

The Parties

- Prosecution
 - Internal/External Lawyer
 - Staff member(s)
 - Other Committee instructing on Penalty/Order

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The prosecution from a defence perspective...



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The Parties (cont.)

- Defence
 - Member/registrant (sometimes)
 - Lawyer (sometimes)

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The defence from a prosecution perspective...



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The Parties (cont.)

- Non-party participants
 - As permitted by statute/Panel

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The Adjudicators

- Tribunal
 - Members of DC
 - Pre-hearing Chair
 - Chair of DC (motions brought prior to hearing)
 - Panel for the hearing (including a Chair)
 - Independent Legal Counsel (ILC)

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The parties from the tribunal's perspective???



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R v. Boucher [1954] S.C.J. No. 54

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.

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The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

-Rand, J.

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“The Big Stick”

- Power of the state vs the individual
 - financial
 - resources (human and otherwise)
- Seriousness of an accusation
 - reputation
 - financial
- Potential ramifications of a finding
 - livelihood and even career

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Natural Justice

- AKA: Procedural fairness, fundamental justice, fair play
- Three main components:
 - notice
 - opportunity to be heard
 - have response heard by an impartial decision-maker
- Content of duty varies depending on context and what's at stake

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Sources of Disclosure Obligations

- Governing statute
 - What needs to be disclosed?
 - expert Reports
 - written or documentary evidence
 - identity of witnesses
 - When must it be disclosed?
 - Certain number of days in advance of the hearing

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Sources of Disclosure Obligations (cont.)

- Other applicable statutes (SPPA)
- DC Rules
- Case law generally
 - *R. v. Stinchcombe* [1991] 3 S.C.R. 326, onward
- Principles of Natural Justice
 - Notice

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Disclosure Obligations: Prosecution

- The prosecution is required to disclose to the defence all relevant material in its possession that is not subject to privilege
- Relevance assessed in terms of potential usefulness to the defence
 - counter prosecution evidence
 - advance potential defence theory
 - assist defence making tactical decision
- Both inculpatory and exculpatory materials should be disclosed

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Markandey v. Ontario (Board of Ophthalmic Dispensers) [1994] O.J. No. 484 (O.C.G.D.)

...tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a (member's) position, in a timely manner unless it is privileged as a matter of law...

The absence of a request for disclosure...is of no significance. The obligation to make disclosure is a continuing one.

-Trafford J.

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Disclosure Obligations: Defence

- Expert Reports

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Purposes of a pre-hearing

- Open the dialogue
- Provide an “off the record” forum for frank discussion
- Ensure disclosure has been made
- Encourage the parties to narrow issues (e.g., agreement on any facts/admission of documents not in dispute)

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Purposes of a pre-hearing (cont.)

- Identifying significant procedural and legal issues
- Scheduling hearing dates and any motions
- Further pre-hearings, where appropriate

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Purposes of a pre-hearing (cont.)

- Providing the Chair's candid views on the strengths of the case and the appropriate order/penalty
 - Reinforce separation between prosecution and tribunal
 - Reality check for parties

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Preparing a Discipline case

- Step 1: Evaluate allegations
- Step 2: Identify/assess evidence
- Step 3: Prepare your documents
- Step 4: Prepare your witnesses

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Step 1: Evaluate each allegation

- Determine what exactly needs to be proven
- Break it down:
 - The Member/Registrant signed or issued,
 - in his/her professional capacity,
 - a document
 - that s/he knew or ought to have known
 - contains a false or misleading statement.

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Step 1: Evaluate each allegation (cont.)

- Onus: refers to which party has the responsibility of proving the allegation(s)
- Standard of proof: refers to the degree to which the trier of fact must be persuaded of the truth of the facts/allegations to be proven

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Step 2: Identify/Assess Evidence

- What evidence is required?
 - Witnesses
 - Documents
 - expert opinion(s)
 - demonstrative evidence
- What evidence do you have?
- What else do you need?
- What are the likely defences?

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Step 3: Prepare your documents

- prepare any required Notices
 - Evidence Act Notices
- identify and Assemble Exhibits
- confirm whether any documents can be tendered jointly
- final review for disclosure

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Step 4: Prepare Witnesses

- Re-interview Witnesses
 - assess credibility
 - refresh their memory
 - ask them the questions you need to prove allegations

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Step 4: Prepare Witnesses (cont.)

- Explain what will happen before their testimony
 - getting summonsed
 - travel arrangements
 - what to wear
 - where they will sit/wait

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Step 4: Prepare Witnesses (cont.)

- Explain what will happen during their testimony
 - room layout/parties
 - being sworn/affirmed
 - exam-in-chief vs cross-examination vs re-direct
- Provide general advice on testifying

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Step 4: Prepare Witnesses (cont.)

- Explain what will happen after their testimony
 - don't discuss testimony with anybody
 - travel arrangements/expenses
 - how to find out what happened

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Selection of Panel Members (cont.)

- Considerations
 - geographic representation
 - mix of newer and more experienced panel members
 - length of hearing (impact on personal/work commitments)
 - rotation of tribunal members

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Selection of Panel Members (cont.)

- Requirements
 - composition requirements
 - quorum requirements
 - no conflicts/bias

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Quorum & Composition

- Quorum requirements
 - Usually set in statute
 - Dictate minimum/maximum number of panel members required
- Composition requirements
 - Formal requirements usually set in statute
 - Informal requirements set in policy/guidelines
 - Dictate who must be on panel (e.g., public member of Council)

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Conflict of Interest

- Conflict of interest can arise when an individual is, or is perceived to be, in a position to make a decision/take action that could directly or indirectly benefit them or someone they know
 - Financial benefit (perceived or real, actual or potential)
 - Other benefit (perceived or real, actual or potential)

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Bias

- Bias is the absence of neutrality, impartiality and objectivity
 - Connection to participants
 - Prior knowledge of case/member
 - Professional/personal connection to a party or witness
 - Impetus to decide case/issues/credibility in favour of or against one party
 - Strong connection to issues raised by case
 - Real or perceived, actual or potential benefit

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R. v. Sussex Justices; Ex parte McCarthy (1924) 93 KB 129

*Not only must Justice be done;
it must also be seen to be done.*

-Lord Hewart

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Conflict of Interest vs Bias

- In most cases, an individual in a real or perceived conflict of interest will be deemed to have a reasonable apprehension of bias.
- An individual can be deemed to have a reasonable apprehension of bias for reasons other than a conflict of interest.

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Why Training Matters


- Discipline is one of the most “public” activities of the regulator
 - public is judging
 - membership is judging
 - press is judging
 - appellate body/Div Ct is judging
 - Ministry/overseer is judging

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Why Training Matters (cont.)

- Member/Registrant livelihood at stake
 - serious proceedings
 - important consequences
 - want to get it “right”
- Public interest is at stake
- Appeals are expensive

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Why Training Matters (cont.)

- Avoid perpetuating misinformation
- Turnover of tribunal members
- Consistency is important
- Confidence/comfort of DC members
- THIS STUFF IS NOT EASY!!!!

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Typical Training Topics (cont.)

- Review of governing statute
- Overview of other relevant statutes
 - SPPA
 - Evidence Act
 - Human Rights Act/Charter
- Any DC rules/guidelines

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Typical Training Topics (cont.)

- Overarching Responsibilities
 - Confidentiality
 - conflict of interest/bias
 - decorum
- How matters get to discipline
- How matters are scheduled
- How Chairs/Panels are selected

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Typical Training Topics (cont.)

- The Pre-hearing/Hearing processes
 - role of parties/participants
 - order of proceedings
 - Goals/expectations
 - typical challenges
- How to be a Chair
- Writing Decisions & Reasons

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Typical Training Topics (cont.)

- Common Legal Issues
 - Basic rules of evidence
 - hearsay
 - rule in Browne v. Dunn
 - similar fact evidence
 - character evidence
 - prior statements
 - Role of experts
 - Common motions

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Not-as-typical Training Topics

- The public interest
- Role of prosecution vs. role of defence
- Lawyers' duties to clients/colleagues/tribunal
- Balancing member/registrant rights against the public interest
- How resolutions are negotiated

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Beyond Courses/Conferences

- Attend a pre-hearing/hearing at your regulatory body
- Attend a hearing at another regulatory body
- Go to court
- Customized training sessions

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Speak softly and carry a big stick



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