

## **Professional Disciplinary Hearings & Related Civil Actions:**

### **How Evidentially Intertwined Are They?**

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## Professional Disciplinary Hearings & Related Civil Actions:

### How Evidentially Intertwined Are They?

#### I. INTRODUCTION

*You are a plaintiff's lawyer. Your client takes issue with the quality of services provided by a financial planner, engineer, architect, accountant or other professional. If you advise the client to lodge a complaint with the professional body which regulates that professional and to which he is held accountable, you are in a win-win situation: if the complaint is well-founded, a good deal of the leg-work necessary to ground a civil action has, perhaps, been done for you via the regulatory body's investigative process. If the complaint is rejected as not being well-founded, your client is not bound by those results, and you remain free to frame your civil action in whatever manner you wish, although you may need to seek expert evidence to counteract the committee's findings.*

The above logic is, perhaps, betrayed by a recent trend amongst plaintiffs of bringing two-pronged attacks against professionals who are allegedly guilty of episodes of professional malfeasance. As a result, many questions percolate amongst the defence bar, as they increasingly contend with the repercussions of the disciplinary processes during civil actions that they are retained to defend. Questions include:

- *Will a negotiated resolution to the complaint (a plea bargain about the penalty to be meted out) damn the professional's chances of a credible defence at trial?*
- *Is the bare fact of the complaint admissible at trial? What about the disciplinary body's findings?*
- *What weight may be given to a disciplinary ruling, as compared to a negotiated resolution of the complaint?*
- *Will a negotiated resolution (undertaken by the professional for pragmatic reasons only) be used at trial as an admission of fault or of a breached standard of care?*
- *Is there strategic merit to resisting a plea, risking instead the stigma of an official disciplinary ruling in order to preserve a civil defence?*
- *Is testimony given to a regulatory body admissible at trial, particularly when governing legislation has compelled co-operation with the investigation?*
- *Of what effect is the magnitude of the potential penalty or the breadth of the privacy protections that are built into the relevant legislative framework?*

Jurisprudence from various jurisdictions and professions reflects that this emerging dual strategy is shaping the litigation needs of professionals of various stripes. The cases featured in this paper discuss a cross-section of legislation, and reveal a range of considerations that will determine whether privilege applies to various elements of the disciplinary process, when related litigation ensues.

## II. DISCUSSION & CASE LAW

### A. The Common Law Position

*Bergwitz v. Fast*<sup>1</sup> is often cited as authority for the proposition that at common law, members of a profession's investigative committee will be compellable at a trial when negligence is alleged against that same professional. In *Bergwitz*, a patient complained to British Columbia's College of Dental Surgeons, and in the related malpractice trial demanded production of a report prepared by the College's investigative committee. The Court cited the eminent "Wigmore Criteria," for establishing privilege,<sup>2</sup> and ultimately ordered production of the report. The decision reflects a clear concern with issues of public interest:

Surely, it is in the public interest that a member of the public who ... appears to have a legitimate claim ... should have an opportunity to obtain this information and to call, if he sees fit, a member of the committee, or any other dentist, to establish the negligence at the trial. ... [G]enerally, it is in the public interest that a complainant know that the investigating committee feels that the complaint is unjustified or, at least, does not support an allegation of negligence. **Knowledge of the views of the investigating committee would be a very important factor, if not the determining factor, in advising a client whether to proceed with an action against a dentist.** [Emphasis added] [pp. 737-738].

*Bergwitz* is of diminished relevance where a statutory or regulatory framework governs the determination of privilege, admissibility and weight issues. The case does, however, represent a basic standard to which Courts may stray, when relevant enactments leave a question mark about the intended scope of privilege to be applied to disciplinary processes. For instance, in *Finlay et al. v. University Hospital Board et al.*<sup>3</sup>, the Court followed *Bergwitz* in determining the status of investigative material and correspondence that was held by a Hospital Board and by a defendant doctor. The material was never actually considered by a designated investigative committee, and so it fell outside of the ambit of section 60(2) of Saskatchewan's *Medical Profession Act, 1981*,<sup>4</sup> which protects evidence gathered by such committees from disclosure in legal proceedings. This explains

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<sup>1</sup> (1980) 108 D.L.R. (3d) 732

<sup>2</sup> Namely: (1) The communications must originate *in a confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. See: *Wigmore on Evidence*, Vol. 8, 3rd ed. (McNaughton Revision, 1961), para. 2285.

<sup>3</sup> (1986) 33 D.L.R. (4<sup>th</sup>) 200.

<sup>4</sup> S.S., 1980-81, c.M-10.1.

why a seemingly divergent decision was issued by the same Court a year later in *Sawchuk v. Lee Sing*,<sup>5</sup> discussed below, where section 60(2) was indeed engaged.

## **B. The Impact of a Profession’s Governing Statute or Regulatory Framework**

### **i. *Doctors, Dentists & Chiropractors***

*What about health care professionals? Malpractice suits abound in these professions, and disciplinary sanctions can be severe, including termination of privileges, which may rob the professional of his livelihood. When public health is at stake, committees must be able to effectively determine whether a professional should continue to practice, and so medical professionals are often compellable witnesses. The frequency of baseless complaints, compounded by the impact that the complaint process generally has on a professional (regardless of the outcome) has meant that relevant legislation often contains strong confidentiality protections.*

*One particular Saskatchewan plaintiff encountered these strong protections, and learned that the Court will often take legislative cues when ruling on evidentiary matters at trial.*

In *Sawchuk v. Lee-Sing*<sup>6</sup> a plaintiff wished to call evidence of proceedings before the Complaints Committee of the College of Physicians and Surgeons in a subsequent civil trial. The matter was set to proceed by way of jury trial, and the issue of the admissibility of the evidence was argued on a pre-trial motion. The Court held that such evidence would be hearsay, could prejudice the jury unduly, and was, furthermore, prohibited by s.60 of Saskatchewan’s *Medical Profession Act*.<sup>7</sup> As a result, the judge concluded that the plaintiff could not adduce any evidence of the proceedings, nor could she give evidence that she made a complaint, or received a reply or took legal action as a result of the complaint process. The Court relied upon the following excerpt from *Phipson on Evidence*<sup>8</sup> with respect to the hearsay ground:

former statements of any person whether or not he is a witness in the proceedings may not be given in evidence **if the purpose is to tender them as evidence of the truth of the matters asserted in them**, unless such statements constitute admissions relevant to the facts in issue. [Paragraph 4]. [Emphasis in the original].

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<sup>5</sup> (1987), 58 Sask.R. 94 (Q.B.).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra*, note 4.

<sup>8</sup> 13th ed. (London: Sweet & Maxwell, 1982) at paragraph 16-02.

Saskatchewan's *Medical Profession Act* broadly prohibits *any* subsequent use of evidence from disciplinary proceedings by a witness in a legal proceeding. The Court viewed the *Act's* goal as ensuring that such proceedings are conducted "without fear on the part of any physician, committee member, witness or patient that the proceedings, the evidence gathered by the Committee and its findings will become evidence in a subsequent court proceeding." [Paragraph 9].

It appears that the Court's biggest concern in *Sawchuk* was the probative value of the evidence versus the prejudicial effect that it would have upon the jury:

... there is a very great danger that such evidence, even if otherwise admissible and capable of being given some weight, would be very prejudicial if given before a jury. The tendency of lay persons to defer to the opinion of a panel of the defendants' peers selected to investigate the defendants' professional conduct would be very great. All the cautions in the world on my part would not likely overcome that danger. The jury's function is to decide the very question the Complaint's Committee apparently decided. [Paragraph 7].

Interestingly, evidence of a disciplinary tribunal's findings was ruled to be admissible in the context of an Ontario jury trial in *Etienne v. McKellar General Hospital*,<sup>9</sup> discussed below. In spite of this, the two decisions are not entirely at odds with each other, because the need to balance the evidence's prejudicial effect with its probative value was a key consideration in *Etienne*, just as it was in *Sawchuk*. The balance simply tipped in favour of admissibility in *Etienne*.

The *Sawchuk* decision demonstrates the importance of the wording of the relevant statute, and the cases discussed below suggest that similar legislative efforts to protect the confidentiality of the disciplinary process will often not go far enough; in many of those instances, we see the Courts' willingness to order the production of transcripts or to rule affirmatively on the admissibility of hearing evidence.

A final note about *Sawchuk* is in order. The Court's decision to bar reference to even the bare fact that the complaint had been made is stricter than most of the decisions that we survey below. Consequently, one must query whether the decision represents the prevailing standard of admissibility, or whether the breadth of the relevant statute, coupled with the circumstances of the case, translated into a somewhat unique decision.

*What about potential prejudice to the plaintiff's civil case when a Committee's findings are favourable to the doctor? While testifying at trial, an Ontario complainant referred to the fact that she had made a complaint, but did not explain that the doctor's name was ultimately cleared. In the Court's view, this testimony, if not balanced by evidence of the Committee findings, could seriously prejudice the Defendant in the jury's eyes. Furthermore, the plaintiff's testimony had assured the relevance of the Committee's finding at trial.*

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<sup>9</sup> [1994] O.J. 26029.

In *Etienne v. McKellar General Hospital*<sup>10</sup> it was the doctor who wished to introduce a Committee's favourable findings into evidence, and to cross-examine the plaintiff about them at trial. The issue arose after the plaintiff gave evidence revealing that a complaint had been made, but without indicating the outcome. The doctor argued that the committee findings were relevant and admissible to assist the jury, because the fact of the complaint had already been introduced, and because the issues, parties, and standard of proof at trial were identical to those at the hearing.

Faced with the dilemma of balancing the self-serving nature of the evidence with the adverse inference likely to be drawn by a jury considering only the incomplete testimony, Mr. Justice Platana echoed the concern voiced in *Sawchuk, supra*:

The question now is whether I should exercise my discretion as a result of the trier of fact being a jury. In the exercising of that discretion, it is my view that **different considerations may apply depending upon how and why the evidence is sought to be introduced.** Is it, for example, totally self-serving? Is it introduced by a party who seeks to rely upon it as part of their case? Is it evidence which the party opposing introduction had an opportunity to respond to? What is the source of the evidence? Is it from someone who is totally interested in the result to one party or the other, or is the source of the evidence neutral and objective?

...

**While this evidence may be prejudicial to the Plaintiff, my function as a trial judge is to ensure fairness to all parties. The evidence has now revealed a complaint and a review process, and this jury is left with a question mark as to what happened subsequent to that.** ... A fact finder, be it judge alone or jury, should not have to speculate on questions if indeed evidence is admissible which is available to assist them in removing such speculation.

...

I will specifically instruct the jury at the appropriate time in my charge that any finding ... is not to be considered determinative of this action ... and that it should be considered as one piece of evidence to be weighed by them, together with all the rest of the evidence. [Paragraphs 18 - 21] [Emphasis added].

The combined effect of the *Sawchuk* and *Etienne* decisions may be to suggest that the likelihood of prejudicing the defendant may have a greater persuasive effect on a Court than the likelihood of prejudicing the plaintiff. On the other hand, one must wonder whether the defendant in *Etienne* would

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<sup>10</sup> *Ibid.*

have been allowed to introduce the evidence, had the plaintiff not made the mistake of providing incomplete and potentially misleading testimony, touching directly upon the complaint.

In *Kenyeres v. Cullimore*<sup>11</sup> a defendant doctor fought an order to produce all documentation and answer all questions relating to a disciplinary hearing, which had culminated in a finding of professional misconduct. She relied upon provisions in Ontario's *Health Disciplines Act*<sup>12</sup> mandating in-camera hearings and forbidding general disclosure of disciplinary proceedings.

Initially, the defendant succeeded, based upon what the Court saw to be the *Act's* "prime concern" for confidentiality; however, despite noting that confidentiality *was* a clear goal in the Act, the judge granting leave to appeal the decision stated that "**[i]n the absence of a strict prohibition against the production of evidence from a disciplinary hearing, in my view, disclosure should be made. The in camera hearing is over.**"<sup>13</sup> [Emphasis added]

The Court of Appeal<sup>14</sup> agreed that there was a clear divergence between the protections afforded in the *Act* to the in-camera phase of the disciplinary process, and the absence of protections extending to the post-decision phase. In allowing the appeal it did, however, reduce the scope of the order, requiring production of only those transcripts that were relevant to the civil proceedings.

Later, at trial,<sup>15</sup> the Court made the following comment when ruling on the standard of care issue:

I cannot leave this issue of standard of care without commenting on the decision of the Discipline Committee in which they found Dr. Cullimore guilty of professional misconduct in failing to maintain the standard of the profession.

... **While such decision may be admissible as evidence in this action, it would only be prima facie evidence of her failure to maintain proper standards of care and subject to rebuttal by the defence.** See: *Re DeCore and Ontario College of Pharmacists*, (1985) 51 O.R. (2d) 1 (Ont. C.A.) and *Taylor v. Baribeau et al.*, (1985) 51 O.R. (2d) 541 (Div. Ct.).

... **In any event, that decision, while allowed to be pleaded because of its relevancy, does not assist me in deciding whether or not Dr. Cullimore's standard of care was reasonable.** ... The important issue, as I have already stated, is whether her conduct was the cause or

<sup>11</sup> [1990] O.J. No. 1093, 1990 CarswellOnt 2283.

<sup>12</sup> R.S.O. 1980 Ch. 186.

<sup>13</sup> *Supra*, note 11.

<sup>14</sup> (1991), 44 O.A.C. 318, 49 C.P.C. (2d) 228.

<sup>15</sup> [1992] O.J. 540 (O.C.J. Gen. Div.), 1992 CarswellOnt 2212.

a contributing cause of Ryan's present condition. This issue I will discuss under the next heading, Causation, and will be determined on a balance of probability based on the evidence adduced at this trial. [paragraph 160-162][Emphasis added].

Although the doctor lost the initial fight to keep the hearing transcripts out of evidence, the Court gave them almost no weight in determining whether the standard of care had been met, preferring instead the evidence adduced at trial on that issue.

*What about the plaintiff's own transcripts? Even in the face of a strict statute, a plaintiff is likely entitled to recycle her own contributions to the disciplinary process for use at trial. An Alberta Doctor had to relinquish transcripts of both the plaintiff's testimony and that given by her own experts, but the Court restricted the plaintiff's use of the transcripts to pre-trial preparation only.*

In *Lafreniere v. White*<sup>16</sup> the Alberta Court of Appeal upheld an Order that defendant doctors produce transcripts of the plaintiff's own evidence and that of the two expert witnesses that she had retained for disciplinary hearings. The physicians had received complete transcripts of that evidence, and had provided them to their own counsel. The Court commented that it was "reluctant to prevent a witness who has given evidence, even in a proceeding held in private, from receiving a transcript of his or her own evidence, absent a clear statutory prohibition to this effect." Since there was no clear statutory prohibition against disclosing the information, the Court agreed that the transcripts ought to be produced. The lower Court had specified that the transcripts were to be used for trial preparation purposes, and were not to be admissible at trial, and the Court of Appeal did not vary that aspect of the order.

*An Ontario dentist found that Courts may interpret relevant enactments with painstaking precision. Furthermore, by asserting the defence that he had met professional standards, he invited the introduction of disciplinary findings in rebuttal of that defence.*

In *Spataro v. Handler*<sup>17</sup> a woman sued her former dentist for malpractice. In his statement of defence, he alleged that the treatment that he provided "was in accordance with the standards of practice of the profession and performed by the defendant with reasonable skill and care". The plaintiff wished to refute that assertion by pleading that the defendant was found guilty of professional misconduct after a disciplinary hearing.

As in *Kenyeres*, the Defendant relied upon provisions in Ontario's *Health Discipline Act*<sup>18</sup> preserving the secrecy of in camera Committee matters, and stating that investigated members "shall not be required to give testimony in any civil proceeding."

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<sup>16</sup> [1997] A.J. No. 66.

<sup>17</sup> [1988] O.J. 841.

<sup>18</sup> *Supra*, note 12.

The Court held that the plaintiff *could* plead the fact of the Disciplinary Committee's finding, and could examine the defendant about it, since it was a material fact. As well, the Court noted that the *Act*

mandated that a copy of the decision be served upon the complainant, who was not a party to the proceeding. As such, the Court felt that it could not have been the legislators' intention that the decision itself be kept a secret, and added that... there is no reason why such findings should be kept secret. **It certainly is not in the public interest that such findings be kept secret, nor would such secrecy ensure public confidence.**

...

**It is the "proceedings with respect to the investigation and resolution" ... that are secret, and where the privacy of the member is recognized and not the finding or decision of the committee,** that is so because until the matter is determined and a finding made, then if there were no policy of privacy, great and irreparable harm would be done to a practitioner against whom an unfounded complaint is made.

...

I ... am reinforced in such view by looking at other legislation which protects the privacy of the individual and **where the disposition or decision or adjudication is to be kept secret, then that is specifically spelled out in the enabling legislation.** ... It is not spelled out in the [*Health Discipline*] Act. [Emphasis partly in the original].

*Spataro* establishes that the party seeking to admit evidence of any aspect of the disciplinary process should first raise the fact in her pleadings. As well, it endorses the same distinction seen in *Kenyeres* between the protections afforded to proceedings and those afforded to their outcome. The case also illustrates that Courts will consider the **precise** wording in the relevant enactment in determining the admissibility of a committee finding. As such, even statutes taking considerable steps to preserve confidentiality will not necessarily ensure that hearing details remain privileged, unless the governing statute explicitly forbids later use of both testimony and findings.

*Be sure to read the fine print in the relevant enactment before responding to the complaint: an Alberta chiropractor who 'plead out' found himself vulnerable to a statutory nuance; while any testimony given by him would have been protected, the disciplinary committee's file was not.*

In *A.v. L.*<sup>19</sup> a chiropractor entered a guilty plea to the charge of "unskilled practice" while in the midst of a disciplinary hearing. In a subsequent civil action, the complainant applied to compel production of all documents in the chiropractor's possession which related to the disciplinary hearing, and also applied to have the College of Chiropractors produce information relating to other disciplinary proceedings launched against the chiropractor by other complainants.

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<sup>19</sup> [1998] A.J. No. 154.

As in the *Baumann* decision discussed below the relevant legislation specifically disallowed the later use of **testimony** in civil proceedings. Despite the fact that the hearings were held in private as mandated by the statute, the chiropractor **had not actually testified** at the disciplinary hearing. While *The Chiropractic Profession Act*<sup>20</sup> does create an express privilege for oral evidence given by professionals under investigation, it does not expressly prohibit production of the disciplinary file. As such, no privilege was seen to attach to the file, and the Court ordered its production. Notably, neither the defendant nor the College was ordered to produce information relating to other discipline proceedings, because the plaintiff had not provided affidavit evidence establishing that third party complaints were relevant and admissible as similar fact evidence. By implication, had this been done, that other evidence could have ended up before the Court as well.

## ii. Architects

*What about Architects? They are often the subject of complaints and litigation, and although they are often responsible for the public's safety, cases show that their governing enactments do not always protect disciplinary processes as keenly as those regulating health care professionals do.*

*When an Alberta architect found himself plagued at trial by evidence of a disciplinary committee's findings, the Court did limit the weight given to the evidence, largely because the Alberta Architects Association was not bound by the rules of evidence in conducting its investigative & disciplinary process. The weight issue has bearing for practically all professionals, since virtually all investigative and disciplinary committees are exempted from the rules of evidence.*

In *Spectra Architectural Group Ltd. v. St. Michael's Extended Care Centre Society*<sup>21</sup> a civil action was brought against an architect after the Alberta Architects Association found him to be guilty of unprofessional conduct and suspended him. At trial, his counsel objected to an attempt to enter disciplinary findings into evidence. The complainant argued that the evidence was relevant for two reasons: because it went to the architect's credibility, and because the findings touched upon some of the same issues that were before the court, and were thus "relevant as tending to prove, at least indirectly a fact in issue in this action." The architect's counsel objected on the grounds that the evidence related to "some other body's determination of the ultimate issue the court must determine in this action."

Burrows J. held that the disciplinary committee findings were relevant since the decision dealt with the same set of facts, but noted that they neither constituted *prima facie* proof of guilt, nor caused any onus to shift at trial. He also noted the obvious: the architect could present evidence and argument at trial on the issue of weight:

Indeed the points counsel raised relating to the questionable value of evidence that the review panel found [the defendant's] conduct worthy of sanction, assuming that is what the evidence is, in determining the issues before me, are relevant to the question of weight. Similarly the

<sup>20</sup> R.S.A. 1980, c. C-9.1.

<sup>21</sup> [2001] A.J. 1379 (A.B.Q.B.).

fact that the findings may represent the opinion of someone not proved to be expert may go to weight. Also the fact that the disciplinary body was not bound by the rules of law respecting evidence applicable to judicial proceedings may have significant effect on the weight... . [Paragraph 42].

This case underscores a simple but important point: attacking the measure of weight to be afforded to an unfavourable disciplinary finding may often represent a professional's best chance of mounting a successful defence to a later civil action.

### *iii. Accountants*

*Can the disciplinary hearing be stayed in order to preserve the autonomy of the litigation process? An Ontario Accountant's attempt to see the trial concluded before the hearing could be conducted reveals that the strategy is not likely to avail your client, unless 'exceptional' circumstances exist.*

In *Howe v. Institute of Chartered Accountants of Ontario*,<sup>22</sup> the Court considered an accountant's application to stay a disciplinary hearing, pending final disposition of a related civil action. Essentially, the accountant's counsel tried to achieve the strategic coup of staving off any portentous disciplinary outcome until the civil action had progressed to completion. The Court ultimately acceded to the view that swift disciplinary action is crucial to maintaining public confidence in self-regulating professions. The case was not "exceptional" enough, nor was the risk of prejudice to the accountant great enough to outweigh the public interest in an expeditious disciplinary hearing. The Court commented that:

Although the decision of the Discipline Committee on the charges against the applicant would no doubt be granted some deference in the civil actions, and might be of considerable persuasive value in those actions, **it would not be binding in the civil actions, because the plaintiffs in the civil actions will not have been parties to the disciplinary proceedings.** Issue estoppel only arises where the parties in the subsequent proceedings, or their privies, were parties or privies to the earlier proceedings. See Halsbury's Laws of England, vol. 16, 4th ed. Reissue, para. 977. The plaintiffs in the civil actions would not be prevented from attacking a decision of the Discipline Committee exonerating the applicant, nor would the applicant be prevented from challenging in the civil actions an adverse decision by the Discipline Committee. [Emphasis added].

Although the Court acknowledged that the disciplinary committee's decision may be given deference, it felt that the non-binding nature of the decision and both parties' ability to attack it were ample to neutralize any prejudice that might arise from the outcome. Accordingly, conducting the hearing and the trial in tandem was justified.

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<sup>22</sup> 21 O.R. (3d) 315 (O.C.J. Gen. Div.), [1994] O.J. No. 2907.

Mr. Justice Saunders dissented, and considered that the prejudice to the defendant in continuing with the hearing prior to the conclusion of the civil trial was, in fact, greater than the public benefit to be gained by proceeding with the disciplinary hearing without delay. The Court of Appeal approved of the majority's decision to deny the stay.<sup>23</sup>

It is submitted that *Howe* illustrates that it will be practically impossible to establish that a case is 'exceptional' enough, or that the risk of prejudice to a professional is great enough to outweigh the public interest in pushing forward with the disciplinary action, rather than staying it while the litigation wends its way through the civil process.

*A statute giveth and a statute taketh away: most statutes balance the ability to compel a member's testimony by cloaking incriminating answers in privilege.*

In *Baumann v. Bonderove*,<sup>24</sup> the Alberta Court of Appeal considered whether a chartered accountant was obliged to produce the transcript of proceedings from a disciplinary hearing, which had culminated in disciplinary action being taken against him. The plaintiffs argued that they were entitled to use the transcripts to prepare their case and to cross-examine the accountant, in order to attack his credibility. The disciplinary hearing had been conducted in private, and the accountant was a compellable witness, pursuant to the provisions of *The Chartered Accountants Act*.<sup>25</sup> The Act also **specifically provided** that incriminating answers at hearings could not be used against members in civil proceedings.

The Court determined not only that the transcripts were inadmissible at trial, but also that the accountant did not have to produce them. In so deciding, the Court placed a great deal of emphasis on the purpose of the legislation, as reflected by the wording of the provisions:

[The] Legislature undoubtedly wanted a full and frank disclosure. The rules of evidence were not to apply. **All documents must be disclosed. The member had to answer all questions.** All of this was to **take place in private** unless the member chose otherwise... . **However, there is built into the section a balancing factor ...** that his answers "shall not be used or received against him in any civil proceedings". ... [Emphasis added].

The Alberta *Chartered Accountants Act* is significantly stricter about protecting the confidentiality of proceedings and witnesses than enactments governing many other professions. Indeed, it is stricter than statutes applicable to chartered accountants in many other jurisdictions. Consequently, the case will likely be distinguished in many instances.

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<sup>23</sup> 25 O.R. (3d) 96, [1995] O.J. No. 2496.

<sup>24</sup> [1986] A.J. 425 (A.B.C.A.).

<sup>25</sup> c.C-5, R.S.A. 1980.

**C. Judicial Review Applications: Relevance of a Professional Committee's File in Assessing a Tribunal's Procedural Fairness**

*What about the interplay between the strictures of procedural fairness that bind professional tribunals and the relevance, in judicial review applications, of the tribunal's file material?*

*When the disciplinary committee of Alberta's Association of Professional Engineers, Geologists & Geophysicists decided not to proceed with a disciplinary hearing, based upon the investigation done by a separate committee, the complainant launched a judicial review application. Without ever seeing the investigation committee's transcripts and records, the Chambers Judge determined that the disciplinary committee's decision not to proceed had been reached in a procedurally fair manner. The complainant appealed that decision, but the Court of Appeal upheld it, ruling that the investigative record was irrelevant in determining the procedural fairness of the manner in which the decision was reached.*

In *Friends of Oldman River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*<sup>26</sup> Mr. Justice Cooke of the Alberta Court of Queen's Bench initially granted an order requiring APPEGA to produce the transcript and record of proceedings of an investigation of five of its member engineers. The application was made within the context of an application for judicial review of the disciplinary committee's decision not to discipline the engineers -- a decision which had been made after reviewing the results of a separate committee's investigation. The initial order was based upon public interest principles, but the Court of Appeal disagreed with that decision,<sup>27</sup> commenting as follows:

The task of the chambers judge was twofold. First, he had to determine whether judicial review was available in the circumstances. Second, if it was available, he had to determine whether Council owed a duty of procedural fairness to FOR and Opron and, if so, the content of that duty and whether it had been observed. **Neither required production of the record of proceedings before Council.** [Paragraph 33]. [Emphasis added].

The Court of Appeal's decision in the *Oldman River* case shows that while a tribunal must decide whether or not to proceed in a procedurally fair manner, Courts will accord a measure of deference to the tribunal's decision, and to the final ruling that the Board makes, based upon its consideration of the investigation.

<sup>26</sup> [1997] A.J. No. 920.

<sup>27</sup> [2001] A.J. No. 568.

#### D. A Brief Word about *The Charter*

Section 5(2) of the *Canada Evidence Act*<sup>28</sup> specifies that incriminating answers, when compelled, are not admissible against the witness in a criminal proceeding. Privilege against self-incrimination is also a primary constitutional right. Section 13 of *The Canadian Charter of Rights and Freedoms*<sup>29</sup> provides that:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in **any other proceedings**, except in a prosecution for perjury or for the giving of contradictory evidence. [Emphasis added].

While this section extends protection beyond criminal proceedings, case law indicates that, in order for the privilege against self-incrimination to apply to a proceeding (whether it is section 11 or section 13 of *The Charter* that is engaged), the witness must face ‘true penal consequences.’ The prevailing description of such consequences remains that provided by the Supreme Court of Canada in *R. v. Wigglesworth*,<sup>30</sup> namely: “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.”

It is submitted that Courts are not particularly apt to find that a suspension or a fine – even a significant one – is of ‘true penal’ magnitude. In *McDonald v. Law Society of Alberta*<sup>31</sup>, a lawyer facing disbarment and a maximum \$10,000 penalty under Alberta’s *Legal Profession Act*<sup>32</sup> did not face ‘true penal consequences,’ nor did an engineer facing suspension or a possible \$10,000 fine in *Spicer v. Assn. of Professional Engineers, Geologists and Geophysicists (Alberta)*.<sup>33</sup>

Finally, jurisprudence suggests that true penal consequences must exist, not at the initial proceeding in which the witness testifies, but in the subsequent proceeding where use of incriminating testimony is proposed.<sup>34</sup> As such, opportunities to invoke *Charter* rights vis-à-vis the use of testimony from disciplinary proceedings in later civil proceedings would appear to be rare. Where criminal charges follow upon a disciplinary proceeding, self-incrimination is clearly an issue, but such discussion lies beyond the scope of this paper.

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<sup>28</sup> R.S.C. 1985, c.C-5.

<sup>29</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>30</sup> [1988] 1 W.W.R. 193 (S.C.C.).

<sup>31</sup> [1994] 3 W.W.R. 697.

<sup>32</sup> S.A. 1990, c.L-9.1

<sup>33</sup> (1989), 95 A.R. 132 (Q.B.).

<sup>34</sup> *R. v. Dubois*, [1985] 2 S.C.R. 350, at 363.

### III. CONCLUDING COMMENTS

The evidentiary fall-out from self-regulated disciplinary processes is certainly foreshadowing (and often overshadowing) the course that related litigation may take. Plaintiffs' counsel are, perhaps, gaining a valuable early advantage in civil actions by riding the coat-tails of a process that is often beyond a professional's control.

Issues of privilege, admissibility and weight will all play a role in determining the influence that disciplinary proceedings will have on a civil action. A conclusive analysis of the precise influence that those issues will have in each case is hindered by the significant statutory and regulatory variance, both among different professions and across Canadian jurisdictions.

The wording of the governing statute will, clearly, be crucial in determining the degree to which the findings, transcripts and file material generated by the disciplinary process will impact a related civil action. Alberta's *Chartered Accountants Act*, which was in issue in the *Baumann* case, is a good example of an extremely strict statute. Readers are cautioned not to assume that the dicta provided by that case will be applicable to every professional's case.

In addition to legislation, many professions are governed not only by statute, but by a separate set of regulations or bylaws as well. For example, provincial securities legislation complements the Investment Dealers Association of Canada (IDA) Bylaws, which govern the disciplinary process applicable to brokers across the country. Saskatchewan's *Securities Act*<sup>35</sup> states that **any statements**, either by the IDA or by a self-regulatory organization recognized by the Securities Commission **about any decision of the IDA are "admissible in evidence, so far as they are relevant, for all purposes in any action, proceeding or prosecution."** Although there are no reported decisions dealing with that provision, Saskatchewan's Court of Appeal considered a similar *Securities Act* provision in the context of a criminal proceeding,<sup>36</sup> ruling that admissibility for "all purposes" includes the purpose of proving the truth of the statement. Not every province's securities legislation contains such a provision respecting IDA decisions, but some jurisdictions do have similar provisions respecting Securities Commission decisions, and reference should be made to the 'General Provisions' section of local legislation.

In answer to the questions posed at the beginning of the paper, it seems clear that provisions found in relevant enactments concerning:

- the privacy or confidentiality of the hearing (ie: mandating that it be held "in-camera");
- the compellability of a witness; and
- the prohibition against the use of incriminating answers in later civil proceedings

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<sup>35</sup> *The Securities Act, 1988*, S.S., 1988-89, c.S-42.2.

<sup>36</sup> *R. v. Ashby* (1982), 14 Sask.R. 389 (C.A.).

are signposts which signal that a strong case may be made against the common law duty to produce transcripts or, at the very least, against their admissibility at trial.

Jurisprudence indicates that the **findings** of the disciplinary tribunal will generally be admissible at trial, subject to weight considerations (unless the statute is remarkably strict). Furthermore, while some authority does suggest that hearing **transcripts** may not always be admissible, the *Kenyeres* case stands out as suggesting that the defendant's transcripts *will* be admissible at trial, subject to relevance considerations.

It will be worth watching as new cases emerge on the issue of the admissibility of transcript evidence. As a rule, it is suggested that statutes protecting health care professionals tend to fall on the more restrictive end of the spectrum, in specifying that many elements of a hearing will be off limits in civil proceedings. The *Sawchuk* decision does, however, seem to be more favourable for the defendant than those featuring doctors from other jurisdictions. This is perhaps explained by the strictness of Saskatchewan's *Medical Profession Act*. It obliges witnesses to answer questions, while simultaneously protecting them from having to testify about the proceedings at trial. As such, *Sawchuk* may be distinguishable on that basis.

We would also surmise that arguments for the production of the **entire disciplinary file** will likely be heeded by Courts where there is no express statutory prohibition barring such production. In addition to the *Kenyeres* decision, the *Lafreniere* case indicates that a complainant can, almost certainly, get production orders for their own transcripts, and for the transcripts and reports generated by their own experts.

While a disciplinary committee's findings are almost invariably going to be admissible at trial, they are rebuttable and should not be afforded much weight, since they were based upon a different body of evidence than that being considered at trial. The *Spectra* and *Etienne* decisions illustrate this recurring theme, and we see it again in *Kenyeres*, applied to the standard of care issue. Courts are clearly mindful of the risk of prejudice to the professional in jury trials, particularly where the statute does advocate confidentiality for members under review. This was clearly the concern in *Sawchuk*. Unfortunately, the judiciary's willingness to issue warnings about the slight weight to be afforded to evidence of committee's findings when it **is** admissible does little to alleviate the risks of leaving such a nuanced consideration to the jury.

Finally, the *Howe* decision suggests that the strategy of trying to have disciplinary proceedings stayed, pending resolution of the trial is not likely to succeed in doing more than delaying the inevitable.

Is there any strategic advantage to resisting a negotiated resolution to the disciplinary process? There is no clear answer. However, negotiated resolutions are often tantamount to an agreed statement of facts (which may, in turn, be read to include admissions). Given a choice, many professionals simply do not wish to risk career suicide by ignoring an opportunity to settle a complaint. Further, allowing a disciplinary ruling to be made, simply to bolster a civil defence does seem to undermine the very purpose and function of professional liability insurance.

The simple fact is that a plea or an acknowledgment of fault will make it more difficult to mount a civil defence. This should be carefully weighed against the perceived advantages of retaining a measure of control over the imposition of sanctions by the professional body and resolving the complaint process promptly. The trade-off will have to be assessed in light of the facts of each particular case.

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