

COMPLAINT REVIEWS BEFORE THE HEALTH  
PROFESSIONS APPEAL AND REVIEW BOARD

BY

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## Complaint Reviews Before the Health Professions Appeal and Review Board<sup>1</sup>

This paper considers some aspects of the practice and procedure of the Health Professions Appeal and Review Board (the "Board") with respect to one aspect of its jurisdiction: the Board review of a decision of a complaints committee of a College of a regulated health profession. It is not intended to be (a) complete, (b) comprehensive or (c) relied on as legal advice.

Ontario's Health Professions Appeal and Review Board is a successor to the Health Professions Board, itself a continuation of the Health Disciplines Board and the Denture Therapists Appeal Board. The Health Disciplines Board was established by statute in 1974 (Health Disciplines Act, 1974, S.O., 1974, c. 47) to further the governmental objective of ensuring that the activities of the health professions are effectively regulated in the public interest:

"With respect to some matters respecting complaints made by members of the public against a member of a health discipline ... and also some matters relating to licencing, the Legislature has seen fit not to leave the whole field of regulation at the self-governmental level... the Board is imposed as a provincial governmental review agency to review those decisions of the self-governing bodies which are appropriately brought to its attention."<sup>2</sup>

Prior to the enactment of the Regulated Health Professions Act, 1991, S.O. 1991, c. 18, as amended (here-after the "Act") which came into force on December 31, 1993, the Board had responsibility with respect to "some matters" concerning complaint reviews and licensing in five "health disciplines" under the Health Disciplines Act: medicine, dentistry, optometry, nursing and pharmacy. The Board possessed parallel jurisdiction with respect to veterinarians and denture therapists.<sup>3</sup> The Act expanded and clarified the jurisdiction and powers of the Board. Pursuant to the Act, the Board now has jurisdiction with respect to "some matters" concerning complaint reviews and licensing in the "health professions". A "health profession" is defined in subsection 1(1) of the Act to mean "a health profession set out in Schedule 1". There are some 23 health professions currently set out in Schedule 1 including dietetics, midwifery, psychology and

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<sup>2</sup> *Re Ombudsman of Ontario and Health Disciplines Board of Ontario* (1979), 29 O.R. (2d) 117,118 (C.A.).

<sup>3</sup> The Board's jurisdiction with respect to veterinarians is set out in the Veterinarians Act, R.S.O. 1990, c. V.3, as amended. The Board was constituted as the Denture Therapists Appeal Board under section 13 of the Denture Therapists Act, R.S.O. 1990, C. D.7. This has now been superseded as denture therapists are now a regulated health profession (denturists) in Schedule I to the Act.

opticianry (currently organized into 21 regulatory colleges). The Board's powers with respect to veterinarians are continued.

The Board is to be composed of at least 12 members,<sup>4</sup> none of whom can be employed by a Crown agency or in the public service, nor can they be members or former members of one of the Colleges of a regulated health profession.<sup>5</sup>

Members are appointed by the Lieutenant-Governor in Council on the Minister's recommendation for three-year terms.<sup>6</sup> Panels of the Board constituted to consider and determine a proceeding are to be made up of one or more members, one of whom is to be a chair, or a vice-chair of the Board.

Pursuant to section 24 of the Act, the Board may engage persons not employed in the public service to provide expert or professional advice in respect of complaint reviews and registration reviews and hearings. The nature of such advice is to be made known to the parties, and the parties given an opportunity to make submissions in response.

A complaint filed with the Registrar of a College of a regulated health profession is investigated by a panel of the complaints committee of that College and disposed of according to the Act.<sup>7</sup> The word "complaint" is not defined in the legislation, although the complaint must be "regarding the conduct or actions of a member" of the College.<sup>8</sup>

Should a complaints committee of a College fail to dispose of a complaint within 120 days after it was filed, the complainant or the member who is the subject of the complaint may apply to the Board for an order requiring the complaints committee to ensure that the complaint is disposed of.<sup>9</sup> If the complaint is still not disposed of within 60 days of the Board's requirement, the Board itself is mandated to investigate the complaint and in so doing has the same powers as the complaints committee.<sup>10</sup> After the Board so investigates, the Board may do one or more of the following:

1. Refer the matter to the Complaints Committee.

<sup>4</sup> Subsection 3(1) of the Ministry of Health Appeal and Review Boards Act, 1998, S.O. 1998, c. 18, Schedule H, as amended.

<sup>5</sup> Section 4, the Ministry of Health Appeal and Review Boards Act, 1998.

<sup>6</sup> Section 3, the Ministry of Health Appeal and Review Boards Act, 1998.

<sup>7</sup> Sections 25, 26, 27, and 28 of Schedule 2 of the Act, the Health Professions Procedural Code (the "Code").

<sup>8</sup> Subsection 25(1), the Code.

<sup>9</sup> Subsection 28(2), the Code.

<sup>10</sup> Subsections 28(3) and (4), the Code.

2. Make recommendations the Board considers appropriate to the Complaints Committee.
3. Require the Complaints Committee or a panel to do anything the Committee or a panel may do under the health professions Act and this Code except to request the Registrar to conduct an investigation.<sup>11</sup>

The complainant or member who is the subject of the complaint has a right to request that the Board review a decision of the complaints committee, unless that decision was to refer an allegation of professional misconduct or incompetence to the discipline committee or to refer the matter to the executive committee for incapacity proceedings.<sup>12</sup> The request for review must be made within 30 days after receipt of the notice of the right to request a review.<sup>13</sup>

The Board may extend this time limitation for up to 60 days upon application to the Board if the Board is satisfied that there are reasonable grounds and that no person will be unduly prejudiced thereby.<sup>14</sup>

On receipt of a request for a review, the Board will contact the registrar of the appropriate college and request a record of the investigation and the documents and things upon which the decision was based. The registrar is required to give such record, documents and things to the Board within 15 days after the Board's request.<sup>15</sup> The legislation provides that the Board shall disclose this material to the parties unless the Board is of the opinion that some or all of it contains anything that may:

- (a) disclose matters involving public security;
- (b) undermine the integrity of the complaint investigation and review process;
- (c) disclose financial or personal or other matters of such a nature that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that disclosure be made;
- (d) prejudice a person involved in a criminal proceeding or in a civil suit or proceeding; or
- (e) jeopardize the safety of any person.<sup>16</sup>

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<sup>11</sup> Subsection 28 (5), the Code.

<sup>12</sup> Section 29, the Code.

<sup>13</sup> Subsection 27(c), the Code.

<sup>14</sup> Section 26, the Act.

<sup>15</sup> Subsection 32(1), the Code.

<sup>16</sup> Subsection 32(3), the Code.

The statutory language and the Board's procedure derive from court decisions in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 7 C.P.C. (3d) 269, 93 D.L.R. (4th) 415, *Stumbillich and Health Disciplines Board (Ont.)* (1983), 44 O.R. (2d) 196 (Div. Ct.) and (1984), 47 O.R. (2d) 545, 7 Admin. L.R. 184, 3D.L.R. (4th) 417 (C.A.) and in *Kadoke v. Health Disciplines Board (QL)* (1987), 23 O.A.C. 75 (Div. Ct.). These decisions reversed the earlier approach of the Board which had been more restrictive as to disclosure. The courts held that while the Board had discretion to withhold materials from the parties, such discretion had to be exercised with great care.

There are two statutory procedures which permit the Board to dismiss matters prior to the complaint review, which procedures parallel the summary dismissal powers of the civil courts. First, the Board is not to review a decision if the party who requested the review withdraws the request and the other party consents.<sup>17</sup> Second, if the Board considers a request to review a decision to have been frivolous, vexatious, made in bad faith or otherwise an abuse of process it gives the parties notice both of its intention not to proceed with the review and of the parties' rights to make written submissions within 30 days of receipt of such notice.<sup>18</sup> Pursuant to Rules 10.5 and 10.6 of the Board's Rules of Practice the Board will screen every request for review in order to determine whether it considers the request to be "frivolous, vexatious, made in bad faith or otherwise an abuse of process" and that consequently the Board will not entertain any pre-review motions from the parties for such consideration. If the Board is satisfied, considering the submissions of the parties, that the request was frivolous, vexatious, made in bad faith or otherwise an abuse of process, it will not review the decision.

As to the conduct of the review itself, the parties are notified of the date, time and location of the review. The complainant and the member who is the subject of the complaint are parties to the review.<sup>19</sup> However, the Board may require a representative of the college concerned to be present in order to answer questions from the Board.

Pursuant to Rule 16 of the Board's Rules of Practice the Board will not grant an adjournment as of right to either of the parties to a complaint review. The Board will not consider the convenience of counsel to be a sufficient reason for an adjournment. Rule 16.2 instructs parties requesting an adjournment as follows:

- 16.2 Adjournment requests shall be made as soon as possible and shall be served by the party requesting adjournment to all other parties. The request shall include:
- (1) an indication of whether or not the other parties have consented to the request;
  - (2) reasons for the request;

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<sup>17</sup> Subsection 30(1), the Code.

<sup>18</sup> Subsections 30(2) and (3), the Code.

<sup>19</sup> Subsection 29(4), the Code.

- (3) the amount of time needed for the adjournment; and
- (4) replacement dates convenient to all parties (if the request is on consent).

The complaint review is open to the public. However, on its own motion, or on the application of either party, the Board may order the exclusion of the public from a review or any part of it if the panel is satisfied that:

- (a) matters involving public security may be disclosed;
- (b) financial or personal or other matters may be disclosed at the hearing of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweigh the desirability of adhering to the principle that hearings be open to the public;
- (c) a person involved in a criminal proceeding or in a civil suit or proceeding may be prejudiced; or
- (d) the safety of a person may be jeopardized.<sup>20</sup>

The Board may further make non-disclosure orders including publication bans in the circumstances set out above. Any order excluding the public or preventing public disclosure of the matters disclosed at the review must be made available to the public in writing and with reasons.<sup>21</sup>

In reviewing a decision of the complaints committee the Board must consider either or both of the adequacy of the investigation conducted and the reasonableness of the decision arrived at.<sup>22</sup> Again, this is something of a codification of the common law, in particular *Re Yuz* (1986), 57 O.R. (2d) 106, 24 Admin. L.R. 276, 32 D.L.R. (4th) 452 (C.A.), leave to appeal to S.C.C. refused (1987), 61 O.R. (2d) 538 (note), 23 O.A.C. 318 (note) (S.C.C.) which held that the issue in question in a complaint review was not solely the determination of a question related to professional misconduct, but the quality of the decision of the complaints committee as well.

The Board will not make any finding that a member is or is not guilty of professional misconduct, but will decide, among other things, whether the complaint should go forward to adjudication before the discipline committee. The complaints committee performs a screening function and the Board reviews that screening function, itself performing a screening function.

The screening test has been set out in the decision of *Brett v. Ontario Board of Directors of Physiotherapy* (1993), 13 Admin. L.R. (2d) 217, 104 D.L.R. (4th) 421 (Ont. C.A.) such that in order to refer complaints to discipline, the Board should receive sufficient information so as to be satisfied not only that there is information which if unanswered could give rise to a finding of professional misconduct, but also that the case is an appropriate one in all the circumstances to send on for a hearing. In matters which may not be appropriate to send on for a hearing the Board may also, for example, recommend that a member undergo a course of educational upgrading or in

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<sup>20</sup> Subsection 45(2), the Code.

<sup>21</sup> Subsection 45(7), the Code.

<sup>22</sup> Subsection 33(1), the Code.

certain circumstances, require a member to undergo upgrading or an assessment (see *Modi v. Ontario (Health Professions Board)* (1996), 27 O.R. (3d) 762 (Div. Ct.). Schedule 2 to the Act, the Health Professions Procedural Code (the “Code”), sets out general rules for the conduct of complaint reviews and provides that the Board:

- (a) shall give the party requesting the review an opportunity to comment on [the adequacy of the investigation conducted and or the reasonableness of the decision] and the other party an opportunity to respond to those comments; *(parentheses added)*
- (b) may require the college to send a representative;
- (c) may question the parties and the representative of the college;
- (d) may permit the parties to make representations with respect to issues raised by any questions asked under clause (c); and
- (e) shall not allow the parties or the representative of the college to question each other.<sup>23</sup>

Therefore the Board does not hear from witnesses at the review nor is any electronic or written transcript of the proceedings made. The review is not governed by the Statutory Powers Procedure Act, R.S.O. 1990, c. 5.22, as amended (except for specific provisions of the Statutory Powers Procedure Act specified in the Code).<sup>24</sup>

In a complaint review, on request of a person providing information in relation to allegations of a member's sexual misconduct involving that person, the Board may order that no one may publish the identity of that person or any information which may disclose the identity of that person.<sup>25</sup>

After conducting a complaint review, the Board may do one or more of the following:

1. Confirm all or part of the decision.
2. Make recommendations the Board considers appropriate to the Complaints Committee.
3. Require the Complaints Committee to do anything a committee or a panel may do under the health profession Act and this Code except to request the Registrar to conduct an investigation.<sup>26</sup>

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<sup>23</sup> Subsection 33(2), the Code.

<sup>24</sup> Subsection 1(2), the Code. The specific provisions of the Statutory Powers Procedure Act which are applicable to complaint reviews before the Board are set out at subsection 34(2) of the Code.

<sup>25</sup> Subsection 47(1), the Code.

<sup>26</sup> Subsection 35(1), the Code. Note that the Complaints Committee's powers after investigation and consideration of a complaint are set out in subsection 26(2) of the Code, and include the power to refer a specified allegation of the member's misconduct to the Discipline Committee if the allegation is related to the complaint, refer the member to the Executive Committee for incapacity

The Board must give its decision and reasons in writing to the parties and to the complaints committee.<sup>27</sup> In its decision the Board is confined to the matters set out above. It has held consistently that it cannot make financial awards where damages are sought, nor can it recommend or prescribe treatment. It, however, has found occasion to comment on general matters of policy and practice within the health professions or within particular institutions, and to make non-binding recommendations thereon. The Board's decisions are released to the public.

While there is no statutory right of appeal from decisions of the Board in a complaints review, such decisions may be subject to judicial review before the Divisional Court of the Superior Court of Justice (General Division). Similarly, under general administrative law, and pursuant to Rule 17 of its Rules of Practice the Board retains limited authority to reconsider its own decisions.<sup>28</sup>

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proceedings, require the member to appear before the panel or another panel of the Complaints Committee to be cautioned, and/or take action which it considers appropriate that is not inconsistent with the health professions Act, the Code, the regulations and by-laws.

<sup>27</sup> Subsection 35(2), the Code.

<sup>28</sup> See, for example, *Chandler v. Association of Architects (Alta.)*, [1989] 2 S.C.R. 848, 40 Admin. L.R. 128, 70 Alta. L.R. (2d) 193, 36 C.L.R. 1, [1989] 6 W.W.R. 521, 62 D.L.R. (4th) 577, 97 N.R. 277, 101 A.R. 321.