

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

Thomas Kelly, Vice-Chair, Presiding

Timothy P. D. Bates, Board Member

Sharon McKeown, Board Member*

* Ms. McKeown did not participate in the decision

Review held on March 11, 2015 at London, Ontario

IN THE MATTER OF A COMPLAINT REVIEW UNDER SECTION 29(1) of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, Statutes of Ontario, 1991, c.18, as amended

B E T W E E N:

AMANDA LAMPMAN

Applicant

and

ROBERT NOTKIN, MD

Respondent

Appearances:

The Applicant: Amanda Lampman

For the Respondent: Nadia Marotta, Counsel

For the College of Physicians
and Surgeons of Ontario: Cameron Vale (by teleconference)

DECISION AND REASONS

I. DECISION

1. It is the decision of the Health Professions Appeal and Review Board to confirm the decision of the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario to take no action pursuant to section 26 (5) of the

Health Professions Procedural Code, being Schedule 2 to the *Regulated Health Professions Act*, 1991, on the basis that this complaint is frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process.

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by Amanda Lampman (the Applicant) to review a decision of the Inquiries, Complaints and Reports Committee (the Committee) of the College of Physicians and Surgeons of Ontario (the College). The decision concerned a complaint regarding the conduct and actions of Robert Notkin, MD (the Respondent). The Committee decided to take no further action on the basis that this complaint is frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process.

II. BACKGROUND

3. The Applicant was injured in a motor vehicle collision in January 1998.
4. The Applicant saw the Respondent psychiatrist on or about May 25, 2006 for the purpose of an assessment and third-party report related to that accident.

The Complaint

5. The Applicant complained that the Respondent:
 - provided a third party report that was dishonest, inaccurate and biased;
 - made diagnoses for which there was no medical evidence, nor was he qualified to make;
 - discriminated against her because she was an “MVA [motor vehicle accident] patient”;
 - used his authority as a physician to aid and abet the insurance company;
 - was cruel and inconsiderate to her during the assessment; and
 - accused her of not being truthful.

6. The Committee met on February 19, 2014 to consider the Applicant's complaint and made the preliminary determination that it would take no action with respect to the Applicant's complaint on the basis that the complaint was frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process.
7. This determination was taken pursuant to sections 26(4) and 26(5) of the *Health Professions Procedural Code* (the *Code*), being Schedule 2 of the *Regulated Health Professions Act* (the *RHPA* or the *Act*), which determines the procedure to be followed when the Committee determines a complaint to be frivolous and vexatious, made in bad faith, moot or otherwise an abuse of process.
8. The Committee advised the parties of its preliminary decision by letter dated March 6, 2014 and provided the parties with 30 days' notice, informing them that they could make submissions regarding the Committee's intention to take no further action and that the Committee would make a final determination at a later date as to whether an investigation into this matter was warranted.
9. That letter set out that the Committee's preliminary determination was based on the following:
 - This is just one of several similar complaints brought by the Applicant for which the Committee took no action; and
 - In the similar complaints investigated, the Committee found no evidence of bias, there was no credible evidence to support the claim that the physicians were engaged in a conspiracy with the insurance company to deny treatment, and there was nothing objective in the investigative records to support the concerns.
10. The Respondent did not make any submissions in response to that letter.

11. The Applicant made a number of submissions including:

- she maintains that other physicians are continuing to deny her treatment based on the Respondent’s report that she was “feigning and malingering.”;
- information about the Respondent’s report was used in a previous College investigation (file TB84359) without her consent, yet the notation in the Committee’s decision indicates that she provided the material;
- she disputes that the Committee’s reasons for not investigating fall within the *Act* section 26(4) and (5);
- she believes that the Respondent responded to the College and his response should have been disclosed to her;
- she disagrees that her complaint about the Respondent is similar to others, in that:
 - (i) the Respondent is a psychiatrist and the other physicians she complained about were not;
 - (ii) “the Respondent’s report is the only defence medical report I have filed a complaint about.”;
 - (iii) “the Respondent was the only one who said her symptoms were “bizarre” and that she was “feigning and malingering.”;
- she suggests that the fact that there were similar complaints concerning other physicians should be a reason to investigate, not a reason to not investigate, since multiple similar complaints would indicate a more “widespread and repetitive problem.”;
- she disagrees with the Committee’s reason that there was no evidence to support her claim, and points to evidence gathered in the previous investigations, already disposed of by the Committee;
- she believes that relying on the outcomes of previous investigations in order to make a decision in this case is prejudicial;
- she claims that she “was told 3 times by the College itself that they have no intentions of finding a doctor guilty of anything, regardless of the evidence, or severity [sic] of harm to the patient.”;

- by refusing to investigate, the College is denying her “right to complain without consequences.”;
 - she concludes that by not obtaining a written retraction from the Respondent, which would then permit her to receive continued health care, the College is, in effect, “resinding [sic] my right to OHIP and Insurance benefits.”
12. The Committee met on May 21, 2014 and determined that it would take no action, pursuant to section 26(5) of the *Code* on the basis that the complaint was frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process.
13. In reaching this decision, the Committee indicated that it had considered the following points:
- in this case, the Applicant wishes, among other things, for a retraction of a third party report that the Respondent wrote on her behalf regarding her condition in 2006. She claims that she “suffered, as a result of a motor vehicle collision in January 1998, optic nerve damage and an occipital lobe head injury, with consequential seizures, hallucinations, tinnitus, pain, and suicidal tendencies.”
 - the Committee notes that on two previous occasions in the past two years, the Applicant has complained to the College about many physicians, using similar language (for example, accusations that assessments, diagnoses and treatments were inaccurate, biased, and discriminatory towards MVA patients; that the physicians were not qualified to make diagnoses; that the physicians accused her of being untruthful, etc.). The Committee took no further action on those matters. The Applicant appealed those cases to the Health Professions Appeal and Review (HPARB), which upheld one College decision (and concluded there was a satisfactory review of all the evidence) and the second appeal is pending.
 - the Committee’s review of its own deliberations for both previous complaints reveals that they received very detailed consideration. We are of the view that further additional investigation into the Applicant’s current concerns about the same or similar issues is not warranted and would be an abuse of process.

- the Committee has carefully reviewed and considered the Applicant’s additional submission, whereby she maintains her allegations, disputes the preliminary decision of the Committee, claims this complaint differs from the others, accuses the College of hiding the Respondent’s response to current allegations, and claims the College told her in the past that it had no intention of finding any MD “guilty”. This submission, in the Committee’s view, is similar in its content to the Applicant’s previous complaints to the College (in that there is no credible evidence to support the claims and nothing objective in the investigative records to support the concerns). The submission has not changed the Committee’s view that this current matter is essentially the same as previous complaints.

III. REQUEST FOR REVIEW

14. In a letter dated July 21, 2014, the Applicant requested that the Board review the Committee’s decision.

IV. POWERS OF THE BOARD

15. After conducting a review of a decision of the Committee, the Board may do one or more of the following:
 - a) confirm all or part of the Committee’s decision;
 - b) make recommendations to the Committee;
 - c) require the Committee to exercise any of its powers other than to request a Registrar’s investigation.
16. The Board cannot recommend or require the Committee to do things outside its jurisdiction, such as make a finding of misconduct or incompetence against the member, or require the referral of allegations to the Discipline Committee that would not, if proved, constitute either professional misconduct or incompetence.

V. PRELIMINARY MOTION

17. The Respondent's Counsel indicated prior to the Review that she would be making a preliminary motion at the Review to have the Board consider this matter under the provisions of section 30(2) of the *Code* which reads as follows:

Request in bad faith, etc.

30. (2) If the Board considers a request to review a decision to have been frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process, it shall give the parties notice that it intends not to proceed with the review and that the parties have a right to make written submissions within thirty days after receiving the notice.

Idem

(3) If the Board is satisfied, after considering the written submissions of the parties, that a request was frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process, the Board shall not review the decision.

18. At the Review, the Respondent's Counsel brought a preliminary motion requesting the Board to consider this matter under the provisions of section 30 of the *Code*.
19. The Respondent's Counsel and the Applicant indicated they had prepared submissions regarding this motion.
20. After a brief discussion, the Respondent's Counsel withdrew her motion and the Review proceeded.

VI. ANALYSIS AND REASONS

21. Pursuant to section 33(1) of the *Health Professions Procedural Code* (the *Code*), being Schedule 2 to the *Regulated Health Professions Act, 1991*, the mandate of the Board in a complaint review is to consider either the adequacy of the Committee's investigation, the reasonableness of its decision, or both.

22. As indicated earlier, the Committee took no action on the complaint because it determined that the complaint fell within the parameters of sections 26(4) and (5) of the *Code*.
23. Sections 26(4) and (5) of the *Code* provide as follows:
- 26(4) If the panel considers a complaint to be frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process, it shall give the parties notice that it intends not to proceed with the review and that the parties have a right to make written submissions within thirty days after receiving the notice.
- 26(5) If the panel is satisfied, after considering the written submissions of the parties, that a request was frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process, the panel shall not take action with respect to the complaint.
24. The terms “frivolous”, “vexatious”, “made in bad faith”, and “abuse of process” are legal terms describing requests for review that, for example, are beyond the jurisdiction of the complaint proceedings, have no chance of success, or are brought for an improper or collateral purpose.
25. In *R v. Scott* [1990] 3 SCR 979 at p. 1007, McLachlin J. (as she then was) commented on the doctrine of abuse of process as follows:
- . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community’s sense of fair play and decency.
26. Abuse of process has been referred to as a doctrine engaging the inherent power of the court to prevent the misuse of its procedure. As such, it has been recognized as a flexible doctrine. An attempt to re-litigate a claim that has already been determined is one example of abuse of process. (See for example, *Canadian Union of Public Employees, Local 79 v. City of Toronto and Douglas Stanley* [2003] 3 SCR 77 2003.)

27. The Ontario Superior Court of Justice observed in *Deep v. the College of Physicians and Surgeons of Ontario*, 2010 ONSC 5248 (CanLII), that the general purpose of abuse of process is, for example, to bar proceedings that are inconsistent with public policy considerations, such as multiplicity of proceedings and inefficient use of judicial proceedings. The Court commented that an individual may be a vexatious litigant where that person has “persistently and without reasonable grounds” either “instituted vexatious proceedings” or “conducted a proceeding in any court in a vexatious manner.”
28. A frequently cited case, *Lang Michener et al. and Fabian et al.*, (1987) 59 O.R. (2d) 353, has set out a number of identifying signs of a vexatious proceeding including:
- (a) bringing of one or more actions to determine an issue which has already been determined;
 - (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
 - (c) bringing a proceeding for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
 - (d) rolling forward grounds and issues into subsequent actions; and
 - (e) persistently taking unsuccessful appeals from judicial decisions.
29. In determining that the Applicant’s complaint fell within sections 26(4) and (5) of the *Code*, the Committee referred to the fact that the Applicant complained to the College on two previous occasions in the past two years about many physicians, using similar language to the language in this complaint. The Committee noted that it took no action on those complaints.
30. The Committee further stated that a review of its own deliberations for both previous complaints reveals that they received very detailed consideration. The Committee stated

that it was thus of the view that further additional investigation into the Applicant's current concerns about same or similar issues is not warranted and would be an abuse of process.

31. The Committee's first reason for disposition was that it noted that the Applicant wished, among other things, for a retraction of the third-party report that the Respondent wrote on her behalf in 2006. The Board notes that the Committee has no power to compel a physician to retract his report and that the Applicant's request in this regard has no reasonable prospect of success.
32. The Committee's second reason for disposition was that the Committee had considered that the Applicant has brought similar types of complaints to the College's attention in the past regarding physicians using similar language, (for example, accusations that assessments, diagnosis and treatments were inaccurate, biased and discriminatory towards MVA patients; that the physicians were not qualified to make diagnoses; that the physicians accused her of being untruthful, etc.).
33. The Board has reviewed those prior complaints and the Committee decisions, which were contained in the Record of Investigation (the Record) and finds that the language used and the issues raised in those complaints are similar to this complaint. Although there are some differences in the language used, for instance, the Applicant alleges the Respondent is the only doctor who said her symptoms were "bizarre" and that she was "feigning and malingering", the language used and the issues alleged in this matter are essentially the same as in the two prior complaints noted by and fully investigated and considered by the Committee
34. The Committee's third reason for disposition is that it noted that the previous complaints received very detailed consideration and it was of the view that further additional investigation into the Applicant's current concerns about the same or similar issues was not warranted and would be an abuse of process.

35. The Board notes that the Applicant acknowledges that she complained about many physicians in the past but submitted that this was the only defence medical expert that she had complained about. The Board has reviewed the two previous complaints noted by the Committee and finds that the Applicant, notwithstanding her submission in this regard, has previously complained about defence independent medical experts making similar allegations and using similar language in those complaints.
36. The Board thus finds support in the Record for the Committee's statement that the Applicant's complaint is about the same or similar issues.
37. The Committee's fourth reason for disposition is that it had reviewed the Applicant's additional submissions and they did not change the "Committee's view that this current matter is essentially the same as previous complaints".
38. The Board finds the Committee's conclusion is supported by the information available. This complaint is essentially the same as the Applicant's previous complaints in that it arises from the same origin, namely the 1998 motor vehicle accident, and contains much of the same language and allegations as previous complaints which have been fully investigated and considered by the Committee.
39. The Committee determined to take no further action in this matter in that it deemed it to be frivolous, vexatious, made in bad faith, moot or an otherwise an abuse of process.
40. For the reasons as stated, the Board finds the Committee's decision to be reasonable. It is based upon information in the Record, the Committee's analysis and consideration of the Applicant's complaint and the allegations contained therein, and the Committee's review of previous dispositions concerning similar facts and allegations. The Committee's decision is one of the possible, acceptable outcomes that are defensible in respect of the facts and the law.

VII. DECISION

41. Pursuant to section 35(1) of the *Code*, the Board confirms the Committee's decision to take no action pursuant to section 26 (5) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, on the basis that this complaint is frivolous, vexatious, made in bad faith, moot or otherwise an abuse of .

ISSUED November 3, 2015



Thomas Kelly



Timothy P. D. Bates