



Disciplinary Hearing and Action Policy

May 26, 2016

Acknowledgement:

This document has used information directly from (or has modified information from) the following sources:

Association of BC Forest Professionals

College of Alberta Professional Foresters

Ontario Professional Foresters Association

Association of Registered Professional Foresters of New Brunswick

HANDBOOK ON PROFESSIONAL DISCIPLINE PROCEDURE
The Law Reform Commission of Saskatchewan March 2007

WHAT DOES IT MEAN TO BE A SELF-GOVERNING REGULATED PROFESSION?
A Discussion Paper Presented to the 4th Annual Workshop of the
Saskatchewan Assessment Appraisers' Association October 2006
Robert Schultze, MBA, AAAS, AACI, CAE

THE EXPECTATIONS THAT AFFECT THE MANAGEMENT OF PUBLIC FOREST AND RANGE LANDS
IN BRITISH COLUMBIA: LOOKING OUTSIDE THE LEGISLATION
Discussion Paper prepared for the Ministry of Forests and Range
and the Ministry of Environment (February 2006)
by Roberta Reader

Individual references to, or footnotes from, these various sources have not been provided.

Disclaimer/Notice

The information presented in this document is designed to provide guidance for holding a Discipline Hearing and for other elements of the discipline process.

The information presented in this document is not binding on the Discipline Committee who maintain the right to vary/conduct the discipline process as they see fit within the parameters of *The Forestry Professions Act (Saskatchewan)*.

Variance from this document does not provide grounds for an appeal.

1.0 Table of Contents

- 1.0 Table of Contents 3
- 2.0 Purpose 4
- 3.0 Scope 4
- 4.0 Mandate 4
- 5.0 Roles and Responsibilities 6
 - 5.1 Roles and Duties of the Discipline Committee 6
 - 5.2 Duties of the Chair of the Discipline Committee 6
- 6.0 Discipline Committee Membership 7
- 7.0 Procedures Prior to the Hearing 7
 - 7.1 Committee Members Hearing the Complaint 8
 - 7.2 Notification of Hearing 9
 - 7.3 Disclosure Requirements 10
 - 7.4 Hearing Room and Administration..... 11
- 8.0 Conducting a Discipline Hearing 11
- 9.0 Issues During a Discipline Hearing..... 14
- 10.0 Decision Making and Setting Orders 19
 - 10.1 Nature of Professional Misconduct..... 19
 - 10.2 Nature of Professional Incompetence 20
 - 10.3 Incapacity 21
 - 10.4 Decisions and Orders..... 22
 - (10.4.1) *Overview of Possible Orders* 22
 - (10.4.2) *Factors to Consider in Making Decisions and Orders*..... 24
 - (10.4.3) *Assignment of Costs*..... 27
 - 10.5 Written Decision and Reasons 28
- 11.0 Appeals 30
- 12.0 Publication & Commenting on Complaints and Cases 33

2.0 Purpose

The Association of Saskatchewan Forestry Professionals (the "**ASFP**" or the "**Association**") is a professional and self-regulating association which, pursuant to *The Forestry Professions Act* of Saskatchewan (the "**Act**") has the power to discipline any member of the Association (a "**Member**") who has committed professional misconduct or is found professionally incompetent. The Act describes a process for a discipline Hearing to determine the validity of any formal complaint against a member. The Purpose of this policy is to give clear direction to all parties that might be involved in a discipline Hearing and to provide a single document where information related to hearings can be found.

3.0 Scope

This policy applies to all registered practising members and former members, for up to two years from the day their membership ended, subject to disciplinary action including the actions of non-registered members that they supervise or have supervised. This policy is administered by the Discipline Committee.

4.0 Mandate

The objects of the Association (as outlined in Section 4 of the Act) are:

- (a) to establish and maintain high standards of professional ethics and excellence for members in the professional practice of forestry;*
- (b) to assure the general public of the knowledge, skill, proficiency and competency of members in the professional practice of forestry;*
- (c) to promote and improve the knowledge, skill, proficiency and competency of members in all matters relating to the professional practice of forestry; and*
- (d) to foster the professional practice of forestry by members in a manner that is in the public interest of the people of Saskatchewan.*

The discipline committee of the Association (the "**Discipline Committee**") has a duty to help ensure that the public interest is served and protected, and that the membership of the ASFP maintains high standards of skill, proficiency, competency, professionalism and ethics.

The Council of the Association ("**Council**") may pass regulatory bylaws pursuant to Section 14 of the Act prescribing procedures for:

- (i) the review, investigation and disposition by the professional conduct committee (the "**Professional Conduct Committee**") of complaints alleging that a Member is guilty of professional misconduct or professional incompetence;

- (ii) hearings by the Discipline Committee of complaints alleging that a Member is guilty of professional misconduct or professional incompetence.

To maintain the integrity of the Association and the public trust, the Discipline Committee is authorized by the Act to act independently of the Council, the Professional Conduct Committee, and the other committees of the Association. In accordance with the Act, no member of the Discipline Committee is eligible to be a member of the Professional Conduct Committee.

The Discipline Committee's role is only intended to be exercised (and a discipline hearing is only intended to be held) following the completion of an investigation and the rendering of a report by the Professional Conduct Committee.

In that regard, Section 27(1) of the Act provides as follows in relation to the investigations to be undertaken (and the written reports to be filed with the Discipline Committee) by the Professional Conduct Committee:

27(1) Where the professional conduct committee is requested by the council to consider a complaint or is in receipt of a written complaint alleging that a member is guilty of professional misconduct or professional incompetence, the committee shall:

- (a) review the complaint; and*
- (b) investigate the complaint by taking any steps it considers necessary, including summoning before it the member whose conduct is the subject of the complaint.*

(2) On completion of its investigation, the professional conduct committee shall make a written report to the discipline committee recommending:

- (a) that the discipline committee hear and determine the formal complaint set out in the written report; or*
- (b) that no further action be taken with respect to the matter under investigation.*

(3) The formal complaint set out in a written report made pursuant to clause (2)(a) may relate to any matter disclosed in the complaint received pursuant to subsection (1) or the investigation conducted pursuant to subsection (1).

(4) A report signed by a majority of the professional conduct committee is the decision of that committee.

(5) The professional conduct committee shall provide, or cause the registrar to provide, a copy of a written report made pursuant to clause (2)(b) to:

- (a) the council;*
- (b) the complainant, if any; and*
- (c) the member whose conduct is the subject of the complaint mentioned in subsection (1).*

5.0 Roles and Responsibilities

In order for hearing processes to be timely, efficient and un-biased, the roles and responsibilities of the committee membership must be clearly articulated so as to withstand scrutiny for any hearing process or decision the committee makes.

5.1 Role and Duties of the Discipline Committee:

The Discipline Committee is a standing committee of the Association established pursuant to Section 28 of the Act, which provides as follows:

Discipline committee

28(1) The discipline committee is established consisting of at least three persons appointed by the council, one of whom shall be the member of council appointed pursuant to section 9.

(2) No member of the professional conduct committee is eligible to be a member of the discipline committee.

(3) Subject to this Act and the bylaws, the discipline committee may make rules regulating its business and proceedings.

Outside of the established processes of the ASFP, members of the Discipline Committee taking part in a discipline hearing will not discuss any aspect of a complaint, investigation, hearing or appeal with any Member of the Association, the members of the Professional Conduct Committee, the Council, or the original complainant, until after the case fully is resolved.

The duties of the Discipline Committee include:

- Conducting hearings for the purpose of determining whether professional misconduct has occurred, or professional incompetence exists.
- Making appropriate orders and assessing penalties against Members found guilty of professional misconduct or professional incompetence.
- Monitoring to ensure orders of the Discipline Committee are being adhered to, satisfied or completed.
- Reporting annually to the membership of the Association and publishing outcomes.

5.2 Duties of the Chair of the Discipline Committee:

At least one member of Council shall be appointed, in accordance with Section 79 of the Bylaws, to act as the Chair of the Discipline Committee. The duties of the Chair of the Discipline Committee include:

- Chairing the meetings of the Discipline Committee.
- Being responsible for the implementation of the key functions of the Committee.

- Subject to the Act and the bylaws of the Association (the "**Bylaws**"), leading the development of the rules and procedures relating to the Discipline Committee's business and proceedings.
- Reporting annually to the membership of the Association and to Council.

6.0 Discipline Committee Membership:

The membership of the Discipline Committee shall be:

- At least 3 persons appointed by Council, of which one is to be the member of Council appointed by the Minister pursuant to Section 9 of the Act (the "**Public Appointee**").
- The Public Appointee is appointed by the Lieutenant Governor in Council, becomes a Council member, and is automatically a member of the Discipline Committee.
- Section 9 of the Act indicates that if the Public Appointee has not been appointed, or is absent or unable to act as member of the Discipline Committee, that will not impair the ability of the other members of the Discipline Committee to act.
- No member of the Professional Conduct Committee is eligible to be a member of the Discipline Committee (Section 28 of the Act).
- At least one member of the Council shall be appointed to act as the Chair of the Discipline Committee (Section 79 of the Bylaws).
- The initial term of appointment of the Public Appointee is for three years, and such appointment may be extended for another three years as determined by the Minister (subject to a maximum term of six years).

Guidance on Discipline Committee membership selection

To be eligible for appointment by Council to the Discipline Committee it is recommended that a Member have at least ten years of forestry experience, and have been a registered member of a Professional Forestry body for at least five years (either the ASFP or another recognized provincial forestry association).

7.0 Procedures Prior to the Hearing

Before a hearing of the Discipline Committee commences several procedural items must be dealt with in accordance with the Act (such as official notification). The Discipline Committee Chair must also ensure several administrative items have been addressed, including disclosure.

When a Professional Conduct Committee investigation report recommends a discipline Hearing be held, the formal complaint (which must be specific with regard to the alleged offence, time and place) is to be included in the Professional Conduct Committee's report. (Section 27 (3) of the Act)

The Professional Conduct Committee investigation report is to be provided to the Registrar, to Council, to the complainant, and to the Member who is the subject of the investigation. (Section 27(5) of the Act)

An outline of some of the basic procedures to be followed at a Hearing are set forth in Section 29 of the Act, an excerpt of which appears below:

Discipline hearing

29(1) Where a report of the professional conduct committee recommends that the discipline committee hear and determine a formal complaint, the registrar shall, at least 14 days before the date the discipline committee is to sit:

(a) send a copy of the formal complaint to the member whose conduct is the subject of the hearing; and

(b) serve notice on the member whose conduct is the subject of the hearing of the date, time and place of the hearing.

(2) The professional conduct committee shall prosecute or direct the prosecution of the formal complaint, but its members shall not participate in any other manner in the hearing of the formal complaint except as witnesses when required.

(3) The discipline committee shall hear the formal complaint and shall determine whether or not the member is guilty of professional misconduct or professional incompetence, notwithstanding that the determination of a question of fact may be involved, and the discipline committee need not refer any question to a court for adjudication.

(4) The discipline committee may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence.

7.1 Committee Members Hearing the Complaint

The Discipline Committee is responsible to hear all complaints. At least 3 members of the committee should be available to hear every complaint (including the Public Appointee and the chair when possible). Any decision made by the members hearing the complaint will represent the decision of the Discipline Committee. When the chair is unable to participate in the Hearing for any reason then he/she shall temporarily assign a new chair for the purpose of the Hearing. The chair may arrange for legal advice and the presence of legal counsel to assist the committee with the Hearing process. The members hearing the complaint will provide the outcome of the Hearing including any orders to the Discipline Committee Chair.

If a committee member is disqualified or otherwise becomes unable to continue to act, the Hearing would need to be reconvened and evidence heard again when three members of the committee are available.

Conflict of Interest:

Discipline Committee members may not serve on a Hearing if they have taken part in any investigation concerning, or in the consideration of, the subject matter of the Hearing beforehand (unless it was at a previous Hearing of the Committee). Members should also disqualify themselves if they feel there is a conflict of interest in regard to the Member whom the complaint is filed against or the subject matter being heard.

The Discipline Committee, as decision-makers, must remain disinterested and unbiased. Even an appearance of bias could be sufficient to nullify a Hearing or the results of a Hearing. An appearance of bias can occur through pre-judgement by a committee member, the conduct of a committee member during the Hearing, the relationship of a committee member to a participant in the Hearing, or a monetary or other interest of a committee member in the outcome of the Hearing. A Member whose conduct is the subject of the Hearing may be able to waive an apprehension of bias, but must be aware of its existence and expressly, or by conduct, elect to waive the conflict of interest or perception of bias.

7.2 Notification of Hearing

The Registrar (Section 29(1) of the Act) shall, at least 14 days before the date the Discipline Committee is to sit, by double registered mail, send to the Member whose conduct is the subject of the Hearing:

- A copy of the "official complaint and charge".
- Notice that a Hearing will be held, which notice (a "**Notice of Hearing**") must include the specified date, time and place of the Hearing.

The Notice of Hearing may also include:

- (a) A statement that the Member is entitled to have his/her own legal counsel present at the Hearing at their own expense.
- (b) A statement that the Hearing is a discipline proceeding, and not merely a preliminary or investigative meeting.
- (c) Reference to the statutory authority under which the Hearing will be held.
- (d) A statement that, if the Member does not attend the Hearing, the Discipline Committee may proceed in his or her absence.
- (e) A copy of the investigation report of the Professional Conduct Committee (if such report has not already been provided to such Member).
- (f) Information in accordance with the disclosure requirements.

- (g) The names of the committee members hearing the complaint, with a deadline by which the Member is to provide any objection to a committee member based on a conflict of interest, or a perception of bias.

In order to ensure the Member whose conduct is the subject of the Hearing knows the case that he or she has to meet and defend, the Member is entitled to reasonable information regarding the allegations. This is normally provided with the Notice of Hearing, in the form of a statement of allegations containing an outline of the material facts, and the legal conclusion to be drawn from the facts (e.g. unskilled practice of forestry or professional misconduct.)

7.3 Disclosure Requirements

Disclosure provides an opportunity to examine evidence before the Hearing begins and it is a good practice for both parties (not just the prosecutor acting on behalf of the Professional Conduct Committee) to share information, as this sharing of information may help to avoid a formal hearing. However, there is a greater onus on the prosecutor to ensure the relevant material is made available to the Member and, if applicable, to the Member's legal counsel.

Disclosure provides more detail than the information that is contained in the Notice of Hearing and enables the Member to prepare the best possible defence. The Member shall be afforded an opportunity to examine, before the Hearing, any written or documentary evidence that will be produced, or any report the contents of which will be given in evidence at the Hearing (including disclosures of expert witness reports). Although no time limit is specified, 10 days before a Hearing is a commonly accepted as reasonable opportunity.

Without proper disclosure, the evidence may not be admissible during the Hearing. However, the discipline committee does have the discretion to admit evidence if it is necessary to rebut evidence previously presented at the Hearing, or if the committee believes the evidence is necessary to make a fair decision. It is common for the committee to admit late evidence provided it was not deliberately withheld, and the committee can give directions to ensure that neither the Member nor the prosecution is prejudiced. For example, the Hearing can be adjourned to enable the Member, or the prosecution, to respond to the evidence. The duty of disclosure continues even after the Hearing and any appeals are completed, including in the event subsequent information shows innocence or raises doubt as to guilt.

The prosecutor should inform the person receiving disclosure, normally defense counsel, that they have a duty to ensure disclosure materials are not improperly disseminated. In some circumstances, it may be necessary to take steps to protect the privacy of complainants and witnesses. Material that is privileged does not have to be disclosed unless it is essential for the defence.

Disclosure includes items such as (but not limited to) e-mails, investigation notes, calculations and calculation notes, photographs, copies of documents, can say statements, and collected itemized lists of evidence.

7.4 Hearing Room and Administration

ASFP staff will make the necessary room arrangements for conducting the Hearing, including arrangements to have the Hearing recorded by a court reporter.

ASFP staff will ensure that all of the costs associated with the Hearing, including all out of pocket expenses associated with the meeting room, the court reporter, related equipment, Association staff, members of the Professional Conduct Committee and the Association Counsel, expert witnesses, and Discipline Committee member expenses, are recorded accurately.

8.0 Conducting a Discipline Hearing

A discipline hearing is similar to a court proceeding. It is adversarial in nature with two competing parties, the Association (as represented by the Professional Conduct Committee) as prosecutor, and the Member, as the defence, each presenting their cases to the Discipline Committee. The Discipline Committee, acting in a manner similar to a panel of judges in a court of law, ensures that both sides present their cases fairly, listens impartially to the evidence and arguments, and decides the issues after the parties have completed their presentations.

The Discipline Committee may make rulings on such matters as the admissibility and relevance of evidence, and may question witnesses for clarification, so long as it does not usurp the function of the prosecution or of the defence. In this section, "**Chair**" refers to the chairperson of the Hearing, and "**Association Counsel**" refers to the prosecution as led by the Professional Conduct Committee or its legal counsel.

Outline of a Typical Hearing:

The initiating party, normally the Association Counsel/Professional Conduct Committee will present all their evidence first then the Member in question presents his or her evidence of defence.

In calling witnesses, the party calling the witness leads that witness's evidence, the other party then cross examines, and the party calling the witness has opportunity to re-examine.

In closing argument, the Association Counsel goes first, the Member second, and the Association Counsel may reply. In re-examination or reply, the party should confine himself or herself to points raised by the other party and not repeat points he or she has already covered.

If the Discipline Committee intervenes at any point by, for example, asking questions of a witness or a party, each party is allowed to respond once and the party whose stage of proceeding is interrupted responds last. The Discipline Committee has the flexibility to vary these guidelines where appropriate.

Generic Procedural steps:

1. All proceedings of the Hearing shall be recorded by a court reporter.
2. The Chair of the Discipline Committee calls the Hearing to order, makes opening remarks (e.g. authority to hold a hearing, the name of the case, acknowledgement of individuals present, the day's schedule, meeting room and general housekeeping items, etc.) and describes the role of the Association Counsel in the proceedings.
3. The charge is read by the Registrar. If the accused Member is not present, the Registrar demonstrates proof that the charge and Notice of Hearing were delivered to the accused Member. If the accused Member fails to attend the Hearing, the Discipline Committee, on proof of service of the Notice of Hearing on the accused Member, may proceed with the Hearing in his or her absence. (Section 29 (10) of the Act)
4. The Chair inquires if the accused Member admits or denies the charge.
5. If the accused Member admits the charge, the Chair will receive any submission the accused Member may wish to make concerning mitigating circumstances and penalties to be imposed.
6. The Association Counsel will then outline the severity of the charge, and make a submission regarding penalties.
7. If the accused Member denies the charge, evidence must be called by both parties.

8. The Association Counsel outlines the facts relating to the charge and refers to the specific provision(s) of the Act, the By-Laws, or the Code of Ethics that is alleged to have been violated. The Association Counsel should outline any interpretation and principles of law that are pertinent.
9. Members of the Discipline Committee should raise any questions they may have regarding the meaning of any part of the Act, the By-Laws or the Code of Ethics, or they may ask for clarification regarding matters of law.
10. The Association Counsel submits evidence in the form of documents and calls witnesses.
11. The testimony of witnesses is to be under oath or affirmation administered by the Chair. (section 29 (6) of the Act)
12. Each witness called by the Association Counsel may be cross-examined by the accused Member or his/her legal counsel. The witness may then be re-examined by the Association Counsel.
13. Following the examination of each witness, the Chair should inquire if any member of the Discipline Committee wishes to question the witness. After any such questioning, both counsels (or, if the accused Member is unrepresented, the accused Member) may briefly re-examine regarding matters arising from questions by members of the Discipline Committee.
14. Counsel for the accused Member (or, if the accused Member is unrepresented, the accused Member) then submits evidence and calls witnesses, which may include evidence given by the accused Member. Each witness may be cross-examined and re-examined.
15. When all the evidence has been submitted, and examination of all witnesses is complete, the Association Counsel and the counsel for the accused Member (or, if the accused Member is unrepresented, the accused Member) will submit a summary of the evidence and state the facts which they feel are supported by the evidence.
16. The Chair will then have various alternatives:
 - a. The Hearing may be briefly adjourned while the Discipline Committee considers the evidence and arrives at a decision.
 - b. The Hearing may be adjourned, to be reconvened at a specified time and place, when a decision will be given.
 - c. The Hearing may be adjourned with the accused Member being told he/she will be informed of the decision by mail.

17. In the case of a guilty decision, where the offence is serious, or where the Discipline Committee considers there may be mitigating factors, the Chair may reconvene the Hearing to hear arguments regarding the penalty to be imposed. In such an event, the accused Member shall be informed of the decision and be given a suitable time to prepare arguments. The Chair of the Professional Conduct Committee or the Association Counsel may also submit arguments concerning the appropriate penalty.
18. The accused Member is informed, in writing, regarding the decision of the Discipline Committee, the order, and the penalty.
19. The Registrar is instructed by the Chair of the Discipline Committee to see that the penalty is carried out.

Caveats & Qualifications:

Note: The information in this section is not binding on the Discipline Committee, who maintain the right to vary/conduct the Hearing procedures as they see fit within the confines of the Act.

The information presented here is for guidance only. It represents a typical approach for holding a discipline hearing, and provides a general understanding of the process. Other approaches are available to conduct a fair hearing. Variance from this guidance does not provide grounds for an appeal.

9.0 Issues During a Discipline Hearing

The following are some of the more common issues that might arise during a discipline Hearing. This information borrows heavily from the *Handbook on Professional Discipline Procedure* and references the Act. In some cases a legal opinion should be sought before proceeding.

Legal Counsel for the Discipline Committee

Members of the Discipline Committee are usually not legally trained and may have questions about Hearing procedures, evidence, or on other matters of law. Counsel for the Discipline Committee acts as an advisor to the committee on legal and procedural questions raised during the Hearing. Counsel can also be retained by the Discipline Committee to provide legal advice on points of law, and assistance in writing the final decision (to help ensure legal clarity).

Should the Discipline Committee elect to obtain legal counsel ("**Committee Counsel**"), then:

- The Committee Counsel selected shall not be the same person advising/leading the prosecution on behalf of the Association, as this introduces a perceived bias to the fairness of the Hearing.
- At the start of the Hearing the role of the Committee Counsel should be fully explained to all parties, and entered into record (official transcript).
- Specific topics that should be mentioned include:
 - Committee Counsel is not acting as the general spokesman for the Discipline Committee, or replacing the roles/duties of the committee members.
 - Committee Counsel, with permission of the Discipline Committee members, may ask questions of the witness for clarification, but is not to conduct an examination of witnesses or of the respective counsel of the parties
 - The decision making rests with the Discipline Committee members, and Committee Counsel is not a member of the committee.
 - Committee Counsel (if used in this role by the Discipline Committee) will assist in writing of the decision made by the committee.
 - If, during the deliberation phase, the Discipline Committee members request a written opinion on a point of law from Committee Counsel, the Discipline Committee will provide a copy of such opinion to all parties, and will accept a written reply.

Right to a Hearing

The rule of natural justice clearly requires that the accused be given the right to be heard. However if, after investigation of a complaint, the decision is made not to proceed with a Hearing, there is no obligation to hold a Hearing so the accused can "clear his or her name", as the courts have not been persuaded that justice requires a hearing in these cases.

Attendance by the Member

While attendance at the Hearing by the Member whose conduct is the subject of the Hearing is preferred, it is not mandatory unless a writ of *subpoena ad testificandum* has been issued to the member per (Section 29(8) of the Act), and if proper notification was given, the Hearing can commence and continue in the absence of the Member.

Where a writ of *subpoena ad testificandum* has been issued to the Member and is disobeyed, the proceedings and penalties are those applicable in civil cases in the court (Section 29(9) of the Act).

Should the Member whose conduct is the subject of the Hearing choose not to attend and send his or her representative (i.e. legal counsel) to the Hearing on his or her behalf, the Hearing will proceed in the absence of the Member.

However, proceeding in this manner is not a recommended practice on the part of the Member, nor does the same constitute grounds for an appeal.

Public Hearing versus Private Hearing

Subsections (13) and (14) of Section 29 of the Act state that, subject to subsection (15), Hearings shall be public and allow for the complainant to attend.

(14) Subject to subsection (15), the discipline committee shall conduct all hearings in public.

(15) The discipline committee may exclude members of the public and the person who made the complaint from any part of the hearing when the committee is of the opinion that evidence brought in the presence of the person or persons to be excluded will unduly violate the privacy of a person other than the member whose conduct is the subject of the hearing.

As such, subsection (15) of Section 29 of the Act allows the Discipline Committee to exclude members of the public and the person who made the complaint from any part of the Hearing when the Discipline Committee is of the opinion that evidence brought in the presence of the person or persons to be excluded will unduly violate the privacy of a person other than the accused Member whose conduct is the subject of the Hearing.

The request to exclude the public is made by motion and can be made at any time, by any party or person, or by the Discipline Committee. The Discipline Committee may also order the public to be excluded while it receives evidence or submissions on the motion or while it deliberates on the matter. If these circumstances arise, the Discipline Committee still must balance whether the competing interest calling for privacy outweighs the public interest in having an open hearing.

In interpreting Section 29(14 & 15) of the Act, the Discipline Committee may consider:

- matters of public security that may be disclosed,
- avoiding disclosure of personal or financial information that outweighs the desirability of a public hearing,
- whether the safety of a person may be jeopardized by an open hearing,
- whether an open hearing may unduly violate the privacy of a person.

The Discipline Committee also has the power to have witnesses remain outside the hearing room except when actually providing testimony, and this includes the complainant if acting as a witness. Decisions about witness testimony are to be made at the start of the proceedings.

Evidence

(Section 29 (4) of the Act) - The Discipline Committee may accept any evidence that it considers appropriate, and is not bound by rules of law concerning evidence and the admission of evidence.

Generally speaking, tests of relevance, fairness and accessibility (access to both parties for examination and use in questioning witnesses) apply when determining admissible evidence and for "new" evidence.

Pre-hearing disclosure should be provided to all parties in timely fashion whether damaging or supportive of the accused Member's position. It should include all information unless privileged as a matter of law.

The registrar, upon request of the Discipline Committee, may have a writ of *subpoena duces tecum* issued to the accused Member, a member of the professional conduct committee, or a member of the discipline committee in order to obtain evidence (Section 29(8) of the Act).

Witnesses

Section 29 (7) of the Act - At a Hearing, there is to be full right:

- to examine, cross-examine, and re-examine all witnesses; and
- to present evidence in defence and reply.

The members of the Discipline Committee may choose to question any witness who testifies, but must take care not to display any hostility or lack of impartiality, and must ensure not to appear to advocate a position. Questions should be limited to those intended to clarify an area of evidence, and should not be directed to new areas not previously covered by either party. The Chair of the Hearing should intervene if a committee member asks an improper question, or asks too many questions. The Chair should ask questions last and, as the impartial moderator, should tend to ask the least number of questions. After the members of the Discipline Committee have asked their questions, the Chair should invite the parties to re-examine the witness on any evidence elicited by the questions.

In civil lawsuits a party can be compelled to testify at the insistence of another party. Discipline hearings are not a court of law and, as such, none of the Association or the Discipline Committee has the inherent jurisdiction to compel the attendance of a witness other than the accused Member, or member of the Professional Conduct Committee or Discipline Committee (Section 29(8) of the Act). Additionally, Section 29(8) allows for the application by the Registrar to a Court to subpoena to testify, or to produce records from:

- a Member whose conduct is the subject of a hearing pursuant to the Act;
- a Member of the Professional Conduct Committee;
- a Member of the Discipline Committee.

Other Members of the Association may also become subject to discipline action if they don't comply with Bylaw 93, which provides:

"All members shall co-operate fully with the discipline committee or its representative during the course of any investigation undertaken and shall produce all documents or other information that, in the opinion of the discipline committee or its representative, are necessary to complete a proper investigation."

New or Amended Charge

If, during the course of a Hearing, the evidence shows that the Member whose conduct is the subject of the Hearing may be guilty of a charge different from, or in addition to, any charge specified in the formal complaint, the Discipline Committee shall notify the Member of that fact. (Section 29 (11) of the Act)

If the Discipline Committee proposes to amend, add to or substitute the charge in the formal complaint, the Discipline Committee shall adjourn the Hearing for any period that the Discipline Committee considers sufficient to give the Member an opportunity to prepare a defense to the amended formal complaint, unless the Member consents to continue the Hearing. (Section 29 (11) of the Act)

Criminal Charges, Convictions & Related Issues

Often a criminal conviction may be grounds for disciplinary actions and, conversely, an investigation into professional misconduct or incompetence may reveal a possible criminal offence has occurred. While an investigation and a discipline Hearing can technically be held while a criminal investigation or trial is proceeding, issues about the accused's right to a fair trial on the criminal charges can arise. Likewise, a Member cannot be found "unbecoming" as a result of a criminal code charge before actually being convicted of the criminal offence. The preferred practice is to let the criminal code proceedings conclude first.

Three sections of the Act provide direction in this regard:

Section 31 states that when a Member is convicted of criminal code offence, the discipline Hearing process is conducted in a manner similar to that outlined above. This includes proceeding with a report by the Professional Conduct Committee and proceeding with the Hearing.

Section 32 states there is a duty to report should the investigation or a Hearing indicate the Member may be guilty of criminal offence. In such an event, the investigation or Hearing can be immediately discontinued and a report is made of the findings to:

- (a) the President of the Association; and
- (b) the Deputy Minister of Justice.

In some cases, suspension from practice of a Member accused of professional misconduct or incompetence pending the outcome of a disciplinary proceeding is in the public interest. However, Section 32 of the Act is the only section that allows for suspension of a Member before completion of a Hearing. Section 32 of the Act provides as follows:

A judge of the court, on the application of the council, may direct that a member be suspended pending the disposition of a criminal charge where:

- (a) a criminal charge is laid against the member; and*
- (b) the member has applied to the court for a stay of any disciplinary proceedings against the member.*

10.0 Decision Making and Setting Orders

The Discipline Committee must decide what it is the accused Member has done, and then decide whether it constitutes professional misconduct or professional incompetence. In the process of deliberation it is helpful to separate the finding of guilt from the penalty determination process. The following are some general principles to consider for each phase.

10.1 Nature of Professional Misconduct

Section 25 of the Act provides as follows:

Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:

- (a) it is harmful to the best interests of the public or the members;*
- (b) it tends to harm the standing of the profession;*
- (c) it is a breach of this Act or the bylaws; or*
- (d) it is a failure to comply with an order of the professional conduct committee, the discipline committee or the council.*

Findings of professional misconduct are often challenged or defended on the basis that the provision defining the misconduct is invalid or does not apply to the facts of the case, the Member did not have the required intent to perform the misconduct, or there is a legal impediment preventing the committee from making a finding in the case. Challenges to the validity of provisions defining misconduct are often constitutional and/or often involve complex legal arguments (thereby increasing the likelihood that the Committee's decision will be reviewed by the courts). Other challenges may also be made based on principles of common law and legislative interpretation which could either render the provision invalid or result in a narrow interpretation.

Challenges that the definition of professional misconduct does not apply to the facts of the case are also common. Issues that may be considered are whether the definition applies to conduct that occurred before the Member joined the Association (for example, criminal convictions), or whether it applies to conduct outside the Province or outside the practice of professional forestry. Professional misconduct is defined by the Act, the Bylaws and the standards of the Association as harmful to the best interests of the public, or the Members, or the standing of the profession generally, and relates to conduct, failing to maintain standards of practice, record keeping, confidentiality, conflict of interest, fees, and so on. The Professional Conduct Committee must interpret the meaning of the definition and courts will normally defer to the Professional Conduct Committee as long as the interpretation is reasonable.

Other defences to charges of professional misconduct can include claims of: mental illness on the part of the Member, abuse of process or delay on the part of the committee, the issue already having been decided, the Hearing being held while the person is not a Member, the Member having legal immunity, or the breach is too trivial to prosecute.

10.2 Nature of Professional Incompetence

Section 24 of the Act provides as follows:

Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

- (a) continue in the practice of the profession; or*
- (b) provide one or more services ordinarily provided as a part of the practice of the profession;*

is professional incompetence within the meaning of this Act.

Where professional misconduct involves unethical or dishonest conduct, professional incompetence involves the status or condition of the Member and is assessed based on the quality of a Member's advice or services performed for clients or employers. The incompetence complained of must relate to the Member's professional advice and/or services, rather than managerial or other errors. It must also relate to a deficiency in knowledge, skill or judgement, or a disregard for the forest. Finally, it must be of a nature, or to an extent, that demonstrates that the Member is unfit to engage in the practice of professional forestry, or that the Member's practice should be restricted from a particular aspect of forestry.

A mere failure to maintain the standards of practice of the profession, or an instance of malpractice, does not necessarily constitute professional incompetence. Rather, it involves a fundamental or basic error, often associated with lack of education or knowledge, suggesting that the Member cannot be trusted with the practice of professional forestry in at least some circumstances.

Legal defenses to allegations of professional incompetence are similar to those available for allegations of professional misconduct. To place evidence of professional incompetence in perspective, the Discipline Committee can consider evidence that the Member generally acts in a competent manner, or evidence as to the context in which the alleged professional incompetence occurred.

10.3 Incapacity

Section 30 of the Act allows the Discipline Committee, when a Member is guilty of professional misconduct or professional incompetence, to make an order that individual obtain medical treatment or other treatment or counselling.

In these cases the Member should not only be found to have a physical or mental condition or disorder, but that condition must also warrant some restrictions on the Member's practice. The Member should tend to demonstrate a lack of insight into his or her illness to the extent that there is a valid concern that he or she will practice inappropriately. For example, many mental or substance abuse related illnesses would meet this definition, and most incapacity cases involve those situations. It may also be the case for with those with anger management issues.

The purpose of this provision is not to punish or blame a Member for his or her illness, but to protect the public from members whose illnesses are interfering with their ability to practice and to ensure that the Member receives treatment, and is supervised and monitored, in such a way that he or she can continue to practice if possible.

10.4 Decisions and Orders

Section 30 of the Act describes the powers of the Discipline Committee to make orders, and provides as follows:

(1) Where the discipline committee finds a member guilty of professional misconduct or professional incompetence, it may make one or more of the following orders:

- (a) an order that the member be expelled from the association and that the member's name be struck from the register;*
- (b) an order that the member be suspended for a specified period;*
- (c) an order that the member be suspended pending the satisfaction and completion of any conditions specified in the order;*
- (d) an order that the member may continue to practise, but only under conditions specified in the order, which may include, but are not restricted to,*

an order that the member:

- (i) not do specified types of work;*
- (ii) successfully complete specified classes or courses of instruction;*
- (iii) obtain all or any medical treatment, other treatment or counselling;*
- (e) an order reprimanding the member;*
- (f) any other order that the discipline committee considers just.*

(2) In addition to any order made pursuant to subsection (1), the discipline committee may order:

- (a) that the member pay to the association, within a fixed period:*
 - (i) a fine in a specified amount not exceeding \$5,000; and*
 - (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses; and*
- (b) if a member fails to make payment in accordance with an order pursuant to clause (a), that the member be suspended.*

(10.4.1) Overview of Possible Orders

An overview of some of the possible orders that may be made by the Discipline Committee are discussed below:

Expulsion from the Association: Expelling the Member from the Association and striking the Member's name from the register removes the Member from the profession for at least a year (unless otherwise specified by the Discipline Committee), after which the onus is on the former Member to apply to be permitted back into the profession and the Association. This includes meeting the admission requirements and successfully completing the examination. It is the harshest possible punishment for a Member but is intended primarily to protect the public interest. It should be reserved for repeat offenders and the most serious cases of professional misconduct or incompetence involving, for example, premeditation, exploitation, dishonesty or lack of integrity.

Suspension: Suspension is a temporary removal of a Member from the profession, and a suspended Member should not be considered a Member of the Association during the suspension period. Suspension is normally for a fixed period of time (except for cases of professional incompetence where suspensions could be indefinite) and the suspension could be made conditional by, for example, having the suspension suspended or terminated if the suspended Member permits an inspection of his or her practice. A suspension could also be imposed that will end upon the occurrence of an event, but it must be clear exactly what will end the suspension (for example, successfully completing a specified course and obtaining a mark of 75% or higher). Suspensions of six months or longer are considered quite severe, while those of two months or less might be viewed more as a "slap on the wrist".

Terms, Conditions and Limitations: The power to impose terms, conditions and limitations provides the Discipline Committee with considerable flexibility in addressing discipline issues. Terms, conditions and limitations can be for specified or indefinite periods. A "term" involves a continuing restriction and can imply that some positive action must be done. A "condition" refers to a requirement needed in order to practice (e.g. completing a course). A "limitation" is a restriction that implies avoiding certain actions. These words are usually used together since their meanings overlap.

A term, condition or limitation must relate to the finding made by the Discipline Committee, must be reasonable, and must not be excessive in relation to the finding or impossible to fulfil. Examples include requirements to obtain retraining, cooperate with an investigation, restrict a Member's scope of practice, and apologize in writing. They must be clearly stated, and must describe the scope of the restriction, consequences of breaching it, and what must be done to remove it.

Reprimands: A reprimand is an expression of disapproval by the practitioner's peers and the public and is usually made in writing. It involves the Discipline Committee verbally conveying its views to the practitioner regarding his or her conduct and how to correct the problems. Normally only the practitioner is present. The Discipline Committee can direct that the fact of the reprimand be recorded on the register, but the content of the reprimand is not recorded in the register. Including a notation of the reprimand on the register means it is available to the public and results in the practitioner's name being included in the publication of the decision.

Fines: The Discipline Committee can impose a fine in an amount up to \$5,000, plus the cost of the investigation and hearing, costs of the Professional Conduct Committee, costs of the Discipline Committee, and costs of legal representation. If a fine and costs is imposed, the Discipline Committee should outline the consequences of failure to pay by a specified date (e.g. a period of suspension).

Postponed Imposition of Penalty: The Discipline Committee may direct that the imposition of a penalty be postponed for a specified period and not be imposed on a Member if specified terms are met within that period (for example permitting the inspection of his or her practice). A postponed or suspended order acts as an incentive to encourage the Member to behave in a certain manner in future. It also allows the Discipline Committee to take into account mitigating factors in a serious case that would otherwise have resulted in the full order. The period for which the order is suspended should be clearly stated. The Discipline Committee should also decide whether to note the postponed order in the register.

(10.4.2) Factors to Consider in Making Decisions and Orders

In exercising its broad discretion in making orders, the Discipline Committee should begin by considering the impacts on the parties affected, namely the public, the profession and the practitioner. Will the order be sufficient to protect the public, including the complainant, bearing in mind that the primary purpose of the Association is to protect the public interest? Will the order act as a general deterrent to the profession and reflect how seriously the Association views the conduct? Will the order both deter the Member and assist in his or her rehabilitation versus being overly punitive and destructive to the Member's livelihood?

The Discipline Committee should next consider the seriousness of the conduct, any factors which aggravated or mitigated the conduct, and any prior orders it has made concerning the conduct.

a. Nature of the Professional Misconduct or Incompetence

The order should reflect the seriousness of the conduct. Court rulings have indicated that conduct that is intentional is more serious than that which is inadvertent; conduct carried on over a period of time is more serious than an isolated incident; and immoral, dishonest or criminal behaviour, or behaviour which involves a breach of trust, is considered serious. Conduct motivated by personal gain is considered an aggravating factor. Conduct caused in part by a psychiatric condition or a substance abuse problem, however, is often considered less serious perhaps because the motivation of the member is different.

b. Prior Decisions

The Discipline Committee should review prior decisions of the Discipline Committee in similar cases or, if none exist, look to decisions in similar cases from other professions or provinces. Decisions should not stray too far from precedents without good reason in order to survive court scrutiny.

c. Prior Conduct by Practitioner

Prior conduct can both aggravate and mitigate an order, but the rules for considering past conduct must be followed carefully. The following excerpt from the *Steinecke* case outlines these rules (in the case of a professional college) as follows:

"The general rule is that the discipline committee can only consider the conduct alleged in the notice of hearing because it is unfair for the committee to receive evidence of other instances of such conduct or evidence of other forms of misconduct, given that the practitioner has not come prepared to defend him or herself against such allegations. However, this general rule has some exceptions. The first exception is that if the practitioner places his or her good character in issue, then the college can introduce evidence of other instances of misconduct to show that the practitioner's character is not as good as he or she suggests. Also, if the practitioner suggests that the conduct in issue was an isolated instance, the college can lead evidence of other instances. Another exception is that the discipline committee can consider prior findings of misconduct against the practitioner as an aggravating factor. The prior finding may demonstrate that the practitioner may not have learned from the first decision and order. Prior findings refer to findings by the discipline committee. In some circumstances, such as where the allegation is a breach of the criminal law, prior findings of the criminal court might be relied upon as well.

Undue weight should not be put on a prior finding, particularly if it did not constitute similar misconduct or was made long before the proceeding at hand. Also, if the other finding was made after the conduct alleged in the current case, then it is not truly a prior finding because the practitioner has not had an opportunity to learn from the first order. It is, however, still relevant to show that the conduct was not an isolated incident."

d. Subsequent Conduct of the Practitioner

Although subsequent bad conduct cannot usually be used against the Member, subsequent good conduct can often be a mitigating factor in deciding which order to make regarding the Member. For example, the Member may have made restitution for damage caused or have taken other steps to remedy his or her deficiencies or conduct. The passage of time without a repetition of the misconduct can also be a mitigating factor.

e. Conduct of Practitioner's Defence

Opinion is mixed as to whether, or how, the Discipline Committee should consider this factor. On one hand, the Member has the right to conduct a vigorous defence and the order should not be more severe if the Member requires the Association to prove all of its allegations. On the other hand, a plea of guilty could be considered as a mitigating factor since it represents an admission of wrongdoing and makes rehabilitation more likely.

f. Character of Practitioner

Good character should be considered by the Discipline Committee as a mitigating factor. Factors such as a Member's abilities, length of practice, devotion to his or her work, academic achievement and reputation can result in a less severe order, unless the misconduct is so serious that doing so would be out of the question. Evidence of bad character should not be introduced by the Association unless the Member puts his or her character into issue first.

g. Effect of Order on Practitioner

The Discipline Committee should consider the effects of its order on the Member's practice, family life, reputation and emotional state. Evidence regarding these factors, and the Member's financial circumstances are, therefore, relevant. Sometimes, however, the Member's misconduct may be so serious that an order with adverse consequences must be made in any event.

(10.4.3) Assignment of Costs.

The Discipline Committee can order either the Association or the Member to pay costs to the other, although the criteria are different for each party.

a. Costs Payable by Association to Practitioner

Where the Discipline Committee is of the opinion that the commencement of the proceeding was unwarranted, they shall order that the Association reimburse the Member for his or her costs, or such portion thereof as the Discipline Committee fixes. This provision enables the Member to recover some or all of his or her legal fees if the Discipline Committee feels the discipline process was being abused. The Discipline Committee should consider the reasonableness of the decision to refer the matter to the Discipline Committee. Even if the allegations turn out to be unfounded, that does not mean that costs will necessarily be avoided, particularly if the investigation raised valid concerns about the Member's practice. Reasons should be given by the Discipline Committee for the decision to grant or refuse costs.

b. Costs Payable by Practitioner to Association

The Act empowers the Discipline Committee to make an order requiring the Member to pay: "*the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses..*"

Factors that the Discipline Committee may take into account in making such an order include the nature of the professional misconduct and/or incompetence found to have been committed, the conduct of the Member during the Hearing, and the relative degree of success of the parties.

Costs of the actual Hearing, and of the Discipline Committee, are typically assigned with finding of professional misconduct or incompetence, and include the room and meeting costs, court reporter expenses, travel and lodgings (not wages) for the members of the Discipline Committee, and the costs of the Discipline Committee's legal counsel.

The Association's Hearing costs that may be assigned include:

- The Discipline Committee's costs in preparing for, and during the Hearing associated with any legal assistance, legal representation, and expert witnesses.
- Associated travel and lodgings costs (not wages) of the members of the Discipline Committee.

The Association's investigation costs that may be assigned include:

- The Professional Conduct Committee's associated travel and lodgings costs (not wages) during the investigation.
- Any costs associated with the gathering and the analysis of information.
- Any costs associated with obtaining expert opinion or legal advice.

c. Procedure for Ordering Payment of Costs

The issue of costs should be argued after the penalty has been decided, in order to avoid potential conflicts regarding the impact of the member's conduct during the Hearing. The amount of costs should be based on records, not conjecture, and the power to award costs must be exercised reasonably. When assigning costs and penalties, the order should be very specific as to which costs have been assigned, and include the time frame for payment.

10.5 Written Decision and Reasons

The decisions of the Discipline Committee will be in writing and should be drafted in a manner that is clear, and capable of withstanding appeal. The following is general discussion about providing written reasons for a decision, and determining credibility.

- The Discipline Committee is required to serve its decision, with reasons, on the parties and the complainant.
- Where privacy rights of witnesses are a concern, pseudonyms may be used in the reasons.
- The decision and reasons can be combined in one document. One advantage to providing them separately is that the decision can be delivered before the reasons have been finalized.
- Reasons must both state the conclusions and why those conclusions were reached. Normally this would include responding to the evidence or defences raised by the unsuccessful party.
- Adequate reasons should demonstrate that a party's case has been heard and understood, explain the basis for the decision, and negate perceptions of arbitrariness or unfairness.

- In reviewing a decision for adequacy, a court will consider the statutory context, the nature of the case, the issue involved, and the nature of the tribunal.

Witness Credibility

Witness credibility is often the basis of the Discipline Committee's decision. Credibility involves the honesty of the witness, and his or her ability to give accurate testimony. Phrased as a formula:

Credibility = Honesty + Ability (to tell the truth)

The Discipline Committee, which an appellate body will consider as being in the best position to determine credibility, must explain why it found a witness to be credible or not. A finding of credibility can be made on one or more of the following grounds:

1. **Appearance or demeanor.** The tone and body language of a witness may affect his or her credibility. For example, confusion, partisanship, sarcasm or arrogance can indicate much as to a witness's credibility.
2. **Ability to perceive.** Was the witness in a position to make a certain observation? Was the witness concentrating on the event when it was observed? Is the witness an observant person?
3. **Ability to recall.** Does the witness have a good memory? How much time has passed since the observation? Has the witness had reason to review the memory since it was registered? Is the witness able to refresh his or her memory from notes?
4. **Motivation.** Witnesses sometimes have a reason to remember a matter in a particular way. Having something to gain or lose from the hearing or liking or disliking a party to the hearing can influence a witness's recollection or testimony.
5. **Probability or plausibility.** A powerful indicator of the truth of a fact is its probability or plausibility. A Discipline Committee should apply its collective common sense to the evidence of a witness when assessing probability. Plausibility is particularly important when a witness is giving an explanation or excuse for his or her questionable behavior.
6. **Internal consistency.** A common attack on the testimony of a witness is whether it is consistent throughout. Sometimes a statement made on cross-examination is inconsistent with that made in chief. Sometimes the witness is inconsistent with a prior statement which he or she has made. Where there is inconsistency, the Discipline Committee should look at the reason for the inconsistency when deciding its significance.
7. **External consistency.** The testimony of the witness should also be compared with externally proven facts. For example, does the testimony contradict what was said by another witness who was found to be credible by the Discipline Committee? Does the evidence contradict a document

filed as an exhibit? Of course, one always has to accept the possibility that the other witness or the document is in error.

The Discipline Committee should explain why any of these factors are applicable, and must ensure its reasons are supported by the evidence.

Members of the Discipline Committee should take careful and detailed notes during the Hearing to ensure facts and evidence are accurate. Care should also be exercised in making inferences against witnesses where the issue was not put to the witness in cross examination. The Discipline Committee need not review all aspects of the evidence in its reasons, so long as the reasons make it clear that the important aspects were considered.

11.0 Appeals

Section 34 of the Act (dealing with Appeals to the Council of the Association) provides as follows:

(1) A member may appeal the decision or any order of the discipline committee to the council by serving the registrar with a notice of appeal within 30 days after the decision or order if:

- (a) the member has been found guilty of professional misconduct or professional incompetence by the discipline committee; or*
- (b) the member is subject to an order made pursuant to section 30.*

(2) An appellant shall set out the grounds of appeal in a notice of appeal mentioned in subsection (1).

(5) On hearing an appeal, the council may:

- (a) dismiss the appeal;*
- (b) quash the finding of guilt;*
- (c) direct a new hearing or further inquiries by the discipline committee;*
- (d) vary the order of the discipline committee; or*
- (e) substitute its own decision for the decision appealed from.*

(6) The council may make any order as to costs that it considers appropriate.

Most associations of professional foresters in Canada have only one avenue for appeal, and that is to a designated court within their province. These appeal courts have the inherent authority to review the exercise of power and the decisions made by those implementing legislation. Courts traditionally exercise their authority in terms of three prerogative writs (*mandamus, prohibition and certiorari*), described as follows:

- Compelling a public official or public body to fulfil a public duty. (*mandamus*)
- Intervening to prevent a public official or public body from doing something illegal or improper. (*prohibition*)
- Exercising the power to review the legality of decisions made by public officials or a public body and to invalidate or quash that decision if found to be defective (*certiorari*).

In other words, appeals to the courts often tend to focus on the "legal pedigree" or "legality" of the decision and the exercise of powers, and not so much if the decision was "correct" or "right" on its merits.

As such, court appeals will seldom be a forum for debating the merits of forest management. The courts are far more interested in ensuring that statutory requirements are fulfilled, understanding the evidentiary basis used to make the decision, or if new evidence has come to light.

Unlike many other jurisdictions, in Saskatchewan there is an opportunity for the Member to appeal to the Council of the Association after the Discipline Committee renders its decision - and prior to an appeal being made to the Court of Queen's Bench of Saskatchewan. In this regard, the Council can serve an important role.

Procedural Guidance:

- 1.0 Following receipt of request for an Appeal, the Registrar acknowledges receipt of the appeal request and informs the Council.
- 2.0 If the appeal is within scope (only the Member can appeal, not a third party) the Chair of the Discipline Committee, working with the Registrar:
 - Ensures that official notice of the hearing before Council (similar to Section 29) is made.
 - Arranges for a meeting room, and a court reporter.
 - Arranges for copies of the Hearing transcripts, original evidence, and the Discipline Committee written decisions and orders to be distributed to all parties.
- 3.0 Prior to the Council's Appeal Hearing:
 - 3.1 In addition to the above, a new round of disclosure is required including:
 - Notice of appeal,
 - The appeal book, which contains the transcript and exhibits from the proceedings before the Discipline Committee,
 - Factums/ Briefs from the Member that more completely outlines the nature and the grounds of the appeal, and
 - Any new evidence either party intends to produce.
 - 3.2 Council is to ensure sufficient time is allowed to both parties to review the material.

4.0 Council will hold a special single purpose hearing to hear the appeal (i.e. there will not be any agenda items that relate to a regular Council meeting).

- Quorum will consist of at least 2/3 of the active Council members (at the time of filing the appeal), such quorum to be determined after excluding:
 - the Chair of the Discipline Committee,
 - the Chair of Professional Conduct Committee, and
 - any members of Council who participated in the Hearing or in the Professional Conduct Committee investigation panels (including, if applicable, the appointed public member).
- A minimum of 3 Council members are required.
- The Council may obtain its own legal counsel and other experts, not for decision making but, rather, to provide advice. Legal counsel may also assist Council in writing Council's decision to help ensure legal clarity.

5.0 At the Appeal Hearing of Council

5.1 This is not a re-trial of the Hearing held by the Discipline Committee.

5.2 An appeal to Council is similar to an appeal to a Court, and is about hearing "legality" arguments associated with:

- The implementation of authority provided in the legislation.
- The process used to reach the decision, in terms of administrative law.
- The evidentiary base for that decision.

5.3 Unlike an appeal Court, however, Council has expertise in forestry and, as such, is in a much better position to evaluate the "correctness" or "rightness" of the decisions and orders of the Discipline Committee. Council, in reviewing "rightness and fairness" can:

- Review existing evidence and make its own conclusion.
- Accept new evidence and make its own conclusion.
- Return the case to the Discipline Committee for a new hearing.
- Accept arguments/briefs for Council's consideration.

6.0 The Hearing process before Council includes:

- Presentations made by the Member.
- Presentations made by the Discipline Committee.
- Examination of existing and, if applicable, new evidence
- Review of documentation.
- In an orderly fashion, the questioning of the presenters, by the other party and by Council.
- Generally, witnesses will not be called.
- Before concluding the hearing, Council may also request that arguments to a specific question be prepared by either party and provided to Council within specified (reasonable) time.

Cost Assignments

Cost of filing appeal to Council - \$ 500.00 (refundable)

The general principle is 50/50 split of all costs will be used, which costs include:

- Costs of the hearing room, court reporter, and transcript of the discipline Hearing and of the appeal to Council (when concluded)
- Cost of Council's legal counsel and experts
- Cost of Council Members transportation and lodging.

It is assumed that only legitimate and complex cases will be appealed. The \$500 fee discourages frivolous appeals and a portion of this money will be used by the Association to produce the appeals book. The 50/50 rule is use to remove bias from the system.

Appeal to Court

Section 35 of the Act provides that a Member whose conduct is the subject of an order of the Council pursuant to Section 34 may appeal that order to a judge of the court within 30 days after the date of the order of the Council.

Legal advice should be obtained in relation to any such appeal, and that process is outside of the procedures of the Discipline Committee.

12.0 Publication & Commenting on Complaints and Cases

Should a complaint of professional misconduct or professional incompetency be made but be unproven, there is a real risk the Member's reputation could still be significantly tarnished. Therefore, it is important that a high level of confidentiality and discretion be used whenever a complaint is filed. Likewise, active complaints should not be openly discussed as it may influence and/or introduce bias into the Discipline Committee hearing and/or the appeal process to Council.

Conversely, reporting of decisions made by the Discipline Committee, or at least a summary of its reasons for such decisions and the outcome, helps educate the profession and the public regarding the types of conduct considered appropriate and inappropriate by the Association.

Internal Restrictions:

- When a complaint is first received all information is to be kept confidential and known only to the Registrar and to members of the Professional Conduct Committee during the course of their investigation.

- Council and members the Discipline Committee are only informed that a complaint of professional misconduct or incompetence has been received and is under investigation. Names and particulars are not discussed.
- Should the investigation report of the Professional Conduct Committee recommend a hearing of the Discipline Committee be held, Council at that time, may learn:
 - The name of the Member.
 - The name of the complainant or the source of the complaint.
 - The allegation as described in the "official charge".
- The investigation report submitted to Council is held in trust by the Registrar until the appeal to Council period has expired.
- Should a mediated settlement be reached, or complaint found to be unfounded (no investigation started or Hearing held), Council at that time may learn of all the particulars of the complaint/case.

Public Commenting Active File:

- The Association will not comment on matters that may be the subject of a complaints resolution processes, whether as a matter of investigation or alternative dispute resolution mechanisms such as (by way of example) negotiation, arbitration or mediation.
- Once a matter has passed through the investigation stage, and a notice for a discipline Hearing has been issued, the matter is considered to be "public". In such cases:
 - The Association will not take any extra steps to publicize the issuance of a notice of a discipline Hearing.
 - The Association will respond to public/media inquiries by providing only the basic information (such as the date of the discipline Hearing, the charge and the Member's name). Particulars of the case or of the investigation report are not discussed.
 - The investigation report is not available for release until after the opening of the discipline Hearing, other than to the parties listed in the legislation.

Exception: The Registrar, in consultation with the appropriate Discipline Committee members, may decide that in a particular case the risk of harm to the public interest and/or the profession by remaining silent outweighs the potential for harm to the individual(s) involved by commenting on the matter. In such an event the Registrar will issue, or cause to be issued, a statement about that particular case. The statement will give due regard to the protection of reputation of any person(s) involved and upholding the presumption of innocence. Ideally the complainant and the Member will be provided with advance notice of the intention to issue a statement. It is assumed that cases of this importance would be appealed to Council and, therefore, members of Council cannot be involved in the release of the statement.

- Discipline Hearings and Appeals to Council - these Hearings and Appeals meeting are open to the public.

Publication of Discipline Outcomes

The Association will produce individual summary digests for publication on the Association's website for each complaint that has been received and concluded.

Where the discipline process finds a Member guilty of professional misconduct or professional incompetence the name of the Member involved will be included in the digest except when:

- the penalty imposed does not include suspending or rescinding a Member's enrolment;
- publication will cause grievous harm to the subject Member or other identifiable individuals that outweighs the interest of the public and the Association in full publication (where the harm is more than damage to the Member's reputation or simple embarrassment that normally stems from a guilty finding).

In complaints resolved through mediation or other processes, the choice to publish or not to publish the Member's name will be included in the settlement documentation.