DECISION NO.  2012-HPA-217(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 COLLEGE
AND: A Physician REGISTRANT
BEFORE: Lorianna Bennett, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on November 20, 2012

APPEARING:
For the Complainant: Self Represented
For the College: Sarah Hellman, Counsel
For the Registrant: Lara Zee, Counsel

I DECISION

[1] Upon reviewing the application of the Complainant to extend the time for filing an application for review pursuant to section 50.61(4) of the Act, it is my decision that the application is denied.

II INTRODUCTION AND BACKGROUND

[2] In a complaint form dated February 18, 2011, the Complainant wrote to the College alleging concerns about the Registrant’s care of the Complainant during her hospitalization in October 2010.

[3] The Complainant was admitted to hospital by an emergency physician as a result of a scratch to her leg and resulting leg pain following a fall in October 2010. The scratch on the Complainant’s leg subsequently turned into a painful infection that required antibiotics. The complaint focused around the Complainant’s concerns that she felt neglected and ignored by the Registrant during her hospitalization.

[4] The complaint form was signed by the Complainant herself and also her representative (her “Advocate”). On the complaint form, the Complainant gives her Advocate permission to represent her and to file the complaint on her behalf.
[5] By way of a letter dated April 4, 2012, the College responded to the Complainant advising that it had considered the allegations concerning the Registrant. The College concluded that, notwithstanding its comprehensive review of the matter, it could find no basis for criticism of the Registrant’s care.

[6] In its letter, the College advised the Complainant that if she was dissatisfied with the College’s response, she had the right to submit the matter to the Review Board within 30 days of her receipt of its letter.

[7] The Complainant says that she was away in April in Burn’s Lake for medical treatment, and consequently she did not receive the disposition letter until late May 2012.


[9] On June 8, 2012, the Review Board wrote to the Complainant providing her with supplementary written information regarding the appeal process. In its letter, the Review Board states:

It appears from our discussion that the College’s decision was dated April 4, 2012 but you received it on May 24, 2012 as you were away during that period for medical treatment in Burns Lake. Therefore your application may be out of time.

The Review Board may extend the time for filing an application if the Review Board is satisfied that special circumstances exist. If you wish to apply to the Review Board to extend the time to file an application for review you must deliver a written request that explains the following:

- The reason why the application was not made within the required time;
- The reasons why an extension of time is required;
- What special circumstances exist that justify the Review Board granting an extension; and
- Any supporting documents relating to the request to extend the time.

[10] The Review Board did not hear or receive anything further from the Complainant or on her behalf until October 30, 2012. On that date the Review Board received a letter dated October 29, 2012 from the Complainant’s Advocate. In this letter, the Advocate states that although he is employed with a counseling and legal services society, he is not a lawyer, and his organization has been trying to set up the Complainant with a lawyer through Pro Bono BC. The Advocate adds that the College decision was not sent to his office and that they still have not seen the decision.

[11] The Advocate then explains that the Complainant requests an extension of time to file an application for review, and in making the requests he states the following reasons for doing so:
a) The Complainant does not have the capacity to complete the review process without assistance, and she is in the process of finding a lawyer to help her through Pro Bono BC;

b) The decision of the College was never released to the Advocate;

c) It is not clear whether the Registrant was informed of the decision;

d) An extension of time will [sic] prejudice the other party as the complaint is based mostly on written evidence and photographs; and

e) The Complainant has done everything in her power to move the complaint process forward and the delay is only the result of difficulties in finding legal assistance and representation. The Advocate adds, “It would not be in the interest of justice to deny the Complainant an extension of time”.

[12] In response to the letter of October 29, 2012 and in particular response to paragraph [11] b) and c) above, the Review Board made inquiries of the College Inquiry Committee. The College records confirmed that the Complainant telephoned the College on May 22, 2012 advising that she had just received the final disposition, and she had questions regarding the appeal process. The College Records also confirmed that the Registrant received a copy of the decision under cover letter dated April 4, 2012.


[14] On November 9, 2012 counsel for the Registrant wrote back advising that if the Complainant delivers her application for review by November 30, 2012, then the Registrant will take no position on the request for an extension of time.

[15] On November 19, 2012, the Review Board received a further letter from the Advocate (dated November 16, 2012) in which he makes additional submissions regarding the extension of time application. In the letter, the Advocate reiterates that he is not a lawyer but works under the supervision of a lawyer. He says that the primary reason for the delay in filing the application for review has been the delay in the Complainant finding a pro bono lawyer.

[16] The Advocate states that, in his opinion, the Complainant definitely needs some form of legal assistance in order to properly complete the application for review and to make submissions. He says that the Complainant would, ideally, be best served by having a lawyer assist her but that he is prepared to assist in the absence of a lawyer and can complete an application for review by November 30, 2012.

[17] The College’s response is dated November 19, 2012. The College contends that the extension of time should not be granted and the application should be dismissed.

[18] The College points out that on April 4, 2012, the College sent its letter of disposition to the Complainant c/o her Advocate at the address provided for on the
Complaint form signed by both the Complainant and the Advocate. The College notes that, by her own acknowledgment, the Complainant received the letter of disposition as of May 22, 2012. As such, the College says that the application submitted by the Advocate (as set out in the letter dated October 29, 2012) is well beyond the 30 days from the date that the Complainant received notification of the disposition letter.

[19] The College further contends that the application submitted by the Advocate does not meet the onus of establishing that special circumstances exist to permit an extension to the 30 day appeal period. The College says that while they appreciate the Advocate’s submission that the Complainant requires assistance to complete the application and the review process, considerable time has passed and in that passing of time the Complainant and/or the Advocate could have at least communicated an intention to appeal. The College says that communicating an intention to appeal to either the College or the Review Board could have readily been achieved without legal representation.

[20] The College then goes on to submit that there is no merit in the application for review in any event, and that the College’s conclusion is clearly within the range of reasonable outcomes.

[21] The College concludes by stating that it is not in the interest of justice to expend further time and resources to proceed to a full hearing of the matter, particularly where the application lacks merit.

[22] On December 3, 2012, the Review Board received the Complainant’s application for review dated November 30, 2012. The application was completed by the Advocate. In the application, the Complainant says the Inquiry Committee’s disposition should be changed for the following reason:

The Complainant disagrees that she has been diagnosed with diabetes and that the delay in healing was therefore partly a result of a diabetic condition.

[23] As for relief sought, the Complainant states:

The [Complainant] asks that the College acknowledge that the [Complainant] is not diabetic and to reconsider its decision on that basis. In the alternative, the [Complainant] requests documentation supporting the diagnosis of diabetes.

III ISSUE

[24] The issue on this application is to determine whether any special circumstances exist in relation to the Complainant’s application which justifies an extension of time to file her application for review.

IV ANALYSIS AND DISCUSSION

[25] The general principles to consider on an application of this nature are set out in sections 50.6(1)-(3) and 50.61(4) of the Act which read as follows:
50.6  (1) A complainant may apply to the review board for a review of a disposition described in section 50.53(1)(c).

(2) An application under subsection (1) must be made within 30 days of the day on which written notice of the disposition is delivered to the complainant.

(3) A complainant under subsection (1) must, within the time period set out in subsection (2), deliver a copy of the application to the college and the registrant who is the subject of the complaint.

50.61  (1) On application, the review board may extend the time for filing an application for review under this Part, even if the time for filing an application has expired, if the review board is satisfied that special circumstances exist.

[26] The factors that ought to be considered on application to extend time were described in Craig J.A. in Flair Construction Ltd. (Trustee of) v. Bank of Montreal, [1981] B.C.J. 914 at page 2:

…this Court has always considered such factors as whether (1) the application had a bona fide intention to appeal before the expiration date appeal period, (2) he informed the respondent, either expressly or impliedly, of his intention, (3) the respondent would be unduly prejudiced by an extension of time, (4) there is merit in the appeal in the sense that there is a reasonably arguable ground, (5) it is in the interests of justice, i.e., the interest of the parties, that an extension be granted. How much weight will be given to any of these factors in determining whether there are special circumstances will depend on the circumstances of each case.

[27] Several years later, the British Columbia Court of Appeal in Clock Holdings Ltd. V. Braich Estate, [2009] B.C.J. No. 2464 (C.A.) adopted these factors. The Review Board has followed the British Columbia Court of Appeal in several decisions to date (see for instance Review Board Decisions 2009-HPA-0006(a), 2010-HPA-197(a), 2011-HPA-121(a), and 2012-HPA-142(a)).

[28] The first factor to be considered is whether the Complainant had a bona fide intention to apply to the Review Board for a review of the Inquiry Committee disposition within 30 days of the day on which she received notice of that disposition.

[29] On April 4, 2012, the College sent its letter of disposition to the Complainant c/o her Advocate at the address provided for on the Complaint form signed by both the Complainant and the Advocate. The Complainant said she never received the disposition in April as she was away in Burns Lake, and that she never received and/or reviewed it until May 24, 2012.

[30] On May 25, 2012, that the Complainant first made contact with the Review Board about the appeal process. Despite making those inquiries, and despite the Review Board’s letter of June 8, 2012 advising the Complainant that her complaint may be outside of the 30 day appeal period, neither the Complainant nor her Advocate gave notice to any party of an intention to apply for a review until October 29, 2012.
[31] The Complainant and her Advocate argue that the delay was a result of the Complainant’s failed efforts to retain a pro bono lawyer to assist her. Notwithstanding that the Complainant felt incapable of filing the application for review on her own and without a pro bono lawyer to assist, I find that, at the very least, she had the capacity (either on her own or through her Advocate) to communicate an intention to appeal to either the College or the Registrant or the Review Board.

[32] As such, I find that the Complainant had no intention to apply to the Review Board for a review of the disposition within the statutory 30 day appeal period.

[33] The second factor is whether the Complainant informed the Registrant or the College, either expressly or impliedly, of her intention to apply for a review. For the reasons just mentioned, I find that no such intention was expressed until at least October 2012 when the Advocate wrote to the Review Board.

[34] Again, I appreciate that the Complainant feels that this review process is beyond her capabilities, and I also appreciate that she feels she requires the assistance of a lawyer in order to help her properly present her case. However, the fact remains that the Complainant, knowing full well that she was having difficulties retaining counsel, still had the ability to give notice of her intention to appeal through her Advocate. She could have given notice either on her own or through her Advocate, and still pursued her efforts to retain legal counsel for the balance of the review process.

[35] The third factor is whether the Registrant or College would be unduly prejudiced by an extension of time. The Registrant, in its submissions, takes no position on the review application whereas the College says it will face undue prejudice if an extension is granted.

[36] In considering this third factor, I note that the Complainant filed her application for review almost eight months following the date of the College disposition, and she did not give any notice or intention to appeal until October 2012, more than seven months after the date of the College disposition was sent to her.

[37] Given the considerable time that had passed, I find that both the College and the Registrant would be unduly prejudiced if an extension were granted. Both parties are entitled to move on with their lives, professional or otherwise, with some degree of certainty as to whether they are going to be the subject of ongoing appeals, review, litigation etc.

[38] In considering the fourth factor and whether the appeal has merit, I refer to the relief sought in the application for review. It says:

…The [Complainant] asks that the College acknowledge that the [Complainant] is not diabetic and to reconsider its decision on that basis. In the alternative, the [Complainant] requests documentation supporting the diagnosis of diabetes.

[39] What the Review Board can do on a review is set out at s.50.6(8) of the Act which states that the Review Board may do one of the following on completion of a review of an Inquiry Committee disposition:
(a) confirm the Inquiry Committee’s disposition;
(b) direct the Inquiry Committee to make a disposition that could have been made by the inquiry Committee in the matter; or
(c) send the matter back to the Inquiry Committee to reconsider the matter with specific directions.

[40] I note that the application for review seems to have an entirely different focus than the original College complaint. The original College complaint focused on the Complainant’s concerns that she felt neglected and ignored by the Registrant during her October 2010 hospitalization. The application for review focuses on the Complainant’s disagreement with her diabetes diagnosis and provides no explanation as to its relevance to the initial complaint. The Review Board has no jurisdiction to review a matter that was not the subject of investigation and disposition by the College. This in my view is conclusively determinative of the merit of the proposed application.

[41] Finally, I have considered whether it would be in the interest of justice to grant an extension. The delay factors, combined with my finding that the appeal lacks merit leads me to conclude that it would not be in the interest of justice to grant an extension of time. This is particularly so given the time, expense and stress that would of necessity be incurred by all parties to this review if this matter were allowed to proceed.

V CONCLUSION

[42] For all the reasons set out above, I do not grant the Complainant an extension of time as the facts of this case do not support a finding that special circumstances exist to justify an extension.

[43] In making this decision, I have considered all of the information and submissions before me, whether or not specifically reiterated therein.

“Lorianna Bennett”
Lorianna Bennett, Panel Chair
February 14, 2013