

The Disciplinary Process

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Key words: professional association, discipline, competence, natural justice

SUMMARY

Presentation Theme:

Unfortunately in exercising the public responsibility to maintain a high level of competence in the surveying profession, professional associations on occasion must exercise their statutory authority to sanction the activities of some of their members. The disciplinary process is a judicial process and may have a serious effect on the rights of individual practitioners. In that regard it is essential that a disciplinary tribunal be cognizant of procedural fairness and ensure that they follow the rules of natural justice in dealing with such matters.

Abstract:

This paper will describe a normal disciplinary process and will outline some of the concerns and pitfalls that a disciplinary panel must be aware of when dealing with sanctions against a professional surveyor. The paper will present examples of disciplinary hearings and identify weaknesses and strengths in the processes followed. The paper will be based on disciplinary legislation and cases dealt with by the Alberta Land Surveyor's Association and other Canadian disciplinary tribunals.

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Discipline, however, in the eyes of the public is the most important duty of the profession – and public disbarment or cancellation of the license of a fellow professional is the most painful task that the profession carries out.

But it must be done. Abscission of an unethical or incompetent member is essential for the protection of the public generally and for all those who could be affected by that profession's work.

The right and responsibility of self-discipline to protect the public is the keystone of the self-governing profession and of the social contract between the profession and the public.

[Honourable Bette Stephenson, M.D.,
Ontario Minister of Education]

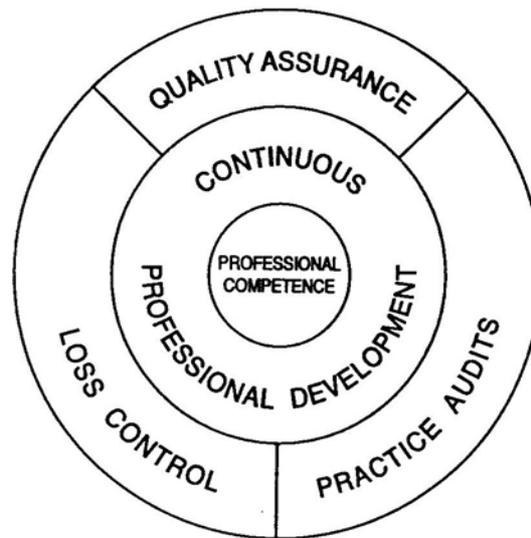
1. INTRODUCTION

The Alberta Land Surveyors' Association is a self regulating professional organization with a full gambit of professional responsibilities including establishing entrance requirements, registration and licensing of practitioners (both individual and corporate), and maintenance of competency. The responsibility for ensuring that licensed practitioners continue to meet a reasonable standard of competency is perhaps the most serious and most onerous of these tasks. The setting of entrance standards and ensuring that candidates meet those standards is one thing, ensuring that members continue to maintain high standards of knowledge, skill and judgment is another.

2. THE COMPETENCY PARADIGM

Professionals practicing on their own are by and large unregulated. There may be mandatory requirements for professional liability insurance, continuing professional development, regular reporting to the licensing body, and even practice audits but unless problems arise which clients either go public with, or file complaints to the professional body, the practitioner is bound only by his own personal responsibility and ethical conduct. He (or she) will likely not have an employer or supervisor watching over their every step and clients may not be in a position to judge whether the performance of the professional is unsatisfactory until a major problem becomes evident. At that point the clients interests may already have been compromised and it may be too late to obtain a satisfactory resolution of the problem. The problem may not even be evident until after the practitioner has retired or is deceased.

Quality assurance programs, continuing professional development and loss control seminars are great tools to assist practitioners in keeping abreast of new developments and honing their skills in procedures that they may be inexperienced in but even if these programs are mandatory there is no guarantee that individuals are participating or garnering the full benefit of this assistance. Practice audits on the other hand will give the auditor a better assessment of the level of competence of the individual and the breadth of his capabilities. The question sometimes arises when the competence of a practitioner is not up to standard and the individual is either unwilling or incapable of meeting those standards.



The Competency Circle

Practice review programs are intended to assist and coach practitioners as opposed to imposing penalties. There are however instances where it is necessary more serious action may be required to protect the public from an inadequate level of practice. In order to preserve their mandate as coach and not as a policeman a Practice Review Board will refrain from getting involved in sanctions but rather will refer the matter to a proper judicial process that is set up to adjudicate on disciplinary matters.

3. THE DISCIPLINARY PROCESS

There are a number of bodies and or individuals involved in a disciplinary process. A discipline action is only commenced as a result of a complaint. A complaint might come from a member of the public, a fellow practitioner or by way of a referral from the Practice Review Board. The complaint is directed to the Registrar whose responsibility is to examine the complaint and determine if it has substance and possibly to attempt to mediate the complaint between the parties.

When a complaint is made either by a member of the public, another surveyor or by way of a referral from the Practice Review Board, the investigated person has a right to be made aware of the complaint and the nature of the allegations. An independent investigation is usually necessary to gather sufficient data to either justify or dismiss the allegations. The registrar may refer the matter to the chair of the Discipline Committee for further action. The chair may either do an investigation himself or engage an investigator to do an independent assessment of the complaint. The investigation will produce a comprehensive report on the details of the issues complained of and any other matters that come to light as a result of the investigation. In conducting the investigation it is possible that further problems may become evident. The investigation is not however a witch hunt – it is intended to examine the allegations made in the complaint and to examine witnesses or to conduct field investigations to flesh out the matters being complained about. The conclusion of the investigation will normally result in a report setting out detailed findings of the investigation. The investigator is likely to be called as a witness and would be subject to examination and cross-examination.

An investigator must be totally independent and is required to submit a report on the facts with or without opinions but without recommendations. The chair of the Discipline Committee oversees the complaint and reviews the investigator's report to determine if the complaint should be referred to a formal hearing of the committee. If so he will prepare a detailed set of allegations and through the Registrar the investigated person is advised that the matter is either being referred to the Discipline Committee for a formal hearing or is being dismissed. If it is being referred to the Discipline Committee for a hearing the allegations to be heard will be set out in written format.

The investigated person will also be advised that he is entitled to retain independent legal advice and counsel to represent him at the hearing. A lawyer will also be appointed to represent the professional association in the hearing. If the Discipline Committee are of the opinion it is necessary they may also retain independent counsel to advise them on procedural matters, although this is not normally the case. A Discipline Committee has the discretion to retain legal counsel to provide procedural advice or assist in writing up the final decision. Counsel for the association and the investigated person may discuss the matters at issue and attempt to arrive at an agreed statement of facts to simplify the procedure and avoid spending an undue amount of time introducing evidence that is not at issue.

4. THE HEARING

At the hearing both the association and the investigated person are normally represented by counsel. A court reporter is retained to prepare a verbatim transcript of all testimony and argument. A panel of three members of the Discipline Committee are selected to hear the case. The panel is chosen by the chair being careful not to appoint anyone who has a potential conflict of interest or a perceived bias against the individual being heard. This can be somewhat difficult in a small association where everyone knows each other. It is important to choose persons who do not have a close relationship either as former business partners or strong competitors. The Chair does not sit on the panel or have any further involvement unless new members need to be chosen.

Being that the hearing is not being held in the court system, the hearing is usually somewhat informal although the chair of the panel must be careful to ensure that the proceedings offer the investigated person a fair opportunity to be heard and defend himself. The disciplinary panel has no prior knowledge of the matter until the hearing commences and the evidence is introduced. Discipline hearings are held in camera.

Adjournments are often requested, sometimes as late as the day of the hearing. The panel must decide if a request for an adjournment is reasonable and if it should be granted. The panel may also be challenged on procedural or jurisdictional grounds. Again they must decide whether these issues are legitimate, seeking legal advice if necessary. If they determine that the arguments for an adjournment, or procedural or jurisdictional challenges are not compelling they must be prepared to either give verbal reasons before the hearing continues, or address the issues in their written decision. Their decision on purely procedural or jurisdictional grounds can be challenged in the Court of Queen's Bench.

If there are witnesses, they must testify under oath and are subject to both examination and cross-examination. Members of the panel may also ask questions, although panelists must be careful not to show a perception of bias in their questioning or give the appearance that they have made up their minds before all of the evidence has been introduced.

Unlike a criminal trial the investigated person is a compellable witness and will be required to testify on his own behalf. This is an anomaly peculiar to professional disciplinary law. In the words of Justice Belzil of the Alberta Court of Queen's Bench:

The practice of a profession is a privilege. The law grants to certain groups a monopoly to carry on certain well-defined activities and imposes upon the members of those groups an obligation to prevent abuse and to ensure that the monopoly will be exercised for the public good. It is normal that those who enjoy these privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. This discipline is peculiar to them and is not part of penal law. In consequence of this, the right to silence preserved in Article 11(c) of the Charter does not apply to professional disciplinary law. One cannot claim in the same breath the so-called right to silence and the privileged status as a professional.

Fang v. The College of Physicians and Surgeons

The discipline process is a quasi-judicial matter which ultimately has the power to take away a practitioner's livelihood and to impose considerable financial hardship on that person or entity. It must therefore follow the general legal procedures like any trial. The process does not however take place in a court of law before a magistrate or a judge. The disciplinary committee is appointed by the governing council of the professional association and is made up of peers of the investigated person and often includes a lay member if the governing statute mandates that procedure. Despite the lack of formality it is necessary for the process to be

fair and observe the rules of natural justice. While largely unwritten the principles of natural justice include:

- A duty of procedural fairness
- The right to be heard
- The right to an unbiased tribunal
- The right to be represented by counsel
- The right to notice with particulars of matters to be decided
- Disclosure of material evidence
- The right to cross-examine witnesses
- The right to reasons

As with most hearings, once all the evidence is presented and witnesses examined and cross-examined, the lawyers representing each party present their closing arguments and the hearing is adjourned.

Despite the fact that the tribunal is composed of ones peers does not mean that the person is going to get anything less than a fair hearing. The disciplinary tribunal has a responsibility to the public to protect them from incompetent practice as well as an obligation to the member to ensure that he gets a fair hearing and if found guilty, to a fair and reasonable penalty. The disciplinary process must therefore meet meticulous standards to ensure that the practitioner receives a fair and just hearing in every regard.

The *Land Surveyors Act* sets out the scope of matters that are subject to disciplinary sanction. These matters are broadly referred to as unprofessional conduct and unskilled practice and are defined as follows:

- Any conduct of a practitioner that, in the opinion of the Discipline Committee,*
- (a) is detrimental to the best interests of the public,*
 - (b) contravenes a code of ethics of the profession as established under the regulations,*
 - (c) harms or tends to harm the standing of the profession of surveying generally,*
 - (d) displays a lack of knowledge of or lack of skill or judgment in the practice of surveying, or*
 - (e) displays a lack of knowledge of or lack of skill or judgment in the carrying out of any duty or obligation undertaken in the practice of surveying, whether or not that conduct is disgraceful or dishonourable, constitutes either unskilled practice of surveying or unprofessional conduct, whichever the Discipline Committee finds.*
- (2) If an investigated person fails to comply with or contravenes this Act, the regulations or the bylaws, and the failure or contravention is, in the opinion of the Discipline Committee, of a serious nature, the failure or contravention may be found by the Discipline Committee to be unprofessional conduct whether or not it would be so found under subsection (1).*

At the conclusion of the hearing the discipline panel meets in private to weigh the evidence and prepare the written decision. The decision must summarize the evidence and arguments

of the parties, make findings as to the facts, and reach a decision with reasons. Perhaps the most important part of the decision is to articulate the reasons for the conclusions they have arrived at. The panel may wish to have independent counsel review their written decision to ensure that it is complete and the rationale for the conclusions are clear and logical. Independent counsel will not however attempt to influence the decision of the panel.

If the panel finds the person guilty of one or more of the allegations, a further hearing is usually called to accept argument on the penalty. The panel must again deliberate and come up with a final order enunciating the penalty.

The Discipline Committee has the power to suspend or cancel a practitioner's membership, which is his license to practice. It may also issue a reprimand, a fine up to \$10,000., levy costs (which can include legal, court reporting fees and disbursements), restrict a members scope of practice, require him to practice under supervision, direct a practitioner to take counseling for a disability, or take specific courses of instruction.

5. APPEALS TO THE DECISION

Once the decision has been made and duly communicated to the investigated person, that person has 30 days in which to file an appeal of either the decision or the penalty or both. The appeal goes to the Council of the Alberta Land Surveyors' Association which is comprised of eleven members including a lay member. The Chair of the Discipline Committee is usually the Past President and therefore a voting member of Council. Normally he would either withdraw from the appeal or would refrain from adding any further evidence or comment that might influence the appeal. He may not however vote on a discipline appeal.

The appeal is based on the record of the discipline proceedings and counsel for both the appellant and the association are entitled to present their arguments. The Council on appeal must go through a similar process as the Discipline Committee although new evidence would not ordinarily be introduced - the appeal is on the record. The Council would issue a decision upholding, varying or overturning the decision of the Discipline Committee with regard to either the order or the penalty or both.

The appellant if unsuccessful on appeal to the Council also has the right of appeal to the Alberta Court of Appeal and ultimately to the Supreme Court of Canada. Several cases heard by the Alberta Land Surveyors' Association have been heard before the Alberta Court of Appeal and with very few exceptions have been upheld by the Court.

The responsibility of a disciplinary tribunal to articulate clear and cogent reasons cannot be over emphasized. The Supreme Court of Canada has recently made it abundantly clear that the purpose of the courts in reviewing a decision of a quasi-judicial tribunal is not to substitute their own decision for that of the tribunal unless the reasons for the decision are patently unreasonable. The Supreme Court has confirmed that the standard by which the courts should question a decision of a quasi-judicial tribunal is based on a reasonable standard. The Court made the point that this is a deferential standard and that the court is not

to substitute its opinion for that of the tribunal. So long as there is evidence on the record that would support the tribunal's decision, the court should not interfere even if it might have come to a different conclusion on the evidence. If there is a basis in the evidence for the tribunal's conclusions, the court should not interfere and the court should not substitute its view of the evidence in place of the conclusions of the tribunal. The appeal court must make its decision based on the record. If the record is not clear and the written decision is not logical and reasonable the court may very well overturn it. But if the reasoning is sound, the courts will be reluctant to tamper with the decision even if they would reason otherwise.

6. CONCLUSIONS

As Madame Justice Wilson of the Supreme Court of Canada commented “[m]embership in a profession should be in and of itself a guarantee of competence.” While it may not be possible to **guarantee** competence, a professional association has a responsibility when confronted with a potential challenge of the competence of one of its members to investigate and take appropriate action to safeguard the public. In doing so, however, it must observe a fair and just process in exercising its professional mandate.

In this regard members of the surveying profession are in a somewhat better position than most professionals as Brian Campbell has observed:

The surveying profession is one which, more than most other professions, comes into frequent contact with the law, from specific concepts such as property law, land registration systems and boundaries to the more philosophical legal concepts implicit in a self-governing profession.

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BIOGRAPHICAL NOTES

The Alberta Land Surveyors' Association (ALSA), established in 1910, is a self-governing professional association legislated under the Land Surveyors Act of Alberta, Canada. The Association regulates the practice of land surveying for the protection of the public and administration of the profession.

G. K. (Ken) Allred is a past president of the Alberta Land Surveyors' Association. He is also a Vice President of FIG. He was chair of Commission 1 - Professional Practice from 1994-98.

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