BRITISH COLUMBIA COLLEGE OF NURSES AND MIDWIVES

DISCIPLINE HEARING

IN THE MATTER OF the CITATION issued September 27, 2022 pursuant to Section 37 of the *Health Professions Act*, RSBC 1996, c 183

BETWEEN

BRITISH COLUMBIA COLLEGE OF NURSES AND MIDWIVES (the "College")

PETITIONER

AND

SEAN TAYLOR ("Mr. Taylor")

RESPONDENT

NOTICE OF APPLICATION

Name(s) of applicant(s): Sean Taylor, Respondent

TO: Petitioner

AND TO Brent Olthuis
Suite 1915, 1030 West Georgia St, Vancouver, B.C., V6E 2Y3
Counsel for the Petitioner

AND TO Fritz Gaerdes
Suite 2100 - 1055 West Georgia Street, Vancouver, B.C., V6E 3P3
Counsel for the Discipline Panel

TAKE NOTICE that an application will be made by the applicant(s) to the Discipline Panel (the "Panel") presiding at the prehearing conference, conducted by telephone on 27/Feb/2023 at 10:00 a.m. for the order(s) set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. The Respondent requests that the Panel exercise its powers under s.38(4.2)(c) of the Health Professions Act, c. 183, R.S.B.C., 1996, to make the following orders:

The College shall, at least 90 days before any scheduled discipline hearing, provide to the Respondent, a detailed affidavit identifying the documents, not already produced, reflecting the information or submissions that were directly or indirectly considered by the College in making the decision to issue the citation dated September 22, 2022 (the "Citation"), even if the documents are not going to be tendered or relied upon by the College at the discipline hearing, including but not limited to the following:

i. all emails, meeting minutes, correspondence, notes of any and all individuals at Interior Health, the College, the Ministry of Health, concerning Mr. Taylor and his employment with Interior Health Authority, his standing with the College, and the issues raised in the citation issued September 22, 2022 (the "Citation").

ii. all audio or video or transcripts of the incidents referenced in the Citation that form the basis of the Citation, including a copy of the complaint and all material supplied by the complainant in support of the complaint as well as copies of any and all emails, letters, fax, or correspondence between the complainant and the College, or Interior Health Authority, including any notes of any conversations between the College or the Interior Health Authority, and the complainant that is in the possession or control of the College.

iii. the particulars of how each paragraph of the Citation and the conduct referred to therein, violates any statute, bylaw or practice standard.

iv. the remedy that the College is seeking as a result of their Citation.

PART 2: FACTUAL BASIS

1. On December 20, 2022, Mr. Olthuis, counsel for the College provided a letter to counsel for the Panel advising that the College was not proposing any preliminary applications, but that it would respond to any proposals that Mr. Taylor wished to make. The College proposed that the parties should follow the timelines prescribed in s.38(4.1) of the *Health Professions Act*, RSBC 1996, c 183 (the "*HPA*") in terms of disclosing documentary evidence, expert opinions evidence and lay evidence (i.e., 14 days prior to the Disciplinary Hearing). The College proposed that this deadline be fixed to the pre-hearing schedule.

2. On December 20, 2022 Mr. Turner, counsel for the Respondent, requested from Mr. Olthuis the following information that in any way relates to the Citation:

i. all emails, meeting minutes, correspondence, notes of any and all individuals at Interior Health, the College, the Ministry of Health, concerning Mr. Taylor and his employment with Interior Health Authority, his standing with the College, and the issues raised in the Citation;

ii. all audio or video or transcripts of the incidents referenced in the Citation that form the basis of the Citation, including a copy of the complaint and all material supplied by the complainant in support of the complaint;

iii. the particulars of how each paragraph of the Citation and the conduct referred to therein, violates any statute, bylaw or practice standard;

iv. the remedy that the College is seeking as a result of their Citation;

(collectively, the "**Disclosure Request**").

3. On January 4, 2023, Mr. Turner reiterated that he made it clear after Mr. Gaerdes asked for both counsel's available dates for the PHC that he could not provide his availability for the PHC or the Disciplinary Hearing for that matter until he had a response to the initial disclosure request, as well as the disclosure itself. Mr. Turner stated that he did not want to commit himself to any date until he knew the College's position on disclosure, what kind of disclosure he was dealing with, and the nature of the evidence that the College intended to tender at the Disciplinary Hearing. Mr. Turner stated that if the College was not in a position to give its position on these issues, then he would provide his dates on a tentative basis that would be dependent upon the College's response to the disclosure request, and the disclosure that was ultimately obtained.

4. On January 4, 2023, Mr. Olthuis confirmed by email that the College would disclose their evidence in accordance with the timelines in s.38(4.1) (i.e., at least 14 days before the Disciplinary Hearing, not the PHC) and asserted that absent any order from the Panel to the contrary, that is the timeline that applies. Mr. Olthuis also stated that disclosure (14 days before the Disciplinary Hearing) will include an affidavit from the investigator, which will append the investigator's report, which itself includes the complaint. Mr. Olthuis further advised in response to Mr. Turner's inquiry as to what remedy the College seeks in relation to the Citation, that the College has not yet determined what penalty it is seeking.

5. On January 9, 2022 Mr. Gaerdes sent an email to Mr. Turner and Mr. Olthuis advising that the Panel members are not all available on the dates the parties proposed for the hearing. Accordingly, the Panel directs the following:

i. Each party must by provide Independent Legal Counsel for the Panel (ILC), by no later than 5pm on January 13, 2023 with all calendar dates, which need not be consecutive dates, during May, June, July, and August 2023 on which they are available to proceed with a 3-day discipline hearing.

ii. A pre-hearing conference (PHC) is set to be conducted by telephone on February 27, 2023 at 9am.

iii. Any Preliminary Application materials to which any party wishes to speak at the PHC must be filed with ILC by email no later than 5pm on January 27, 2023.

iv. Any Response to such Preliminary Application must be filed with ILC by email no later than 5pm on February 14, 2023.

v. Any Reply to such Response must be filed with ILC by email no later than 5pm on February 22, 2023

6. On January 19, 2023 Mr. Gaerdes sent an email to Mr. Turner and Mr. Olthuis advising them that the Panel has set the hearing for July 18 to 20, 2023 at 10:00 am on each day (the "**Discipline Hearing**"), and confirmed that the College will be utilizing the College's Webex platform to appear by way of videoconference on the New Hearing Dates (the "**January 19 Email**").

PART 3: LEGAL BASIS

Disclosure and the Requirements of Transparency, Intelligibility, and Justification

7. To date the College has not provided any information in response to the Disclosure Request.

8. Disclosure of the information requested in the Disclosure Request is necessary to ensure transparency and procedural fairness. It is critical that the record before the Panel is contains all of the relevant evidence pertaining to the allegations made in the Citation. Only with a complete record will the Respondent be afforded a proper opportunity to know the case he has to meet and be in a position to properly respond.

9. Having a comprehensive record of proceedings is essential to the Panel fulfilling its entrusted responsibility to engage in meaningful administrative action.

10. The Federal Court of Appeal has recently confirmed that a full record is widely recognized to be "indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review". [1]

11. The College is not a neutral third party in these proceedings – it is a party to the proceedings with a clear and direct interest in seeing its own administrative decisions upheld.

12. As such, the Panel cannot merely accept the College's assertions and opinions, offered in defence of its decision to investigate and discipline Mr. Taylor, as part of or in substitution for the actual record of evidence in this case.

13. The task of the Panel is to independently review and assess the evidence before it to determine whether discipline is warranted. In order to provide a full and meaningful response to that evidence counsel must first have full disclosure beforehand. The law of procedural fairness demands it.

14. It would be an abdication of the Panel's essential role for it to defer to the College's own view of what evidence should be disclosed, and what it demonstrates.

15. Speaking in the context of a judicial review, the Supreme Court of Canada in *Vavilov* explained that the courts must "develop and strengthen a culture of justification in administrative decision making", which requires decisions that are "transparent, intelligible and justified". [2] The Panel is functioning as an administrative tribunal in a

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[1] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at paras 67-71.
[2] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras 2, 14-15.

quasi-judicial role akin to that of a court when it is deciding on a matter of professional discipline. Thus, one can reasonable impart the same requirement of such a tribunal to require the College to provide timely disclosure in order to develop and strengthen a culture of justification in administrative decision making by making the process transparent.

16. As a corollary to the role of administrative tribunals, the Supreme Court of Canada stated that administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness". [3]

17. In this context, the courts and administrative tribunals must be alert to attempts by decision makers to prevent them from fulfilling their functions "by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making". [4]

18. The Federal Court of Appeal explained the importance of full disclosure by administrative or government decision makers, to those reviewing such decisions, including tribunals and the Courts, as follows: [5]

> [105] The rationale against the complete immunization of administrative conduct from review is as fundamental as it can get:
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> > "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; United States v. Nixon, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); Magna Carta (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
> >
> > Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how

[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 14.
[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 106.
[5] *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, at paras 105-106.

> important—must be subject to meaningful and fully independent review and accountability.
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> (*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24; see also *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404 at paras. 6-7, aff'd 2019 FCA 148, [2019] 3 F.C.R. 503.)
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> [106] Courts are alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 51; *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24; Slansky at para. 276 (dissenting but not disputed by the majority); see also Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 Can. J. Admin. L. & Prac. 87 at 113; and see the requirement for reasoned explanations behind administrative decision-making in *Vavilov* at paras. 83-87 and 91-104. [emphasis added]

19. In order to fulfil the requirements of transparency, intelligibility, and justification in this case, the College must be able to justify initiating the disciplinary process and specify by what authority they assert their right to do so, and to provide full disclosure of all relevant information to enable a full and proper review of the evidence to determine if the actions taken are justified.

20. As the Federal Court of Appeal has explained, it is not open to the government, or in this case, the College, to say, "Trust us, we got it right." Nor is it sufficient for the government to say "trust us, but here's a hint". [6]

21. Similarly, the Supreme Court of Canada in *Vavilov* stressed the importance of transparency and intelligibility to the proper application of the reasonableness standard, in words that apply directly to the present application: [7]

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. **It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party**.
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> [emphasis added]

22. This is precisely what Mr. Taylor is faced with in these proceedings. There has not been proper disclosure, despite that request having been made on December 20, 2022 and despite

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[6] *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, at paras 21-22.
[7] *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, at para 95.

the fact that the Citation was issued September 27, 2022 and pertains to conduct that is alleged to have occurred in 2020.

23. Procedural fairness demands not only full disclosure, but also timely disclosure. The College's position that they will produce what evidence they intend to rely upon at the Discipline Hearing, 14 days before the hearing (scheduled for July 18-20, 2023) does not constitute full or timely disclosure and is not procedurally fair in these circumstances. Mr. Taylor needs sufficient time to review the disclosure and to make whatever additional applications may be needed to obtain further disclosure if the initial disclosure is not complete.

24. By refusing to provide full disclosure in a timely fashion, the College is saying to Mr. Taylor, and to the Panel, "trust us, we reviewed the record, and we got it right – here are our conclusions". That is not sufficient for a hearing of this nature that can have severe consequences for Mr. Taylor. Any decision rendered by the Panel in these circumstances is at great risk of being set aside on judicial review for not meeting the standard set out in *Vavilov*, which requires the College to be "transparent, intelligible, and justifiable".

Judicial Review Record Disclosure Requirements are Analogous to Administrative Proceedings

25. The right of a petitioner on judicial review to a proper and complete record of evidence before the tribunal, and the essential role this plays in meaningful judicial review, has been confirmed many times by courts across the country, which is analogous to the disclosure requirements of an administrative decision maker before a tribunal:

i. ***Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128**, paras 67-71: [8]

> Thus, we must have front of mind the role that the evidentiary record plays in reviewing courts. It lies at the heart of meaningful judicial review. Its importance cannot be understated.
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> (…)
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> The reasons of the administrative decision-maker—and, thus, the evidentiary record intimately associated with them—are no small thing. They are the starting point and the focus for the reviewing court's judicial review analysis…
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> And, quite apart from the foregoing, the evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative

[8] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, AT paras 67-71.

> scheme and—most importantly for present purposes—the evidentiary record before the administrative decision-maker. [emphasis added]

ii. ***Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74**, para 24: [9]

> In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question. No other result is fully consistent with the present substance of administrative law. [emphasis added]

iii. ***Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ON CA)**, para 161: [10]

> **An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court**. This is an aspect of the superior court's inherent powers of judicial review. A superior court may insist upon the production of an adequate record of the proceedings before the tribunal being reviewed. As stated by Denning L.J. in *R. v. Medical Appeal Tribunal ex p. Gilmore*, [1957] 1 Q.B. 574 at 583 (C.A.): "The court has always had power to order an inferior tribunal to complete the record ... [A] tribunal could defeat a writ of certiorari unless the courts could order them to complete or correct an imperfect record. So the courts have the power to give such an order"…. A statutory body subject to judicial review cannot immunize itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court. [emphasis added]

26. It is not controversial that the "record" generally consists of the material, evidence, documents, and information that was "before" the decision maker or decision-makers in making a particular decision.

27. The "record" here includes what was before the College when they decided to issue the Citation, whether or not they intend to tender that evidence at the hearing.

28. As the BC Court of Appeal has recently stated: [11]

> [49] Thus, while it may be more difficult to identify precisely which documents were before a decision maker such as the Minister or their delegate as in this case, as opposed to a tribunal, it is clear that the only documents to be produced as part

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[9] *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, at para 24.
[10] *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ON CA), at para 161.
[11] *British Columbia (Minister of Health) v. Eastside Pharmacy Ltd.*, 2022 BCCA 259, at para 49.

> of the record are those that were *actually before* the decision maker. [emphasis added]

29. This legal requirement to include all documents before the decision-maker in the record before the Court was recently applied by the BC Supreme Court in the *Canada Mink Breeders* case: [12]

> [19] It has been held that an applicant under s. 17 is generally entitled to receive production of the "record of the proceeding", and no more: *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41; *Community Outreach Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2017 BCSC 1634 at para. 18. The applicant is entitled only to those documents that were actually before the decision-maker: *British Columbia (Minister of Health) v. Eastside Pharmacy Ltd.*, 2022 BCCA 259 at para. 49.
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> (…)
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> [23] In light of these authorities, I am satisfied that the "record of the proceedings" in this case includes at least some of the documents that the petitioners seek to have produced, particularly those that will enable the court to reconstruct what was before cabinet when it made the impugned decision.
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> (…)
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> [35] In summary, I have concluded that the respondents should be directed to produce, to the extent they have not already done so, the documents in their possession or control reflecting the information and submissions that were directly or indirectly considered by cabinet in making the impugned decision, unless continuing to withhold those documents is found to be justified under the PII test, to which I turn next.
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> (…)
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> [39] The respondents are directed, within 30 days, to prepare and deliver to counsel for the petitioners a detailed affidavit identifying the documents, not already produced, reflecting the information or submissions that were directly or indirectly considered by cabinet in making the impugned decision, and the basis for the respondents' assertion of PII in each case. [emphasis added]

Disclosure Obligations and Procedural Fairness

30. A higher standard of procedural fairness and the highest degree of disclosure is required of an administrative tribunal when they are making a decision pertaining to professional discipline and when the right to continue in one's profession or employment is at stake. Disclosure must include all evidence that may assist the person affected by the decision in

[12] *Canada Mink Breeders Association v British Columbia*, 2022 BCSC 1731, at paras 19, 23, 35, and 39.

defending themselves, even if the tribunal does not plan to rely upon it in rendering its decision.

31. Procedural fairness requires disclosure of sufficient information to permit meaningful participation in the hearing process. [13]

32. Both *Knight v. Indian Head School Division No. 19,* 1990 CanLII 138 (SCC), [1990] 1 SCR 653 [14] and *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 ("*Baker*") [15] made clear that procedural fairness does not dictate one size fits all outcomes; its content is "eminently variable." As set out in the *Baker* factors, the requirements of fair procedure in a particular case depend on the nature of the statutory scheme, the nature and importance of the interest affected, the impact of the decision on that interest, the nature of the tribunal's decision-making process, the legitimate expectations of the individuals affected, the tribunal's choice of procedures and the institutional context within which the tribunal operates. The law is clear that matters pertaining to professional discipline–where a person's profession, reputation, and livelihood are at risk–the disclosure requirements are substantial and include all of the information the tribunal is being asked to consider in rendering its decision.

33. The case of *May v. Ferndale Institution*, 2005 SCC 82 ("*May*") [16] involved a challenge by several inmates serving life sentences to decisions by the Correctional Service of Canada (the "CSC") to transfer them from minimum to medium security institutions. The transfer decisions were made not as a result of specific inmate misconduct, but rather following a general risk assessment undertaken respecting all inmates serving life sentences who had not undertaken violent offender programming. The risk assessment was undertaken using a "scoring matrix," which was not disclosed to the inmates. The inmates argued that the failure to disclose the matrix made it impossible for them to challenge the decision.

34. The inmates did not rely solely on the common law. They argued that this was one of those rare instances in administrative law where the decision affected their liberty interest under s. 7 of the *Charter*. They argued that if the principles of fundamental justice in s. 7 of the *Charter* gave rise to the *Stinchcombe* standard in by the proceedings, fundamental justice required no less in respect of their s. 7 rights in administrative proceedings.

While the Court accepted that s. 7 of the *Charter* was operative, it rejected the proposition that the principles of fundamental justice impose the same requirement in every context:

> "The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decisions involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with involuntary transfers is administrative law and not criminal law. The *Stinchcombe*

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[13] *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCSC 1663 at para 61.
[14] *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653 at para 3.
[15] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21-28.
[16] *May v. Ferndale Institution*, 2005 SCC 82.

> disclosure standard is fair and justified when innocence is at stake but not in situations like this one."
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> "We share the respondents' view. *The requirements of procedural fairness must be assessed contextually in every circumstance*…" [emphasis added]
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> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. *The Stinchcombe principles do not apply in the administrative context*." [emphasis added]
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> "***In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet…***" [emphasis added] [17]

35. The Court nevertheless held that the disclosure was not sufficient to comply with principles of procedural fairness. The CSC relied on the scoring matrix, and failed to disclose it. This was "a major breach of the duty to disclose inherent in the requirement of procedural fairness".[18] This was a breach not only of the common law and the *Charter*, but of the Commission's own statutory requirements governing fair hearings.

36. In *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [19] which was decided only a few months after *May, supra*, a licenced trustee in bankruptcy faced discipline proceedings as a result of a complaint by a creditor. Disciplinary proceedings are facilitated by the Superintendent of Bankruptcy, whose office includes investigators ("senior disciplinary analysts") operating at arm's length from the Superintendent, who is the ultimate decision-maker.

37. The issue in *Sheriff* was whether the investigators were as a matter of procedural fairness under the same type of obligation as Crown Counsel in a criminal case (i.e., *Stinchcombe*) to disclose all relevant reports and documents to a licencee facing a discipline hearing, *even if the documents were not going to be tendered or relied on by investigators as evidence at the hearing.*

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[17] *May v. Ferndale Institution*, 2005 SCC 82 at paras 89-92.

[18] *May v. Ferndale Institution*, 2005 SCC 82 at para 117; in BC see also: *Napoli v. British Columbia (Workers' Compensation Board)*, 1981 CanLII 310 (BC CA), and *Hammami v. College of Physicians and Surgeons of British Columbia*, 1996 CanLII 1845 (BC CA).

[19] *Sheriff v. Canada (Attorney General)*, 2006 FCA 139.

38. The licencee learned that investigators were in possession of evidence that they did not propose to call but which might have been helpful to the licencee. The Attorney General of Canada argued that *May* governed, and the disclosure of this information was unnecessary and not required by law. The Federal Court of Appeal (the "FCA") disagreed. The FCA dealt with *May* as follows (paras. 29-34):

> "While the Court is unequivocal in stating that "[t]he *Stinchcombe* principles do not apply in the administrative context," **it clearly is not referring to a licensing review hearing, where a loss of livelihood and damage to professional reputation are at stake**. In contrast, in the present appeal, **the innocence, i.e. the reputation of the Trustees, is under review**. Accordingly, I would classify a review of a trustee in bankruptcy's license by the OSB as an exception to the rule established in *May*." [emphasis added]
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> "It must be noted that this Court has on a number of occasions refused requests for disclosure of all documents related to an investigation (see Re *CIBA-Geigy Canada Ltd.*, [1994] F.C.J. No. 884, 1994 CarswellNat 1796 (C.A.); *D & B Co. of Canada Ltd. v. Canada (Director of Investigations & Research)* (1994), 176 N.R. 62 (C.A.)). However, these cases can be easily distinguished from the case on appeal because of the nature of the action. While both *CIBA* and *D&B* involve potential economic hardship for the appellant companies, neither case involves the individual's right to work or professional reputation. The interests of the appellants in these cases do not parallel those of the accused in a criminal proceeding; therefore, a lower level of disclosure was appropriate."
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> "In contrast, **our Courts have repeatedly recognized a higher standard of procedure for professional discipline bodies when the right to continue in one's profession or employment is at stake** (see *Kane v. Board of Governors of University of British Columbia*, [1980] 1 S.C.R. 1105 at page 1113; Brown and Evans, Judicial Review of Administrative Action in Canada (Canvasback Publishing: Toronto, 1998 at pages 9-57 and 9-58). **This higher standard of disclosure exists regardless of whether the provincial jurisdiction recognizes the application of section 7 of the *Charter* in these cases**." [emphasis added]
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> "**The requirement for increased disclosure is justified by the significant consequences for the professional person's career and status in the community**. Some Courts have noted that a finding of professional misconduct may be more serious than a criminal conviction (see *Howe v. Institute of Chartered Accountants* (1994), 19 O.R. (3d) 483 (C.A.) per Laskin J.A. in dissent at pages 495-496; *Emerson v. Law Society of Upper Canada* (1983), 44 O.R.

> (2d) 729, at 744). **The scope of disclosure in professional hearings continues to be expanded by provincial courts, which have applied the *Stinchcombe* principles in cases where the administrative body might terminate or restrict the right to practice or seriously impact on a professional reputation** (see *Hammami v. College of Physicians and Surgeons of British Columbia* (1977), 47 Admin. L.R. (2d) 30 (B.C.S.C.) at paragraph 75; *Milner v. Registered Nurses Association (British Columbia)* (1997), 71 B.C.L.R. (3d) 372 (S.C.)). In *Stinchcombe*, the Supreme Court of Canada held that there is **a general duty** on Crown prosecutors **to disclose all evidence that may assist the accused, even if the prosecution did not plan to adduce it**. While these principles originally only applied in the criminal law context, **the similarities between a criminal prosecution and a disciplinary hearing are such that the objectives are, in my analysis, the same**, i.e. the search for truth and finding the correct result. In this case, the Trustees **face a suspension of their license and injury to their professional reputation. In order to fully understand the case against them and to ensure a fair disciplinary proceeding, the Trustees must have access to all relevant material which may assist them**. This is consistent with the Superintendent's earlier ruling in this case that the SDA had a duty to disclose all documents unless they were "clearly irrelevant."" [emphasis added] [20]

39. *Sheriff* is good law in Canada and has been cited with approval by the Federal Court, the Manitoba Court of Appeal, the Alberta Queen's Bench, and the Ontario Supreme Court. [21]

40. The actions available to the Discipline Committee under s.39 of the *HPA* to penalize a registrant are expansive, including the restriction or prohibition of that individual's ability to practice in his or her designated profession and the ability to levy considerable and uncertain monetary penalties. Good standing and the unrestricted or unprohibited ability to practice are of the utmost importance to a registrant, past or present, to practice within the province or even in another jurisdiction in later years of his or her career. Lastly, the personal and professional reputation of Mr. Taylor has the potential to be negatively impacted by any prospective publication that arises from the results of any disciplinary hearing.

41. Thus, it is clear, that a higher standard of procedural fairness and disclosure is required of an administrative tribunal when they make a decision pertaining to professional discipline and when the right to continue in one's profession or employment is at stake. This standard will be akin to that of *Stinchcombe* where disclosure must include all evidence that may

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[20] *Sheriff v. Canada (Attorney General)*, 2006 FCA 139 at paras 29-34.

[21] See *Canada (Citizenship and Immigration) v. Jozepovic*, 2021 FC 536, *Dhillon v. Canada (Attorney General)*, 2020 FC 1167, *Hudson Bay Mining and Smelting Co. v. Cummings*, 2006 MBCA 98, *McCormick v. Greater Sudbury Police Service*, 2010 ONSC 270, *Chief of Police v Mignardi*, 2016 ONSC 5500, *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 513.

assist the accused (i.e., the person affected by the decision), even if the prosecution (i.e., the Discipline Committee) did not plan to adduce it.

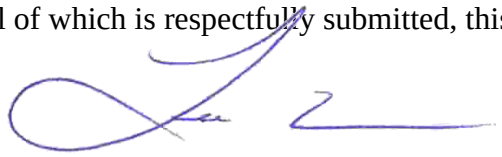
42. Given the extent of the potential consequences arising from the substantial accusations levied against Mr. Taylor it is paramount that the College produce the information in the order sought. The way in which the Citation is worded leaves it completely open to what provisions the College are saying have been breached and why. The allegations contained in the Citation form the very basis of the disciplinary process itself. Impugned conduct must rise to the level of contravening explicit laws, rules, or standards in order to empower the relevant administrative bodies to initiate any form of investigation or disciplinary process. Thus, the particulars are required before we can proceed. Procedural fairness requires disclosure of all information pertaining to the Citation before the disciplinary hearing commences, with a reasonable period of time given to consider the information and to complete any submissions or applications that may be required.

PART 4:MATERIAL TO BE RELIED ON

1. Affidavit #1 of Alexandra Hill, made January 27, 2023.

2. The applicant estimates that the application will take 2 hours.

All of which is respectfully submitted, this 27th day of January 2023:



Lee C. Turner, counsel for Sean Taylor