

The Shared Responsibility for Disciplining Land Surveyors



By Will O'Hara and Maria Burseay

There was a time in the early days of land surveying when the members of the profession were truly self-governing. Members would make up their own rules about membership, standards of competence and discipline, and they were free to follow the rules as they wished. Those days are long gone. These days the governance of land surveyors in Canada - and throughout most of the common law world - is a shared responsibility. The most notable example is in the area of discipline. Although associations of land surveyors have the nominal responsibility for disciplining their members, they are fenced in on all sides by the applicable statutes and guarded over by the courts. Disciplinarians within the profession must follow the rules or they will be disciplined themselves.

THE STATUTORY FRAMEWORK

The *Surveyors Act*¹ provides the statutory basis for the Association of Ontario Land Surveyors and confers the power to license members and set standards by which members must abide. Professionals must ensure they maintain a high level of ethics. G.K. Allred states that where the businessman's creed is profit, products, people and principle in that order, the professional's creed must be exactly the reverse. The client must trust that the professional has his or her interests at heart but also that he or she is guided by honesty, integrity and character.² A degradation of ethics can lead to a loss of respect in society and also possibly to a loss of self regulation. The legislature can repeal or amend the *Surveyors Act* at any time.

The discipline procedure is also subject to the *Statutory Powers Procedure Act*³ which is applicable to all administrative tribunals in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required to hold a hearing before making a decision. In addition, the discipline procedure is subject to the common law and the courts. These responsibilities are recognized in the comprehensive *Manual of Procedures for the Discipline Committee of the Association of Ontario Land Surveyors*.⁴

THE COMPLAINT

The disciplinary process often begins with a complaint by a member of the public or a fellow surveyor. An official complaint must be made in writing, and both the complainant

and the surveyor are given at least two opportunities to review and rebut, in writing, the claims of the other party. The Complaints Committee has no statutory power to hold a hearing, but may refer the surveyor to the Discipline Committee, or order such other action within their powers, as they deem appropriate. The Registrar, as a result of a Registrar's Investigation under the Act, may also refer a member to the Discipline Committee. In practice this is usually done using the governing Council as an intermediary.

In all disciplines, an investigation into a complaint against a member involves a duty of the profession's governing body to act fairly.⁵ An investigation must be respectful of the member but also thorough and systematic in order to ensure that the standards of practice are upheld.

Throughout any complaints proceedings the member must ensure that all communications from the Association are responded to promptly. A bad situation can quickly turn much worse if the Association's telephone calls and letters go unanswered.

The Discipline Committee recently approved the use of mediation prior to a hearing. The mediator is someone who is a member of the Association but, like the Discipline Committee Panel, has no prior connection to the member being disciplined or the matters that are the subject of the discipline. The mediator can help prepare a joint submission to present to the Discipline Committee. The Discipline Committee panel will then review the joint submission and decide whether or not to accept it.

THE HEARING

If mediation is not appropriate and the Discipline Committee proceeds to call a hearing, they will strike a panel to preside over that hearing. The members of the panel are required to ensure there is no conflict of interest. Both real and perceived conflicts of interest must be disclosed including past or current personal or working relationships or any involvement in the situation for which the member is being disciplined. This means that not only are members ineligible to serve as Discipline Committee members if they have an actual conflict but also if a member of the public could perceive there to be conflict then their appointment to the panel is prohibited and they are to exclude themselves. Carrying on business with the member being investigated is considered a conflict of interest

but working in the same geographical area is not.

Once the panel has been struck, a hearing date must be agreed upon by all parties. The member may request an adjournment if more time is needed. In the case of *Morgan and Association of Ontario Land Surveyors (Re)*⁶ the court stated that the right to an adjournment is not an absolute one but a person charged with professional misconduct is entitled to a fair hearing and is therefore, in appropriate circumstances, entitled to an adjournment. The case involved a member who was informed of the hearing taking place in two weeks time. He requested an adjournment in order to retain counsel and prepare for the hearing. The request was denied and the hearing proceeded. At the hearing the member requested an adjournment again and explained that his lawyer was to be away for the whole summer. The committee proceeded with the hearing, found him guilty of misconduct and suspended him for a minimum of one year. The member appealed and a judge of the Divisional Court overturned the decision. The court states that

“the appellant here was denied an adjournment on a matter in which his professional work, his career, his livelihood and his reputation were in jeopardy. While a discipline committee may not be required to strictly adhere to procedure observed by the Courts...the committee here had a duty in law to be fair.”⁷

Part of that fairness is holding the hearing in a manner which is convenient and just. The Discipline Committee may conduct a hearing in person, electronically or in writing.⁸ An oral hearing means that the professional and the members of the panel are in a room together and the evidence is presented and the questioning is done face to face. An electronic hearing usually proceeds via teleconference. In a written hearing the parties submit their arguments on paper.

Regardless of the form of the hearing, all hearings must abide by the rules of natural justice. These rules have been established in common law and although their application can vary widely, they include the concepts of:

- Procedural fairness
- The right to be heard and cross-examine witnesses
- The right to an unbiased tribunal
- The right to be represented by counsel
- The right to see the case to be met

In criminal proceedings, it is not possible for the Crown to compel the accused to testify. The rule against “self-incrimination” is upheld strictly in Canadian criminal courts. The rights of a member before a professional disciplinary body are much different however. An investigated person is a compellable witness and is expected to answer to the Association. The Ontario Court of Appeal addressed the issue in this way:

The practice of a profession is a privilege. The law grants to certain groups a monopoly to carry on certain well-

defined activities and imposes upon the members of those groups an obligation to prevent abuse and to ensure that the monopoly of those groups will be exercised for the public good. It is normal that those who enjoy those privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. This discipline is peculiar to them and is not part of penal law...One cannot claim in the same breath the so-called right to silence and the privileged status as a professional.⁹

Another manner in which a disciplinary hearing varies from a court of law is the final determination. In a court the judge or panel of judges makes the final determination without the assistance of counsel. A disciplinary panel usually contains very few members with legal experience so it is permissible for the panel to enlist the assistance of a lawyer to act for the panel in its deliberations. In the case of *Depres v. New Brunswick Land Surveyors Assn.*¹⁰, the panel made a decision and then used the association’s solicitor to assist in drafting the wording of the decision. The court agreed that this was undertaken with a proper motive and as the members of the committee were surveyors and not lawyers, they were entitled to be assisted by legal counsel.

The member is entitled to bring motions and applications during the process if issues arise during the hearing that need to be addressed. Attempting to manipulate procedure to impede the proceeding will not be taken lightly however. In the case of *Piller v. Association of Ontario Land Surveyors*¹¹, the member brought an application to the Ontario Superior Court of Justice for judicial review asking the court to consider the conduct of the tribunal. In that case the member made numerous objections and engaged in “stall tactics”. The court reprimanded him stating:

It appears that the applicant has attempted, from the outset, to use every tactical and technical argument in order to avoid proceeding with this matter on the merits. He is certainly entitled to assert his legitimate rights, but he is not entitled to raise spurious arguments in an attempt to frustrate the process. The respondent has an important role to play pursuant to its statutory duty to protect the public.¹²

THE PUNISHMENT

Admonishment is one of the lesser penalties available to the Association. A reprimand can be recorded on the register but can occur and be unrecorded in cases of minor professional misconduct or incompetence. The panel also has available a number of other punishments that may vary from one jurisdiction to another including a suspension or cancellation of a practitioner’s membership, a fine, a requirement for the member to practice under supervision, restriction of their scope of practice or directing the member to take courses or obtain counselling. The disciplinary committee can only impose penalties that they are allowed to impose according to the statute.

In a case where a member has had their license or certificate of registration revoked or suspended, the Discipline Committee is obligated to publish the name of the member in an official publication of the Association under s.26(5) of the *Act*. In a case where the punishment is less than a revocation or suspension, the Discipline Committee has the discretion to choose whether or not they think publication should occur. The Discipline Committee has stated in past decisions that they consider it important to identify members by name as a deterrent to other members and if there is no identification then there may be a perception that being disciplined by the Association has no significant effect. There is also an important element of public notification. Since disciplinary proceedings often arise from a complaint from a member of the public, it is important that members of the public be able to determine how the Association regulates itself in disciplinary matters.¹³ Upholding the public trust will inevitably involve dealing seriously with public complaints in an open and transparent manner.

Costs are another type of penalty which can be ordered relating directly to the hearing. Costs can be ordered to be paid by the member to cover the expense of holding the hearing. However, this has to be within the realm of the *Surveyors Act*. In the case of *Backman v. Association of Nova Scotia Land Surveyors*,¹⁴ the discipline committee ordered the member who had been found guilty to pay \$5,500 in legal fees and disbursements but the court overturned this decision. The court found the infraction to be a technical contravention of the statute.

Once the final determination is made a member also has the option of appealing the decision. An appeal is not an opportunity for a “rehearing” but it may be necessary to cover old ground where the member asserts that the panel made a mistake of fact or law, or both. An appeal from the Discipline Committee of the Association of Ontario Land Surveyors is made to the Divisional Court of the Superior Court of Justice. The courts can and do overturn decisions of discipline committees of the various professions where those in charge of the discipline process need to be reminded of the proper procedures. Of course, the converse is equally true: the courts are just as likely to side with a professional discipline committee where the member is attempting to abuse the system or is demanding procedural concessions that go beyond fairness.

CONCLUSION

The fabric of professional discipline for Canadian land surveyors is woven from threads of statute, regulation, policy manuals and the common law. It is woven together by the actions of the legislature, the Association and the courts, working together, watching for frays and patching where necessary. The result is a remarkably strong system that strives to be fair to the member and fair to the Association, with the ultimate result of safeguarding the Association and the protection of the public.



Will O’Hara is a partner at the firm of Gardiner Roberts LLP, practicing in professional liability litigation, intellectual property, insurance and dispute resolution. He is certified by the Law Society of Upper Canada as a Specialist in Civil Litigation and teaches a post-graduate course at Ryerson University entitled *Legal and Ethical Issues in GIS and Data Management*. He can be reached by email at: wohara@gardiner-roberts.com.

Maria Bursey is an articling student with Gardiner Roberts LLP. She graduated from Queen’s University Faculty of Law and holds an Honours BA from Dalhousie University as well as a MA from Carleton University where she focused on Canadian political institutions.

¹ R.S.O. 1990, c. S.29 and R.R.O. 1990, Regulation 1026.

² J. White, *Honesty, Morality and Conscience* (Colorado Springs: NavPress, 1979). as cited in G.K. Allred, “The Surveying Profession” in *Survey Law in Canada* (Toronto: Carswell, 1989) 417 at 472.

³ *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

⁴ s. 4.3.1. The *Manual* is available on the AOLS web site.

⁵ *Nicholson v. Haldimand-Norfolk (Region) Board of Police Commissioners* (1979), 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311.

⁶ [1980] 28 O.R.(2d) 19 (Ont. Div. Ct.).

⁷ *Ibid* at 22.

⁸ *Manual of Procedures for the Discipline Committee of the Association of Ontario Land Surveyors*, s. 9.3 - 9.3.5.

⁹ *Belhumeur v. Discipline Ctee. of Que. Bar Assn.* (1983), 34 C.R. (3d) 279 as cited in *Re Fang and College of Physicians and Surgeons of Alberta* (1985), 25 D.L.R. (4th) 632 at 4.

¹⁰ (1992), 130 N.B.R. (2d) 210, 8 Admin. L.R. (2d) 136 (C.A.).

¹¹ 148 O.A.C. 191, 36 Admin. L.R.. (3d) 305.

¹² *Piller v. Association of Ontario Land Surveyors* [2001] 148 O.A.C. 191, 36 Admin. L.R. (3d) 305 (Ont. Sup. Ct) at para 24. Appeal on issue of quorum allowed at Ontario Court of Appeal, 2002 Canlii 44996.

¹³ *Petrich (Re)*, Hearing of the Discipline Committee of the Association of Ontario Land Surveyors. September 22, 2008. Available on AOLS website.

¹⁴ (1991), 106 N.S.R. (2d) 283 (S.C.).

Sites to See

Career Website for Youth

www.setyourboundaries.ca

The Canadian Council of Land Surveyors introduces [setyourboundaries.ca](http://www.setyourboundaries.ca), a new website designed to attract the attention of youth (13 to 18 years of age) and provide them with information and materials on the appropriate high school courses and post secondary programs that would lead to a career in surveying.