

Accessibility of Discipline Decisions from Public Hearings

Registrar's Report to Council

October 1, 2007

1. Background

The Ontario College of Teachers recently initiated a review of its procedures for providing public access to Discipline Committee panel decisions following public disciplinary hearings.

From time to time, the College receives requests for access to decisions of Discipline Committee panels. Recently, some of these requests have been for copies of decisions where the Discipline Committee ordered either that the decision not be published in the College's official publication, *Professionally Speaking/Pour parler profession*, or that it be published without the member's name.

As a result of these requests, it became apparent there has been some inconsistency with respect to the College's practices in this area and that there was a lack of clarity with respect to the College's obligations as a regulatory body.

Through this review of our practices, it is the College's intention to develop an effective procedural framework for complying with our obligation to give public access to decisions of the Discipline Committee reached in public hearings that is transparent, consistent and understood by College stakeholders and the public.

2. Public Transparency Landscape

Canadians – and the governments they elect – want greater transparency in decision making by professions. Self-regulated professions, accordingly, are responding.

Some regulators face changes in their enabling legislation to ensure they provide the public with more information than they have in the past. Others, like the Ontario College of Teachers, are reflecting on their own practices and how they serve the public interest.

Recent events make one fact clear: governments will not be slow to force the issue for professions that do not respond to society's changing expectations.

In Ontario, for example, the media recently revealed the damage done to patients by health care institutions and medical regulators that did not provide adequate information about adverse outcomes and complaints or judgments against practitioners.

The provincial government acted swiftly, enacting the *Health Systems Improvement Act* in June. The Act sets minimum standards for the information that health care professions must provide to the public about disciplinary decisions against their members and allows professional colleges to share previously confidential information with other bodies in the public interest.

Similarly, the *Access to Justice Act* (2006) amended the enabling legislation of the Law Society of Upper Canada (LSUC). The Act requires LSUC to maintain a register of its members which would include a record of all terms, conditions, limitations and restrictions imposed on licences as well as all suspensions, revocations, abeyances or surrenders of licences.

LSUC's governing body recently voted to keep its discipline and conduct records permanently accessible to the public. It also decided that there were no circumstances in which a discipline or conduct record should be vacated after a period of time.

The court system is also grappling with the public's right to know. The provincial government has announced a series of changes that significantly improve access to information about court proceedings, ranging from sharply reduced access fees and same-day web posting of complete appeal court decisions to online broadcasts of appeal court proceedings.

Transparency is also a foundational piece of the provincial government's *Fair Access to Regulated Professions Act, 2006*. The Act, which received Royal Assent on March 1, 2007, aims to help ensure that registration practices for the professions are transparent, objective, impartial and fair.

The Act:

- sets out a general duty of fair registration practices
- sets out specific duties in the Fair Registration Practices Code
- provides for the appointment of a Fair Registration Practices Commissioner and creates the Office of the Fairness Commissioner
- establishes the Access Centre for Internationally Trained Individuals
- requires regulatory bodies to review their registration practices regularly and submit annual reports to the Fairness Commissioner
- gives the Fairness Commissioner the power to order compliance.

In March, the government appointed Ontario's first Fairness Commissioner to work with regulatory bodies to ensure that the credentials of internationally trained professionals are evaluated fairly and transparently. The Commissioner will oversee regular audits of regulatory bodies and submit an annual report to the Minister of Citizenship and Immigration on the implementation and effectiveness of the Act.

The Fair Registration Practices Code itself governs specific duties regarding information, timely decisions, responses and reasons, internal review or appeal, qualifications, assessment of qualifications, training and access to records.

In response, the College has initiated a review of its registration practices to help develop a regulation to ensure College registration and appeals practices reflect the requirements of the *Fair Access to Regulated Professions Act* and support the audit and reporting functions of the Office of the Fairness Commissioner.

Understanding that, it is useful to look at the first three of 33 conclusions of a discussion paper on *Open Courts, Electronic Access to Court Records, and Privacy* prepared for the Canadian Judicial Council:

- i. The right of the public to open courts is an important constitutional rule.
- ii. The right of an individual to privacy is a fundamental value.
- iii. The right to open courts generally outweighs the right to privacy.

As judicial proceedings become more transparent, it is becoming increasingly evident that the focus of the media and the public has shifted to the transparency of quasi-judicial proceedings like the disciplinary processes of professional regulators.

Teachers understand transparency, through report cards, parent interviews and EQAO results. They know what it means to account to colleagues, administrators, boards, parents, the public and, most importantly, to students.

So, too, the College is committed to accountability and transparency in fulfilling our ethical and legal responsibilities as we regulate the teaching profession.

3. Overview of Decision Inventory

The College maintains an archive of Decisions of the Discipline Committee issued since the establishment of the organization in 1997. The archive includes 355 discipline decisions in both English and French.

Of this total, the following group of decisions are worthy of note:

78	Deal with the withdrawal of a Notice of Hearing
19	The Discipline Committee ordered the member's name withheld in the College publication
14	The Discipline Committee ordered that only the member's initials be published in the College publication
11	The Discipline Committee ordered that the decision not be published in the College's official publication or did not address publication in the decision
10	The member was found not guilty
4	The member was found to be incompetent, but not guilty of professional misconduct

4. Research

In order to identify effective practices, the College surveyed 36 Ontario professional self-regulatory bodies with respect to their processes for making discipline decisions available to the public.

- Twenty organizations replied.
- Eleven of the 19 organizations are health colleges and are governed by the *Regulated Health Professions Act*.
- The other eight organizations are the Ontario Association of Architects, the Institute of Chartered Accountants of Ontario, the Ontario Professional Foresters Association, the Registered Insurance Brokers of Ontario, the Association of Ontario Land Surveyors, the Law Society of Upper Canada, the Association of Professional Engineers Ontario and the College of Veterinarians of Ontario.

The College also held four information sessions with various College stakeholder representatives from:

- parent organizations and private schools (June 5)
- trustee, supervisory officer and principal organizations (June 12)
- government representatives (June 18)
- Ontario Teachers' Federation and affiliates (June 20).

The representatives from each group were asked to consider these questions and provide comment:

- a) What are some of the critical issues for you and your community with respect to College Discipline Committee decisions?
- b) How should the College ensure that the public is aware of the College's procedures for making decisions accessible to the public?
- c) What are the appropriate venues for making decisions accessible to the public and how long should they be available?
- d) Should procedures be the same for all decisions – where, for instance, disciplinary proceedings have been held only partially in public; the Discipline Committee has made an order intended to restrict publication of information; or the Discipline Committee has ordered a summary of a decision in *Professionally Speaking/Pour parler profession* either without the member's name or with the member's initials?
- e) What information should be removed, when should it be removed, and by whom, from a full decision, in order to protect victims and/or witnesses? In many cases, witnesses or victims are minors. The Discipline Committee has ordered that victims be referred to by their initials and has ordered the non-publication of other information that may identify them. In addition to the inclusion of victims' actual initials, other information such as victims' birth dates is often included in decisions. But in cases where the school and/or geographic location in which the alleged events occurred are small, the inclusion of initials may be sufficient to identify the witnesses or victims.

- f) What are the appropriate procedures with respect to court-ordered publication bans? Specifically, would the Discipline Committee always note the existence of a court-ordered publication ban and would the College review the decision to ensure that the terms of the publication ban have not been breached?
- g) Should past decisions be available in searchable format so that individuals have an opportunity to identify issues raised in other cases of which the College may be aware but which may not have come to the attention of others?
- h) Should procedural rulings by the Discipline Committee be available, in searchable format, regardless of the final outcome of the hearing?

All organizations provided verbal input during the briefing sessions and seven organizations provided written submissions: Elementary Teachers' Federation of Ontario (ETFO); Association des enseignantes et des enseignants franco-ontariens (AEFO); Ontario English Catholic Teachers' Association (OECTA); Ontario Association of Parents in Catholic Education (OAPCE); Ontario Secondary School Teachers' Federation (OSSTF); Ontario Principals' Council (OPC); and Parents partenaires en éducation (PPE).

A number of central themes emerged. For example, several of the organizations believed a blanket policy with respect to publication would be inconsistent with both the legislation and principles of administrative law. They felt that the Discipline Committee had sole jurisdiction with respect to its decisions and had the requisite authority to issue binding publication orders. They argued that the College was not given residual authority under the legislation to make discipline decisions publicly available absent an order from the Discipline Committee to this effect. There were also concerns expressed with respect to the privacy interests of complainants and victims.

Other organizations believed that decisions should be publicly accessible (for example, online or through a 1-800 number for those without access to the Internet), and recommended several means through which the College could notify the public of the availability of decisions.

5. Discipline Committee's Authority

Powers of the Discipline Committee

The Discipline Committee is a statutory committee, created under the *Ontario College of Teachers Act* ("OCTA").

The Discipline Committee hears matters relating to "professional misconduct" (defined in Regulation 437/97) or "incompetence" (defined in s. 30(3) of the OCTA). These matters may be referred to the Discipline Committee by the Investigation Committee (s. 26), or the Executive Committee or Council (s. 29).

All hearings are conducted in accordance with the Discipline Committee's rules of procedure, and generally speaking, are held in public.

Panels are established to hear matters referred to the Discipline Committee. Any decisions, findings, orders, opinions or actions of a panel are deemed to be the Committee's decisions, findings, orders, opinions or actions.

Where the Discipline Committee finds a member guilty of professional misconduct or to be incompetent, it may make an order doing any one or more of the following (s. 30(4)):

- directing the Registrar to revoke any certificate held by the member under this Act
- directing the Registrar to suspend any certificate held by the member under this Act for a stated period, not exceeding 24 months
- directing the Registrar to impose specified terms, conditions or limitations on any certificate held by the member under this Act
- directing that the imposition of a penalty be postponed for a specified period and not be imposed if specified terms are met within that period.

In addition to the powers described above, where the Discipline Committee has found a member guilty of professional misconduct, it may make an order for any one or more of the following (s. 30(5)):

- requiring that the member be reprimanded, admonished or counselled by the Committee or its delegate and, if considered warranted, directing that the fact of the reprimand, admonishment or counselling be recorded on the register for a specified or unlimited period
- imposing a fine in an amount that the Committee considers appropriate, to a maximum of \$5,000, to be paid by the member to the Minister of Finance for payment into the Consolidated Revenue Fund
- directing that the finding and the order of the Committee be published, in detail or in summary, with or without the name of the member, in the official publication of the College and in any other manner or medium that the Committee considers appropriate in the particular case
- fixing costs to be paid by the member to the College.

Access to Discipline Committee Decisions

In addition to the contents of the register, and specific provisions of the OCTA which require certain persons to be provided with copies of Discipline Committee decisions, there are two distinct mechanisms under the OCTA by which members of the public may learn the results of discipline hearings: (i) "panel-ordered publication"; and (ii) "openness of discipline hearings."

(i) Panel-Ordered Publication

As noted above, the Discipline Committee panels are given specific power under s. 30(5) of the OCTA to direct that a decision be published, in detail or in summary, and with or without the name of the College member involved, in the College's official publication, or in any other media and manner the panel may direct.

This power is a part of the Discipline Committee's statutory authority, and within the scope of the legislation, a panel's directions are binding with respect to the nature and content of publication it may order under this provision. By extension, the panel may make directions regarding the contents of this publication. It may, for example, restrict the publication of information that would identify witnesses, or specify that certain information be omitted.

However, while s. 30(5) empowers a panel to direct that there be publication, and to exercise some control over that publication, McCarthy Tétrault LLP and Stockwoods LLP, independent legal counsel to the Discipline Committee, have advised that this power does not give a panel authority to prevent publication of information about public hearings and their results in other types or channels of publication, including public media, nor does it permit the Committee to limit public access to the decisions themselves.

(ii) Openness of Discipline Hearings

The second mechanism by which Discipline Committee panel decisions are made available to the public arises from the statutory public-interest mandate of the College (as set out in s. 3(2), under which the College is obligated to serve and protect the public interest while carrying out its objects, and related legislative provisions).

Subsection 32(6) of the OCTA requires that hearings be open to the public. Subsection s. 32(7) prescribes limited circumstances in which a Discipline Committee panel may exclude the public from all or part of a hearing, a power that has been used only rarely since the College's inception.

Where a hearing is open to the public, anyone may attend a Discipline Committee hearing, observe all witnesses and hear all evidence, arguments and rulings. In many cases, at the conclusion of a hearing the Discipline Committee panel delivers an oral decision indicating its findings and orders, with a written decision and reasons provided later. At other times the panel may reserve its decision and deliver it in writing at a later time. In either case, College legal counsel advises that because the hearing was open to the public, any decision and the reasons that flow from it must also be available to the public.

Although s. 48(1) imposes a duty of confidentiality on the College, there are exceptions to this duty. In particular, information may be disclosed where it is necessary to the carrying out of the purpose and functions of the College, or if the information is already available to the public under the OCTA (s. 48(1)(a) and (d)).

Insofar as Discipline Committee panel decisions originating from public hearings are concerned, both of these exemptions apply. Accessibility is provided to further the College's legislative objects, and public information arising from public hearings is released.

As already noted, a Discipline Committee panel may order that a hearing be partially or entirely closed to the public. To the extent the hearing is not public, information from, and reasons related to the closed portion of the hearing are not public, and would not comply with the s. 48(1)(d) exemption under which access is permitted.

Avenues of Access to Discipline Committee Decisions

The College provides public access both to full Discipline Committee decisions, as well as to summaries of those decisions, through a variety of avenues and in several formats.

(i) Full Decisions

The College held its first discipline hearings in April 1998, and copies of most Discipline Committee decisions have been available in the College's Margaret Wilson Library since that time. In most cases, paper or electronic copies of Discipline Committee decisions were available to members of the public upon request, once the decisions had been signed by the panel members.

Members of the public could also request electronic versions of the decisions.

The College provides full decisions to Quicklaw, one of several professional Canadian legal research services available to service subscribers. Other regulatory bodies such as the Law Society of Upper Canada and the College of Physicians and Surgeons of Ontario also use Quicklaw as a means of providing access to decisions on a 24/7 basis to those subscribers who would otherwise be unable to visit an organization's headquarters in Toronto. The service is most typically accessed by law firms on behalf of clients, the courts and academic users (typically law students). The last Discipline Committee decisions were sent to Quicklaw on November 21, 2006. The Quicklaw database contains over 300 Discipline Committee decisions.

(ii) Decisions Summaries

Summaries of Discipline Committee decisions appear in the College's official publication, as well as on the College's web site. Under the College's current publication policy, where there has been a finding of professional misconduct and an order to publish a summary of the decision, the summaries are prepared by staff in Communications after the 30-day appeal period. Decision summaries are approved by the Co-ordinator, Investigations and Hearings, and chairs of the Discipline Committee panel and Discipline Committee, and reviewed by the Editorial Board prior to publication in *Professionally Speaking/Pour parler profession*.

6. Redaction of victim/witness identification

Privacy Interests of Victims and Witnesses

Discipline Committee hearings and the decisions arising from them may include personal information regarding complainants and/or witnesses involved in the matter. In many cases, the victims and witnesses involved in the College's disciplinary proceedings are minors (under the age of 18 years) who, because of their age, are vulnerable.

In addition, allegations may relate to sexual misconduct, which adds considerably to witnesses' vulnerability. Accordingly, protection of private and personal information regarding complainants and witnesses is a matter of significant concern to the College and to panels of the Discipline Committee.

The inherent vulnerability of children who have been sexually abused was thoroughly explored in a 1991 report of the Ontario Law Reform Commission in the context of court proceedings.¹ They were also discussed by Mr. Justice Robins in the context of administrative proceedings in his 2000 report, *Protecting Our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools*. In particular, he noted:

In administrative proceedings, a balance need also be struck between the interests of the child witness or sexual complainant and those of the adverse party. **Concerns for dignity and legitimate privacy interests of child witnesses or sexual complainants remain significant.** Such witnesses may be no less devastated by a requirement that they need testify in non-criminal proceedings. Indeed, **the requirement that victims testify in non-criminal proceedings, following their criminal testimony, can constitute a revictimization, with profound physical and emotional consequences.** [Emphasis added, p. 225].

Such victims and witnesses require special consideration, both during a Discipline Committee hearing and in the writing of reasons for judgment.

Accordingly, Discipline Committee decisions will be reviewed and identifying information about victims and child witnesses, including names, initials, dates of birth, telephone numbers, addresses, will be redacted before they are made available to the public. Other identifying information may also be removed depending on the circumstances of the particular case. The College will comply with the terms of any court-ordered publication bans pertaining to related proceedings.

7. Process for providing public access to discipline decisions

Effective Accessibility Practices

The availability of decisions serves the public interest, and in this respect it reflects the duty of the College under s. 3(2) of the *OCTA* to serve and protect the public interest.

The publication of Discipline Committee Decision summaries in the College's magazine and their availability on its web site allows all members of the College and the public to see that justice is being done, regardless of where they live or how convenient it may be to attend hearings in person.

Public access to decisions also corresponds to recent trends in Canadian professional regulation. It follows a fundamental principle that has shaped legislation and legal theory for at least 200 years: the public has a right to know. The open administration of justice is vital to ensure justice is not only done but seen to be done. What is paramount is that the availability of decisions serves the public interest.

In order for the College to fulfill this statutorily imposed duty, it is imperative that the decisions of the College's Discipline Committee following proceedings that were held in public be made

¹ Ontario Law Reform Commission, *Report on Child Witnesses* (1991), at pp. 70-71, referred to in *Protecting Our Students* (2000) at pp. 222-223.

available. Months of consultation within the self-regulatory and education sectors as well as a detailed review of legal opinions on the issue support that view.

Effective October 5, 2007 the College will operate on the basis of the following access protocol:

- i. Full decisions of the Discipline Committee for hearings that were held in public will be available in the College's Margaret Wilson Library in both English and French, with victim and child witness names and other identifying information removed and the member identified.
- ii. Electronic copies of these decisions in both English and French will be available on Quicklaw, with victim and child witness names and other identifying information removed and the member identified.
- iii. Decisions will remain available in both the Margaret Wilson Library and on Quicklaw indefinitely.
- iv. Decision summaries will continue to be available in English and French in the College's magazine and on the College's web site where publication has been ordered. If the Discipline Committee orders that the member's name be withheld, the decision summary will appear with the name withheld.

8. Process for the communication of policy to members and the public and the infrastructure to support access

Communication of policy:

In order to ensure the widest possible understanding of our accessibility practices, the College will:

- Write to the Minister of Education, the Attorney General, education stakeholders and regulatory bodies to confirm details of the protocol.
- Post a copy of the protocol for access on the College's external web site and internal StaffNet and CouncilNet sites.
- Provide appropriate training for College staff members to ensure effective and consistent implementation of the protocol.