

BCCAT Annual Conference  
Investigations in a Regulatory  
Context

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# Agenda

- Regulatory Context
- Purpose of Regulatory Investigations
- Legal Context
  - How does procedural fairness apply to investigations
  - Standard of reasonableness not perfection
  - Issues that do matter
- Moving Forward



# Regulatory Context

- Bodies that may assist in making, overseeing, and enforcing rules and regulations
- Includes:
  - Government Agencies (e.g. Employment Standards Branch)
  - Independent quasi-governmental agencies (e.g. Agricultural Land Commission)
  - Self-Governing Agencies (e.g. Professional Regulators)
- Each created and governed by its own enabling legislation
- Decisions usually subject to further review/appeal



# Role and Purpose of Investigations

- Statutory context
- Fact-finding
- Gives the respondent the opportunity to know what the allegations are and respond
- Provides a reasonable underpinning for the basis of decision making, including an assessment of credibility



# Standard of Fairness in Investigations

- Procedural fairness is an important component of both the conduct and consideration of investigations
- Procedural fairness is a concept that applies to administrative decision making, so we need to think carefully about how it applies in the context of an investigation report
- Investigators are not decision makers, and the investigation report is not a decision
  - It is one part (albeit an important part) of the overall decision-making process



# Contextual Factors

- Statutory context
- Seriousness of the allegations
- Participants role in the investigation
- Potential impact of the investigation process on participant
- Role of the investigation in the decision making process
- Investigatory framework / expectations
- Investigative resources



# Legal Context – General Framework

## Conducting a fair investigation:

requires considering bias, thoroughness, and the employee's right to reply and be heard. Many Canadian courts have criticized employers for failing to provide employees with a fair and fulsome opportunity to respond. While an employer need not be perfect, cumulative mistakes in an investigation can amount to a breach of procedural fairness and constitute a failure to act in good faith.

*Oberg v. Saskatchewan (Board of Education of the South East Cornerstone School Division No. 209)* [2020] SKQB 96 (CanLII)



# Nobody's Perfect

- In conducting an investigation, the standard is not perfection, or correctness, rather, it is:

## Reasonableness and Proportionality





# Standard is not perfection

- An investigator need not pursue every conceivable angle
- “Degree of thoroughness required” depends on the circumstances of each case
- Thoroughness must also be qualified by the need for a workable and administratively effective system
- Only “fundamental issues” need to be investigated
- An investigator is not required to refer to everything submitted by a complainant

*Bergeron v. Canada (Attorney General)* [2015] FCJ No. 834, paras. 74-76



# Standard is not perfection

- The investigator was required to conduct a thorough and neutral investigation. **Absolute perfection is not the standard.** The investigator's efforts in assessing the appellant's complaint met this standard and the appellant has failed to demonstrate that the investigator's impartiality and methodology are questionable.
- I accept that the investigation report contains factual mistakes, but these are not material and they did not lead to fundamentally flawed conclusions. ...

*Ritchie v. Canada (Attorney General)* 2017 FCA 114, paras. 31-32



# Remedying Procedural Unfairness

Many of the appellant's complaints in this case relate to the investigative process. I have not been persuaded that anything which took place during the investigative process or any of the decisions made by the Investigation Committee constituted a breach of the duty of procedural fairness owed to the appellant. Moreover, I am satisfied that the rules of natural justice were complied with at the discipline hearing and that the discipline hearing provided the appellant a full and fair opportunity to be heard. Therefore, any unfairness that may have arisen at the prehearing stage would have been corrected by the full and fair discipline hearing.

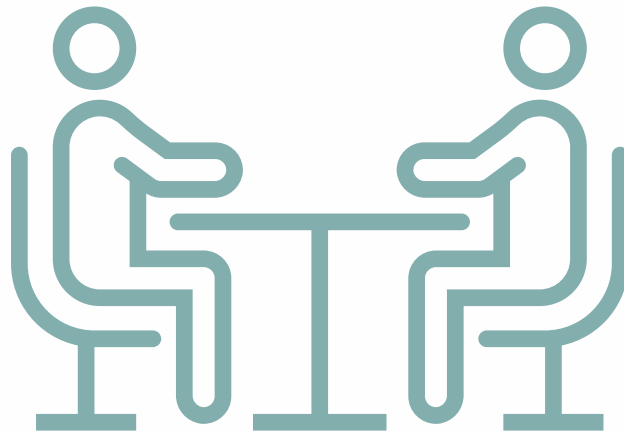
*Hancock v. College of Registered Nurses of Manitoba* 2021 MBCA 20, at para 50.



# What types of issues do matter?

Discuss:

What types of missteps do you think *COULD* lead to a finding that an investigation report is fundamentally flawed, keeping in mind the purposes for which the report is written?



# Fundamental Missteps

Failing to follow the statutory requirements:

- *Finn v. Highland Shores Children's Aid Society*, 2023 ONSC 5495
- *Chapman v. York Region Children's Aid Society*, 2021 ONSC 2620



# Fundamental Missteps

Failing to follow the statutory requirements:

- *Finn v. Highland Shores Children's Aid Society*, 2023 ONSC 5495
- *Chapman v. York Region Children's Aid Society*, 2021 ONSC 2620

Failing to provide sufficient notice or information:

- *MacLeod v Alberta College of Social Workers*, 2018 ABCA 13
- *Wasty v. Canada (Attorney General)* 2023 FC 1042

Failing to investigate key issues or make key findings, whether in relation to disputed facts or credibility:

- *Humphries v. Bobsleigh Canada Skeleton* SDRCC File No. 19-0421



# Fundamental missteps, cont.

- Failing to act impartially
- Rushing to judgment before obtaining the facts
- Failing to be transparent or honest with the respondent during the investigation process
- Failing to provide particulars of allegation
- Failing to provide an adequate opportunity to explain or respond
- Failing to consider a party's response



# Fundamental missteps, cont.

- Failing to interview witnesses with potentially relevant information
- Failing to consider other available evidence which might be relevant to the investigation
- Failing to follow the investigating body's policies regarding the conduct of investigations





# Adequacy

Adequacy describes a relationship between an action and a goal. An investigation is "adequate" if it is sufficient to meet its goals. There may be many goals of an investigation of a complaint against a physician. Obvious goals include public accountability and uncovering the truth. A further possible goal is to gather sufficient information to allow an effective remedy to be crafted. Scarcity of resources dictates that one goal of investigations will be to obtain necessary information without squandering resources. There are, no doubt, other goals that can be ascribed to the investigative process.

*College of Physicians and Surgeons of BC v. HPRB 2022 BCCA 10, at para 114*



# Top Pitfalls in Investigations

- Delay
- Poor communication – before, during, and after
- Forgetting that having fairness, and the feeling of fairness, are paramount



# Timeliness

- Timeliness should be a priority.
- Balanced with this is the need to take sufficient care to ensure that fairness is met.

**Fairness cannot be sacrificed  
for urgency.**



# Effects of Delay on the Investigation Process

- Undermining the quality of the evidence
- Undermining the confidence that the participants have in the process
- Creating uncertainty
- Undermining the acceptability of the ultimate findings
- Creating the perception that the issues were complex or the findings hard to determine



# Acceptability

- It is important that parties feel the process has been fair
- In a hearing context, inputs and outputs are more visible than in investigations
- Communication with involved parties is crucial to their feeling of being heard and respected



Thank you

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