



## COUNCIL POLICY

### Appeals from Investigation Committee

Initial Approval: December 18, 2024

Effective Date: December 18, 2024

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## 1. Overview:

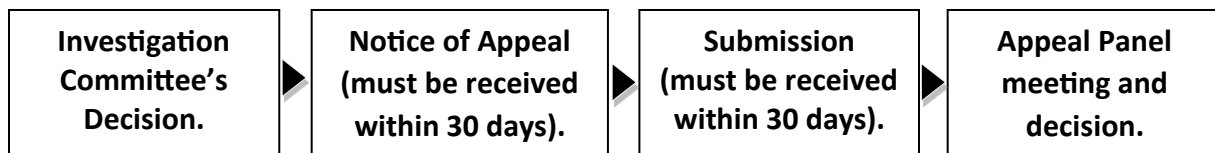
Under the *Regulated Health Professions Act* (“RHPA”), if a Complainant is not satisfied with a decision of the Investigation Committee, then they *may* have the right to appeal the decision to an Appeal Panel of the Executive Committee. Whether the Complainant has a right of appeal will depend upon the nature of the decision that was made by the Investigation Committee.

To make an appeal, the Complainant must send the Registrar a Notice of Appeal within 30 days of receiving the Investigation Committee’s decision. Both the Complainant and the Investigated Registrant are given the opportunity to provide a written submission to the Appeal Panel.

Appeal Panels are typically made up of CPSM Council members. The Appeal Panel can dismiss the appeal, make any decision it believes ought to have been made by the Investigation Committee, or refer the matter back to the Investigation Committee for further investigation or consideration in accordance with any direction that the Appeal Panel may give.

Throughout the appeal process, the Complainant and the Investigated Registrant are entitled to have legal representation.

The following flow chart summarizes the process:



This Policy addresses procedural requirements and guiding principles for the Appeal Panel to follow in deciding appeals.

## 2. What is the purpose of the Appeal Panel?

The purpose of the Appeal Panel is to review the Investigation Committee’s decision to determine if there are any significant errors or deficiencies. What the Appeal Panel can consider is limited based on law set by Canadian courts of appeal. The details of what the Appeal Panel can consider are explained in the section “Standards of Review”.

It is important to understand that the Appeal Panel does not reconsider evidence and arguments to come to its own independent decision about the complaint that was made before the Investigation Committee. Its primary function is to correct unreasonable conclusions.

The Appeal Panel does not consider the same questions that were asked before the Investigation Committee. Applying the “Standards of Review” and considering the issues raised in the Notice of Appeal, the Appeal Panel decides if there is an error that affected the conclusion of the Investigation Committee’s decision.

Guiding principles and considerations applicable to the Appeal Panel's review include:

- The Appeal Panel will not intervene merely because it disagrees with the decision of the Investigation Committee. It is possible for two people, acting reasonably, to come to two different conclusions. If the Investigation Committee decision is reasonable the Appeal Panel will not interfere with that decision merely because they would have decided the case differently.
- The key question for the Appeal Panel is whether the Investigation Committee's decision was based on errors of law, fact or principle, or is not reasonably sustainable.
- The focus of the appeal is not to re-examine the facts and evidence; rather, it is on the Investigation Committee's assessment of the facts and evidence, and its overall analysis and disposition of the matter.
- However, as this is an internal review process that serves CPSM's public interest mandate, the Appeal Panel will remain flexible and review the decision under appeal holistically, without a rigid focus on the stricture of the applicable standards of review.

### 3. What decisions can be appealed?

Section 102 of the RHPA limits the types of decisions that the Investigation Committee can make when it decides a complaint. A Complainant may appeal some, but not all, decisions made by the Investigation Committee depending on what action or actions the Committee decides to take.<sup>1</sup> The following table contains information about decisions that can and cannot be appealed.

Decisions that <u>can</u> be appealed.	Decisions that <u>cannot</u> be appealed.
<ul style="list-style-type: none"> <li>• A direction that no further action is to be taken (ss. 102(1)(b)).</li> <li>• The acceptance of an undertaking from the Investigated Registrant. For example, for practice conditions, education, etc. (ss. 102(1)(f)).</li> <li>• Any other action the Investigation Committee considers appropriate under ss. 102(1)(g) of the RHPA. For example, criticism or advice.</li> </ul>	<ul style="list-style-type: none"> <li>• A referral to the Inquiry Committee (ss. 102(1)(a)) or censure (ss. 102(1)(d)).</li> <li>• Referral to mediation with the agreement of the Complainant and Investigated Registrant (ss. 102(1)(c)).</li> <li>• Acceptance of voluntary surrender of registration or license (ss. 102(1)(b)(e)).</li> <li>• Acceptance of an informal resolution under s. 95 of the RHPA.</li> </ul>

<sup>1</sup> Subsection 108(1) of the RHPA states that "The complainant may appeal to the council any decision made by the complaints investigation committee under clause 102(1)(b), (f) or (g)."

When considering whether to bring an appeal, the Complainant should consider whether the Investigation Committee could make the decision that they would have liked it to make. If the Investigation Committee cannot make that decision, then the Appeal Panel also has no authority to make that decision.

#### **4. Who decides appeals from decisions of the Investigation Committee?**

Under the RHPA, appeals from decisions of the Investigation Committee are made to CPSM's Council. The Council has delegated authority to hear appeals to the Executive Committee.<sup>2</sup>

Appeals are ordinarily decided by a three-person panel of the Executive Committee referred to in this Policy as the Appeal Panel. The following rules apply to how Appeal Panels are formed:<sup>3</sup>

- The Chair of the Executive Committee is responsible for appointing Appeal Panels, and for naming the Appeal Panel chairperson.
- Appeal Panels will consist of at least three members of the Executive Committee or Council, one third of whom must be public representatives.
- If there are insufficient members of the Executive Committee or Council without a conflict of interest, then the Chair of the Executive Committee may appoint other public representatives or registrants of CPSM in accordance with the Council's Governance Policy.

#### **5. How is an appeal started?**

To initiate an appeal, the Complainant must give the Registrar a Notice of Appeal, including reasons for the appeal. The Notice of Appeal must be provided by the complainant within 30 days after receiving notice of the Investigation Committee's decision.<sup>4</sup>

The Notice of Appeal must be in writing and should clearly state what is being appealed and why (i.e., the reasons for requesting the appeal). The reasons for appealing, also referred to as the grounds for appeal, should include the specific procedural, factual, or legal errors that the Complainant believes were made by the Investigation Committee.

The Notice of Appeal should be brief and concise. Explanation and argument should be saved for the appeal submission document (see below). The Notice of Appeal should not include evidence, such as new facts or documents.

Examples of reasons or grounds for appeal may include:

- That inadequate investigation was conducted.
- Unreasonable analysis or inferences in respect to the facts and circumstances.

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<sup>2</sup> See section 91. C. of The Affairs of the College Bylaw.

<sup>3</sup> Subsections 108(3), 108(4) and 108(5) of the RHPA.

<sup>4</sup> Subsection 108(2) of the RHPA.

- Unreasonable conclusions about whether standards of care or professionalism were met based on the facts and circumstances.
- Procedural unfairness or failure to follow proper procedure, including respecting the complainant's participatory rights.
- Unreasonable disposition given the findings.
- Biased decision maker.

The Complainant may choose to file their Notice of Appeal and submission as one document.

## **6. When does the appeal period start and end?**

A Notice of Appeal cannot be accepted after the 30-day appeal period has expired.<sup>5</sup> With respect to the appeal period:<sup>6</sup>

- Notice on the Investigation Committee's decision is considered given when it is delivered personally, or when sent by registered mail or another service that provides CPSM with proof of delivery to the complainant's last recorded address.
  - Notice by registered mail is deemed to be given 5 days after the day it was sent.
  - Email notice is given when a delivery receipt is received.
- Complainants are reminded of the importance of maintaining up to date contact information with CPSM.

A Complainant who wishes to file a Notice of Appeal may contact CPSM for assistance or to request accommodations if they have difficulty completing a written Notice of Appeal. However, no extension of the timeline is possible.

## **7. Process upon receiving a Notice of Appeal.**

Upon receiving a Notice of Appeal from a Complainant, the Registrar will acknowledge receipt and ask the Complainant if they intend to file a written submission (see below). If so, they have 30 days to provide the written submission. Notwithstanding, the Complainant will be asked to file submissions at their earliest convenience. In general, the Notice of Appeal and written submission are the only documents the Complainant should be providing in the appeal process.

The Registrar will provide a copy of the Notice of Appeal to the Investigated Registrant when it is received, copying their legal counsel if they have legal counsel. If a written submission is received from the Complainant, that will also be sent to the Investigated Registrant.

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<sup>5</sup> Subsection 19(2) of *The Interpretation Act* states that "Where, under any Act of the Legislature, the time limited for the registration or filing of any instrument, or for the doing of any thing, expires or falls on a day on which, pursuant to any statute or law in force in the province, the office or place in which the instrument or thing is required or authorized to be filed or done, is closed, the time so limited extends to, and the instrument or thing may be filed or done, on the first following day on which the office is open."

<sup>6</sup> Section 176 of the RHPA.

The Registrar will provide the Investigated Registrant with 30 days to make a written submission from the date they are provided with the Complainant's written submission or the date on which they are advised a written submission from the Complainant is not expected.

#### **8. What is a written submission?**

The submission should contain arguments, as well as references to the facts underlying the complaint and references to the Investigation Committee's process and decision that support the grounds of appeal. The purpose of the submission is to help the Appeal Panel:

- understand the Complainant's and Investigated Registrant's perspectives,
- apply the law, and
- reach a decision.

No written submission can be accepted after the 30-day period set by the Registrar has expired

#### **9. Appeal Material.**

The Registrar must include the following in the material submitted to the Appeal Panel:

- the Investigation Committee's decision,
- the Investigator's Report,
- the Notice of Appeal, and
- the written submissions of the Complainant and the Investigated Registrant.

Apart from the listed Appeal Material, the Appeal Panel will not accept any further information or records from the Complainant or the Investigated Registrant.

#### **10. Date of meeting.**

The Chair of the Executive Committee is responsible for fixing a date for the meeting of the Appeal Panel after all the Appeal Materials have been assembled.

#### **11. Meeting.**

When an Appeal Panel meets to consider an appeal:

- The Complainant and the Investigated Registrant are not permitted to attend.
- The Appeal Panel may have legal counsel to assist it in relation to the appeal.
- The Appeal Panel may request any additional information it deems necessary and may have access to the Investigator's Report or any documentation gathered by the Investigation Committee for the purposes of its investigation.
- The Appeal Panel may send clarifying questions to the Investigator prior to deciding the appeal.

## 12. New issues or evidence:

Appeals focus on the information used to make the original decision. In other words, appeals are 'on the record'.

When new evidence is presented, or new issues are raised, the Appeal Panel has the discretion to not consider the new evidence or issues, especially when it is clear they could have been raised before the Investigation Committee. Absent significant countervailing public interest considerations, the Appeal Panel should be reluctant to consider new issues or evidence that was not before the Investigation Committee.

Where the complainant brings forward new evidence that the Appeal Panel is willing to consider, the Appeal Panel should assess whether that new evidence might reasonably impact upon the decision and, if so, whether the matter should be remitted to the Investigation Committee for reconsideration.

Appeals are generally restricted to matters that were determined by the Investigation Committee. Where the appeal raises a new issue, the Appeal Panel must assess its ability to fairly decide the matter based on the available information. If the Appeal Panel is unable to fairly decide the matter without additional information, the matter should be referred to the Investigation Committee to obtain the additional information.

## 13. Standards of review:

When reviewing an Investigation Committee decision, the Appeal Panel will apply the following standards of review to determine if the decision is based upon an error of fact, law or principle, or is otherwise not reasonably sustainable.<sup>7</sup>

- The Investigation Committee's **factual assessments**, including inferences drawn from its examination of the facts, are reviewed for reasonableness.<sup>8</sup> The Appeal Panel should afford a significant deference to the Investigation Committee's findings and examination of the facts, and only interfere based on an articulable reason for disagreeing with the Committee's assessment.
- Findings on questions of **mixed facts and law** (e.g., whether the standard of care was met based on the facts under review) require careful consideration of the nature of the error that is said to have occurred. A deferential standard is appropriate where the decision results more from consideration of the evidence, but a standard of correctness can be

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<sup>7</sup> The law relating to the applicable standard of review for internal appeals was considered in *Moffat v. Edmonton (City) Police Service*, 2021 ABCA 183.

<sup>8</sup> In summary, reasonableness is concerned with justification, transparency and intelligibility. A decision is unreasonable if it is internally incoherent or if it is untenable having regard to the relevant factual and legal constraints.

applied when the error arises from the statement of the legal test. The correctness standard promotes uniformity in interpretation of applicable standards of practice and ensures that proper professional standards are maintained.

- Legal compliance and **conclusions on issues of law** are reviewed for correctness. This may include questions of statutory interpretation, including interpretation of the RHPA, or true issues of jurisdiction. Again, this is to promote consistency and uniformity.
- Questions about the application of common law rules of natural justice and **procedural fairness** are reviewed to see whether the appropriate level of due process or fairness required by the statute or common law has been afforded.
- **Discretionary decisions**, including how the Investigation Committee decided to resolve the complaint, are reviewed against the standard of reasonableness. The disposition should fall within a range of possible, acceptable conclusions which are defensible in respect of the facts, circumstances, and law.
- The test on review for **bias** is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias.
- In terms of the **adequacy of the investigation**, the Appeal Panel will typically defer to the Investigation Committee's expertise and discretion, unless there is evidence that the investigation was conducted in a manner that is clearly deficient or unreasonable. For example, when the Appeal Panel finds the Investigation Committee failed to follow proper procedures, failed to gather key or essential evidence necessary to inform a reasonable disposition, or ignored critical aspects of the complaint, then it may intervene. The Appeal Panel may intervene where there is either no investigation or only a cursory investigation that is inconsistent with the nature of the complaint or goals of the investigation.

Overall, the Appeal Panel is well-positioned to review the entire decision and conclusion of the Investigation Committee for reasonableness, to ensure that it properly protects the public and reputation of the profession.

As an overriding principle, the Appeal Panel should not interfere simply because it might have reached a different conclusion on the case.

#### **14. Powers of the Appeal Panel.**

Appeal Panels can exercise the following powers:

- dismiss the appeal,
- make any decision that in its opinion ought to have been made by the investigation committee, or



- refer the matter back to the investigation committee for further investigation or consideration in accordance with any direction that the panel may give.

**15. Reasons.**

Reasons for the decision will be drafted by the chair of the Appeal Panel, usually with the input of legal counsel. Reasons should:

- address the major points in issue,
- explain why the Appeal Panel reached the decision which it made (i.e., show the reasoning which formed the basis of the decision), and
- show that the Appeal Panel did consider the points raised.

Although reasons need not be elaborate, they must be sufficient to permit the complainant and the physician to be able to say that they know what the result is and the basis upon which the decision was reached.

**16. Referral to the Investigation Committee.**

In cases where the Appeal Panel refers a matter back to the Investigation Committee for further investigation, the second decision of the Investigation Committee is to be treated as a new decision and is subject to a right of appeal by the complainant.

**17. Notice of decision.**

The Appeal Panel's decision and the reasons for it must be communicated to the Complainant, the Investigated Registrant and the Assistant Registrar, Complaints and Investigations, in writing by way of a written Notice of Decision and Reasons for Decision.

**18. No further right of appeal.**

There is no appeal from the Appeal Panel's decision.