

The disciplinary process for chiropractors in the Province of Ontario: a review

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The purpose of this manuscript is to review in a generic sense, the process of discipline of chiropractors in the jurisdiction of Ontario and to raise the consideration currently extended to various provisions set out in the Regulated Health Professions Act, 1991, as amended (RHPA). Various procedural logistics are reviewed in the context of procedural fairness and due process. While authority rests with the law and the courts, the implementation of discretionary initiatives may not be in the interests of parties to the disciplinary process. Discipline cases reported in the annual report of the College of Chiropractors of Ontario (CCO) for 1994 to 1996 are reviewed and various principles and procedures are discussed.
(JCCA 1998; 42(1):46-55)

KEY WORDS: chiropractic, discipline, regulation, misconduct, self-governance.

Cet article vise à dresser un bilan général du processus de discipline des chiropraticiens dans la juridiction de l'Ontario et à soulever les motifs présentement étendus à différentes dispositions prévues dans le Regulated Health Professions Act de 1991, tel qu'amendé (RHPA). Différentes formalités de procédure sont examinées dans le contexte de l'équité procédurale et du processus de justice. Alors que le gouvernement s'appuie sur la loi et les tribunaux, l'application d'initiatives discrétionnaires pourrait ne pas servir les intérêts des parties engagées dans le processus disciplinaire. Les cas de discipline mentionnés dans le rapport annuel du College of Chiropractors of Ontario (CCO) pour les années 1994 à 1996 sont examinés et certains principes et procédures sont abordés.
(JCCA 1998; 42(1):46-55)

MOTS CLÉS : chiropratique, discipline, règlement, inconduite, autonomie.

Introduction

In Ontario, the profession of chiropractic along with 23 other health professions is delegated the privilege of self governance as determined under the Regulated Health Professions Act, 1991, as amended (RHPA).¹ The RHPA sets out provisions which allow enforceability of various statutory duties. Among the many duties outlined are:

- 1 the registering of members who meet the minimum entry requirements, and
- 2 the discipline of members when certain actions or behaviour are viewed as below the acceptable standards.

When members become involved with the disciplinary process, they quickly learn of the intricate, complex and expensive paths to resolution of disputes. The logistics of these paths to resolution are at times difficult in which to manoeuvre. Both parties in the discipline process should be fully cognizant of the intermediary steps and their consequences, in any effort to resolve outstanding issues before an administrative tribunal. The purpose of this paper is to consider various procedural logistics and review them in the context of procedural fairness and due process. The major elements of the discipline process are outlined below. For the purposes of this paper, the various provisions of the Regulated Health Procedural Code, Schedule 2 to the RHPA (the Code) to which discussion pertains, will be cited by section for ease of reference.

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Current discipline process

A matter coming to the Discipline Committee, either misconduct or incompetence or both, may be referred from either the Complaints Committee or the Executive Committee of the College of Chiropractors of Ontario (CCO). If the referral source is the latter, the Executive Committee may in certain circumstances direct the Registrar to suspend or impose terms, conditions or limitations on the member's certificate of registration as an interim order if the Executive Committee is of the opinion that the member's conduct exposes or is likely to expose his or her patient to harm or injury (s.37).

The proceedings of discipline are commenced when the charges of professional misconduct or incompetence, or both are formulated and the Registrar signs the Notice of Hearing. The Chair of the Discipline Committee selects a panel from among the members of the Committee to hold a hearing of the allegations of a member's professional misconduct or incompetence referred to the Committee by the Executive or Complaints Committee. The College and the member against whom allegations have been made are the parties to the hearing. **The complainant is a witness and not a party.** A discipline hearing is generally open to the public, although there is a provision which allows for the exclusion of the public when for example, matters of public security or personal safety are involved (s.45 of the Code). The prosecutor leads evidence and bears the burden of proof. A member is innocent until proven guilty. The prosecutor must prove that the allegations in fact occurred, that the standard of proof had been met and that the behaviour or act proven constituted misconduct or incompetence. The standard of proof required in administrative hearings is that the evidence must be clear, convincing and cogent.²

At a hearing of the allegations, a panel of the Discipline Committee may make findings which must be based exclusively on the evidence admitted before the panel. A panel may find a member has committed an act of professional misconduct if for example, the member has been found guilty of an offence that is relevant to the member's suitability to practise the profession (i.e. perhaps fraud or sexual assault) or the member has committed an act of professional misconduct as defined in the regulations (i.e. poor record keeping or dishonourable conduct) (s.51 of the Code). In Ontario, the professional misconduct regulation of the CCO has 33 separate provisions.³ A panel may

find a member to be incompetent if the member's professional care of a patient displayed a lack of knowledge, skill or judgement or disregard for the welfare of the patient of a nature or to an extent that demonstrates that the member is unfit to continue to practice or that the member's practice should be restricted (s.52 of the Code).

In making a finding of professional misconduct or incompetence, a panel may direct the Registrar to revoke, suspend, impose specified terms, conditions and limitations on the member's certificate of registration, or reprimand the member, fine the member up to \$35,000 dollars, or require the member to reimburse the College for funding provided for therapy and counselling for a patient whom the member sexually abused (ss.51.2 of the Code). In an appropriate case, as a means of cost recovery, a panel may further require the member to pay all or part of:

- 1 the College's legal costs and expenses,
- 2 the College's costs and expenses in investigating the matter
- 3 the College's costs and expenses in conducting the hearing (s.53.1 of the Code).

If a panel is of the opinion that the commencement of proceedings was unwarranted, it may make an order requiring the College to pay all or part of the member's legal costs (s.53.1 of the Code).

The CCO has a statutory duty to publish a panel's decision and its reasons, or a summary of its reasons in its Annual Report (s.56 of the Code).

This overview, while somewhat simplistic, constitutes the major elements of the current disciplinary process in place and implemented by the CCO.

Issues

In this paper, various provisions of the RHPA which directly impact the parties to a disciplinary proceeding are reviewed and relevant issues are discussed in an effort to better inform the members of the profession at large who for the most part have not interfaced with the disciplinary process. Outlined are 14 separate issues that should be considered by the profession at large in an effort to determine whether these issues are professional issues, and if so whether consensus exists and how that consensus relates to protecting the public interest.

The information provided in table 1 was sourced from the Annual Reports of the CCO for 1994, 1995 and 1996

respectively, and as such is clearly in the public domain. During this three year period, 17 cases were reported as having undergone the formal disciplinary process. Allegations of sexual abuse involved 11 cases, fraud in 2 cases, record keeping infractions in 2 cases, unlawful importation in 1 case and excessive treatment in 1 case. Only 4 (23.5%) members were found innocent, and of the remaining 13 cases, 3 (17.6%) members were found guilty while 10 (58.8%) pled guilty. The 7 cases (4 + 3) where the member pled innocent and the facts were in dispute represented 41.1% (23.5 + 17.6) of the cases. Joint submissions with an agreed statement of facts were made with respect to the plea in 7 of the cases and with respect to the penalty in 8 of the cases. Allegations ranged from recordkeeping and excessive treatment infractions to fraud, unlawful importation and sexual abuse. Penalty impositions in-

cluded reprimand, suspension, undertakings, revocation, remediation and cost recovery, as well as the imposition of terms, conditions, and limitations on a member's certificate of registration.

The interesting elements of each case are charted in a generic sense only. The term sexual abuse was interpreted in a manner consistent with the definition that appears in subsection 1(3) of the Code.

Issue analysis

Issue #1: Registrar's power of investigation

If the Registrar of CCO believes on "reasonable and probable grounds" that a member has committed an act of professional misconduct or is incompetent, the Registrar, with the approval of the Executive Committee, may ap-

Table 1*: Discipline cases reported in 1994, 1995 and 1996

| Case number | Allegation | Determination | Disposition | Penalty imposition | Disposition |
|-------------|--|----------------|------------------|---|------------------|
| 1 | fraud | pled guilty | submissions | - suspension | submissions |
| 2 | sexual abuse | found guilty | submissions | - reprimand - suspension - remediation | submissions |
| 3 | sexual abuse | found guilty | submissions | - reprimand - suspension - remediation - cost recovery | joint submission |
| 4 | sexual abuse | pled guilty | joint submission | - reprimand - suspension - remediation - cost recovery | joint submission |
| 5 | excessive billing, treatment, and xray | pled guilty | joint submission | - reprimand - suspension - cost recovery - undertaking | joint submission |
| 6 | sexual abuse | pled guilty | joint submission | - reprimand - revocation - cost recovery | joint submission |
| 7 | sexual abuse | found guilty | submissions | - reprimand - suspension - remediation - term imposed on certificate | submissions |
| 8 | sexual abuse | found innocent | submissions | | |

point an investigator (ss.75(a) of the Code). The investigator, for the purposes of the investigation has all the powers of a commission under the Public Inquiries Act, and may take evidence under oath during an investigative hearing (s.76 of the Code). The Supreme Court of Canada has characterized reasonable and probable as "the point where credibly based probability replaces suspicion".⁴ Accordingly, the Registrar should exercise his/her discretion carefully after having considered all the circumstances.

Issue #2: Approval of referral to Discipline Committee

In those circumstances where the Complaints Committee or the Executive Committee has referred specified allegations of a member's conduct to the Discipline Committee,

the author's view is that some consideration should be given to introducing an additional mechanism of allegation review. When a referral is made, the Registrar with the assistance of the prosecutor drafts the Notice of Hearing and formalizes the commencement of the discipline proceeding, based on the specified allegations referred by the Executive or Complaints Committee. Most Colleges have a statutory committee review the allegations before they are finalized. However, in order to minimize the remote possibility of Registrars and prosecutors who may lose their objectivity in their effort to prepare for and eventually gain a conviction, perhaps further consideration should be given to charge screening. In referring a matter to the Discipline Committee, some Colleges have implemented a charge screening process as a procedural safeguard. An example might have a statutory committee

| Case number | Allegation | Determination | Disposition | Penalty imposition | Disposition |
|-------------|----------------------|----------------|------------------|---|------------------|
| 9 | record keeping | pled guilty | submissions | - reprimand | joint submission |
| 10 | record keeping | pled guilty | joint submission | - reprimand - remediation | submissions |
| 11 | unlawful importation | pled guilty | joint submission | - reprimand - suspension - cost recovery - undertaking | joint submission |
| 12 | sexual abuse | found innocent | submissions | | |
| 13 | sexual abuse | pled guilty | submissions | - reprimand - revocation - cost recovery | joint submission |
| 14 | sexual abuse | found innocent | submissions | | |
| 15 | sexual abuse | found innocent | submissions | | |
| 16 | sexual abuse | pled guilty | joint submission | - reprimand - suspension, - cost recovery, - remediation, - condition attached to certificate | submissions |
| 17 | fraud | pled guilty | joint submission | - reprimand, - suspension, - cost recovery | joint submission |

*Source: College of Chiropractors of Ontario (CCO) annual reports 1994, 1995, and 1996

review the actual wording of the notice of hearing because it is not as close to the case. A further example of charge screening may call for a second lawyer other than the prosecutor, to approve the referral as an additional mechanism to ensure procedural fairness, thereby reducing the potential for unnecessary hearings and conserving resources in a fiscally responsible manner. Such a procedure or person is more distant from the investigation and preparation of the case for prosecution. If there is no reasonable expectation of the discipline panel making a finding, then consideration should be given to withdrawing the allegations and finding an alternate solution.

Issue #3: Attaching terms, conditions and limitations to a member's certificate of registration

Currently under the RHPA, the Registration, Discipline, and Executive Committees may impose terms, conditions or limitations on a member's certificate of registration. There are procedural safeguards entrenched in law that are consistent with due process in order to prevent unfair practices in dealing with member's rights. However, some regulatory boards have or are considering by way of regulation, granting the Quality Assurance Committee such powers even without the member having a hearing prior to such impositions. Regulators argue that such procedure assists with enforceability issues and is appropriate because it is not punitive and intended to require participation and remediation where indicated. Some may argue this is prejudicial and contrary to natural justice, and that every member has a right to a hearing prior to any imposition on the member's certificate of registration. Administrative tribunals that are empowered to impose sanctions on a member's certificate of registration have a duty to approach issues without bias and to give the member a full opportunity to be heard. Members have a right to a hearing, a right to cross examine, a right to examine all the evidence, a right to lead evidence and to be represented by counsel.

Cases 7 and 16 have terms, conditions or limitations attached to the member's certificate of registration as a component of the penalty, imposed by the Discipline Committee.

Issue #4: Alternative Dispute Resolution process (ADR)

In an effort to resolve certain types of disputes through a mechanism other than formal disciplinary hearings, parties may agree to undertake mediation as a means to resolve matters. Participation is voluntary and the process is co-ordinated by an impartial mediator who facilitates both parties to be effective in their negotiations. A party may withdraw at any time during the discussions and in this event, the matter would proceed to the formal discipline hearing. The discussions of negotiation are made on a without prejudice basis. The College continues to be a party to the negotiations and ensures that the protection of the public interest is maintained. Parties may communicate directly or through the mediator and should an agreement be reached, a Memorandum of Agreement is approved by the parties.

There are distinct advantages to ADR. The complainant has an opportunity to meet face to face with the doctor. The complainant becomes a participant in the process as opposed to a witness and may satisfy specific concerns by including specific components to an agreement. This may provide a more meaningful settlement to the complainant. For example, the complainant may have his/her needs satisfied by meeting face to face and having the doctor apologize, or negotiating a remedial component to address a specific communication or clinical standards issue. The Discipline Committee in discharging its duty, may approve those negotiations which generate a successful ADR outcome. ADR saves valuable time and resources. At the same time its creativity introduces education and remediation. Consideration should be given to implementing ADR at those times which are in addition to the interim period between the Complaints Committee investigation and the initiation of a discipline proceeding.

Issue #5: Rules of Procedure of the Discipline Committee

Recent amendments to the *Statutory Powers Procedure Act*⁵ have allowed administrative tribunals greater flexibility and the opportunity to increase efficiency and reduce costs while at the same time preserving procedural fairness. CCO plans to implement such Rules with respect to motions, prehearing conferences, disclosure and electronic hearings. The Rules must be consistent with the governing legislation. Their purpose is designed to enable

settlement, to narrow the issues, to agree on evidence or to agree on the scheduling of the hearing. Each regulated profession most likely will have divergent, or similar but distinct, Rules of Procedure. Strong arguments can be made by regulators that the discipline process viewed in the context of a civil proceeding allow for greater disclosure provisions. Appropriate advocates should consider whether unwarranted erosions of defendant's right will occur with such rules, and whether the parties view the disciplinary process as similar to a civil or criminal process.

Issue #6: Notice of Hearing

A discipline proceeding is commenced when allegations are formalized and a Notice of Hearing is signed by the Registrar. The question arises as to who is drafting the notice of hearing with the "specified" allegations. Is it the Complaints Committee, the Executive Committee, the Registrar, or the prosecutor. The purpose of the prosecutor may be to gain a conviction based on the allegations investigated and referred to the Discipline Committee by the Complaints Committee, or the Executive Committee. Some would argue that this purpose is separate and distinct from the purpose of seeking the truth. Those specified allegations which warrant a referral to Discipline should serve as the basis for the Notice of Hearing. If prosecutors and/or Registrars formulate the Notice of Hearing, one may argue that there is an incentive to load the charges or broaden the allegations in order to gain a conviction and perhaps force a plea bargaining process. Prosecutors however, would disagree that their role is to gain a conviction, and would argue instead, that their duty is to lead all of the credible evidence in support of the allegations while demonstrating fairness to the member.

Issue #7: Panel Selection and the Chair of the Discipline Committee

Section 38 of the Code sets out that the Chair of the Discipline Committee selects a panel to hold a hearing. A panel is composed of at least three and no more than five persons. At least two must be public representatives, and at least one must be a doctor. If a panel of three were selected by the Chair, as is permitted by the legislation, the composition of a panel may be two public representatives and one doctor. Given this circumstance, one may argue that the case is not being heard by a panel of one's peers. The chair of the Discipline Committee could be a public

representative, as could the chair of the Executive Committee or any statutory and non-statutory committee. The governing legislation and by-laws of the CCO allow for this provision. The chair of the Discipline Committee has a discretion to select a panel to hear a case. If in his/her discretion, the chair continually chose panels of three as is expressly provided by statute, one could argue that this detracts from the principle of self regulation or the principle of peer review.

Issue #8: Joint submission process

In those circumstances where all of the issues are in dispute and the parties cannot agree on the facts, the prosecutor, because he/she bears the burden, must prove the allegations to the standard of proof. The proven allegations must constitute professional misconduct or incompetence. In this context, the process may become exhaustive both in terms of resources and expense. Plea bargaining is a part of the disciplinary process. Member's may agree to plead guilty to certain allegations, if the prosecutor will withdraw other allegations and perhaps recommend a lesser penalty as well. Joint submissions with respect to penalty imposition are also common. Given the nature of the process and the inherent emotional and economic burdens, it is conceivable that in an effort to bring closure to a matter, a party to the proceeding may agree to such circumstances. It remains open to a Discipline Panel whether to accept a joint submission or hear the evidence itself in order to satisfy any concerns related to the public interest.

In the reported cases, 7 had joint submissions with respect to the plea, and 8 cases had joint submissions with respect to the penalty.

Issue #9: Penalty imposition

In examining the issue of punishment appropriate for a doctor, consideration should be given to effectiveness and mandate. Regulatory agencies are charged with the statutory duty of protecting the public interest, a mandate which in the view of some, is separate and distinct from the concept of punishment. Protecting the public interest and punishment are not competing principles applied to similar circumstances. The purpose of self regulation is not to punish, but to protect the public interest. This is accomplished by maintaining high professional standards.

In the author's view, the prime directives which drive

administrative tribunals should be:

- 1 setting specific deterrents to the particular member,
- 2 setting general deterrents to the profession at large, and equally important
- 3 doctor remediation

Penalty imposition should satisfy these three constituent elements. Any penalty must set a general deterrent to the profession at large, a signal that sets an expectation of conduct, a standard. As well, there must be a specific deterrent to the practitioner to ensure that this type of behaviour is unlikely to occur again. Thirdly, there must be a rehabilitative or remedial component to the penalty. This allows for the public interest to be protected and is a duty that squarely falls within the mandate of the regulatory agency of the profession. Punishment per se should not be an element to the penalty aspects of the proceeding. For those infractions that give rise to circumstances that are beyond the mandate of administrative tribunals, the civil and criminal justice systems are available to those parties wishing to punish doctors. That simply is not the role of an administrative tribunal in the health field.

The author does acknowledge that in certain circumstances, the Discipline Committee may conclude that the member may not need remediation, or that the member cannot be remediated and that revocation is required.

In the cases reported, 6 have a remediation component.

Issue #10: Recovery of Costs

If a panel is of the opinion that the commencement of proceedings was unwarranted, it may make an order requiring the College to pay all or part of the member's legal costs (s.53 of the Code).

Section 53.1 of the Code provides that in an appropriate case, a panel may order the doctor to pay all or part of the College's legal costs and expenses, as well as the costs and expenses of investigating the matter and conducting a hearing. One may argue that such a provision provides the basis or incentive to find the doctor guilty in order to pay for the process. This may be perceived as contrary to procedural fairness and introduces apprehension of bias, particularly if one argues that professional regulators are experiencing severe financial restraints. Some view cost recovery as a reimbursement and not a penalty. However, the Supreme Court of Canada accepts the principle of cost recovery by self-regulating discipline committees as being

unlikely to create a reasonable apprehension of bias.⁶ In the cases reported, 8 cases have cost recovery elements which totalled \$53,500 dollars.

Table 2 attempts to outline the costs incurred in the discipline process, but the information in the annual reports is scanty. In addition to the costs recoverable under section 53.1, there are other areas to consider. The Chiropractic Review Committee (CRC) may recommend that OHIP related costs be recovered. For those cases of concern in the respective time period, the annual reports list an amount of \$60,263 dollars. In addition, other third party payers may be reimbursed as part of a penalty imposition. The legal costs of the proceedings, themselves borne by the parties, both the College by way of the prosecutor and the member by way of defence counsel to the proceeding, are not quantifiable, but with lengthy proceedings are estimated to be substantial. Regulatory agencies experience some difficulty in knowing before the hearing whether the allegations are true or not and perhaps such costs are the price to be paid for the privilege of self-regulation. When the facts of a case are all in dispute and the evidence required falls short of a reasonable expectation of a disciplinary finding, fuller consideration needs to be given to a fiscally responsible and resource driven venue. Remedial costs are those costs incurred by the member, in order to satisfy the Discipline Committee in terms of correcting a communication problem or a clinical deficiency and depending on the context can be expensive for the member. In addition, provisions in the RHPA allow for fines of up to \$35,000 dollars.

For those members whose conduct or competence has fallen short of the standards and are guilty, the public interest must prevail. The disciplinary process and the hearing can be very difficult and traumatizing experiences for complainants and witnesses, in terms of anguish, emotional, physical or psychology trauma that may have been imposed upon innocent victims by a guilty doctor. But what of those doctors who are entangled in the disciplinary process and are innocent, whose reputations have been destroyed by the process, whose family lives have been adversely challenged, whose emotional and psychological well being have been drained. In the author's view, the process falls short at this stage, although some would argue that section 53 is sufficient remedy to this issue. In one of the cases found innocent, the panel ordered the recovery of the member's legal costs from the College.

Issue #11: Publication of doctors name, city and hearing date

A discipline hearing is open to the public, subject to certain exclusions. If a panel was satisfied that public security, financial or personal matters, or personal safety were issues, it could make an order excluding the public from the hearing. Similarly, if a person involved in a criminal or civil proceeding could be prejudiced, it may order the hearing closed. The consideration given to this order must weigh the public's interest of hearings being open to the public, against the desirability of avoiding public disclosure.

However, prior to the actual hearing, when the Notice of Hearing has been served on the doctor months before, the matter now becomes public domain information. The regulator provides to the public on request, the doctor's name, the nature of the allegation, the city where the doctor practices and the date of the hearing. Some would argue that this is what professions must surrender in order to gain the privilege of self governance.

Public confidence in the process might be compromised if discipline proceedings were conducted secretly. The comparison of disciplinary proceedings to the criminal process which is public, raises Charter issues, particularly freedom of expression and freedom of the press.

Further consideration needs to be given to weighing the principle of public disclosure against the principle of "innocent until proven guilty". The process has procedural safeguards which may be implemented in order to protect the public interest. Clearly, the Executive Committee, has authority to make an interim order imposing terms, limitations, or conditions on the member's certificate of registration, if it is of the opinion that the conduct of the member exposes or is likely to expose his or her patients to harm or injury. On the other side of the equation, the publishing of names, cities, dates and allegations has the potential to devastate, damage reputations and psychological well being. The burden of proof rests with the College, and a member is innocent until proven guilty. Until that point in time is reached, one could argue proce-

Table 2

| Case # | Cost Recovery (s.53.1) | Third party Reimbursement (OHIP, Ins. Co.) | Criminal Conviction Fine | Legal Costs | Remediation Costs |
|--------|------------------------|--|--------------------------|-------------|-------------------|
| 1 | | \$20,742 | \$5,000 | | |
| 2 | | | | | |
| 3 | \$ 1,000 | | | | |
| 4 | 1,500 | | | | |
| 5 | 5,000 | 2,000 | | | |
| 6 | 20,000 | | | | |
| 7 | | | | | |
| 8 | | | | | |
| 9 | | 30,057 | | | |
| 10 | | 9,464 | | | |
| 11 | 1,500 | | | | |
| 12 | | | | | |
| 13 | 7,500 | | | | |
| 14 | | | | | |
| 15 | | | | | |
| 16 | 5,000 | | | | |
| 17 | 12,000 | | | | |
| Total | \$53,500 | \$62,263 | \$5,000 | | |

dural unfairness.

The annual reports under review list 4 cases or 23.5% as having been determined as innocent.

Issue #12: Cost to defend oneself

The nature of the process of discipline and the expense required to adequately defend oneself are enormous, particularly when all of the facts are in dispute. The process may begin with the receipt of a letter of complaint to the Registrar, or the appointment of an investigator by the Executive Committee, or a request from the Chiropractic Review Committee. The costs at the investigative and complaints levels may reasonably be anticipated to extend to \$10,000 dollars primarily for legal costs. The regulator may incur a similar expense, although no data is available to support such speculation. The further costs in preparing for the hearing and the costs for the hearings themselves depend on the nature of the allegations, the precedents, the experience of panel members, the skill of the legal counsels, and a host of other factors. Hearings may extend for lengthy periods of time and when 7 to 10 days are required, it would be reasonable to speculate that substantial costs, at times in excess of \$50,000, may be incurred by each party to the proceeding.

Currently Canadian Chiropractic Protective Association (CCPA) members may be eligible in certain circumstances to financial assistance up to a maximum of \$10,000 for legal expenses.

Issue #13: Parallel proceedings

In certain circumstances, given the nature of the allegations (i.e. fraud or sexual abuse), members may find themselves entangled not only with administrative proceedings, but also with civil and criminal proceedings. These three types of proceedings may be ongoing in parallel fashion, the timing of which may be juxtaposed or sequential. Several cases in the annual reports describe involvement in more than one proceeding. Case #3 describes that at the administrative level, the member pled not guilty, that the defence made no representations with respect to the uncontradicted evidence, and that criminal proceedings were still in progress. A plea of guilty, as opposed to being found guilty, at the administrative level, most likely would have facilitated an adverse effect at the criminal level. Members have a right to make a full defence, but the complexities of parallel proceedings may at

times bind such rights.

The standard of proof required at these three levels of proceedings are different. The standard in the civil proceeding calls for "a balance of probabilities". The standard in the administrative proceeding calls for "clear, convincing and based on cogent evidence". The standard of proof rises with the gravity of the allegations and the seriousness of the consequences. The criminal proceeding calls for "beyond a reasonable doubt", which is a higher standard. It is conceivable that a member convicted of misconduct by the administrative tribunal may not be convicted at the criminal level. Different evidence may be lead at the discipline hearing and evidence which is inadmissible at the criminal level may be introduced at the discipline hearing.

Pressures mount and rights are challenged when parties attempt to gain a conviction, or obtain information at the administrative level to use at the civil or criminal level. Many of the procedural safeguards available to persons charged with criminal offences are not available to members charged with misconduct or incompetence. However, members may abuse the disciplinary process in similar fashion. Discipline Committees may reduce this abuse by the implied undertaking rule, confidentiality provisions and making orders.

Issue #14: Training of Regulators

Having regard to the nature and extent of issues before regulatory agencies, the public and members of regulated professions have rights and remedies entrenched in law. The purpose of professional regulation is to advance the public interest, not the interests of the professions. The Health Professions Legislation Review (HPLR) concluded that "self regulation overall will be more accountable to the public and more open to public scrutiny and that health professionals will be treated more fairly, in accordance with contemporary standards of due process of law".⁷ In order to satisfy these issues,

- 1 registrars should clearly understand "reasonable and probable", an issue the courts still struggle with,
- 2 Complaints, Executive and Discipline Committee members should continually undergo training sessions to enhance their skills in investigating and adjudicating respectively,
- 3 Investigators should be trained in a manner consistent with recent court rulings related to liability and im-

proper investigations,

- 4 the effectiveness of regulators should be continually measured.

Generally, the members of a discipline panel do not possess the training and experience to assess the more complex legal issues in a case. While panel members have the benefit of independent legal counsel, his/her role is to advise the panel on procedural and legal issues only. Having such inexperience determine critical issues that have significant impact on the parties may be argued to be inappropriate even in the face of the safeguard of appeal. One need only look at legal complexities such as the law of similar fact evidence to argue whether non-legal minds can adjudicate properly.

Implementing quality assurance mechanisms with respect to the skill sets of regulators would enhance compliance with efficient and effective administration of due process and natural justice within the disciplinary context.

Summary

This paper attempted to review relevant and perhaps contentious provisions of the RHPA respective of the disciplinary process currently in place. The issues were reviewed in a generic sense and therefore would most likely equally apply to the other 23 professions regulated under the RHPA scheme. While the legislation was originally drafted with the intent of providing similar remedies to the public, the issues of procedural fairness and natural justice need to be revisited even in the face of the current proce-

dural safeguards framed within the RHPA. Process should not be a rigid concept, but should be a dynamic and responsive mechanism. Administrative tribunals have immense and significant powers which have considerable impact to the parties to a proceeding. While the principles of self governance are framed to protect the public interest, the disciplinary process within that framework needs to be clearly consistent with the principle of natural justice and due process.

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