DECISION NO. 2012-HPA-160(a); 2012-HPA-161(a); 2012-HPA-162(a)  
(Grupoed File: 2012-HPA-G18)

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 1

AND: A Physician

REGISTRANT 2

AND: A Physician

REGISTRANT 3

(Collectively, the “Registrants”)

BEFORE: John H. O’Fee, Panel Chair

REVIEW BOARD

DATE: Conducted by way of submissions concluding on June 7, 2013

APPEARING: For the Complainant: Self-represented

For the College: Sarah Hellmann, Counsel

For Registrants 1 & 2: Lindsay Johnston, Counsel

For Registrant 3: No-one appearing

I INTRODUCTION AND BACKGROUND

[1] The Complainant applied under s. 50.6 of the Act to review a June 29, 2012  
disposition of the Registrar concluded under Section 32(3)(c) of the Act and  
communicated to her a letter signed by the Registrar of the College on behalf of the  
Inquiry Committee.

[2] The Complainant, now 55 years old, asserts that the Registrants acted  
inappropriately with respect to advising her regarding fertility issues between her and  
her spouse. She believes that the Registrants should have advised her of issues  
related to her spouse’s low testosterone levels and sperm count so that appropriate
measures could have been taken for her to conceive. She states that the failure of the Registrants to properly inform her amounted to a deception that caused her to lose her last chance to have a child.

[3] Registrant 1 is the family physician of the Complainant. She started treating the Complainant in July of 2008. Her records indicated that the Complainant did not raise fertility concerns until November 2008 at which point she was 50 years old. Registrant 1 explained in her response to the College that this is well past the optimum age for fertility. Notwithstanding that advice and at the Complainant’s insistence, other options were explored.

[4] Registrant 1 referred the Complainant to a fertility clinic where the Complainant was advised against pregnancy due to risk to herself and the fetus. She was seen by Registrant 2, an obstetrician and gynecologist, in February 2009. At that point the Complainant had been unsuccessful in her attempts to conceive for a period of about eight years. Registrant 2 reviewed the semen assessments for the Complainant’s spouse from 2007 and 2008 and determined that they were reasonable and consistent with obtaining a pregnancy at home. His assessment of the fertility issue for this couple was the Complainant’s advanced reproductive age. The Complainant wished to explore in vitro fertilization (“IVF”). Registrant 2 indicated that “there had been no reported pregnancies using IVF in patients at the age of 50 using their own eggs”. The Complainant was adamant that this treatment should be tried but Registrant 2 felt it would be unethical to “give patients thousands of dollars of medication whose long term effects are unclear when you know there is no benefit.”

[5] On November 25th, 2010 the Complainant called Registrant 2 stating she was upset over the semen assessments and Registrant 2 assured her that the assessments were reasonable and that her spouse was not infertile.

[6] Registrant 3 is also an obstetrician and gynecologist. He first saw the Complainant in March 2006 when the Complainant was 48 years old. At that time Registrant 3 states that he reviewed a semen analysis for the Complainant’s husband that showed a normal count, motility and morphology. In his response to the College, Registrant 3 states:

The REI (Reproductive Endocrinology and Infertility) community is at one when it comes to the ethics of treating advanced reproductive age females – since there is a paucity of evidence to suggest a successful outcome (success being measured as a “take home baby”) in women of this patient’s age – I would confidently state that I do not believe a single fertility clinic in Canada would treat this patient with anything other than the proposed ovulation monitoring and timed intercourse.

[7] In December 2006 the Complainant returned to see Registrant 3 and a repeat semen analysis was conducted in January 2007. The analysis indicated a normal count and motility and a mild restriction in the morphology parameter. Registrant 3 indicates this is, at worst, a mildly subfertile ejaculate and that these results were discussed with the Complainant. A further test was performed in February of 2008 that revealed a similar result which was also communicated to the Complainant.
In November of 2008 Registrant 3 received another referral from Registrant 1 but declined same. Registrant 3 states clearly that, as was evidenced in three separate semen analyses, the Complainant’s husband was not sterile. He states that the Complainant was unwilling to accept his diagnosis that the Complainant was at an advanced reproductive age and unlikely to conceive.

The Complainant advanced other theories related to fertility issues including her spouse’s testosterone levels and physiology. None of these factors were considered by any registrant of being determinative of fertility.

The Complainant does not accept any of the diagnoses advanced by the Registrants. In her letter of complaint to the College she states “my purpose of the complaint was that my husband was sterile and I was not advised of this.”

In her Complaint form, the Complainant states as follows:

Over the past 10 years I have tried continually to conceive. My husband [name] as it turns out was the problem. He is sterile and has very low testosterone. No one ever advised me of this or offered me any alternatives. I have tried repeatedly to find out exactly how early they knew this, and how long [my spouse] has known. He went for his first testing 2001 again in 2003 and finally 2008. The fact that no one told me is just criminal. I lost my last chance to have a child by this deception. I would like the truth of this matter.

The College disposed of the complaint in a letter to the Complainant dated June 29, 2012. The College determined that that assertion of the Complainant that she was never advised respecting her spouse’s semen analysis is was not supported by the medical record or the response of the Registrants. The College also found that the Complainant’s assertion that her spouse was sterile was not supported by the medical evidence.

Counsel for the College and Registrants 1 and 2 assert that the College’s investigation was adequate and its disposition of this matter was reasonable in the circumstances. Counsel for Registrants 1 and 2 and the College object to me considering certain materials provided by the Complainant consisting of articles including one titled “Male Infertility Overview” and assert this “new evidence” is not required for a full assessment of the matters before the appeal panel.

II  JURISDICTIONAL ISSUES

This application is brought pursuant to s.50.6(1) of the Act which provides for the Review Board to review the disposition of a matter by a college. Upon receipt of such application for review of this disposition the review board is bound by s.50.6(5) which reads as follows:

50.6  (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.
[15] I accept the submissions of Counsel for Registrants 1 and 2 and the College that I should not admit the articles submitted by the Complainant as evidence. Section 50.6(7) of the Act does allow me to review additional evidence to the extent it is required for a full and fair disclosure of all matters related to the issues under review. The articles submitted by the Complainant are primarily an educational overview of infertility issues. They are of no probative value in assessing the adequacy of the College’s investigation or the reasonableness of its disposition of this matter. Accordingly, I will not be considering them as part of my decision.

III ADEQUACY OF THE INVESTIGATION

[16] There is some conflict between the factual narrative presented by the Registrants and the Complainant relating to how much information the Complainant was provided by the Registrants concerning her spouse’s fertility or lack of same. The Complainant insists that her spouse is, as she put it, “the problem” related to their fertility issues as a couple. The Registrants and the Record indicate that the Complainant’s spouse is not infertile, and that this information was communicated to the Complainant on multiple occasions.

[17] It would appear that the Complainant was never advised of her husband’s infertility because there was never any medical evidence indicating that this was so. Not getting the answer you believe to be correct is not evidence of an inadequate investigation.

[18] Review Board Decision No. 2009-HPA-0001(a) to 0004 (a) at paragraphs [97] and [98] outlines the test for the adequacy of the investigation respecting a complaint.

[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.

[19] I accept the submissions of Counsel for both the College and Registrants 1 and 2 that, in this case, multiple semen analyses indicate that the Complainant’s spouse was not infertile. The diagnoses of Registrants 2 and 3 are clear. The Complainant was at the end of her reproductive years and very unlikely to conceive. This is a diagnosis that the Complainant is unwilling to accept but it is supported by the Record. The Review Board should not substitute its own standards of practice for those of a physician. In Decision No. 2010-HPA-G02(b) at paragraph [44] and [45] the Review Board reaches a similar conclusion and notes “The Review Board cannot provide treatment advice to physicians.”
The medical record and the responses of the Respondents are reasonably thorough. This indicates to me that the College conducted a reasonably careful review of relevant materials and carried out an adequate investigation.

IV REASONABLENESS OF THE DISPOSITION

Decision No. 2009-HPA-0001(a) to 0004(a) at paragraph [92] outlines a clear test for reasonableness:

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.

The Complainant asserts that her spouse was sterile, she was not informed of this and that this “deception” caused her to lose her chance to conceive. However, the Complainant has not provided any evidence contradicting the medical record or the statements provided by the Registrants.

The College found that there was no evidence to support the Complainant’s assertion that her spouse was infertile. As stated, my role is not to second guess well established medical tests and analyses and I accept that this is an appropriate disposition of this aspect of the complaint.

Whether or not the Complainant should have been provided with full access to reports related to the fertility of her spouse is a separate issue. There is some dispute as to whether or not the Complainant was provided semen analyses but the record and the statements of the Registrants indicate that the Complainant was in fact advised of these results.

The Complainant asserts that if she were fully and properly advised of all fertility issues between herself and her spouse she could have taken appropriate steps to conceive. This position is not supported by the diagnoses of the Registrants or the medical record.

Even if there were steps the Complainant could have taken had she been provided with more medical information about her spouse, in the absence of clear instructions to the contrary, physicians have to respect patient confidentiality. In many circumstances, including this one, there is no presumption that one spouse is entitled to full disclosure of medical information related to the other spouse. In addition, the Record shows that the Complainant’s spouse was unwilling to undergo procedures that might enhance his fertility and he was at best, ambivalent about having a child with his spouse.

My role is to consider, on a reasonableness standard, whether the disposition of the Registrar falls within the range of acceptable outcomes that are defensible in respect of the facts and the law. I find that the disposition of the Registrar in this matter is reasonable.
V DECISION

[28] My review of the Record causes me to conclude that the requirements of the Act have been met. I find that there was an adequate investigation of the facts concerning the complaint and that the disposition of the complaint was reasonable. Pursuant to s.50.6 (8)(a) of the Act I confirm the disposition of the Registrar which, pursuant to s.32(3) of the Act, is considered to be the disposition of the Inquiry Committee of the College.

[29] 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.

“John H. O’Fee”

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John H. O’Fee, Panel Chair
Health Professions Review Board

July 18, 2013