The Professions Tribunal and the Control of Ethical Conduct among Professionals

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The *Professional Code,* passed in 1973 by the National Assembly,[1] effected a complete reorganization in the regulation of professions. The resulting administrative structure, of which the Professions Tribunal is a part, was designed to ensure that professional practice would remain in conformity with one paramount objective: protection of the public. The background and main features of this new regulatory scheme will be set forth in Part I of this article. The organization and procedure of the disciplinary system will appear in Part II. Part III will be devoted to an analysis of the peculiar features of legal rules governing discipline among members of the professions and the relationship of these rules with other branches of the legal system.

I. REGULATORY REFORM IN THE PROFESSIONAL FIELD

A. The regulation of professions before 1973

In order to perceive the thrust of the reform embodied in the *Professional Code* of 1973, one must first look back to the state of the law in the field of professional organization during the 1960's — a time of intense social change in Quebec.[2] The most salient feature

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[1] S.Q. 1973, c. 43, as am.

[2] The situation as of 1969 in the health and welfare professions is exhaustively and very critically surveyed in Sheppard, "L'organisation et la réglementation des professions de la santé et du bien-être au Québec" in Government of Quebec, *Report of the Commission of Inquiry on Health and Social Welfare* (1970), App. 12.

A somewhat more sanguine view is taken in Ouellette, "Les corporations professionnelles" in Barbe (ed.), *Droit administratif canadien et québécois* (1969), 181-222; and Lemieux, *Nature et pouvoirs des corporations professionnelles au Québec* (1967-68) 9 C. de D. 37. The major features and trends in

of that period was the accelerated growth of the public sector in the areas of education, social services, public utilities and economic development. It became necessary for the State to employ an increasing number of professionals who, as a result, experienced changes in their status and the tasks that they performed. These developments rendered obsolete the existing system of professional organization.

Prior to 1973, each profession had been governed by its own statute. The three oldest and most prestigious professions in Quebec society (legal, notarial and medical) were the first to be granted such recognition by the Legislature.[3] A second group of professions emerged between Confederation and the First World War and were accorded similar legislative treatment when they had attained a level of social status almost equivalent to that of the "established" professions.[4] Members of a third group of occupations that came into existence more recently as a result of the increased specialization of knowledge likewise sought incorporation by an Act of the Legislature,[5] thereby hoping to obtain the status, privileges, and prestige enjoyed by people practising the older professions. Inevitably, the statutes that were eventually passed reflected a compromise between the ambitions of the new professionals, the inclinations of the government in power, and the sullen opposition

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pre-1970 legislation are summarized in *Report of the Commission of Inquiry on Health and Social Welfare* (1970), Part V (hereinafter cited as *Castonguay-Nepveu Report*), t. 1.

[3] *An Act for the organization of the Notarial Profession in that part of this Province called Lower Canada,* Provincial Statutes of Canada 1847, 10-11 Vict., c. 21; *An Act to incorporate the Members of the Medical Profession in Lower Canada, and to regulate the Study and Practice of Physic and Surgery therein,* Provincial Statutes of Canada 1847, 10-11 Vict., c. 26; *An Act to incorporate the Bar of Lower-Canada,* Provincial Statutes of Canada 1849, 12 Vict., c. 46.

[4] Dental surgeons (S.Q. 1869, c. 69), pharmacists (S.Q. 1870, c. 52), surveyors (S.Q. 1882, c. 16), architects (S.Q. 1890, c. 59), engineers (S.Q. 1898, c. 32), veterinarians (S.Q. 1902, c. 27) and optometrists (S.Q. 1906, c. 89).

[5] Nurses (S.Q. 1920, c. 141 and S.Q. 1946, c. 88), chartered accountants (S.Q. 1920, c. 118), forest engineers (S.Q. 1921, c. 143), dispensing opticians (S.Q. 1940, c. 61), industrial accountants (S.Q. 1941, c. 95), agronomists (S.Q. 1942, c. 61), dental technicians (S.Q. 1944, c. 43), certified general accountants (S.Q. 1946, c. 89), dieticians (S.Q. 1955-56, c. 156), social workers (S.Q. 1959-60, c. 178), radiology technicians (S.Q. 1960-61, c. 87), psychologists (S.Q. 1962, c. 88), industrial relations counsellors (S.Q. 1963, c. 99), vocational guidance counsellors (S.Q. 1963, c. 100), chemists (S.Q. 1963, c. 53), town planners (S.Q. 1963, c. 101), speech therapists and audiologists (S.Q. 1964, c. 58), chartered administrators (S.Q. 1966-67, c. 128), chartered appraisers (S.Q. 1969, c. 104).

raised by members of the established professions.[6] As these three factors varied considerably from one case to the next, the statutory product was predictably very different.

All statutes conformed to the principle that the regulation of ethical conduct should be exercised primarily by the professional groups themselves. However, the statutory arrangements for the implementation of that principle varied significantly. These inconsistencies were reflected in all three components of the regulatory process: legislative, administrative, and adjudicative.

For instance, while all professional groups recognized at least implicitly the need for ethical standards,[7] only a few attempted to embody guidelines of professional ethics in legislation.[8] The usual practice was to delegate the authority to regulate discipline and ethical conduct to the governing body of the corporation. These regulations varied widely in form, style, and detail[9] and were often — but not always — subject to approval by the Lieutenant Governor in Council.[10] Nor were these regulations always exhaustive; some statutes granted to the adjudicating authority the power to punish *all* conduct considered to be "derogatory to the dignity of the profession", whether or not such conduct breached the provisions of the Act or the regulations.[11]

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[6] A number of occupations (*e.g.*, nursing assistants, occupational therapists, medical technologists) failed to obtain recognition in the form of a special enactment, and were organized as non-profit associations incorporated by letters patent under Part III of the *Companies Act*, R.S.Q. 1964, c. 271. Since the beginning of this century, most professional organizations began as interest groups of this kind and moved after some time to the higher status of a professional corporation exercising regulatory powers under a special statute.

[7] Provision for the regulation of discipline illustrates this recognition: see, *e.g.*, *Act respecting the Corporation of Psychologists of the Province of Quebec*, S.Q. 1962, c. 88, s. 7; *Act to incorporate The Corporation of Urbanists of Quebec*, S.Q. 1963 (1st Sess.), c. 101, s. 7.

[8] *E.g.*, *Pharmacy Act*, R.S.Q. 1964, c. 255, s. 45; *Dental Act*, R.S.Q. 1964, c. 253, s. 122.

[9] See, *e.g.*, the statutes regulating the health and welfare professions as compiled in Sheppard, *supra*, note 2.

[10] *E.g.*, approval was required by the following acts: *Bar Act*, S.Q. 1966-67, c. 77; *Medical Act*, R.S.Q. 1964, c. 249; *Pharmacy Act*, R.S.Q. 1964, c. 255. Approval was not required by the psychologists' and town planners' statutes, *supra*, note 7.

[11] *Bar Act*, S.Q. 1966-67, c. 77, s. 105; *Medical Act*, R.S.Q. 1964, c. 249, s. 66(2); *Pharmacy Act*, R.S.Q. 1964, c. 255, s. 48. Ouellette, *supra*, note 2, shows that breaches of professional ethics may be committed at common law even where the particular conduct is not prohibited by any enactment. Quebec cases on the point, however, are scarce, relatively old, and conflicting: see *Tremblay* v. *Bernier* (1891) 17 Q.L.R. 185 (C.S.) and *O'Farrell* v. *Brassard* (1877) 1 L.N. 32, 3 Q.L.R. 33 (Que. Q.B.).

The pre-1973 statutes also failed to follow a uniform approach with respect to the administrative functions of inspection, investigation, and enforcement. Procedures for monitoring professional conduct, filing and investigating complaints, and initiating procedures against violators differed greatly.[12]

With regard to the adjudicative process, the same unsystematic approach prevailed. Although all of the processes were internal in nature (that is, with no outside participation), procedural safeguards varied widely.[13] All statutes listed the sanctions that could be imposed on violators, but the range of available penalties was not uniform.[14] Most statutes provided for a two-tier adjudicative system in which the lower tier consisted of a disciplinary committee chosen by the governing body of the corporation from members of the profession and the upper tier consisted of the governing body itself.[15] However, the composition and relationship of these two bodies varied significantly. Some statutes did not exclude members of the governing body from serving on the lower tier disciplinary committee, with the result that such members would occasionally hear appeals from their own decisions.

In addition, subsequent recourse to a judicial body outside of the professions was not always available. Only a few statutes allowed for an appeal to the courts;[16] many, on the other hand, contained

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[12] For instance, the decision on the validity of a complaint could be taken by the president of the corporation (*Pharmacy Act*, R.S.Q. 1964, c. 255, s. 47), the executive committee of the corporation (*Medical Act*, R.S.Q. 1964, c. 249, s. 61), an official of the corporation responsible for the monitoring of professional conduct (*Bar Act*, S.Q. 1966-67, c. 77, s. 23), a screening committee (*Regulation of the Corporation of Psychologists*, Q.S.R. 1972, 9-661, s. 52), or the disciplinary body itself (*Regulation of the College of Optometrists and Opticians*, Q.S.R. 1972, 9-277, ss. 114 *et seq.*).

[13] Ouellette, *supra*, note 2, 212-13.

[14] All statutes provided for reprimands and temporary or permanent disbarment from the profession. Many also allowed for the imposition of fines. Some authorized suspension of permits or certificates issued by the corporation, disfranchisement as a voting member, ineligibility for office in the corporation, or disqualification from such office.

[15] Disciplinary bodies under the *Medical Act* and the *Pharmacy Act* conformed to that basic model, with minor variations between them. Noteworthy among other schemes were the *Bar Act*, which provided for two large panels of members (one for each level) from which a quorum would be selected for each case, and the psychologists' Disciplinary Board, elected by the annual general meeting of members.

[16] *Dispensing Opticians Act*, R.S.Q. 1964, c. 258, s. 28; *Veterinary Surgeons Act*, R.S.Q. 1964, c. 259, s. 59; *Pharmacy Act*, R.S.Q. 1964, c. 255, s. 58; and *Optometry Act*, R.S.Q. 1964, c. 257, s. 47, all provided for an appeal to the Provincial Court as the second or third level of adjudication.

some form of privative clause.[17] When confronted with such clauses, however, the courts often relied on the doctrine of jurisdiction to censure disciplinary actions by professional corporations. Judicial review could therefore be invoked against the exercise of rule-making powers,[18] investigations by officers of corporations,[19] and adjudication by disciplinary bodies.[20]

Thus as far as the regulation of ethical conduct was concerned, the situation seemed unsatisfactory in several respects: the values and principles involved remained uncertain, the rules were difficult to collect, the notion of unprofessional conduct appeared open-ended, the disciplinary process generally took place entirely within the profession, and procedural safeguards were often left to the discretion of inexperienced adjudicators. In addition, the lack of outside control resulted in a wholesale delegation of regulatory powers — some of which were rather extraordinary — to people who were only nominally accountable to the legislature or the government. Therefore, while on the one hand the system could be suspected of exposing members of the professions to the tyranny of their peers and perhaps to unfair sanctioning, it could equally be viewed as a whitewashing operation for the profession.[21]

B. The reform of 1973

1. *The Castonguay-Nepveu Report*

The idea of formulating a *Professional Code* was formally proposed in 1970 in the Report of the Commission of Inquiry on Health and Social Welfare.[22] The Commission, appointed in 1966, had initially been concerned with the professions involved in the provision of health and social services. Due to increased specialization, to recent changes in status following the expansion of the public

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[17] See Lemieux, *supra*, note 2, 59-62.

[18] *X.* v. *La Salle* [1964] R.P. 266 (C.S.); *Paratte* v. *Collège des optométristes* [1967] B.R. 645; *Béchard* v. *Roy* [1974] C.S. 13, *aff'd* [1975] C.A. 509.

[19] *Gosselin* v. *Bar of Montreal* (No. 1) (1912) 2 D.L.R. 19 (Que. K.B.); *Maillet* v. *Bureau des gouverneurs du Collège des chirurgiens-dentistes* (1919). 28 B.R. 539; *B.* v. *Chambre des notaires* [1954] C.S. 476.

[20] *Cahoon* v. *Conseil de la Corporation des ingénieurs* [1972] R.P. 209 (C.A.); *Comité d'appel du Bureau provincial de médecins* v. *Chèvrefils* [1974] C.A. 123. See also *Chèvrefils* v. *Conseil de discipline du Collège des médecins* [1976] C.S. 1468, *aff'd* [1978] C.A. 94.

[21] See Deschênes, *Les professionnels dans le Québec contemporain* (1967) 27 R. du B. 69, for an attempt to dispel the latter criticism.

[22] Part V, *supra*, note 2.

sector, and to the gradual erosion of the monopoly formerly enjoyed by physicians, these professions were in an acute state of crisis. In the course of its study, however, the Commission became convinced that since other professions faced problems that were similar in nature, the matter should be approached globally. Thus the Commission recommended the adoption of a single *Professional Code* which would supersede the existing special statutes and include the following elements:

(1) representation of the public and the government on the governing bodies of professional corporations;

(2) public discussion of regulations drafted by professional corporations prior to their adoption by the Lieutenant Governor in Council;

(3) continuance of the corporations' responsibility for professional ethics;

(4) inclusion in the *Professional Code* of some broad ethical standards, to be completed by regulations drafted within each profession;

(5) the creation, within each profession, of a disciplinary tribunal composed of members of the profession and presided over by a lawyer appointed by the Chief Judge of the Provincial Court;

(6) the creation, within each profession, of a disciplinary appeal tribunal, composed of members of the profession and presided over by a judge appointed by the Chief Judge of the Provincial Court;

(7) a right of appeal from the final decisions of a disciplinary appeal tribunal to the Superior Court;

(8) incorporation in the *Professional Code* of a single uniform list of disciplinary sanctions, including probationary periods and the obligation to repay the victim of unprofessional conduct;

(9) discretion on the part of the disciplinary tribunals to impose on violators any of the sanctions on that list;

(10) incorporation in the *Professional Code* of standard rules of procedure for all disciplinary tribunals, including:

a) a requirement that the complaint be written and specific;

b) the right to counsel for parties and witnesses;

c) a presumption of innocence in favour of the accused;

d) the right to summon witnesses and to examine and cross-examine them under oath;

e) a requirement that evidence be recorded;

f) protection against self-incrimination;
g) a requirement that hearings be held in private unless the tribunal decides otherwise in the public interest;
h) a requirement that decisions be given in writing, be brought to the attention of the parties and interested persons, and be published in a collection of reported cases;
i) a provision that appeals be heard on the basis of the file, saving the power of the appeal tribunal or the court to hear additional evidence in certain cases.[23]

The *Castonguay-Nepveu Report* clearly emphasized the need for *uniformity* in the area of professional discipline as well as in other areas of professional organization. At the same time, it recognized that to be meaningful and reasonably specific, rules of ethical conduct must be drafted by the members of each profession for themselves. The proposals also reflected other values such as *openness,* insofar as self-regulation by the profession would allow for public comment. For example, non-members would sit on the governing and disciplinary bodies of the corporations, disciplinary proceedings could occasionally be conducted in open court, and decisions of disciplinary tribunals would be reported. *Fairness* was safeguarded by the establishment of a three-tiered adjudicative structure under the direction of lawyers and judges and the introduction of basic procedural standards which would govern all disciplinary proceedings. *Impartiality* in the adjudicative process was reinforced by the introduction of non-member chairmen at lower levels and independent judicial authority as a last resort.

The proposals set forth in the *Castonguay-Nepveu Report* were included in a bill introduced before the National Assembly in 1971,[24] where a lengthy and lively debate ensued before the Assembly's Health and Welfare Committee. Although the professions voiced their misgivings about the proposed regulatory scheme, the provisions in the bill concerning professional discipline were not the subject of much controversy. In the following year, when the government introduced a new bill which considerably strengthened the position of the Professions Board as a policy-making body and overall policing agency, the provisions concerning discipline were left unaltered.[25]

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[23] *Ibid.*, 43 and 50-62.

[24] (1971) Bill 250, 2d Sess., 29th Leg. (Que.).

[25] (1972) Bill 250, 3d Sess., 29th Leg. (Que.). The main changes concerned the role, composition and powers of the Professions Board, the regulation of

Two of the major proposals made in the *Castonguay-Nepveu Report* have been incorporated into the new regulatory structure. First, professional organization and regulation were meant to ensure the protection of the public rather than the interests of the corporation. In the past, there had been a tendency to further the interests of a particular profession under the guise of protecting the public when in fact the public interest might have benefited from a curtailment of some of that profession's privileges.[26] Under the new scheme, professional corporations would act as agents for the community, entrusted with a delegation of public authority which could only be exercised to further the common good.[27] Second, the new system was to include a code, of general application to all professions, to be supplemented by special statutes or letters patent specifying the objects and powers of a corporation within the code's framework,[28] and a set of regulations for each profession to be approved by the Lieutenant Governor in Council.

2. *The new regulatory structure*

To appreciate the role of the Professions Tribunal, one must examine its position in the complex administrative structure set up by the *Professional Code*.[29]

a) **Professional corporations**

Although the *Professional Code* distinguishes between professions where practice is subordinate to membership in the corporation ("exclusive professions") and those where practice is free but the bearing of the professional title is reserved to members

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advertising by professionals, the approval of schedules of fees, temporary practice by foreign professionals, the appointment of non-members to the governing bodies of corporations, the corporations' responsibility for continuing education, the setting of membership dues, the corporations' duty to set up an indemnity fund, the power of certain corporations to authorize non-members to perform professional acts, the membership and powers of professional inspection committees, and the use of injunctions to restrain continuing violations of professional legislation.

[26] See, *e.g.*, *Collège des médecins* v. *Lesage* (1933) 71 C.S. 338.

[27] *Castonguay-Nepveu Report*, *supra*, note 2, 39-41.

[28] Companion bills to the *Professional Code* amended the existing special statutes governing seventeen professions, and legislated into existence by special statute professional corporations for denturologists (S.Q. 1973, c. 50), hearing-aid acousticians (S.Q. 1973, c. 54), podiatrists (S.Q. 1973, c. 55) and chiropractors (S.Q. 1973, c. 56).

[29] The administrative structure reflects the very real constraints imposed on the autonomy of the professions. See Dussault & Borgeat, *La réforme des professions au Québec* (1974) 17 Can. Pub. Admin. 407, 422-39.

of the corporation ("professions with reserved titles"),[30] in both types the corporation is given a standard form of organization. Professional corporations are administered by a Bureau which includes a president and several directors whose number varies according to the size of the corporation.[31] While the president and most of the directors are elected by the members,[32] between two and four directors (one or two of whom must not belong to any corporation) are appointed by the Professions Board upon consultation with the Interprofessional Council and socio-economic organizations.[33] Directors are elected to the Bureau on a regional basis and must be practising in the region they represent.[34] The Bureau acts either by resolutions[35] or regulations, which must receive advance circulation among members, advance publication in the *Official Gazette,* and approval by the Lieutenant Governor in Council.[36] In corporations consisting of more than five hundred members, the Bureau delegates responsibility for all day-to-day business other than the drafting of regulations to an administrative committee which it elects annually from among its members. The president and one of the appointed directors must sit on this committee.[37]

The *Professional Code* also provides for the establishment, within each profession, of an inspection committee made up of three members appointed by the Bureau.[38] This committee's task is to supervise the technical quality of the members' practice through investigations, the inspection of records, the administration of tests of competence, and the assignment of members to refresher training courses.[39] The committee may also refer disciplinary cases either directly to the syndic of the corporation[40] or indirectly,

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[30] This distinction, already present albeit in a confused and unsystematic way in pre-1973 legislation, was somewhat underplayed by the *Castonguay-Nepveu Report, supra,* note 2, 25-26.

[31] *Professional Code,* S.Q. 1973, c. 43, ss. 60-61.

[32] *Ibid.,* ss. 62-63, 65-66, 68-73, 75-76.

[33] *Ibid.,* s. 77.

[34] *Ibid.,* ss. 64, 67 and 74.

[35] *Ibid.,* s. 84.

[36] *Ibid.,* ss. 85-93. The exercise of regulation-making powers under ss. 85-91 is mandatory.

[37] *Ibid.,* ss. 94-95.

[38] *Ibid.,* s. 107.

[39] *Ibid.,* ss. 110-111. See also ss. 88 and 12(g) and (h).

[40] Though not expressly provided for in the *Professional Code,* this seems to be an accepted practice in cases of gross incompetence: see Office des professions du Québec, *Quatrième rapport d'activités 1976/77,* 36.

through a recommendation to the Bureau.[41] Within the disciplinary structure, it is further mandatory for each profession to establish both a committee on discipline and the office of syndic.[42]

b) **The Quebec Interprofessional Council**

The Council was instituted in 1965 as a voluntary organization where professional groups could meet to exchange views, collaborate to resolve common problems, and settle difficulties between them.[43] The existence of the Council (to which all professions now belong) is maintained by the *Professional Code*.[44] The Council has become an integral part of the regulatory structure.[45] It may make recommendations to the corporations on matters of common interest, advise the Professions Board and the Lieutenant Governor in Council on the creation of new professional corporations, and suggest the appointment of a majority of the Board's members.[46] It must also be consulted before certain types of regulations are made by the Lieutenant Governor in Council.[47] In short, the Council provides a channel of communications which promotes cooperation between the professions and government in the process of regulation.

c) **The Professions Board (Office des professions)**

The Board is the keystone of the new administrative structure. It represents a major departure from the proposals contained in the *Castonguay-Nepveu Report* which had suggested that the regulation of professions be entrusted to the Department of Financial Institutions, Companies, and Cooperatives (expert in similar forms of regulation).[48] The National Assembly thought it preferable to set up an autonomous administrative agency, representative in character and specialized in its field.

The five members of the Board are appointed by the Lieutenant Governor in Council, three of whom (including the chairman or the vice-chairman) must be chosen from a list of five names submitted by the Interprofessional Council.[49] All five must be members of a

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[41] *Professional Code*, ss. 110 and 125.

[42] *Ibid.*, ss. 114-119. Both of these organs are part of the disciplinary structure and will be described in Part II, *infra*.

[43] See Deschênes, *supra*, note 21.

[44] *Professional Code*, ss. 17-22.

[45] Significantly, the Council reports annually to the Minister responsible for the application of the *Professional Code*: *ibid.*, s. 22.

[46] *Ibid.*, ss. 19 and 4.

[47] *Ibid.*, s. 177.

[48] *Castonguay-Nepveu Report*, *supra*, note 2, 67-69.

[49] *Professional Code*, s. 4.

professional corporation.[50] The staff of the Board are also appointed by the Lieutenant Governor in Council, on the Board's recommendation.[51] In view of this composition, it is still possible, to a certain extent, to consider the Board as an instrument of professional self-management, rather than just another government agency. Indeed, in some respects, its functions overlap with those of the Interprofessional Council. For instance, the Board must "endeavour to bring the corporations to work together to find solutions for common problems".[52]

An examination of the Board's duties, however, reveals that its primary purpose is to protect the public interest rather than the professions. Its basic task is plainly and succinctly stated in the first paragraph of section 12 of the *Professional Code*: "The function of the Board shall be to see that each corporation ensures the protection of the public". The *Professional Code* then specifies various activities which follow from this function, such as making suggestions to the government concerning the establishment, amalgamation, or dissolution of professional corporations,[53] as well as changes in the *Professional Code* or in the special statutes governing professions. The Board is also invited to suggest improvements in professional training to the professions and the universities.

The Board's responsibilities regarding the rule-making powers of professional corporations are crucial to the success of the regulatory scheme described in the *Professional Code*. First, the Board is given a mandate to make recommendations concerning the regulations adopted by professional corporations and may thus suggest regulatory changes to any corporation.[54] In addition, the Lieutenant Governor in Council will rely on the Board's expertise and advice in approving such regulations.[55] Second, if a corporation

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[50] *Ibid.*, s. 6.

[51] *Ibid.*, s. 5. A recent amendment has brought the staff of the Board under the general rules governing employment in the public service: L.Q. 1978, c. 18, s. 22.

[52] *Ibid.*, s. 12, para. 2.

[53] S. 25 lists the factors which the Board must take into account to assess the desirability of creating a professional corporation. For Board policy on the subject, see Office des professions du Québec, *L'évolution du professionnalisme au Québec* (1976). To implement the Board's suggestions requires legislative action in the case of exclusive professions (see s. 26); as for professions with reserved titles, implementation would require either an amendment of s. 36 and Schedule I or the issuance, amendment or revocation of letters patent (see ss. 27 and 35).

[54] *Professional Code*, s. 12, para. 2, *in fine*.

[55] *Ibid.*, s. 93.

fails to adopt the regulations made mandatory by sections 85 and 91 of the *Professional Code*,[56] the Board may act in its stead, and implement, *inter alia*, a code of ethics to govern the members of that corporation. In this respect, the Board's "suggestions" for changes are really imperative, since it can, in effect, overrule a corporation's objections.[57] Regulations adopted by the Board under section 12 must, however, be approved by the Lieutenant Governor in Council.[58] Third, the Board has the power to adopt, after consultation with the profession involved and other bodies, a tariff of fees for the services rendered by the members of that corporation. Such tariffs are subject to one month's advance publication, which allows for comments from the general public.[59]

In addition to overseeing the regulations made by professional corporations, the Board must investigate and report on the financial administration of any corporation which shows a deficit or is financially incapable of meeting its statutory obligations. In this event, the corporation may be placed under the control of the Board, or a subsidy may be granted.[60]

Such an accumulation of power and influence clearly circumscribes the autonomy formerly enjoyed by professional corporations. It illustrates that the meaning of "tempered self-management", the keynote phrase of the *Castonguay-Nepveu Report*,[61] has shifted to a point where the emphasis is on "tempered" as much as on "self-management".

d) The Cabinet and the Minister

The Lieutenant Governor in Council at least nominally plays a prominent role in the scheme. He approves regulations made by professional corporations, the Professions Board, and the Professions Tribunal[62] and, in addition, makes regulations on his own initiative.[63] Furthermore, he wields a power of great practical significance in that he appoints Board members and staff, as well as the chairmen of committees on discipline.[64]

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[56] *Ibid.*, s. 12, subparas. 3(a) to (p).
[57] *Ibid.*, s. 12, subparas. 3(q) and (r).
[58] *Ibid.*, s. 13.
[59] *Ibid.*, s. 12, subpara. 3(u) and s. 13.
[60] *Ibid.*, s. 12, subparas. 3(s) and (t), and ss. 14 and 267.
[61] *Supra*, note 2, 10.
[62] *Professional Code*, s. 172*a* (as am. by S.Q. 1974, c. 65, s. 29) and ss. 93 and 13.
[63] *Ibid.*, ss. 177-178.
[64] *Ibid.*, ss. 4 and 115; as to the latter, see *infra*, pp. 603-604.

In contrast, the role of the Minister responsible for the application of the *Professional Code* is rather limited.[65] He is granted no power to issue policy directives to the Board. As is generally the case where an autonomous administrative agency has been set up outside departmental structures, the Minister is more or less confined to the role of parliamentary spokesman for the Board.

e) **The Professions Tribunal**

The Tribunal's single function is to act as a judicial body with primary regard to disciplinary matters. Due to its very specialized role, its links with the other elements of the regulatory structure are rather limited. In relation to the other disciplinary authorities and, in certain cases, to the Bureau of a corporation, it stands exclusively as a court of appeal; it has no involvement in the appointment or training of members of those bodies or in the regulation of their activity. With respect to professional corporations, the Tribunal's judicial position requires complete independence. The Board's only involvement is its responsibility to publish the Tribunal's decisions.[66] The Lieutenant Governor in Council may intervene solely to approve the Tribunal's rules of practice and procedure.[67]

II. THE DISCIPLINARY PROCESS

The three disciplinary authorities set up by the *Professional Code* — the syndic, the committee on discipline, and the Professions Tribunal — will now be examined in detail, with reference to their powers, procedure, and the appointment of their members. In addition, specific problems such as the amenability of these authorities to judicial review will be discussed.

A. The syndic

The *Professional Code* requires the Bureau of every corporation to appoint a syndic from among the members of the corporation. While no particular selection procedure is prescribed, a recent amendment provides that officers of the corporation, including the syndic, can only be dismissed by a two-thirds majority of Bureau members.[68] Interestingly, the major provisions concerning this position appear in the subdivision entitled "Constitution of

[65] *Ibid.*, ss. 1(i) and 191.
[66] *Ibid.*, ss. 12, para. 3(v) and 173.
[67] *Ibid.*, s. 172*a*.
[68] *Ibid.*, s. 83*a* (as am. by S.Q. 1977, c. 66, s. 7) and s. 119.

committees on discipline".[69] This would seem to indicate that the syndic functions as an auxiliary to the committee and the placement is therefore somewhat misleading. In fact, the syndic protects the public interest in committee proceedings by acting as investigator and prosecutor for the corporation, inquiring into alleged or suspected professional misconduct. Although special statutes constituting corporations may empower the syndic to open an inquiry on his own initiative,[70] generally an investigation is triggered by any "information to the effect that a professional is guilty of an offence" against the *Professional Code*, against the act constituting the corporation to which he belongs, or against its regulations, including the corporation's code of ethics.[71] The information may come from a variety of sources, including members of the public, fellow members of the corporation,[72] the Bureau,[73] a special committee of inquiry set up by the Bureau,[74] the professional inspection committee, or one of its investigators.

It should be noted that in some corporations, the professional inspection committee appoints the syndic one of its investigators.[75] The investigator-syndic then serves both statutory committees. Investigations which begin for the purpose of inspection may be converted into disciplinary investigations if the investigator-syndic deems it proper. This hardly seems compatible with the principle of separating the control of professional competence and the sanction of unprofessional behaviour — one of the original aims pursued by the draftsmen of the *Professional Code*.[76]

When conducting an inquiry, the syndic and his assistants or regional correspondents may exercise broad powers: they may require the production of any relevant information or document and examine and make copies of any records kept by a professional.[77] Obstructive, uncooperative, or misleading behaviour by a profes-

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[69] *Ibid.*, ss. 119-121.

[70] *Bar Act*, S.Q. 1966-67, c. 77, s. 90*b*, as am. by S.Q. 1973, c. 44, s. 36.

[71] *Professional Code*, ss. 120 and 114.

[72] The codes of ethics of the various corporations make it an offence for a member not to refer to the syndic a case of unprofessional behaviour that comes to his knowledge. See, *e.g.*, the code of ethics of the Bar: *By-law respecting the Code of Ethics*, O.C. 1425-77, Reg. 77-250 (1977) Québec Official Gazette 3311, s. 4.02.01(p).

[73] *Professional Code*, s. 55.

[74] *Ibid.*, s. 84(c).

[75] *Ibid.*, s. 110.

[76] Dussault & Borgeat, *supra*, note 29, 417-18.

[77] *Professional Code*, ss. 120 and 186.

sional in the course of an inquiry is an offence punishable by a fine.[78] At the close of the inquiry, the syndic has the discretion to decide whether the facts warrant the laying of a complaint before the committee on discipline. However, should he choose not to lodge a complaint, he must provide the informant with reasons for his decision. In many of the pre-1973 statutes, the syndic's determination of the seriousness of the facts disclosed by the inquiry was final. This is no longer the case since the Bureau may now order the syndic to lay a complaint,[79] and any other person, including an individual informant, may lodge a complaint when the syndic declines to do so. This latter provision is a useful safety mechanism in cases where the informant believes that the corporation, through its syndic, is trying to protect an alleged violator.[80] The institution of a complaint by the syndic is mandatory in situations in which he is informed that a member of the corporation has been found guilty of an indictable offence (triable only by indictment) by a final decision of a Canadian court.[81] This procedure raises the broader question of the relationship between criminal law and professional discipline, to be dealt with in Part III.

In order to enjoy immunity from prosecution, the syndic must act in good faith. He is protected further by provisions purporting to exclude judicial review, but this protection is not absolute and must be considered in light of the doctrine of jurisdiction.[82] Since the syndic's powers are so broad and could conceivably be used to harass professionals or to undermine their reputations, it is crucial that he act in good faith. Whether sued for damages or challenged in judicial review proceedings, this element is essential to the syndic's defence.[83]

The syndic must remain independent and steadfast in the face of the many (often conflicting) pressures which may be brought to bear on him. The Bureau (which appoints and may pay him) has the power to order him to lodge a complaint, and may informally exert "political" pressures.[84] In certain professional corporations, the syndic also serves both the committee on discipline and the pro-

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[78] *Ibid.*, ss. 112 and 182.
[79] *Ibid.*, s. 125.
[80] *Ibid.*, s. 120*a* (as am. by S.Q. 1975, c. 80, s. 12) and s. 125.
[81] *Lamarche* v. *Fiset* [1976] C.A. 765.
[82] *Professional Code*, ss. 188-190.
[83] *Ibid.*, s. 187.
[84] However, the syndic's newly acquired protection against dismissal (*supra*, note 68) should strengthen his independence.

fessional inspection committee, and in cases where an information has been referred to him by the Professions Board, it too may exert its influence. Finally, the syndic is liable to attract criticism and hostility from fellow members within the profession who resent being suspected of wrongdoing and from informants who may suspect him of protecting a violator. Thus the office of syndic would seem to require an individual with unassailable integrity as well as great independence of mind.

B. The committee on discipline

In this area the *Professional Code* has blended tradition with reform. It has upheld the traditional claim of the professions to basic responsibility for the control of ethical conduct among their members. The notion that judgments concerning the violation of professional ethics should in principle be made by members of the profession was fully accepted by the *Castonguay-Nepveu Report* and implicitly retained in the *Professional Code.* Reform has taken place by imposing uniformity and giving a more judicial flavour to the disciplinary process.

1. *Composition*

Committees on discipline, which are mandatory for all corporations, must be constituted similarly. While the Bureau of the corporation may select the members of the committee from among the members of the corporation, the chairman must be a lawyer (and therefore an outsider to all corporations other than the Bar) appointed by the Lieutenant Governor in Council after consultation with the Bar.[85] To foster expertise and consistency, the appointment of the same person to chair the committees of several corporations has been encouraged.[86] In practice, multiple appointments are usually made to the committees of related or similar corporations; for example, the same person chairs the committees on discipline for general accountants, administrators, and appraisers.

Although each corporation's special statute or regulations govern the number of members and the manner of selection, committees always sit in groups of three, including the chairman. If the number of members is sufficient and the volume or geographical distribution of complaints requires it, the committee may sit in several divisions. Each division must be chaired by a lawyer, selected by the

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[85] *Professional Code,* s. 115.
[86] *Ibid.,* s. 118.

chairman of the committee from a list prepared by the Lieutenant Governor in Council after consultation with the Bar.[87]

Committee members, including the chairman, may be recused in the same manner as judges.[88] In this regard, it may be noted that the reorganization of disciplinary bodies by the *Professional Code* has eliminated many possibilities of bias that existed under the pre-1973 statutes. The syndic will no longer be able to both prosecute and sit on the disciplinary body in the same case, nor will the Bureau be called upon to adjudicate on appeals from a committee which includes some of its members.[89]

2. *Jurisdiction and powers*

The jurisdiction of the committee is clearly set out in sections 114, 148 and 153 of the *Professional Code*:

> 114. A committee on discipline is constituted within each corporation.
>
> The committee shall be seized of every complaint made against a professional for an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or that act.
>
> 148. The committee shall decide to the exclusion of any court, in first instance, whether the respondent is guilty of an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or the said act.
>
> 153. The committee on discipline shall impose on a professional convicted of an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or the said act, one or more of the following penalties:
>
> (a) reprimand;
> (b) temporary or permanent striking off the roll;
> (c) a fine of at least two hundred dollars for each offence;
> (d) the obligation to remit to any person entitled to it a sum of money the professional is holding for him;
> (e) revocation of his permit;
> (f) revocation of his specialists's certificate.

Several points may be made concerning the substance of the committee's jurisdiction. First, the authority of the committee to

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[87] *Ibid.*, s. 133.

[88] *Ibid.*, s. 135.

[89] The diverse and awkward disciplinary structure of pre-1973 corporations gave rise to much litigation on bias in disciplinary proceedings: see *O'Farrell* v. *Brassard, supra,* note 11; *Gosselin* v. *Bar of Montreal, supra,* note 19; *Maillet* v. *Bureau des gouverneurs du Collège des chirurgiens-dentistes, supra,* note 19; *Décarie* v. *Collège des chirurgiens-dentistes* (1928) 44 B.R. 435; *Masson* v. *Collège des chirurgiens-dentistes* (1930) 49 B.R. 376; *G.* v. *Barreau de Montréal* [1959] B.R. 92; *Béchard* v. *Roy, supra,* note 18.

hear complaints and impose sanctions may be exercised only when the alleged violator is a member of the corporation. This conforms to the tradition of self-regulation, which did not allow professional corporations to pass judgment on infringements of their privileges by non-members. That class of proceedings continues to belong to the jurisdiction of ordinary courts.[90] Second, the scope of professional misconduct is strictly limited to offences against the *Professional Code*, the statutes incorporating professions, and the regulations made under both. Significantly, this has been repeated at length in each of the three sections defining the committee's jurisdiction, thus emphasizing a major change from pre-1973 legislation. Previously, disciplinary bodies had the common-law jurisdiction to declare and punish violations of professional ethics not covered by any specific enactment.[91] Third, section 153 breaks with tradition by providing a uniform list of penalties for all professions. Most of the sanctions enumerated in that list could be found in different combinations in pre-1973 statutes. The obligation to reimburse money held for others, however, is a new type of indirect sanction suggested in the *Castonguay-Nepveu Report*.[92]

To the committee's adjudicative tasks must be added two significant powers. It may make recommendations regarding an application for reentry by a professional who has been struck off the roll of the corporation pursuant to a decision of the committee, although the final decision rests with the Bureau.[93] The committee may also recommend that the Bureau require a professional to serve a period of refresher training, during which his right to practise may be limited.[94] This essentially operates as an extension of the committee's sanctioning power and allows it to deal more effectively with cases where curative action seems necessary.

The jurisdiction of the committee is therefore firmly confined to violations of the ethical rules laid down in the relevant enactments. Such limited jurisdiction does not allow the committee to

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[90] *Zenith Radio Corp.* v. *Ordre des audioprothésistes* [1976] C.S. 1758; *Corporation professionnelle des médecins* v. *Boily* [1977] C.S. 84.

[91] Borgeat, *La faute disciplinaire sous le Code des professions* (1978) 38 R. du B. 3, 5-7. This crucial aspect of the *Professional Code* will be discussed further in Part III, *infra*.

[92] *Supra*, note 2, 58-59.

[93] *Professional Code*, s. 157.

[94] *Ibid.*, ss. 156 and 92(h). The professional inspection committee has the same recommendatory power under s. 111.

consider issues such as the constitutional validity of legislation or the legality of regulations, which remain reserved to the courts.[95]

3. *Procedure*

a) General character

Disciplinary procedure may be considered a hybrid.[96] Depending on the particular aspect of the case, the committee may look to either the *Criminal Code*[97] or the Code of Civil Procedure for guidance. Although no provision in the *Professional Code* requires the sole use of either type of procedure,[98] specific rules may be borrowed to reflect the nature of the action. For instance, the procedures for laying complaints and imposing penalties bear a strong resemblance to criminal proceedings, while most of the other committee functions are analogous to civil proceedings.[99] However, disciplinary procedure must always be seen as an autonomous field, and the direct transposition of external rules may not be appropriate.[100]

The committee's freedom to choose its own manner of proceeding where no statutory provision is applicable[101] has been recognized in the *Professional Code*. Section 139 authorizes the committee to use "all legal means to ascertain the facts", and section 142 allows it to summon such witnesses and require the production of such documents as it considers useful.

A third element, characteristic of adjudication, is that the procedural autonomy of the committee is ultimately limited by the requirements of natural justice. Both elements of natural justice have been made explicitly applicable to the committee by sections 135 (import-

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[95] For unsuccessful attempts to bring committees to exceed their jurisdiction in this regard, see *Comité-Médecins-1* [1974] D.D.C.P. 49; *Comité-Médecins-21* [1976] D.D.C.P. 335.

[96] *Goodman* v. *Bureau de discipline du Collège des pharmaciens* [1971] C.A. 841; *Lemieux* v. *Lippens* [1973] R.L. 405 (Prov. Ct).

[97] R.S.C. 1970, c. C-34 as am.

[98] *Tribunal-Avocats-3* [1975] D.D.C.P. 294.

[99] *Richard* v. *Bureau de discipline du Collège des pharmaciens* [1969] R.P. 151 (C.A.); *Comité-Psychologues-1* [1975] D.D.C.P. 59.

[100] *Comité-Avocats-7* [1974] D.D.C.P. 12 (error in the wording of the complaint not fatal); *Tribunal-Médecins-1* [1975] D.D.C.P. 75 (appeal suspends execution of a committe's decision); *Tribunal-Notaires-1* [1976] D.D.C.P. 209 (imposition of a single sanction for several offences not fatal); *Tribunal-Médecins-4* [1977] D.D.C.P. 136 (joinder of complaints); *Tribunal-Avocats-11* [1977] D.D.C.P. 353 (respondent's evidence treated as admission).

[101] *Lambert* v. *Lippens* [1973] R.L. 446 (Prov. Ct).

ing the recusation provisions of the Code of Civil Procedure) and 140 (maintaining the right of the respondent "to present a full and complete defence").

b) **Some specific rules**

Sections 123 to 157 of the *Professional Code* also contain a large number of procedural provisions which, considered as a whole, leave no doubt as to the quasi-judicial character of the process.[102] A few of these provisions deserve comment in view of their originality. Section 127 allows the plaintiff to request that the respondent be struck from the roll immediately, pending the committee's decision on the complaint. This is considered an interim measure for the protection of the public where the continuation or repetition of the behaviour complained of might threaten public safety.[103] The plaintiff has the onus of establishing that the public may be in serious jeopardy if the respondent is allowed to carry on his practice.[104] Since it is an emergency measure, the decision of the committee to strike the respondent off the roll, although appealable, normally remains in force until the final decision of the committee, unless the Professions Tribunal orders its suspension.[105]

Among the provisions concerning the taking of evidence by the committee, the most striking are sections 143 to 145, which require any witness before the committee, including a professional and the respondent himself, to answer all questions under oath. Refusal to answer may be punished by the committee as contempt of court.[106] The duty of secrecy, imposed on professionals by section 9 of the *Charter of Human Rights and Freedoms*, [107] by section 85(3) of the

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[102] See, *e.g.*, the provisions pertaining to the form of the complaint (s. 124), the right to counsel (s. 130), notice of the hearing (s. 134), the right of both parties to make representations on the penalty to be imposed after a conviction (s. 146), and the form and contents of the decision (s. 150).

[103] An analogy may be drawn between this measure (in relation to corporation members) and the interlocutory injunction procedure of s. 185 (in relation to non-members).

[104] *Comité-Avocats-7* [1975] D.D.C.P. 12; *Comité-Avocats-11* [1975] D.D.C.P. 17; *Comité-Comptables agréés-2* [1975] D.D.C.P. 20.

[105] *Professional Code*, ss. 157 and 162; *Tribunal-Avocats-2* [1974] D.D.C.P. 73, based on identical provisions in the *Bar Act*, S.Q. 1966-67, c. 77.

[106] *Professional Code*, s. 161, referring to the *Public Inquiry Commission Act*, R.S.Q. 1964, c. 11, s. 11.

[107] S.Q. 1975, c. 6. Statutes or regulations passed subsequent to the Charter may expressly set aside that provision for their purposes: see s. 52 of the Charter and Borgeat, *Le secret professionnel devant les tribunaux québécois* (1976) 36 R. du B. 148.

Professional Code, and by the codes of ethics of the various corporations, cannot be raised as an objection before the committee as it could before a court.[108] When these provisions are added to sections 120 and 186, which give the syndic and the committee unrestricted access to the records of a professional, it becomes obvious that the disciplinary process overpowers the principle of confidentiality. The clients of a professional must rely instead on the fact that committee hearings are normally held *in camera,*[109] on the oath of discretion taken by the syndic and the members of the committee,[110] and on the duty of secrecy imposed on any person having knowledge of the evidence at the hearing.[111] Although witnesses are protected against self-incrimination in court proceedings, evidence given before the committee could be used against them in other disciplinary or administrative proceedings.[112]

The uncertain relationship between disciplinary procedure and civil or criminal procedure has given rise to a number of evidentiary problems. For instance, what is the standard of proof required to establish a violation of professional ethics? In some cases it has been assumed that, in view of the penal character of the complaint, guilt must be proved beyond a reasonable doubt.[113] The majority of cases, however, require no more than the usual standard of proof for civil proceedings, that is, that the weight of evidence support the finding of guilt.[114]

It seems clear from the scheme of the *Professional Code,* as well as from a line of jurisprudence going back to the pre-1973 period, that the respondent in disciplinary proceedings must be presumed innocent until his guilt is established by the plaintiff.[115] But can the latter rely on presumptions or circumstantial evidence to establish guilt on the part of the respondent? In one case, a committee refused to hold a professional responsible for misrepresentations made by his receptionist as to his qualifications as a spe-

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[108] *Comité-Psychologues-1, supra,* note 99; *Comité-Avocats-22* [1975] D.D.C.P. 115.

[109] *Professional Code,* s. 137.

[110] *Ibid.,* s. 121.

[111] *Ibid.,* s. 145.

[112] *Ibid.* See Grey, Décary & Bernier, *Some Comments from a Symposium on Quebec's Professional Code* (1976) 22 McGill L.J. 110, 113-14.

[113] *Comité-Avocats-17* [1974] D.D.C.P. 40.

[114] *Comité-Psychologues-1, supra,* note 99; *Comité-Optométristes-3* [1975] D.D.C.P. 240; *Tribunal-Médecins-2* [1975] D.D.C.P. 77.

[115] See, *e.g., Léonard* v. *Amyot* [1971] C.S. 349; *Comité-Psychologues-1, supra,* note 99.

cialist; the committee held that implied liability for damages under article 1054 of the Civil Code could not be used to establish a contravention of section 57 of the *Professional Code.*[116] On the other hand, the Professions Tribunal upheld the decision of another committee which had found a professional guilty of illegal advertising on the basis of circumstantial evidence to the effect that he had at least tacitly approved of such advertising, if not actually authorized it, and had certainly benefited from it.[117] Generally, in evidentiary matters, the case law seems to favour a broad interpretation of the provisions in the *Professional Code* giving the committee a large measure of procedural freedom.[118] In particular, the Professions Tribunal has been prepared to allow committees to consider hearsay evidence.[119]

4. *The caseload*

During the period between the coming into force of the *Professional Code* in February 1974 and the end of June 1977, committees on discipline have heard over five hundred complaints.[120] In approximately twenty per cent of the cases, the committee dismissed the complaint. Professionals found guilty were struck from the roll permanently in about three per cent of the cases, and in another twelve per cent, the respondent was struck from the roll for periods ranging from a few weeks to several years. In the remaining cases, the committee imposed one of the lesser penalties listed in section 153.

Complaints made against members of the oldest established professions (lawyers, notaries, and physicians) accounted for a large proportion of the total caseload. This presumably reflects the expertise these professions have acquired over time in the control of ethical conduct. Pharmacists, a slightly newer group, have also experienced a great deal of disciplinary litigation; this may be due in part to the lack of consensus within the profession regarding recent movements to suppress commercial practices. While a few

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116 *Comité-Médecins-22* [1976] D.D.C.P. 339. S. 58 considers such misrepresentations derogatory to the dignity of the profession.

117 *Tribunal-Médecins-5* [1977] D.D.C.P. 161.

118 See especially ss. 139 and 142.

119 *Tribunal-Médecins-7* [1976] D.D.C.P. 172.

120 Committee decisions have been reported in the series *Décisions disciplinaires des corporations professionnelles* (D.D.C.P.), published twice yearly by the Professions Board in pursuance of ss. 12(v) and 173 of the *Professional Code.*

complaints concerning twelve other professions were also heard over that period, twenty-two committees on discipline (most of them in recently constituted corporations with reserved titles) remained inactive throughout the period.

5. *Judicial review of committee proceedings*

The possibility of judicially challenging the legality of proceedings before committees on discipline set up under the *Professional Code* has never been in doubt even though the immunities and privative clauses of sections 187 to 190 apply to disciplinary committees as well as to syndics. These privative clauses are indeed more sweeping in terms than those found in the pre-1973 professional statutes, but they too may be circumvented under the doctrine of jurisdiction.

A long line of English and Canadian cases, reaching as far back as the seventeenth century, has treated disciplinary bodies as exercising quasi-judicial functions and characterized them as "inferior tribunals" subject to the review jurisdiction of the Superior Court.[121] Whether the advent of the Professions Tribunal, endowed with a general appellate jurisdiction over disciplinary committees, has affected that review jurisdiction will be examined below. It may be noted that the Superior Court has already reviewed the proceedings of committees on discipline on a few occasions since 1973.[122]

C. The Professions Tribunal

The *Castonguay-Nepveu Report*, attempting to reconcile the tradition of professional self-regulation with the perceived need for judicial expertise, recommended the adoption of a three-tiered disciplinary structure.[123] Complaints would be heard by the committee on discipline whose decisions would be reviewable by a second-tier authority presided over by a Provincial Court judge. At the third level, there would be an appeal to the Superior Court. This proposal was rejected by the Government in favour of a less elaborate two-tiered structure in which the upper level is composed entirely of Provincial Court judges and is completely independent of the corporations. This choice arose from a desire not

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[121] This position has been repeatedly endorsed in Quebec cases: see, *e.g.*, *Gosselin* v. *Bar of Montreal*, *supra*, note 19.

[122] *Byer* v. *Barreau du Québec* [1976] C.S. 1020; *Abramovitch* v. *Comité de discipline de l'Ordre des pharmaciens* [1976] C.A. 480.

[123] *Supra*, note 2, Recommendations 7.I.37 to 7.I.39.

to impose an unpredictable burden on the already overworked Superior Court, to benefit from the experience acquired by the Provincial Court in the exercise of its appeal jurisdiction over the disciplinary processes of some corporations, and to have all components of the new regulatory structure for the professions appointed by the Quebec government.

1. *Composition*

At its inception in 1973, the Tribunal consisted of five judges selected by the Chief Judge of the Provincial Court from among the members of that Court. One of them was appointed chairman.[124] To provide more flexibility in the assignments of Tribunal members, however, a recent amendment has created a further group of five Provincial Court judges, again designated by the Chief Judge; these are known as deputy judges (*juges suppléants*).[125] Members of the Tribunal are intended to become part-time specialists in Professional Law but not to devote all their time to their duties as Tribunal members. (All have continued to sit as judges of the Provincial Court.) The Tribunal normally sits as a bench of three judges designated by the chairman, one of whom may be a deputy judge.[126]

Although it is composed of judges, the Professions Tribunal cannot be considered a court of justice. It should rather be characterized as an administrative tribunal, in the strictest sense of the phrase, meaning a non-departmental public authority specializing in adjudicative functions. The Legislature has the power to decide what sorts of persons will participate in such bodies. If it chooses judges, it simply expresses a concern that the members be experts in the art of justice; it does not necessarily intend that the particular authority become a court. The federal Parliament rather infrequently calls on judges to staff federal tribunals.[127] By contrast, in Quebec, a whole series of recently-created tribunals are composed in whole or in part of Provincial Court judges.[128] Such a practice has the political advantage of vesting in those new tribunals at least some of the prestige and moral authority associated with judges. A secondary practical advantage is the creation of a whole class of judges with in-depth experience of various sectors of public administration.

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[124] *Professional Code*, s. 158.

[125] *Ibid.*, s. 159, para. 2 (added by S.Q. 1977, c. 66, s. 11).

[126] *Ibid.*, s. 159; *Tribunal-Avocats-1* [1974] D.D.C.P. 71.

[127] *E.g.*, unemployment insurance umpires are Federal Court judges; members of the Pension Appeals Board are provincial Superior Court judges.

[128] *E.g.*, the Labour Tribunal, the Expropriation Tribunal, the Transport Tribunal, the Rentals Commission, the Social Affairs Commission.

2. *Jurisdiction and powers*

The main provision concerning the Tribunal's jurisdiction appears in the second paragraph of section 158 of the *Professional Code*: "An appeal shall lie to such tribunal from any decision of a committee on discipline, by the plaintiff or the respondent". The jurisdiction is therefore purely appellate; it can only be invoked after a disciplinary committee has made a decision. On the other hand, it extends to *any* decision of a committee, incidental or otherwise, including a decision on a request under section 127 to immediately strike from the roll a professional against whom a complaint is made.[129]

The reform of 1973 has placed rights of appeal against disciplinary decisions in a new setting. Prior to that date, disciplinary committees or councils were internal to the various corporations, and any appeal to an outside authority — if and when such an appeal was provided for — could only be by the respondent professional. Since the advent of the *Professional Code*, however, committees on discipline have been chaired by outsiders, and anyone can lodge a complaint; therefore, the syndic or an individual plaintiff would also have standing to appeal. This was expressly recognized in 1974 by an amendment to section 158 of the *Professional Code*.[130]

Under section 51*d*, the Tribunal also has appellate jurisdiction over certain decisions of the Bureau. These are cases in which the Bureau refuses to enter a person on the roll, strikes him from the roll, or limits his right to practise, because he is reported by three physicians to be in a mental or physical condition incompatible with the practice of the profession, or has refused to undergo a medical examination to determine whether he is in such a condition. In any case, the decision of the Tribunal is final.[131]

With regard to committee decisions, the Tribunal has the full powers generally associated with an appellate jurisdiction: it may confirm, vary, or quash the decision appealed from, and substitute its own decision for it. Furthermore, the Tribunal has consistently taken the view that its powers are no different from those of an ordinary court of appeal. Thus, it will not disturb the committee's decision unless it finds a serious and manifest misapprehension of the facts, an excess of jurisdiction, misuse of the committee's discre-

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[129] *Tribunal-Avocats-1*, *supra*, note 126; *Tribunal-Médecins-1*, *supra*, note 100.
[130] S.Q. 1974, c. 65, s. 26.
[131] *Professional Code*, s. 51*d* (as am. by S.Q. 1977, c. 66, s. 2) and s. 170.

tion as to the sentence, or an inappropriate or disproportionate penalty.[132] As have many other administrative agencies, the Tribunal has received the broad investigative powers provided for in the *Public Inquiry Commission Act*.[133] Among other things, this allows the Tribunal to require witnesses to attend, and to punish them for contempt.[134]

3. *Procedure*

The Tribunal may adopt its own rules of procedure, subject to their approval by the Lieutenant Governor in Council.[135] In general, however, procedure before the Tribunal is meant to follow the Code of Civil Procedure, saving the specific provisions in the *Professional Code*.[136] Thus, the Tribunal has held that the setting of a simpler procedure by section 160 of the *Professional Code* excludes application of the provisions of the Code of Civil Procedure governing appeals to the Court of Appeal.[137] On the other hand, the general rule that time limits for appealing are inflexible has been held to apply to the limit set in section 160, in the absence of *Professional Code* provisions allowing for an extension.[138] Similarly, in the absence of provisions to the contrary, an appeal to the Tribunal from an interlocutory decision was held to suspend proceedings before the committee, as would have been the rule under the Code of Civil Procedure.[139] Some provisions of both Codes are substantially identical, and the Tribunal may rely on either or both. One example of this is section 165 of the *Professional Code* dealing with the admissibility of additional evidence under exceptional circumstances and where justice may require that it be authorized.[140]

Some of the basic rules made applicable to the procedure before the committee on discipline are reiterated in respect of the Tri-

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[132] *Tribunal-Avocats-3* [1974] D.D.C.P. 75; *Tribunal-Médecins-2, supra,* note 114; *Tribunal-Médecins-3* [1975] D.D.C.P. 309; *Tribunal-Avocats-15* [1976] D.D.C.P. 407; *Tribunal-Pharmaciens-1* [1976] D.D.C.P. 223; *Tribunal-Avocats-4* [1977] D.D.C.P. 123; *Tribunal-Arpenteurs-géomètres-2* [1977] D.D.C.P. 341.

[133] R.S.Q. 1964, c. 11.

[134] *Professional Code,* s. 161.

[135] *Ibid.,* s. 172*a*. See *Rules of practice of the Professions Tribunal,* O.C. 765-76, Reg. 76-128 (1976) Québec Official Gazette 2121.

[136] *Ibid.,* s. 161.

[137] *Tribunal-Avocats-1* [1975] D.D.C.P. 69.

[138] *Tribunal-Notaires-1* [1977] D.D.C.P. 387.

[139] *Tribunal-Médecins-1, supra,* note 100.

[140] *Tribunal-Médecins-1* [1974] D.D.C.P. 79; *Tribunal-Avocats-14* [1976] D.D.C.P. 406.

bunal.[141] One provision expressly adopted from committee procedure requires witnesses, including the professional whose behaviour is the subject of the complaint and any other professional, to answer all questions, but grants them immunity against the use of that evidence in judicial proceedings.[142]

The Professions Tribunal seems to have avoided the pitfall of excessive formalism, a risk in any judicial proceeding. Its hearings are said to be no more formal than those of the committees, and generally tend to assume the form of an orderly discussion. The Tribunal has also succeeded in preserving the major advantage of administrative tribunals: speed. Cases are generally heard and decided within three months, which is remarkable in view of the fact that the members of the Tribunal still carry on their normal judicial duties.

4. *The caseload*

Between February 1974 and mid-1977, the Tribunal handed down one hundred decisions. About half of the cases were decided in the last year of that period. The rate of reversal of committee decisions was about seventy per cent until that final year, at which time the nature of the caseload changed due to the fact that a large number of appeals concerned matters of procedure and therefore did not immediately affect the outcome of the complaint. Among the cases where a substantive decision was at issue, the reversal rate fell to approximately thirty per cent. Appeals from decisions concerning lawyers, physicians, and pharmacists accounted for eighty-eight of those hundred cases; the rest dealt with members of seven other corporations.

5. *Judicial review and the constitutional issue*

Like the other disciplinary authorities set up by the *Professional Code*, the Professions Tribunal found, in sections 187 to 190, only limited shelter from the traditional review powers of the Superior Court. Early in its existence, one of its decisions was challenged by a plaintiff who applied to the Superior Court for a writ of evocation. Although he was unsuccessful, the application gave the Court an opportunity to indicate that it would read the privative clauses in

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[141] *E.g.*, the right to counsel (s. 166), the principle of *in camera* hearings (s. 168) and the duty to give reasons (s. 171).

[142] *Professional Code*, s. 169.

the customary way, that is, so as not to exclude review for want or excess of jurisdiction.[143]

Similar proceedings were initiated in 1977 against decisions of the Tribunal; this time the attack was founded on section 96 of the *British North America Act, 1867*.[144] That section provides that appointments to the superior courts of the various provinces are to be made (in effect) by the federal Cabinet. When a province confers jurisdiction on an inferior court or tribunal (the members of which are appointed by the provincial Cabinet), the question arises as to whether that particular jurisdiction was included, in 1867, in the jurisdiction of the superior courts of that province. A number of criteria have been used, in a large body of case law, to ascertain the answer to that question. If it is found that jurisdiction was conferred upon the Superior Court in 1867, then the inferior tribunal or court becomes unconstitutional as regards that particular jurisdiction, and is therefore liable to evocation of its proceedings. In recent years, a number of administrative tribunals set up by the Legislature of Quebec have had their jurisdiction challenged in this way.

In a case decided in April 1977, the Superior Court held that the Legislature, when it gave the Professions Tribunal jurisdiction to hear appeals from committees on discipline, including appeals on questions of law and jurisdiction, in fact transferred jurisdiction which had substantially belonged to the Superior Court in 1867.[145]

In November of the same year, Nadeau J. of the Superior Court supported the constitutional validity of sections 158 and following of the *Professional Code*, on the grounds that the jurisdiction conferred on the Tribunal previously belonged to other inferior tribunals or courts, namely the governing bodies of professional corporations, their committees, and in some cases the Provincial Court; that the Tribunal remained subject to review by the Superior Court; and that provinces do not impinge on section 96 when they set up inferior appeal tribunals.[146]

The Supreme Court of Canada has recently ruled on a similar application involving the Transport Tribunal.[147] The Supreme Court,

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[143] *Brière* v. *Tribunal des professions* [1975] C.S. 745.

[144] 30-31 Vict., c. 3 (U.K.).

[145] *Crevier* v. *Aubry* [1977] C.S. 324 *per* Poitras J.

[146] *Choquette* v. *Comité de discipline du Barreau* C.S.M. no. 500-05-14949-779, Nov. 15, 1977. Both this and the *Crevier* case (*supra*, note 145) have been taken to the Court of Appeal.

[147] *A.-G. Québec* v. *Farrah* (1978) 86 D.L.R. (3d) 161; 21 N.R. 595.

confirming an earlier decision of the Quebec Court of Appeal, unanimously held that the exclusive jurisdiction given to the Transport Tribunal to hear appeals on questions of law and jurisdiction from decisions of the Quebec Transport Commission was *ultra vires.* Chief Justice Laskin considered as fatal to the constitutionality of the Transport Tribunal the fact that it was not set up simply as an appeal tribunal, with power to decide on questions of law in the exercise of a general appellate authority over the decisions of the Transport Commission. Rather, the Transport Tribunal was an appeal body whose primary task was to examine questions of law.[148]

By contrast, it may be argued that the Professions Tribunal is simply an appeal tribunal with that sort of general appeal jurisdiction where questions of law may or may not be involved. However, in the recent Superior Court decision of *Haltrecht* v. *Tribunal des professions,* Mr Justice Meyer (following the *Farrah* case) held that the same reasoning that applies to an appeal tribunal primarily dealing with questions of law applies *a fortiori* to tribunals with the jurisdiction to deal with questions of both law and fact, such as the Professions Tribunal.[149]

III. PROFESSIONAL LAW WITHIN THE LEGAL SYSTEM

The control of ethical conduct within professional organizations has long been a central feature in the body of legal rules pertaining to the professions. This emphasis on disciplinary law corresponds to a sociological fact observed by the Professions Board in its policy document on the evolution of professional organization in Quebec: among the different forms of activity which professional corporations undertake in order to protect the public, control of professional ethics is the most common. According to the Board's survey, in 1974 about one-half of the total number of professional corporations had an active committee on discipline; this proportion rose to two-thirds among exclusive professions. The degree of involvement by the corporations was substantially lower for other forms of activity aimed at the protection of the public.[150]

The preeminence of the disciplinary function in the activities of professional corporations is likely to increase. For one thing, section 23 of the *Professional Code* has confirmed the tendency (already

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[148] *Ibid.,* 165-66. Spence, Dickson and Estey JJ. concurred.

[149] *Haltrecht* v. *Tribunal des professions* C.S.M. no. 500-024855-783, Dec. 1, 1978 (Meyer J.).

[150] Office des professions du Québec, *supra,* note 53, 35-41.

apparent before 1973) of corporations to relinquish their role as promoters of group interests and concentrate instead on protecting the public by maintaining a high standard of quality in professional services. The *Professional Code* has further introduced all the elements required for an orderly, consistent, and systematic development of disciplinary law: (1) mandatory rule-making by the professions under centralized supervision by the Board; (2) a uniform procedure for the introduction, investigation, and adjudication of disciplinary complaints; (3) a uniform set of disciplinary sanctions; and (4) an overall appellate authority, capable of developing a body of case law. The experience of a few years already points to a substantial enrichment of disciplinary law, in terms of both quantity and quality. The changes introduced by the *Professional Code* and its subsequent developments have not, however, removed some basic difficulties in the control of ethical conduct among professionals. Nor have they suppressed the perennial problem concerning the relationship between disciplinary law and other parts of the legal system.

A. Some peculiar features of disciplinary law

1. *Codes of ethics*

The legal nature of ethical rules established by professional corporations to guide the conduct of their members has to some extent been clarified by the *Professional Code*. For one thing, these rules are now an essential element in the legal order governing the professions. In addition, codes of ethics are always expressed in the familiar legal form of regulations issued by the Lieutenant Governor in Council. Finally, section 85 of the *Professional Code* succinctly outlines the purposes served by codes of professional ethics and contains a list of minimal provisions:

> The Bureau must make, by regulation, a code of ethics governing the general and special duties of the professional towards the public, his clients and his profession, particularly the duty to discharge his professional obligations with integrity. Such code must contain, *inter alia*:
>
> 1. provisions determining which acts are derogatory to the dignity of the profession;
>
> 2. provisions defining, if applicable, the professions, trades, industries, businesses, offices or duties incompatible with the dignity or practice of the profession;
>
> 3. provisions to preserve the secrecy of confidential information that becomes known to the members of the corporation in the practice of their profession;
>
> 4. provisions respecting the right of any person having recourse to the services of a professional to take cognizance of the documents re-

garding him in any record made by that professional about him and to obtain copies of those documents.

The introductory paragraph of this section distinguishes between two levels of ethical obligations, characterized as general and special duties of the professional, and lists the persons to whom those duties are owed, namely, the public, the clients of a professional, and the profession. The specific mention of one's "duty to discharge his professional obligations with integrity" is obviously an example of a general duty. As to the minimal requirements, groups 3 and 4 seem to relate mainly to the clients' protection, while group 2 concerns both the public and the profession. Group 1 would appear applicable to all classes of duties; its main object is to require that codes determine exhaustively which acts are to be treated as derogatory to the dignity of the profession, so that the meaning of that phrase may be reasonably defined.

a) **The inherent generality**

Codes of professional ethics do not easily lend themselves to the formulation of cut and dried rules for specific situations. Rather than to define a solution for every conceivable difficulty in neat legal terms, their aim is to provide moral guidance for broad categories of situations. It should be kept in mind that codes of professional ethics are basically ideological statements made in the sometimes technical context of a particular professional practice.[151] For this reason, it is often impossible for the draftsmen of such a code to be very specific. They must rely on broad general prescriptions of conduct.

One example of this type of provision is section 52A(24) of the *Regulation of the College of Physicians and Surgeons*: "The physician must refrain from omissions, procedures or acts unsuitable or contrary to current medical science".[152] The validity of an earlier version of that provision was challenged in evocation proceedings brought under the pre-1973 legislation.[153] The applicant contended that under the pretence of regulating the conduct of physicians, an unfettered discretion to define the elements of an offence had been delegated to the disciplinary bodies of the corporation. The

[151] *Cf.* Dussault & O'Neil, *La déontologie professionnelle au Québec* (1977), 40-45, 157-161.

[152] This provision was adopted under the *Medical Act* before 1973: see Q.S.R. 1972, 9-101. It was continued in force by s. 262 of the *Professional Code*, and subsequently by successive orders-in-council, the latest extending its validity to July 1, 1979: O.C. 3610-78 (1978) Gazette officielle du Québec, Lois et règlements 6695.

[153] *Béchard* v. *Roy*, *supra*, note 18.

Court of Appeal, affirming the judgment of the Superior Court, held that the general wording of the section did not affect its validity. The essentially moral character of the duties laid down in a code of professional ethics, as well as the need to conform to the changing conditions of professional practice, required the formulation of broad principles rather than specific rules.

Interestingly, the Professions Tribunal has had the opportunity to rule on the standard of evidence required to prove that a particular omission, procedure or act was "unsuitable or contrary to current medical science". It read that phrase as referring to the common stock of knowledge of physicians. Accordingly, the plaintiff had to prove violation of a scientific standard acknowledged by all in the profession. A single testimony could not achieve that proof.[154]

The need for such general statements of principle had been overlooked in section 85 of the *Professional Code* as it was originally passed by the National Assembly. At that time, the introductory paragraph merely stated the duty of each corporation to adopt a code of ethics. When corporations began submitting draft codes to the Board for approval by the Lieutenant Governor in Council, it was realized that the delegation of regulation-making authority effected by section 85 could not support a formulation of the codes in general terms, uncertain in their meaning, and indefinite in their application. On the contrary, the first paragraph of the section contemplated a specific listing of prohibited acts.[155] This obstacle in the path of disciplinary rule-making could only be removed by an amendment expressly providing for the enunciation of general, as well as special, duties.

An examination of codes of ethics recently approved by the Lieutenant Governor in Council shows that the corporations and the Board have attempted to be as specific as possible. Provisions which impose on professionals the general duties of objectivity, moderation, dignity, integrity, availability, diligence, discretion, or a duty to act in accordance with current professional or scientific standards, are usually completed by more specific provisions setting out situations in which the particular duty applies. In some cases, the statement of principle is immediately followed by a non-limitative list of illustrations.[156]

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[154] *Tribunal-Médecins-2*, *supra*, note 114.

[155] Borgeat, *supra*, note 91, 10-11.

[156] See, *e.g.*, the "integrity" provision in the code of ethics of the Bar, *supra*, note 72, s. 3.02.01.

b) **Classification of duties**

By the time an amendment to section 85 of the *Professional Code* became necessary to allow for the adoption of general ethical standards, the Professions Board had begun to develop a model code of ethics. The model was to be used to provide suggestions and guidance to corporations engaged in the drafting of their codes, and rested on the threefold classification of professional duties (towards the public, the client, and the profession). This classification thus became incorporated into the enlarged version of section 85.

The influence of the Board's model code is quite obvious when one compares recently approved codes of ethics. All are arranged under the following headings with only minor variations.

i) *Duties to the public*

The greatest variations from one code to the other occur within this part, since it sets out each profession's commitment to particular social values. Thus, the advocates' code emphasizes respect for the law and the courts, the pharmacists' code commits members to the furtherance of public health, the town planners' code underlines the protection of land as a limited natural resource, and so on.

ii) *Duties to the client*

1. General provisions on the formation of the professional-client relationship
2. Integrity
3. Availability and diligence
4. Liability
5. Independence and impartiality
6. Professional secrecy
7. Accessibility of records
8. Determination and payment of fees.

iii) *Duties to the profession*

1. Incompatible duties and responsibilities
2. Derogatory acts (although somewhat formally categorized as violations of the duty to preserve the profession's reputation, they are obviously of vital concern to the professional's clients and to the public)
3. Relations with the corporation and colleagues
4. Contribution to the advancement of the profession.

The item "derogatory acts" deserves further comment. Prior to 1973, the disciplinary bodies of several major corporations could

decide that a particular behaviour, not covered by any enactment, was nevertheless "derogatory to the dignity of the profession" and therefore punishable. Section 85, on the contrary, requires that the list of such acts be determined in the code of ethics. Disciplinary committees must base a finding of "derogatory act" on a specific item in that list or on sections 56 to 58 of the *Professional Code*, which declares certain acts to be derogatory. However, one exception has survived the reform of 1973 and appears at section 105 of the *Bar Act*:[157]

> In the absence of a provision of this act or a by-law applicable to a particular case, the committee shall decide to the exclusion of any court, in first instance:
>
> (a) if the act complained of is derogatory to the honour or dignity of the Bar or prejudicial to the discipline of its members [.]

One can only wonder at the survival of this vestige of a period that seems to have ended for all other professions. Fortunately, such decisions of the committee on discipline of the Bar are subject to appeal before the Professions Tribunal.[158] As regards all other professions, the Tribunal has made it quite clear that, in the absence of any enactment declaring a particular behaviour to be derogatory, committees have no power to characterize it as such and thereby create offences not contemplated in the codes of ethics or other regulations.[159]

The development and implementation of a uniform model of ethical rules for the professions has required a joint effort from the corporations and the Board to view the problems globally, and thereby transcend the peculiar perspective and turn of mind of each profession. Such an effort would have been inconceivable ten years ago. The result attests to the effectiveness of the new regulatory structure. It also provides a completely new textual basis for the development of disciplinary law by the Professions Tribunal and the committees on discipline.

2. *Disciplinary penalties*

The purpose of disciplinary penalties has been diversely interpreted. Some would say that, while the primary aim of the disciplinary process is to protect the public, disciplinary penalties should, to the greatest possible extent, foster rehabilitation of the profes-

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[157] S.Q. 1966-67, c. 77, s. 105, as am. by S.Q. 1973, c. 44, s. 54.

[158] *Tribunal-Avocats-3, supra,* note 98; *Tribunal-Avocats-9* [1976] D.D.C.P. 150.

[159] *Tribunal-Psychologues-1* [1976] D.D.C.P. 229; *Tribunal-Optométristes-2* [1976] D.D.C.P. 425.

sional.[160] The *Castonguay-Nepveu Report* showed some agreement with that point of view when it suggested that probation, with or without refresher training, be added to the list of possible penalties.[161] In addition, the liberal use of reprimands (the mildest of penalties) by disciplinary committees certainly shows faith in the educational value of the disciplinary process. However, the Professions Tribunal still adheres to a more conventional view of disciplinary penalties as a punishment that serves to protect the public and maintain the reputation of the profession.[162]

Whatever may be their primary aims, committees on discipline have retained their pre-1973 discretion to choose from the list of available penalties according to what seems fair, appropriate, and commensurate with the seriousness of the offence. Within the list, there is no minimum or maximum penalty prescribed for any particular offence.[163] The committee must, however, impose *some* penalty when it has made a finding of guilt. Where guilt is found on several counts, a separate penalty should normally be imposed for each.[164]

Committees have occasionally imposed a given penalty with the intention of setting an example. To be effective as a general deterrent, this requires publicizing the sentence within the profession; the minimum exemplary penalty would be revoking the respondent's permit or striking him from the roll temporarily. Lesser penalties would not be reported to members of the corporation.[165] The committee's desire to impose an exemplary penalty may be influenced by the fact that the offence was repeated, or by the danger to the public.[166] The committee should not, however, try to make the case an example for society as a whole, as a criminal court might do; the exemplary effect should be aimed at the members of the profession only.[167] Nor should the committee feel bound to impose an exemplary penalty because a criminal court judging the same facts imposed an exemplary sentence.[168] Finally, the committee ought to take into account extenuating circumstances, such as good faith or the fact that the offensive behaviour had no direct repercus-

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[160] Dussault & O'Neil, *supra,* note 151, 264.
[161] *Supra,* note 2, Recommendation 7.I.41.
[162] *Tribunal-Avocats-9* [1977] D.D.C.P. 345.
[163] *Comité-Arpenteurs-géomètres-2* [1975] D.D.C.P. 2.
[164] *Tribunal-Notaires-1, supra,* note 100; *Tribunal-Médecins-4, supra,* note 100.
[165] *Professional Code,* s. 174.
[166] *Comité-Ingénieurs-2* [1975] D.D.C.P. 24.
[167] *F.* v. *Comité de discipline des médecins,* Professions Tribunal no. 02-046 060-773, May 30, 1978.
[168] *Ibid.* See also *Tribunal-Pharmaciens-5* [1977] D.D.C.P. 165.

sions on actual practice.[169] Generally (allowance being made for the very broad discretion conferred by section 153 as to the choice of penalty), it seems fair to say that the disciplinary tribunals have approached the problem of sanctions very much in the spirit of the criminal law.

B. Relationship to other branches of law

Some of the general affinities between disciplinary law and civil or criminal law have already been described.[170] The relationship between those various branches of the law may also be considered on a more specific level, that is, in situations where certain behaviour of a professional simultaneously or successively becomes the subject of process before a disciplinary tribunal and before a criminal or civil court or an administrative tribunal.

1. *The criminal process*

One example of conflict between the disciplinary process and the criminal process may occur when, at the time disciplinary proceedings are being initiated, the behaviour complained of has already been the subject of a final judgment by a criminal court. If a criminal court has found the respondent guilty of an indictable offence triable by indictment only, section 152 of the *Professional Code* requires the syndic to refer the decision of that court to the committee on discipline, by means of a complaint. The decision itself is conclusive proof of guilt for disciplinary purposes; the committee has no discretion to examine the facts on which the conviction is based so as to dismiss the complaint if it considers those facts irrelevant from the standpoint of professional ethics.[171]

Following this automatic finding of guilt, the committee "may" then impose one or more of the penalties provided by section 153. The Professions Tribunal has ruled that the committee has no discretion, however, not to impose any penalty; it must impose a penalty, since the word "may" is to be construed as imperative when

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[169] *Tribunal-Médecins-4* [1976] D.D.C.P. 160; *Tribunal-Pharmaciens-1, supra,* note 132; *Tribunal-Médecins-18* [1976] D.D.C.P. 415.

[170] *Supra,* Part II and the first section of Part III.

[171] *Comité-Médecins-16* [1975] D.D.C.P. 204; *Comité-Médecins-19* [1975] D.D.C.P. 211; *Tribunal-Médecins-6* [1976] D.D.C.P. 164. Committees assumed discretion to reject the complaint as irrelevant in *Comité-Médecins-3* [1975] D.D.C.P. 42; *Comité-Médecins-8* [1976] D.D.C.P. 46; *Comité-Conseillers d'orientation-1* [1976] D.D.C.P. 313.

used to confer jurisdiction on a judicial body.[172] The Tribunal pointed out that section 109 of the *Bar Act*[173] is almost identical to section 152 of the *Professional Code*, with the added words "may, if it deems it proper", which, in the Tribunal's opinion, are necessary to restore the usual permissive meaning of "may". It might be argued, however, that when "may" is used to confer on a judicial body the power to impose a penalty, its meaning is permissive.[174] If the requirements of section 152 are not met, the plaintiff will not have the benefit of the automatic finding of guilt. He must comply with the usual standard of evidence and establish before the committee a violation of the *Professional Code* or of the profession's statute or regulations.[175]

If the respondent in disciplinary proceedings has been acquitted of criminal charges based on the same facts as the disciplinary complaint, he cannot plead *autrefois acquit* before the committee, since both processes are completely distinct and pursue different ends.[176] The same principle leads to the conclusion that both processes may be carried out simultaneously. There is no need for a suspension of disciplinary proceedings while a case based on the same facts is pending before a criminal court.[177]

2. *The civil process*

The autonomy of the disciplinary process has been emphasized just as forcefully in relation to the civil process. The Tribunal, relying on old case law, has refused to suspend disciplinary proceedings in cases where civil proceedings based on the same facts are pending. Since each process has a different subject matter and leads to different conclusions, the judgments to be delivered cannot contradict each other.[178] It follows that, just as cases on tort liability cannot assist in the interpretation of codes of ethics, a finding of guilt by a disciplinary committee has no bearing on the determination of the respondent's civil liability.

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[172] *Tribunal-Médecins-6, supra,* note 171.

[173] S.Q. 1966-67, c. 77.

[174] See Pigeon, *Rédaction et interprétation des lois* 2d ed. (1978), 31; *McHugh* v. *Union Bank* (1913) 10 D.L.R. 562 (P.C.).

[175] *Comité-Avocats-4* [1976] D.D.C.P. 285.

[176] *Dussault* v. *Barreau de Montréal* (1926) 64 C.S. 395; *Lemieux* v. *Lippens, supra,* note 96; *Lambert* v. *Lippens, supra,* note 101.

[177] *Tremblay* v. *Bernier* (1893) 21 S.C.R. 409; *Comité-Avocats-17, supra,* note 113; *Tribunal-Avocats-3, supra,* note 98; *Comité-Conseillers d'orientation-1, supra,* note 171; *Byer* v. *Barreau du Québec, supra,* note 122.

[178] *Vidal* v. *Bureau de Québec* (1905) 27 C.S. 115; *Tribunal-Comptables agréés-2* [1975] D.D.C.P. 307; *Tribunal-Pharmaciens-3* [1976] D.D.C.P. 431.

3. *The administrative process*

The involvement of the State in the provision of professional services (such as health insurance or legal aid) and the employment of many professionals in the public service have brought professional misconduct within the scope of administrative law. For instance, a physician summarily convicted of having fraudulently claimed remuneration from the Quebec Health Insurance Board may become subject to disciplinary proceedings based on the same facts. Such a conviction cannot, however, be treated as conclusive proof of guilt under section 152 of the *Professional Code,* and the plaintiff will have the burden of proving guilt before the committee.[179]

Similarly, purely administrative sanctions may be imposed on a professional in addition to disciplinary penalties. For example, where the board of directors of a health or social services establishment refuses, on the basis of misconduct or negligence, to reappoint or reinstate a physician or dentist to the medical council of the establishment, or dismisses him from that council, such sanctions cannot prevent disciplinary proceedings from being taken against him on the same basis.[180]

There is no doubt that professionals who belong to the public service may be subject to disciplinary sanctions under the general statutes governing employment in the public service.[181] At the same time, it would seem that professionals who belong to the public service and whose behaviour gives rise to a complaint under the *Professional Code* would not be protected from the application of the legislation on professions by the rule that the Crown is not bound by a statute unless it is expressly mentioned.[182] Once again, the disciplinary process appears to stand in a position of autonomy in respect to the administrative process.

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[179] *Tribunal-Médecins-4* [1975] D.D.C.P. 311.

[180] *An Act respecting health services and social services,* S.Q. 1971, c. 48, ss. 92*a* and 92*b*, as enacted by S.Q. 1974, c. 42, s. 48; *Comité-Médecins-15* [1976] D.D.C.P. 325.

[181] For federal public servants, see Garant, *La fonction publique canadienne et québécoise* (1973), 303-23; for Quebec, see *Loi sur la fonction publique,* (1978) Bill 50, 3d Sess., 31st Leg. (Que.), ss. 93-99 and the *Regulation respecting ethics and discipline in the civil service,* O.C. 2208-74, Reg. 74-317 (1974) Québec Official Gazette 3131.

[182] Dussault & Pelletier, *Le professionnel-fonctionnaire face aux mécanismes d'inspection professionnelle et de discipline institués par le Code des professions* (1977) 37 R. du B. 2, 9-19.

IV. CONCLUSION

The whole reform of professional organization undertaken in 1973 has been shaped by two opposing trends. One trend, emphasizing government responsibility and the need for public participation, favours the introduction of public law elements into the regulatory structure and standards of the professions. The other trend prefers continued autonomy for professional organizations and the body of law that applies to them.

The case for stronger public law features in the regulation of professions rested on a number of concerns. The increasing involvement of the community in what had been a purely bilateral and individual relationship between the professional and his client called for institutional recognition through some form of participation by the public and its representatives in the regulation of professional activity. A new philosophy of professional organization was emerging, emphasizing the protection of the public rather than the promotion of sectional interests. Finally, it became increasingly clear that a measure of direct State involvement and the establishment of close links between the Government and the existing organizations were the surest ways to rationalize the existing institutions in the professional field. All these ideas were expressed in the *Castonguay-Nepveu Report* and served as inspiration for the draftsmen of the *Professional Code.*

At the same time, the specific character of professional organizations, especially with respect to the control of ethical conduct among members of the professions, was recognized as legitimate. It was readily acknowledged that an increased subjection of professional corporations to public law should not lead to the elimination of that specific character. The autonomy of corporations might be reduced, but not to the point where their disciplinary law would cease to exist as a distinct branch of the legal system.

Ultimately, the most valuable concepts derived from the public law character of professional organization — a unified source of policy, a code of standard procedures for all professions, a centralized appeal structure — combine to reinforce the unique character of the disciplinary law of professions. The *Professional Code* has given that branch of our legal system a definite legislative framework with a set of stable institutions and a capacity for orderly growth.