DECISION NO. 2011-HPA-173(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: Herbert Silber, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on April 2, 2013

APPEARING: For the Complainant: Self-represented

For the College: Jason Herbert, Counsel

For the Registrant: Self-represented

HEARING DECISION

I DECISION

[1] Upon considering the application made by the Complainant under s. 50.6 of the Act, it is my decision that the disposition of the Inquiry Committee of the College is confirmed.

II INTRODUCTION

[2] The Application for Review by the Complainant concerns a complaint filed with the College by letter dated August 26, 2009, supplemented by a further letter dated September 5, 2009 (collectively “the Complaint”).

[3] The complaints arise from the period that the Complainant was a patient of the Registrant between March of 2006 and August of 2009. The Complainant sets out in her letter of September 5, 2009 a series of questions which summarize her allegations
against the Registrant. These include allegations the Registrant failed to refer the Complainant to another dentist when the Complainant reported experiencing ongoing pain with bridge work the Registrant had performed; the failure of the Registrant thereafter to investigate his own work; the improper attribution by the Registrant of the source of the Complainant’s discomfort; and the inability of the Registrant to offer a treatment to alleviate the Complainant’s symptoms of pain. The Complainant further questioned whether the Registrant exercised proper judgement in removing the Complainant’s tooth at location 2.7. In addition, the Complainant sought reimbursement from the Registrant for his alleged failed treatments.

[4] The College investigated the Complaint and the Inquiry Committee determined in a letter of disposition dated September 22, 2011 (“Letter of Disposition”) that no further action was required regarding the Registrant.

[5] Subsequently, on October 19, 2011, the Complainant filed an Application to Review.

[6] During the course of submissions to the Review Board, the Complainant brought forward additional evidence not included in the Complaint, consisting most significantly of photographs of the affected areas of the Complainant’s mouth taken by another dentist in November of 2009 (after the Complainant ceased being a patient of the Registrant).

[7] On July 24, 2012, I ordered the Application for Review to be adjourned to give the College an opportunity “…to review the Complainant’s new evidence and allegations and issue a new disposition if it chooses to.”

[8] On September 11, 2012, the College issued a further letter of disposition (“Supplementary Letter of Disposition”) re-affirming the conclusion contained in the Letter of Disposition that no further action was necessary against the Registrant.

[9] The Complainant and the College both filed Statements of Points and Replies to each other’s Statements of Points. The Registrant made no written submissions to the Review Board.

III ISSUES

[10] The issues I must address in this matter as prescribed by s. 50.6(5) of the Act are two: was the investigation conducted by the College adequate and the disposition reasonable?

IV FACTS

[11] In the Complaint, the Complainant states that she initially saw the Registrant to treat an abscess tooth, 2.7, that had been treated with a root canal therapy several years before by another dentist and was crowned by a bridge. Tooth 2.7 was repaired by an Endodontist chosen by the Complainant. The Complainant states in the
Complaint that she has a “documented history of extreme sensitivity to dental composite... [and because of] adverse reactions to dental materials turned to a dentist [Registrant] known for his concern, testing and caution with patients with such histories.”

[12] The Registrant filled a cavity in tooth 2.5 using a product known as Aqua Inofil Plus (With Sancorn) dental cement. This resulted in an acute painful reaction according to the Complainant. Thereafter the Registrant added a minute amount of the Complainant’s saliva to the dental cement and no painful reaction occurred. There is a dispute between the Complainant and the Registrant as to whose idea it was to use the Complainant’s saliva – the Complainant says it was the Registrant and the Registrant says it was the Complainant.

[13] Following the filling of the cavity at Tooth 2.5, the Registrant placed a new bridge for teeth 2.5 to 2.7 in June 2006 and cemented it in December 2006. The Complainant stated that the “bridge looked great.”

[14] After the bridge work was done in June 2006, the Complainant stated she kept experiencing pain. The Complainant was told by the Registrant that the pain was attributable to teeth 3.5 and 3.7. Thereafter, the Complainant had additional root canal therapy by the Endodontist referred to in paragraph [10] with respect to these teeth between June and November 2006.

[15] In June of 2008 the Registrant, in consultation with the Endodontist, refilled the fillings, which had largely disappeared in teeth 3.5 and 3.7. The Complainant complained that the fillings then done by the Registrant also had largely disappeared within a week after being placed in her mouth, which was denied by the Registrant.

[16] The Complainant in her Complaint suggests that the problem with pain in her teeth in the area of the bridge work done by the Registrant had largely continued throughout the period from when it was placed by the Registrant until she ceased seeing the Registrant in August of 2009.

[17] The Complainant says in her Complaint that the Registrant suggested variously that the pain would settle down or that the cause could be from a “bite” problem. Ultimately, the Complainant says the Registrant identified that tooth 2.5 had decayed, notwithstanding that the Registrant had asserted this could not have occurred because that tooth had been “completely sealed” when the the bridge work was done. The Registrant made several suggestions to the Complainant to try to ameliorate this issue, none of which the Complainant found acceptable because she says of issues with the Complainant’s manual dexterity.

[18] Later, in August 2009, the Registrant extracted teeth 2.5 and 2.7. The Complainant states that a second dentist (“Second Dentist”) she saw shortly after that time told her that the “root canal” on Tooth 2.7 was fine and thought “the tooth should not have been pulled”.

[19] The Registrant’s response regarding tooth 2.7 is as follows:
I suggested that after removing the crown, I might have to rebuild #27 (sic), with glass ionomer or composite, but she reacts to composite and she’s afraid about the glass ionomer, worried that she might dissolve this. Also, I had a concern about the cracks I found in the roots and across the pulp chamber, so long-term prognosis was questionable. Then, she raises questions and fears about the gutta percha and root canal filling, saying she has an allergy to latex.

We discussed all the risks and then entered into a discussion about how to replace the teeth if #27 (sic) was removed. I then showed her demo models of designs for removable partial dentures, talking about different materials to use for this. Because she’s wondering how she would react to these materials given her many allergies, she suggested and wondered about using a gold alloy for a partial denture. I said it was possible, as I had done this before. Of course, implants were considered. She was worried about a reaction to the titanium.

After this considerably extensive discussion, she decided to have #27 (sic) removed as well. Upon completing this discussion, I proceeded with administering local anaesthetic removing the teeth …

[20] The Letter of Disposition recited the specific allegations made by the Complainant and concluded that the records provided by the Registrant including the radiographs and chart notes, which the Inquiry Committee concluded were “extensive and thorough” supported the treatment recommended by the Registrant and his response to the Complainant’s complaints about him. Moreover, the Letter of Disposition states at page 2 with specific reference to the Complaint regarding the removal of tooth 2.7 that:

There is no evidence suggesting that you did not consent to the treatment you received or that the Registrant provided you with anything but dental treatment that was in accordance with your wishes and within the standard of care expected of dentists in BC. Referring you to another dentist would not have been a solution to your concern given that you already rejected every other form of proposed treatment, with the exception of the extraction.

[21] As to the financial component of the Complainant’s complaint, the Inquiry Committee rightly noted that this was not within its mandate to investigate. Moreover, the Complainant takes no issue with this conclusion in her Application for Review.

[22] As a consequence, the Inquiry Committee determined that no further action was necessary and closed its file.

[23] The Review Board received submissions from the Complainant in April 2012 that consisted of photographs taken at the Second Dentist’s office in November of 2009 that the Complainant says support her contention that filling materials other than composite and glass ionomer could have been safely used for her when the Registrant did the fillings of teeth 3.5 and 3.7 in June 2008. This was advanced to support the Complainant’s contention that the materials used at that time washed away shortly after they were placed.
The Complainant also submitted prescription receipts and a prescription pad note for medication to deal with pain in the extraction sites.

The College consented to the receipt of the new evidence, conducted a further investigation and issued the Supplementary Letter of Disposition which concluded that the new information did not alter their earlier conclusion in the Letter of Disposition, noting that there were intervening events that made the photographs an unreliable reference point as to the condition of the fillings when they were placed over a year earlier.

V DISCUSSION AND ANALYSIS

A. Additional Evidence

The College in its Statement of Points seeks to introduce a log of a telephone call ("Log") between its Investigator and the Second Dentist. The most salient part of the Log is the statement by the Second Dentist that the Complainant sought to alter the contents of a letter the Second Dentist sent to the College’s Investigator dated July 10, 2011 during the course of his initial investigation of the Complaint. The Log does not disclose in what way the Complainant allegedly sought to have the Second Dentist alter her Report, other than suggesting to the Second Dentist that it was "incorrect."

The Complainant opposes the introduction of the Log arguing, inter alia, that the College has failed to demonstrate the justification of including this new evidence as part of the Record, as it is required to do pursuant to s.50.6(7) of the Act.

Section 50.6(7) of the Act states:

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.

I am not satisfied that the Log is of assistance because it is equivocal and provides no details. One of the tests I need satisfied before additional evidence is to be admitted, where objected to, is whether the additional evidence - in this case, the Log - would make disclosure more full or complete to enable me to render a full, fair and proper decision. See Decision No. 2009-HPA-0001(a) to 0004 (a). I am not satisfied that the Log meets this test.

Therefore, I am not prepared to admit the Log as part of the Record before me.

B. Adequacy of the Investigation

The interpretation as to what constitutes an “adequate investigation” for Review Board purposes was set out in Decision No. 2009-HPA-0001(a) to 0004(a) (at paras. 97 and 98) and has since been followed by a number of Review Board decisions:
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.

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.

[32] This passage was commented upon recently in Decision No. 2012-HPA-212(a) where it was stated:

[16] In other words, the Review Board will examine whether the College took reasonable steps to find the information necessary to address the complaint given its seriousness, complexity and their ability to access evidence. It is important to understand the Review Board does not re-hear or re-examine the issues. Our role under the law in British Columbia is to perform an independent review function focusing on the investigation and the disposition of the College.

[33] In this case, on receipt of the Complaint, the College wrote the Registrant and asked for his response to the allegations. The Registrant provided a lengthy and detailed response to the issues raised. The College obtained and reviewed the Complainant’s dental records from the Registrant, including radiographs and charts, which were voluminous. The College also sought and received a report as noted earlier from the Second Dentist regarding her treatment of the Complainant as well as a report from a third dentist who was involved in the Complainant’s treatment after she ceased her treatments with the Registrant. As well, the College offered the Complainant a further opportunity (which she declined) to meet with its Investigator to provide any further information she felt might be useful to his investigation and so he could share information received from the Registrant. The Investigator met with the Registrant to discuss the College’s investigation of the allegations against him. Finally, and of some significance, the College readily re-opened its investigation in order to consider the significance of the new evidence that the Complainant brought forward following her filing the Application for Review.

[34] Although there are conflicts in the evidence between the Complainant and the Registrant as noted earlier, the Inquiry Committee does have the discretion to conclude that the conflicting evidence does not call for additional investigation or the need to resolve the conflict (Decision No. 2010-HPA-003(a)). In the circumstances of this case I do not find that the conflicts in the evidence and any failure to resolve those conflicts render either the investigation inadequate or the disposition by the Inquiry Committee unreasonable.
I conclude that the investigation in this case was adequate as that test has been interpreted by the Review Board.

C. Reasonableness of the Disposition

In the Complainant’s Application for Review and in her Amended Statement of Points the Complainant is, to a large measure, asking the Review Board to “rehear” her case. This is beyond the mandate of the Review Board as set out in s.50(5), (6) and (8) of the Act.

The test of what constitutes “a reasonable disposition” is guided by the standard of judicial reviews set out by the Supreme Court of Canada in Dunsmuir v. New Brunswick, 2008 SCC 9. In Review Board Decision No. 2009-HPA-0001(a) to 0004(a), the panel quoted from paragraph [47] of the Dunsmuir decision and stated the following, which I adopt as the correct approach which should be taken in considering the reasonableness of a disposition:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appropriation within the range of acceptable and rational solutions. A court conducting a review of reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. 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.

In considering whether the disposition falls within “the range of acceptable outcomes”, it has been said the two questions to be asked are whether the disposition can be rationally supported by the evidence, and whether the disposition appropriately addresses the major issues presented by the complaint. It is not, however, for the Review Board to decide whether the Inquiry Committee was right or wrong or whether the Review Board may have decided differently; only whether the disposition is transparent, sufficiently justifiable and intelligible. (Review Board Decision No. 2011-HPA-151(a) at paragraph [21-22]).

It is my impression that the Complainant’s unhappiness is driven by what appears to be a genuine feeling of dissatisfaction over the services the Registrant provided to her. However, it must be said that the function of the Inquiry Committee was not to adjudicate the Complainant’s level of satisfaction with respect to the Registrant, but to determine whether he met the appropriate standards of practice. (Review Board Decision No. 2011-HPA 151(a) at paragraph [37]).

I am satisfied based on the Record before me that the decision by the Inquiry Committee is a reasonable disposition based upon the evidence obtained from its
investigation and the law. The disposition by the Inquiry Committee is justifiable, transparent, and intelligible and falls within a range of acceptable outcomes.

VI CONCLUSION

[41] Pursuant to s. 50.6(8)(a) of the Act, I confirm the disposition of the Inquiry Committee.

[42] Accordingly, I dismiss the application of the Complainant.

[43] In making this decision I have considered all of the evidence and submissions before me, whether or not specifically re-iterated in these reasons.

“Herbert S. Silber”

Herbert S. Silber, Panel Chair
Health Professions Review Board

December 3, 2013