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REPORT RECOMMENDS THAT THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO CHANGE HOW IT INVESTIGATES COMPLAINTS AND INVESTIGATIVE REPORTS

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On April 30, 2018, the Ministry of Health and Long-Term Care made public *Streamlining the Physician Complaints Process in Ontario*, a report written in 2016 by the Honourable Justice Stephen Goudge who retired from the Ontario Court of Appeal in 2014 (the "Report"). The Report makes a number of far-reaching recommendations on how to streamline the College of Physicians and Surgeons of Ontario ("CPSO")'s investigative and discipline processes. What follows is a summary of some of the major proposed changes to the CPSO's investigative process. The recommended changes will be of interest to physicians and other health professionals because, if adopted by any health regulatory College, members may face fewer meritless complaints and/or overly broad registrar investigations.

The Report begins by highlighting that the CPSO receives the largest number of complaints against physicians of any health regulator in Canada. Moreover, the report notes that approximately 80 per cent of all complaints filed with the CPSO and a smaller number of registrar's investigations result in either no action or insignificant action being taken against the physician. Moreover, the Report found that only 0.30 per cent of all investigative files opened by the CPSO result in a fully-contested discipline hearing. The Report goes on to find that "more time and money is spent on a disposition in Ontario than in other jurisdictions, with little apparent benefit to the public in terms of better or safer physician services". As a result, the Report concludes that "too many complaints and investigations are in the system too long". In an effort to make the CPSO's investigative process more efficient, the Report makes a number of potentially far reaching recommendations.

1. Appoint a Complaints Director

The Report recommends that the CPSO appoint a "Complaints Director" to review each new complaint filed with the CPSO and dismiss meritless complaints. Specifically, the Report recommends that the Complaints Director be empowered to, among other things, dismiss a complaint where he or she is satisfied that there is no reasonable prospect of an outcome other than the CPSO's Inquiries, Complaints and Reports Committee (the "ICRC") dismissing the complaint. However, the Report recommends that where the Complaints Director does dismiss a complaint, he or she provide the complainant with written reasons for the dismissal and an opportunity to appeal the dismissal to the ICRC. Although subsections (4) and (5) of section 26 of the *Health Professions Procedural Code* (Being scheduled 2 to the *Regulated Health Professions Act, 1991* S.O. 1991, c. 18 (the "Code"))

empower the ICRC to dismiss a complaint which it finds to be “frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process”, the process for doing so is time consuming. Specifically, the ICRC must first give the complainant and the member notice of its intention to dismiss the complaint. Next, the complainant and the member are given an opportunity to make written submissions within 30 days. It is only after the ICRC has reviewed those written submissions that it can dismiss the complaint under subsections (4) and (5) of section 26 of the Code. Thus, the Report’s recommendation to appoint a Complaints Director may allow the CPSO to dismiss meritless complaints more expeditiously. As a result, members may be spared having to contend with spurious complaints.

2. Create a Patient Advocate Position

The Report recommends that the CPSO create a “Patient Advocate”. The Patient Advocate would be required to contact the complainant upon the filing of a complaint. In particular, the Patient Advocate would clarify the substance of the complaint and make the complainant aware of the jurisdictional limits of the ICRC and/or the Discipline Committee, i.e. neither committee can award damages, order the Member to render treatment to the complainant, etc. The Report opines that a Patient Advocate may be able to educate complainants such that more complaints are withdrawn because complainants understand that the subject matter of the complaint does not fall within the scope of the CPSO or the remedy sought by complainant cannot be awarded by a health regulatory College. Again, should this recommendation be adopted, members could find themselves having to spend less time contending with meritless complaints.

3. Limit the Scope of Registrar’s Investigations

Under section 75 of the Code, a health regulatory College can, under several circumstances, commence an investigation into a member’s practice, commonly referred to as a “registrar’s investigation”. The Report found that a registrar’s investigation is typically much more time consuming and expensive to investigate than a complaint. The Report noted that, on average, each registrar’s investigation costs four times as much as a complaint for the CPSO to process. Thus, the Report recommends that, when a registrar’s investigation is commenced, the registrar inform the physician of the precise conduct at issue and the registrar’s basis for starting an investigation. The Report explains that having the registrar precisely identify the conduct at issue may “help to keep the Registrar’s Investigations properly focused and less open to challenge [by the physician]”. Similarly, the Report recommends that any patient chart review or audit completed as part of a registrar’s investigation be limited to ten (10) patient charts with the CPSO investigator provided with the discretion to review more charts if he or she has “reasonable cause for doing so”. If adopted, these recommendations may help reign in registrar investigations both in scope and number. They may also help members better understand the focus of an investigation. In turn, members would be in a position to more meaningfully prepare for and respond to the reports arising from such registrar’s investigations.

4. Empower the ICRC to Make Conditional Referrals to the Discipline Committee

The Report recommends that the ICRC be empowered to refer matters to the CPSO’s Discipline Committee subject to conditions which, if met, would result in the complaint being disposed of by the member satisfying those conditions. The Report reasons that the CPSO could achieve substantial cost savings and efficiencies by way of this disposition as it would allow the ICRC to address conduct which may constitute professional misconduct without the need to refer a physician to the Discipline Committee for a contested hearing, which can last from days to weeks. Such a change could help members avoid having to endure time consuming, stressful and, potentially, risky discipline hearings.

Conclusion

In short, the Report makes a number of recommendations which attempt to reduce the amount of time which the CPSO takes to investigate complaints and registrar investigations. Many of those recommendations centre on empowering the CPSO to quickly dismiss meritless complaints and educating complainants about the complaint process. If adopted, these recommendations could help members avoid meritless complaints and overly broad registrar investigations. Given the toll

which such investigations can take on members and the CPSO resources they consume, such changes would appear to be in the interest of all parties. However, it remains to be seen which, if any, of the above recommendations are adopted by the CPSO or whether another health professions regulatory College adopts some of the Report's recommendations to address its own investigative process.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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