



Health Professions Review Board

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DECISION NO. 2011-HPA-155(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, (the "Act") for review of a complaint disposition made by an inquiry committee

BETWEEN:	The Complainant	COMPLAINANT
AND:	The College of Dental Surgeons of BC	COLLEGE
AND:	A Dentist	REGISTRANT
BEFORE:	Michael J. Morris, Panel Chair	REVIEW BOARD

DATE: Conducted by way of written submissions concluding on March 23, 2012

APPEARING: For the Complainant: Self-represented
For the College: Jason Herbert, Counsel
For the Registrant: Self-represented

I DECISION

[1] Upon reviewing the decision of the Inquiry Committee of the College in this matter, I confirm the disposition of the Inquiry Committee.

II INTRODUCTION

[2] The Complainant was experiencing pain in his upper molars. He attended the Registrant's clinic for an examination, and after various sessions over the course of a few weeks, the Registrant performed a root canal on the Complainant. Shortly after the root canal took place, the Complainant felt the Registrant had operated on the wrong tooth and complained to the College.

III BACKGROUND

[3] On August 20, 2008 the Complainant attended the Registrant's dental practice complaining of pain in his upper left molar region. The Registrant took x-rays of the suspected area of pain and according to the Complainant, could not identify any

particular tooth that may be causing the pain. The Registrant recommended the Complainant wait a few weeks to see if there was any change to his condition.

[4] The Complainant states that on August 28, 2008 a filling came out from his "upper left 8 tooth". The Complainant attended the Registrant's clinic on September 3, 2008 to advise him of this, and inform him that he had identified the problem tooth. According to the Complainant, the Registrant again advised the Complainant to wait a few more weeks to see if the tooth would settle down and at that time, the Registrant would fill the cavity.

[5] A few weeks later, the tooth was still causing the Complainant pain. He attended the Registrant's office and made an appointment for a root canal. On November 13, 2008 the Registrant performed a root canal on tooth 2.7. When the Complainant returned home, he felt pain from his "upper left 7" tooth (tooth 2.7) and could feel the new filling in that tooth. The Complainant determined that the Registrant had treated the wrong tooth as he believed it should have been the upper left 8 tooth (tooth 2.8).

[6] The Complainant filed his complaint to the College on November 30, 2008.

[7] The Complainant commenced seeing another Dentist who examined the Complainant and stated the treatment on tooth 2.7 seemed fine. The second dentist claimed he could not verify if the root canal treatment was necessary.

[8] On January 19, 2009 the Registrant responded to the College's request for information. The Registrant confirmed he had seen the Complainant on August 20, 2008 and had taken an x-ray of the Complainant's teeth. The x-ray indicated there was a large composite filling in tooth 2.7 that was close to the nerve, and it was likely that tooth was the problem. He confirmed that he suggested the Complainant wait to see if the tooth settles down.

[9] The Registrant also confirmed that after persistent complaints from the Complainant, and several visits to his clinic without appointments, the Registrant finally consented to perform a root canal on tooth 2.7 on November 13, 2008. A few days later, on November 17, the Complainant returned to the Registrant's clinic complaining that tooth 2.8 was painful, and insisting that the Registrant had worked on the wrong tooth.

[10] The College contacted the dentist the Complainant saw subsequent to submitting his complaint to the College. That dentist, who is not subject of a complaint, provided information indicating he saw the Complainant on December 4, 2008. The Complainant related his complaint against the Registrant with that dentist who confirmed that a root canal had been done on tooth 2.7 but that he was not in a position to confirm the Complainant's impression of his previous dental treatment. That dentist also confirmed the Complainant had a small mesial decay on tooth 2.8 that required treatment. Further x-rays were taken on March 15, 2009.

[11] On May 18, 2010 the College contacted the Registrant for a second time requesting further information regarding the Complainant's claim that he had informed the Registrant about the "composite" that had fallen out of his problem tooth during his appointment on September 3, 2008. In his response the Registrant provided a

paragraph of information regarding the September 3rd session but did not comment on whether the Complainant had advised him of the filling having fallen out or not. The Registrant did say that four days after he had completed the root canal, the Complainant came into his office to suggest it was the wrong tooth and at that time noticed "2.8 was missing an MO" (filling).

[12] On August 25, 2011 the Complainant received the disposition of the Inquiry Committee which stated,

Based on the information available, we cannot conclude that [the Registrant] treated the wrong tooth by recommending root canal therapy to tooth 2.7. The x-ray shows a large composite filling near the nerve and no issues with tooth 2.8 to suggest this was the problem.

[13] The Inquiry Committee further stated that while it was appropriate for the Registrant to allow for more time to pass before recommending any treatment, it would have been preferable for him to have referred the Complainant to a specialist for diagnosis. The Inquiry Committee further stated that the Registrant did not document the numerous tests he performed on the Complainant, nor did he document the discussions he had with the Complainant about treatment options. The Inquiry Committee recommended the Registrant take the next available records keeping course offered by the College.

[14] The Complainant filed his application for review on August 25, 2011 which included the following documents:

- (a) original complaint to the College;
- (b) two pages of notes disagreeing with the disposition of the College;
- (c) copies of BC Provincial Court documents pertaining to a small claims matter between the Complainant and the Registrant;
- (d) what the Complainant refers to as [the Registrant's] fake dental record; and
- (e) the College's notice of disposition.

[15] In this review process, the Complainant was given the opportunity to provide his statement of points (SOP). His submission indicated he was relying upon the information provided with his application to the Review Board.

[16] The Registrant also chose not to provide a SOP. Instead he submitted a brief email response questioning the Complainant's accusation that he had changed radiographs.

[17] The College provided a detailed SOP, including a request to enter new evidence to supplement the Record, and provided arguments related to the new evidence submitted by the Complainant in his application for review.

[18] The Complainant exercised his right of final reply by submitting a lengthy submission arguing against the College's SOP. The Complainant also attached a series of x-rays and photographs as new evidence.

IV NEW EVIDENCE REQUESTS**A. Small Claims Court Reply**

[19] This document was filed by the Registrant in reply to a claim brought against him by the Complainant. The College states that they have no objection to the Review Board reviewing this document but states that it is a mere pleading filed in another proceeding and not a statement of evidence. I find the written narrative in this document reflects the same information the Registrant provided to the College during their investigation and provides no additional evidentiary value.

B. Radiographs(X-rays) of Complainant taken by Registrant

[20] Although no x-rays formed part of the Record, there are several references throughout the Record to x-rays taken on August 20, 2008 and November 15, 2008. These x-rays appear to be the same x-rays referenced in the Record, and therefore were considered during the College's investigation. It is not the role of this Review Board to interpret the x-rays but to consider the evaluation of the x-rays by a qualified person and whether this information was included in the investigation. The x-rays themselves are not of any evidentiary value.

C. Photographs of a person's mouth and teeth

[21] The Complainant purports the photographs to be of himself. He references one picture to describe his bite and the other showing a composite filling. I do not see the relevance of these photographs to this review notwithstanding the fact I would find them inadmissible in any event. Due process also requires that all parties to this matter be provided an opportunity to comment on any new evidence submitted. In this case the Complainant included the x-rays and photographs in his final submission and the College and Registrant were not afforded the opportunity to respond. Because I have decided not to consider these items as evidence, I see no reason to delay this matter pending further submissions.

D. Letter to the Review Board from the College dated October 5, 2011

[22] The College submits that the letter corroborates the information in the Record indicating that the College contacted the Complainant to discuss his complaint and that the Complainant declined the invitation, contrary to the position the Complainant takes in his application for review. This letter appears to have been written by the College to advise the Review Board of their attempt to bring both parties together to resolve the matter prior to holding a hearing. It is recognized that any information disclosed during a mediation or alternate dispute resolution process is held in confidence. In this case, no information was disclosed other than the Complainant's unwillingness to participate in a teleconference with the Registrant. The letter also set out the attempts to contact the Complainant during the investigation itself and the Complainant's refusal to speak to the investigator. The Complainant has had the opportunity to view the letter and has provided comments in his final reply. I conclude that this letter is relevant and admissible as it is reasonably required for a full and fair disclosure of all matters under review.

E. Additional telephone records

[23] The additional telephone records include a notation of a telephone voice message left for the Complainant by the College on February 17, 2011 requesting the Complainant call the College, and a further notation of a message received from the Complainant on the same date stating that the Complainant has no further information to provide regarding the investigation.

[24] The College submits that these phone records were part of the Record but they had been inadvertently omitted from the Record when it had been forwarded to all the Parties to these proceedings. The College supports their request to have these records included as relevant to this matter as they relate to information already contained in the Record regarding the College's attempts to contact the Complainant. The Complainant has had the opportunity to view these records and his comments are provided in his final reply. I conclude that these phone records are relevant and reasonably required for a full and fair disclosure.

V DISCUSSION AND ANALYSIS

[25] The Review Board's authorities under the Act are:

s.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

[26] The pertinent parts of Section 50.6 that also apply to this matter are:

50.6 (1) A complainant may apply to the review board for a review of a disposition described in section 50.53 (1)(c).

...

(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

(6) A review under this section is a review on the record.

(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.

VI ADEQUATE INVESTIGATION

[27] The degree of thoroughness required for investigations to be "adequate" depends on the circumstances. 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. [98] and [110]:

[98] A complainant is not entitled to a perfect investigation, but he or she is entitled to an 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.

...

[110] The degree of diligence expected of the College – what degree of investigation was adequate in the circumstances – may well vary from complain to complaint. Factors such as the nature of the complain, the seriousness of 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.

[28] The Record in this matter indicates the College obtained information from both the Registrant (on two occasions) and the second dentist who had treated the Complainant after the Registrant had performed the root canal. The investigator also examined the x-rays taken prior to and subsequent to, the root canal procedure. Prior to rendering their decision, the Record also indicates the College attempted to contact the Complainant to discuss the investigation but was advised by the Complainant that he had nothing to add. I find that the College took the necessary steps to obtain the key information required to conduct an adequate investigation.

[29] The Complainant argues the College withheld key evidence in the form of x-rays that were disadvantageous to the Registrant and that they only accepted the Registrant's version of events. The Complainant also questions whether the x-rays reviewed by the investigator were actually x-rays of the Complainant. I find his argument is contradicted by the evidence presented in the Record and is without merit.

VII REASONABLE DISPOSITION

[30] With respect to the reasonableness of the decision of the Inquiry Committee, and similar to previous Review Board decisions, I look to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para.47 to provide guidance in respect to the issue of reasonableness:

[47] 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.

[31] The disposition of the College was comprised of three components – one stating that they could not conclude that the Registrant treated the wrong tooth by recommending root canal therapy to tooth 2.7. The second component was a finding that it would have been preferable for the Registrant to have referred the Complainant to a specialist to diagnose the problem. The third component found that the Registrant did not properly document the numerous tests he performed on the Complainant or the discussions he had with the Complainant about recommended treatment options. The

College also recommended, and the Registrant agreed, to take the College's Record Keeping Course at the first opportunity.

[32] I find the disposition of the College is reasonable under the circumstances and meets the tests as articulated at paragraph [30] above.

VIII CONCLUSION

[33] For all the reasons set out above, I confirm the disposition of the Inquiry Committee of the College.

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

"Michael J. Morris"

Michael J. Morris, Panel Chair
Health Professions Review Board

September 12, 2012