



## Health Professions Review Board

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June 22, 2017

BC Health Regulators  
2855 Arbutus Street  
Vancouver, B.C. V6J 3Y8

Attention: Cynthia Johansen, Chair

Dear Ms. Johansen:

**Re: Section 39.2 of the *Health Professions Act* – Past Complaint History**

In my capacity as Review Board Chair, I have been made aware of the work that the health professions colleges have undertaken through your umbrella organization to develop a *Framework for Public Notification* (June 2015), whose stated purposes included ensuring transparency and consistency in how the health colleges apply the public notification provisions set out in s. 39.3 of the *Health Professions Act*.

The purpose of this letter is to invite your members to engage in a similar undertaking in relation to the application of s. 39.2 of the *Act*.

As you know, s. 39.2 authorizes the registrar, the inquiry committee and the discipline committee to consider any action previously taken under Part 3 against a registrant prior to taking its own action respecting a registrant in a matter. The provisions that apply to the registrar and the inquiry committee are set out in ss. 39.2(1)(a) and (b) and 39.2(2), reproduced below for convenient reference:

**39.2** (1) Before taking any action respecting a registrant under the following provisions, the registrar, inquiry committee or discipline committee may consider any action previously taken under Part 3 respecting the registrant:

- (a) in the case of the registrar or the inquiry committee, section 32, 32.2 or 32.3;
- (b) in the case of the inquiry committee, section 33 or sections 35 to 37.1...

(2) The registrar, inquiry committee or discipline committee may, in applying subsection (1), consider

- (a) any action under Part 3 respecting the registrant that occurred or was recorded before the coming into force of this section, or
- (b) any action, similar to an action that may be taken under Part 3, that was taken by the governing body for a health profession under a former enactment regulating the health profession.

As it is presently structured, s. 39.2 confers a discretion on the registrar, inquiry committee and discipline committee. This differs from s. 26(2) of Ontario's *Regulated Health Professions Act* (Schedule 2), which was amended in 2007 following Ontario's *New Directions* Report, to *require* "all available prior decisions" to be considered by the Inquiries, Complaints and Reports Committee except where a complaint is dismissed as frivolous or vexatious:

**26(2)** A panel of the Inquiries, Complaints and Reports Committee shall, when investigating a complaint or considering a report currently before it, consider all of its available prior decisions involving the member, including decisions made when that committee was known as the Complaints Committee, and all available prior decisions involving the member of the Discipline Committee, the Fitness to Practise Committee and the Executive Committee, unless the decision was to take no further action under subsection (5).

While the current British Columbia provision confers discretion, the law is clear that it is open to the colleges to develop guidelines to structure the exercise of discretion. Such guidelines, while not having the force of law, have been recognized as being valuable administrative law tools to help ensure that discretion is exercised thoughtfully, consistently and transparently. These are the very same interests that are reflected in the Review Board's statutory authority to "develop and publish guidelines and recommendations for the purpose of assisting colleges to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair": *Act*, s. 50.53(1)(d).

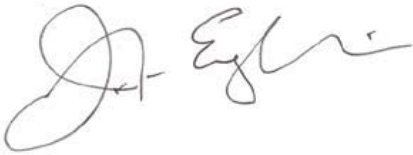
To date, a few Review Board decisions have touched on aspects of s. 39.2. For example, in *Decision No. 2010-HPA-004(a)*, the Review Board stated that "except in the exceptional circumstance ... of similar fact evidence, past conduct history is not relevant to whether particular conduct actually took place." Instead, the potential relevance of this material speaks to "what the Inquiry Committee might have done, in terms of outcome, had it been made aware of the past conduct history": paras. [5-6]. In *Decision No. 2015-HPA-G21*, the Review Board, in reviewing the reasonableness of an inquiry committee remedial disposition, expressed concern that the Record was silent as to what inquiries the Inquiry Committee had made with respect to past conduct history and stated: "While I am prepared in this case to assume that there is no relevant past conduct history, it would greatly assist the Review Board in future to have some indication in the Record as to whether an inquiry into past conduct history has been made in any case where the Inquiry Committee determines that regulatory criticism against a registrant is appropriate" (para. [215]).

In my respectful view, the time has come, in the public interest, for a systematic review of the issue of how "past conduct history" is employed by the health professions colleges. While the Review Board cannot fetter its own statutory mandate to develop guidelines and recommendations for the colleges, there is merit in the perspective that your organization should be given a reasonable period of time in the first instance to develop its own framework before the Review Board considers, in May 2018, whether it is necessary for the Review Board to issue any guidelines or recommendations on the issue under s. 50.53(1)(d) of the *Act*.

As noted earlier, any framework you were to develop would not necessarily determine any particular complaint. However, the development of a considered common framework for decision-making would serve the public interest from many perspectives. It would enable your members to work together to assess, evaluate and, if necessary, modify their own current practices. It would assist college decision-makers by ensuring a reasoned and consistent framework for decision-making. It would provide a measure of notice and certainty to both complainants and registrants who will be told how past conduct history will be used. It would assist the Review Board as it undertakes the review of college dispositions under ss. 32 and 33.

I look forward to your early reply as to the willingness of the colleges, through your organization, to undertake the suggested project.

Yours truly,

A handwritten signature in black ink, appearing to read "J. Thomas English". The signature is fluid and cursive, with the first name "J." being particularly prominent.

J. Thomas English, Q.C.  
Chair, Health Professions Review Board

cc. BCHR Executive Committee