DECISION NO. 2010-HPA-0147(b)

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

BETWEEN: The Complainant

AND: The College of Physicians and Surgeons of BC

AND: A Physician

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

DATE: Conducted by way of written submission concluding on November 16, 2011

APPEARING: For the Complainant: Dr. Francois A. Theriault, Agent

For the College: Shaleen Kanji, Counsel

For the Registrant: Nevin Fishman, Counsel

I DECISION

[1] Upon considering the Application for review of a decision made by the Inquiry Committee, I order that this matter be referred back to an Inquiry Committee to fulfill the directions set forth in paragraph [45] following.

II INTRODUCTION

[2] This is an unusual case in that the detailed substantive argument that could be submitted on behalf of the Complainant did not surface at the time the matter was being adjudicated by the College but rather when the matter was under review before the Review Board in this Application.

[3] There is little question that this Application is part of a political campaign being waged by the Agent against “illegal billing for cataract surgery at private clinic… in B.C.”, (per the newspaper article at page 23 of the Record). The Agent is a physician and surgeon who specializes in Oculoplastic and Lacrimal surgery.
The issue of “illegal billing” has been before the Review Board on a previous occasion and, as the Agent acknowledged, as a result of Decision No. 2010-HPA-0073(a) that issue is not within the jurisdiction of the College and/or the Review Board.

The jurisdictional grounds upon which the College may hear complaints against a Registrant are set forth in s. 33(4) of the Act, of which two grounds therein are relevant in this matter, being paragraphs (c) and (d) which read as follows:

(c) professional misconduct or unprofessional conduct;
(d) competence to practice the designated health profession;

Section 26 of the Act further defines “professional misconduct” as including sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession.

The disposition was made by an Inquiry Committee which had presented to them a significant portion of the Record (pages 162-282) but not the detailed allegations set forth in the Statement of Points filed with this Application which included an additional 97 pages of other documents sought to be introduced under s. 50.6(7) as “evidence that is not part of the record as reasonably required by the review board for a full and fair disclosure of all matters related to the issues under review.”

III PRELIMINARY ISSUE – ADDITIONAL EVIDENCE

The issue that arises when the Complainant submits material evidence that was not part of its original complaint is to reconcile the interests of the Complainant, the College and the Registrant while keeping in mind the goal of the Act and the Review Board’s role therein in ensuring that the process is transparent, objective, impartial and fair (see Act s. 50.53(d)).

The interest of the Complainant is that she has the opportunity to present to the Inquiry Committee her evidence supporting her allegations and that the process is objective, impartial and fair.

Similarly the Registrant interest is that he be made aware of the allegations against him and have an opportunity to respond and introduce on his behalf evidence and submissions that may have a relevant bearing on the matter to be decided by the Inquiry Committee.

The College for its part wishes to have before it all relevant evidence and submissions on the matter in dispute in order that it may deliver a judgment that is objective, impartial and fair. To fulfill the foregoing, the Act enables the Inquiry Committee to appoint an inspector, s. 27(1), and then grants them the powers, set out in s. 28 which reads as follows:

28 (1) During regular business hours, an inspector may, subject to any limits or conditions imposed on the inspector by the inquiry committee, investigate, inquire into, inspect, observe or examine one or more of the following without a court order:
(a) the premises, the equipment and the materials used by a registrant to practice the designated health profession;

(b) the records of the registrant relating to the registrant’s practice of the designated health profession and may copy those records;

(c) the practice of the designated health profession performed by or under the supervision of the registrant.

(2) The inquiry committee may direct an inspector to act under subsection (1) or undertake any aspect of an investigation under section 33.

(3) If an inspector acts under this section as a consequence of a direction given under subsection (2), the inspector must report the results of those actions in writing to the inquiry committee.

[12] In addition, the Inquiry Committee may and often does obtain the opinions of others, usually physicians and surgeons, who have specialized knowledge of the matters in issue and thus are in a position to render an opinion as to whether “the conduct or competence to which the matter relates is satisfactory”; see Act s. 33(6)(a).

[13] So the issue becomes what is the Review Board to do with the additional evidence in this matter that is contained in the Statement of Points. Often when additional relevant evidence is raised which was not before the Inquiry Committee the Application is adjourned and referred back to the Inquiry Committee so that they may examine the additional evidence and then determine whether any change ought to be made to their original decision. That did not happen in this matter.

[14] The sequencing of the Act is of assistance in dealing with the issue of additional evidence. The primary rule is set forth in s. 50.6(6) that a review is a review on the record. This is immediately followed by s. 50.6(7) which reads:

(7) The review board may hear evidence that is not part of the record as reasonable required by the review board for a full and fair disclosure of all matters related to the issues under review.

[15] Therefore, the Review Board has to determine if the evidence that is not part of the record (the 97 pages) is reasonably required for a fair and full disclosure of all matters related to the issued under review. It is important to note that if the additional evidence discloses a probable breach of one of the grounds set forth in s. 33(4), even if not raised by the Complainant in the original Application, the Review Board has an obligation to ensure that the College takes such information into account in making its decision.

IV BACKGROUND AND FACTS

[16] The Complainant was referred to the Registrant by her family physician to determine the courses of action available to her in connection with various issues involving her eyesight.

[17] On February 13, 2008, the Complainant signed informational and consent forms authorizing the Registrant to perform cataract extraction with intraocular lens implantation and astigmatism correction on the Complainant’s left eye. The
informational and consent forms all of which are part of the Record described the basic procedures, risks, benefits, possible complications, alternatives to and costs of cataract surgery and surgical astigmatism correction, which included a condition referred to as droopy eyelids. The surgery was performed by the Registrant on the same day at a private clinic in which the Registrant has an interest. The surgery was uneventful.

[18] On February 14, February 18, and March 5, 2008, the Complainant attended at the Registrant’s office for standard post-operative care. The Complainant presented with “no specific complaints” at each of the aforementioned attendances.

[19] On March 26, 2008, the Complainant signed informational and consent forms authorizing the Registrant to perform cataract extraction with intraocular lens implantation and astigmatism correction on the Complainant’s right eye. The informational and consent forms all of which are part of the Record described the basic procedures, risks, benefits, possible complications, and alternatives to cataract surgery and surgical astigmatism correction, which included a condition referred to as droopy eyelids. The surgery was performed by the Registrant on the same day at the same private clinic referred to above. The surgery was uneventful.

[20] On March 27, 2008, the Complainant attended at the Registrant’s office for standard post-operative care. The Complainant presented with “no specific complaints.”

[21] On April 3, 2008, the Complainant attended at the Registrant’s office complaining of drooping eyelids, a condition known as ptosis. The Registrant recommended repair of the Complainant’s ptosis through surgery and suggested the Complainant see Dr. B, an ophthalmic surgeon in Vancouver, BC. The Registrant also noted that the Complainant had some residual post-operative astigmatism which could be corrected.

[22] On July 16, 2008, the Complainant attended at Dr. B’s office. Dr. B examined the Complainant. He recommended treatment of the Complainant’s bilateral ptosis by levator resection. The Complainant agreed to this procedure, which was performed on July 21, 2008, in Vancouver. The Complainant advises that her out of pocket expenses to travel to Vancouver for the procedure are approximately $1,000.

[23] On July 28, 2008, the Complainant attended at the Registrant’s office for a follow-up appointment. She presented without specific complaints. The Registrant noted the Complainant was healing well from the ptosis repair.

[24] On July 30, 2009, the Complainant filed a complaint with the College which was mostly concerned with the fees she was charged although she raised the issue as to why the surgeries could not have been performed in the local hospital. She also had the Agent look at her medical file and he advised her she did not have the astigmatic keratotomy (“AK”) surgery she had signed for and was charged for.

[25] As a result of the complaint, the College requested a response from the Registrant.

[26] On October 5, 2009, the Agent wrote to the College presenting his technical interpretation of the services provided to the Complainant by the Registrant. The Agent
first analyzed the fees charged which he submitted led to three ethical concerns or questions that should be examined by the College being:

(a) patient autonomy, in that the Complainant was not advised of less expensive public alternatives;

(b) why the Complainant was not informed that public hospitals were available for certain procedures; and

(c) why AK surgery was not performed but apparently charged for.

[27] On October 27, 2009, the Registrant responded that the cost per eye was to deal with astigmatism and that treatment in his private clinic could include a variety of treatments or techniques such as incision placement, incision extension, limbal relaxation, astigmatic keratotomy, toric lens implantation or excimer laser surgery. The fee charged was a composite fee and was not dependent on which method of treating astigmatism was finally chosen.

[28] On October 28, 2009, an inspector for the College met with the Complainant to obtain further information regarding her complaint against the Registrant.

[29] The inspector's report entitled “Note to File” was given to the Complainant who made certain additions and signed it on March 10, 2010 with manual amendments and again in its final form on April 1, 2010. There were four specific allegations made by the Complainant against the Registrant being:

(a) that she was advised that lens implants had to be undertaken in his private clinic as opposed to a public hospital;

(b) that she was overcharged for the cost of a foldable lens;

(c) that she would have AK eye surgery to correct her astigmatism when she didn’t; and

(d) that she was unnecessarily referred to a Vancouver ophthalmologist.


[31] On August 3, 2010, the College issued its disposition letter which is the subject matter of this Application.

[32] In her Statement of Points made as part of the Application to the Review Board some serious allegations are made against the Registrant including:

(a) deceptive medical records regarding the Complainant;

(b) inappropriate diagnosis for financial gain;

(c) false advice regarding availability of a public hospital;

(d) a fraudulent composite fee;

(e) lack of a composite fee alternative;
(f) lack of an astigmatism treatment plan;
(g) false statements in the medical file of the Complainant regarding incision placement;
(h) false claim regarding an astigmatism decrease;
(i) inappropriate intraocular lens mark-up; and
(j) a breach of the College’s conflict of interest policy.

[33] To support her Statement of Points, the Complainant is requesting that 97 pages of additional information or evidence be considered by the Review Board pursuant to s. 50.6(7) quoted above and below.

50.6 (7) The review board may hear evidence that is not part of the record as reasonably required by the review board for a full and fair disclosure of all matters related to the issues under review.

V ANALYSIS

A. Alleged Illegal Billing

[34] As previously mentioned in paragraph [4] above and as decided by Decision No. 2010-HPA-0073(a) this issue is beyond the jurisdiction of the Review Board and the College.

B. Allegations within jurisdiction

[35] As also previously mentioned in paragraph [5] above, the matters that are relevant to the College, to this Review and in respect of which a disposition needs to be made are whether with respect to s. 33(4)(c) and (d), there has been professional misconduct or unprofessional conduct on the part of the Registrant and/or was the conduct or competence of the Registrant in respect of the matters complained of satisfactory (s. 33(6)(a)).

C. Professional misconduct or unprofessional conduct (s. 33(4)(c))

[36] The allegations that need to be addressed by the College under this ground appear to be:

(a) was there deception in the medical records of the Complainant forwarded to the College by the Registrant?
(b) was the Complainant misled as to her need for treatment in order to provide financial gain to the Registrant?
(c) was the Complainant misled as to the need to have the procedures performed in a private clinic as opposed to a hospital?
(d) was the blanket offering of astigmatism correction of any kind to all patients for a composite fee fraudulent, as alleged by the Complainant?
(e) in accordance with College policy, was an opportunity not to agree to a composite fee provided to the Complainant.
(f) Is the alleged failure by the Registrant to inform the Complainant of:
   (i) his financial interest or arrangement with the manufacturer,
   (ii) the wholesale cost of the item and the mark-up;
   (iii) the availability of the same or a similar product elsewhere, and,
   (iv) documented evidence that describes the validity of the product and provides sufficient information for a patient to make an informed decision
   (v) a misconduct issue?

D. Competence to practice the designated health profession

[37] The allegations of the Complainant raise the following “competence” issues which need to be addressed by the College:

   (a) does the alleged failure to have a treatment plan for AK or limbal relaxing incisions in the medical file of the Complainant raise a competency issue?;
   (b) does the alleged failure in incision placement raise a competency issue?;
   (c) does having both cataract extraction incisions placed in a standard position without regard for astigmatism control, as alleged, raise a competency issue?;
   (d) is the alleged intraocular lens mark-up allegation an “illegal fees” issue or a breach of College policy issue?

E. Additional Evidence

[38] As mentioned the Complainant has filed an additional 97 pages of materials which are not part of the Record and the issue is whether they are reasonably required for a full and fair disclosure of the matter under review.

[39] As mentioned, it is regrettable that the College in the first instance did not have the Statement of Points of the Complainant and the additional materials before them prior to making a disposition of the complaint. It is for this reason that my decision does not address the usual issues of adequacy of investigation or reasonableness of the disposition. As noted at the beginning of this decision, this is a rare case in which substantive information that could have a significant impact on the Inquiry Committee’s deliberations was not before the Committee – and as far as I can determine, the absence of such information was in no way the fault of the College.

[40] I also wish to make it clear that the Review Board is not to be used as a “side door” to put information before the Inquiry Committee that would not normally form part of its investigative materials. The Complainant in any such proceeding has a responsibility to share with the Inquiry Committee all relevant information in his/her possession that could reasonably have a bearing on the Committee’s deliberations. However, I also recognize that a typical lay person will not normally be in a position to adequately understand or obtain such information, and that many complainants who take an active interest in their complaint to the College will gain a measure of understanding over time. These complainants may, subsequent to their submission to the Inquiry Committee, come into possession of information that could have, and should
have, been before the Inquiry Committee to enable it to comprehensively address the many issues arising out of a complex series of allegations.

[41] Where such circumstances arise I think that it is in the interests of justice that an Inquiry Committee be reconvened with the appropriate specialists to consider the information presented in its entirety. The Inquiry Committee may choose to extend the scope of its original investigation in order to test the information now before it and determine what to accept as evidence; I would endorse this practice, even at the cost of lengthening an already lengthy process. As a matter of fairness, the Registrant should of course have access to and be provided adequate opportunity to respond to this additional information.

[42] I recognize that this Application may be part of a campaign being waged by the Agent against practitioners such as the Registrant. Nevertheless, the allegations - and I wish to make it clear that at this stage of the proceedings these are merely allegations and not proven facts – raise very serious issues that only professionals in the ophthalmology community and others with expertise within the College ranks can responsibly answer. Certainly, I as Panel Chair do not have that expertise nor do any other members of the Review Board.

[43] As additional material filed by the Complainant may be relevant I am not prepared to exclude any of it at this time in order that the Inquiry Committee may consider all of the arguments and evidence presented by the Complainant before issuing its disposition.

VI CONCLUSION

[44] Pursuant to s. 50.6(8) I may do any of the following with this Application:

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

[45] I am sending this matter back to the Inquiry Committee with the following directions:

(a) the Inquiry Committee that hears this matter is to include an ophthalmologist(s) and/or have opinions provided to the Inquiry Committee by persons who have expertise in the issues raised in the Statement of Points of the Complainant;
(b) the Inquiry Committee is to respond to the matters raised in paragraphs [36] and [37] above;
(c) the Inquiry Committee is to advise all parties of the disposition within a reasonable time as agreed to by the College and the Review Board; and
(d) after the disposition has been distributed to all parties the Complainant will have 30 days from receipt to file a fresh application under s. 50.6(1) if she so
desires at which time the Review Board will determine if there has been an adequate investigation and/or a reasonable disposition, s. 50.6(5).

VII APOLOGY

[46] Due to circumstances internal to the Review Board that have since been rectified, the Review Board apologizes for the excess time it has taken to process this Application.

“J. Thomas English”

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

February 21, 2013