the MPA. That is the appropriate forum to address the Complainant’s concerns. I agree with the submissions of counsel for the College and the Registrant that this is not a matter within the jurisdiction of the College, and hence cannot be a matter within the review power of the Review Board.

[20] 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.

[21] The Complainant himself refers to two patients who he has assisted with individual complaints. Those patients may avail themselves of the delayed investigation provisions in section 50.57 of the Act if the College’s investigation is not completed within the
legislated timeframes in section 50.55 and/or once the College has made a disposition, they may seek a review of that disposition before the Review Board.

[22] However, there are other forums better able to address the Complainant’s systemic concerns including the Ministry of Health Services and the Medical Services Commission. The Review Board complaint review process is not the appropriate forum to address those issues.

[23] Finally, in regard to the Complainant’s submission that the Review Board has jurisdiction to consider the systemic issue in the larger interest of the public under its power to publish recommendations and guidelines under section 50.53(a)(d) of the Act, I do not find my powers under that section to be of assistance to the Complainant in this case. This power is afforded to the Review Board separate and apart from its mandatory individual inquiry committee and registration review processes and cannot be invoked by an individual, on application, as a complaint.

[24] The Review Board’s recommendations authority is discretionary and will be exercised on the basis of the priorities and resources of the Review Board. The current focus of the Review Board is on ensuring fair registration and investigation practices amongst the self-regulated health professions colleges. Recommendations and guidelines will be developed and published by the Review Board on the basis of issues that come to our attention through the operation of our complaint and registration review mandates to ensure that college procedures for addressing complaint and registration matters are transparent, objective, impartial and fair.

VI  CONCLUSION

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

[26] For all the reasons given above, I find that the Review Board does not have jurisdiction to consider the Complainant’s Application and accordingly it cannot be accepted for review and is summarily dismissed pursuant to s. 31(1)(a) of the ATA.

“J. Thomas English, Q.C.”

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

August 19, 2010