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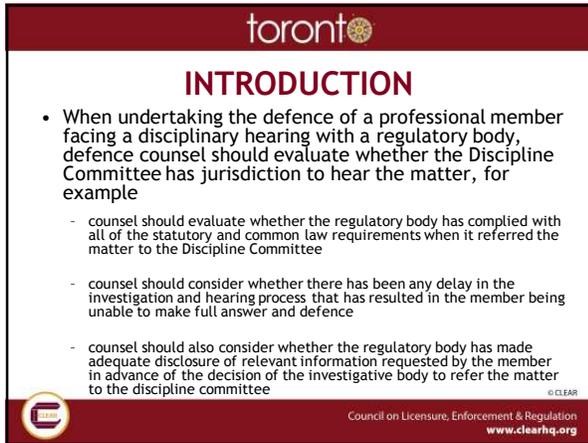
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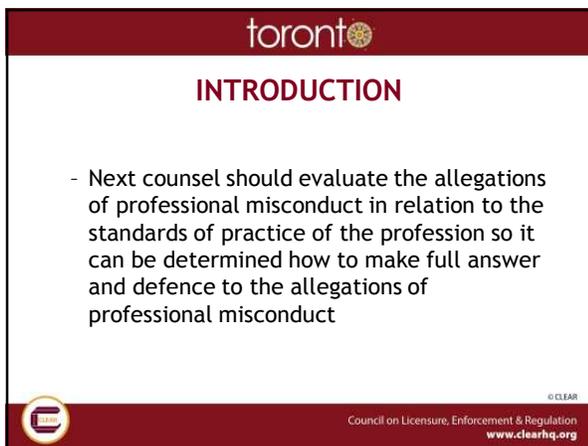
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### LOSS OF JURISDICTION

- There are a number of ways a Discipline Committee can lose jurisdiction over a matter. I will be discussing the following two:
  - A failure by the governing body to properly refer a matter to the discipline committee; and
  - Delay in the proceeding resulting in a denial of natural justice.

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### FAILURE TO PROPERLY REFER MATTER

- A professional regulatory body (or governing body) is a creature of statute.
- Before a governing body can subject a member to a professional disciplinary proceeding, it must strictly abide by the legislative requirements of its enabling statute and the common law when referring a matter to a discipline committee for hearing.
- A failure to do so will, in most cases, result in a loss of jurisdiction in the disciplinary proceeding.

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### FAILURE TO PROPERLY REFER

- *Kupeyan v. Royal College of Dental Surgeons of Ontario* [1982] O.J. No. 3376 (Div.Ct.):
  - a member of the profession is not to be subjected to proceedings before the discipline committee save for subject-matters of a complaint considered and referred, in relatively precise terms
  - It is not appropriate that the precise allegations be framed by the College after the matter has been referred to the discipline committee in some amorphous way

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### FAILURE TO PROPERLY REFER

- *Yar v. College of Physicians and Surgeons of Ontario*, [2009] O.J. 1017 (S.C.).
  - the jurisdiction of a discipline committee is restricted to considering acts of professional misconduct or incompetence properly referred to it. A discipline committee lacks the jurisdiction to go beyond matters properly before it
  - A loss of jurisdiction cannot be cured by a party's consent or by the provision of disclosure

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### FAILURE TO PROPERLY REFER

- At a minimum, a regulatory body should refer allegations or a matter to a discipline committee in relatively precise terms and ensure that those allegations, if proven, would constitute professional misconduct
- The referral of a member to discipline, or the referral of a bald allegation that the member is alleged to have committed professional misconduct, will likely not be sufficient to provide a discipline committee with jurisdiction to hear and consider the allegations.
- Defence counsel should carefully scrutinize the charging document (e.g. Notice of Hearing, Statement of Allegations) along with the decision referring the matter to the discipline committee to ensure that the matter has been properly referred and the allegations are consistent with the referral
- The subsequent provision of specific allegations or particulars by the regulatory body to the member will not cure the lack of jurisdiction.

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### DELAY CAUSING PREJUDICE

- *Blencoe v. British Columbia (Human Rights Commission)*
  - delay alone will not be grounds to stay the proceedings as an abuse of process at common law
  - in the administrative context, there must be proof of significant prejudice resulting in addition to an unacceptable delay
  - undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied.

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### DELAY CAUSING PREJUDICE

- *Harvey v. Law Society of Newfoundland*
  - A delay resulting in lost evidence is sufficient to result in a stay of proceedings even where the lost evidence only goes to the issue of credibility

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### DISCIPLINE COMMITTEE ONLY HAS JURISDICTION TO HEAR EVIDENCE RELEVANT TO THE ALLEGATIONS

- *Golomb v. College of Physicians and Surgeons of Ontario [1976] O.J. No. 1707 (Div. Ct.)*
  - the charge must be particularized to the extent that an accused must not be tried on a charge of which he has not been notified
  - It also follows that evidence ought to be confined to the charge against him
  - Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend

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### DISCLOSURE ISSUES

- The law is clear that regulators have *Stinchcombe* like disclosure obligations to a member whose conduct has been referred to a discipline committee and is facing allegations of professional misconduct
- However, a very recent decision of the Divisional Court held that some regulatory bodies have a duty to make disclosure at the investigation stage of the proceeding (see *Gopinath v. CPSO* ONSC 3143, May 26, 2014)

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### DISCLOSURE REQUIREMENT AT INVESTIGATIVE STAGE

- In *Gopinath v. CPSO*, the member brought an application for judicial review and requested that the court quash a decision of the Investigations, Complaints and Resolution Committee (“ICRC”) and that it order CPSO to make full disclosure of its investigation

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### *Gopinath v. CPSO*

- Facts:
  - In 2008, Chief of Staff of TEGH wrote to CPSO informing it of complaints of lack of collegiality against Gopinath, a physician at the hospital
  - CPSO appointed an investigator/physician to enquire into the conduct of Gopinath
  - During the investigation, Gopinath made several requests for disclosure and by January 2012 had received 1500 pages in disclosure that was represented by CPSO to be the entire investigative file
  - At the conclusion of the investigation ICRC required Gopinath to attend the College for a caution and to participate in the PULSE program at his expense

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### *Gopinath v. CPSO*

- Continued facts:
  - After the investigation, Gopinath learned that the CPSO investigator had conducted 13 interviews of hospital personnel which had not been disclosed to Gopinath

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*Gopinath v. CPSO*

- The Divisional Court held:
  - The standard of disclosure at the investigative stage has been held to require adequate notice to ensure a member has sufficient information to answer the case against him;
  - The extent of the duty of procedural fairness depends on:
    - the nature of the decision being made;
    - the nature of the statutory scheme;
    - the importance of the decision to the member affected;
    - the legitimate expectations of the person challenging the decision; and
    - the choices of procedure made by the tribunal.

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*Gopinath v. CPSO*

- The Court considered the powers of ICRC under the *RHPA* which included the power to refer to discipline, caution, refer for incapacity proceedings and take other actions and held that, given those possible outcomes, the decision made by ICRC was important
- The Court noted that ICRC was considering a recommendation that Gopinath attend PHP of PULSE and that given the multiple requests for disclosure and the extent of the disclosure he did receive he had a legitimate expectation that he would receive adequate disclosure to be able to respond

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*Gopinath v. CPSO*

- The Court held that based on their analysis, CPSO's duty of disclosure to Gopinath was at the high end of the continuum in the investigative phase
- The Court ordered the decision of ICRC to be set aside and that CPSO formally disclose the information related to the interviews within 20 days and that CPSO pay costs fixed in the sum of \$20,000 on the application

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### POST-REFERRAL DISCLOSURE ISSUE

- The standard is that the Regulator must make timely disclosure of all information that is or was in its possession or control that is not clearly irrelevant to the proceeding
- That disclosure obligation is not limited to any and all documents and statements obtained during the course of an investigation but would include any other information that may be relevant to the proceeding

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### DISCLOSURE ISSUES

- Disclosure obligations in professional disciplinary proceedings are a two-way street
- Defence counsel has an obligation to participate in the disclosure process by making timely and meaningful requests for disclosure
- Additionally regulatory bodies may have an obligation to disclose prior decisions of committees on matters at issue when requested by defence counsel to do so

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### PRE-HEARING CONFERENCES

- Regulatory Bodies have different rules respecting pre-hearing conferences (PHC)
- Depending on the Rules of the Discipline Committee:
  - a PHC may be mandatory or voluntary;
  - a PHC memorandum may or may not be required of the member;
  - there may be costs sanctions associated with a failure to properly participate in a PHC

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### PRE-HEARING CONFERENCES

- defence counsel attending a PHC must make a strategic decision on whether to attempt to settle issues at the PHC or keep their cards close to their chest for the hearing
- in circumstances where a tribunal's rules do not mandate the disclosure of documents or witness statements by the defence, counsel may give up a serious strategic advantage by setting out the strategy of the defence in advance of the hearing

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### CIVIL STANDARD OF PROOF

- Recently, the Supreme Court of Canada has cast at least a shadow on the standard of proof to be applied in professional disciplinary proceedings in Canada
- For years the leading case in Ontario on the standard of proof in professional disciplinary proceedings was *Bernstein v. CPSO* (1977), 15 O.R. (2d) 447 (Div. Ct.) which was believed to have held that:
  - there was a sliding scale standard of proof in professional disciplinary cases depending on the severity of the misconduct at issue and the seriousness of the consequences to the member
  - The court held that allegations against a member must be proven on "clear, convincing and cogent" evidence

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### CIVIL STANDARD OF PROOF

#### *F.H. v. McDougall* [2008] 3 S.C.R. 41

- In 2008, a unanimous decision of the SCC seemed to have settled the issue of the standard of proof in its decision in *F.H. v. McDougall*.
- In that case the unanimous SCC held that "... in civil cases there is only one standard of proof and that is proof on a balance of probabilities." "[E]vidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

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### CIVIL STANDARD OF PROOF

*Penner v. Niagara (Regional Police Services Board) [2013] 2 S.C.R. 125*

- However, a 2013 decision of the SCC in *Penner v. Niagara* has rekindled the debate on whether there is an intermediate standard of proof in professional disciplinary proceedings (i.e. between the “balance of probabilities” and “beyond a reasonable doubt”)

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### *Penner v. Niagara (Regional Police Services Board) [2013] 2 S.C.R. 125*

- I have summarized the following by borrowing from an excellent analysis of the case by Christopher Wirth and Edward Marrocco in a paper entitled *Penner's Paradox Continued: The Standard of Proof in Administrative Proceedings*:
  - In 2003, Penner (a police officer) was in traffic court in Niagara where his wife was on trial for failing to display licence plates
  - Penner repeatedly disrupted the trial by “chirping” during the testimony of the charging officer, Parker, causing the J.P. to address him from the bench
  - after his testimony a confrontation ensued between Penner and Parker during which the J.P. “fled the courtroom”

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### Summary: *Penner v. Niagara (Regional Police Services Board)*

- Penner was forcibly removed from the courtroom by police officers and subsequently arrested by Parker and another Niagara Region police officer
- In the course of the arrest Penner sustained injuries including scrapes, a black eye, bruised knee, sore elbows, wrists and ribs
- Subsequently, Penner brought a civil action against Parker et. al. and made a complaint against him under the *Police Services Act* for unnecessary use of force

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*Summary*  
*Penner v. Niagara (Regional Police Services Board)*

- Penner participated as a party in the PSA proceeding and acted as his own counsel
- In 2004, the complaint against Parker was dismissed and the dismissal was ultimately upheld by the Divisional Court in 2008
- The civil action remained dormant throughout the hearing and appeals of the PSA proceeding

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*Summary*  
*Penner v. Niagara (Regional Police Services Board)*

- In October 2009, Fedak J. struck the pleadings against police defendants in the civil action on a Rule 21 motion on the basis that the findings at the complaints hearing estopped Penner from re-litigating the same issues
- In 2010, the Ontario Court of Appeal dismissed Penner's appeal of Fedak J.'s decision
- Penner's position in the Court of Appeal is that issue estoppel should not apply as the PSA imposes a higher standard of proof on "clear and convincing" evidence
- There was no reference to *F.H. v. McDougall* in the Court of Appeal decision

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*Summary*  
*Penner v. Niagara (Regional Police Services Board)*

- Penner was appealed to the SCC where the majority held the following:
  - *"As the Court of Appeal recognized, because the PSA requires that misconduct by a police officer be 'proved on clear and convincing evidence' (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation on the issue of liability in a civil action where the balance of probabilities - a lower standard of proof - would apply. However this cannot be said in the case of acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be proven on the balance of probabilities.*

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*Penner's Paradox Continued:  
The Standard of Proof in Administrative Proceedings*

- In their paper, Wirth and Marrocco conclude the following:
  - "As a result, it is now open to question whether the standard of proof in police discipline hearings in Ontario is that of the balance of probabilities as per McDougall, or whether the Supreme Court's decision in Penner has once again created an intermediate standard of proof that is a heightened standard above the single balance of probabilities."

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*Penner's Paradox Continued:  
The Standard of Proof in Administrative Proceedings*

- However, the authors caution that *Penner*:
  - "... is intended to advance the law of issue estoppel, not standard of proof. As Laskin J.A. pointed out at the Court of Appeal stage of the matter - standard of proof had become immaterial in that case subsequent to the Hearing Officer's utter rejection of Penner's evidence. In other words, *Penner* is intended to be the next step in cases like *Danyluk*, not the next step in *McDougall*."

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*Penner's Paradox Continued:  
The Standard of Proof in Administrative Proceedings*

- Ultimately, the authors opine that *McDougall* remains the leading decision on the rejection of an intermediate standard of proof in professional disciplinary proceedings as it was not expressly overturned in *Penner*

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