DECISION NO. 2012-HPA-010(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 Physical Therapists of BC COLLEGE

AND: A Physiotherapist REGISTRANT

BEFORE: Judith Berg, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on September 21, 2012

APPEARING: For the Complainant: Self-Represented

For the College: Anthony Tobin, Counsel

For the Registrant: Michael Schalke, Counsel

PRELIMINARY APPLICATION FOR SUMMARY DISMISSAL

I  DECISION

[1] The Registrant applied for summary dismissal of the Complainant’s Application for Review of a disposition made by the College. I approve the Summary Dismissal Application for the reasons set out below.

II  INTRODUCTION

[2] The Complainant filed a complaint with the College concerning the Registrant and her treatment of the Complainant’s mother while she was a patient in the hospital.

[3] The Complainant claims the Registrant was incompetent, unprofessional, exhibited poor communication skills and provided faulty assessment tests on her mother, and that the faulty tests prevented her mother from being discharged from the hospital.

[4] After investigating, the College’s Inquiry Committee dismissed the complaint as “there is insufficient evidence of incompetence to substantiate the allegation”.

III ISSUES

[5] The three issues to be determined are as follows:

(1) Is the complaint within the jurisdiction of the Review Board and filed within the applicable time limit?
(2) Is there no reasonable prospect the application will succeed?
(3) Should the Review Board accept the new evidence presented?

IV BACKGROUND, FACTS AND EVIDENCE

[6] On August 10, 2010, the Complainant filed a complaint with the College concerning the Registrant’s treatment of her 100 year old mother while her mother was a patient in the hospital. The seven page letter of complaint and five pictures raised issues of unprofessional conduct, poor listening and communication skills, the use of an abdominal belt that caused discomfort to her mother, unfair mobility tests and that the Registrant prevented her mother from being discharged from the hospital at an earlier date.

[7] The Complainant alleged the Registrant ignored the Complainant’s explanation of the history of homecare assistance provided to her mother in the home and that her mother’s health and mobility deteriorated with the extended hospital stay.

[8] The Complainant concluded in the complaint to the College that the Registrant’s unprofessional treatment of her mother was “a very grave matter” and the Complainant did not want other patients to be treated in the same way by the Registrant.

[9] The Inquiry Committee instructed the Registrant to address and clarify the 10 specific issues of complaint raised in the Complainant’s letter of complaint.

[10] The Inquiry Committee requested clinical information from the hospital on all physical therapy treatment provided to the Complainant’s mother. The Inquiry Committee also requested the Emergency Assessment, Older Adult Assessment, History Sheet and Discharge Summary regarding the Complainant’s mother during her 18 days of hospitalization.

[11] The Registrant responded to the Inquiry Committee on October 12, 2010 with respect to the 10 specific complaint allegations requested by the Inquiry Committee. She denied being disrespectful, causing discomfort to the Complainant’s mother, denied interpreting an outcome of a mobility test and denied a specific conversation with the Complainant. The Registrant defended the use of the discharge test that she conducted, the standard footwear recommended for the test, and submitted that the Registrant had followed the proper instructions regarding the discharge assessment test.

[12] The Registrant explained to the Inquiry Committee that she went on vacation shortly after the Complainant’s mother was admitted to hospital, and only worked with the mother for the first three days out of 18 days of her hospitalization. The Registrant
concluded that her initial assessment during this period indicated that the Complainant’s mother “was unsafe for discharge home at that particular time” and that other physiotherapists and hospital personnel were responsible for discharge assessment for the remaining 15 days.

[13] The Inquiry Committee concluded that the Registrant was not in breach of relevant College Standards of Practice with this complaint - Section 55(1.4) Responsibilities to the Client and Section 55(3.2) Responsibilities to the Profession.

[14] The College dismissed the complaint pursuant to s.33(6)(a) of the Act on the basis that there was no reason for the committee to take further action as, on the face of the information before it, there was insufficient evidence of incompetence to substantiate the allegation."


[16] The Registrant applied to the Review Board on August 29, 2012 to summarily dismiss the Application for Review based on sections 31(1) (a), (b) and (f) of the Administrative Tribunals Act (the “ATA”) and sections 9(1) (a), (b) and (f) of the Health Professions Review Board Rules of Practice and Procedure (the “Rules”).

[17] The Complainant responded to the Summary Dismissal Application on September 14, 2012 requesting her Application for Review not be summarily dismissed. In her seven page response the Complainant contested the accuracy of the Registrant’s responses to the Inquiry Committee and introduced three witness letters in defence of her Application for Review.

[18] The College’s submission on September 17, 2012 concurred with the Summary Dismissal Application of the Registrant.

[19] The Registrant responded on September 21, 2012 that the Complainant’s lengthy response and new witness letters were a reiteration of the original complaint.

V DISCUSSION AND ANALYSIS

[20] The Review Board’s summary dismissal power is applied carefully. Previous decisions have emphasized the summary dismissal power as a gate-keeper function and not an occasion for making a decision on the merits. I have applied these principles in assessing this Application for Summary Dismissal.

A. Issue 1 – Jurisdiction and Applicable Timeframe

[21] The Registrant’s first argument for summary dismissal asserts the Complainant’s Application for Review is not compliant with the procedural requirements of the ATA s.31(1) (a) and (b) and also with the Rules s.(9)(1) (a) and (b) which state:
The Review Board may refuse or dismiss an application or part of an application at any time, on its own initiative or at the request of a party, for one or more of the following reasons:

(a) the matter for review is not within the review board’s jurisdiction

(b) the application was not filed within the application time limit

[22] The Registrant argued that the Complainant’s Application for Review did not provide complete information that is required in an Application for Review as set out in both the Act 50.61(1)(c) and in Rule (4)(1)(c) “state the relief being sought, and in the case of a decision or disposition, why the decision or disposition should be changed.”

[23] The Review Board notified the Complainant in writing on January 24, 2012, that her Application for Review was deficient as she had neglected to identify the relief being sought. This letter stated:

Your application is deficient because it fails to state any relief which the Review Board has the power of granting. Attached for your information and for completion and return to the Review Board is a Relief Being Sought form.

Please provide all of the above information no later than February 7, 2012. If the deficiencies in your application are not corrected, the Review Board may dismiss the application under s.31(1) of the Administrative Tribunals Act.

[24] The Complainant responded by filling out the Relief Being Sought form within the designated timeframe (received February 7, 2012) and identified the relief being sought as:

(a) direct the Inquiry Committee to take appropriate action to resolve the matter between me and the Registrant.

(b) send the matter of my complaint back to the Inquiry Committee for reconsideration with such directions as the Review Board determines are appropriate

[25] The Complainant stated in her February 7, 2012 response letter to the Review Board her rationale why the disposition of the Inquiry Committee should be changed. In this letter the Complainant referred to a breach of the College’s Standards of Practice by the Registrant citing:

(a) s.55(1.4) physical therapists must give clients the opportunity to consent or decline treatment or alterations to the treatment regime, and

(b) s.55 (3.2) physical therapists must conduct themselves in a manner as to merit the respect of society.

[26] The Complainant has not written her request for relief and her rationale for her Application for Review in a manner which tracks the language of the Act. She has, however, described her concerns and issues with the Registrant’s professionalism, conduct, and performance of discharge assessment tests and requested her complaint be sent back to the Inquiry Committee for reconsideration.
The Complainant noted in her September 12, 2012 response to the summary dismissal application that “I am an educator, not a lawyer so I will be using layman’s language…”. To deny access to her Application for Review based on not using specific legislative language identifying the relief being sought would be unjust.

I therefore find the Review Board does have the jurisdiction to review the Complainant’s Application for Review based on her general requests for relief and within the timelines determined by the Review Board.

B. Issue 2 - No Reasonable Prospect for Success

The Registrant’s second argument for summary dismissal was the Application for Review should be dismissed pursuant to s.31(1) (f) of the ATA and Rule 9(1) (f) of the Rules which allows the Tribunal to dismiss an Application for Review if “there is no reasonable prospect it will succeed."

In applying the above sections of the ATA and Rules, it is necessary that I determine if the Application for Review is “bound to fail” if it were to proceed to a review hearing. For an Application for Review to succeed it would need to satisfy a Review Panel that the Inquiry Committee’s investigation was not adequate or the disposition by the College was unreasonable: s.50(6) of the Act.

In a summary dismissal application it is important that the Review Board conduct its assessment based on the evidence in the Record in order to determine if the investigation was adequate. It is not appropriate however for the Review Board to make a final determination concerning the issues in dispute. I adopt the approach taken by the Review Board in Decision No. 2009-HPA-0052(a):

...The Review Board must take care not to use s.31(1)(f) as a pretext to engage in adjudication that is more properly undertaken by the hearing panel. Similarly, while the Review Board can assess the evidence for the purpose of determining whether the evidence takes the case “out of the realm of conjecture”, it is not the Review Board’s role, at the preliminary stage, to go beyond that and to usurp the hearing panel’s role by finding facts that are or could reasonably be in dispute.

In accordance with the above, I have considered the Complainant’s submission of complaint to the College, the Application for Review, submissions filed by the Registrant, the hospital medical file and have reviewed the post-Record witness letters filed by the Complainant. I have not made a final determination regarding the merits of the arguments advanced by either party, but have assessed the Summary Dismissal Application based solely on the adequacy of the investigation and whether there is sufficient evidence to assert that the complaint warrants a hearing before the Review Board.

The Review Board has determined in prior decisions that not all complaints will require a College to pursue every possible avenue of investigation (a so-called “perfect investigation”), but a Complainant is entitled to an adequate investigation.
[34] The standard I have adopted for assessing the adequacy of this investigation is whether the Inquiry Committee investigated the complaint diligently and considered its seriousness, complexity and the availability of evidence.

[35] The Inquiry Committee’s Record consists of 96 pages of documents. In its disposition the Inquiry Committee addressed each issue raised by the Complainant. In making its decision the Inquiry Committee reviewed the following:

1. nature of the complaint;
2. relevant College Standards of Practice;
3. all correspondence by the Complainant to the College;
4. the Registrant’s written responses and explanation to the specific points of concern raised by the Complainant;
5. physical therapy diagnosis established by the Registrant;
6. other physical therapy assessments for discharge;
7. all hospital medical records of the Complainant’s mother. This included all physical therapy treatment notes, emergency assessment, older adult assessment and the history sheet; and
8. the Discharge Summary which included the Course in Hospital and the Discharge Disposition by the hospital physician.

[36] In consideration of the above assessments of the complaint allegations, the Registrant’s responses and the assessment of the complete hospital file of the Complainant’s mother, I find all relevant sources of evidence were identified and pursued. I further find the evidence requested and received was sufficient and relevant to the nature of the allegations.

[37] I am satisfied that the College took the necessary steps to investigate the complaint. There is no evidence on the Record, or in any other information submitted, that the College did not conduct a full and adequate investigation into this complaint.

[38] I now turn to the standard for assessing the reasonableness of a disposition based on what was before the Inquiry Committee and additional evidence that the Review Board considers is reasonably required for a full and fair disclosure of all matters related to issues under review: s.50.6(7) of the Act.

[39] In Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] S.C.J. No.18 (SCC) at para. 39, the Supreme Court of Canada held, as paraphrased below:

The reasonableness standard which ought to be applied to the College’s disposition requires deference to the decision of the Inquiry Committee. It is not open to the Review Board to ask itself whether it would have arrived at the same decision as the Inquiry Committee. Rather the test is whether the Inquiry Committee’s decision was reasonably supported by the information that was before it, and whether it can withstand “a somewhat probing examination”.

[40] In Review Board Decision No. 2009-HPA-0001(a)-0004(a), paras. [90] to [94], the Review Board set out a comprehensive description of the applicable law in general regarding the “reasonableness of the disposition” which I adopt. In regard to the reasonableness of the disposition, the Review Board stated in the above noted decision at para. [92]:

> While the Review Board’s application of the test will necessarily reflect its expertise as a specialized administrative tribunal rather than a Court, the Review Board’s focus is nonetheless not to step into the shoes of the Inquiry Committee, but rather to determine whether the Inquiry Committee’s disposition falls within the range of acceptable and rational solutions, and is, viewed in the context of the whole record, sufficiently justified, transparent and intelligible to be sustained.

[41] I now turn to the fairness of the disposition when the Inquiry Committee is presented with conflicting information. The question can be put in the following fashion: Is it reasonable to take action against the Registrant when both the Registrant and the Complainant viewed the treatment of the Complainant’s mother differently?

[42] The Ontario Health Professions Appeal and Review Board addressed the issue of conflicting evidence and stated:

> When presented with conflicting information based on personal recollections, or when credibility is questioned, the Committee is not required to carry out an exhaustive fact-finding process to assess the truthfulness of one version of events over another. Our function, as a review body, is to review the Committee’s decisions to determine if those decisions are supported by information in the record of investigation, and if they can withstand somewhat a probing inquiry. (Muracura v. Deonandan, unreported, File No’s. 8616 and 8619, June 6, 2007 (Ont. H.P.A.R.B., at paragraph 25).

[43] I find the Inquiry Committee made a reasonable disposition based on the Record of a complaint that nonetheless contained conflicting recollections of communication, historical medical events and the correctness of treatment assessments. The Inquiry Committee based their disposition on a thorough investigation that was substantiated by independent evidence, namely the hospital medical file.

[44] I believe the Complainant sincerely feels the Registrant’s “conduct” and “the effects of her actions” were responsible for her mother’s prolonged hospitalization of 18 days. The reality is the Registrant was only present for the first three days of treatment prior to leaving on vacation, and cannot be responsible for her mother’s declining health, insufficient physiotherapy interventions and the lack of discharge assessments for the remaining 15 days of hospital treatment.

[45] I have conducted a preliminary review of the Record, and without making findings of fact, I find the Inquiry Committee took diligent steps to obtain all relevant information and documentation necessary to assess and adjudicate the complaint. I also find no evidence at this stage of the proceedings to suggest that its disposition was unreasonable.
C. Issue 3 - Additional Evidence

[46] Pursuant to s.50.6(6) and (7) of the Act, the Review Board is required to apply its standards for review based on any evidence that is part of the Record. The Review Board’s role and jurisdiction in assessing additional evidence is limited to assessing whether it is necessary for a full and fair disclosure that will assist the Review Board in making a decision.

[47] The Complainant responded to the Registrant’s Application for Dismissal in a letter dated September 12, 2012 restating and re-emphasizing her previous complaints, refuting the responses made by the Registrant to the Inquiry Committee and by providing three witness statements as new evidence.

[48] The Complainant asserted in her response that the Inquiry Committee was “unfair” in not allowing her to reply to the Registrant’s responses to her complaint and that she was requesting “a further investigation.”

[49] I carefully assessed the three witness statements submitted by the Complainant (former Caregiver, and two neighbours) and do not find them useful or necessary for a full and fair disclosure of the issues in this proceeding. They do not supply new or additional information that was not already included as part of the Record.

[50] I find the Inquiry Committee’s investigation is supported by the Record and it is not a requirement for an adequate investigation to give a Complainant a final reply. The Review Board can only consider evidence when such evidence is clearly new and/or relevant to the complaint and to the adequacy of the investigation or the reasonableness of the decision. No new relevant evidence was presented by the Complainant.

[51] The Registrant responded on September 21, 2012 that the new evidence should be rejected as it was a reiteration of the complaint and the Complainant was engaging in a re-hearing. In the Registrant’s view this did not prove that the Inquiry Committee’s investigation was inadequate. Lastly, should the Review Board accept the new evidence by the Complainant; the Registrant is also prepared to introduce new evidence.

[52] I find the Complainant’s response letter of September 12, 2012 and the witness statement letters the Complainant wishes to introduce to the Review Board are not relevant to the Application for Review as they are a reiteration of the complaints and shall not be admitted as new evidence.

[53] I have concluded that advancing to a hearing would not provide the Complainant with the responses she is seeking, only a continuation of the impasse of perceptions and opinions with this complaint. As mentioned before, the Review Board’s responsibility is to assess the adequacy of the Inquiry Committee’s investigation and the reasonableness of their decision.

[54] Given that the Inquiry Committee based their findings and disposition on a full and fair investigation on the Record, and produced a disposition that is not demonstrably outside the bounds of what would rationally be considered a “reasonable
disposition", it is my conclusion that the Complainant is not able to provide evidence to establish that the investigation was inadequate or the disposition unreasonable. If the Complainant is unable to clearly meet the test, the Application for Review will undoubtedly be unsuccessful and is therefore bound to fail.

VI CONCLUSION

[55] 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.

[56] For the reasons given above, the Registrant’s Application for Summary Dismissal of the complaint is approved.

“Judith Berg”

Judith Berg, Panel Chair
Health Professions Review Board

January 21, 2013