DECISION NO.  2011-HPA-174(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 Physicians and Surgeons of BC  COLLEGE
AND: A Physician  REGISTRANT
BEFORE: David A. Hobbs, Panel Chair  REVIEW BOARD
Helen del Val, Panel Member

DATE: Conducted by way of written submissions concluding on July 30, 2013

APPEARING: For the Complainant: Self-represented
For the College: Sarah Hellmann, Counsel
For the Registrant: Lindsay R. Johnston, Counsel

I  INTRODUCTION

[1] The Complainant applies for review of a disposition of the Inquiry Committee to take no further action on her complaint against the Registrant regarding sinus surgery some 30 years ago.

II  BACKGROUND

[2] On November 15, 2010 the College received a complaint form from the Complainant regarding an ear, nose and throat specialist (the “First Physician”) concerning surgery performed on the Complainant’s sinuses in 1981 (the “Complaint”). As is explained later in this decision, the Complainant had named the wrong physician and wrong date of surgery in her initial complaint form to the College (see para. [13]).

[3] After the initial sinus surgery the Complainant said she experienced problems and underwent another sinus surgery in 2000. The Complainant subsequently had a third
sinus surgery in 2010 at which time she reported “a piece of gauze came from my nose (R. Side)”. The Complainant stated in her Complaint that her “sinuses are damaged” and that she has experienced “non-stop pain since 1981 in this facial area”.

[4] The Deputy Registrar wrote the First Physician on December 14, 2010 seeking his response to the Complaint. On December 14, 2010, the Deputy Registrar also wrote the physician who performed the second sinus surgery, reportedly in 2000, requesting a summary of her attendance on the Complainant (the “Second Physician”).

[5] The First Physician replied to the Deputy Registrar on January 18, 2011 advising he could not locate any records and noting the Complainant had two sinus surgeries since his alleged treatment of the Complainant years prior.

[6] The Second Physician replied on February 8, 2011 stating the second surgery was in 1999. The Second Physician could only say the Complainant had bilateral sinonasal disease and she did not use permanent packing, only absorbable packing during the second surgery. The Second Physician made no note of finding any foreign bodies though the Complainant had purulent secretions in her antra (hollow cavities within bony structure) bilaterally. In the report of the procedure performed by the Second Physician it is noted the Complainant had inferior metal windows performed and the inferior turbinates resected surgically in the past.

[7] The record contains a letter dated May 7, 2010 from the physician who performed the third sinus surgery in 2010 (the “Third Physician”). This letter was provided to the Deputy Registrar in the context of a prior complaint made by the Complainant against a different registrant.

[8] The Third Physician’s letter of May 7, 2010 states the Complainant reported she extruded from her nose a foreign body in 2003 and some gauze in 2009. The Third Physician said the Complainant had extensive scarring of the middle meatus and “there could probably be a foreign body in the region”. The Third Physician discussed the situation in detail with the Complainant and the benefits/risks of further surgery. At that time the Complainant declined being placed on the waiting list for surgery. Eventually, the Complainant had the third sinus surgery on February 9, 2010. The Third Physician stated “she may have micro foreign bodies which were not identified on gross examination”. The Third Physician stated the Complainant’s pain was “essentially resolved” and the Complainant was “extremely happy with her outcome.”

[9] The Deputy Registrar wrote the hospital where the alleged 1981 surgery was performed on February 22, 2011 seeking all records from 1981 onwards. The records provided by the hospital contained a November 9, 1982 minor case record describing an operation performed to treat an admitting diagnosis of “persistent maxillary sinusitis”. The summary states “uneventful”. The patient history states the Complainant was admitted for bilateral nasal antral windows. The attending physician was not the First Physician originally named in the Complaint. The pathology report refers to removed turbinate tissue showing chronic inflammation.

[10] The College wrote the First Physician incorrectly named by the Complainant in the Complaint on May 16, 2011 advising no further response was required and his record
would be expunged. The Deputy Registrar wrote on May 17, 2011 the Registrant who performed the sinus surgery on November 9, 1982 (the “First Surgery”) requesting his response to the Complaint.

[11] The Registrant replied on May 30, 2011 advising his relevant records were destroyed. Lacking his notes the Registrant described his usual standard of care in such cases at the time. The Registrant emphasized his practice to remove packing himself and not by the patient as stated by the Complainant in her Complaint. The Registrant did not accept the Complainant’s version of the facts. The Registrant stated it was not unusual for patients with chronic sinusitis to have multiple operations for their condition as did the Complainant in 1999 and 2010.

[12] In the Disposition the Deputy Registrar concluded it was difficult to reconcile the Complainant’s description of what occurred with the Registrant’s description of his routine practice, in particular his practice of not permitting patients to remove their own packing. The Deputy Registrar considered it extremely unlikely the Registrant would have suggested the Complainant remove her own packing, being a single, continuous strip of gauze. The Deputy Registrar noted the Complainant’s nose was carefully inspected by two subsequent treating physicians with no gauze reported found. The Deputy Registrar concluded no regulatory criticism was warranted. The Deputy Registrar noted that while sinus surgery will usually lead to improvement, recurrence of scarring and obstruction will commonly occur.

[13] The Deputy Registrar communicated the disposition of the Complaint to the Complainant by letter dated September 28, 2011 (the “Disposition”). The Complaint was concluded under s. 32(3)(c) of the Act with no further action taken on the Complaint.

III PROCEDURAL HISTORY

[14] The Complainant filed her application for review with the Review Board on October 20, 2011. The Complainant states in her application the Registrant used in 1981 a “hack saw” technique.

[15] One week prior to filing the application for review the Third Physician wrote a letter to a physician dated October 13, 2011, and which the Complainant attached to her application for review (the “October 13 Letter”). The October 13 Letter states: “She had obvious osteoneurogenesis of the bone and significant damage to the area where the turbinates were lateralized. She had large nonfunctional inferior nasoantral windows which were causing some crusting and recirculation. Fortunately she healed very well from an anatomical stand point and all her sinuses have remained open and the scar tissue has not recurred. However, she is left with significant dryness and crusting secondary to the partial loss of her turbinates bilaterally as well as the placement of inferior nasoantral windows which are causing further drying of her nose”.

[16] The parties were directed to and exchanged written statements of points during May through August, 2012. The Complainant’s position was that the October 13 Letter explained the cause of the problems that have plagued her for thirty years being an alleged “hack saw” operation performed in 1982 by the Registrant. The Complainant sought to have the October 13 Letter and the Third Physician’s opinions considered by
the Review Board as additional new evidence. By then, the parties recognized that the Third Physician would be acting as the Complainant’s expert.

[17] In their Statement of Points filed with the Review Board on June 27 and July 20, 2012 the College and Registrant respectively submitted that an adequate investigation had been conducted and a reasonable disposition reached.

[18] The Review Board wrote the parties on September 18, 2012 providing clarification and directions that:

(a) no decision had been made yet on the style of hearing;

(b) the Complainant explain the relevance and purpose of the computer images sought to be added as new evidence; and

(c) the Complainant provide a report setting out the Third Physician’s qualifications and a summary of his opinions and the facts on which the opinions are based.

[19] By letter dated October 15, 2012, the Complainant delivered to the Review Board and parties a letter dated October 1, 2012 from the Third Physician setting out his qualifications and certain opinions (the “Report”). The Report states in a summary manner that the Complainant had “very old fashioned surgery done on her sinuses” that left her with “neurogenic pain from excessive scarring affecting her nerves in the area”. The Third Physician opined that openings were made where there are not supposed to be any openings and her sinuses were not properly opened.

[20] The Registrant advised the Review Board by letter dated October 31, 2012 that the Report was not relevant, and if admitted, the Disposition was still reasonable.

[21] The College advised the Review Board by letter dated November 13, 2012 that the Complainant’s letter of October 1, 2012, was insufficient to satisfy the directions made by the then Panel Chair in her letter of September 18, 2012, and further, inadmissible being unnecessary for a full and fair hearing.

[22] On December 20, 2012, the then Panel Chair wrote the parties addressing the issues of the new evidence and Report. The Panel Chair decided:

(a) no ruling would be made on the new evidence until the final disposition of the matter;

(b) the Report was incomplete as it did not set out the facts and assumptions underlying the opinions, and further, granting the Complainant an opportunity to provide a supplemental report; and

(c) the hearing would be conducted in writing, subject to any expert evidence admitted being dealt with in person or by other means. No further ruling would be made regarding expert evidence until the Report was made compliant with the requirements of Rule 53.

[23] By letter dated January 16, 2013 the Complainant provided the Review Board and parties with further submissions regarding the adequacy of the investigation and
reasonableness of the Disposition. In many respects this submission is repetitive of things stated by the Complainant in earlier submissions. The Complainant was granted an extension by the Review Board until February 1, 2013 to provide a supplemental expert report. By letter dated January 29, 2013, the Third Physician provided a further report explaining how he arrived at his opinions and containing more detail of the underlying facts and assumptions (the “Second Report”).


[25] The Second Report makes clear that the Third Physician’s opinions critical of the 1982 surgery are based on current techniques in surgery not techniques employed in 1982. The Third Physician states:

In all fairness, this level of sophistication, visualization and equipment as well as the knowledge of the anatomy and physiology of the sinus cavities did not exist thirty years ago. Sinus surgery has evolved extensively over the past two to three decades with the endoscope only introduced in our field in the mid 1980’s.

The Third Physician states in the Second Report “The openings made in (the Complainant’s) case would be very much against the standard of care in today’s rhinologic training and practice”. The Third Physician says nothing regarding standards of practice in 1982 in British Columbia and it is implicit from his above opinions standards have changed extensively over the 30 year period in question. The Second Report attaches sample endoscopic pictures and CT Scans of the areas of concern.

[26] Following the Second Report, the then Panel Chair ruled that an oral in person hearing would be held to afford the parties an opportunity to fully present and examine the Third expert and his evidence. A pre-hearing Conference was held in this matter on April 10, 2013 where the Complainant advised that she would not be able to produce the Third Physician as expert due to his busy schedule. As a result, the parties agreed to hold the oral hearing by way of a teleconference call and the Complainant was to arrange a date for direct and cross-examination of the Third Physician via a teleconference call to be attended by all parties and the Review Board panel. At the pre-Hearing conference, the Complainant was also reminded of the Review Board’s limited mandate, namely, to review the adequacy of the College’s investigation and the reasonableness of its disposition.

[27] The oral hearing held by way of a telephone conference was held on June 18, 2013 where the Third Physician acting as the Complainant’s expert was examined by the Complainant and cross-examined by counsel for the College and Registrant. During his testimony the Third Physician explained he did not see any gauze expelled from the Complainant’s nose. The Third Physician stated that for a generalist it was common practice in 1982 to perform the surgical procedure the Registrant performed on the Complainant. At the time this was the procedure used for maxillary sinusitis as it was thought creating a bigger passageway in the sinus would help alleviate the patient’s symptoms. The Third Physician stated that in 1982 a surgeon used a headlamp which did not disclose the complexity of the anatomy to the extent the introduction of the
endoscope achieved in the mid 1980’s where the anatomy became clear on a screen. The Third Physician said this invention changed the speciality completely.

[28] Following completion of the oral testimony of the Third Physician the parties filed further final written submissions during July, 2013, concluding on July 30, 2013 with the final reply from the Complainant.

[29] The College submits standards of practice in 1982 are not within the Third Physician’s area of expertise and his opinions are of limited assistance. The College submits the Third Physician’s opinions are helpful to clarify that the standard of practice in 2013 is drastically different than the standards of practice in 1982, and therefore, 2013 standards do not need investigation by the College in the circumstances of the Complaint.

[30] The Registrant submits that the Third Physician’s evidence, even if obtained by the College, would not have changed the Disposition. The Registrant adopts the Third Physician’s opinions to the extent he explained the differences between 1982 standards of practice and current standards of practice in effect concluding that the manner by which the Registrant proceeded was the way things were done in 1982 though not suitable currently.

[31] The Complainant states in her reply submission that the College is allowing this old fashioned surgical procedure to continue being used currently. This submission misses the point that the Complaint made is with regard to the conduct of the Registrant in 1982.

IV DISCUSSION AND ANALYSIS

[32] The role of the Review Board on an application for review is to consider the adequacy of the investigation and reasonableness of the Disposition.

[33] We find that the Complainant’s error of making the Complaint initially against the wrong physician brings seriously into question the accuracy of the Complainant’s recollection of events which occurred in 1982. Further, given the Complaint was made on November 5, 2010, almost 30 years post the surgery performed by the Registrant, many of the records have been destroyed, which hinders the investigative process. The College obtained all the available records and sought the responses of the Complainant, Registrant and two subsequent treating physicians. We find the investigation was adequate. We do not conclude the College needed to make an investigation of current standards of practice as the relevant standards of practice for the Registrant to observe were those existing in British Columbia in 1982 in all the circumstances. There is no evidence the Registrant did not meet the 1982 standards of practice.

[34] As the Registrant met the 1982 standard of practice for this type of surgery it follows that to take no further action on the Complaint is a reasonable disposition.

[35] The Complainant’s position has somewhat changed from the Complaint against the wrong physician and then the Registrant to a submission that if physicians are still performing this type of surgery the way it was done in 1982 something should be done to
stop this continuing. This is a submission which does not form any basis for the Complaint made against the Registrant and is not part of the mandate of the Review Board.

[36] As the Review Board is not bound by the legal rules of evidence we admit the new evidence including the expert testimony of and letters written by the Third Physician. We conclude the new evidence is reasonably required for a full and fair disclosure of all matters related to the issues under review, in particular understanding differences between techniques, equipment and surgical standards of practice comparing 1982 to current times. We note every party has made reference to parts of the new evidence in support of submissions made and during examination of the Third Physician by all parties or their counsel.

[37] We reiterate that in receiving expert testimony as additional evidence, the Review Board is focusing its attention on the scope of matters that the Inquiry Committee should properly look at as components of an adequate investigation. The Review Board is in no way attempting to pass judgment on the contextual appropriateness of techniques, equipment or surgical standards; these are matters for the collective medical judgment of the Inquiry Committee.

V CONCLUSION

[38] We confirm the Disposition of the Inquiry Committee to take no further action on the Complaint.

[39] We have reviewed the record, new evidence and submissions of all parties though not referred to in their entirety herein.

“David A. Hobbs”

David A. Hobbs, Panel Chair
Health Professions Review Board

“Helen del Val”

Helen del Val, Panel Member
Health Professions Review Board

November 29, 2013