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Commentary and information on issues affecting professional regulation and tribunal practice in British Columbia

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DISCLOSURE IN DISCIPLINE CASES

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Disclosure in Discipline Cases

The question of the nature and extent of the disclosure of a regulatory body's files, documents, internal memoranda, investigation reports, telephone notes, complainant's journals as well as clinical and therapeutic records has, as a result of certain rulings of the Supreme Court of Canada in criminal cases, R.v. Stinchcombe in particular, become one of the most contentious issues at discipline hearings. **Peer Review** examines some of the many issues related to this difficult topic.

Before courts began importing into professional discipline proceedings concepts and principles from the criminal law, regulatory bodies had only to concern themselves with ensuring that they met the rules of natural justice in the conduct of their proceedings.

One of the principles of natural justice has always been the right of the defendant to know the case against him or her. The corollary right is to dispute, correct or contradict anything that is prejudicial to his or her interests and to present arguments and evidence in support of his or her case. Within the constraints of procedural fairness the common law allows administrative tribunals significant freedom to set their own rules for the conduct of hearings. Moreover, the common law also allows that the procedures required for a hearing may differ according to the context and the circumstances of the case. Indeed, part

of the raison d'être for administrative tribunals is their flexibility and their ability to address issues expeditiously and efficiently. One year before the decision of the Supreme Court of Canada in R. v. Stinchcombe, which we will get to shortly, Mr. Justice Gonthier, in the case of Consolidated Bathurst Packing Ltd. V. International Woodworkers of America had said,

> "The rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the board to abide strictly by the rules applicable to the courts of law. In fact it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and the institutional constraints it faces."

There can, of course, be little argument with the proposition that when a professional person is facing allegations of misconduct or incompetence that the tribunal must have procedural safeguards that ensure a high degree of fairness. However, there is considerable argument about whether or not a disciplinary tribunal must provide the Member with the "highest procedural safeguards known to the law".

Madame Justice Wilson, writing for a majority of the Supreme Court of Canada in R. v. Wigglesworth, held that a person is entitled to the highest procedural protection known to our law if that individual is to be subject to true penal consequences such as imprisonment – the most severe deprivation of liberty known to our law.

In Wigglesworth, an RCMP officer was convicted of a major service offence under the *RCMP Act* and was also facing criminal proceedings for the same incident. He argued that his Charter rights under section 11(h) would be violated if he was punished twice for the same offence. Madame Justice Wilson wrote in that decision:

> "I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the *Charter* only when a public wrong or transgression against society, as opposed to an internal wrong, is committed."

This line of reasoning in Wigglesworth clearly marks the distinction between a transgression against society and what the court refers to as an "internal wrong". True penal consequences, such as imprisonment, only result from a transgression against society such as violation of the criminal law or the committing of a statutory offence. A self-regulating profession deals with "internal wrongs". It can never imprison a Member – the RCMP may be an exception.

Of course you have heard it said that a self-regulating body has a greater

power, that of "capital punishment". It can cancel the member's right to practise his or her profession. But is this analogy accurate? Most governing legislation does not provide a power to impose a lifetime license revocation. In most cases those Members whose licenses have been revoked can re-apply for admission to the profession.

In the 1991 decision of the Supreme Court of Canada in R. v. Stinchcombe the court was concerned to ensure that accused persons facing true penal consequences are afforded in law the highest procedural protections. It is in that context that the court held that there is a duty of disclosure on the prosecution in a criminal case that goes beyond advising the accused of the evidence to be presented against him or her. **The court held that all relevant, non-privileged information had to be disclosed.** This must include evidence which the prosecutor does not intend to present at trial but which may assist the accused and which the prosecutor has in his or her control or possession.

Since this decision, discipline tribunals are now frequently faced with submissions from counsel for the Member that the principles concerning disclosure as set out in Stinchcombe apply to discipline hearings. Discipline tribunals are also being urged to apply the remedy available in criminal proceedings, to stay or dismiss the proceedings against the Member if the level of disclosure provided by the regulatory body does not meet the Stinchcombe requirements.

What are the Stinchcombe requirements for disclosure? They are summarized in the more recent case of R. v. Chaplin (1995) in the Supreme Court of Canada. The disclosure requirements set out in Chaplin are that the prosecution must disclose all information, whether inculpatory or exculpatory, except evidence which is beyond the legal control of the prosecution, clearly irrelevant, privileged or subject to a right of privacy. The prosecutor has the discretion to refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. The duty to disclose is triggered when a request for disclosure is made (See. R. v. Egger [1995] 1 S.C.R. 451).

What documents must be produced? In R. v. O'Connor the Supreme Court of Canada drew a distinction between disclosure and production. The Chief Justice along with Mr. Justice Sopinka say that in the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defense. In the context of production (of documents in the possession of third parties), the test of relevance is higher. The information sought must be **logically probative** to an issue at trial or the competence of the witness to testify. For discipline tribunals this raises the further question of the jurisdiction of such a tribunal to order, aside from use of the subpoena power, production of records in the possession of a third party

Do the disclosure principles in Stinchcombe apply to disciplinary proceedings? The law on this question is not settled. So far courts have arrived at opposite conclusions on this question. The following examples serve to illustrate the division of the courts on this issue.

In favour of the application of Stinchombe disclosure principles to disciplinary hearings: Dispensers (Markandey v. Board of Opthalmic Ontario) [1994] O.J. No. 484 (Ont. Gen. Div.); Bailey v. Registered Nurses Association (Saskatchewan) [1996] 7 W.W.R. 751 (Sask.Q.B.); Hammami v. College of Physicians and Surgeons (British Columbia), Vancouver A912442 Supreme Court of British Columbia, (June 27, 1997).

Against the application of Stinchcombe disclosure principles to disciplinary hearings: Kullman v. Borbridge (1995) 168 A.R. 223; Nuosci v. The Royal Canadian Mounted Police (1994) 1 F.C. 353 (Affirmed on appeal to the Federal Court of Appeal, leave to appeal to the Supreme Court of Canada dismissed); Yeung v. RNABC, (Vancouver A934379, Supreme Court of British Columbia, 16 June 1994)

Of the foregoing decisions, the analysis found in Nuosci seems clearest. The court in that case relies on the principles set out by Madame Justice Wilson in R. v. Wiggelsworth to conclude that it was the possibility of imprisonment for Nuosci, for up to one year, that compelled it to consider the application of the principles Stinchcombe to the case. This is considerably different from the usual analysis by way of "analogy to the criminal law".

There is an analysis similar to that in Nuosci in Kullman v. Borbridge. In the latter case the court said that disclosure as contemplated in R. v. Stinchcombe had no application to a hearing convened pursuant to the *Police Act*. "For one thing there is no criminal stigma attached to a discipline hearing and for another the *Canadian Charter of Rights and Freedoms* has no applicability to disciplinary charges under the *Police Act*". We await a decision of the British Columbia courts that will provide the needed clarity of principle and detailed analysis on this contentious issue.

What are the implications? If the result of such a decision is that Stinchcombe applies to disciplinary proceedings then this will probably require self-regulating professions to consider reorganizing the management of their investigations and documents. Such was the result in Police and Crown Prosecution offices across the country when the implications of the Stinchcombe decision were fully realized.

Those Colleges that instituted new file management and information protocols as a result of the *Freedom of Information and Protection of Privacy Act* will obviously be better able to address any new concerns. However, the implications of Stinchcombe raise new practical issues concerning the nature of investigation and evidence gathering

procedures in use by the self-regulating professions.

Overall the result will not be any increased efficiency as discussed by Mr. Justice Gonthier in Bathhurst Packing. Rather, the more likely result is that hearings will be lengthier, and therefore more costly. Disclosure applications and arguments can consume days at a hearing.

Passing thoughts...

$$$ Hearing costs - If Colleges are regulating their respective professions to protect the public, and are statutorily mandated by the Provincial Legislature to do so, is there not an argument that they ought not to be paying Provincial Sales Tax on legal fees paid for this purpose?

Independence, impartiality, conflict of interest, apprehension of bias

A reader asks, "Is it a conflict for a member to both be on the profession's regulatory board and also on its association's board?" Peer Review does not contain or offer legal opinions or advice. However, it can identify and comment generally on the issues that a topic may raise.

The general topic raised by the question is that of conflict of interest. However, there is more than that since it also raises issues of independence and impartiality, which are different than conflict of interest.

A tribunal has to be independent in the sense that its members are free to make decisions without interference or influence. Member independence may also refer to that person's connections or other positions that may influence his or her decision.

Impartiality refers to personal interests, allegiances, opinions, societal roles and other personal matters that reflect upon the state of mind that a tribunal member can bring to a decision.

The notion of conflict of interest is not limited to direct pecuniary interest. In many instances it has more to do with the appearance rather than the substance of decision-making. The well-worn phrase is that not only should justice be done but that it should manifestly be seen to be done. In this context, issues that blur or cloud the transparency of judicial or quasi-judicial acts are to be avoided or removed.

Obviously, bias is lack of neutrality or predisposition with regards to the very issue for determination. However, the law also refers to "apprehension of bias". The courts have set out a test for assessing whether or not there may be a reasonable apprehension that a tribunal member is biased. It is, generally speaking, whether a reasonable person knowing the facts about the member would suspect that the member may be influenced, even though unintentionally, by improper considerations to favour one side in a matter that he or she has to decide.

The courts err on the side of caution when faced with these issues and are not reluctant to overturn a tribunal's decision on the basis of a reasonable apprehension of bias on the part of one of the members of the tribunal. Some statutes and bylaws set out strict rules concerning bias and conflict of interest. Issues that arise from overlapping appointments or memberships can sometimes be most effectively addressed by the use of such rules.

Thank you for your very positive response to the first edition of Peer Review.

Your e-mails and faxes are most welcome.

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Proposed New Feature – Notable Cases. You are invited to submit to **Peer Review** cases that you think would be of interest to other professional bodies. **Peer Review** will either summarize these cases and / or provide a brief case commentary.

>>>>>**Upcoming Issues of Peer Review**

December issue: the results of delay in disciplinary proceedings.
February issue: legal competencies and training requirements for tribunal members.

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