

## Recurring and Current Fairness Issues in Professional Regulatory Proceedings

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Procedural Fairness in  
Administrative Decision-  
Making, Presented by CIAJ,  
June 16, 2005

## Principles of Administrative Law

- Procedural Principles:
  - administrative tribunals must follow proper procedures when making decisions
  - statute(s), regulation(s), by-law(s), and/or rules establish basic procedures for making decisions by an administrative tribunal
    - look at governing legislation, *Statutory Powers Procedure Act*, *Administrative Procedures Act*, and *Canadian Charter of Rights and Freedoms*
  - basic procedures include adequate notice, disclosure, right to counsel, right to present evidence & cross-examine witnesses
  - there are also common law procedural principles to ensure all individuals affected by actions or decisions of administrative tribunals are treated fairly: natural justice and fairness

## Application of Natural Justice

- in the past, principles of natural justice were only applied to administrative tribunals that were classified as "judicial" or "quasi-judicial"
- principles of natural justice imposed trial-like procedural protections
- example: decision by the Discipline Committee of an administrative tribunal that a professional had committed an act of professional misconduct would be considered "judicial" or "quasi-judicial" ⇒ procedural protections would be required that would make the hearing look like a trial

## Application of Fairness

- problems developed in applying principles of natural justice
- why?
  - broad range of administrative tribunals were affecting people
  - functions of administrative tribunals could not always be classified as "judicial" or "quasi-judicial"
  - people were denied any procedural protections when administrative tribunals were not "judicial" or "quasi-judicial" (i.e. "executive", "administrative", or "legislative" tribunals)
  - trial-like procedures were imposed in situations when they were not suitable or necessary

## Application of Fairness

- principles of fairness began to develop and were applied instead of principles of natural justice
- principles of fairness set a lower threshold for providing procedural protections and required less trial-like procedures
- real turning point occurred in SCC decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*
  - a person's procedural rights do not depend on classifying an administrative tribunal as "judicial" or "quasi-judicial"
  - duty of fairness applied even though Board was exercising an administrative function: inform Nicholson why he was being dismissed and give him an opportunity to make submissions

## Application of Fairness

- *Nicholson* and later cases focused on which procedural protections were appropriate in a particular situation rather than whether any procedural protections were required
- today, no distinction between principles of natural justice and principles of fairness

## Content of Natural Justice/Fairness

- recently, courts have stopped classifying the function of an administrative tribunal to determine content of duty of fairness
- courts have started to use a contextual approach to determine content of duty of fairness
- SCC in *Baker v. Canada (Minister of Citizenship and Immigration)* identified 5 factors for determining which procedural protections will be applied in a particular situation

## Content of Natural Justice/Fairness

- 5 factors:
  1. nature of the decision being made and the process followed in making that decision ⇒ trial-like procedures when it resembles judicial decision-making
  2. nature and terms of the governing statute ⇒ greater procedural protections are required when the statute does not provide for an appeal
  3. importance and impact of the decision to the person(s) affected ⇒ more stringent procedural protections if decision is important and has great impact on the person(s) affected
  4. legitimate expectations of the person challenging the decision ⇒ if person has a legitimate expectation that a certain procedure will be followed, it will be required
  5. choices of procedure

## Content of Natural Justice/Fairness

- implications for professional regulators:
  - duty of fairness applies to committees other than the Discipline Committee i.e. Complaints Committee
  - the actual procedural protections that will be required will vary – variable duty of fairness
  - i.e. 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
  - i.e. 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 right to cross-examine witnesses

## Content of Natural Justice/Fairness

- implications for professional regulators:
  - cases regarding variable duty of fairness:
    - *Butterworth v. College of Veterinarians of Ontario* (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
    - *Strauts v. College of Physicians and Surgeons of British Columbia* (C.A.)
      - "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."
    - *Violette v. New Brunswick Dental Society* (C.A.)
      - adjudicative hearings require a more detailed notice than one given with respect to investigations

## What Does Natural Justice/Fairness Include?

- 2 basic components:
  1. right to be heard
  2. right to an unbiased decision-maker

## What Does Natural Justice/Fairness Include?

- right to be heard:
  - notice-complaints/investigative stage:
    - duty of fairness at this stage is minimal
    - professional is entitled to: notice of the complaint and notice of the right to make written submissions to Complaints Committee
    - ordinarily, notice does not need to include a description of what possible decisions Complaints Committee might make
    - however, if professional/complainant might be deceived about what options Complaints Committee is considering (referral to discipline vs. dismissal), duty of fairness may require notification about what may happen and opportunity to make submissions
    - failure to give notice to professional renders decision of Complaints Committee invalid

## What Does Natural Justice/Fairness Include?

- notice-complaints/investigative stage:
  - normally, notice of a complaint should be given in writing
    - *Kenney v. College of Physicians and Surgeons of New Brunswick (C.A.)* – notice over the telephone is unacceptable
  - professional is not required to be given a copy of the complaint, but, this would be the easiest and most common way of giving notice
    - *Re Baldry and College of Nurses of Ontario (H.C.J.)*
    - *Bradford v. College of Physicians and Surgeons of Ontario (Div. Ct.)*
    - *Strauts v. College of Physicians and Surgeons of British Columbia (C.A.)*
  - instead, notice of the complaint could be adequate if professional is only provided with a summary of the allegations

## What Does Natural Justice/Fairness Include?

- notice-complaints/investigative stage:
  - a summary of the allegations may be appropriate if: full complaint contains derogatory comments, giving notice of the full complaint could interfere with the investigation, or complaint deals with irrelevant conduct of other persons besides the professional
  - sufficient notice must be made in the summary to allow the professional to make a full response to the allegations
    - *Bradford v. College of Physicians and Surgeons of Ontario (Div. Ct.)*
    - *Re Baldry and College of Nurses of Ontario (H.C.J.)*
    - *Rotelick v. The Institute of Chartered Accountants of Saskatchewan (Q.B.)* – failure to give notice of the identity of the complainant is acceptable
    - *Findlay v. College of Dental Surgeons of British Columbia (S.C.)*

## What Does Natural Justice/Fairness Include?

- notice-complaints/investigative stage:
  - Complaints Committee can investigate the complaint before giving notice of the complaint to the professional as long as notice is given before Complaints Committee makes a decision and finally disposes of the complaint
    - *Re Baldry and College of Nurses of Ontario (H.C.J.)*
    - but in *Tanaka v. Certified General Accountants' Assn. of the Northwest Territories (S.C.)* – breach of the duty of procedural fairness for failing to give notice of the complaint before conducting an investigation and disposing of the complaint

## What Does Natural Justice/Fairness Include?

- notice-complaints/investigative stage:
  - 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
    - *McIntosh v. College of Physicians and Surgeons of Ontario (Div. Ct.)* – failure to give notice for ~4.5 years after complaint is made does not meet the standard of procedural fairness

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - duty of fairness at this stage is high
  - notice of a discipline hearing is usually provided through a notice of hearing, an official document that formally starts proceedings before Discipline Committee
  - notice of hearing contains information to allow professional to decide whether to attend the hearing and if attending, helps the person prepare for the hearing
  - notice of hearing must include a statement of the time, place and purpose of the hearing
    - *Sinkovich v. Strathroy (Town) Commissioners of Police (Div. Ct.)* – breach of the duty of fairness for not giving notice of the purpose and possible consequences of the inquiry
    - *Re Davis and Newfoundland Pharmaceutical Association (T.D.)* – professional must be given notice of time & place of hearing

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - in stating the purpose, the notice must indicate that the hearing is a discipline proceeding, not merely a preliminary/investigatory meeting
    - *Re Davis and Newfoundland Pharmaceutical Association (T.D.)*
  - in the notice of hearing, it is useful, but not required, to state the possible orders that can be made by the Discipline Committee
    - *Sinkovich v. Strathroy (Town) Commissioners of Police (Div. Ct.)* – breach of the duty of fairness for not giving notice of the purpose and possible consequences of the inquiry

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - *Statutory Powers Procedure Act*:
    - reasonable notice
    - reference to statutory authority under which the hearing will be held
      - i.e. 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.
    - i.e. 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.

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - *Statutory Powers Procedure Act*:
    - different notice requirements for oral, written, and electronic hearings
    - i.e. notice of an oral hearing must include:
      - a statement of the time, place, and purpose of the hearing
      - a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice
  - adequate notice vs. reasonable notice is required under Alberta's *Administrative Procedures Act*

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - before the discipline hearing, professional is entitled to adequate notice - reasonable information about the allegations, usually incorporated in the notice of hearing
    - *Sinkovich v. Strathroy (Town) Commissioners of Police* (Div. Ct.)
    - *Re Davis and Newfoundland Pharmaceutical Association* (T.D.)
    - *Re Golomb and College of Physicians and Surgeons of Ontario* (Div. Ct.)
    - *Gale v. College of Physicians and Surgeons of Ontario* (Div. Ct.)
    - *Steele v. Assn. of Registered Nurses of Newfoundland* (T.D.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - generally, a statement of allegations must have 2 parts:
    - 1. material facts
      - *Re Golomb and College of Physicians and Surgeons of Ontario* (Div. Ct.)
      - *Re Takahashi and College of Physicians and Surgeons of Ontario* (Div. Ct.) – inadequate notice from lack of material facts
      - *Violette v. New Brunswick Dental Society* (C.A.) – sufficient facts are required to enable professional to tie the allegation of wrongdoing to his/her conduct
      - *Roy v. Newfoundland Medical Board* (C.A.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - generally, a statement of allegations must have 2 parts:
    - 2. legal conclusion to be drawn from the facts (i.e. incompetence, gross negligence, or category/categories of professional misconduct)
      - *Violette v. New Brunswick Dental Society* (C.A.) – must permit professional to identify what provisions alleged to be breached
      - *Bateman v. Association of Professional Engineers of Manitoba* (Q.B.) – must indicate in what way the conduct is in breach of professional standards, not sufficient to allege only that the professional is guilty of unprofessional conduct or misconduct
      - *Wagner v. College of Physicians and Surgeons of Saskatchewan* (Q.B.)
      - *Morton v. Registered Nurses Assn. of Nova Scotia* (T.D.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - allegations can be stated in the alternative
    - *Gilliss v. Barristers' Society of New Brunswick* (C.A.) – allegations of professional misconduct and conduct unbecoming can be made
  - wording of the allegations does not have to contain the same level of precision as in a criminal charge
    - *Re Golomb and College of Physicians and Surgeons of Ontario* (Div. Ct.)
    - *Re Stevens and Law Society of Upper Canada* (Div. Ct.)
    - *Re Cwinn and Law Society of Upper Canada* (Div. Ct.)
    - *Violette v. New Brunswick Dental Society* (C.A.)
    - *Roy v. Newfoundland Medical Board* (C.A.)
    - *Gale v. College of Physicians and Surgeons of Ontario* (Div. Ct.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - 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 the professional knows the case he/she has to meet without being taken by surprise
    - *Re Cwinn and Law Society of Upper Canada* (Div. Ct.) – where before the hearing, full particulars of all evidence to be presented at the hearing is provided, professional is not taken by surprise
    - *Gale v. College of Physicians and Surgeons of Ontario* (Div. Ct.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - Discipline Committee is restricted to allegations raised in the notice of hearing
    - *Re Milstein and Ontario College of Pharmacy* (C.A.) – appeal dismissed because DC made its decision on the basis of allegations in the notice
  - Discipline Committee cannot find professional to have engaged in conduct or to have breached categories of professional misconduct that were not alleged in the notice of hearing
    - *Re Golomb and College of Physicians and Surgeons of Ontario* (Div. Ct.)
    - *Re Takahashi and College of Physicians and Surgeons of Ontario* (Div. Ct.)
    - *Violette v. New Brunswick Dental Society* (C.A.)

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - Discipline Committee cannot find professional to have engaged in conduct or to have breached categories of professional misconduct that were not alleged in the notice of hearing
    - *Holden v. College of Alberta Psychologists* (C.A.)
    - *Steele v. Assn. of Registered Nurses of Newfoundland* (T.D.)
    - *McAllister v. New Brunswick Veterinary Medical Association* (C.A.) – DC cannot make a finding of gross negligence/incompetence for allegations that arose in evidence during the hearing without issuing separate notice of hearing and holding separate hearing
    - *K.C. v. College of Physical Therapists of Alberta* (C.A.) – DC cannot make a finding of professional misconduct for allegations that arose in evidence during the hearing or even for conduct at the hearing (i.e. failure to attend the hearing) without issuing separate notice of hearing and holding separate hearing

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - safest course of action for Discipline Committee is to not admit evidence relating to other allegations
    - *Re Golomb and College of Physicians and Surgeons of Ontario* (Div. Ct.)
  - i.e. Discipline Committee cannot find the professional to have engaged in fraud when the allegation is billing errors
  - i.e. Discipline Committee cannot make a finding of incompetence when the allegation is failing to maintain the accepted standard of practice of the profession
  - often, multiple allegations are combined in 1 notice of hearing
    - acceptable as long as there is not a significant danger of prejudice to the professional and Discipline Committee will not have problems keeping the evidence separate for the different allegations

## What Does Natural Justice/Fairness Include?

- notice-discipline stage:
  - there is no requirement about the method of serving the notice of hearing on the professional
    - under the *Regulated Health Professions Act, 1991*, 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 notice was received 5 days later
    - however, because the entire discipline proceeding could be set aside if the professional proves he/she did not receive the notice of hearing, most prosecutors serve the professional personally
  - there is 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* (T.D.) suggest the period of notice must be reasonable (i.e. a month)

## What Does Natural Justice/Fairness Include?

- Exercise 1:

A lawyer was served with a Notice of Application containing an allegation of professional misconduct that he failed to cooperate with the Law Society by failing to produce books and records of his practice for examination. The lawyer wants to see if he can challenge this on the basis of inadequate notice. He reviews the *Statutory Powers Procedure Act* and notices that section 10 gives a party to a proceeding the right to be represented by counsel or an agent but the Notice does not mention this right. Can the lawyer successfully argue that he received inadequate notice?

## What Does Natural Justice/Fairness Include?

- Exercise 2:  
A funeral director has just been served with a Notice of Hearing. It alleges: "you committed an act of professional misconduct as provided by s.16(2)(b) of the *Funeral Directors and Establishments Act*, in that during the months of August and September 2002, you acted in a manner relevant to the practice of funeral directing that, having regard to the circumstances, would reasonably be regarded as unprofessional conduct, contrary to paragraph u of section 44 of Regulation 470 made under the *Funeral Directors and Establishments Act*". Is this adequate notice? Why?

## What Does Natural Justice/Fairness Include?

- Exercise 3:  
Discipline Committee of the College of Optometrists of Ontario found Dr. X "guilty of professional misconduct for having altered Mrs. Y's clinical records". After hearing all of the evidence including Mrs. Y's testimony that she did not attend at Dr. X's office on May 5, 1993, the Committee made a finding that the May 5, 1993, appointment "did not take place and, therefore, the entry on the records was false". The allegation in the Notice of Hearing was that "you altered your clinical records". Mrs. Y had been a patient of Dr. X from 1990 until February 22, 1995. Can Dr. X argue on an appeal that he did not receive adequate notice? Why?

## What Does Natural Justice/Fairness Include?

- disclosure-complaints/investigative stage:
  - 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
    - *Bradford v. College of Physicians and Surgeons of Ontario (Div. Ct.)* – 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 (S.C.)* – full disclosure is not required during investigative stage, no need to disclose to the professional: names of each witness/names of persons interviewed/witness statements
    - *Roy v. Newfoundland Medical Board (C.A.)* – failure to disclose to the professional the reply of complainant (no new allegations) to professional's response to original complaint is acceptable

## What Does Natural Justice/Fairness Include?

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

## What Does Natural Justice/Fairness Include?

- disclosure-complaints/investigative stage:
  - Complaints Committee has a discretion to disclose only a summary of the professional's response or to provide no disclosure, as long as complainant is treated fairly
    - *Greenhorn v. Law Society of Saskatchewan (Q.B.)* – failure to disclose to the complainant professionals' responses to the complaint is acceptable
  - in Ontario, Complaints Committees under *Regulated Health Professions Act, 1991* tend to disclose the professional's response because complainant, in any event, usually gets a copy of the entire file on a complaints review before the Health Professions Appeal and Review Board

## What Does Natural Justice/Fairness Include?

- disclosure-complaints/investigative stage:
  - 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 interfere with the investigation (i.e. witnesses may be hesitant to give statements if information routinely disclosed)

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - disclosure is different from notice
  - disclosure provides more detailed information of potential evidence to allow the professional to present the best possible case
- governing statute usually sets out disclosure requirements, i.e. *Regulated Health Professions Act, 1991* has disclosure requirements on the College and the professional at discipline
  - requires College to disclose at least 10 days before the hearing: 1. written or documentary evidence against the professional, 2. identity of expert and a copy of expert's written report/written summary of expert evidence, 3. identity of any witness who will testify against the professional
  - same disclosure requirement on professional re: expert evidence

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - if College/professional does not make this disclosure, evidence is not admissible at discipline hearing
    - Discipline Committee has a discretion to admit the evidence and make directions to ensure professional/College is not prejudiced (i.e. an adjournment)
  - section 5.4 of *Statutory Powers Procedure Act* allows the Discipline Committee to make rules requiring broader disclosure than the governing statute does
  - aside from the governing statute (i.e. *Regulated Health Professions Act, 1991*) and the *Statutory Powers Procedure Act*, there is caselaw dealing with disclosure

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - principles of disclosure from cases:
    - generally, in a discipline hearing, a professional must be given all relevant information about the case
      - *Markandey v. Ontario (Board of Ophthalmic Dispensers)*
    - courts may set aside decisions of Discipline Committees if they rely on evidence without providing disclosure
    - prosecutor must disclose all statements from witnesses, i.e. witness statements, investigators' notes
      - *Markandey v. Ontario (Board of Ophthalmic Dispensers)*

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - principles of disclosure from cases:
    - non-disclosure might be justified if the information is privileged (i.e. solicitor-client privilege) or irrelevant (i.e. impressions of a witness)
      - *Markandey v. Ontario (Board of Ophthalmic Dispensers)*
    - prosecutor does not have to disclose cases that he/she will rely on
      - *Tymchuk v. Real Estate Council of British Columbia (S.C.)* – no breach of the duty of fairness for failing to disclose cases before the hearing
    - duty to disclose is a continuing duty
      - *Markandey v. Ontario (Board of Ophthalmic Dispensers)*

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - principles of disclosure from cases:
    - professional's counsel must make reasonable disclosure requests
      - *Kuntz v. College of Physicians and Surgeons of British Columbia (S.C.)* – no breach of the duty of fairness where disclosure had already been made and additional request for disclosure was made –2 years after completion of the hearing
      - *Violette v. New Brunswick Dental Society (C.A.)* – professional's decision not to participate in the hearing constitutes abandonment, leading to waiver of possible breaches of procedural fairness, including failure to disclose to the professional a list of witnesses (including expert witness) before the hearing

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - principles of disclosure from cases:
    - professional's counsel must make reasonable disclosure requests
      - *Familamiri v. Assn. of Professional Engineers and Geoscientists of British Columbia (S.C.)* – no breach of natural justice because professional failed to challenge late disclosure (piece of evidence disclosed on second day of hearing) at the hearing by not requesting an adjournment
    - disclosure disputes must be determined first by Discipline Committee
      - *Thompson v. Chiropractors' Assn. of Saskatchewan (Q.B.)* – failure to disclose investigative videotape, investigators' notes and expert witness' proposed testimony bears on fairness of the hearing but DC should initially decide whether lack of disclosure has adverse effect on fairness of hearing
      - *Howe v. Institute of Chartered Accountants of Ontario (C.A.)*

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - principles of disclosure from cases:
    - 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
      - *Pierce v. Law Society of British Columbia* (C.A.) – 10 month adjournment adequate remedy for delay in disclosing piece of evidence over 2 years after initial complaint
      - *Milner v. Registered Nurses Assn. of British Columbia* (S.C.) – new hearing ordered where late or non disclosure of documents has a significant effect on conduct of professional's defence
      - *Solicitor v. Law Society of British Columbia* (S.C.) – new hearing ordered where witness statements disclosed 1 full business day before the hearing and professional is first witness called by Law Society

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - it is unclear whether the caselaw in criminal cases regarding disclosure applies to discipline proceedings
    - before the *Canadian Charter of Rights and Freedoms*, 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 apply to discipline proceedings but the duty of disclosure is not quite as strict
      - *Violette v. New Brunswick Dental Society* (C.A.)
      - *Familiamiri v. Assn. of Professional Engineers and Geoscientists of British Columbia* (S.C.) – where administrative proceedings are disciplinary, the criminal *Stinchcombe* standard of disclosure should be applied

## What Does Natural Justice/Fairness Include?

- disclosure-discipline stage:
  - more recent cases suggest that the general principles of disclosure from criminal cases apply to discipline proceedings but the duty of disclosure is not quite as strict
    - *Howe v. Institute of Chartered Accountants of Ontario* (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
    - *Milner v. Registered Nurses Assn. of British Columbia* (S.C.) – 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 *Stinchcombe* standard of disclosure

## What Does Natural Justice/Fairness Include?

- Exercise 4:

During the Discipline Committee hearing, a doctor requested on 2 separate occasions that he be provided with disclosure of the evidence that the Executive Committee relied on before referring allegations to the Discipline Committee. The Discipline Committee refused to grant his requests and ultimately made findings of professional misconduct. The doctor brought an appeal. Can the doctor successfully argue on his appeal that he was provided with inadequate disclosure?

## What Does Natural Justice/Fairness Include?

- Exercise 5:

A professional engineer was served with a Notice of Hearing but the investigation file and the investigator's notes were not disclosed to the professional engineer prior to the hearing. Prior to the Discipline Committee hearing, the professional engineer never made a request for disclosure. The Discipline Committee made findings of professional misconduct. On appeal, he argued that disclosure was insufficient. Was the Association of Professional Engineers of Ontario required to disclose the investigator's notes? Does it make a difference that the professional engineer never made a request for disclosure?

## What Does Natural Justice/Fairness Include?

- right to an unbiased decision-maker:
  - a person directly affected by a decision is entitled to have an impartial and unbiased hearing
  - any decision made by an administrative tribunal must be based on the evidence and submissions made by the parties, not influenced by outside or external factors
  - actual bias does not need to be shown, unbiased appearance is adequate but bias is hard to prove
  - making a general claim of bias is not enough - need evidence to prove bias
  - bias test: whether a reasonably informed bystander could reasonably perceive bias on the part of the decision-maker, focus on a reasonable person's opinion of what is bias



## What Does Natural Justice/Fairness Include?

- bias test will be applied differently depending on nature and function of administrative tribunal (SCC in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*)
- closed mind test applies to administrative tribunals who conduct investigations (i.e. Complaints Committee, Professional Conduct Committee) – whether the decision-maker has a closed mind/incapable of being persuaded
  - *Butterworth v. College of Veterinarians of Ontario* (Div. Ct.), no bias
  - *Rotelick v. The Institute of Chartered Accountants of Saskatchewan* (Q.B.), no bias

## What Does Natural Justice/Fairness Include?

- in contrast, traditional reasonable apprehension of bias test applies to administrative tribunals who exercise a “judicial” or “quasi-judicial” function (i.e. Discipline Committee, Hearing Committee)
  - *Wasylyshen v. Law Society of Saskatchewan* (C.A.), no bias
  - *Li v. College of Physicians and Surgeons of Ontario* (Div. Ct.), bias
  - *Krop v. College of Physicians and Surgeons of Ontario* (Div. Ct.), no bias
  - *Nasrala v. Assn. of Professional Engineers of Ontario* (Div. Ct.), bias

## What Does Natural Justice/Fairness Include?

- categories of bias:
  - prejudice by the administrative tribunal
    - i.e. panel member involved in another case raising similar issues
    - i.e. panel member decided a prior case against same professional
  - conduct of the administrative tribunal during the hearing
    - i.e. questions by panel members of the professional

## What Does Natural Justice/Fairness Include?

- categories of bias:
  - relationship of panel member to a hearing participant
    - i.e. personal, professional, or business relationship between a party/witness/lawyer and panel member
  - interest in the outcome of the hearing
    - i.e. panel member has a direct financial interest in the outcome of the hearing

## What Does Natural Justice/Fairness Include?

- examples of bias:
  - bias was found where 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, subject matter of the hearings were different
    - *Huerto v. College of Physicians and Surgeons* (Sask. C.A.)
  - bias was found where Discipline Committee member of the Nova Scotia Barristers’ Society questioned a lawyer excessively including asking questions on matters not relevant to the allegations
    - *Solicitor “X” v. Barristers’ Society (Nova Scotia)* (C.A.)

## What Does Natural Justice/Fairness Include?

- examples of bias:
  - bias was found where 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
    - *Roberts v. College of Nurses of Ontario* (Div. Ct.)
  - bias was found where 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 subject to discipline
    - *Moskalyk-Walker and Ontario College of Pharmacy* (Div. Ct.)