DECISION NO. 2011-HPA-120(c)

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 COMPLAINANT

AND: The College of Physicians and Surgeons of Bc COLLEGE

AND: A Physician REGISTRANT

BEFORE: Judith Berg, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on May 17, 2013

APPEARING: For the Complainant: Roy W. Millen, Counsel
For the College: Sarah Hellmann, Counsel
For the Registrant: William S. Clark, Counsel

I DECISION

[1] Upon reviewing the Application under s. 50.6 of the Act, I order that the matter be sent back to the Inquiry Committee with directions to further investigate the complaint.

II INTRODUCTION

[2] The Complainant, a physician, applied for a review of the disposition of the College regarding his complaint of unprofessional conduct by another physician (the “Registrant”). The Complainant does not believe the Inquiry Committee addressed the seriousness of his complaint; he also asserts that the College did not provide an appropriate rationale for their decision.

III BACKGROUND, FACTS AND EVIDENCE

[3] On October 8, 2010, the Complainant filed a complaint with the College concerning the conduct of the Registrant. The Complainant alleged the Registrant made false statements and insinuations concerning him to other physicians and hospital administrators in letters and in hospital departmental meetings. He provided two letters and the minutes of two hospital meetings as evidence.
[4] The Complainant claims the unprofessional behaviour by the Registrant is contrary to the Canadian Medical Association (the "CMA") Code of Ethics, article 48 which reads “avoid impugning the reputations of colleagues for personal motive; however report to the appropriate authority any unprofessional conduct by colleagues,” and article 52 “treat your colleagues with dignity and as persons worthy of respect”.

[5] The Complainant further stated the “numerous false statements and insinuations” by the Registrant “have caused and are causing devastating harm to his reputation, practice and personal affairs.”

[6] The Registrant was asked to respond to the complaint and he replied in a letter dated March 14, 2011. He denied making statements that would harm the reputation of the Complainant, contested the allegations as being false, provided information of his past unsatisfactory business arrangement with the Complainant and gave an account of statements he made in the two hospital meetings.

[7] In a letter dated May 13, 2011 the Complainant responded to the Registrant’s March 14, 2011 letter with a continuation of the allegations and a denial of the Registrant’s version of events.

[8] The Inquiry Committee found that the complaint did not engage the jurisdiction of the College as set out in s. 16(1)(a) of the Act “to serve and protect the public.” In the College’s view, this complaint did not concern the Registrant’s clinical care or medical judgment, and patients had not been affected by the Registrant’s conduct. The Inquiry Committee concluded the complaint was a disagreement between two professionals and dismissed the complaint pursuant to s.33(6)(a) of the Act.

[9] The Complainant applied to the Review Board on July 21, 2011 claiming that the Inquiry Committee did not properly investigate the facts of his complaint, failed to consider his written response of May 13, 2011, erred in determining his complaint was “a disagreement between two professionals,” and was incorrect in claiming that the College’s jurisdiction is limited to complaints regarding a Registrant’s clinical care and medical judgment that affects patients. The Complainant further argued that the Inquiry Committee erred in law in that it made no finding that the complaint was “trivial”, “frivolous”, “vexatious” or “made in bad faith or that the conduct or competence to which the matter relates is satisfactory” which is a precondition for dismissing a complaint pursuant to s.33(6)(a) of the Act.

[10] In previous decisions of this Board, the Summary Dismissal Application was denied (2011-HPA-120(a)) and it was determined that the hearing would be conducted as a written hearing (2011-HPA-120(b)).

[11] Counsel for the Complainant submits that the College failed to comprehend the seriousness of the complaint and to reasonably fulfill its statutory mandate to enforce standards of professional conduct. Counsel asserts that the Complainant’s May 13, 2011 response letter was not part of the evidence submitted to the Inquiry Committee and this represents a procedural error and is prejudicial to the Complainant for a fair disposition of his complaint.

[12] Counsel for the College submits the Complainant’s May 13, 2011 response letter was submitted to the Inquiry Committee and was part of the Record but was omitted in
the June 21, 2011 disposition letter. The College argues that the Inquiry Committee took reasonable steps to obtain the necessary information for the investigation of the complaint from both the Complainant and the Registrant, the investigation was adequate and the disposition was reasonable.

[13] Counsel for the Registrant submits that the complaint concerns a disagreement between two physicians and does not involve the Registrant’s clinical care, medical conduct that affects patients or the general public. Counsel further submits that the mandate of the College is to serve and protect the public, not to adjudicate personal disputes between Registrants.

[14] Counsel for the Complainant submits in their reply that the investigation of the complaint was inadequate and unfair and that the College failed to fulfill its statutory mandate to enforce standards of professional conduct among Registrants. Counsel further states the disposition was unreasonable and that the College erred in dismissing the complaint pursuant to 33(6)(a) of the Act. The Complainant asks the Review Board to send the matter back to the Inquiry Committee with directions.

IV ISSUES

[15] The issues I must decide are:

(a) Did the College fail to recognize its jurisdiction and statutory mandate in the context of this complaint?
(b) Did the Inquiry Committee adequately investigate the facts of unprofessional conduct in the context of this complaint?
(c) Was the Inquiry Committee’s decision to dismiss the complaint pursuant to s.33(6)(a) of the Act reasonable?

V DISCUSSION AND ANALYSIS

A. Jurisdiction and Statutory Mandate

[16] The College’s first argument for dismissal of the Application for Review is on the basis of jurisdiction, arguing the College lacks the jurisdiction to consider this matter, identifying the complaint as a disagreement between professionals. The Inquiry Committee concluded that formal adjudication was not required; rather the Registrant’s concerns would be better addressed by the requisite hospital or Health Authority.

[17] The Inquiry Committee’s rationale for dismissal was that the Registrant’s clinical care or medical judgement was not in question and that patients had not been affected by the Registrant’s conduct.

[18] Lastly the Committee was guided in dismissing the complaint based on an earlier HPRB Decision No. 2009-HPA-0057(a), where the Review Board concluded as follows:

[12] This is self-evidently a financial dispute between two former business associates who have other remedies available to any financial losses one seeks to claim against the other. The courts, not the Review Board, are the proper forum for that sort of litigation.
[19] I find that the Inquiry Committee failed to address this complaint as within the College’s statutory mandate and duty to investigate breaches of professional standards pursuant to s.16(2)(g) of the Act, namely, “to establish, monitor and enforce standards of professional ethics amongst registrants.”

[20] I further find the Inquiry Committee interpreted and dismissed this complaint as a disagreement between professionals and failed to acknowledge the complaint as an allegation of professional misconduct, and as such, within the jurisdiction of the College. The Inquiry Committee is mandated to investigate a Registrant regarding professional misconduct or unprofessional conduct as set out in s. 33(4)(c) of the Act.

[21] It is my view that the Inquiry Committee did not interpret this complaint pursuant to articles 48 and 52 of the College and CMA Code of Ethics. In particular, article 48 which sets out the College’s mandate to acknowledge a Registrant’s responsibility to report to the appropriate authority a colleague’s unprofessional conduct. The College therefore has the mandate and is the appropriate authority to investigate breaches of professional conduct.

[22] The Inquiry Committee erroneously relied on HPRB Decision No. 2009-HPA-0057(a) as a rationale for dismissal. This 2009 Decision was not a complaint concerning professional misconduct, but a complaint concerning an acrimonious business dispute.

[23] It is my opinion that the College failed to execute their responsibility and statutory mandate to enforce standards of professional conduct amongst Registrants pursuant to ss.16(2)(g) and 33(4)(c) of the Act and articles 48 and 52 of the CMA Code of Ethics.

B. Adequacy of the Investigation

[24] The standard I have adopted for assessing the adequacy of this investigation is whether this complaint was investigated diligently. The law applying to the adequacy of an investigation was properly determined in Review Board Decision No. 2009-HPA-0001(a)-0004(a) at paras. [97] and [98]:

[97] A complainant is not entitled to a perfect investigation, but he or she is entitled to adequate investigation. Whether an investigation is adequate will depend on the facts. An investigation does not need to have been exhaustive in order to be adequate, provided that reasonable steps were taken to obtain the key information that would have affected the Inquiry Committee’s assessment of the complaint.

[98] The degree of diligence expected of the College – what degree of investigation was adequate in the circumstances – may well vary from complaint to complaint. Factors such as the nature of the complaint, the seriousness of the harm alleged, the complexity of the investigation, the availability of evidence and the resources available to the college will all be relevant factors in determining whether an investigation was adequate in the circumstances.

[25] It must be noted that the Review Board has determined in prior decisions that not all complaints will require a College to pursue every possible avenue of investigation, but a Complainant is entitled to an adequate investigation.
The Inquiry Committee reviewed on the Record the following:

(a) correspondence from the Complainant with enclosures dated October 8, 2010
(b) correspondence from the Registrant with enclosures dated March 14, 2011
(c) correspondence from Counsel for the Registrant dated March 18, 2011
(d) correspondence from Counsel dated May 13, 2011 *(not included as part of the Record in the Disposition letter)
(e) Report to the Inquiry Committee dated May 12, 2011
(f) HPRB decision 2009-HPA-0057(a)
(g) CMA Code of Ethics

The Inquiry Committee reviewed the Complainant’s written complaint and the written response by the Registrant along with hospital meeting minutes and concluded this was a dispute between two physicians.

The role of the Review Board in assessing the adequacy of an investigation is to determine whether the Inquiry Committee’s investigation provided it with sufficient information to assess the particular complaints made against the Registrant (see McKee v. Health Professions Appeal and Review Board [2009] O.J. No. 4112 (Ont. Div. Ct.).

An investigation does not need to be exhaustive in order to be adequate, but reasonable steps must be taken to diligently assess the facts of the complaint. This complaint was dismissed based solely on the reply letter by the Registrant and the Registrant’s Counsel to a complaint concerning allegations of honesty, competency, unethical billing practices and misuse of confidential patient records.

Given the seriousness of the complaint concerning allegations of professional misconduct, a greater degree of diligence was required by the Inquiry Committee than that shown. The nature of the complaint was serious and the response was lacking.

I am not satisfied that the Inquiry Committee took the necessary steps to investigate the facts of this complaint diligently and to consider its seriousness as an unprofessional conduct complaint before concluding and dismissing the complaint as a professional disagreement. There is no evidence on the Record, or in any other information submitted, that the Inquiry Committee attempted to interview the Complainant, the Registrant or external parties concerning the conflicting allegations of unprofessional conduct.

I find the Inquiry Committee’s investigation is lacking and that they did not conduct a full and adequate investigation into this complaint.

As stated by the Review Board in Decision No. 2010-HPA-0102(c);2010-HPA-0103(c);2010-HPA-0104(c);2010-HPA-0105(c) at para. [59]: “the disposition cannot be sustained because the investigation itself was inadequate.” There is therefore no need to determine the reasonableness of the disposition.
C. Dismissal of Complaint Pursuant to s. 33(6)(a) of the Act

[34] The correct approach in deciding whether an Application for Review is “trivial”, “frivolous” and “vexatious” is to determine whether the complaint made to the College was an abuse of process for the reasons set out in the following paragraphs from Review Board Decision No. 2009-HPA-0052(a):

[44] The term “frivolous” focuses on the substance of the claim. An application will be frivolous where it is, in all the circumstances, readily recognized as being groundless, fanciful, lacking in substance and seriousness, or as wasting the Review Board’s time.

[45] The term “vexatious” focuses on the good faith of the claim. An application whose intent, as determined the circumstances, is to annoy, harass, embarrass, abuse another party or abuse the Review Board’s process, will properly be characterized as vexatious.

[46] The term “trivial” is sometimes considered as being part of the term “frivolous”. However, as noted in a recent decision of the Workers Compensation Appeal Tribunal (Decision No. WCAT 2005-00929), the term “trivial” is properly given independent content in s31(1)(c). Even if a claim is not otherwise frivolous or vexatious, an application may still be branded as “trivial” if the underlying subject matter of the dispute is so objectively insignificant as to be a waste of the tribunal's time.

[35] I find the alleged public allegations by the Registrant of the Complainant’s competency, ethics and honesty cannot be considered to be lacking in substance, seriousness or considered insignificant, as professional conduct and ethics are issues a College is authorized to consider in evaluating a complaint.

[36] Before the Inquiry Committee can dismiss the complaint and take no further action it has to form the view that the conduct of the Registrant did not breach the professional ethics of the College. The Inquiry Committee made no findings of fact nor did it provide an explanation for its conclusion to dismiss the complaint pursuant to 33(6)(a) of the Act.

[37] I find the Application for Review regarding allegations of professional misconduct or unprofessional conduct cannot be considered trivial, frivolous, vexatious, or an abuse of process.

[38] Based on the information the Inquiry Committee had available to it and their expressed reasons for making the disposition, it is my view that the conclusion to dismiss the complaint pursuant to s.33(6)(a) is not supportable.

VI CONCLUSION

[39] I do not accept the Inquiry Committee’s decision that the College does not have jurisdiction or the statutory mandate with this complaint and that the complaint was dismissed suggesting alternate jurisdictions for adjudication.

[40] I find the Inquiry Committee relied solely on written documentation and could have pursued interviews to determine the accuracies of the conflicting evidence.
[41] In my opinion there is no evidence this complaint is trivial, frivolous, vexatious, or made in bad faith. Dismissal of the complaint in such circumstances, without defensible reasons, is not supportable under s.33(6)(a) of the Act.

VII ORDER

[42] For the reasons given above, I order that the matter be sent back to the Inquiry Committee pursuant to 50.6(8) of the Act to proceed as directed in the next paragraph.

[43] The Inquiry Committee may only dismiss the matter after further investigation if it is satisfied that the allegations of unprofessional conduct did not contravene the College’s responsibility and mandate pursuant to ss. 16(2)(g) and 33(4)(c) of the Act and articles 48 and 52 of the CMA Code of Ethics. The investigation shall include interviews with the Complainant, the Registrant and external parties as deemed appropriate, a review of the May 13, 2011 reply letter and the assessment of ethical conduct regarding the distribution of patient information records.

[44] In making this decision, I reiterate that I have considered all of the information, evidence and submissions before me, whether or not they are specifically referred to in these reasons.

“Judith Berg”

Judith Berg, Panel Chair
Health Professions Review Board

October 8, 2013