Recurring and Current Fairness Issues in Professional Regulatory Proceedings

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Introduction

Generally, all administrative tribunals must ensure that they follow proper procedures when making decisions. In each situation, what is considered "proper" depends on a number of things, including the particular facts and surrounding circumstances of each case. Usually, a statute(s), regulation(s), by-law(s) and/or rules will establish the basic procedures that control the process for making decisions by an administrative tribunal. These basic procedures include: adequate notice, disclosure, the right to counsel and the right to present evidence and to cross-examine witnesses. These basic procedures are commonly found in the administrative tribunal's governing legislation.

In addition to the governing legislation, in Ontario, the *Statutory Powers Procedure Act*[1], outlines the general procedures for certain administrative tribunals while, in Alberta, the *Administrative Procedures Act*[2], also sets out general procedures. For the most part, both of these Acts codify the common law regarding procedures for administrative tribunals.[3]

When the governing legislation does not establish basic procedures, there are common law procedural principles of natural justice and, more recently, fairness to ensure that all individuals who are affected by the actions or decisions of administrative tribunals are treated fairly.

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1 *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

2 *Administrative Procedures Act*, R.S.A. 2000, c. A-3.

3 The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, is also relevant.

Application of Natural Justice

Traditionally, the principles of natural justice were only applied to administrative tribunals that were classified as "judicial" or "quasi-judicial". Administrative tribunals which carried out "legislative", "administrative" or "executive" functions were not required to comply with the principles of natural justice. As a result, an initial decision had to be made to determine whether an administrative tribunal's function was "judicial" or "quasi-judicial" and, if so, trial-like procedural protections were usually imposed in those cases. In the professional regulatory context, a decision by the Discipline Committee of an administrative tribunal that a professional had committed an act of professional misconduct or unprofessional conduct would be considered "judicial" or "quasi-judicial" and would require procedural protections that would make the hearing look very much like a trial.

Application of Fairness

The principles of natural justice became less effective over time because a broad range of administrative tribunals were affecting people and the functions of these administrative tribunals could not always be classified as "judicial" or "quasi-judicial". In situations where the administrative tribunals were not being classified as "judicial" or "quasi-judicial" but as "legislative" or "administrative" or "executive", people were being denied any procedural protections. In addition, trial-like procedures were imposed in situations when they were not suitable or necessary.

As a result, the principles of fairness began to develop and were applied instead of the principles of natural justice. The principles of fairness set a lower threshold for providing procedural protections and required less trial-like procedures than the principles of natural justice. The real turning point occurred in the Supreme Court of Canada decision of Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671, where the Court recognized, for the first time, that a person's procedural rights did not depend on classifying an administrative tribunal as "judicial" or "quasi-judicial". The Court determined that a duty of fairness applied even though the Board of Commissioners of Police was exercising an administrative function. The Court concluded that the duty of fairness required the Board of Commissioners of Police to inform Nicholson why he was being

dismissed and give him an opportunity, orally or in writing, to make submissions.

Nicholson and later cases focused on which procedural protections were appropriate in a particular situation rather than whether any procedural protections were required. Also, these later cases moved away from a distinction between the principles of natural justice and the principles of fairness in determining the procedural requirements for all administrative tribunals. As a result of the decision of the Supreme Court of Canada in Martineau v. Matsqui Institution (Disciplinary Board) (1979), 106 D.L.R. (3d) 385, there is now no distinction between principles of natural justice and principles of fairness. In particular, the Court stated the following:

> In general, Courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.
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> …
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> It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each.

Content of Natural Justice/Fairness

To some extent, the Courts still classified the function of the particular administrative tribunal in issue because this was important for determining the content of the duty of fairness in particular situations. However, more recently, the Courts seem to have stopped classifying the function of an administrative tribunal in determining the content of the duty of fairness. Instead, the Courts have started to use a contextual approach to determine the content of the duty of fairness. For example, the Supreme Court of Canada in Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4^{th}) 193 identified five factors to be used in determining which procedural protections will be applied in a particular situation. These five factors include the following:

(a) the nature of the decision being made by the administrative tribunal and the process followed in making that decision ⇒ trial-like procedures when it resembles judicial decision-making

(b) the nature and the terms of the governing statute of the administrative tribunal ⇒ greater procedural protections are required when the governing statute does not provide for an appeal

(c) the importance and impact of the decision by the administrative tribunal to the person(s) affected ⇒ more stringent procedural protections if the decision is important and has a great impact on the person(s) affected

(d) the legitimate expectations of the person challenging the decision of the administrative tribunal ⇒ if the person has a legitimate expectation that a certain procedure will be followed, this procedure will be required

(e) the choices of procedure made by the administrative tribunal

This new contextualized approach to determining the content of the duty of fairness has tremendous implications for professional regulators. It is now clear that the duty of fairness applies to committees other than the Discipline Committee such as the Complaints Committee. But, the actual procedural protections that will be required will vary depending on the context, and thus, there is a variable duty of fairness[4]. For example, the duty of fairness of the Complaints Committee may be met if it gives the professional an opportunity to make written submissions instead of holding an oral hearing. Similarly, the duty of fairness of the Complaints Committee may be met even though the professional was not given the right to call and examine witnesses or the

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[4] Cases regarding this variable duty of fairness include: *Butterworth* v. *College of Veterinarians of Ontario*, [2002] O.J. No. 1136 (Div. Ct.) (regulators are not obliged to provide the same procedural protections to their members during the investigative phase as they must provide during the adjudicative (i.e. Discipline Committee) phase), *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (adjudicative hearings require a more detailed notice than one given with respect to investigations) and *Strauts* v. *College of Physicians and Surgeons of British Columbia*, [1997] B.C.J. No. 1518 (C.A.).

right to cross-examine witnesses. In contrast, the duty of fairness of the Discipline Committee would require, in many circumstances, an oral hearing with the right to examine and cross-examine witnesses.

The British Columbia Court of Appeal in Strauts v. College of Physicians and Surgeons of British Columbia[5] described this variable duty of fairness as follows:

The appellant's argument would have the Court interpret the jurisdiction of the College in a strict manner that in my opinion would be contrary to "serve and protect the public"…The approach of the Courts with respect to the College has been to recognize its purpose and functions as being to serve and protect the public. That is clear from the statute itself. That end is not accomplished by imposing on the College in its investigative function the panoplies of administrative law that protect the members at the adjudicative stage of the College's proceedings. In my opinion the Court should not find itself cloaking the individual member of the College with rights at the stage of investigation – as is the case here – that would or could work contrary to the public interest. Where the stage is adjudicative the member is and must be protected by all of the principles which over the years have been developed by the Courts to ensure fairness at every stage of the adjudicative process.

Here we are concerned with the investigative process and in my opinion the courts must be mindful of the public factor and duties of the College to protect the public interest when it comes to what principles of fairness the College must follow at that stage.

(a) The right to be heard

The principles of natural justice or fairness include two basic components: the right to be heard and the right to an unbiased decision-maker. The first component, the right to be heard, includes many general procedural requirements. Adequate notice and disclosure of potential evidence are two very important and recurring elements of the right to be heard and will be the focus of the rest of this paper.

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[5] *Strauts* v. *College of Physicians and Surgeons of British Columbia*, [1997] B.C.J. No. 1518 (C.A.).

(i) Notice – complaints/investigative stage

The duty of fairness at the complaints/investigative stage is minimal in comparison to the discipline stage. In terms of notice, the professional is only entitled to: notice of the complaint and notice of the right to make written submissions to the Complaints Committee. For example, the Northwest Territories Supreme Court in Tanaka v. Certified General Accountants' Assn. of the Northwest Territories[6], described these notice requirements as follows:

> …I suggest that any such concerns would be easily alleviated, having regard to what I conceive as the limited duty of procedural fairness on the investigator, by giving notice of the investigation to the member affected and by seeking the member's response to the complaint…
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> …
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> For these reasons, I have concluded that there is a duty on the part of the investigator to, at a minimum, notify the member of the complaint and solicit a response from the member. That is as far as the investigator needs to go. That was not done in this case, hence Mr. Wowk's direction for an inquiry is quashed.

Ordinarily, notice does not even need to include a description of what possible decisions the Complaints Committee might make. However, if the professional or the complainant might be deceived or confused about what options the Complaints Committee is considering (i.e. it appears that the Complaints Committee is considering dismissal of the complaint where in fact it is considering referral of specified allegations to discipline), the duty of fairness may require notification about what may happen and the opportunity to make submissions. Failure to give any notice to the professional will render the decision of the Complaints Committee invalid.

Normally, notice of a complaint should be given in writing[7]. The duty of fairness does not require that the professional be given a copy of the actual complaint, but, this would be the easiest and most common way

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[6] *Tanaka* v. *Certified General Accountants' Assn. of the Northwest Territories*, [1996] N.W.T.J. No. 25 (S.C.).

[7] *Kenney* v. *College of Physicians and Surgeons of New Brunswick* (1991), 85 D.L.R. (4th) 637 (C.A.) (notice over the telephone is unacceptable).

of giving notice[8]. For example, the Ontario Divisional Court in Bradford v. College of Physicians and Surgeons of Ontario[9] said the following about the professional's lack of a right to a copy of the complaint:

> …The doctor is not entitled as of right to receive at this stage the statement of the complainant or alleged victim, although any such statement may often be provided to the doctor as the most appropriate way to give particulars…

Instead, notice of the complaint could be considered adequate if the professional was only provided with a summary of the allegations being made against him/her in the complaint. A summary of the allegations may be appropriate in the following circumstances: the full complaint contains derogatory comments about the professional, giving notice of the full complaint could interfere with the investigation, or the complaint deals with irrelevant conduct of other persons besides the professional. If only a summary of the allegations is provided, sufficient notice must be provided in the summary to allow the professional to make a full response to the allegations[10].

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8 *Re Baldry and College of Nurses of Ontario* (1980), 116 D.L.R. (3d) 522 (H.C.J.) (in order for notice to be adequate, the professional is not required to be given a copy of the complaint), *Bradford* v. *College of Physicians and Surgeons of Ontario*, unreported decision dated March 15, 1993 (Div. Ct.) and *Strauts* v. *College of Physicians and Surgeons of British Columbia*, [1997] B.C.J. No. 1518 (C.A.) (in order for notice to be sufficient, the professional is not required to be given a copy of the complaint).

9 *Bradford* v. *College of Physicians and Surgeons of Ontario*, unreported decision dated March 15, 1993 (Div. Ct.).

10 *Bradford* v. *College of Physicians and Surgeons of Ontario*, unreported decision dated March 15, 1993 (Div. Ct.) (the doctor was provided with sufficient details regarding the alleged incidents to enable him to submit any explanations or representations he might wish to make concerning the matter), *Re Baldry and College of Nurses of Ontario* (1980), 116 D.L.R. (3d) 522 (H.C.J.) (notice of the complaint to the professional must be in such detail so that he/she is able to make a full representation/explanation in writing), *Rotelick* v. *The Institute of Chartered Accountants of Saskatchewan*, [1998] S.J. No. 554 (Q.B.) (failure to give notice of the identity of the complainant is acceptable, especially where the identity of the complainant is irrelevant to a determination of the issues raised by the complaint and the identity of the complainant is of no assistance to the professional in determining his/her response to the complaint) and *Findlay* v. *College of Dental Surgeons of British Columbia*, [1997] B.C.J. No. 2040 (S.C.) (notice is sufficient if it permits the

The Complaints Committee can investigate the complaint before giving notice of the complaint to the professional as long as notice is given before the Complaints Committee actually makes a decision and finally disposes of the complaint[11]. However, excessive delay in notifying the professional of the complaint can lead to procedural unfairness, especially where the professional is prejudiced in preparing a response to the allegations[12].

(ii) Notice - discipline stage

In comparison to the complaints/investigative stage, the duty of fairness at the discipline stage is high. To begin with, notice of an upcoming discipline hearing is usually provided through a notice of hearing, an official document that formally starts the proceedings before the Discipline Committee. The notice of hearing is expected to contain enough information to, at the very least, allow the professional to decide whether to attend the hearing and, if attending, to help that person to begin preparing for the hearing.

The notice of hearing must include a statement of the time, place and purpose of the hearing[13]. In stating the purpose, the notice must indicate that the hearing is a discipline proceeding, not merely a

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professional to respond to the complaint(s) to the extent he/she wishes to do so during the investigative stage).

11 *Re Baldry and College of Nurses of Ontario* (1980), 116 D.L.R. (3d) 522 (H.C.J.) (the complaint can be investigated before giving notice of the complaint to the professional as long as notice is given before the Complaints Committee takes action on the complaint, i.e. refers it to discipline). But, in *Tanaka* v. *Certified General Accountants' Assn. of the Northwest Territories*, [1996] N.W.T.J. No. 25 (S.C.), the court found a breach of the duty of procedural fairness for failing to give notice of the complaint before conducting an investigation and disposing of the complaint.

12 *McIntosh* v. *College of Physicians and Surgeons of Ontario*, [1998] O.J. No. 5222 (Div. Ct.) (failure to give notice for ~4.5 years after the complaint is made does not meet the standard of procedural fairness).

13 *Sinkovich* v. *Strathroy (Town) Commissioners of Police* (1988), 51 D.L.R. (4th) 750 (Ont. Div. Ct.) (breach of the duty of fairness for not giving notice of the purpose and possible consequences of the inquiry) and *Re Davis and Newfoundland Pharmaceutical Association* (1977), 86 D.L.R. (3d) 375 (T.D.) (the professional must be given notice of the time & place of the hearing).

preliminary/investigatory meeting[14]. In the notice of hearing, it is useful, but not required, to state the possible orders that can be made by the Discipline Committee[15].

The Ontario Statutory Powers Procedure Act[16] establishes additional requirements relating to notice[17], including establishing different notice requirements for oral, written and electronic hearings. For example, notice of an oral hearing must include: a statement of the time, place and purpose of the hearing and a statement that if the party notified does not attend at the hearing, the Discipline Committee may proceed in the party's absence and the party will not be entitled to any further notice. The notice of hearing must also include a reference to the statutory authority under which the hearing will be held. The following are some samples of this requirement:

> The Discipline Committee will hold a hearing, under the authority of sections 16 and 17 of the Funeral Directors and Establishments Act, for the purpose of deciding whether the allegations are true.
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> A discipline panel will hold a hearing under the authority of sections 38 to 56 of the Health Professions Procedural Code, as amended, for the purposes of deciding whether the allegations are true.

Before the discipline hearing begins, the professional is entitled to adequate notice or reasonable information about the allegations, which is usually incorporated within the notice of hearing[18]. Generally, a

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[14] *Re Davis and Newfoundland Pharmaceutical Association* (1977), 86 D.L.R. (3d) 375 (T.D.) (the professional must be given notice that the hearing relates to disciplinary procedures).

[15] *Sinkovich* v. *Strathroy (Town) Commissioners of Police* (1988), 51 D.L.R. (4th) 750 (Ont. Div. Ct.) (breach of the duty of fairness for not giving notice of the purpose and possible consequences of the inquiry).

[16] See section 6 of the Act.

[17] *Statutory Powers Procedure Act* requires reasonable notice while adequate notice is required under Alberta's *Administrative Procedures Act*.

[18] *Sinkovich* v. *Strathroy (Town) Commissioners of Police* (1988), 51 D.L.R. (4th) 750 (Ont. Div. Ct.) (the professional is required to receive specific notice of the allegations made against him/her), *Re Davis and Newfoundland Pharmaceutical Association* (1977), 86 D.L.R. (3d) 375 (T.D.) (the professional must be given notice of the allegations upon which the tribunal is to consider disciplinary action), *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73

statement of allegations must have two parts: the material facts[19] and the legal conclusion to be drawn from these facts (i.e. incompetence, gross negligence or the category/categories of professional misconduct)[20]. The Ontario Divisional Court in Re Takahashi and College of Physicians and Surgeons of Ontario[21] described the importance of the material facts part of the statement of allegations as follows:

> It is evident that the appellant was held guilty under s. 26, para. 31 on the ground that he had deliberately misled patients with respect

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(Div. Ct.) (it must give the person reasonable notice of the allegations that are made against him/her so that he/she may fully and adequately defend himself/herself), *Gale* v. *College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 3948 (Div. Ct.) (it is clear that natural justice requires that adequate notice of the substance of the allegations be given to the person before the hearing) and *Steele* v. *Assn. of Registered Nurses of Newfoundland*, [1992] N.J. No. 33 (T.D.) (the tribunal must provide a timely notice to the professional which is sufficiently explicit to enable that person to understand the nature of the allegations).

19 *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73 (Div. Ct.) (it is particularly important for a person accused of professional misconduct to know with reasonable certainty what conduct of his/hers is alleged to amount to professional misconduct), *Re Takahashi and College of Physicians and Surgeons of Ontario* (1979), 26 O.R. (2d) 353 (Div. Ct.) (inadequate notice from lack of material facts), *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (sufficient facts are required to enable the professional to tie the allegation of wrongdoing to his/her conduct, it cannot simply allege incompetence in the provision of professional services because this is a bald allegation of wrongdoing) and *Roy* v. *Newfoundland Medical Board*, [1996] N.J. No. 234 (C.A.), application for leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 491 (notice must be sufficiently specific so that the professional accused of professional misconduct can know with reasonable certainty what conduct of his/hers is alleged to amount to professional misconduct).

20 *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (notice must permit the professional to identify what provisions are alleged to have been breached), *Bateman* v. *Association of Professional Engineers of Manitoba*, [1984] M.J. No. 391 (Q.B.) (an allegation of unprofessional conduct must indicate in what way the conduct is in breach of professional standards by following the wording of one or more of the rules of conduct, it is not sufficient to allege only that the professional is guilty of unprofessional conduct or misconduct), *Wagner* v. *College of Physicians and Surgeons of Saskatchewan*, [1984] S.J. No. 391 (Q.B.) and *Morton* v. *Registered Nurses Assn. of Nova Scotia*, [1989] N.S.J. No. 270 (T.D.) (adequate notice is provided when the professional knows, with reasonable certainty, in what way the conduct was alleged to amount to misconduct).

21 *Re Takahashi and College of Physicians and Surgeons of Ontario* (1979), 26 O.R. (2d) 353 (Div. Ct.).

> to their OHIP claims. But, and this is equally evident, no allegation of this nature was contained in the complaints against him, nor can such an allegation be inferred from the specific acts of misconduct with which he was charged. A complaint framed in the general words of s. 26, para. 31 of the Regulation that "you conducted yourself in a manner that your conduct relevant to the practice of medicine having regard to all the circumstances could reasonably be regarded by the Members as disgraceful, dishonourable and unprofessional" does not by itself provide sufficient disclosure to a party subject to disciplinary action of the allegations against him. Fairness requires timely and adequate notice of the particular acts or conduct said to be disgraceful, dishonourable or unprofessional. A complaint must reasonably delineate the issues so that the party charged may know and can meet the cases against him…
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> Here the appellant was faced with a considerable number of counts relating mainly to his alleged failure to comply with specific statutory requirements but none, as I indicated, alleging his conscious and deliberate misleading of patients. Patently, this is a serious matter raising questions tantamount to fraud and deception and impugning the appellant's probity and honesty. Undoubtedly, it significantly influenced the Committee's decision to revoke his licence to practise.
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> If the charges under s. 26, para. 31 were intended to encompass conduct of this nature, it was incumbent on the College to say so by indicating the allegedly disgraceful, dishonourable or unprofessional conduct complained of. In short, the complaint should spell out in what respects the party charged is alleged to have conducted himself in a manner contrary to s. 26, para. 31 – the bare words of that section do not provide requisite notice of the complaint…

Even though the duty of fairness is high at the discipline stage, the requirements relating to notice are not as strict as they are in the criminal process. For example, the allegations can be stated in the alternative[22]. In addition, the wording of the allegations does not have to contain the same

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[22] *Gilliss* v. *Barristers' Society of New Brunswick*, [1986] N.B.J. No. 21 (C.A.) (allegations of professional misconduct and conduct unbecoming can be made).

level of precision as in a criminal charge[23]. For example, the New Brunswick Court of Appeal in Violette v. New Brunswick Dental Society[24] said the following about the differences between the discipline and criminal process:

> …At the same time, the law does not insist on the same level of detail, precision and accuracy as it does in connection with criminal proceedings. For example, multiple and overlapping particulars of conduct alleged to comprise professional misconduct have not been viewed in the same light as "counts" in a criminal indictment. Nor have the rules against multiple charges and duplicitous proceedings been applied to administrative proceedings…

Where the notice of hearing does not provide reasonable information about a particular allegation, particulars may need to be provided. Particulars can be provided formally (by document specifying them) or informally (by disclosure of the evidence). The issue in all cases is to ensure that the professional knows the case he/she has to meet without being taken by surprise[25]. In commenting about the inadequacy

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[23] *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73 (Div. Ct.) (no one would suggest that an allegation of professional misconduct need have that degree of precision that is required in a criminal prosecution), *Re Stevens and Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 (Div. Ct.) (the complaint is not in the form of an indictment and it should not be approached in an overly technical manner), *Re Cwinn and Law Society of Upper Canada* (1980), 28 O.R. (2d) 61 (Div. Ct.), *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.), *Roy* v. *Newfoundland Medical Board*, [1996] N.J. No. 234 (C.A.), application for leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 491 (it is clear that the degree of precision required in criminal prosecutions is not required in disciplinary proceedings) and *Gale* v. *College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 3948 (Div. Ct.) (while allegations before professional bodies need not have the particularity of criminal indictments, they must be sufficient to bring home the specific matter alleged).

[24] *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.).

[25] *Re Cwinn and Law Society of Upper Canada* (1980), 28 O.R. (2d) 61 (Div. Ct.) (where before the hearing, full particulars of all the evidence to be presented at the hearing is provided, the professional is not taken by surprise) and *Gale* v. *College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 3948 (Div. Ct.).

of the particulars provided in Gale v. College of Physicians and Surgeons of Ontario[26], the Ontario Divisional Court said the following:

> …Where the practice is to provide particulars of general charges via a post-charge disclosure process, there is a probability of uncertainty as to exactly what is relevant. That occurred here. The prosecutor gave, as part of his closing statement, a clear description of what was involved in each charge. In our view, that was too late. He should have provided that list to the Tribunal at the opening of the case. This would have reduced the number of conferences with the witness excluded, which interrupted this hearing, and also avoided the claim that the prosecutor's case was "Protean" in that it was constantly changing.

The Discipline Committee is restricted to the allegations raised in the notice of hearing[27]. The Discipline Committee cannot find the professional to have engaged in conduct or to have breached categories of professional misconduct that were not alleged in the notice of hearing[28].

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[26] *Gale* v. *College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 3948 (Div. Ct.).

[27] *Re Milstein and Ontario College of Pharmacy* (1978), 87 D.L.R. (3d) 392 (C.A.) (appeal dismissed because DC made its decision on the basis of allegations in the notice).

[28] *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73 (Div. Ct.) (since the professional was not charged with fraud nor given any notice that the College intended to prove fraud against him, the determination which the DC made based on what amounts to a finding of fraud cannot stand and must be set aside), *Re Takahashi and College of Physicians and Surgeons of Ontario* (1979), 26 O.R. (2d) 353 (Div. Ct.), *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (there must be a match between the alleged wrongdoing and the findings of the tribunal, a notice will be declared materially defective if it alleges incompetence only and the tribunal goes on to make an unrelated finding that the professional is dishonest), *Holden* v. *College of Alberta Psychologists*, [2001] A.J. No. 1333 (C.A.) (the professional was convicted of an allegation for which he was given no notice), *Steele* v. *Assn. of Registered Nurses of Newfoundland*, [1992] N.J. No. 33 (T.D.) (the professional was found guilty of a serious and fundamental lapse in charting procedure even though she was given no notice that these matters would be considered), *McAllister* v. *New Brunswick Veterinary Medical Association*, [1985] N.B.J. No. 167 (C.A.) (DC cannot make a finding of gross negligence/incompetence for allegations that arose in evidence during the hearing, without issuing a separate notice of hearing and holding a separate hearing) and *K.C.* v. *College of Physical Therapists of Alberta*, [1999] A.J. No. 973 (C.A.) (DC cannot make a finding of professional misconduct for allegations that arose in evidence

For example, the Discipline Committee cannot find the professional to have engaged in fraud when the allegation is billing errors. As another example, the Discipline Committee cannot make a finding of incompetence when the allegation is failing to maintain the accepted standard of practice of the profession. The safest course of action for the Discipline Committee is to not even admit evidence relating to other allegations[29]. Otherwise, there is the risk that a Court on appeal will set aside the finding and this is precisely what the New Brunswick Court of Appeal did in McAllister v. New Brunswick Veterinary Medical Association[30]:

> In the present case, the finding of gross negligence and/or incompetence made by the Council was not related to the complaint as it appeared in the sworn statement or the evidence of the Costellos, nor as it was set forth in the particulars of the complaint furnished to the appellant. Rather, the finding was based on the inconsistency of the evidence of the appellant with his medical records. There was no prior notice given to the appellant that the Council was considering these inconsistencies and the appellant was not given an opportunity to explain or otherwise deal with these inconsistencies. In fact, it was only when rendering their decision that the Council referred to them. To say that such a serious allegation came as a surprise is an understatement…I would therefore quash the finding of gross negligence and/or incompetence.

The Alberta Court of Appeal did the same thing in K.C. v. College of Physical Therapists of Alberta[31]:

> The Notice of Hearing in respect of the 21 charges did not refer to the use of letterhead in a personal dispute…The use of letterhead was first mentioned by C's neighbour in his testimony at the

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during the hearing or even for conduct at the hearing (i.e. failure to attend the hearing), without issuing a separate notice of hearing and holding a separate hearing).

29 *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73 (Div. Ct.).

30 *McAllister* v. *New Brunswick Veterinary Medical Association*, [1985] N.B.J. No. 167 (C.A.).

31 *K.C.* v. *College of Physical Therapists of Alberta*, [1999] A.J. No. 973 (C.A.).

> hearing, in reply to a question about how he knew C. was a physical therapist…The matter was next brought up by a member of the committee who questioned C. about it…There is no reference to the use of the letterhead in either the prosecutor's or defence's final arguments.
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> C. was found guilty of a count of professional misconduct for which he had never been charged. The discipline committee has extensive powers, but the exercise of its authority will only be valid if it follows the procedures outlined in the Act. While the statute recognizes that matters related to the professional conduct of an investigated person may arise in the course of a hearing, the investigated person must be given at least 15 days' notice of a further hearing at which the matters will be considered…Procedural fairness dictates that an investigated person be notified of the particulars of further charges and be given an opportunity to gather evidence, instruct counsel, research the law and defend the charge. The discipline committee circumvented this entire procedure by convicting C. of an offence that occurred to them in the course of the hearing. The conviction for this offence must be quashed.

The Ontario Divisional Court in Re Golomb and College of Physicians and Surgeons of Ontario[32] went even further when it suggested that evidence relating to other allegations should not even be presented:

> …It also follows that evidence ought to be confined to the charge against him. Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend.

Often, multiple allegations are combined in one notice of hearing. This is considered acceptable as long as there is not a significant danger of prejudice to the professional and the Discipline Committee will not have any problems keeping the evidence separate for the different allegations.

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[32] *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73 (Div. Ct.).

There is no requirement about the method of serving the notice of hearing on the professional. But, for example, under the Regulated Health Professions Act, 1991[33], if notice is served by prepaid first class mail addressed to the person at the person's last known address, there is a rebuttable presumption that the notice was received five days later. However, because the entire discipline proceeding could be set aside if the professional proves that he/she did not receive the notice of hearing, most prosecutors serve the professional personally as an extra level of protection. There is also no requirement about how long before the hearing the professional must be served with the notice of hearing. Cases such as Re Davis and Newfoundland Pharmaceutical Association (1977), 86 D.L.R. (3d) 375 (T.D.) suggest that the period of notice must be reasonable. This has been commonly interpreted to mean that at least one month's notice is provided in most cases.

(iii) Disclosure – complaints/investigative stage

At the complaints/investigative stage, given the minimal duty of fairness, the professional is not required to receive disclosure of the details of information obtained during the investigation as long as the professional is able to make a full response to the allegations[34]. The Newfoundland Court of Appeal in Roy v. Newfoundland Medical Board[35] described this limited disclosure obligation to the professional as follows:

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[33] *Health Professions Procedural Code*, s. 91, being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[34] *Bradford* v. *College of Physicians and Surgeons of Ontario*, unreported decision dated March 15, 1993 (Div. Ct.) (the professional is not entitled to receive the evidence that may be relied on to support the allegations i.e. witness statements), *Findlay* v. *College of Dental Surgeons of British Columbia*, [1997] B.C.J. No. 2040 (S.C.) (full disclosure is not required during the investigative stage, there is no need to disclose to the professional: names of each witness/names of persons interviewed/witness statements) and *Roy* v. *Newfoundland Medical Board*, [1996] N.J. No. 234 (C.A.), application for leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 491 (failure to disclose to the professional the reply of the complainant to the professional's response to the original complaint is acceptable, at least where it simply expands on the original complaint and does not make new allegations).

[35] *Roy* v. *Newfoundland Medical Board*, [1996] N.J. No. 234 (C.A.), application for leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 491.

Here, the first letter was sent to the appellant and he was given an opportunity to reply. He did not see the second letter before the decision was made to hold a hearing, but none of the cases cited to this Court suggest that full disclosure is required at that stage – what is required, at most, is that the substance of the evidence be revealed…This was done. While the appellant points to one new detail in the second letter concerning the manner of the examination, this was not a new allegation. Rather, it was elaboration on what was in the first letter…

Similarly, the British Columbia Supreme Court in Findlay v. College of Dental Surgeons of British Columbia[36] said the following:

> …Although disclosure short of full disclosure (copies of statements and names of complainants and potential witnesses) might invite the concerns expressed by this petitioner, full disclosure is not required during the investigative stage either by common law or by the statute and rules presently under consideration. The disclosure here was sufficient to permit the petitioner to respond to the complaints to the extent he wished to do so during the investigative stage.
>
> There is no necessity for the College to identify each complainant or witness during the investigation…

In terms of disclosure to the complainant, when the professional responds to the complaint, often this response is disclosed to the complainant for comment. The duty of fairness requires that if the professional raises a defence which has not been addressed by the complainant, the complainant must have an opportunity to respond to the defence before the Complaints Committee disposes of the complaint. Disclosure of the professional's response may not occur in the following circumstances: the professional's response provides no new information requiring comment, the professional's response contains derogatory comments, or there is a concern that the complainant will use the response for improper purposes (i.e. influence a witness named in the response, bring other legal proceedings between the complainant and the professional). The Complaints Committee has a discretion to disclose only a summary of the professional's response or to provide no

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[36] *Findlay* v. *College of Dental Surgeons of British Columbia*, [1997] B.C.J. No. 2040 (S.C.).

disclosure, as long as the complainant is treated fairly[37]. In Ontario, the Complaints Committees under the Regulated Health Professions Act, 1991 tend to disclose the professional's response because the complainant, in any event, will usually get a copy of the entire file on a complaints review before the Health Professions Appeal and Review Board.

Information obtained during the investigation can be disclosed to the complainant and/or the professional. However, disclosure does not have to be made and may even interfere with the investigation (i.e. witnesses may be hesitant to give statements if information is routinely disclosed).

(iv) Disclosure – discipline stage

At the discipline stage, a disclosure obligation is different from a notice requirement in that disclosure provides more detailed information of the potential evidence in order to allow the professional to present the best possible case before the Discipline Committee.

The governing statute usually sets out the disclosure requirements. For example, the Regulated Health Professions Act, 1991[38] imposes disclosure requirements on the College and also on the professional. In particular, it requires the College to disclose at least ten days before the hearing the following: 1. written or documentary evidence against the professional, 2. the identity of the expert and a copy of the expert's written report or, if there is none, a written summary of the expert evidence, and 3. the identity of any witness who will testify against the professional. The only disclosure obligation imposed by this Act on the professional relates to expert evidence and the nature of this disclosure requirement is the same as the requirement imposed on the College. If the College or the professional does not make this disclosure, the evidence is not admissible at the discipline hearing. The Discipline Committee has a discretion to admit the evidence and make any directions that are

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[37] *Greenhorn* v. *Law Society of Saskatchewan* (1991), 81 D.L.R. (4th) 712 (Q.B.) (failure to disclose to the complainant members' responses to the complaint is acceptable).

[38] *Health Professions Procedural Code*, ss. 42 and 42.1, being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

necessary to ensure that the professional or the College is not prejudiced (i.e. order an adjournment). Section 5.4 of the Statutory Powers Procedure Act[39] allows the Discipline Committee to make rules requiring broader disclosure than what is contained in the governing statute.

Aside from the governing statute (i.e. Regulated Health Professions Act, 1991) and the Statutory Powers Procedure Act, there is caselaw dealing with disclosure. The Ontario Court (General Division) decision in Markandey v. Ontario (Board of Ophthalmic Dispensers)[40] is a good example of a case that nicely summarizes the disclosure principles that apply to discipline proceedings:

The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters…tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearances of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure…

The principles of disclosure that can be delineated from Markandey[41] and other cases include the following:

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39 *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 5.4.

40 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

41 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

1. Generally, in a discipline hearing, a professional must be given all relevant information about the case[42].

2. Courts may set aside decisions of Discipline Committees if they rely on evidence without providing disclosure.

3. The prosecutor must disclose all statements from witnesses, including witness statements and investigators' notes[43].

4. Non-disclosure might be justified if the information is considered to be privileged (i.e. solicitor-client privilege) or irrelevant (i.e. impressions of a witness)[44].

5. The prosecutor does not have to disclose cases that he/she will rely on[45] in the presentation of his/her case.

6. The duty to disclose is a continuing duty[46].

7. The professional or his/her counsel must make reasonable disclosure requests[47].

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42 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

43 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

44 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

45 *Tymchuk* v. *Real Estate Council of British Columbia*, [1999] B.C.J. No. 1858 (S.C.) (no breach of the duty of fairness for failing to disclose cases before the hearing).

46 *Markandey* v. *Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

47 *Kuntz* v. *College of Physicians and Surgeons of British Columbia*, [1999] B.C.J. No. 199 (S.C.) (no breach of the duty of fairness where disclosure had already been made and additional request for disclosure was not made before or at the hearing but was made ~2 years after completion of the hearing), *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (the professional's decision not to participate in the hearing constitutes abandonment, leading to waiver of possible breaches of procedural fairness, including the failure to disclose to the professional a list of witnesses (including expert witness) before the hearing) and *Familamiri* v. *Assn. of Professional Engineers and Geoscientists of British Columbia*, [2004] B.C.J. No. 995 (S.C.) (no breach of natural justice because the professional failed to challenge the late disclosure (piece of evidence disclosed on the second day of the hearing) at the hearing by not requesting an adjournment).

8. Where there has been a failure to make adequate disclosure, the most common remedy is an adjournment but non-disclosure can also lead to a new hearing[48].

9. Disclosure disputes must be determined first by the Discipline Committee[49].

For example, the Saskatchewan Court of Queen's Bench in Thompson v. Chiropractors' Assn. of Saskatchewan[50] said the following in relation to the necessity of allowing the Discipline Committee to make initial determinations relating to disclosure disputes:

> In the instant case, as of the hearing before me, there had not been full disclosure. This bears upon the fairness of the hearing which is to take place. However, it is the adjudicative tribunal which should initially decide whether the lack of disclosure has an adverse effect on the fairness of any hearing and, if it does, whether it can be rectified in any way. For example, if the applicant has been prevented from properly preparing his answer and defence, an adjournment may be appropriate.
>
> The tribunal is entitled to conduct the hearing and control its process. Until it acts in an erroneous or unfair manner, this court should not intervene. At this time I do not know what the respondent committee will rule vis-à-vis the lack of disclosure.

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[48] *Pierce* v. *Law Society of British Columbia*, [2002] B.C.J. No. 840 (C.A.), application for leave to appeal to S.C.C. dismissed [2002] S.C.C.A. No. 311 (10 month adjournment was an adequate remedy for delay in disclosing a piece of evidence over 2 years after the initial complaint was made), *Milner* v. *Registered Nurses Assn. of British Columbia*, [1999] B.C.J. No. 2743 (S.C.) (new hearing ordered where late or non disclosure of documents has a significant effect on the overall conduct of the professional's defence) and *"Solicitor"* v. *Law Society of British Columbia* (1995), 128 D.L.R. (4th) 562 (S.C.) (new hearing ordered where witness statements disclosed one full business day before the commencement of the hearing and the professional is the first witness called by the Law Society).

[49] *Thompson* v. *Chiropractors' Assn. of Saskatchewan*, [1996] S.J. No. 11 (Q.B.) (failure to disclose investigative videotape, investigators' notes and expert witness' proposed testimony bears on the fairness of the hearing but DC should initially decide whether lack of disclosure has an adverse effect on the fairness of the hearing and, if it does, whether it can be rectified) and *Howe* v. *Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.).

[50] *Thompson* v. *Chiropractors' Assn. of Saskatchewan*, [1996] S.J. No. 11 (Q.B.).

> Were I to make a determination in respect to disclosure, I would be usurping the legitimate task of the committee. It would be wrong to do that and I reject the suggestion. It follows that I decline to grant prohibition on the basis of no disclosure.

It is unclear whether the caselaw in criminal cases regarding disclosure applies to discipline proceedings. Before the Canadian Charter of Rights and Freedoms[51], there was no duty to provide additional disclosure in discipline proceedings other than what was specifically required by statute. More recent cases suggest that the general principles of disclosure from criminal cases also apply to discipline proceedings but the duty of disclosure is not quite as strict[52]. For example, the British Columbia Supreme Court in Familamiri v. Assn. of Professional Engineers and Geoscientists of British Columbia[53], described this recently expanded duty of disclosure as follows:

> However, a persuasive line of cases has since established that where the administrative proceedings are disciplinary, the criminal Stinchcombe standard should be applied…Because of the significance and impact on the individual of professional disciplinary proceedings, a high standard of disclosure is required.

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[51] The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[52] *Violette* v. *New Brunswick Dental Society*, [2004] N.B.J. No. 5 (C.A.) (it is clear in law that a party to a disciplinary hearing must be given sufficient information for the purpose of enabling that party to mount an effective defence), *Familamiri* v. *Assn. of Professional Engineers and Geoscientists of British Columbia*, [2004] B.C.J. No. 995 (S.C.) (where administrative proceedings are disciplinary, the criminal *Stinchcombe* standard of disclosure should be applied), *Howe* v. *Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) (*Stinchcombe* does not apply to professional regulatory proceedings but several of the observations made in *Stinchcombe* seem apt to determine content of fairness obligations of administrative tribunals) and *Milner* v. *Registered Nurses Assn. of British Columbia*, [1999] B.C.J. No. 2743 (S.C.) (it appears clear that more recently the standard of disclosure in professional disciplinary tribunals has been expanded far beyond the narrow administrative law model, courts have clearly moved toward requiring disciplinary tribunals to approach, if not meet, the *Stinchcombe* standard of disclosure).

[53] *Familamiri* v. *Assn. of Professional Engineers and Geoscientists of British Columbia*, [2004] B.C.J. No. 995 (S.C.).

> The respondent in this case does not contest the application of the Stinchcombe standard…

Similarly, Laskin J.A. dissenting in the Ontario Court of Appeal's decision in Howe v. Institute of Chartered Accountants of Ontario[54] said the following:

> …In this sense, the chair of the Discipline Committee was literally correct in stating that Stinchcombe does not apply to professional regulatory proceedings. But several of the observations made by Sopinka J. in that case seem apt to determine the content of the fairness obligations of administrative tribunals. Thus, it is hardly surprising that many courts have already applied a number of the principles underlying the decision in Stinchcombe to administrative proceedings…

(b) The right to an unbiased decision-maker

The second basic component of the principles of natural justice or fairness is the right to an unbiased decision-maker. A person directly affected by a decision of an administrative tribunal is entitled to have an impartial and unbiased hearing. Any decision that is made by an administrative tribunal must be based on the evidence and submissions made by the parties and should not influenced by any outside or external factors.

Making a general claim of bias is not enough; evidence is needed in order to prove bias. In addition, actual bias does not need to be shown, an unbiased appearance is adequate but bias is very difficult to prove.

The traditional bias test developed by the Courts is whether a reasonably informed bystander could reasonably perceive bias on the part of the decision-maker. The focus is on a reasonable person's opinion of what is bias, not on a Court's or an administrative tribunal's opinion of what is bias.

The bias test will be applied differently depending on the nature and function of the administrative tribunal[55]. The closed mind test applies

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[54] *Howe* v. *Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.).

to administrative tribunals who conduct investigations (i.e. Complaints Committee, Professional Conduct Committee). The test is whether the decision-maker has a closed mind or is incapable of being persuaded[56]. In contrast, the traditional reasonable apprehension of bias test applies to administrative tribunals who exercise a "judicial" or "quasi-judicial" function (i.e. Discipline Committee, Hearing Committee)[57].

Bias may occur through a number of different circumstances including the following: prejudgment by the administrative tribunal (i.e. a panel member is involved in another case raising similar issues, a panel member decided a prior case against the same professional[58]), the conduct of the administrative tribunal during the hearing (i.e. questions by panel members of the professional[59]), the relationship of a panel member to a hearing participant (i.e. a personal, professional or business relationship between a party/witness/lawyer and a panel member[60]), or an interest in

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55 SCC in *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289.

56 *Butterworth* v. *College of Veterinarians of Ontario*, [2002] O.J. No. 1136 (Div. Ct.) (no bias) and *Rotelick* v. *The Institute of Chartered Accountants of Saskatchewan*, [1998] S.J. No. 554 (Q.B.) (no bias).

57 *Wasylyshen* v. *Law Society of Saskatchewan*, [1987] S.J. No. 81 (C.A.) (no bias), *Li* v. *College of Physicians and Surgeons of Ontario*, [2004] O.J. No. 4032 (Div. Ct.) (bias), *Krop* v. *College of Physicians and Surgeons of Ontario*, [2002] O.J. No. 308 (Div. Ct.), application for leave to appeal to S.C.C. dismissed [2002] S.C.C.A. No. 382 (no bias) and *Nasrala* v. *Assn. of Professional Engineers of Ontario*, [1998] O.J. No. 1270 (Div. Ct.) (bias).

58 For example, bias was found in *Huerto* v. *College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (Sask. C.A.) where a Discipline Committee member of the College of Physicians and Surgeons of Saskatchewan found a cardiologist guilty of professional misconduct in a previous Discipline Committee hearing, the subject matter of the two hearings were different.

59 For example, bias was found in *Solicitor "X"* v. *Barristers' Society (Nova Scotia)* (1998), 171 D.L.R. (4th) 310 (C.A.) where a Discipline Committee member of the Nova Scotia Barristers' Society questioned a lawyer excessively, including asking questions on matters not relevant to the allegations.

60 For example, bias was found in *Roberts* v. *College of Nurses of Ontario* (1999), 122 O.A.C. 342 (Div. Ct.) where a Discipline Committee member of the College of Nurses of Ontario attended meetings of a hospital committee with a principal College witness on an ongoing basis during the hearing without disclosing this fact.

the outcome of the hearing (i.e. a panel member has a direct financial interest in the outcome of the hearing[61]).

Conclusion

Notice, disclosure and bias are three examples of recurring fairness issues in professional regulatory proceedings. The actual content of the duty of fairness will vary depending on whether the professional is at the complaints or discipline stage in the regulatory process. At the complaints stage, the duty of fairness is minimal and the actual requirements relating to notice, disclosure and bias reflect this fact. In contrast, the duty of fairness is high at the discipline stage given the potential serious consequences from a discipline hearing including possible revocation or cancellation of a license and, consequently, the actual requirements relating to notice, disclosure and bias also reflect this fact.

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[61] For example, bias was found in *Moskalyk-Walker and Ontario College of Pharmacy* (1975), 58 D.L.R. (3d) 665 (Div. Ct.) where a Discipline Committee member of the Ontario College of Pharmacists was competing in a small town with and engaged in negotiations to buy the business of a pharmacist who was the subject of a discipline hearing.