HEALTH PROFESSIONS REVIEW BOARD

2015 Annual Report

Covering the reporting period from January 1 – December 31, 2015

Health Professions Review Board

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July 22, 2016

The Honourable Terry Lake
Minister of Health Services
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Minister Lake:

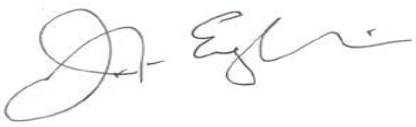
Re: **Health Professions Review Board Annual Report**

On behalf of the Health Professions Review Board, it is my pleasure to respectfully submit the Annual Report of the Health Professions Review Board for the period January 1, 2015 to December 31, 2015. As has been our practice in past years we include several excerpts from significant decisions released in the first two months of 2016, to bring these to the attention of readers in a timely way.

This report is submitted as required by Section 50.65(1) of the *Health Professions Act*.

We remain committed to fulfilling the important mandate entrusted to the Review Board to ensure the highest levels of accountability and transparency in BC's health professions.

Yours truly,



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

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A meeting of minds - and occasionally, of hearts

Since its inception the Review Board has promoted non-adversarial resolution of disputes. While we strive to make our quasi-judicial hearing processes efficient, user-friendly and fair, the fact remains that they are adversarial, with parties typically taking sides in opposition to one another. This can be stressful for everyone, including registrants, college staff and the majority of our applicants or complainants who have had no previous exposure to administrative law, or any other type of law. For that reason we view a non-adversarial approach such as mediation as the best vehicle to produce optimal results for all parties.

That having been said, it remains true that even getting the parties to participate in a mediation process can be difficult. Not all of them may feel an equal attraction to the process - for example, a registrant may be concerned about losing income as a result of the participation time that mediation requires. While this may be a legitimate concern, we do not believe it merits dismissing the mediation option, particularly as mediations can often be scheduled creatively to meet the needs of the parties. In situations where our preliminary assessment establishes that mediation offers the best chance of meeting the needs of the parties, we consider that we should be able to compel participation in that process, even if it means a penalty for non-participation.

The Legislature of British Columbia agrees. In December 2015 amendments were made to s.28 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"), which now states:

> 28 (1) The chair may appoint a member or staff of the tribunal or another person to conduct a facilitated settlement process to resolve one or more issues in dispute.
> (2) The tribunal may require 2 or more parties to participate in the facilitated settlement process, in accordance with the rules of the tribunal.
> (3) The tribunal may make the consent of one, all or none of the parties to the application a condition of a facilitated settlement process, in accordance with the rules of the tribunal.

Note sub-section (2) above. This statutory amendment has caused the Review Board to amend its Rules (see Rule 38 on our website or in this Annual Report in the "mediation results" section) such that failure to participate can result in assignment of the matter to another "process stream," or an order of costs against an applicant, complainant, registrant or college where that party was required to attend mediation but failed to comply.

The Rules recognize that mediation is not appropriate for every case. Mediation may be inappropriate where, for example, an application identifies a broad systemic problem, or where a dispute raises an issue of law, policy or interpretation that needs to be determined on the record, or where an applicant or complainant is proceeding with a vexatious application, or where there are allegations of abuse of power. Each of these situations can raise special concerns that require adjudication and determination within the Review Board's formal decision-making process. But these exceptions do not undermine the Review Board's general philosophy in favour of a robust process designed to encourage all parties to participate and resolve applications in a non-litigious way; with this in mind, we are more committed than ever to pursuing consensual resolution of disputes.

The Review Board and the Courts

In my last Message (2014 Annual Report) I offered this comment:

> …on a few occasions there has been a divergence of opinion with certain colleges, expressed by way of judicial review applications. A key issue in these proceedings is the scope and substance of the legal relationship between the Review Board and the inquiry committees of the health colleges as well as the proper relationship between the court and the Review Board. This is a matter that will likely be determined and defined – and refined – by the courts in the coming years.

The good news is that, compared to the number of decisions the Review Board makes (and compared with the judicial review volume that other tribunals experience), judicial review of Review Board decisions is still relatively rare. At the same time, in those cases where judicial review does occur, it is apparent to me, as Board Chair, that the proper relationship between the Court and the Review Board is an issue that still needs to be finally worked out. When is it appropriate for a court to intervene when the Review Board, which was created for this purpose with a strong privative clause, has made a judgment about the adequacy of an investigation or the reasonableness of a disposition? It would not be appropriate for me to comment further on this issue given that this issue is before the Court on every judicial review application. I will simply say that I know that this issue is not an easy one. It has to be addressed whenever a court reviews an administrative tribunal decision, and has especially been an issue where, as here, the Review Board is still relatively new on the administrative law scene and is applying a mandate over certain types of college decisions that were not formerly subject to judicial oversight. What I can say is that the Review Board is committed to carrying out its responsibility to ensure that its processes are fair and that its decisions are clearly and fully explained.

Why the Review Board?

The Review Board opened its doors for business seven years ago with myself as the legally-trained Chair (a requirement of the *Health Professions Act*, s.50.51(2)) (the "Act") and 18 newly-appointed members, half of whom had legal training and experience. The other half are members appointed from various walks of life after a merit based process. Significantly, the Act prevents any Review Board member from being a current member of a health college.

Why would the legislature create a tribunal that was not allowed to have clinical "health professions" expertise, to sit in judgment of the colleges that have been widely accepted as having that expertise? Shouldn't a specialized body like the Review Board have sophisticated expertise in the clinical subjects involved in the health professions over which they are going to act as an expert review agency?

The answer lies in understanding that the Review Board was not created to be clinical decision-making body. It was purposely designed to be a body of non-clinicians whose objective is to ensure that the colleges, which exercise the privilege of self-regulation, are acting in the public interest. The need for such a body was expressed by no less than British Columbia's Ombudsman, who rather bluntly stated as follows in a Special Report issued in 2003:

> My experience in investigating complaints about the colleges confirms the Minister's observation that some colleges have failed, on occasion, to act in the public interest in carrying out their mandate. Some colleges have demonstrated a fundamental lack of understanding of their legal responsibilities and of the requirements of fairness not only to members of the public but also to members of their professions. In other cases, the professions do not appear to have fully accepted

> or understood what it means to act in the public interest. They still believe, perhaps because it is the members who elect the governors and pay for the colleges' operations, that the colleges are primarily there to protect the interests of the members.[1]

The Ombudsman was not suggesting, and I do not suggest, that the colleges systematically make decisions that fail to respect the public interest. He was, however, suggesting that there is merit in creating a body that can independently and objectively review that issue so that errors can be corrected and the public can have confidence in college decision-making.

From this perspective then, it makes perfect sense that the Legislature created a body made up of people who are *not* clinicians. And it makes perfect sense that this body's specialized role would *not* be to second guess clinical judgments, but rather to review and assess the adequacy of college investigation processes (which is not a medical expertise question) and the reasonableness of its dispositions (which can go wrong where, for example, a college has failed to address key issues or has shown a serious lack of proportion in decision-making). The Review Board's experience has confirmed the legislature's wisdom that the colleges, while deserving of great respect, are composed of human beings and are not perfect. It does not take a clinician to identify problems with the adequacy of the investigation and the reasonableness of the disposition.

It is important for me to say as well that as our members conduct successive hearings, they gain what the law has called "accumulated experience and expertise" in assessing adequacy and reasonableness. The Review Board has now developed a body of decisions ("case law") that is progressively refined with each passing year, even as it tackles more complex, difficult questions. Over the last seven years the Review Board has learned much about investigative processes in the health professions, a regulatory specialization that has developed its own discrete body of knowledge. Collectively, it applies that knowledge to carry out effectively the intent of the legislature: to assure transparency and accountability in health college decision making, as those colleges work to protect the public.

"He Said, She said"

As to the Inquiry Committee, they are also statutory decision makers, charged with making decisions under Part 3 of the Act. One of the most difficult tasks they face is making a determination - if in fact a determination is made at all - with respect to complaints arising in a private one-on-one treatment by a health professional. In this scenario a host of bedevilling questions arise: if the patient/complainant in this private setting alleges the registrant made a serious departure from standards of practice, it becomes the patient's word against the registrant's - and it is usually only the registrant that has any notes (clinical records) of the encounter. To the extent these records exonerate the registrant, how much weight should they be given, since one could expect the Registrant to give him/herself the benefit of the doubt in recording procedures and outcomes? Should the Inquiry Committee invariably give the Registrant the benefit of the doubt, based on clinical records? In these circumstances, what constitutes an adequate investigation? How far afield should the Inquiry Committee go in obtaining evidence that might corroborate the patient's assertions?

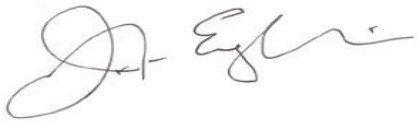
[1] Ombudsman, Acting in the Public Interest? Self-governance in the Health Professions: The Ombudsman's Perspective, Special Report No. 24, May 2003 at p. 3.

Obviously, these are not easy questions. They have been and will continue to be addressed substantively in Review Board decisions - see my message in the 2013 Annual Report regarding "adequate investigations." These questions are foundational and underline the Review Board's reason for existence. By focusing on process, we become an integral part of a provincial quality assurance mechanism, assuring fairness, objectivity and transparency (and hopefully, continual improvement) in the workings of self-regulating health professions. Since all we can usually do when taking issue with an investigation or a disposition (decision) of an Inquiry Committee is to remit it back to the Inquiry Committee with specific directions, our task is fundamentally akin to that of a coach: "give it another try and, this time, focus on [one or more particular issues]."

It is with this coaching relationship in mind that I trust we can move forward in a spirit of collegiality (the perfect word, obviously). To quote my Executive Director, Michael Skinner, from his message in our last Annual Report, "We are all working toward the same goal - we just have different job descriptions."

Perennial thanks

As always, my heartfelt gratitude to those key players who do the heavy lifting at the Review Board: our Order In Council appointed members who pour themselves into the task of conducting hearings and mediations, our legal counsel Frank Falzon, Q.C., the "back office" financial and administrative support provided by the ever-helpful staff of the Environmental Appeal Board, and last but by no means least, Executive Director Michael Skinner and his highly competent team of case managers and administrators at the Review Board's Victoria office - they are the engine of our organization!



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

It's not "alternative" dispute resolution - it's mainstream

Continuing the opening theme of the message from Chair Tom English, I want to say a few words about mediation.

Mediation is often touted as a time and cost-effective alternative to litigation. When compared to classic court litigation, that is undoubtedly true - and the cost difference can be startling, with mediation sometimes costing just a small percentage of the cost of case research, pleadings and related documentation, discovery processes, pre-trial applications, trial preparation and the trial hearing itself.

In administrative law, the cost difference is not quite as pronounced, primarily because Review Board hearing processes are relatively streamlined and most often do not involve legal counsel, at least on the complainant's side. The benefit of mediation in this context (and of course this applies to conventional litigation also) resides more in the area of flexible agreements and outcomes that can transcend the authority of a Review Board member when making orders under the *Health Professions Act* (the "Act"). Under the Act, the most a Review Board member can usually do when reviewing a decision of a college inquiry committee - almost always by way of a hearing conducted through written submissions - is send the matter back to the Inquiry Committee with directions to correct certain parts of an investigation or a disposition (outcome decision) that were deficient.

In contrast to this type of adjudicated outcome, parties to an application for review may choose to work matters out themselves under the guidance of a mediator whose primary task is to facilitate a safe, respectful environment for the parties to talk. Because the parties are crafting their own agreement, they are not bound by the jurisdictional restrictions with which member adjudicators must cope. The only direct jurisdiction conferred on the Review Board is with respect to colleges; the Review Board cannot make direct orders involving any other party. This realization can be frustrating for complainants whose dispute remains more with the registrant (health professional who is a registered member of a college) than with the college. However, because the complainant and registrant are parties to the review, they have the legal rights of parties; these rights include the right to meet with one another and come to their own agreement to resolve the dispute. Resolutions achieved in this way can typically be much more satisfying for the complainant, because they can address the heart of the dispute that gave rise to the complaint in the first instance, and for the registrant as it can bring final closure to the matter.

We have seen enough positive examples of mediated outcomes that the Review Board has adopted a policy of considering mediation in each review filed with the Review Board, unless there are reasons why mediation would not be appropriate in that specific case (see Chair's message for a few examples). To pursue this in a practical way, we at the Review Board have followed the lead of the Legislature in its amendment of the *Administrative Tribunals Act* (again, see Chair's message for details), and have amended our Rules of Practice and Procedure to allow the Review Board, after carefully considering the appropriateness of mediation, to direct parties to mediation and to provide for possible sanctions, including the requirement to pay costs, in the case of failure or refusal to participate.

The rationale for this amendment to our Rules is spelled out in greater detail in our revised Practice Directive No. 5 (Mediation), which offers this commentary on the value of the process:

> Review Board experience has shown that the most common theme in disputes between health professionals and the individuals they serve is inadequate communication in the delivery of the health-related service. The reasons for this may vary, but the bottom line is that health professionals who do not adequately communicate end up creating situations where the patient or client believes that the professional either doesn't care or doesn't know. What the Review Board has also found is that the best solution for poor communication is good communication, facilitated through mediation. And the results can be both dramatic and cathartic - we have seen complainants gain insight into the demands of professional practice, and a realization that the professional does care, and is competent. On the other side of the table, professionals often come away with a renewed commitment to make good communication a priority in their practice.

For those wanting to understand the philosophy, rationale and legal foundation underpinning the Review Board's approach to mediation, I recommend reading Practice Directive No. 5, available on the Review Board website. It should be remembered that while I have been using complaints about inquiry committee dispositions as the example for this discussion, registration committee decisions (issues arising from a decision of a registration committee whether or not to accept a person's application for registration as a practising member of a college) are equally amenable to mediation processes, and typically produce results for the applicant more satisfying than a Review Board decision.

We will continue to refine our approach to mediation, to make it more accessible, effective and attractive to all parties. Among the biggest challenges in getting all parties to mediation are time, cost and sometimes geography (which obviously has a significant impact on time and cost). To attempt to address this, the Review Board will in the coming year, in addition to our current mediation practices (face to face meetings, written exchanges and teleconferences), be examining and testing newer technology options including online mediation by videoconference. We are convinced that by removing barriers to participation more parties will be able to enjoy the many benefits of non-adversarial dispute resolution.

My thanks as always to the dedicated and talented staff of the Review Board who provide the administrative, logistical and professional services (including, of course, leading mediations) without whom our mediation initiatives would not be possible.

And speaking of thanks, what better way to end this note than to quote verbatim a heartfelt "thank you" from a complainant to one of our case managers:

> I've been wanting to say how grateful I am for the Health Professions Review Board. I don't know the history of how this governing body came to be but this is government working at its best. It is an objective agency with the power and expertise to help ensure public safety. This process helps to level the playing field and, ultimately, it takes care of the greater good in our society. I can imagine that most people don't even know that this agency exists...which is good in a way because hopefully that means people don't need your services very often. But I needed help. I didn't have a chance on my own. I was at a huge disadvantage in seeking justice for what happened to me until I learned that I could appeal through the HPRB. So at this point I just wanted to say "thank

you". Please know what a comfort it is that you are there. And I appreciate the great work you have done on my behalf.

Michael Skinner, Executive Director
Health Professions Review Board

About the Review Board

On March 16, 2009, the Health Professions Review Board (the "Review Board") opened its doors and began receiving applications for review, making British Columbia the second province, after Ontario, to establish an independent health professions review body.

The Review Board is an independent quasi-judicial administrative tribunal created by the *Health Professions Act*, R.S.B.C. 1996, c. 183, as amended, (the "Act") that provides oversight of the regulated health professions of British Columbia. As such, the Review Board is an innovative and integral component of the complex health professions regulatory system in British Columbia. It is a highly specialized administrative tribunal, with a specific mandate and purpose, designed to address a few carefully defined subjects outlined in the Act. The Review Board's decisions are not subject to appeal and can only be challenged in court (on limited grounds) by judicial review.

The Review Board is responsible for conducting complaint and registration reviews of certain decisions of the colleges of the 22 self-regulating health professions in British Columbia. The 22 health professions designated under the Act and whose decisions are subject to review by the Review Board are listed below:

- Chiropractors
- Dental Hygienists
- Dental Surgeons
- Dental Technicians
- Denturists
- Dietitians
- Massage Therapists
- Midwives
- Naturopathic Physicians
- Nurses (Licensed Practical)
- Nurses (Registered)
- Nurses (Registered Psychiatric)
- Occupational Therapists
- Opticians
- Optometrists
- Pharmacists
- Physical Therapists
- Physicians and Surgeons
- Podiatrists
- Psychologists
- Speech and Hearing Professionals (regulating the separate professions of Audiology, Hearing Instrument Practitioner, and Speech-Language Pathology)
- Traditional Chinese Medicine Practitioners and Acupuncturists

The Mandate of the Review Board

Through its reviews, early resolution processes and hearings, the Review Board monitors the activities of the colleges' complaint inquiry committees and registration committees, in order to ensure they fulfill their duties in the public interest and as mandated by legislation. The Review Board provides a neutral forum for members of the public as well as for health professionals to resolve issues or seek review of the colleges' decisions.

The Review Board's mandate is found in s.50.53 of the Act. Under this section the Review Board has the following two types of specific powers and duties:

1. On request to:

    - review certain registration decisions of the designated health professions colleges;
    - review the timeliness of college inquiry committee complaint dispositions or investigations; and
    - review certain dispositions by the inquiry committee of complaints made by a member of the public against a health professional.

    The Review Board has potentially broad remedial powers after conducting a review in an individual case. In the case of registration and complaint decisions it can either:

    - confirm the decision under review;
    - send the matter back to the registration or inquiry committee for reconsideration with directions; or
    - direct the relevant committee of the college to make another decision it could have made.

    In cases where a review has been requested of the college's failure to complete an investigation within the time limits provided in the Act, the Review Board can either send the matter back to the inquiry committee of the college, with directions and a new deadline, to complete the investigation and dispose of the complaint, or the Review Board can take over the investigation itself, exercise all the inquiry committee's powers, and dispose of the matter.

2. On its own initiative the Review Board may:

    - develop and publish guidelines and recommendations to assist colleges to develop registration, inquiry and discipline procedures that are transparent, objective, impartial and fair.

    This particular power of the Review Board allows for preventive action to be taken, recognizing that while the review function of deciding individual requests for review is important, it may not have the same positive systemic impact as a more proactive authority to assist colleges, in a non-binding process, to develop procedures for registration, inquiries and discipline that are, in the words of the Act, transparent, objective, impartial, and fair.

Further information about the Review Board's powers and responsibilities is available from the Review Board office or the website: http://www.hprb.gov.bc.ca

Review Board Members

Unlike the colleges, the Review Board is a tribunal consisting exclusively of members appointed by the Lieutenant Governor in Council. This is required by the Act to ensure that the Review Board can perform its adjudicative functions independently, at arm's-length from the colleges and government. This is reinforced by s.50.51(3) of the Act which states that Review Board members may not be registrants in any of the designated colleges or government employees.

The Review Board consists of a part-time Chair and 25 part-time members. The members of the Review Board, drawn from across the Province, are highly qualified citizens from various occupational fields who share a history of community service. These members apply their respective expertise and adjudication skills to hear and decide requests for review in a fair, impartial and efficient manner. In addition to adjudicating matters that proceed to a hearing, members also conduct mediations and participate on committees to develop policy, guidelines and recommendations.

During the present reporting period the Review Board consisted of the following members:

Tribunal Members as of December 31, 2015

Member	Profession	From
J. Thomas English, Q.C. (Chair)	Lawyer	Vancouver
Michael J.B. Alexandor	Business Exec./Mediator (Ret.)	Vancouver
Kent Ashby	Lawyer	Victoria
Karima Bawa	Business Executive	Vancouver
Lorianna Bennett	Lawyer/Mediator	Kamloops
Shannon Bentley	Lawyer/Advocate	Bowen Island
Fazal Bhimji	Mediator	Delta
Lorne Borgal	Business Executive	Vancouver
D. Marilyn Clark	Consultant/Business Executive	Sorrento
Douglas S. Cochran	Lawyer (Ret)	Vancouver
William Cottick	Lawyer	Victoria
Brenda Edwards	Lawyer	Victoria
Leigh Harrison	Lawyer (Ret)	Rossland
David A. Hobbs	Lawyer	North Vancouver
Robert J. Kucheran	Lawyer	Vancouver
Victoria (Vicki) Kuhl	Consultant/Mediator/Nursing	Victoria
Sandra K. McCallum	Lawyer (Ret)	Victoria
Lori McDowell	Consultant/Lawyer	Vancouver
Robert McDowell	Project Director	Vancouver
John O'Fee, Q.C.	Lawyer/CEO	Kamloops
Thelma O'Grady	Lawyer	Vancouver
Herbert S. Silber, Q.C.	Lawyer	Vancouver
Donald A. Silversides, Q.C.	Lawyer	Prince Rupert
Lorraine Unruh	Hospital Administrator (Ret.)	Penticton
Kent Woodruff	Lawyer/Mediator	Kamloops
Deborah Zutter	Mediator	West Vancouver

The Review Board Office

The administrative support functions of the Review Board are consolidated with the Environmental Appeal Board/Forest Appeals Commission (EAB/FAC) offices, which also provide administrative services to a number of other tribunals.

The Review Board staff complement currently consists of the following positions:

- Executive Director
- Three Case Managers
- One Intake Administrator
- One Administrative Assistant
- Finance, Administration and Website Support (provided by EAB/FAC)

The Review Board may be contacted at:

Health Professions Review Board
Suite 900 - 747 Fort Street
Victoria, BC V8W 3E9

Telephone: 250-953-4956
Toll-free number: 1-888-953-4986
Facsimile: 250-953-3195

Website Address: www.hprb.gov.bc.ca

Mailing Address:

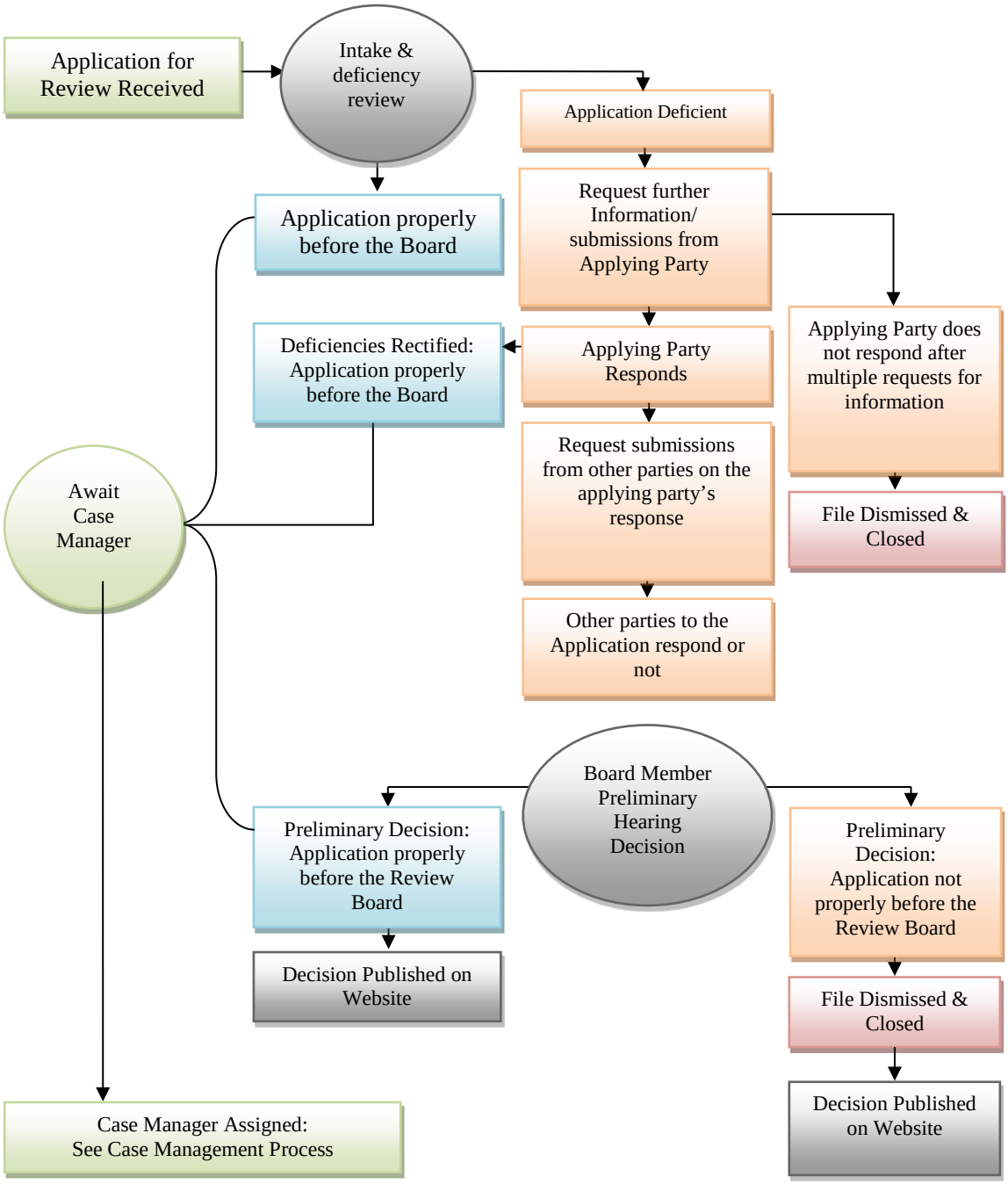
Health Professions Review Board
PO Box 9429 STN PROV GOVT
Victoria, BC V8W 9V1

The Review Process and Activity

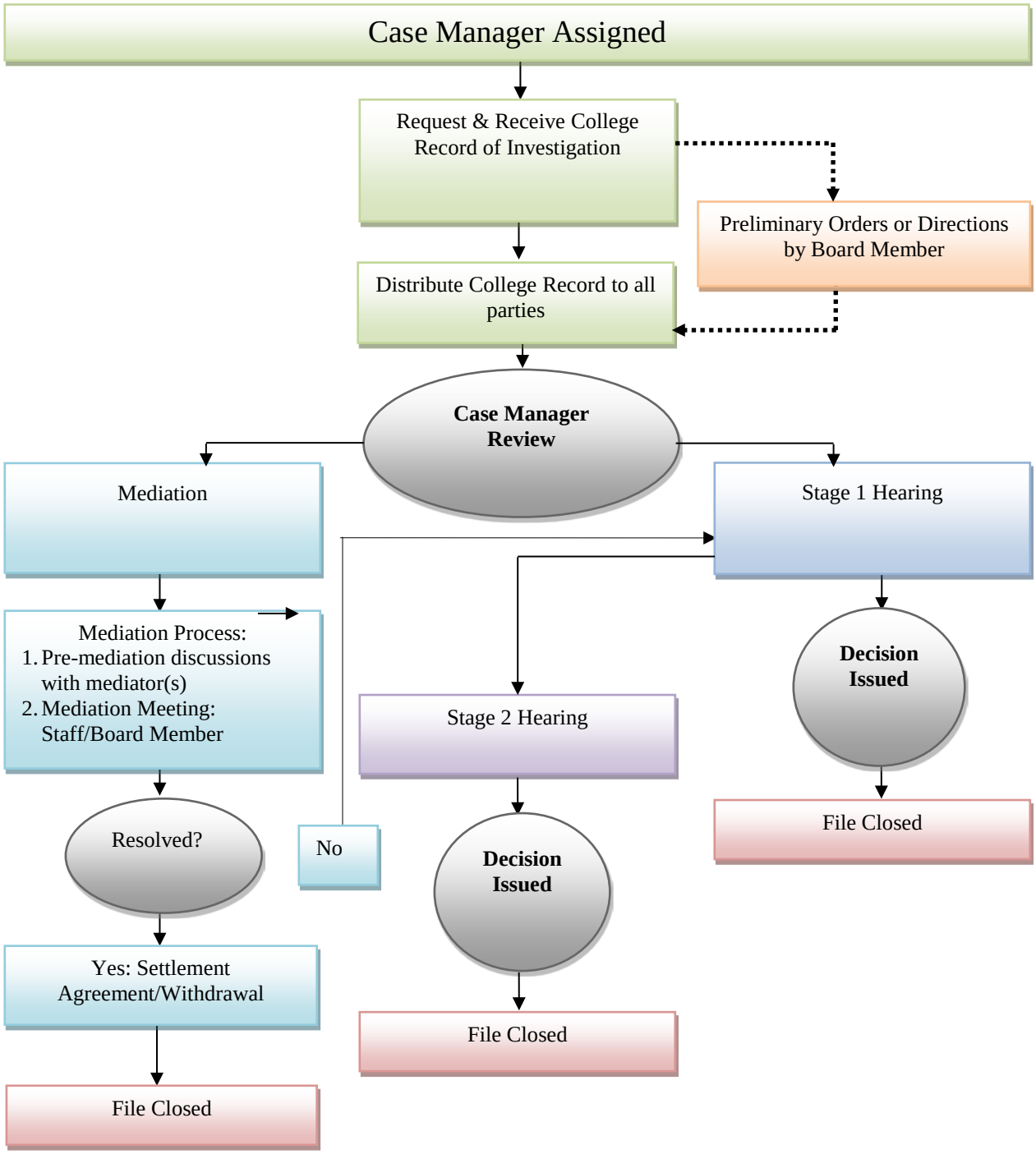
The following is a visual overview of the review process. For more detailed information, a copy of the Review Board's Rules of Practice and Procedure and other information can be accessed at the Review Board website or obtained from the Review Board Office.

Few applicants who submit applications for review to the HPRB have had any exposure to administrative law or process. For that reason intake staff assists applicants to go through the steps necessary to "perfect" an application so that it meets the requirements of the *Health Professions Act* and the Rules of the Review Board. The chart below illustrates how Review Board staff does that.

Intake Administrator: Intake Process



The Chart below illustrates the steps in the process for managing a case from assignment of a case manager through to resolution, either by way of a mediated settlement or a decision of a Review Board member following a hearing.



The Adjudication Process

As the Review Board's Rules indicate, mediation may not be appropriate for every case. Mediation may be inappropriate where, for example, an application identifies a broad systemic problem, where a dispute raises an issue of law, policy or interpretation that needs to be determined on the record, where an applicant is proceeding with a vexatious application, or where there are allegations of abuse of power. Each of these situations can raise special concerns that require adjudication and determination within the Review Board's formal decision-making process.

In other cases, even though the parties have entered into mediation in a sincere effort to resolve the issues on the application for review, the application may remain unresolved and must therefore be decided by the Review Board's adjudication (hearing) process.

A formal review before the Review Board is conducted as a "review on the record," subject to any additional information or evidence that was not part of the record that the Review Board accepts as reasonably required for a full and fair disclosure of all matters related to the issues under review. Hearings at the Review Board are primarily conducted in writing using the previously mentioned two-stage process. They can however also be conducted in person (an oral hearing) or by using an electronic format such as video or teleconferencing or by any combination of these formats. Reviews conducted by way of an oral hearing are generally open to the public, unless the Review Board orders otherwise.

If a written hearing is held, the Review Board will provide directions regarding the process and timeframe for the parties to provide their evidence, arguments and submissions to the Review Board in writing. An oral hearing gives the parties an opportunity to present their information, evidence and submissions to the Review Board in person.

The chair of the Review Board will designate one or more members of the Review Board to sit as a Panel for each individual hearing. A member of the Review Board who conducts a mediation will not be designated to conduct a hearing of the matter unless all parties consent. Further, in order to ensure that there is no conflict of interest or reasonable apprehension of bias, a board member who has previously been a registrant of a college or served on a college's board of directors will usually not sit on a panel designated to conduct a hearing in any case involving that particular college, unless all parties consent.

After a written or oral review hearing, the Review Board will issue a written decision, deliver a copy to each party and post it to the website.

Mediation Activity

In past years we have presented extremely brief snapshots of mediated outcomes to provide what we referred to as "a flavour of what has been achieved in the resolution of health practices disputes." This is because of the clear requirement that such resolutions be absolutely confidential – no information can be included that would enable identification of the parties.

Nonetheless, within that requirement for absolute confidentiality an opportunity has arisen to provide a more complete picture of what can happen in a productive mediated resolution of what could otherwise have been an intractable dispute characterized by deep hostility. We offer this mediator's glimpse into a very human process:

> This case arose as a result of concerns regarding treatment of a spouse prior to death. The disease which resulted in the spouse's death was a rare form of an otherwise well-known disease which in turn is extremely difficult to detect. The rare form of this disease manifests itself in periodic outbreaks which suggest unrelated illness and which in its own right is detected only by invasive surgery.
>
> The complainant had significant unresolved concerns regarding the spouse's death. These concerns were focused on the last registrant (health professional) to treat the spouse and resulted in considerable antagonism toward that registrant. The pre-mediation assessment of the issues conducted by review board staff and the mediator indicated that the matter was appropriate for mediation. The assessment was partially based upon the evidence in the file of empathy from the registrant that indicated a conversation between the parties could take place that may allow for a greater level of understanding between them. A formal hearing conducted by way of written submissions with a resulting written decision would definitely not have allowed this type of personal confidential conversation to take place and most likely would only have left the Complainant more unsatisfied.
>
> The mediator worked with the complainant to set the goal for a successful mediation, as the negative tone of the writing and the level of emotion at the start of the process was significant. The registrant was initially not keen to participate in mediation but reluctantly agreed. During the mediation College participation proved to be critical to the outcome as the College representative was able to explain the disease and the treatment with considerable empathy.
>
> The mediator established a supportive mediation environment that allowed for him to caucus privately with the registrant and address some concerns that arose. After a break the registrant and the complainant were able to establish a deeper connection. It was that deeper personal connection which in the end provided the bridge for the complainant to accept that everything possible had been done in the treatment of the spouse.
>
> The Complainant was accompanied by adult children during the mediation. It was clear that toward the end of the process the Complainant and the adult children all reached a point of full acceptance that the spouse had been well cared for, and that the people providing the care truly respected the spouse as an individual person whom they cared about. This outcome was only possible through mediation.

This summary highlights the fact that parties occasionally need to be pushed toward the mediation process. By its nature, it is not the sort of process in which one can retreat or otherwise avoid the (perceived, at least) stress of human contact and interaction. As noted in the Chair's and Executive Director's messages in this Report, the Review Board has, following s.28(2) of the *Administrative Tribunals Act*, amended its Rules to provide the authority to compel party participation in the mediation process, with possible penalties for non-participation. For convenient reference, here are the Review Board Rules governing mediation, using as the heading the statutory term "facilitated settlement":

PART VII FACILITATED SETTLEMENT

Rule 36 Commencement

(1) An application will proceed to mediation unless the review board directs the matter into the pre-hearing conference or hearing process stream.

(2) The chair will appoint a member(s) of the review board and/or staff to conduct the mediation.

(3) The review board may require some or all of the parties to participate in a mediation.

(4) The review board may require a party to participate in a mediation even if that party does not consent.

(5) The review board may require the parties to separately attend one or more pre-mediation meetings with the mediator(s) to be held in person or by telephone.

(6) The review board will notify the parties, in writing, of the scheduled date of the mediation.

Rule 37 Confidentiality

(1) The proceedings of a mediation are confidential and unless all participating parties consent, a party must not, other than in a criminal proceeding, disclose or be compelled to disclose:

a) a document or other record created by a party specifically for the purpose of achieving a settlement of one or more of the issues under review through mediation; or
b) a statement made by a party specifically for the purpose of achieving a settlement of one or more of the issues under review.

(2) Where mediation is voluntary, before mediation begins all participating parties and any other persons attending the mediation must sign a Form 8 Agreement to Mediate that includes a confidentiality clause prescribed in these rules.

(3) Where mediation is mandatory, before mediation begins, all participating parties must sign a Form 12 Acknowledgment of Mandatory Mediation Process and Duty of Confidentiality which acknowledges that they have read rules 36-38.

(4) Notwithstanding subsections (1) – (3), the fact that a party did not attend mandatory mediation may be disclosed as permitted by Rule 38(4).

Rule 38 Failure to attend mediation

A. Failure by college or registrant to participate

(1) If the college or registrant fails to participate in mediation the review board may proceed with mediation in the absence of that party.

(2) If the member responsible for prehearing management of the application for review determines that the college or registrant without good reason failed or refused to participate in mediation, the member may do one or both of the following:

(a) direct the application into another process stream without notice to that party; and

(b) order that the application proceed with the new process stream in the absence of that party.

B. Failure by complainant or applicant to participate

(1) If the review board determines that the complainant or applicant refused to participate in a mediation, the review board may do one or more of the following:

(a) direct the application into another process stream without notice to that party;

(b) order that the application proceed with the new process stream in the absence of that party; or

(c) dismiss the application for review.

(2) If a party required to attend mediation did not comply with that requirement:

(a) the mediator conducting the mediation may write a confidential memorandum to the case manager recording that fact;

(b) the case manager may disclose that confidential memorandum to the hearing panel only after the hearing panel has issued its decision to the parties; and

(c) the hearing panel, no later than 21 days after the hearing decision has been issued and irrespective of the outcome of the review, may write to the parties seeking submissions on whether the party who refused to attend should pay the costs of the other party or parties and part of the costs of the Review Board under Rule 54.1.

Rule 39 Action after mediation

(1) At any time after a review has been directed to mediation, the review board may:

a) dismiss the application if all issues are resolved; or

b) if all issues are not resolved, direct the application into another process stream.

The Review Board conducted 134 hearings in 2015, and a selection of significant decisions is summarized below. Several decisions released in the first months of 2016 are also included to bring them to the attention of readers in a timely way. The Review Board process, which finds its authority in Part 4.2 of the *Health Professions Act* and in the provisions of the *Administrative Tribunals Act* (the "ATA"), is codified in the Review Board's *Rules of Practice and Procedure*. These Rules provide for the efficient adjudication of questions arising at the beginning of a Review Board proceeding, such as:

- Does the Review Board have jurisdiction (legal authority) to hear this particular complaint?
- Is this complaint clearly without merit? (i.e., is it frivolous, vexatious, or trivial)
- Was the complaint not filed in time, and should an extension of time for filing be granted?
- Should certain confidential or sensitive third party information in a health college record of investigation be withheld from an applicant?

When a complaint about a health college's inquiry committee investigation proceeds to a Review Board hearing, the Review Board will focus on two primary questions:

1. Was the investigation adequate?

2. Was the disposition (reasoning, conclusion and outcome) reasonable?

1. PRELIMINARY AND INTERIM DECISIONS

Extension of Time Granted

DECISION NO. 2014-HPA-214(a), February 23, 2015, Dental Surgeons

Extension granted. Application filed 15 days late, application not opposed, unable to conclude that it clearly has no merit:

> …. the Complainant explained that she has a physical disability and that she requires wheelchair accessible transit for mobility. She explained that she lives in a town without internet access and has to travel to the adjacent town by transit in order to use a computer. Once in the adjacent town she only has access to a public computer for a very limited amount of time. She explained that in the period leading up to December 16, 2014 there had been multiple storms with road closures that made it challenging for her to reach the adjacent town on days when she felt well enough to travel. Given the Complainant's home address I have no reason to doubt her claims regarding her access to a computer and to the date of receipt of the disposition letter.

DECISION NO. 2015-HPA-011(a), April 1, 2015, Physicians & Surgeons

Extension granted:

> *[9] Applying the above criteria, there is no evidence that there was a bona fide intention to apply for a review of the file within the time period, or that there was notice given to the Registrant regarding the fact that the Complainant wanted to apply for a review, until the Registrant received a copy of the application shortly after the deadline. I emphasize again*

however, that this late filing resulted in a two-week delay at most, and that this period included the Christmas and New Year's Eve holidays.

[10] In my view the Registrant would not be unduly prejudiced by the Complainant's late filing. The matter has not been significantly delayed.

[11] It is not possible for me to determine if there is merit to the appeal based on the minimal information before me at this very preliminary stage in the proceedings. Finally, regarding the last criterion, it is my view that it would be in the interests of justice to allow the application to proceed given the minimal time delay incurred.

Extension of Time Refused

DECISION NO. 2015-HPA-005(a), April 1, 2015, Physicians & Surgeons

Extension of Time denied - critical criterion not met. Application was bound to fail:

[24] … notwithstanding the Complainant's desire to see the Registrant's license to practice revoked, that is not something that a panel of the Review Board can order. In fact, this Complainant, like so many, would like to see the Review Board panel re-investigate the complaint. We cannot step into the shoes of the Inquiry Committee. Because the relief being sought from the Review Board is not within our jurisdiction, this application is bound to fail. To pursue this file to a hearing would be a waste of the resources of the College, the Registrant, the Review Board and the Complainant. I do not find merit in the application. No special circumstances have been identified by the Complainant to warrant an extension of time.

DECISION NO. 2015-HPA-156(a), October 8, 2015, Physicians & Surgeons

Extension of time denied - critical criterion not met. Application for review bound to fail as Complainant does not point to how the investigation was inadequate or the disposition was unreasonable:

[13] …Were an extension of time granted and a review application commenced, the panel chair would then consider whether or not the Inquiry Committee conducted an adequate investigation of this matter and reached a reasonable disposition of the complaint before it. The Complainant's application for review makes no reference to any new or missed information which warrants reconsideration. The Complainant's submissions which were received by the Review Board on July 31, 2015 consist almost entirely of criticisms of the Registrant's findings in the report which assessed the Complainant's Patient and her ability to return to work. These submissions do not contain any evidence that the Inquiry Committee's investigation was inadequate or that their conclusions were unreasonable. Such an application for review is doomed to fail because of the limited grounds for reviewing the Inquiry Committee disposition that the Review Board faces.

Section 42 *ATA* (application to exclude a party from seeing all or part of the record)

DECISION NO. 2015-HPA-083(a), September 9, 2015, Physicians & Surgeons

Registrant's application to redact (remove) 3 pages from the College Record granted:

[9] The Registrant identified content that is on pages 222 to 224 of the Record and has applied to have the information on these pages not disclosed to the Complainant. The

information on these pages includes an email from the Registrant to the inquiry committee and an email from a third party to the Registrant which the originator labelled confidential….

[21] There is significant risk to disclosing the information that is being sought to be protected that can reasonably be expected to have a negative impact on the Complainant's well-being while offering no benefit to him in return. The impact of disclosure can only be negative to both the Complainant and the originator of the email in question. I find no basis to conclude that there is any positive outcome to any party to this review in disclosing the content in pages 222 to 224 of the Record.

[22] In considering the alternatives to nondisclosure I find none exist. There is no reasonable way evident to me to redact the content to enable disclosure while protecting the confidentiality of the originator of the email. To proceed by way of a redacted document would result in a largely meaningless document that in its own way may be more negative than positive.

DECISION NO. 2015-HPA-066(b), December 30, 2015, Physicians & Surgeons

College advanced the unusual position that a portion of its investigative file - from the accused's psychiatrist whom the College incorrectly believed was his GP - was not subject to disclosure to the Review Board or to any of the parties because of the mistake and because the information was privileged. College argued that s. 42 of the ATA is not applicable as the entire file is privileged. Held: File must be disclosed to the Review Board and a proper s. 42 application made:

[21] The Complainant's initial complaint points to her son's underlying yet undiagnosed hardening of the arteries as proof that his care during his emergency was substandard. She now adds that the Deceased's addiction and mental health problems caused him to be pushed out of the Emergency Room without proper diagnosis and treatment. As such, she asserts that the psychiatric file is relevant to her case and necessary to be disclosed….

[25] The issue to resolve is whether the College should be the party determining the relevance of the material it has been provided with or whether that responsibility lies with the Review Board through its Review Panel. In my view, ss. 50.53 and 50.63 of the Act demonstrate a clear legislative intent for these matters to be determined by a Panel of the Review Board.

[26] Given the volume of material provided, there may well be elements of the Psychiatrist's file respecting the Deceased that are not relevant to these proceedings and that should be redacted. However, that is not a decision for the College to judge to the exclusion of a properly constituted Panel of the Review Board. The fair and just process would be for the College to provide all records in its possession to the Review Board Panel and make submissions under the rules and guidelines established pursuant to s.42 of the ATA.

2. REGISTRATION REVIEW DECISIONS

DECISION NO. 2014-HPA-187(a), July 20, 2015, Dental Technicians – registration decision set aside and remitted to registration committee

Applicant seeks review by the Review Board of a decision of the Review Panel of the College dated December 4, 2014, upholding the fail mark given by two examiners (59.1% with 66% needed to pass) for one of 6 assignments being part of the practical component of the Registration Examination. The Review Panel is created under the College's Bylaws. The Applicant explained that the problems he experienced on that assignment were because he had inadvertently broken the model he was using.

The Review Panel upheld the fail mark, and the Applicant applied for review, noting the significant differences in the marks assigned by the two examiners, and incorrect advice he received from the college about whether he should speak to the Review Panel.

> *[46] The Review Panel derives its power and authority from the Registration Committee and the only power granted to the Review Panel was a power to review, not a power to issue a registration decision which power is prescribed by s. 20 of the Act to a different body being the Registration Committee.*
>
> *[47] I do not think the Registration Committee may lawfully delegate the power to grant or deny registration to a committee or panel. In my view the Review Panel in this instance may advise the Applicant and Registration Committee of the results of its review and, nothing more, consistent with its delegated power. The matter of registration granting or denial is left to the Registration Committee as the proper body to make that decision.*
>
> *…*
>
> *[50] It is of concern that the Registrar was also acting as the Examination Coordinator. There is a possibility the Registrar would be defensive as to the proper running of the exam given he also acted as its coordinator. The Registrar is a witness and should not be involved in the investigation by the Review Panel so as to remove any possibility of conflict of interest, perceived or actual.*
>
> *[51] In my view there has not yet been an adequate, independent investigation of the evidence by the Review Panel to constitute a proper review and its results should be reported to the Registration Committee for further handling within its authority and power.*

DECISION NO. 2015-HPA-086(b), February 5, 2016, Registered Nurses – disposition confirmed

Applicant was a Registered Nurse who worked for some years prior to letting her registration lapse. The Applicant has been seeking to be reinstated by complying with the requirements imposed by the Registration Committee, and while the Complainant has complied with many of the requirements imposed, she has not completed one of the courses (Consolidated Clinical Course) prescribed by the Registration Committee as a pre-requisite to her reinstatement and has not provided the form of psychiatric assessment requested by the Registration Committee to confirm her current fitness to practice. The Applicant argued that the requirements were unnecessary and unreasonable, and that the Registration Committee had been biased by certain hospital officials where she previously worked. Held: Disposition confirmed:

> *[37] While I am sympathetic to the Applicant's position, in my view, the Applicant has failed to establish that the Registration Committee acted unfairly by prescribing pre-conditions prior to her reinstatement. Based upon my review of the Record, I cannot conclude that the registration decision was made "arbitrarily or in bad faith, or was made for an improper purpose, was based entirely or predominantly on irrelevant factors, or failed to take into account the requirements under the Act." In my view, the preconditions that have been imposed on the Applicant are reasonable and are within the jurisdiction and reasonable discretion of the Registration Committee.*
>
> *[38] I note that the Registration Committee has looked at the Applicant's circumstances more than once and has remained consistent with the requirements related to additional training. I also note that the Registration Committee has provided a reasonable basis for requiring the Applicant to undergo a psychiatric assessment. Specifically they have stated:*

… the Registration Committee was concerned that in light of the applicant's self-disclosed health issues, such as her self-disclosure of depression noted on her application to reinstate dated March 4, 2014, portions of the applicant's materials ….may indicate an [sic] health issue about which the Registration Committee requires additional information vis-à-vis the applicant's fitness to practice.

[39] Based upon my review of the Record, I cannot conclude that the Registration Committee's assessment is unfounded.

3. COMPLAINT DISPOSITION REVIEW DECISIONS

The "reasonableness of the disposition" test

DECISION NO. 2015-HPA-126(a); 2015-HPA-127(a) (Grouped File: 2015-HPA-G17), February 9, 2016, Physicians & Surgeons

[48] I am mindful that the Review Board has previously determined that the Inquiry Committee's function is not to adjudicate the level of satisfaction in respect of the Registrants' service, but rather whether its members have met appropriate standards of practice; Review Board Decision No. 2011-HPRA-151(a). I agree.

[49] Prior decisions rightly emphasize that the Review Board "is not required to apply the reasonableness test as if it were a generalist court. While reasonableness requires deference, the nature and degree of deference applied by the Review Board must be suited to the statutory context - otherwise, why assign this task to the Review Board and protect it with a privative clause?: Review Board Decision No. 2013-HPA-216(a) at para. [38] Indeed, I note that even common law courts apply the reasonableness test in a contextual fashion, such that the "range of acceptability and defensibility or margin of appreciation" the decision-maker enjoys may be "broad or narrow": see Boogaard v. Canada, 2015 FCA 150 at para. [36].

[50] In this case, I have accorded meaningful deference and respect to the Inquiry Committee's decision, but it is not the highest degree of deference the Review Board could grant - as would for example arise where the Inquiry Committee has to make a judgment about whether a registrant met the regulatory standard of clinical care. The subject matter here is conflict of interest. Many professional bodies have conflict of interest standards that apply to their members. The Review Board is conversant with conflict of interest principles.

[51] I acknowledge the Inquiry Committee's primary role in defining the conflict of interest standards that should apply to its members, but it obviously cannot simply define and apply conflict of interest any way that it likes. The Review Board has a right to interfere where those standards are applied in a way that falls outside the range of acceptability. That is especially so where, as here, the College has itself articulated the standards it will apply in defining conflict of interest and the question is whether the Inquiry Committee's decision reasonably accords with the College's own pre-established standards.

<u>Systemic flaw identified in the internal processes of a College</u> – Registrar was issuing "disposition decisions" to complainants and registrants before referring the matter to the Inquiry Committee – Review Board Decisions

DECISION NO. 2014-HPA-109(a), 2014-HPA-110(a) (Grouped File 2014-HPA-G23), December 21, 2015, Physicians & Surgeons, Stage 2 – Disposition upheld

In that case – a review of a disposition arising from complaint about ophthalmic surgery and care by 2 Registrants – a Panel determined that it could confirm the disposition despite the fact that the College's internal process was the same as in 2013-HPA-255(a):

> *[28] During the course of my deliberations, Review Board decision (2013-HPA 255(a)) ["Decision"] was issued that brought into question the procedures that were apparently routinely followed by inquiry committees of the College in rendering its decisions on complaints, and which was followed in this case…*
>
> *[30] I asked the parties to address this apparent non-compliance with the Act as was present in the Decision and whether I should follow the Decision which, though not binding upon me, nevertheless in my opinion presents a significant hurdle as to whether the disposition by the Inquiry Committee was reasonable….*
>
> *[32] … the College …. pointed out in several pages of its submissions the lengths it has gone to since August 2014 as part of an evolving process to balance the volume of complaints it investigates with the need to honour its obligations under the Act. The College states that it has:*
>
> (a) *stopped sending registrar disposition letters before the Inquiry Committee has fulfilled its function under s.32(5) (as was the case here); and*
>
> (b) *removed the following sentence from registrar disposition letters: "A written report has been delivered to the Inquiry Committee ('the Committee') setting out the circumstances of the decision. The decision becomes final when endorsed by the Committee, generally within 30 days."*
>
> *[34] The Registrants expressed a concern that a delay would be prejudicial to the Registrants on the basis that an outstanding complaint against a physician is itself prejudicial, which I agree with as I have stated previously (See Review Board Decision No. 2014-HPA-118(a) at para [38]).*
>
> *[35] In deciding what, if any, impact on my decision results from the failure by the Inquiry Committee to carry out its investigation and render a decision in compliance with s. 32(5), as acknowledged by the College in paragraph 32, and the potential consequences of not doing so, I have a discretion to confirm the disposition even if I were to conclude that the compliance failure renders the disposition here unreasonable-see Review Board Decision 2010-HPA-0002(b).*
>
> *[37]…if I am satisfied that had there been compliance with s.32(5) the Inquiry Committee would have declined to interfere with the Registrar's decision, then I am at liberty to confirm the disposition despite the error. I should be guided whether Justice "…warrants the further cost, delay and technicality that would be entailed by sending matters back to the [Inquiry Committee] only to give rise to the same result" (see paragraph [30] of Review Board Decision No. 2010-HPA-0002(b)). I do not consider that my discretion is limited by the matters set out previously, merely that they represent matters that I should consider. In the end my obligation is to do justice to the parties in exercising my discretion under s. 50.6(8) of the Act.*

[38] To determine whether and how I should exercise my discretion, I will need to first consider the adequacy and reasonableness of the disposition with respect to both Registrants 1 and 2.

Panel held that the investigation was adequate and the disposition was reasonable:

[48] I am satisfied that it in the circumstances of Registrant 1 that had the College followed the requirements of s.32(5), the Inquiry Committee would likely have not considered the Registrar's decision to be an unreasonable one. In doing justice to the parties I am also mindful of the steps the College has taken not long after the Letter of Disposition was circulated to remedy the defects in its procedure, the fact that the actions of the Inquiry Committee were not done in bad faith and the need for finality as an important principle in the disposition of complaints (See Review Board Decision No 2012-HPA-220(a) at paragraph [28]).

[49] I am therefore of the opinion that it would not be in the interests of justice to refer this matter back to the Inquiry Committee with directions as was done in Review Board decision 2013-HPA-255(a).

[50] I have concluded that, notwithstanding the failure to comply with the Act in this case, based on the Record before me that the disposition by the Inquiry Committee with respect to Registrant 1 is defensible based upon the evidence obtained from its investigation, and the law. The disposition by the Inquiry Committee is justifiable, transparent, and intelligible and falls within a range of acceptable outcomes….

[62] With respect to the issue raised at Stage 1 as set out in paragraph [59](a) above, the College acknowledges that the statement in the Letter of Disposition regarding the privacy of the clinical encounter was not entirely accurate given the presence of the other Ophthalmologist but submits, as does Registrant 2, that deference must be given to the Inquiry Committee's use of resources and conduct of its investigation. Due regard must be given to the nature of the complaint, the seriousness of the alleged harm, the complexity of the investigation and the resources available to the Inquiry Committee. (See Review Board Decision No. 2012 HPA-004(a) and Moore v. College of Physicians of British Columbia and The Health Professions Review Board, 2013 BCSC 2081 at paragraphs [117-121]).

The "serious matter" issue – authority of Registrar under s. 32(3)(c)

DECISION NO. 2015-HPA-006(a), July 30, 2015, Physicians & Surgeons

The Panel held, even taking all of that into account, that the Registrar had unreasonably assumed jurisdiction over a complaint alleging substandard medical treatment of the complainant:

[80] In my view, a Registrar is entitled to a measure of deference in making the assessment referenced in paragraph [65] of Decision No. 2010-HPA-0018. Having accorded that deference, it is my view that the decision to have the Registrar dispose of the complaint, rather than have it disposed of by the Inquiry Committee, was unreasonable. In my view, it is "obvious" (to borrow a term from the decision just quoted) that this complaint as a whole would ordinarily result in one of the remedies listed in s. 39(2)(b) – (e) if it were admitted or proved rather than a fine or reprimand. The College offered no explanation for any other view, or any rationale explaining why the Registrar disposed of the complaint.

Stage 1 Decision Summaries

DECISION NO. 2014-HPA-178(a), March 12, 2015, Physicians & Surgeons

Complaint by a veterinarian that the Registrant physician, who brought his dog in for treatment, was abusive when the Registrant insisted on examining the dog before treatment. According to the Complainant, when he refused to provide the steroid injection in the first instance, the Registrant became loud and verbally abusive. The Complainant further alleges that the Registrant threatened to practice veterinary medicine when he stated he would get the steroid and inject his pet himself, and then left without paying. As a result of the events that transpired, both parties complained about the other's conduct to their respective regulatory colleges. The Inquiry Committee was not critical of the Registrant's conduct and concluded that it was difficult, if not impossible, to adjudicate whose version of behaviour was accurate in the circumstances.

Held: Investigation adequate:

> *[23] It is clear from the record that the Inquiry Committee did not interview the Complainant's staff members, despite the Complainant's various comments throughout the application process that his staff members could attest to the events that took place.*
>
> *[27] …For the purpose of conducting my analysis of whether the Inquiry Committee's decision was defensible, I point out that I have accepted the Complainant's account of events as true. Notwithstanding, it is my further conclusion that additional evidence from the staff members, even if obtained, would have had little, if any, impact on the Inquiry Committee's ultimate disposition particularly when considering the circumstances under which the exchange transpired. In this regard, the Inquiry Committee recognized, correctly in my view, that the unfortunate encounter took place within the context of the animal's perhaps imminent demise. Such circumstances presumably added a high level of emotion to an already fragile situation. Having said this, had this approach (that is, accepting the Complainant's statements as true) indicated a significant issue regarding unprofessional conduct, then I would have expected further information to have been obtained in the investigative process, as witness statements, for example, would have assumed greater importance.*

Disposition reasonable

> *[32] I have reviewed the entire record and considered the circumstances under which the complaint arose. I concur with the Inquiry Committee that both parties were feeling the inherent and unavoidable pressure of an innocent and gentle animal in distress. Each party was trying to do what he felt best, in the most difficult of circumstances. It is difficult to assign blame to anyone in such circumstances.*
>
> *[33] While I appreciate that the Complainant is dissatisfied with the Inquiry Committee's disposition of the complaint, that disposition is a reasonable and defensible outcome given the evidence that was before the Inquiry Committee.*

DECISION NO. 2014-HPA-076(b), March 27, 2015, Physicians & Surgeons

The Complainant's daughter suffered from dizziness, headache, intermittent difficulty speaking and numbness on her right side. The Complainant had family members who had suffered strokes previously so she was concerned that her daughter was exhibiting similar symptoms and took her to the local hospital's Emergency Room where she was dismayed by what ensued. After being repeatedly told that she was too young to have a stroke, a CT scan conducted 5 hours later revealed

that she did have a stroke. Held, the investigation was adequate and it was reasonable for the Inquiry Committee to accept the Registrant's explanation:

> *[25] The Inquiry Committee noted that the Registrant remarked that his opinion shifted regarding the possibility of a stroke once the family history was discussed, and a physical exam was undertaken. It was also noted that the Registrant initially saw the Complainant's daughter at between 3:45pm and 4pm, and the CT scan was ordered at approximately 4:15pm, after consultation with the on call neurologist.…*
>
> *[29] The Inquiry Committee could not reasonably comment on the wait times for the Complainant's daughter as it can only focus on the actions of physicians in their inquiry, and is unable to investigate the actions of other health care practitioners. Likewise, questions regarding the implementation of stroke protocols or the requirement to have on site neurologists at the hospital, however valid, are not the responsibility of the Inquiry Committee.*

DECISION NO. 2013-HPA-152(c), Physicians and Surgeons, April 9, 2015

Complaint alleged that the Registrant had been complicit in the Patient's death. Inquiry Committee investigated and determined that the Registrant met the expected standard of care. Application for review challenged many of the conclusions reached by the Inquiry Committee. Issues raised included the Complainant's assertion of his right of access to the medical records of the Patient, the inappropriate use of drugs, concerns about the intent of other family members and allegations of complicity between the Registrant and other family members in the Patient's death.

<u>Re: Complainant's access to medical information:</u>

> *[8] In his submissions the Complainant raised issues in support of his right to receive his father's medical information. The Complainant has raised no new information regarding his right to access the Patient's medical records other than that which was considered previously in Review Board Decision No. 2013-HPA-152(b).*
>
> *[9] The Complainant is not entitled to receive the medical records of his father (the "Patient") and in accord with Review Board Decision No. 2013-HPA-152(b) he was provided a redacted record in response to his application for review of the Inquiry Committee decision. In my review I have carefully examined the entire medical record of the Patient with the knowledge that the Complainant did not have access to the majority of this information.*

<u>Adequacy: non-disclosure to complainant</u>

> *[28] The Complainant was not provided with copies of the [investigative] material received given the determination that he did not have the legal standing required in order to receive the medical records of the Patient.*
>
> *[29] My conclusion having reviewed the material is that the College assembled a complete and thorough record in considering this complaint. The record is extensive and appears to be complete in every respect. There is no indication that there is any further evidence to be gathered.*

<u>Reasonableness: non-transparent letter to Complainant justified in circumstances</u>

> *[34] I find that the detailed disposition letter provided to the Registrant displays a logical and well considered response to the complaint. This letter deals directly with the substantive challenges to the care provided to the Patient which were raised in the complaint and with the*

Inquiry Committee's considered response. I find that the disposition letter provided to the Registrant contains transparent reasoning which is intelligibly expressed and that it reasonably accords with the facts in the record.

[35] Unfortunately and inevitably the disposition letter provided to the Complainant did not display the tests of a reasonable disposition. This is an inevitable consequence of the legal limitations imposed on all parties when the Complainant is not the patient of the Registrant and does not have a legal right to access the patient's medical records. This does not lead to the conclusion that the Inquiry Committee's disposition is not reasonable. It merely highlights the dilemma faced by the Inquiry Committee in conforming to the law while also trying to communicate their decision in response to a complaint.

DECISION NO. 2015-HPA-087(a), September 17, 2015, Physicians & Surgeons

Complainant filed a complaint following the discovery of a tumor behind her right ear, in the same location as a lump that the Complainant states was brought to the attention of the Registrant in 2007, or perhaps earlier. The Complainant believes that had the Registrant charted the presence of the lump behind her ear when she first brought it to his attention several years earlier, he could have followed up on a regular basis and made the connection between the facial symptoms and the lump. The tumor, which has now been removed, was malignant. She had radiation treatment following the surgery. The Complainant wants the Registrant to admit his negligence and be disciplined. The Inquiry Committee was not critical of the Registrant. In the view of the Inquiry Committee, the Registrant's approach was conservative and not inappropriate. Held:

Investigation adequate (After reviewing steps taken by IC)

[21] In accordance with the level of investigation required in order to comply with the foregoing, I believe the investigation was adequate.

Disposition reasonable

[38] The evidence shows reference to a lump behind the Complainant's right ear for the first time in September, 2011. The evidence does not show any reference to that lump at an earlier date.

[39] Following that September, 2011, identification of the lump, three ophthalmologists examined the Complainant, including Specialist A who performed surgery on her right eye for drooping eyelid, and none of those ophthalmologists saw a relationship between the right eye tearing, the drooping eyelid, and the facial tick causing them to pursue further investigation or referral.

[40] For someone as conscientious as the Complainant about her various health issues, it is surprising that she did not raise the presence of the lump with any of these specialists or even with the Registrant other than the apparent mention seven or eight or ten years earlier. To a certain degree individuals do have responsibility for their well-being. I don't believe that had the Registrant charted the earlier reference to the lump, there would have necessarily been any follow-up without the Complainant bringing it once again to the attention of the Registrant. She claims she felt it every time she showered.

DECISION NO. 2015-HPA-083(b), December 2, 2015, Physicians & Surgeons

Complaint arose from a conflict between the Complainant and Registrant about the type and amount of medication following gallbladder surgery. The Registrant provided multiple referrals for the

Complainant to obtain specialized care, conducted multiple examinations and consulted third party specialist physicians for advice related to the care of the Complainant. The Registrant concluded that the primary medical issue for the Complainant was his drug addictions which were worsening his liver failure and had to be resolved prior to obtaining treatment for his Hepatitis C and liver failure. The Complainant denied having any drug addiction and filed a complaint with the College which included several allegations against the Registrant. The College investigated and the Registrar concluded the complaint under s. 32(3)(c), finding no fault with the treatment provided by the Registrant. Held:

Adequate investigation

> *[24] The Record demonstrates that the investigation provided documentation for the treatment period from December 2009 to October 2014 with over 95 appointments for the Complainant with the Registrant, over 20 consultations with specialists on referral from the Registrant, multiple hospital records, the College Prescribing Principles for Chronic Non-Cancer Pain and records for the period immediately prior to the treatment period.*
>
> *[25] The Record provides a comprehensive report on the care provided to the Complainant. There is no information before me that would lead me to conclude that further investigation by the Inquiry Committee was warranted. I find that the Inquiry Committee conducted an investigation that was appropriate for the facts in this case and I have determined that the investigation was adequate.*

Reasonable disposition

> *[31] The Complainant further submitted that the Inquiry Committee should have been able to conclude that the College's policy on drugs did not apply to the Complainant in his situation…. This may well be the outcome the Complainant desires; however, the Record demonstrates that the College Prescribing Principles and the Registrant's diagnosis have been reviewed in detail and were found to apply in this case.*
>
> *[32] The disposition was signed by the Medical Reviewer and by the Deputy Registrar who are both Medical Doctors. The Complainant may not agree with the course of treatment provided by the Registrant. However, I encourage the Complainant to carefully consider that the Record demonstrates that he received considered evaluation and treatment which was reviewed in detail by the Inquiry Committee. There are now at least three doctors who have reviewed the entire record and who support the diagnosis that the primary issue for the Complainant is drug addiction.*

DECISION NO. 2015-HPA-085(a), February 12, 2016, Dental Surgeons

Complainant stated that the Registrant permitted bullying and harassment in the dentistry practice of which he was an owner and in which she worked as a Certified Dental Assistant. Complainant submits was the source of the harassment was a CDA co-worker who had been hired as a receptionist in 2005 at which time the Complainant states that her previous positive working environment began to erode. The IC determined that no action was required. Held:

Investigation deemed to be adequate:

> *[28] Considering these principles and applying them to the facts as presented, the nature of the complaint is one that questions the propriety of interpersonal conduct and in particular, the role of employers in preventing harassment in the workplace. Given that the employer in question is also subject to the rigorous professional conduct rules and expectations of a regulated health profession, he is somewhat in 'double-jeopardy'. A far greater proportion of other employers*

are subject to much less oversight than one who also happens to be a regulated health professional employing other regulated professionals. Indeed, if this matter had occurred in almost any other business situation, likely it would have been resolved at the point when WorkSafeBC issued its report. In this case however, after the WorkSafeBC report did not support her claim, the Complainant took the matter into another regulatory realm that was available to her because of the additional regulated health professional expectations placed upon her employer.

[29] Regardless of the WorkSafeBC report and its conclusions, I find that the Complaint Investigator conducted a thorough investigation. It appears that no effort was spared to give everyone ample opportunity to express their concerns and respond to allegations. At least ten letters were exchanged; numerous telephone calls and email messages were passed not only between the investigators and both of the parties, but also with members of the Inquiry Committee. None of this includes the considerable work that was also done by the staff at WorkSafeBC, the results of which were also available to the Complaint Investigator.

Disposition deemed to be reasonable:

[39] I have to determine if this disposition was reasonable. As cited earlier 'reasonableness' is a deferential standard; I do not have the capacity to impose my view of reasonableness on that of the Inquiry Committee. I can only judge the validity of that decision on whether it falls within the range of rational choices that are just, understandable and transparent. I have found that the investigation into this matter was adequate and that the Inquiry Committee was well within their statutory authority to render the disposition. My review of the Investigation File Records supports that the decision of the Inquiry Committee was clearly explained and articulated. I am satisfied that this was a rational, justifiable, and intelligible decision and thereby a reasonable disposition.

Stage 2 Decision Summaries (Inquiry Committee disposition confirmed)

DECISION NO. 2013-HPA-151(a), April 13, 2015, Physicians & Surgeons –Inquiry Committee decision confirmed despite defects in investigation and disposition

Complainant filed a complaint with the College alleging that the Registrant, a surgeon, failed to protect him following a workplace injury (table saw) by reporting to WorkSafeBC that he could return to work without limitations. Following that report, the Complainant had a second injury to the same hand that left him with a permanently dysfunctional hand. Inquiry Committee was not critical of the Registrant. Held:

The real problem in this case was not the Registrant's care and conduct, but the WCB's interpretation of the Registrant's letter

[24] The WorkSafeBC Letter is particularly troubling in that I find that the conclusions in this letter are not supported by the record before me. I find on balance that the Registrant Report and the reports of the physiotherapy clinic referenced by WorkSafeBC do not support the WorkSafeBC conclusion that the Complainant was able to return to work without limitations….

[27] The resolution of what constitutes appropriate reporting to WorkSafeBC by physiotherapists and doctors involved with workplace injury is beyond the scope of this hearing. However, I note as a non-jurisdictional courtesy to the parties in this case that in my view the combined reporting to and decision making by WorkSafeBC failed the Complainant. Further it is my view that this general topic might properly warrant a comprehensive review to be conducted by the appropriate authorities with the goal of establishing clear standards of

reporting that in the end provide the WorkSafeBC decision makers with the information that they require in a clear, unambiguous manner.

Inquiry Committee failed to adequately investigate an allegation that the Registrant wrote not one but two different letters to WCB - however, it was inappropriate to grant a remedy:

[40] Given the discrepancy in the Registrant's original submission, the allegations by the Complainant and the critical role of the Registrant's communication with WorkSafeBC, I believe that it would have been appropriate at the time of their review for the Inquiry Committee to have made further inquiries in order to remove the uncertainty that was in the record from the beginning and which permeates the various documents. In the course of this review the question surrounding the August 30, 2010 letter has been asked and answered and I have relied upon the answer that it was an error in reference by the Registrant.

[41] The matters under review in this Complaint are of a serious nature. Having reviewed the entire record it is my conclusion that the Inquiry Committee failed to exercise an appropriate level of diligence in pursuing the facts at the time. However, through submissions the matter is resolved for the purposes of this review. Given the responses it is reasonable for me to conclude that there would have been no change to the outcome of the Inquiry Committee had they obtained the same clarification at the time of their review as has been obtained in the course of this review and which is now in the record.

Reasonable disposition

[47] This case demonstrates the critical role of the Registrant (beyond the medical care provided) in returning the injured worker to work, and specifically the importance of the Registrant's Report to the decision maker at WorkSafeBC. The record shows that the Registrant assumed that the recipient of his letter at WorkSafeBC would understand the meaning of his letter in the context and history of the Complainant's situation. My conclusion is that the WorkSafeBC Letter does not display the understanding of the context and history that the Registrant was relying on.

[48] In the disposition letter the Inquiry Committee devoted considerable effort to explaining how the Registrant did not have the appropriate expertise to determine the exact nature of work that the Complainant was qualified to perform. I find it unfortunate that a similar degree of analysis was not demonstrated by the Inquiry Committee in determining what constitutes the appropriate degree of clarity and precision required of the Registrant in describing the Complainant's condition to WorkSafeBC.

[49] While I find insufficient basis to return this matter to the Inquiry Committee, I strongly recommend that all parties consider what can be learned from this case, and in whatever manner possible the parties collaborate towards a reporting standard that better protects the interests of the injured worker.

[50] Given the standards of practice and the wording of the Act, the Inquiry Committee did what it could in addressing this complaint. The conclusion of the Inquiry Committee fell narrowly within the spectrum of rational and defensible solutions; therefore, I find that the disposition was reasonable.

DECISION NO. 2013-HPA-219(a); 2013-HPA-220(a); 2013-HPA-221(a); 2013-HPA-222(a) (Grouped File: 2014-HPA-G05), June 25, 2015, Physicians & Surgeons – effect of death of a registrant; Inquiry Committee cannot "refuse to decide"; RB may confirm disposition despite finding of unreasonableness

Complainant alleged that the First Registrant and Second Registrant misdiagnosed her mother (the Patient) as suffering from dementia, that the Patient died as a result of a misdiagnosis by the Third Registrant, that the Third Registrant falsified information regarding the cause of the Patient's death in the death certificate which he prepared and that the Fourth Registrant prevented an autopsy of the Patient when one should have been conducted. The Complainant's complaints against the four Registrants were not made to the College until February 16, 2012, more than seven years and five months after the Patient died. Registrant 1 had left the practice of medicine by then, and died in 2014, after the review application was filed.

Effect of death of first registrant (see above)

> *[46] I find that when the First Registrant died, any controversy arising out of the complaint against him which the Inquiry Committee had jurisdiction to deal with ceased to exist and there is therefore no present live controversy between the Complainant and the First Registrant. While the Complainant may still dispute the First Registrant's diagnosis of the Patient as suffering from dementia and this dispute may be relevant to litigation involving the estate of the Patient, any such dispute must be resolved in the courts and not by the Inquiry Committee or the Review Board. I therefore find it is not in the public interest for the Review Board to continue its review of the disposition of the complaint about the First Registrant and I decline to continue that review.*

Adequacy of investigation

> *[35] The efforts of the Inquiry Committee to obtain more information regarding the diagnosis of dementia and the specific care given by the First Registrant, the Second Registrant and the Third Registrant to the Patient were hampered by the fact that the Complainant delayed making any complaint to the College about these Registrants for more than seven years and, by the time the complaints were made, those three Registrants had destroyed their medical records relating to their interactions with the Patient, the care given by them to the Patient and information on which they based their diagnoses. Destruction of medical records is permitted after seven years and was reasonable and to be expected in this case...*
>
> *[37] The issue fundamental to all of the complaints against the Registrants was whether the Patient suffered from dementia and if the diagnoses of that condition by the First Registrant, Second Registrant and Third Registrant were appropriate. The Inquiry Committee was able to obtain from its review of the Patient's medical records and the responses provided by the Second and Third Registrants sufficient information on which to make a decision regarding the complaints against these three Registrants.*

Reasonableness of disposition – diagnosis and effects of dementia

> *[51] With respect to the Complainant's contention that the Patient died as a result of a hunger strike during which she refused to consume food or liquids, the Inquiry Committee confirmed that it is common for patients suffering from dementia to stop eating and drinking in their final days, as the Third Registrant had stated in his response. Unless there is a good reason to do otherwise, I must give deference to decisions made by the Inquiry Committee with*

respect to matters in which they have expertise and experience. In this case, I defer to their expertise and experience regarding the effect of dementia on persons during their final days.

Reasonableness of disposition –Inquiry Committee cannot refuse to decide

[58] After the Inquiry Committee considered the complaint against the Second Registrant and the information obtained during its investigation, it concluded there was insufficient evidence to adjudicate the complaint against the Second Registrant....

[60] ... I invited the parties to make submissions regarding the decision by the Inquiry Committee that they were unable to adjudicate the care that the Second Registrant provided to the Patient in the absence of medical records and whether:

(a) that decision constituted a disposition of the complaint against the Second Registrant pursuant to section 33(6)(a) of the Act; and,

(b) if that decision was a disposition pursuant to section 33(6)(a), it was reasonable....

[68] Provided a complaint is properly made pursuant to the Act and the Inquiry Committee has jurisdiction to consider the complaint, the Inquiry Committee is obliged, pursuant to section 33(6) of the Act to make a decision either to take no further action pursuant to section 33(6)(a) or to take one of the actions described in section 33(6)(b), (c) or (d). Doing nothing is not an option open to the Inquiry Committee.

DECISION NO. 2014-HPA-150(a); 2014-HPA-151(a) (Grouped File: 2014-HPA-G28), October 27, 2015, Physicians & Surgeons; alleged medical mismanagement - remedial orders found to be reasonable

Complainant's late husband died of heart failure in 2013. In the period leading up to his passing, he was seen by Registrants A and B. The Complainant submits that both Registrants failed to exercise due diligence in diagnosing and treating her late husband for his heart condition and shortness of breath, and further submits that the Registrants' mismanagement of her late husband's medical care resulted in his premature death. The Inquiry Committee made remedial orders in respect of both Registrants, which measures were held to be reasonable, following an adequate investigation. Held:

The Inquiry Committee was critical of Registrant A for failing to refer the deceased for appropriate medical management of his cardiac issues. The Committee directed Registrar staff to invite Registrant A for an interview to assess whether a more general practice investigation was warranted. The Inquiry Committee further recommended that Registrant A complete a course of targeted CPD activities, and present to the Inquiry Committee a plan regarding his management of future cardiac patients. Registrant A consented to these recommendations.

The Inquiry Committee was critical of Registrant B for lack of history taking and poor documentation. The Inquiry Committee concluded that had Registrant B undertaken a more thorough evaluation of the deceased that may have prompted urgent evaluation at the hospital. The Inquiry Committee decided that its decision would remain on his permanent file, a comprehensive practice review would be conducted and he was required to attend at the College's offices for an interview.

DECISION NO. 2014-HPA-106(a); 2014-HPA-107(a); 2014-HPA-108(a) (Grouped File: 2014-HPA-G22), November 26, 2015, Pharmacists - email communication with Registrant constituted adequate investigation; remedial disposition reasonable; recommendations for policy reform

Complaint against three Pharmacists, the Registrants, following the death of his mother [the "Deceased"] after a fatal interaction between two prescribed drugs. Following an investigation, the Inquiry Committee decided to take action under s. 36(1) of the Act, which allows the Inquiry Committee to request that a registrant consent to educational courses, a reprimand and/or any other action specified by the Inquiry Committee. This resulted in Registrants 2 and 3 each accepting a 30 day suspension of practice, a requirement for additional educational courses, preparation of papers relating to the impact of not being attentive to drug interactions, public announcement of their suspension on the College's website and subsequent audits of their practice. Held: Investigation adequate

> *[33] The Complainant argues that the investigation was based on email interactions and at no time were the Registrants interviewed in person. He believes that had the investigation begun as soon as it was apparent that the drug-drug interaction was the cause of the Deceased's condition and been conducted in person, there might have been an opportunity to interview the Deceased prior to her death. The Registrants were unaware of any reporting requirement; apparently neither was the family physician who prescribed the drugs nor the emergency room physician who identified the cause of the Deceased's illness.*
>
> *[34] The investigation which did not begin until the complaint was filed was surely not perfect. In-person interviews with the Registrants in their work location may have given a perspective that is not available through email communication. However, given the facts of the case, it is my view that the investigation can be considered adequate.*

Disposition reasonable:

> *[59] The reasonableness of the disposition is a more difficult question. The disposition, which was agreed to, resulted in the remedial consequence the College Inquiry Committee thought appropriate, including in the case of Registrants 2 and 3, suspension of their licences for 30 days, public notification of their suspension, a requirement to take specified additional training and to submit to a practice audit.*
>
> *[60] One of the questions the Review Board must always consider in a case where a "request" under s. 36(1) was "accepted", especially in a serious case, is whether the agreed outcome reasonably serves the public interest. That is always a risk in any process that might involve negotiation and ends in an agreement and does not proceed to formal discipline. In this case, however, I am satisfied that the process was legitimate and that the outcome was within the range of reasonable outcomes, and that the Inquiry Committee did not sacrifice the public interest with these consequences, which could just as easily have been the result of a formal discipline hearing. In my view, the disposition was reasonable.*

"Obiter dicta" (observations additional to the core reasoning of the decision):

> *[61] Separate from the particular consequence to the Registrants, the Complainant would have been satisfied to some extent had the College taken steps to establish, on a more systemic level, necessary reporting requirements when drug-drug interactions occur and especially when serious injury or death occurs so that others do not suffer as has this family. To that I say: do not despair. That could still be an outcome of this complaint as the College considers the "appropriate follow-up" suggested by the Coroner.*

[62] The Institute for Safe Medication Practices Canada (ISMP) encourages healthcare workers to report deaths to the coroner if a medication error is suspected to have caused or contributed to a death, enhancing patient safety by sharing learning. The Canadian Medication Incident Reporting and Prevention System (CMIRPS) is a collaborative program of Health Canada, the Canadian Institute for Health Information (CIHI), the Institute for Safe Medication Practices Canada (ISMP Canada) and the Canadian Patient Safety Institute (CPSI). Its goal is to reduce and prevent harmful medication incidents in Canada.

[63] There are at least three organizations that accept reports of incidents that lead to severe outcomes, including death, as a result of medication errors. While I have no authority to require it, I find the unique circumstances of this case warrant my respectfully offering some observations arising from the tragic circumstances of this case. One is that all health practitioners in British Columbia be required, as they are in the case of gunshot wounds, to report medication incidents with adverse outcomes in order to reduce the number of occurrences in future care. It should not be left to grieving families to report these incidents.

[64] To bring a legislated requirement of this type into being, encompassing all health colleges operating under the Act, would likely be an optimal solution. Even where some errors might fall "between the cracks" in the functional gap between professions (as in this case, between medicine and pharmacy), a sector-wide reporting requirement would go a long distance toward ensuring that the maximum future learning and prevention benefits - perhaps including the updating of drug interaction databases - are extracted from unfortunate incidents.

[65] Closer to home, I respectfully offer the same reporting suggestion to the College in this case, given the wide range of powers it possesses to regulate its registrants under its bylaw-making authority (e.g., ss. 19(1)(k), (k.1) and (x) of the Act).

[66] I also encourage the College to review its continuing education requirements for College registrants, including the reporting, recording and monitoring of annual continuing education activities, and strengthen them if necessary.

[67] I will reiterate that the Review Board has no formal authority to issue systemic directions in the course of a decision made in an application for review of an Inquiry Committee disposition. The suggestions set out in the above paragraphs are offered in the unusual circumstances of this case, and as a courtesy to the College and to the Province in the spirit of public protection that is the core duty of a College as set out in s. 16(1) of the Act.

Stage 2 Decision summaries: Remittal decisions - matter referred back for additional work by Inquiry Committee

DECISION NO. 2014-HPA-185(a); 2014-HPA-186(a) (Grouped File: 2014-HPA-G31), June 22, 2015, Physicians & Surgeons - investigation adequate but remedial disposition unreasonable

Mr. S was operated on by Registrant 2 for colon cancer. He was released from hospital five days after the operation, with a prescription for Tylenol #3 and Toradol, a nonsteroidal anti-inflammatory drug (NSAID). Mr. S was transported to a Hospital as his condition had deteriorated and he was vomiting blood. He received treatment from Registrant 1 at the Hospital Emergency room and was released home after seven and a half hours, based on Registrant 1's assessment that his condition had stabilized. The following day, Mr. S's condition deteriorated and an ambulance was called to transport him back to Emergency. He died en route to Hospital. The Inquiry Committee determined that they had no regulatory criticism of the care provided by Registrant 1. The Inquiry Committee was not critical of Registrant 2 in relation to six of the seven aspects of the complaint, but were critical of him in relation to the prescription of NSAIDs post-operatively, as they "carry significant risks in older

patients…including *gastrointestinal* bleeding, ulcers, kidney failure, and congestive heart failure". As a consequence of this determination, the Inquiry Committee recommended to Registrant 2 that in future he "carefully weigh the potential risks and benefits prior to prescribing NSAIDs to post-operative patients".

Review Board requested submissions on whether the remedy arrived at by the Inquiry Committee addresses the College's obligations under s. 16 of the *HPA*.

Investigation deemed to be adequate:

> *[12] The Complainant suggests further avenues of investigation available to the Inquiry Committee. Certainly, as in most circumstances, more investigation could have been undertaken. There are however, reasonable limits to the time and resources that can be devoted to investigating a complaint. Particularly in instances like this, the friends and family of a deceased patient understandably hope that 'no stone would be unturned' in investigating circumstances surrounding the death of a loved one. There is a balance, however, that must be struck and at some point the Inquiry Committee (and I, exercising my obligations under the Act) must determine whether they have sufficient information to conduct an adequate investigation. It is worthy of note that the sources of information were sufficient for the Inquiry Committee to formulate a cogent criticism of Registrant 2's prescription of post-operative medication. Taking into account the nature of this Complaint, the seriousness of the harm alleged and the information in the Record, I find that the investigation by the Inquiry Committee was adequate.*

Remedial outcome held not reasonable:

> *[21] … both the College and Registrants 1 and 2 note that the mandate to protect the public is not necessarily best served by imposing punitive measures on a Registrant. These comments are germane, yet it remains to be resolved whether the determination of the Inquiry Committee sufficiently addresses the object of protection of the public or is in the public interest.*
>
> *[22] … As is outlined in the letters from Registrant 2 that form part of the new evidence before me, Registrant 2 sought direction from the Inquiry Committee about the circumstances when it is appropriate to prescribe Toradol. The Inquiry Committee replied to Registrant 2's enquiry stating that the prescription of medications must be tailored to the individual, taking into account the potential benefits and determining whether these outweigh the risks. In particular they ask whether an alternative medication or no medication would be safer, in a particular circumstance. In response, Registrant 2 indicated he was "still trying to decide what to do", citing particular benefits of NSAID medications. He notes that "patients do very well with the combination of NSAID and Tylenol #3" and that Mr. S was his first patient who had trouble with bleeding…*
>
> *[24] The Inquiry Committee determined that the only regulatory criticism they have of Registrant 2, in these circumstances, is with regard to his prescription of a NSAID medication post-operatively. As far as it goes I find this conclusion to be reasonable. Yet, taking into account the object of protection of the public and the requirement to proceed in the public interest, the consequence flowing from that determination is not rational. One only has to look at Registrant 2's ongoing confusion regarding how he should now conduct himself in relation to the prescription of NSAIDs to see that the direction of the Inquiry Committee needs to be expanded upon. I conclude that the Inquiry Committee's disposition in relation to Registrant 2 does not fall within a range of acceptable and rational outcomes, which, based on all the evidence before them, are defensible in respect of the facts and law….*

[27] Pursuant to s. 50.6(8)(c), I send this matter back to the Inquiry Committee for reconsideration with the direction that they formulate an appropriate educational program for upgrading Registrant 2's understanding of the use of NSAID medications post-operatively. I further direct that they require Registrant 2 to complete this program within a reasonable time to ensure that his understanding conforms with current medical knowledge regarding use of these medications.

DECISION NO. 2015-HPA-006(a), July 30, 2015, Physicians & Surgeons - Review Board may consider adequacy despite concession that investigation adequate; discovery evidence not admissible on application for review; investigation inadequate for failure to interview witnesses; Registrar unreasonably determined that the complaint was "other than a serious matter"; disposition unreasonable [Note: this decision is subject to application for judicial review brought by the College]

Complaint about the Registrant's treatment of Complainant's (a) basal cell carcinoma; (b) bowel disorder; and (c) mental health issues. Complainant alleged that, but for his inadequate or inappropriate care, the Complainant would not have suffered physically and mentally including suffering the loss of his marriage, home, pet, job opportunities and, generally, life as he formerly knew it. Medical Reviewer on behalf of the Registrar of the College issued a disposition under s. 32(3)(c) of the Act that was critical of some aspects of the care provided by the Registrant and noted that the College expected that he would "reflect on the criticisms" and would "alter his clinical practice accordingly." Complainant applied for review, challenging adequacy and reasonableness. In his final reply, he abandoned his challenge to the adequacy of the investigation. Held:

Review Board may review adequacy despite concession

[11] I pause to note that while I have considered the Complainant's changed position with respect to the adequacy of the investigation of his complaint, it is not determinative of my authority to conduct a review under the Act. The fact that a Complainant may make, or change, his or her assessment of the adequacy of an investigation is not, with respect the end of the matter. When a Complainant seeks a review of the College's investigation of a complaint, I am tasked with ensuring that the investigation conducted is protective of the interests of the person, or the public interest, as the case may be. This requires that I assess the facts of the case and consider the applicable law in what is a complex and evolving area of law.

Examination for discovery evidence in civil suit not admissible on application for review

[19] After hearing from all of the Parties and reviewing the case law, I am satisfied that the law is well settled that evidence obtained by the Complainant in the discovery process for his civil suit against the Registrant should not be admitted as evidence in this proceeding. When the parties or lawyers on their behalf enter into the discovery process as part of a civil action, they undertake to the Court not to use evidence obtained during the proceeding in another proceeding unless that undertaking has been waived. That privilege applies to this proceeding: see Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 40(3).

Adequacy

[64] The complaints, while distinct, should not be viewed in isolation. When woven together the complaints form a tapestry depicting serious concerns regarding the medical care provided by the Registrant to the Complainant over a span of seven years, involving several distinct health issues, at least two of which had serious consequences for his physical and mental wellbeing. Those concerns warranted a thorough investigation and, as I will note below, a disposition by the Inquiry Committee rather than the Registrar.

[65] By my count, the Complainant received care from more than 20 health care professionals in addition to the Registrant regarding health issues referred to in the complaint…

[66] In addition, the complaint referred to encounters between the Complainant and numerous witnesses to his psychiatric condition including: the Complainant's ex-wife, brother, a friend in England, and several RCMP officers; at least some of whom relayed their concerns regarding the Complainant to the Registrant.

[67] Any or all of these health care professionals and individuals were potential sources of key information which may have been invaluable to the Inquiry Committee in assessing the complaint and yet none were interviewed and no statements or responses were sought from any of them save for the current family physician who had only fleeting contact with the Complainant. In a situation such as this where the deterioration in the Complainant's mental health had devastating consequences, it is critical that the College have reliable information on which it can rely to assess the complaint. Given that the Complainant may be disadvantaged in recalling the events given his illness and given the demonstrated shortcomings in the Registrant's record keeping, independent verification of events is particularly important. That independent verification was available but was not pursued by the College Inquiry Committee.

[70] … In my view, the Medical Reviewer made his decision absent key information which was identifiable, obtainable and necessary for an adequate investigation, a situation which is quite distinct from the situation, in McKee v. Health Professions Appeal and Review Board, [2009] O.A.C. 368 at para. 37, where the Court noted among other things that there was no evidence that witnesses identified by the Review Board were even present during key interactions. I wish also to make clear that I have arrived at this conclusion cognizant of the fact that the Review Board is not to foist upon an Inquiry Committee the responsibility to make the kinds of definitive findings made by the Discipline Committee, but is rather to assess the Inquiry Committee's investigation in light of the true nature of the "screening" function it is required to undertake, as discussed in Review Board Decision No. 2011-HPA-0036(a) at paras. 71-86.

Remit specifically to Inquiry Committee as Registrar had no jurisdiction

[80] In my view, a Registrar is entitled to a measure of deference in making the assessment referenced in paragraph [65] of Decision No. 2010-HPA-0018. Having accorded that deference, it is my view that the decision to have the Registrar dispose of the complaint, rather than have it disposed of by the Inquiry Committee, was unreasonable. In my view, it is "obvious" (to borrow a term from the decision just quoted) that this complaint as a whole would ordinarily result in one of the remedies listed in s. 39(2)(b) – (e) if it were admitted or proved rather than a fine or reprimand. The College offered no explanation for any other view, or any rationale explaining why the Registrar disposed of the complaint.

Reasonableness of disposition

[83] In my view, it is not possible in this case to determine the reasonableness of a disposition that is entirely based on the results of an inadequate investigation which lacked key information. This is not for example an exceptional case where it could clearly be concluded on the record that the result would inevitably have been the same even if the investigation had not been inadequate. It is entirely conceivable that, had there been an adequate investigation, the College would have disposed of the matter differently. In any event, the Complainant is entitled to a disposition which is supportable based on an adequate investigation and which is clearly articulated, transparent and intelligible.

DECISION NO. 2015-HPA-126(a); 2015-HPA-127(a) (Grouped File: 2015-HPA-G17), February 9, 2016, Physicians & Surgeons - Inquiry Committee unreasonably interpreted and applied its own conflict of interest standards; lower standard of deference to this kind of question than to a medical judgment

Complaint that Registrant's breached College's conflict of interest guidelines.

Complainant applied for membership in the Law Society of British Columbia (the "Law Society"). As part of the application process he disclosed that he had a substance use disorder which caused Registrant 1, a medical consultant for the Law Society, to recommend that he undergo an independent medical evaluation (IME) by a physician qualified in addiction medicine. Registrant 2 was the physician the Complainant was referred to for the IME. Complainant later learned that Registrant 1, who would be advising the Law Society regarding his medical fitness to be admitted as a member, was a business partner of Registrant 2 in the IME Corporation where he had been evaluated for his IME and they were both affiliated with, and had a financial interest in the Counselling Agency identified by the Law Society as acceptable for treatment. The Complainant complained to the College alleging that the Registrants were in a conflict of interest and asserted that he would not have consented to the IME had he known of the business relationship between the Registrants and these two entities. The Inquiry Committee of the College investigated the complaints and disposed of them without any regulatory criticism of the Registrants. Held:

Investigation adequate:

> *[42] It is always possible to do more by way of an investigation, but the question is "to what end?" The Inquiry Committee has limited resources and many complaints that require investigating. The College has the authority to manage its limited resources in a manner that is consistent with it duty to protect the public interest: Moore, supra at para. [119]; Review Board Decision No. 2014-HPA-G34.*
>
> *[43] After reviewing the Record, I am satisfied that the investigation, in this instance, was adequate. The Inquiry Committee had the key information before it to understand the nature of the complaint, the conduct complained of and the Registrants explanation for their conduct. In addition, the Inquiry Committee had information which appeared to explain the Law Society's understanding of the various relationships between the Registrants and the health evaluation, monitoring and counselling entities named in the complaint. Further, the Inquiry Committee had a summary prepared by the Committee's Medical Reviewer highlighting key points for the Inquiry Committee's consideration. Finally, the Inquiry Committee was in possession of a legal opinion about the matter. That legal opinion has not been disclosed to the Review Board presumably because the College has exercised its right not to waive solicitor-client privilege over the content of the opinion.*

Disposition unreasonable:

Standard of review

> *[50] In this case, I have accorded meaningful deference and respect to the Inquiry Committee's decision, but it is not the highest degree of deference the Review Board could grant - as would for example arise where the Inquiry Committee has to make a judgment about whether a registrant met the regulatory standard of clinical care. The subject matter here is conflict of interest. Many professional bodies have conflict of interest standards that apply to their members. The Review Board is conversant with conflict of interest principles.*
>
> *[51] I acknowledge the Inquiry Committee's primary role in defining the conflict of interest*

standards that should apply to its members, but it obviously cannot simply define and apply conflict of interest any way that it likes. The Review Board has a right to interfere where those standards are applied in a way that falls outside the range of acceptability. That is especially so where, as here, the College has itself articulated the standards it will apply in defining conflict of interest and the question is whether the Inquiry Committee's decision reasonably accords with the College's own pre-established standards.

Disposition unreasonable:

[72] The Inquiry Committee's disposition completely ignores the fact that the Board of the College determined that conduct constituting a conflict of interest was to be addressed in "standards" rather than guidelines; compliance was not discretionary. Further, the disposition ignores the preamble to the Standard which clearly includes indirect transactions with patients and others in the list of circumstances where a conflict of interest may arise. Insofar as the disposition focuses on the medical validity of the recommendations, the Inquiry Committee has also failed to recognize that conflict of interest is an ethical standard – a standard that applies separate and apart from the professional skill with which a particular professional service is rendered. While inadequate professional services may aggravate a conflict of interest where the latter exists, it is not an element of such a finding. A finding that such professional services were adequately delivered does not remove a conflict of interest.

[73] This latter point reflects what is, perhaps the most significant problem with the Inquiry Committee's decision, which was the failure to have reasonable regard to the College's responsibility, as a regulator of a profession, to safeguard the public interest. The College sets the standards against which physicians' conduct is to be measured. The standard regarding Conflict of Interest recognizes this obligation to the public and is drafted as it is, no doubt, to ensure that physicians comply with their obligations to advise patients, and others whose interests may be directly impacted, that the physician has a financial or business interest in the business or facility to which the person is being referred when the physician is the source of that referral. This disclosure then provides the referred person the opportunity to may make an informed decision as to whether to accept the referral. The bottom line here is that, Law Society referral or not, the Complainant – a member of the public for whose benefit these ethical standards exist - was not afforded that opportunity.

[74] In my view, when, as here, the Inquiry Committee has determined that physicians are acting in a real or apparent conflict of interest, the circumstances would have to be quite exceptional for it to take no action. By failing to make any regulatory criticism of the Registrants' breach of the Conflict of Interest Standard, the Inquiry Committee acted unreasonably in light of its duty to safeguard the public interest.

Just as the Review Board was created to ensure that College decision-making is accountable, the Review Board is accountable for its decisions in British Columbia Supreme Court, in a process known as judicial review. Where a Review Board decision is challenged on judicial review, the court considers whether the Review Board acted within its authority, whether its substantive decision was patently unreasonable, and whether its process was fair and impartial.

Judicial Decisions since last Annual Report

College of Chiropractors of British Columbia v. Health Professions Review Board, 2016 BCSC 391

Summary: This Petition challenged Review Board Decision No. 2013-HPA-146(a) (May 30, 2014), arising from a College disposition dismissing a complaint alleging substandard chiropractic treatment. The Review Board remitted the investigation to the Inquiry Committee on the ground that the College's investigation was inadequate.

Held: The Court set aside the Review Board decision. The Court held that the decision (a) was not reasonable in its finding that the Inquiry Committee had failed to inquire as whether the Registrant applied a proper treatment technique, (b) went too far in suggesting that the Inquiry Committee was required to assess credibility as that would necessitate "some form of cross-examination, something beyond the scope of the Inquiry Committee's powers", (c) unreasonably determined that an inquiry into whether the registrant caused the injury (as determined by records from other medical and health professionals) would resolve the issues the Inquiry Committee had to examine.

Petitions outstanding

TM v. Health Professions Review Board (Petition filed June 20, 2012)

This judicial review petition, commenced by a complainant, applied to set aside Decision No. 2012-HPA-004(a); 2012 HPA-005(a) (College of Physicians & Surgeons, April 20, 2012).

Summary: The Review Board Decision under judicial review held that special circumstances did not exist to grant an extension of time to file the application for review.

Status: Following the filing of the Petition, the Review Board determined that the application for review had in fact been filed in time. As such, the Review Board continued with the application for review and on September 9, 2014, rendered its final decision: Decision No. 2012-HPA-G16.
The Petitioner has taken no steps on the Petition since the issuance of the September 2014 decision.

Ouimet v. Health Professions Review Board (Amended Petition filed December 24, 2013)

Summary: The Complainant commenced judicial review from a Review Board decision (Decision No. 2012-HPA-080(a)) dismissing an application to set aside a decision of the College of Dental Surgeons. The original complaint alleged that the Registrant provided substandard advice regarding certain dental issues. The College dismissed the complaint, finding that the Registrant had not engaged in substandard practice. The Review Board held that the College's investigation was adequate and its disposition was reasonable.

Status: On January 17, 2014, the Review Board filed a Response to Petition. The Petitioner has taken no steps on the Petition since the filing of the Review Board's Response to Petition.

New Judicial Review Petitions

Lohr v. Health Professions Review Board (Petition filed June 29, 2015)

Summary: This judicial review application was commenced by an applicant who had applied for registration to the College of Chiropractors. The Petitioner applied to the Review Board for a review of the College's registration decision. In Decision No. 2015-HPA-202(a), the Review Board held that the Review Board had no jurisdiction to conduct a review a decision on the ground that the college registration committee's refusal to register the applicant was made under s. 20(2.1) of the Act, which sets out a class of decisions outside the Review Board's jurisdiction to review. The Petition alleges procedural unfairness.

Status: All court filings have been completed. The parties are seeking to obtain hearing dates for the hearing of the Petition.

College of Physicians and Surgeons of British Columbia v. Health Professions Review Board (Petition filed September 29, 2015)

Summary: The College of Physicians and Surgeons applies for judicial review of Review Board Decision No. 2015-HPA-006(a), which decision held that the College failed to conduct an adequate investigation and ordered that the new disposition be issued by the Inquiry Committee rather than the Registrar. The Petition alleges that the Review Board failed to recognize that the College cannot compel third parties to provide it with evidence, failed to reasonably apply the "adequacy of the investigation" test and exceeded its role in requiring the Inquiry Committee to issue the new disposition.

Status: All court filings have been completed. No hearing date has yet been set for the hearing of the Petition.

Millman v. Health Professions Review Board (Petition filed October 16, 2015)

Summary: This judicial review application is commenced by a complainant from a Review Board Decision dismissing an application for review from a college complaint disposition: Decision No. 2012-HPA-116(b). The Petition alleges procedural unfairness.

Status: All court filings have been completed. No hearing date has yet been set for the hearing of the Petition.

College of Physical Therapists of British Columbia v. Health Professions Review Board (Petition filed April 13, 2016)

Summary: The College of Physical Therapists applies for judicial review of Review Board Decision No. 2015-HPA-121(a). The Petition alleges that the Review Board exceeded its mandate by posing issues not raised by the complainant, unreasonably admitted evidence and made unreasonable findings that the College's investigation was inadequate and its disposition as unreasonable.

Status: All court filings have been completed. No hearing date has yet been set for the hearing of the Petition.

Links to judicial review decisions pertaining to Review Board matters are provided on the Review Board website.

Notices of Delay and Notices of Suspension

Upon receipt of an application from a party, the Health Professions Review Board has the authority to review the issue of a delayed investigation - that is, the failure of a College to dispose of a complaint within the time required by s. 50.55 of the *Health Professions Act* and the corresponding *Health Professions General Regulation* that sets out "prescribed times" for compliance (necessary to interpret s. 50.55 of the Act). This is specific to complaint files, which are files before the Inquiry Committee.

If the College took all of the time allotted to it under the legislation to complete an investigation, it should be completed within 255 days from the date the Registrar is notified of the complaint or the date the college commences an investigation where it has done so on its own initiative. If by this time the investigation has not yet been completed by the College, a right of review to the Review Board arises with respect to that delayed investigation.

During the time allotted to the College under the legislation, the College is required to issue the following delayed investigation notices to the parties:

(1) after 150 days have elapsed,
(2) again after 240 days, (providing a new date of expected disposition) i.e.: a notice of delay
    (a) copied to the Review Board
(3) and a final notice after no more than 285 days, i.e.: a notice of suspension
    (a) copied to the Review Board
    (b) this final notice triggers the 30 day time limit to request a review into the timeliness of the Colleges investigation, to the Review Board

The Review Board has provided guidance for this process on our website in the following Memorandum, found online:

- Applying the Prescribed Time Periods: http://www.hprb.gov.bc.ca/process/prescribed_time.pdf

Legislation Links for Reference:

- Health Professions General Regulations: section 7: Prescribed periods — disposition of complaints and investigations: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/17_275_2008#section7

- *Health Professions Act*: section 50.55: Timeliness of inquiry committee investigations: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96183_01#section50.55

Health Professions Act: section 50.57: Review — delayed investigation: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96183_01#section50.57

Review Activity Statistics

For the reporting period from January 1, 2015 – December 31, 2015

Figure 1: Number of Applications, by type and month

Month	Complaint Dispositions	Delayed Investigations	Registration Decisions	Total Number of Applications	%
January	10	1	0	11	4%
February	17	0	0	17	7%
March	29	1	3	33	14%
April	10	0	4	14	6%
May	8	4	2	14	6%
June	12	17	2	31	13%
July	33	0	2	35	14%
August	14	5	2	21	9%
September	11	0	7	18	8%
October	11	1	2	14	6%
November	11	2	3	16	7%
December	12	2	1	15	6%
Total				239	
% of Total Applications					100%

Figure 2: Total Applications for Review, classified by respondent College

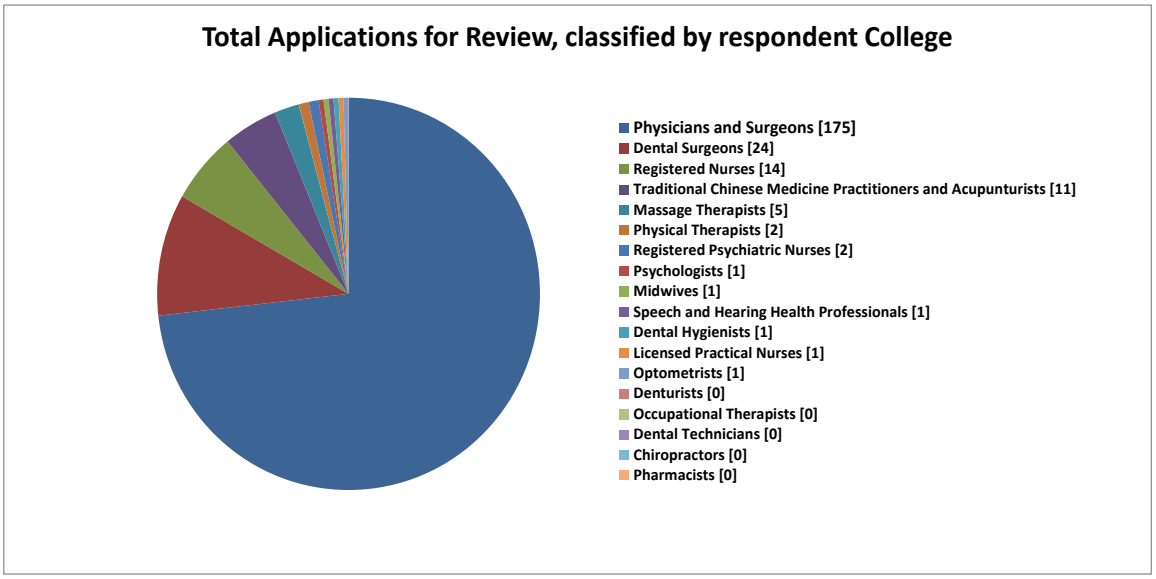


Figure 3: Applications for Review, by college and type

Respondent College	Complaint Dispositions	Delayed Investigations	Registration Decisions	Total Number of Applications	%
Chiropractors	0	0	0	**0**	
Dental Hygienists	1	0	0	**1**	0.5%
Dental Surgeons	23	1	0	**24**	10%
Dental Technicians	0	0	0	**0**	
Denturists	0	0	0	**0**	
Dietitians	0	0	0	**0**	
Massage Therapists	0	3	2	**5**	2%
Midwives	1	0	0	**1**	0.5%
Naturopathic Physicians	0	0	0	**0**	
Licensed Practical Nurses	1	0	0	**1**	0.5%
Registered Nurses	2	1	11	**14**	6%
Registered Psychiatric Nurses	2	0	0	**2**	1%
Occupational Therapists	0	0	0	**0**	
Opticians	0	0	0	**0**	
Optometrists	1	0	0	**1**	0.5%
Pharmacists	0	0	0	**0**	
Physicians and Surgeons				**175**	72%
Physical Therapists	2	0	0	**2**	1%
Podiatric Surgeons	0	0	0	**0**	
Psychologists	1	0	0	**1**	0.5%
Speech and Hearing Professionals	0	0	1	**1**	0.5%
Traditional Chinese Medicine Practitioners and Acupuncturists	1	2	8	**11**	5%
Total				**239**	100%
% of Total Applications					

Figure 4: Applications for Review – by status

Applications for Review	Number
Number of applications open at January 1, 2015 (Case Management in Progress)	147
Number of applications for review received in 2015	239
Applications closed in 2015	203
Number of applications open at December 31, 2015 (Case Management in Progress)	183

2015 Year Expenditures

This reporting period covers the 2015 fiscal year of operation for the Review Board.

Following is a table showing the expenditures made by the Review Board during its 2015 fiscal year.

Health Professions Review Board

Operating Costs - April 1, 2015 – March 31, 2016

Salary & Benefits	$ 485,772
Operating Costs	$ 777,900
Other Expenses	$ 83
Total Operating Expenses	$ 1,263,755

Shared Services Administrative Support Model

Administrative support for the Health Professions Review Board is provided by the office of the Environmental Appeal Board and the Forest Appeals Commission.

This shared services approach takes advantage of synergy and keep costs to a minimum. This has been done to assist government in achieving economic and program delivery efficiencies allowing greater access to resources while, at the same time, reducing administration and operational costs.

In addition to the Health Professions Review Board, the office for the Environmental Appeal Board and the Forest Appeals Commission provides administrative support to five other appeal tribunals.