

2015 regional SEMINARS  
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WHAT DOES OPENNESS AND TRANSPARENCY  
LOOK LIKE FOR OTHER (NON-HEALTH) PROFESSIONAL REGULATORS?

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**INTRODUCTION**

This presentation will address the openness and transparency of other (non-health) professional regulators in the context of:

- i. Confidentiality and privacy limitations
- ii. Governance activities
- iii. Membership information
- iv. Complaint investigation processes and
- v. Discipline hearing processes



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**(i) INTRODUCTION**

- There is no question that lack of openness and transparency foster public distrust
- The growing demand for greater openness and transparency has manifested in increased media scrutiny and increased FOIPPA requests
- Governments in many jurisdictions, including BC, are responding to the public demand for greater openness through regulatory reform

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(i) INTRODUCTION cont'd

- For example, the *Health Professions Act*, R.S.B.C. 1996, c. 183 (the "HPA") contains several features to ensure transparency and accountability to the public and members such as
  - a mandatory duty to investigate complaints
  - a duty to provide written decisions to complainants
  - the right to seek review of inquiry committee decisions by the complainant to the Health Professions Review Board (which facilitates access to the investigative record)
  - mandatory publication of certain categories of decisions

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(i) INTRODUCTION cont'd

- The HPA sets a higher standard of openness and transparency for professional health regulators than many statutes that govern other (non-health) professional regulators
- Before turning to those statutes, it is useful to consider the limitations on openness and transparency that flow from regulatory requirements regarding confidentiality and privacy

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(ii) CONFIDENTIALITY REQUIREMENTS AND PRIVACY LIMITATIONS

- Openness and transparency are constrained by regulatory requirements with respect to confidentiality and privacy that apply to all professional regulators in BC
- These regulatory requirements often limit the ability of a professional regulator to disclose information
- The applicability of these requirements depends on the nature of information that is being sought and the regulatory activity in question

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**Confidentiality Requirements**

- Confidentiality requirements are a standard feature of professional regulatory statutes
- For example, s. 46(1) of the *Engineers and Geoscientists Act* provides:

46(1) A person acting under this Act must keep confidential all facts, information and records obtained or provided under this Act or under a former enactment, except so far as public duty requires or this Act or the bylaws permit the person to make disclosure of them or to report or take official action on them.



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**Confidentiality Requirements cont'd**

- The duty of confidentiality applies to board members, committee members, staff, inspectors, and others who assist the regulator in fulfilling its mandate
- A breach of a confidentiality provision sometimes constitutes a regulatory "offence" under the regulator's statute - e.g. s. 51 of HPA



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**Confidentiality Requirements cont'd**

- A breach of a confidentiality requirement may also be an "abuse of process"

*Clarke v. Complaints Inquiry Committee*, 2012 ABCA 152 - inspector's direction to provide information to his wife's email was a breach of confidentiality and an abuse of process

See also: *Stelmaschuk v. College of Dental Surgeons of BC*, 2011 BCSC 518



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**Confidentiality Requirements cont'd**

- Additionally, certain categories of information may also be subject to **internal** confidentiality requirements preventing dissemination between committees (e.g. quality assurance, personal health information, and discipline history)




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**Privacy Requirements**

- Regulators are also subject to privacy requirements
  - The law recognizes three types of "privacy":
    - privacy involving territorial or spatial aspects
    - privacy of the "person"
    - privacy of personal information - "informational privacy"
- Autosurvey Inc. v. Prevost*, [2005] O.J. No. 4291 (Ont. S.C.)




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**Privacy Requirements cont'd**

- Section 8 of the *Charter* guarantees the right to be secure against "unreasonable search and seizure"
 

*Bishop v. College of Physicians and Surgeons of BC (1985)*, 22 D.L.R. (4th) 185, appeal dismissed (1986) 26 D.L.R. (4th) 15 (C.A.) - a rule authorizing College to examine records and require removal constituted a "seizure" and the impact of removing patient records, appointment book and day sheets made seizure "unreasonable" under s. 8

See also: *College of Physicians and Surgeons of BC v. Bishop (1989)*, 56 D.L.R. (4th) 164 (B.C.S.C.) - modified rule permitting temporary removal during reasonable hours did not infringe s. 8




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Privacy Requirements cont'd

- There are also federal, provincial and territorial statutes that regulate privacy
- The *Privacy Act*, RSBC 1996, c. 373 creates a right to damages for willful violation of privacy
- This does not impede the investigations of professional regulators as they act under statutory authorization

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Privacy Requirements cont'd

- The *Freedom of Information and Protection of Privacy Act* regulates "informational privacy" in the public sector
- Professional regulators must collect, use and disclose information in a manner that conforms to privacy requirements

*Law Society of Manitoba v. Pollock*, 2007 MBQB 51, aff'd 2008 MCA 61 - investigator recorded conversation with individual engaged in unauthorized practice. Court held no violation of *Privacy Act* but surreptitious recording was an unreasonable search under s. 8 of the *Charter*.

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***Freedom of Information and Protection of Privacy Act, RSBC 1996, c. 165***

- In B.C., professional regulators listed in Schedule 3 of FOIPPA are subject to the same rules for access to information and protection of privacy as government and other "public bodies"
- Under FOIPPA, public bodies must:



- give the public a right of access to records in their custody or control subject to limited exceptions; and
- prevent the unauthorized collection, use or disclosure of "personal information"

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**Freedom of Information and Protection of Privacy Act,  
RSBC 1996, c. 165 cont'd**

- A right of access under FOIPPA overrides statutory confidentiality provisions

*College of Physicians and Surgeons of British Columbia v. British Columbia (Information & Privacy Commissioner)*, 2001 BCSC 726 rev'd on other grounds [2002] B.C.J. No. 2779 (C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 83 - s. 70 of the former *Medical Practitioners Act* which imposed a requirement of confidentiality on the College did not trump access rights under FOIPPA

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**Freedom of Information and Protection of Privacy Act,  
RSBC 1996, c. 165 cont'd**

- Providing the public with a right of access to records promotes openness and transparency but is subject to three limitations under Part 2 of FOIPPA:
  - A public body **may** refuse to admit or deny the existence of a record under s. 8(2) of FOIPPA if disclosure of the existence of it would be an unreasonable invasion of privacy

*Law Society of British Columbia*, [2002] B.C.I.P.C.D. No. 1  
*Law Society of British Columbia*, [2008] B.C.I.P.C.D. No. 36

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**Freedom of Information and Protection of Privacy Act,  
RSBC 1996, c. 165 cont'd**

- A public body **may** refuse to disclose records under the discretionary exceptions to disclosure under Part 2 of FOIPPA which include:
  - Policy advice (s. 13)
  - Legal advice (s. 14)
  - Disclosure harmful to law enforcement (s. 15)
  - Disclosure harmful to financial/economic interests of public body (s. 17)

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**Freedom of Information and Protection of Privacy Act,  
RSBC 1996, c. 165 cont'd**

- A public body **must** refuse to disclose records under the mandatory exceptions to disclosure under Part 2 of FOIPPA:
  - Disclosure harmful to business interests of a third party (s. 21)
  - Disclosure harmful to personal privacy (s. 22)

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**Freedom of Information and Protection of Privacy Act,  
RSBC 1996, c. 165 cont'd**

- Part 3 of FOIPPA protects privacy by regulating the “collection, use and disclosure” of personal information by public bodies
- Part 3 significantly restricts the ability of public bodies to disclose third party personal information

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**(i) GOVERNANCE ACTIVITIES**

- Regulators require the confidence of their members and the public to effectively fulfill their public interest mandate
- Many of the problems that have led to regulatory reform in recent years resulted from the dual regulatory and representative role of professional regulators and conflicts of interest




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(i) GOVERNANCE ACTIVITIES cont'd

- In 2012, the Law Society of BC sought an amendment to the *Legal Profession Act* to formally remove its duty to “uphold and protect the interests of its members”
- Dual roles and conflicts of interest led to fundamental governance issues for the former British Columbia College of Teachers and ultimately to its dissolution

Avison, Donald J., *A College Divided: Report of the Fact Finder on B.C. College of Teachers*, October 2010

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(i) GOVERNANCE ACTIVITIES cont'd

- Transparency of governance activities is achieved through various mechanisms:
  - Posting membership of board and committee members and governance manuals on website
  - Posting bylaws and regulations and policies on website
  - Providing notification of board meetings and agendas
  - Posting meeting minutes
  - Annual reports
  - Mandatory reports to the Minister which are made public

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(i) GOVERNANCE ACTIVITIES cont'd

- Importance of ensuring that information on website and other forums is accessible to the public in a meaningful way and accommodates disabilities

*Canada (Attorney General) v. Jodhan*, 2012 FCA 161 - Court held government violated s. 15 of *Charter* because legally blind individual not reasonably accommodated with respect to website access through other means of obtaining information.

See also: *Canadian Association of the Deaf v. Canada*, 2006 FC 971

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(i) GOVERNANCE ACTIVITIES cont'd

- So how transparent are the governance activities of non-health professional regulators?
- There are varying degrees of transparency with respect to governance activities:
  - *The Legal Professions Act* itself does not require transparency with respect to the governance activities of the Law Society
  - The Law Society Rules require the Law Society to hold an annual member meeting although they are silent whether open to public.
  - No requirement to file annual report although Law Society posts annual reports on website



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(i) GOVERNANCE ACTIVITIES cont'd

- *The Notaries Act* does not require public transparency with respect to the governance activities of the Society of Notaries Public of BC
- No requirement for annual meetings in Act, Regulations or Rules
- No requirement to file annual report although Society posts annual report for previous year on website



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(i) GOVERNANCE ACTIVITIES cont'd

- The *Engineers and Geoscientists Act* does not require public transparency with respect to the governance activities of APEGBC
- The Act requires annual meetings with notice to members but silent on whether open to public
- No statutory requirement to file annual reports and nothing on APEGBC's website



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(i) GOVERNANCE ACTIVITIES cont'd

- The legislation governing accountants (*Accountants (Chartered) Act*, *Accountants (Management) Act* and *Accountants (Certified General) Act*) also do not require public transparency with respect to governance activities (in process of amendment)
- The requirements for meetings are silent on whether open to the public
- No statutory requirement to file annual reports



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(i) GOVERNANCE ACTIVITIES cont'd

- The *Real Estate Services Act* requires somewhat more transparency
- The Real Estate Council is required to maintain certain records respecting its business and affairs
- It must permit inspection of those records during business hours
- It must file annual report with minister and provide copy to anyone on request on payment of reasonable fee

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(i) GOVERNANCE ACTIVITIES cont'd

- The *Teachers Act* requires greater transparency
- The Commissioner and BC Teachers' Council must both file annual reports and additional reports with minister which must be made public
- The Act provides that meetings of the BC Teachers' Council are open to the public subject to limited discretion to exclude

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(iii) MEMBERSHIP INFORMATION

- Most professional regulators are required to maintain a “register” or “roll” of members for public inspection
- It is useful to compare the “register” requirements in the HPA with those of other non-health regulators



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(iii) MEMBERSHIP INFORMATION cont'd

- Section 21 of the HPA requires the register to contain:
  - the persons' name, business address and telephone number
  - class of registration
  - limits or conditions on practice
  - notation of each cancellation or suspension on registration
  - additional information required by regulations of Minister
  - additional information required under college bylaws
  - additional information specified by registration committee, inquiry committee or discipline committee
- See also: *Veterinarians Act*, SBC 2010, c. 15



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(iii) MEMBERSHIP INFORMATION cont'd

- Similarly, the *Teachers Act* requires the Director of Certificate to maintain an online registry that contains:
  - the authorized person's name
  - current status of certification or permission
  - a record of any suspension or cancellation of certification or permission
  - a record of consent resolution agreement that is an admission of professional misconduct or conduct unbecoming or an admission of incompetency or a consequences with respect to which a panel may make an order after a hearing
  - a record of any findings or orders following a discipline hearing.



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(iii) MEMBERSHIP INFORMATION cont'd

- In contrast, far less information is required to be recorded on the register or roll of non-health professional regulators:
  - The Executive Director of the Law Society of BC is required to maintain a "barristers and solicitors' roll" in paper and/or electronic form that contains the full names of all persons who are called under Rule 2-51
  - The Society of Notaries Public of BC must maintain a "Roll of Notaries Public" but does not specify what it must contain (s. 13)

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(iii) MEMBERSHIP INFORMATION cont'd

- The Registrar of APEGBC must maintain a register of members that contains the full name and address of each member and the date of issue of each registration (s. 19)
- The Council of the Institute of Chartered Accountants of BC must keep a register with names of all members by class of membership and licensed firms by class of licence (s. 19)
- The Board of the Society of Management Accountants of BC must keep a register of names of members in good standing (s. 17)

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(iii) MEMBERSHIP INFORMATION cont'd

- The Secretary of the Certified General Accountants Association of BC must keep a register of names
- No requirement for a register under the *Real Estate Services Act* although Council must maintain copies of every licence
- The Registrar of the Association of BC Professional Foresters must keep register of members that includes any information specified by resolution

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(iv) COMPLAINT INVESTIGATION PROCESSES



- the complaints investigation process in professional regulatory statutes is generally confidential and not accessible to the public unless it culminates in a discipline hearing or disposition that requires public notification
- Statutory requirements and common law rules of procedural fairness require disclosure of information to professionals who are the subject of investigations
- However, the complaints investigation process is not particularly transparent to complainants



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(iv) COMPLAINT INVESTIGATION PROCESSES cont'd

- Under HPA, inquiry committee must provide written decision to complainant and notify of right to seek review by Health Professions Review Board

See HPRB Recommendation and Guideline No. 2 - HPA s. 50.53(1)(d) Re: *Enhancing fairness of Investigative Process* through greater Complainant involvement which recommends providing the Complainant with a copy of Registrant's response to College, and an opportunity to comment on that response during the investigation to provide greater process transparency and improve Complainant satisfaction with investigative process



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(iv) COMPLAINT INVESTIGATION PROCESSES cont'd

- Under the *Teachers Act*, there are also provisions which confer rights on complainants in investigative process:
  - Commissioner must acknowledge receipt of complaint and conduct preliminary review
  - If Commissioner takes no further action or defers action, must provide written reasons to complainant and licensee; otherwise mandatory duty to report and notify licensee and complainant of investigation



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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- o The Commissioner will not provide investigation report to complainant
- o Following investigation, Commissioner must provide written reasons to complainant licensee and complainant if taking no further action and may make a summary of decision in anonymized form public
- o If licensee provides consent resolution agreement, copy must be sent to complainant and must be made public unless it would cause significant hardship to victim of misconduct

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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- In contrast, complainants have either no or minimal rights of participation in investigative processes of non-health professional regulators:
  - o Under *Legal Professions Act*, complaints are investigated by Law Society staff or referred to Complaint's Review Committee
  - o Complainants do not receive a copy of investigation report




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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- o Following investigation, complaint may be referred to Discipline Committee which may take no further action, send conduct letter, order conduct meeting, order conduct review, or direct citation
- o If a conduct letter is sent, the complainant receives copy or summary
- o Conduct meetings held in private without complainant
- o Conduct reviews are held in private although complainant invited to attend a portion

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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- Under the *Notaries Act*, complaints are referred to Executive Director or staff to determine if basis for investigation
- No requirement to provide information to Complainant during investigation process
- Investigation report provided to member but not complainant

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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- Under the *Engineers and Geoscientists Act*, APEGBC must designate member to review complaint
- Member must refer to practice review committee or conduct review committee or close complaint with reasons to complainant and licensee
- If further investigation warranted, matter referred to investigation committee which prepares report with findings/recommendations for the practice or conduct review committee

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**(iv) COMPLAINT INVESTIGATION PROCESSES cont'd**

- No requirement to provide information to complainant during investigation process
- Complainant may receive recommendations at end of investigation

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(iv) COMPLAINT INVESTIGATION PROCESSES cont'd

- o Under the *Accountants (Chartered) Act, Accountants (Management) Act, and Accountants (Certified General) Act*, there are no provisions for a complaints process
- o Each regulator has authority to conduct investigations and practice reviews
- o No provision that contemplates disclosure of information to complainants

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(iv) COMPLAINT INVESTIGATION PROCESSES cont'd

- o Under the *Real Estate Services Act*, there is no requirement to provide information to complainant during investigation process
- o Investigation report not provided to complainant or licensee
- o Council must inform Complainant of the "disposition" of complaint with reasons

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(v) DISCIPLINE HEARING PROCESSES

- The justifications for openness and transparency in disciplinary proceedings include:
  - o specific deterrence of the professional from future misconduct
  - o general deterrence of other professions and education of the profession
  - o ensuring the public is aware of the disciplinary history of errant professionals
  - o fostering public confidence in the integrity of the regulator's processes




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(v) DISCIPLINE HEARING PROCESSES cont'd

- The HPA requires Colleges to:
  - provide notice of citations to complainants as well as registrants
  - conduct discipline hearings that are open to the public (subject to a limited discretion to exclude where in the public interest), and
  - publish discipline decisions

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(v) DISCIPLINE HEARING PROCESSES cont'd

- The *Teachers Act* also requires a high level of openness at the discipline stage:
  - The Commissioner must notify the complainant of the citation
  - Hearings must be conducted in accordance with the Commissioner's rules of practice and procedure

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(v) DISCIPLINE HEARING PROCESSES cont'd

- Oral hearings must be open to the public subject to a discretion to exclude the public if the desirability of avoiding disclosure outweighs the desirability of adhering to the principle that hearings be open to the public
- Reasons of the Discipline Hearing panel must be made public subject to a finding that it would cause significant hardship to victim of misconduct

➤ See also: *Veterinarians Act*, SBC 2010, c. 15

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(v) DISCIPLINE HEARING PROCESSES cont'd

- Most of the statutes for non-health professional regulators do not expressly require discipline hearings to be public
- Where statute silent, there is some authority that regulator, as master of its own procedure, has discretion to hold hearing in public or private:

*North Simcoe Hospital Alliance v. Ontario Nurses' Association*,  
2007 CanLII 35142 (ONLA)



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(v) DISCIPLINE HEARING PROCESSES cont'd

- However, if the process is judicial or quasi-judicial in nature, it is likely subject to a public right of attendance at common law

*Tafler v. B.C. (Commissioner of Conflict of Interest)*, 1995  
CanLII 2839

See also: *Robertson v. Edmonton (City) Police Service (#10)*,  
2004 ABQB 519 (CanLII) for summary of law



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(v) DISCIPLINE HEARING PROCESSES cont'd

- The requirements for notice to complainants, the right of the public to attend hearings, and publication of discipline decisions are not uniformly set out in other non-health professional regulatory statutes:
  - The *Legal Profession Act* is silent but the Benchers have established Law Society Rules that govern disclosure of citation, conduct of discipline hearings and publication of decisions
  - The Executive Director "may" disclose a citation to the public and its status once the lawyer has received notice of it



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(v) DISCIPLINE HEARING PROCESSES cont'd

- o The Executive Director must notify the complainant and lawyer of the date, time and place of hearing at least 30 days in advance
- o Hearings are open to the public subject to the panel's discretion to make an exclusion order in any circumstances it considers appropriate
- o The Executive Director must give immediate public notice of any suspension or disbarment and circulate a summary of the decision to the profession
- o The Executive Director "may" disclose a condition or limitation

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(v) DISCIPLINE HEARING PROCESSES cont'd

- o The *Notaries Act* provides that the Discipline Committee may inquire into the conduct of members
- o There is no requirement for notice of the hearing to complainant or the public
- o There is no requirement that the hearing be open to the public

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(v) DISCIPLINE HEARING PROCESSES cont'd

- o The Discipline Committee panel submits a report of its findings to the Directors who must then decide whether there has been misconduct
- o If a member's registration has been suspended or terminated, the Secretary must:
  - publish notice of the suspension or termination in the manner set out in the regulations (there are no regulations) and
  - notify the Attorney General, the Registrar, District Registrars of the Supreme Court, Registrars of the Land Title Offices, and members of the Society.

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(v) DISCIPLINE HEARING PROCESSES cont'd

- The *Engineers and Geoscientists Act* provides that the Discipline Committee must hold an inquiry
- There is no requirement for notice of the inquiry to the complainant or the public although APEGBC publishes notices on its website in advance of disciplinary inquiry hearings

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(v) DISCIPLINE HEARING PROCESSES cont'd

- There is no statutory requirement that the inquiry be open to the public although APEGBC's Complaints Procedure confirms hearings are open to public
- There is no requirement for publication of the Discipline Committee's decision but APEGBC publishes disciplinary decisions with third party information redacted

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(v) DISCIPLINE HEARING PROCESSES cont'd

- The *Accountants (Chartered) Act*, *Accountants (Management) Act* and *Accountants (Certified General) Act* simply empower an inquiry to determine the competence, fitness or professional conduct of a member
- No requirements for transparency
- There is no requirement for oral hearings or hearings open to the public
- There is no requirement for publication of discipline decisions but member can be asked to consent to publication

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**(v) DISCIPLINE HEARING PROCESSES cont'd**

- There is somewhat more transparency in the *Real Estate Services Act*
- The Discipline Committee may conduct a discipline hearing
- There is no requirement for notice of the discipline hearing to the complainant or the public
- The Council must publish the Discipline Committee's order and provide a copy of the order to any person who requests it on payment of a reasonable fee

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**(vi) SOME FINAL THOUGHTS**

- What does openness and transparency look like for non-health professional regulators?
- The statutes for many do not set out requirements; however some non-health professional regulators are recognizing the need to move towards greater transparency and are doing so through their rules and policies
- In 2011, for example, the Law Society of BC reported that it had taken "the proactive step of exploring models for an independent review of its regulatory functions" to increase transparency and public confidence in its processes

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**(vi) SOME FINAL THOUGHTS cont'd**

- There is little question that the enhanced and express statutory requirements for notice of decisions, notice of discipline hearings, open hearings, and public notification reflected in the HPA, *Teachers Act* and *Veterinarians Act* represent the future trend towards greater transparency and openness in regulatory proceedings
- It is reasonable to anticipate that non-health professional regulators that are not taking proactive steps to move in this direction will be facing regulatory reforms to increase their transparency in the not so distant future

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