DISCLOSURE:

THE LEGAL AND ETHICAL REQUIREMENTS IN PROFESSIONAL DISCIPLINE CASES

Andrew J. Heal

ANDREW J. HEAL, PARTNER
HEAL & Co. LLP

DISCLOSURE: THE LEGAL AND ETHICAL REQUIREMENTS OF THE PROSECUTION IN

Andrew J. Heal[1]

- **Pre-hearing and Hearing Requirements**

Production and discovery are not automatic rights of parties to proceedings before administrative tribunals, although production and discovery of an opposing party's document "will say" statements, reports and other information may be even more important in administrative tribunals than in court proceedings. This is particularly so with respect to proceedings that are discipline proceedings. Such information may consist of technical and complex reports, including expert reports opining as to the standard of care in the circumstance or investigative reports prepared during the investigation. From the defence perspective, such information can be crucial to effective witness cross-examination at the hearing. In addition, prior examination of reports and other documentation helps to narrow the issues once the hearing begins.

The right to production and discovery is often granted by statute. To determine whether or not the tribunal in question has jurisdiction to order production and discovery, examine the enabling statute and applicable regulations. If the statute endows the administrative tribunal with the powers of rights and privileges of the Ontario Superior Court of Justice, it may be interpreted to authorize the tribunal to make orders compelling productions of documents and discovery. Typically, this is a matter of discretion and an order on a preliminary basis by a pre-hearing panel does not necessarily bind the hearing panel.

[1] Andrew Heal gratefully acknowledges the assistance of Erin Chedd, student at law, in preparing this paper.

The usual remedy at a trial imposed against a party who has failed to produce documentation or evidence that clearly becomes relevant at trial is an adjournment for the party opposite to prepare together with costs often on a substantial indemnity basis necessitated by the adjournment for the late production. It is the exceptional case that results in a stay of proceedings or other such drastic remedy which can be granted under Section 24 of the Charter. Generally speaking, the type of administrative hearing in question will impact upon the disclosure required.[2]

This is to be contrasted with the investigative and discipline function of professional bodies such as the various health disciplines, legal engineering and accounting professions. Indeed, in *Howe v. The Institute of Chartered Accountants of Ontario* (1994),19 O.R. (3d) 483, the Ontario Court of Appeal declined to order production of a written report of a witness Johnson. The IACO argued that the member had already received full disclosure in the "will say" statement of Johnson as to the evidence he was to present on the charges to be heard by the discipline committee. The Chair of the committee sitting on the matter at the pre-hearing stage was of the view that the report was privileged, and contained irrelevant expressions about the investigation of the matter. The majority of the court disposed of the matter simply on the basis of disclosure being premature.

[2] For example, the Ontario Municipal Board ("OMB") while empowered under the *Ontario Municipal Board Act* to exercise all the powers of the Ontario Superior Court of Justice with respect to the production and inspection of documents, has specifically enacted rules under the Statutory Powers Procedures Act, R.S.O. 1990, c. S. 22 ("SPPA") section 25.1 relating to disclosure. These OMB disclosure rules routinely result in a pre-hearing conference order requiring the exchange of documents "will say" statements, and expert reports sought to be relied upon at the hearing well in advance of that hearing. It is unusual for blanket disclosure orders to be required, nor is a party required to list reports unfavourable to their case or other information that is not going to be led as evidence. In an Ontario Municipal Board hearing, the Board applies a public interest test rather than a private interest test in respect of planning matters. Usually a public planning body such as a local municipality and other planning regulatory agencies having jurisdiction over the matter will have circulated their views well in advance of a hearing, and much of the information they produce is already a matter of public record.

The SPPA now provides for orders for disclosure by the tribunal. Section 5.4 allows the tribunal which has made rules relating to disclosure (section 25.1) to make orders for the exchange of documents, the oral or written examination of a party, the exchange of witness statements and expert reports, the provision, of particulars, and "any other form of disclosure".

Other authors have suggested that if the tribunal is not subject to the SPPA, or has not made rules under Section 25.1 and the party has been unable to bring a motion for production and discovery before the hearing for lack of statutory power to do so, the tribunal could issue a subpoena *duces tecum,* if it has such power to issue subpoenas and the hearing may be adjourned to permit examination of the documents in question. [3]

The content of an administrative tribunal's requirements of procedural fairness and natural justice are not easily reduced to set principles. The requirements of natural justice and fairness depend on the circumstances of each particular case and the subject matter under consideration.

The fairness standard arose out of the context of police discipline proceedings when in 1978 the Supreme Court of Canada issued its judgment in *Re: Nicholson* (1978), 88 D.L.R.(3d) 671. Since that time, the courts and legislatures have increasingly recognized the existence of minimum procedural requirements which apply to administrative proceedings.

Prior to the decision of the Supreme Court of Canada in *Stinchcombe* v. *The Queen* (1991), 68 C.C.D. (3d) 1, there was no judicial or legislative recognition that those basic procedural safeguards included a right of document discovery and/or a broad right of disclosure.[4]

---

[3] Public Law 2002, Law Society of Upper Canada, Admission Course Materials.

[4] Alice Wooley, "The Stinchcombe Project: The Law of Disclosure in Canada (2002) 40 Alberta Law Review 717.

The decision of the Supreme Court of Canada in *Stinchcombe* analyzes the relationship between document discovery and procedural fairness. The decision has had a profound impact on judicial and legislative understanding of the importance of document discovery, particularly in the criminal law context, but also in administrative decision making. Several problems arise in application of the *Stinchcombe* model to administrative hearings, partly because the criminal law system is based on the traditional model of the adversary system (as is the civil law system), as opposed to the less adversarial system involving specialized and expert tribunals. In administrative law, principles of public interest are at play, not just in private interest, and in the case of the professions, the privilege of membership.

- **The Ruling in *Stinchcombe***

The ruling in *Stinchcombe* requires that the Crown prosecution must disclose all relevant documents to the defence, subject to a reviewable claim of privilege. The Crown, in cases following *Stinchcombe,* is at risk for failing to produce documents unless they are clearly irrelevant, and any documentation with a semblance of relevance ought to be produced.

The particular and philosophical justification for document discovery borrows from the rationale in civil litigation. Justice is better served by the elimination of surprise and by parties being prepared to address the issues on the basis of complete information of the case to be met. This echoes the underlying rationale for the procedure fairness doctrine developed in *Nicholson,* which in part is simply a restatement of the principles of natural justice. A person whose rights or interests may be affected should be informed of the case against him or her, and be given the opportunity to meet the case. Post *Nicholson*, the degree opportunity granted to meet the case against you depends on the nature of the administrative process. It can be an opportunity to

make submissions in writing, or may require a full oral hearing. In any event, these principles, at least in Ontario, have been codified in the SPPA.

Returning to the justification for *Stinchcombe*, disclosure of documents advances the search for truth. It is hard to justify a position that an administrative tribunal should not adopt a process consistent with advancing the search for truth. Where the application of *Stinchcombe* sometimes "trips up" administrative hearings is when criminal concepts of "full answer and defence" are applied. It certainly makes sense that there should be a high level of disclosure where penal sanctions are in play, or where the administrative tribunal in the case of discipline hearings for example, can revoke member's licence to practice or otherwise terminate their membership in the profession.

- **Maintaining Confidentiality in the Post *Stinchcombe* World**

In *Ontario (Human Rights Commission)* v. *Ontario (Board of Inquiry)* (1992), 115 D.L.R. (4th) 279 (Ont. Div. Crt.), the inquiry was investigating allegations of racial and ethnic discrimination against North Western General Hospital. In furtherance of the investigation and in reliance on *Stinchcombe* it ordered the Human Rights Commission to produce "all statements made by the complainants to the Commission and its investigators at the investigation stage". The Human Rights Commission challenged the production order saying the documents were subject to public interest privilege. The Divisional Court upheld the Board's production order in reliance on *Stinchcombe*. The obligation of the Commission counsel was to bring forward all credible and relevant evidence, rather than to obtain a conviction similar to the obligation on the Crown and criminal proceedings. Similarly, in *Markandey* v. *Ontario (Board of Opthomic Dispensers)* [1994] O.J. No. 484 (Ont. Ct. Gen. Div.), Justice Trafford found in the context of disciplinary

proceedings, that it was inappropriate for the Board of Opthomic Dispensers not to have disclosed, prior to or during the hearing, information with respect to an undercover investigation of the member. However, the lack of disclosure had been cured by full disclosure made in preparation for the appeal which was a trial *de novo*.

- **The Consequences of Ethical Lapses**

The *Markandey* decision of Trafford, J. was cited and applied by the British Columbia Supreme Court in another discipline proceeding *Hammami* v. *College of Physicians and Surgeons of British Columbia*, [1997] B.C.J. No. 1702. Failure to disclose in a timely manner to permit an investigation by the defence, or affecting other tactical decisions may be a failure of justice. The failure to make proper disclosure impacts significantly on the appearance of justice, and the fairness of the hearing itself. While these principles are of general application, there is a residual discretion in the prosecution. The prosecution should feel ethically bound to consider whether disclosure puts at risk persons who provide the prosecution with information and not disclose every document without further thought.

The fruits of the investigations which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. However, confidential information may be the subject matter of disclosure timing concerns.

The prosecutor must retain a degree of discretion. In *Stinchcombe*, Justice Sopinka said at pages 335-336

> "It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor

> must retain a degree of discretion in respect of these matters. The discretion, which would be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. This discretion would also extent at the timing of disclosure in order to complete an investigation."

The drastic remedy for failing to disclose can be seen from the lower court decisions in the *R .v. O'Connor* (1995), 68 C.C.D. (3d) (Supreme Court of Canada). In *O'Connor*, the trial judge had ordered proceedings to be stayed because of numerous failures by the Crown to comply with certain terms of a previous disclosure order. The Court of Appeal for British Columbia reversed on the grounds that the facts of the case did not warrant the extreme remedy of a stay. The Supreme Court of Canada by majority dismissed the further appeal. There was considerable diversity in the judgments in the Supreme Court of Canada in the *O'Connor* case. At issue in that case, were notes from treating psychologists of a victim of sexual abuse whose records were not arguably in the hands of the Crown.

The analysis that such records were "third party" records in my view supports a disclosure model which should apply to third party records in discipline prosecutions. The *O'Connor* model should apply to the arguably relevant records not in the hands of the prosecution. The *O'Connor* third party record model involves a two-step analysis: First, are the records likely to be relevant in the following sense. It is reasonably possible that the material requested in logically probative to the trial issue and second, if likely relevance is established, the court must engage in the balancing between the rights of the accused with the privacy rights of the person whose information is the subject matter of the records. (The Criminal Code of Canada has been amended specifically to provide statutory protection for such balancing in sexual assault cases, but the approach to third party records in still arguably applicable to other cases).

Ultimately, disclosure and lost evidence problems in *Stinchcombe* case, led to the Crown attorney calling no evidence at trial and to *Stinchcombe's* acquittal. A Crown prosecutor memorandum in 1988 mentioned that a witness Abrams may well have lied, although the Crown was unsure. The memorandum was disclosed in 1996, the police interviewed Abrams' lawyer, but he could not recall this discussion. In addition, the police had lost tapes of their interviews with Abrams. *Stinchcombe* claimed his ability to challenge Abrams' credibility was seriously impaired. The Crown apparently agreed, and called no evidence; and acquittals were entered.

The same factual matter however came forward in another forum before the Law Society of Alberta, and those discipline proceedings were themselves ultimately stayed by the Alberta Court of Appeal. *Stinchcombe* v. *Law Society of Alberta* [2002] A.J. No. 544. Stinchcombe's ability to challenge the credibility of Abrams was just as impaired for the purposes of the discipline proceedings, as the criminal ones. A similar result was reached in an Ontario case in *Gilbert* v. *Ontario (Provincial Police)*, [2000] O.J. No. 3521 (Ont. Crt. of Appeal). In the *Gilbert* case, the complainant was not fully cross-examined at the preliminary inquiry on her "recovered memory". Because the entire case for the prosecution before the tribunal depended entirely upon the transcript offered at the *Police Services Act* hearing in the unusual circumstances of the case, the Court of Appeal upheld the Divisional Court findings that a denial of natural justice would occur should the proceedings continue. The complainant had refused to testify.

Further in a recent case *Stanley* v. *Ontario (Health Professions Appeal and Review Board)*, [2003] O.J. No. 2196, the Ontario Divisional Court allowed a judicial review application and quashed the Board's decision confirming a decision by the Complaints' Committee that Stanley had performed an improper breast examination. The complainant had attended at an emergency

room complaining of rectal bleeding. She said Stanley told her she was probably full of cancer and examined her breasts which was not indicated and was done in an inappropriate manner. Stanley denied a breast examination took place. Credibility was clearly in issue and the Committee determined it would not sanction Stanley on the basis of the conflicting evidence alone. The Board determined the examination had occurred in reliance on its own expert, who concluded that the examination was not indicated. The expert opinion and details of the investigation were not provided to Stanley. The court unanimously found the entire process fell below the standard of procedure fairness required.

> "In our view, the entire process fell below the standard of procedural fairness required. The committee correctly decided that it could not determine matters of credibility and declined to do so. It then decided an issue of pure credibility on the basis of statements made by the complainant to others after the event. The review board said this approach was wrong but then proceeded to rely on that very same evidence to determine credibility. Having made this finding of fact, the committee and review board then relied on its own expert to say that the examination was not indicated. While this aspect may have been irrelevant to Dr. Stanley in light of his position that the examination had not taken place, it did alter the focus of the committee's inquiry without it's knowledge…here, a senior surgeon with a long, unblemished career stood to have his reputation tarnished. He was entitled to a basic level of fairness in the proceeding. The process including findings of credibility, secrecy and delay. The elements combined to deny Dr. Stanley the level of fairness to which he was entitled."

Similarly, section 8 of the Statutory Powers Procedures Act which requires pre-hearing disclosure of "reasonable information" where the good character propriety of conduct or competence of a party is in issue. Section 8 states:

> "8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."

Justice Laskin in his dissent in *Howe v. The Institute of Chartered Accountants (Ontario) supra* referred to section 8 as a "mere minimum requirement of disclosure" particularly where the proceedings such as discipline proceedings are near the judicial end of the spectrum of its administrative decision making. However, it is not an answer for the prosecution to "dump" disclosure on a member to satisfy the obligation of "reasonable information". In *Morris v. Royal College of Dental Surgeons of Ontario* (Unreported) Nov. 3, 1999, the Divisional Court held that while the College in that case gave substantial disclosure of the documents on which it relied, it is not for the accused professional to search through the prosecution's documents to seek out misconduct that might be relied on. Particulars are required of the acts intended by the College to be alleged as constituting the unprofessional conduct. One of two charges was quashed for want of particularity. The other charge was sent back to the Discipline Committee for re-hearing.

- **Practical Considerations**

The obligation on the prosecution is to ensure reasonable pre-hearing disclosure in discipline proceedings to ensure a fair process.

- The prosecution is at risk for failing to produce documents unless they are clearly irrelevant and any documentation of a semblance of relevance ought to be produced.

- The production of documents is no substitute for proper particulars in a Notice of Hearing.

- There is a degree of prosecutorial discretion such that disclosure can await the completion of investigation.

- If the investigative report or other evidence comes from a witness who is going to be testifying at a hearing, it is better to produce it.

- Keep your own set of notes with respect to facts to be proven and comments on witnesses' credibility, rather than sharing such thoughts with others. However, if you think a witness may well have lied, you have an obligation to bring that evidence forward to the tribunal to defence counsel.