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## OVERVIEW OF THE RHPA COMPLAINTS PROCESS: FROM THE PERSPECTIVE OF DEFENCE COUNSEL

By **Lad Kucis**

As the governing body of a self-regulated health profession, the College of Physiotherapists of Ontario (the “**College**”) is responsible for investigating complaints made by members of the public with respect to physiotherapists.

To fulfill this mandate, the College is required to have a formal complaints process that complies with the statutory framework set out in the *Regulated Health Professions Act, 1991* and its schedule, the Health Professions Procedural Code (the “**RHPA**”).

All physiotherapists would be well advised to have a full and complete understanding of the RHPA complaints process and should not simply rely on the advices provided by the College in the event a complaint is filed against them.

The following is an overview of the RHPA complaints process:

### Complaints

Under the RHPA, a patient or any other person may file a formal complaint with the College regarding the conduct or actions of a physiotherapist, provided that the complaint is in writing or communicated through a recorded medium.

Alternatively, rather than initiating a formal complaint, a person can raise their concerns with the physiotherapist directly or through a discussion with a College investigator. In many cases, this informal approach can result in a resolution of the matter and thereby eliminates the need to proceed with a complaint.

### Responding to the Complaint

In the event a formal complaint is filed, the College is required to provide the physiotherapist with a copy of the complaint, as well as any prior decisions involving the physiotherapist that have been before the College.<sup>1</sup>

Thereafter, the physiotherapist is typically provided with 30 days to provide the College with a written response to the complaint, as well as any records relevant to the matter, such as clinical and administrative files. As an aside, it is important to note that where the complainant is a patient, the RHPA permits the physiotherapist to disclose their personal health information to the College, for the purpose of administering the complaint.

<sup>1</sup> The only exception are decisions that were dismissed as being frivolous, vexatious, made in bad faith, moot or an abuse of process.

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At this stage of the complaints process, physiotherapists would be well advised to contact legal counsel experienced in these types of matters, to assist them in formulating their response. This is highly recommended as the written response represents the only opportunity for the physiotherapist to provide an answer to the allegations made in a complaint.<sup>2</sup>

It is important that the response is drafted in a careful and concise manner, responding only to the subject matter raised in the complaint. In addition, irrespective of how unfounded a complaint may be, it is essential that the response demonstrates that the physiotherapist has thoughtfully reflected on the matter and has taken the time to prepare a professional and fulsome response.

### Reply

In most cases, the response is then provided to the complainant who has 30 days to submit a reply to the response, if he/she chooses. In the event a reply is submitted, it may be forwarded to the physiotherapist for a subsequent response.

It is important to note that the RHPA does not mandate that the reply be forwarded to the physiotherapist, especially if the College investigator determines that no new information has been put forward. Nevertheless, it is good practice for a physiotherapist to request production of the reply, so as to ensure that all allegations have been ascertained and appropriately addressed.

Likewise, the RHPA does not mandate that the response to a reply be forwarded to the complainant.

### Disposition by ICRC

When all of the above information has been collected, the matter is referred to a College

committee called the Inquiries, Complaints and Reports Committee (the “**ICRC**”), for its review. The ICRC, which is composed of physiotherapists and public members, considers complaints in private, based strictly on the written submissions of the parties, as well as other documentation that has been obtained.

In the event the ICRC believes that further information is required, it may defer rendering its decision and request that additional information be provided by the parties or obtained by the College.

Once the ICRC is satisfied that it has sufficient information to render a decision, it may do any of the following:

- take no further action – in situations where it is determined that the conduct of the physiotherapist was appropriate or if there is insufficient evidence to warrant any other action;
- provide written recommendations to the physiotherapist – in situations where it is determined that the provision of some practice advice would be beneficial;
- direct or accept the physiotherapist’s agreement to participate in a training or educational program – which may include practice inspections, completion of coursework, etc. In many cases, these types of agreements are documented through undertakings;
- issue a written caution – or in more serious cases, require the physiotherapist to appear before the ICRC to be cautioned in person;
- refer the matter to the Discipline Committee for a hearing to determine whether the physiotherapist committed an act of professional misconduct or is incompetent. This is the most serious action that the

<sup>2</sup> In addition, this is also the stage where the physiotherapist (or his/her legal counsel) must decide whether to: (a) bring a motion to have the complaint set aside as being frivolous, vexatious, made in bad faith, moot or an abuse of process; or (b) make a request that the matter proceed by way of alternative dispute resolution.



ICRC can order and should only occur if there is significant evidence of professional misconduct and/or incompetence. In the event a matter is referred to the Discipline Committee, the RHPA and the College By-Laws mandate that the following information appear on the public register and be posted on the College website:

- a notation of the referral, including the date of the referral;
  - a brief summary of each specified allegation; and
  - the date of the hearing, once the hearing date has been set;
- In view of these publication requirements (which can create an impression of guilt in and of themselves), as well as the potential sanctions that can be imposed by the Discipline Committee, physiotherapists would be well advised to take whatever steps necessary to resolve a complaint matter at the ICRC level.

In most cases, unless a complaint is referred to the Discipline Committee or for a capacity investigation, the ICRC will provide written reasons for its decision, with copies provided to both the complainant and the physiotherapist.

As an aside, physiotherapists should also be aware that the ICRC may recommend that the Registrar initiate a new and separate investigation against the physiotherapist in the event information is uncovered that suggests the possibility of additional misconduct that goes beyond the scope of the original complaint.

### **HPARB Complaint Review**

Upon receipt of the ICRC decision with respect to a complaint (the “**ICRC Decision**”), both the complainant and the physiotherapist have the right to request a review of the decision by an independent

adjudicative body called the Health Professions Appeal and Review Board (“HPARB”). This review can be made with respect to all ICRC Decisions, with the exception of cases referred to the Discipline Committee or for a capacity investigation.

After a request has been made for an HPARB complaint review, which must be done within 30 days of receiving the ICRC Decision, the College is required to provide both parties with a Record of Investigation, which contains copies of all documents considered by the ICRC panel. This disclosure can cause significant issues for a physiotherapist, as it also includes documents that were not previously provided to the complainant, including the complaints history of the physiotherapist and other internal College documents relating to the matter.

HPARB complaint reviews are usually held in person before a panel of 3 HPARB members, where each party, or their counsel, provide oral submissions regarding the ICRC Decision. Unlike a hearing, however, no witnesses are permitted.

In reviewing an ICRC Decision, HPARB is limited to considering the following items:

1. *whether the ICRC Decision was “reasonable”* (i.e. whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law); and
2. *whether the ICRC conducted an “adequate” investigation* (i.e. whether it obtained the essential information relevant to making an informed decision regarding the issues raised in the complaint).

At the conclusion of its review, HPARB can do one or more of the following (the “**HPARB Decision**”):



- confirm all or part of the ICRC Decision;
- make recommendations to the ICRC; and
- require the ICRC to exercise any of its powers, other than to conduct a Registrar's investigation or to refer the matter to the Discipline Committee.

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### **Judicial Review**

The parties to an HPARB complaint review have the right to request a judicial review of the HPARB Decision to Divisional Court. However, given the limited powers of HPARB in these types of matters, judicial reviews are quite rare.

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