TRANSPARENCY IN THE PROFESSIONS: DO OUR DISCIPLINE PROCESSES *REALLY* SERVE THE PUBLIC INTEREST?

A paper given to the Executive Directors and Registrars of Professional Organizations of British Columbia

by

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INTRODUCTION

In the mid-1970s, a certified public accountant named Bob Newhart portrayed Dr. Bob Hartley, a psychologist, in a weekly comedy programme. One episode involved Dr. Hartley being interviewed by an aggressive interviewer on a TV talk show. After the usual friendly, relaxing pre-show warm-up, the cameras were turned on and dialogue ensued roughly as follows:

Interviewer	Doctor, you have a busy clinical practice with patients from all walks of life, don't you?
Bob	Yes, I'm proud to say that my patients include top executives, teenagers struggling with examinations stress, and almost everybody in between.
Interviewer	Would that last category include people like politicians and judges?
Bob	Oh yes, quite a few.
Interviewer	How many?
Bob	Oh, I really could not say—I am not sure that it would be ethical for me to do so in any case.
Interviewer	But it's more than one, isn't it?
Bob	Well, yes.
Interviewer	Well, I'm going to guess that it's something in the range of 20 or 25 individuals. Feel free to correct me.
Bob	Ummmm.
Interviewer	What are their names, and how long have they been seeing you and for what?
Bob	Oh, I cannot tell you that! That information is strictly confidential; our professional association could cancel my licence if I answered a question like that!
Interviewer	Okay, so I take it that there are 20 or 30 public figures, some or all of whom are elected politicians, who are crazy.
Bob	Well, not exactly crazy….

Interviewer What are they, then?

Bob Well, disturbed, confused, a couple of schizophrenics,.. you know.

That little skit illustrates the challenge facing the professions as they attempt to reconcile the conflicting issues of the public's legitimate need for information concerning the professionals whom they employ with clients' and patients' entitlement to anonymity, and the professional's personal privacy rights. Although by-laws and guidelines are not only useful but also, as noted below, essential, no by-law or guideline fits every situation.

For example, a physician who discloses a patient's medical condition without his or her express consent will ordinarily be found to have violated doctor-patient confidentiality—a serious matter to the College of Physicians & Surgeons. But consider how health news concerning Ariel Sharon and U.S. presidents is handled by their aides and health care providers. As Mr. Sharon was being admitted to hospital in a coma, doctors and aides were giving hour-by-hour public briefings via television. Likewise, when the American president or vice-president is admitted to hospital for even the most trivial of reasons, insiders are in front of the cameras within minutes, informing the world of their leader's condition. Clearly, the rules that apply to some public figures differ from those applicable to the population at large. This difference, I suggest, is due to a common belief that persons privileged to hold high office must accept some erosion of the privacy enjoyed by the rest of us.

I submit that, to some extent, those of us who enjoy the benefits of legislated occupational exclusivity and self-governance must similarly accept a diminution of entitlement to privacy, at least insofar as disclosure of our professional misdemeanors is concerned.

For the purpose of this presentation, I will define "transparency" as the "communication of *relevant* information as to the disposition by the professional organization of findings of incompetence or wrongdoing on the part of an individual practitioner." In this context, "the public interest" is deemed to mean the extent to which a reasonable observer would

consider (a) the disclosure adequate to enable a consumer of the particular professional service to make an informed decision as to his or her choice of a professional caregiver or advisor and (b) the response by the institution to a complainant to be adequate. Finally, I define "disciplinary action" as a requirement, other than dismissal of the complaint, imposed by the professional body on its member either following a citation and hearing or by agreement between the association and the respondent. The term "liberal professions" means the non-health professions: law, engineering, accounting, teaching, and so on.

This paper reviews the public and governmental environment in which we currently practise, describes some of the best practices that I have observed, and suggests some actions that professional organizations might consider with a view to better serving the public while maintaining their self-governing status.

THE PUBLIC ENVIRONMENT

In October 2003, Phil Evans, then the Principal Policy Advisor in the UK Consumers Association (now called "Which?"), spoke as follows at a conference concerning the regulation of professional services:[1]

> 1. In this market what does the consumer need?... (1.a.ii) Effective and independent redress mechanisms when things go wrong….
>
> 4. Professional self interest produces poor redress mechanisms and ineffective sanctions:
>   a. The complaints procedure for the Law Society is a poor system that engenders little faith among those that use it.
>
>   b. The General Medical Council [GMC] have, however, attempted to reform their rules following the wave of terrible medical scandals….

A paper delivered to the Adam Smith Institute in the UK entitled "Patient Centred Medical Regulation" includes the following comments:[2]

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[1] http://ec.europa.eu/comm/competition/liberalization/conference/speeches/phil_evans.pdf (all Web sources accessed ~December 2005)

[2] http://www.adamsmith.org/policy/publications/doc-files/medical-regulation-note.doc (July 3, 2000)

> The GMC has [sic] behaved in an appalling way over the past 20 years. There is no need to 'throw the baby out with the bath water' - self-regulation is a good idea if done properly - the GMC have not managed self-regulation effectively. The GMC have a credibility problem with patients….
>
> The complaints procedure needs to be transparent and efficient….
>
> Openness and transparency are important. Public disquiet based on lack of trust and transparency will be diminished if more data are published. Patients need to know more about a doctor's experience and background. They only hear rumours.

Closer to home, David Baines, a senior investigative securities reporter with *The Vancouver Sun*, has been critical of the disclosure practices of the two largest accounting bodies in British Columbia: in one case, with respect to the *in camera* hearing process, and in the other, with respect to the paucity of information provided to a complainant following the conclusion of an investigative process. Baines wrote: [3]

> As I have said many times before, whenever we are forced to substitute trust for transparency, we are on the road to hell.

The Ombudsman of British Columbia made the following comments in his 2003 report to the Legislature:[4]

> 'From time to time some colleges have encountered difficulties in effectively carrying out their mandate and have failed to act in the public interest in carrying out their regulatory responsibilities.'... [quoting from a document submitted by the Honourable Sindi Hawkins]
>
> My [the Ombudsman's] experience in investigating complaints about the colleges confirms the Minister's observation that some colleges have failed, on occasion, to act in the public interest in carrying out their mandate….
>
> In recent years we have seen successive elections fought among the dentists, the psychologists, and the opticians on the basis that the colleges are 'unbalanced' in that they give too much weight to the public interest and too little to the interests of the professionals involved. Members of these professions have campaigned on platforms promising greater sympathy and understanding of the human foibles that lead to mistakes…. A review of their submissions, many of which have been made public on college websites, is instructive in demonstrating the extent to which some of the professions have come to see self-government as an absolute right rather than a privilege.

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[3] *The Vancouver Sun*, January 21, 2006

[4] Special Report No 24, May 2003, to the Legislative Assembly of British Columbia: *Acting in the Public Interest? Self-Governance in the Health Professions: The Ombudsman's Perspective*, pp.3-4 and 9-10

> Perhaps the most surprising aspect of our experience in investigating complaints against the colleges has been the sometimes negative responses and lack of cooperation we have occasionally received…. It would be unfair and irresponsible to say that the colleges are indifferent to the public interest. There is no doubt that for the most part, the colleges strive to ensure that the public is protected from what the professions define as being unsafe or unethical practitioners. However, this does not mean that the colleges consistently function as though they were directly accountable to the public. It may be that because college directors are elected by the registrants, who also have the exclusive responsibility to fund college operations through what are sometimes viewed as very expensive license fees, the sense of accountability to the public is minimized.…
>
> The fact that there is no direct means by which the public may hold a college accountable may lessen the sense of accountability to the public…. To the extent that the Ombudsman has been a vehicle for accountability to the public, these factors may explain some of the resistance to and indeed, disinterest in our viewpoint that we have encountered in investigations over the last ten years….
>
> Unlike ombudsmen in some other jurisdictions (notably, the United Kingdom) I have chosen not to review complaints against the colleges on the merits…. I do not attempt to assess the clinical issues except in rare cases….

That report was given in the context of the withdrawal of funding enabling the Ombudsman's office to investigate complaints against professional organizations. His office has now secured sufficient funding to enable it to resume the investigation of complaints against professionals.

Two very recent developments reported in the November 2006 issue of *the Advocate* add weight to the importance and currency of this issue.[5]

First, the Law Society of England and Wales was fined £250,000 by the Complaints Commissioner

> for the inadequacy of its plan to improve complaints handling. This fine was later reduced by £30,000 when the law society negotiated the reduction upon presentation of a plan for how the society will improve its handling of complaints.

Second,

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[5] "Bench and Bar," *the Advocate* Vol 64, Part 6, November 2006, pp. 888-89

> Dutch lawyers face losing their right of self-regulation. A committee has recommended to the Netherlands government that an independent regulator be imposed above the Netherlands Bar Association, consisting of experts appointed by the Ministry of Justice. The bar association claims, rightly in our [*the Advocate*'s] view, that this threatens the independence of the Dutch bar.

Finally, Léger Marketing released its ranking of the most admired Canadian "professions" (actually occupations) on March 6, 2006. Léger's methodology involved interviewing 1,500 Canadians and asking them whether they trusted each of the 20 occupations specified by Léger. The ranking and trust levels are as follows:[6]

	Difference 2005-2006	**2006 %**	**2005 %**	**2004 %**	**2003 %**	**2002 %**
Nurses	**+1**	**95**	**94**	**95**	**94**	**96**
Farmers	+1	92	91	91	91	93
Doctors	**--**	**89**	**89**	**89**	**89**	**92**
Teachers	**--**	**88**	**88**	**88**	**88**	**--**
Engineers	**N/A**	88	**--**	**--**	**--**	**--**
Fire fighters	**N/A**	96	--	--	--	--
Police officers	-2	81	83	79	80	88
Judges	+6	78	72	75	73	80
Notaries	**+4**	**75**	**71**	**72**	**71**	**82**
Bankers	+7	72	65	67	70	72
Church representatives	-1	64	65	65	65	73
Pollsters	-2	63	65	63	62	70
Economists	N/A	62	--	--	--	--
Senior public servants	+5	50	45	49	50	56
Journalists	--	49	49	46	46	53
Lawyers	**+3**	**48**	**45**	**44**	**48**	**54**
Insurance brokers	+2	46	44	41	46	51
Real estate agents	**+2**	**42**	**40**	**39**	**40**	**44**
Publicists	+3	40	37	35	38	47
Unionists	--	38	38	36	39	41
Car salespeople	+1	19	18	19	20	23
Politicians	-2	14	16	14	14	18

The emphasis is mine, highlighting those occupations whose representatives are among the Executive Directors and Registrars of Professional Organizations of British Columbia.

[6] The complete 54-page report is available on Léger's website: http://www.legermarketing.com/eng/tencan.asp.

Note that dentists, accountants, land surveyors, and many other professions are not represented in the survey; therefore, given the researchers' methodology, no inference can be drawn from that omission. The contacts did not have a chance to opine as to whether they trust professions and occupations *not* selected for the research.

To me, the interesting aspect of this survey is that almost all of the occupations have declined in trust level between 2002 and 2006, with lawyers, being 6% lower, among the highest decreases. I think it unlikely that the liberal professions not included on the list would fare much better.

The fact is that, at least institutionally, nobody likes us very much.

CHANGE IN HISTORICAL ATTITUDE

The reluctance of professional organizations to disclose the results of their investigations to complainants and the public at large is somewhat understandable and, in certain respects, supportable. Professions have been given their mandate by lawmakers to determine the educational and experience requirements for offering their services to the public and to determine the misconduct by a member of their professions that should attract sanction or removal from the profession. The disposition by professional associations of complaints from the public affect the entitlement of respondents to

a. continue in their practices undisturbed;
b. continue in their practices, but only if remedial action is undertaken and/or punitive action (such as fines or temporary suspensions) is agreed to; or
c. surrender their licences and discontinue practice.

None of the foregoing outcomes compensates the individual complainants. If they have suffered financially, emotionally, or physically at the hands of a professional, their claim for relief must be pursued through the courts. But the complainants' active cooperation is

frequently needed for the organization to achieve a fair result—cooperation that runs the gamut from writing a letter, to undergoing in-depth interviews with the organization's investigators and counsel, to submitting to cross examination by counsel while under oath. However, one large, well-funded organization refuses to reimburse complainants for their out-of-pocket cost of assisting the organization in its discipline process!

Historically, persons who complained about a professional to the relevant organization received a polite "thank-you" for bringing the matter to its attention, and that was the end of the communication unless the offending member was found to be unfit to continue in practice.

However, several factors have changed the traditional view of the professions' direct responsibility to the public and specific complainants, including those set out below.

Complainants' Rights

The criminal justice system has, until recently, taken a similar attitude to the victims of crime that the professions have taken to complainants. Criminal proceedings are not designed to compensate victims; the objective is to prevent the perpetrator from repeating an offence and to deter others from committing similar ones. Sometimes judges order restitution, but not always—frequently the convicted party has no resources with which to satisfy such an order.

In recent years, however, victims have been invited to address the court during the sentencing phase of a trial, and victim impact statements are routinely considered by the courts.

The same phenomenon exists with those adversely affected by allegations of professional misbehaviour or incompetence. Such individuals believe that they have the right to know what happened to their complaints, and there is authoritative agreement with that view, particularly from the Ombudsman's office.

The health profession organizations' discretion has been removed insofar as communication with a complainant is concerned. Section 36 (1.1) of the *HPA* provides in part as follows:

> 36 (1.1) If requested by the complainant and if a consent or undertaking given under subsection (1) relates to the complaint made by the complainant, the inquiry committee *must* deliver a written summary of the consent or undertaking to the complainant. (my emphasis)

As well, health professions are obligated by the *HPA* to notify complainants of the date and time of a hearing and to deliver a copy of the discipline committee's order to them.[7]

Consumerism

The trend toward consumers' demand for relevant information *before* committing themselves to buying a product or engaging a service provider started some years ago. The professions are learning that consumers expect no less from them.

With the notable exceptions of the British Columbia Securities Commission (BCSC) and the College of Physicians and Surgeons of British Columbia (CPSBC), most professional organizations have not been proactive in making that information publicly available on a continual, accessible basis. All professions publish expulsions, and most report suspensions, but those notices typically appear only once in the print media; someone seeking information about a professional prior to engaging him or her has no option but to phone the relevant organization, only to suffer through a lengthy automated telephone directory to learn that Ms. Smith is a member in good standing. No data are provided as to whether she has just returned to good standing after a six-month suspension or has a distinguished, unblemished, 20-year professional history. Such information is available with a couple of mouse clicks on the BCSC and CPSBC websites.[8]

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[7] ss 37(3) and 39(2)

[8] See the BCSC website at http://www.bcsc.bc.ca/bcscdb/Registration/RegDefault.asp the CPSBC's at https://www.cpsbc.ca/cps/physician_directory/search.

Media Attention

Those who are not involved in the administration or governance of a profession, including practitioners themselves, have little or no knowledge of the inner workings of such an entity. And for good reason: 90% of the running of a professional organization is boring, technically incomprehensible, or both, to those who have not had the years of education and practice experience necessary to achieve even a working understanding. The remaining 10%, involving the disposition of complaints that are in the public domain before their final disposition, is intensely interesting to everybody: to the professional bodies because the public exposure of their processes gives them an insight into practices that might be inadequate and to the media because *some* of the issues are newsworthy. Furthermore, those items that *are* newsworthy are frequently the stuff of headlines *and* the major determinant of our professional organizations' reputations.

Two recent developments have served to exacerbate media attention: the growing responsibility of the professions for the resolution of sexual harassment issues, and the Canadian fallout from accounting scandals in the U.S.

Sexual Harassment

The legislative inclusion of sexual harassment as a professional misdemeanor to be dealt with under, among others, the *HPA* and the *Teaching Professions Act* as opposed to (only) the federal *Criminal Code* has, in my view, a legitimate objective: expediency.[9] The professions' enabling legislative Acts usually contain a provision for the immediate, short-term suspension of practitioners who, in the opinion of the professions' governing bodies, present an immediate threat to the public. This, in the legislators' view, is preferable to a time-consuming wait for resolution by way of a vigorously defended criminal proceeding. As far as that goes, I agree.[10]

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[9] See the *HPA*, s 32.4, and the *Teachers Profession Act*, s 27.1 (1) (b).

[10] While beyond the scope of this paper, I have to say that I do not agree that a panel convened to adjudicate sexual harassment citations, chaired by a person who is not qualified as a lawyer and comprising a majority of persons who are members of the adjudicating profession, is an appropriate decision-making forum. Issues of admissibility and weight to be attributed to the factual and opinion evidence are well beyond the expertise of non-lawyers. In cases of alleged sexual harassment by a professional, there is little or no

When sexual harassment cases come to the media's attention, they invariably attract extensive coverage. Woven into that coverage is commentary as to how well the professional organization has handled the matter in terms of the time taken to bring it forward, the harshness of the sanction, and the success or failure of the inevitable appeal. Even if the media are not overtly critical, the profession itself is inexorably connected to the circumstances of the reported case.

Accounting Scandals

The second phenomenon that has captured the attention of the public is the revelation of scandals involving 27 publicly traded companies and their "big five" auditors. The fallout from the worldwide publication of those scandals includes the disappearance of Arthur Andersen, formerly one of the big five audit firms, and instantaneous reaction from the White House and the U.S. Securities & Exchange Commission that resulted in sweeping regulatory changes being imposed on the international professional accounting community and its clients.[11]

In Canada, no such scandals have been uncovered; nevertheless, the events south of the border have caused major changes here as well. One example is the imposition of the U.S. *Sarbanes-Oxley Act of 2002*, setting out, among other things, a huge increase in audit requirements and costs that will ultimately be borne by the public.[12]

In the Province of Ontario, the practice of public accounting is now controlled by a provincial body called the Public Accountants Council (PAC). In 2002 the mandate of PAC was amended as follows:[13]

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similarity to the technical evidence heard in allegations of, say, clinical deficiencies, where practitioners *are* entitled to deference in the adjudication of standards of professional practice.

[11] http://en.wikipedia.org/wiki/Accounting_scandals#Big_Four_major_audit_firms

[12] For a summary of this far-reaching U.S. Act, now referred to as "SOX," see http://cpcaf.aicpa.org/Resources/Sarbanes+Oxley/Summary+of+the+Provisions+of+the+Sarbanes-Oxley+Act+of+2002.htm.

[13]http://www.pacont.org/about/

> The reconstituted Public Accountants Council will create and implement new regulatory standards that accounting organizations will need to meet in order to grant licences, and ensure that public accounting in Ontario is practised in accordance with internationally respected public accounting norms.

The Council has been granted appellate discipline powers as follows:[14]

> **22**(1) If a member of the public who has made a complaint about the conduct of a public accountant to a designated body and who has exhausted the internal procedures of the designated body available for the handling of the complaint *remains unsatisfied with the manner in which the complaint was handled*, the member of the public may request that the Council review the designated body's handling of the complaint. (my emphasis)

The 17-member Council is chaired by a lawyer and includes eight additional non-accountant members; in other words, accounting regulation in Ontario is controlled by non-accountants.

To summarize: the public and its elected representatives are aware of our professional organizations only through media reporting, and virtually all of that reporting relates to misbehaviour by professionals and media analysis of how the various organizations have discharged their public duty. Although we in B.C. have, so far, continued to retain our self-governing status, examples abound in other jurisdictions of professional associations that no longer control either their standard setting or their disciplinary processes.[15]

The political response to the perception that the professions are not adequately carrying out their respective mandates is increasingly interventionist. For instance, the professions covered by the recently enacted *HPA* must submit their by-laws and changes thereto to the Ministry of Health for approval. In addition, under the *HPA*, at least one-third of not only the governing board but also all committees having regulatory powers must comprise persons who are not members of the profession upon whose board they sit.[16] Board members (but not committee members) are appointed by the provincial government, which receives advice from the professional organization but does not

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[14] 2004, c 8, s 22(1)

[15] See, for example, the description of New York's non-health professional discipline system at www.op.nysed.gov/opd.htm.

[16] http://www.qp.gov.bc.ca/statreg/stat/H/96183_01.htm

necessarily accept it. One association recently had six vacancies for public governors; none of its nominees were appointed.

The practice of appointing government representatives to boards covered by provincial legislation started in the 1970s; the Honourable Brian Smith, then the Attorney General, described the requirement as “sunshine provisions” helping the organizations to remember their public interest focus—the obvious implication being that they needed such help.

EXTERNAL INFLUENCES

Professional organizations, when considering whether, when, or how to address this situation, should give careful consideration to four external factors:

a. the legislation affecting their own profession,
b. the by-laws approved by its membership and, as necessary, by the provincial health ministry pursuant to that legislation,
c. the consequences of an investigation by the Office of the Ombudsman of British Columbia, and
d. the potential reaction of the Privacy Commissioner of British Columbia.

Legislation

In addition to their responsibilities to complainants discussed above, the health professions subject to the *HPA* are governed by section 53 of that Act, which provides as follows:

> **Confidential information**
>
> **53**(1) Subject to the *Ombudsman Act*, a person must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty or function under this Act, the regulations or the by-laws unless the disclosure is:
>
> (a) necessary to exercise the power or to perform the duty or function, *or*

> (b) authorized *as being in the public interest by the board* of the college in relation to which the power, duty or function is exercised or performed. (my emphasis)

In my view, this section imposes an obligation on the health professions to establish policies and guidelines as to how they will define the public interest in their disclosure processes.

With respect to the liberal professions, I started with a review of the confidentiality clause of the *Accountants (Chartered) Act*, which provides as follows:

> **Confidentiality**
>
> **22**(1) A person acting under the authority of this Act or the by-laws must keep confidential all facts, information and records obtained or furnished under this Act or the by-laws or under a former enactment, except so far as the person's *public duty* requires this Act *or* the by-laws to permit the person to make *disclosure* of them or to *report* or take official action on them. (my emphasis)

The *Accountants (Certified General) Act* (s. 22) and the *Engineers and Geophysicists Act* (s. 46) contain identical wording; I did not find confidentiality provisions in the *Legal Professions Act*. I did not examine other statutes of the liberal professions, but I assume that the foregoing wording describes the lawmakers' attitude toward confidentiality in the non-health professions.

In summary, the legislation in British Columbia poses no barrier to public disclosure by the health professions of sanctions and details following disciplinary action, nor do the liberal professions' various Acts that I have reviewed.

By-Laws

The level of disclosure varies widely among B.C. professional organizations: some organizations publish only suspensions and expulsions; in some cases hearings are open to the public but the time and place is not publicly posted; some publish all sanctions imposed pursuant to the disciplinary process; others are selective, their by-laws defining a menu of anonymous and public reprimands; some publish only following the issuance of

a citation; others do so following an investigation. Few, if any, publicize outright dismissals of complaints.

In most, if not all, of the liberal professions, by-laws are drafted by their boards and approved by a simple majority of their membership at their annual general meetings. The health professions may or may not require a vote by members but do require the approval of the Ministry of Health. While it is true that an organization is bound by its own by-laws, there is no impediment to updating them; this process occurs to a greater or lesser extent every year in most professional associations.

I think that it is unfortunate when organizations rely on antiquated by-laws to justify a failure to be proactive in the area of transparency, particularly with respect to complainant communication. I am familiar with a situation in which a professional was investigated for a matter that would have been career threatening if the organization had found professional misconduct. After an intensive six-month investigation, however, the matter was set aside with a minor sanction, including an anonymous reprimand. The member wanted the results of the investigation made public but was informed by the organization that such disclosure was prohibited by its by-laws. The outcome was that the member himself issued a press release, and the organization, when contacted by the media, confirmed its accuracy. I have difficulty accepting that such action served *either* the member *or* the public interest.

Those who say that it is too time consuming to change by-laws might consider the B.C. Court of Appeal decision in *Roberts v. College of Dental Surgeons of British Columbia*,[17] which had a negative financial impact on self-governing professional organizations. As a result, one organization took only four months to do the legal research, draft a by-law

[17] 1999 B.C.J. No 357 (BCCA); in the *Roberts* case, the Court of Appeal said that party-and-party costs, not solicitor and own client costs, were the proper standard in that particular matter. The decision suggested that costs should be awarded in administrative professional tribunals on the same basis as that applied in civil cases heard by the Supreme Court. With rare exception, costs awarded in the B.C. court system are significantly lower than the charges actually invoiced by counsel.

neutralizing the effect of *Roberts*, secure board debate and approval, and present the by-law to its membership.

Office of the Ombudsman

The role of an ombudsman is to review and investigate complaints made by individuals who allege inappropriate responses by governments or governmental agencies to their problems. As noted above, the Office of the Ombudsman, Province of British Columbia, also investigates complaints about the appropriateness of such responses by professional organizations. Budgetary restraints prevented that Office from engaging in this activity for a period of time, but this has now changed. The Office looks into the procedure employed by an organization in resolving a citizen's complaint; if the procedure is deemed to be sufficient, then the result will be considered appropriate. The Ombudsman does not retry cases.

To the Ombudsman, an important part of the process is the adequacy of the communication to the complainant. The statute and by-laws of the organization will be factors in the extent to which his Office is critical of the process. The issue would seem to have been resolved by statute for the health professions, but I expect that the practice followed by some liberal professions, namely, to merely accept the complaint and provide no further information as to outcomes, might not find favour with that Office.

Office of the Information and Privacy Commissioner

The mandate of the Office of the Information and Privacy Commissioner for British Columbia is as follows:[18]

> The Office of the Information and Privacy Commissioner (OIPC) is independent from government and monitors and enforces British Columbia's *Freedom of Information and Protection of Privacy Act* (FIPPA)[19] and *Personal Information Protection Act* (PIPA). FIPPA allows access to information held by public bodies

[18] http://www.oipcbc.org

[19] Also commonly referred to as "FOI"—"Freedom of Information"

> (such as ministries, universities and hospitals) and determines how public bodies may collect, use and disclose personal information. PIPA sets out how private organizations (including businesses, charities, associations and labour organizations) may collect, use and disclose personal information.

The OIPC is concerned with the dissemination of information that individuals have a right to have kept private. It makes orders that, if not complied with after the right of appeal has been exhausted, give rise to a right of civil action by persons who consider themselves to have been harmed by the failure to comply.

While conducting research for this paper, my attention was directed to two helpful public documents. The first, an Investigation Report (Investigation P99-013) written by former Commissioner Mr. David H. Flaherty, issued on January 5, 1999,[20] includes the following text under "1. Background":

> In June 1997, an article appeared in the *Vancouver Sun* concerning the decision by the British Columbia College of Teachers (the College) to terminate a former assistant superintendent's membership in the College and to cancel his teaching certificate. The former administrator, who was named in the article, was found guilty of professional misconduct and conduct unbecoming a member of the profession…. [The article was based on] the College's case summary of the discipline decision, which was published in its quarterly newsletter.

The Commissioner decided to extend his investigation to the College's disclosure of disciplinary information.

Under the heading "The Public Interest Argument," Commissioner Flaherty includes the following observations:

> …the disclosure of respondents' names is reasonable and justified in *most* cases. (my emphasis)

> …where a teacher is judged not to be a danger to others, has learned his or her lesson, or where victims' identities may be revealed, there is less justification for disclosing the teacher's name. In cases such as this, I agree that the College [of Teachers] should withhold the name of the respondent.

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[20] See http://www.oipc.bc.ca/investigations/reports/invrpt13.html for the complete Privacy Commissioner's Report. See http://www.bcct.ca/documents/discipline/jun27_05_respa0705.pdf for a link to the discipline summary published by the College.

> …it is appropriate for the College to publish members' names in most cases, together with details of their transgressions, so members may have concrete examples of behaviour which is deemed unacceptable by College standards.

The Investigation Report makes two specific recommendations (Nos 4 and 5) to the College that have general application: [it should]

- draft guidelines on when it would be appropriate to disclose the names of adult victims or complainants and of respondents in case summaries

- consider making its case summaries routinely available, or available on request, to the public. [The College of Teachers had discretion to release its reports publicly but, according to the Commissioner, rarely did so.]

The second document was Order 02-01, written by Mr. David Loukidelis, the current Commissioner, dated January 21, 2002.[21] The Order related to a request for information about a lawyer pursuant to the *Freedom of Information and Protection of Privacy Act* (*FOI*).

That Order involved a meticulous review of documents that may or may not be released pursuant to *FOI*. In the context of this paper on transparency, at least two useful guidelines emerge from the Order:

- release of any information whatsoever about respondent professionals prior to the issuance of a "citation" would unfairly "subject the members to … financial harm when they have not engaged in any blameworthy behaviour or conduct,"[22] and
- when a complaint has been made but is still under investigation and that fact is not generally known to the public, the Society's policy is to neither confirm nor deny the existence of a complaint.[23]

The Commissioner reacted favourably to that policy in his Order.

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[21] http://www.oipc.bc.ca/orders/2002/Order02-01.pdf

[22] See paragraph 116 of Order 02-01, quoting. the Affidavit of the Deputy Executive Director of the Law Society.

[23] See paragraph 119 of the Order referring to paragraphs 9 and 11 of the Affidavit.

To deny the existence of a complaint is factually untrue and, quite apart from the moral inappropriateness, might engender serious negative press. If, on the other hand, the organization admits to the existence of an unresolved complaint, then the media will put the organization on a timetable which, when published, might put inappropriate pressure on the disciplinary process.

The policy to "neither confirm nor deny" is followed within the securities industry, in particular by the Securities & Exchange Commission in the United States. If the board of an organization is going to employ this strategy, it is essential that the organization establish the policy, ideally by way of a by-law, and follow it always, without exception.

In summary, I conclude that reasonable, common-sense disclosure of the identity of a respondent professional and a common-sense, publicly understandable description of the relevant facts does not offend either of the Offices of the Ombudsman or the Information and Privacy Commissioner.

The following sections of this paper present my view as to the appropriate approach to this complex issue.

THE INTERNET

The best and most convenient tool for continual dissemination of information to the public has become the Internet. From an organization's perspective, after having been set up, it is essentially free. The information disseminated is controlled by the profession: it can be as lengthy or as brief as policy dictates and as accurate as staff makes it.

Publication in the print media and the *British Columbia Gazette* might be legally necessary, but it has the deficiency of not being handy when a potential patient or client actually needs it. In one situation, a professional was expelled and prohibited from

practising, acting as an advisor, and so on, and the particulars were published in the newspapers. But the guilty party merely carried on, uninterrupted and unnoticed. This might have happened anyway, but if the association had had available, which it did not, the ability to permanently post the name and particulars on the Internet, then perhaps some of the subsequent victims would have checked that disclosure and avoided the loss arising from association with the errant former professional. In any event, the Internet tool, now universally accessable, enables organizations to assert that vital information is available to the public on a permanent basis.

I admire particularly the CPSBC and the BCSC for maintaining user-friendly websites that contain relevant information and links to detailed documentation. In the case of the CPSBC, every licensed physician is listed along with his or her date of licensing, province of education, gender, and any disciplinary action that has been taken.[24] The site also lists pending hearings. Identical user-friendly information is accessible on the sites of the BCSC and the Investment Dealers Association of Canada.

The Law Society publishes the identity of the lawyer when a sanction includes a temporary or permanent restriction on the respondent's practice. I believe that members would and should welcome processes such as these because potential clients and patients may conveniently satisfy themselves that the practitioner or advisor has been practising *without* attracting professional sanctions.

I have several suggestions for effective use of the Internet:

- Expelled and suspended individuals should be permanently posted on the Internet.
- There should be a link to the document by which the action was ordered; precise particulars are preferable to summaries.
- Some time limitations should be in place for minor matters.

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[24] https://www.cpsbc.ca/cps/physician_directory/search. The College describes its publicly listed information thus: "If a physician has been the subject of disciplinary action by the College of Physicians & Surgeons of British Columbia since January 1998, that will be noted in the individual physician's profile."

It is in both the professions' and the public's interest to publicize the existence of such postings.

LEGAL ADVICE

When a professional organization determines that one of its members might have committed a professional transgression and that the allegation, if proven, would result in serious sanctions, the organization should expect that the respondent will engage counsel; the organization itself would be foolish to proceed without legal advice. The reasons are obvious and include the following:

- The standard of proof necessary for an organization to deprive a professional of his or her livelihood or to publish information that could damage that professional's earning capacity is very high. The standard is judicially recognized as somewhere between the criminal "beyond a reasonable doubt" standard and the civil "balance of probabilities."[25] As Mr. Jack Giles, QC, a prominent Vancouver lawyer, once told the Annual General Meeting of the Institute of Chartered Accountants of British Columbia, "Accountants are the ideal clients: rich and scared." This applies to all professionals.
- Procedural failings will generally not be tolerated by the courts. No judicial deference should be expected if procedural and evidentiary rules are violated.
- Defendants engage top specialist lawyers; professional organizations must do no less.
- Lawyers, particularly those specializing in administrative law, read and have access to judgments and material concerning matters that are, or are not, in the public interest. Such information is critical to the efforts of the

[25] *Jory v. College of Physicians & Surgeons of B.C.* [1985] B.C.J. No. 320

> professions in their determinations as to whether to proceed with a prosecution.

In my view, however, there is an aspect to legal advice of which professional organizations must be aware. First, the lawyer is retained by the organization: The organization is the lawyer's client; the "public interest" or the "public at large" is not. In the area of transparency, legal advice will be conservative: failure to publish names and circumstances will seldom land the profession in hot water or subject it to legal action whereas doing so might. The guilty respondent *never* wants his or her name to be published in connection with *any possible* wrongdoing.

Accordingly, lawyers can be expected to interpret the governing statutes and by-laws literally and narrowly. They will not ordinarily propose expanded disclosure policies because such policies put the professional organization at greater risk, something that counsel are retained to prevent.

Excessive reliance on judicial precedent is also hazardous from the public interest perspective. To be sure, in the criminal arena, judges do look at public safety and interest when dealing with particular criminal behaviour. Their determination as to whether a specific criminal represents a threat to unidentified and unspecified members of society is one of many factors considered in sentencing and in some respects is analogous to a professional tribunal's decision as to whether fines or other remedial actions serve the public better than expulsion.

But civil cases, of which administrative law cases form a part, deal with disputes between parties. Judges are concerned with broad social policy in such determinations only insofar as the defending profession raises it as a justification for the action that the organization has taken under the umbrella of protecting the public.

My advice is as follows: when organizations receive legal advice that runs against their view of the public interest, they should request *and read* the judicial pronouncements and

other hard data on which the advice is based and make their own determinations as to whether the factual underpinnings of the advice mirror those at hand.

In summary, professional organizations must weigh their duty to serve the public interest against the obvious need for self protection. Advice should be sought and considered, but it cannot obscure the profession's public duty, even given some risk to itself.

REMEDIATION AND NOT-GUILTY FINDINGS

The disciplinary systems of most professional organizations include an option to require respondents to take courses, pay fines, or agree to some practice restriction pending the completion of remedial action. That option is invoked in circumstances where the inquiry committee finds that the professionals do not pose a continuing threat to the public and that the remedial action will rectify the situation. One organization, for instance, provides courses that examine or assess the practitioner on completion. That profession has, in those cases, an improved level of assurance that the problem that gave rise to the complaint will not be repeated.

The dilemma is—how to publicly report such sanctions? One of the liberal professions reports all sanctions, but those involving small fines and courses are reported anonymously. The Law Society reports such cases when the sanction includes some restriction on the lawyer's practice. The BCSC publishes all results arising from complaints when sanctions are imposed.

It's a grey area. Clearly, the distribution of press releases in respect of minor incidents is inappropriate; the media are unlikely to be interested, and there is questionable public benefit to be gained from besmirching a professional's reputation over an incident that is relatively insignificant and rectifiable. However, what about the professional who chronically runs into grief, but his or her transgressions are always outside the "serious" category? It is likely that such a practitioner does present a greater public risk than a

colleague who has never been in difficulty. In my view, one approach to that dilemma is for the association to require in its by-laws that its regulatory committee consider all aspects of the respondent's disciplinary history before making a final decision. Such action would have to be taken only under legal guidance and pursuant to established policy.

Another legitimate argument in favour of non-publication of minor matters is that a respondent will agree to remedial action more readily than with sanctions seen as being accompanied by public exposure. The public benefits from that professional's taking the recommended remedial action months, or even years, sooner than might be the case should a full, lengthy hearing be held.

Another complicating factor arises in smaller communities. When an association's policy on disclosure is similar to the Law Society's but the association is a health profession, the complainant *must* receive a copy of the document ordering the remedial action. The complainant has no duty of confidentiality to the association or the respondent; a telephone call to the local newspaper may be seen to be newsworthy in that community whereas the information would be ignored by *The Vancouver Sun*. Health organizations might weigh the advantages of having the news preemptively posted on the Internet.

It is the normal approach to refrain from publishing "not guilty" findings. The by-laws and statutes of which I am aware are silent on whether or not to publish such findings. In my view, the nature and extent of publication should be at the discretion of the *respondent*. In cases where the existence of an inquiry and its details have previously received media attention, the by-laws should not inhibit the ability of the accused professional to clear his or her name by requiring the institution to publish the findings and such details as are appropriate in the circumstances.

CAVEATS

I wish to acknowledge the many individuals who took the time to talk to me in connection with this paper, including the following: Mr. David Loukidelis, the Information and Privacy Commissioner for British Columbia; Mr. Murray Rankin, QC, an acknowledged expert on privacy issues; a senior administrator in the Office of the Ombudsman; senior staff members of most of the professions mentioned herein. If this paper contains errors or misinterpretations, the fault is entirely mine, not theirs. As well, the views expressed herein are my own; they may or may not reflect the views or policies of organizations with which I am currently or have in the past been associated as a member or director.

CONCLUSION

At this point, I cannot improve on the conclusion of a paper presented by Mr. Bryan Williams (as he then was) 27 years ago:[26]

> There have clearly been a number of instances where professional self-governing bodies have abused the power granted.... The evidence, in my view, demonstrates even more clearly that the kind of representation and accountability which the consumers of professional services are entitled to expect in the future, will include their input and their scrutiny. It would be responsible for the professionals and their governing bodies to be in the forefront of this evolutionary process.

However, as my grade ten math teacher once said, “If you really want to do something, very little will keep you from doing it, but if you do *not* want to do something, very little will *make* you do it.” (*his* emphasis)

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[26] “Abuse of Power by Professional Self-Governing Bodies” (1979), *Special Lectures*, The Law Society of Upper Canada, 345 at 366; Mr. Williams, QC, served as Chief Justice of the Supreme Court of British Columbia from 1996 to 2000.