DISCLOSURE STANDARDS 
IN ADMINISTRATIVE PROCEEDINGS

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Disclosure Standards in Administrative Proceedings

In ordinary civil proceedings, there are rules for disclosure of documents and discoveries. The intent of those rules is, at least in part, to ensure that each party is fully aware of all evidence about the case. The goal of these rules is to avoid trial by ambush. In criminal law, public policy dictates that an accused has a right to all information in the possession of the Crown. In R. v. Stinchcombe,¹ the Supreme Court of Canada made clear the extent of the disclosure requirement in criminal law: it includes all the fruits of the investigation whether favourable or not to the Crown's case.

In administrative proceedings, the rules of natural justice and procedural fairness have long required a certain level of disclosure. Since Stinchcombe, however, there is a growing trend toward developing disclosure standards for administrative proceedings that look a lot like the disclosure standards outlined in Stinchcombe.² Three areas in particular bear some comment: professional discipline, immigration and human rights.

In professional discipline proceedings, because of the grave potential consequences of an adverse finding against the person charged, the courts are requiring a full Stinchcombe-like disclosure as a requirement of procedural fairness:

- **Markandey v. Board of Ophthalmic Dispensers (Ontario);³**
- **Howe v. Institute of Chartered Accountants (Ontario);⁴**
- **Baker v. Law Society of Upper Canada;⁵**
- **Bailey;⁶**
- **Hammami v. College of Physicians & Surgeons (British Columbia);⁷**

- But see: **Kullman v. Calgary (City) Police Service,⁸** where in disciplinary charges under the Police Act by the Chief of Police against two police officers, the court held that where a disclosure process was already set out in the regulations, Stinchcombe did not apply to require disclosure of all the fruits of investigation.
The rationale for this extensive disclosure requirement is that the decision of a tribunal might terminate or restrict a person’s right to practice or pursue a career or seriously impact on a professional reputation. Where rights are affected in this significant way, the court will require full disclosure.

A second area is Convention Refugee appeals. The Federal Court of Appeal has held that although *Stinchcombe* does not apply to these cases, the case is nonetheless "instructive". In *Siad v. Canada (Secretary of State)*, the Court placed the onus to request disclosure on counsel for the party and found that disclosure of "can say" statements a month before the hearing met the duty of disclosure in that case where counsel for the refugee claimant did not make a further request for disclosure until the hearing had commenced. The Court left open the question of whether Personal Information Forms of witnesses would be ordered to be disclosed if a request for disclosure were made in a timely fashion.

We note, however, that the Court of Appeal in the *Siad* case did not refer to the earlier Trial Division case in *Nrecaj v. Canada (Minister of Employment & Immigration)*. In that case it was held that the refugee hearing officer is required to disclose to the claimant all documentary evidence to be used at the hearing by the hearing officer, including interview notes used for preparation for the hearing even though they were not strictly "documents" that would be submitted to the Board.

The third area is human rights cases. In this area, the courts have been fairly consistent in applying *Stinchcombe-like* principles. In *Re Ontario Human Rights Commission and House*, motion for leave to appeal to the Ontario Court of Appeal dismissed, a human rights board of inquiry ordered production of witness statements. The Human Rights Commission sought judicial review of this order and the Court found that the principles in *Stinchcombe* do apply to human rights cases because:

1. The fruits of the investigation are not the property of the Commission for use in securing a positive decision in a complaint, but the property of the public to ensure that justice be done.
2. The role of Commission counsel was analogous to the Crown in criminal proceedings and the purpose of the prosecution is not to secure a conviction but to bring to the trier of fact the credible evidence relevant to the proceeding. This same rationale has been applied in other human rights cases, including:

- *IMP Group v. Dillmant*  
- Dhanjal v. Air Canada  
- *Christian v. Northwestern General Hospital*  
- *Alberta (Human Rights & Citizenship Commission) v. Alberta Motor Assn.* where it was held that even at the investigation stage, *Stinchcombe* principles required disclosure of the complainant's detailed allegations;  
- But see: *Waterman v. National Life Assurance Company (No.1).* where the investigating officer's notes were not ordered to be disclosed at the investigative stage.

There are, as well, some areas where courts have been reluctant to expand disclosure requirements to include all the fruits of investigation. For example:

- In the context of a regulatory tribunal (The Patent Medicine Prices Review Board), the obligations concerning disclosure would be met if the subject of the inquiry into excessive pricing allegations was advised of the case it had to meet and was provided with all the documentation on which the board would be relying: *Re: CLBA-Geigy Canada Ltd.*  
- Where a securities commission matter was at the investigation stage and no one was yet "in potential jeopardy", *Stinchcombe* principles were held not to apply: *British Columbia (Securities Commission) v. Stallwood.*  
- Counsel for an employer was unsuccessful in convincing the Alberta Labour Relations Board that *Stinchcombe* should be applied to require the

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Board to disclose the number of signatories to a petition for certification:

**CE.P, Local 707 v. Salvation Army Community Service Centre Fort McMurray Corps.**

- A witness at the Somalia Inquiry was denied disclosure on the basis that a witness appearing voluntarily or by summons at investigative hearings of an inquiry is not faced with a "case to be met" which required disclosure of the sort directed by *Stinchcombe: Beno v. Canada (Somalia Inquiry Commission).*

When one reviews the cases emerging in this area, there is no question that the trend is toward applying the similar principles to administrative tribunal hearings as are applied in criminal courts. While to date these principles have been applied in situations where the person is in some sort of jeopardy, it remains to be seen how extensive the duty will become over time.

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i [1991] 3 S.e.R. 326.
iii March 14, 1994 Toronto RE 2661/93 (Ont. Gen. Div.).
vi *Supra*, note 17.
ix (1996), 36 *Imm*, L.R. (2d) 1.
xvii (1995) 7 B.e.L.R. (3d) 339 (B.e.s.e.).