INTRODUCTION TO 'CHURCH DISCIPLINE' FOLLOWIND BELOW

The following important article published in January 1994 in the Presbyterian Record magazine on the subject of Natural Justice helped forever change the way most Canadian Churches approach congregational conflict.

For years prior some of us had been pointing out to the various Canadian Churches that the procedures they were using to deal with church fights was not affording their clergy Natural Justice as outlined in the Canadian Constitution of Rights and Freedom.

Most church bureaucrats in those days just laughed in my face at such a notion on my part. Every leader of every stripe to a man (no women were in these positions), intimated that clergy were getting what they deserved because they were the authors of their own misfortune. A view still held by many today.

How excited we in the trenches of clergy support were to read the article. Ogilvie a world class scholar, a professor of law, and active lay person in the Presbyterian Church putting into words the very principles we were fighting for.

With great enthusiasm I dashed off a letter to the editor of the Presbyterian Record saying that this article:

'will define future contributions to the field of conflict management within the pastorate. Without natural justice or 'due process', as some call it, there is nothing but an unjust process which leads to unfair suffering in many a minister's heart.'

The article still has currency to day in 2008.

'Ogilvie gives us the Hope that says justice can be done in every 'church fight', the cancer of conflict on the Body of Christ can and will be healed. When we learn and apply the rules of natural justice, the time wasted on costly and painful conflicts will be reduced and we can get on with the proclaiming the Gospel message. '

I wish this were true today in 2008 but it isn't. Natural Justice has helped but in the main all the various denominations continue to harm clergy but now they have found ways to do so while at the same time using the principles of Fundamental Justice. Churches have spent thousands upon thousands of dollars out of mission money for lawyers to help them achieve the same negative ends without appearing to break these sacred principles.

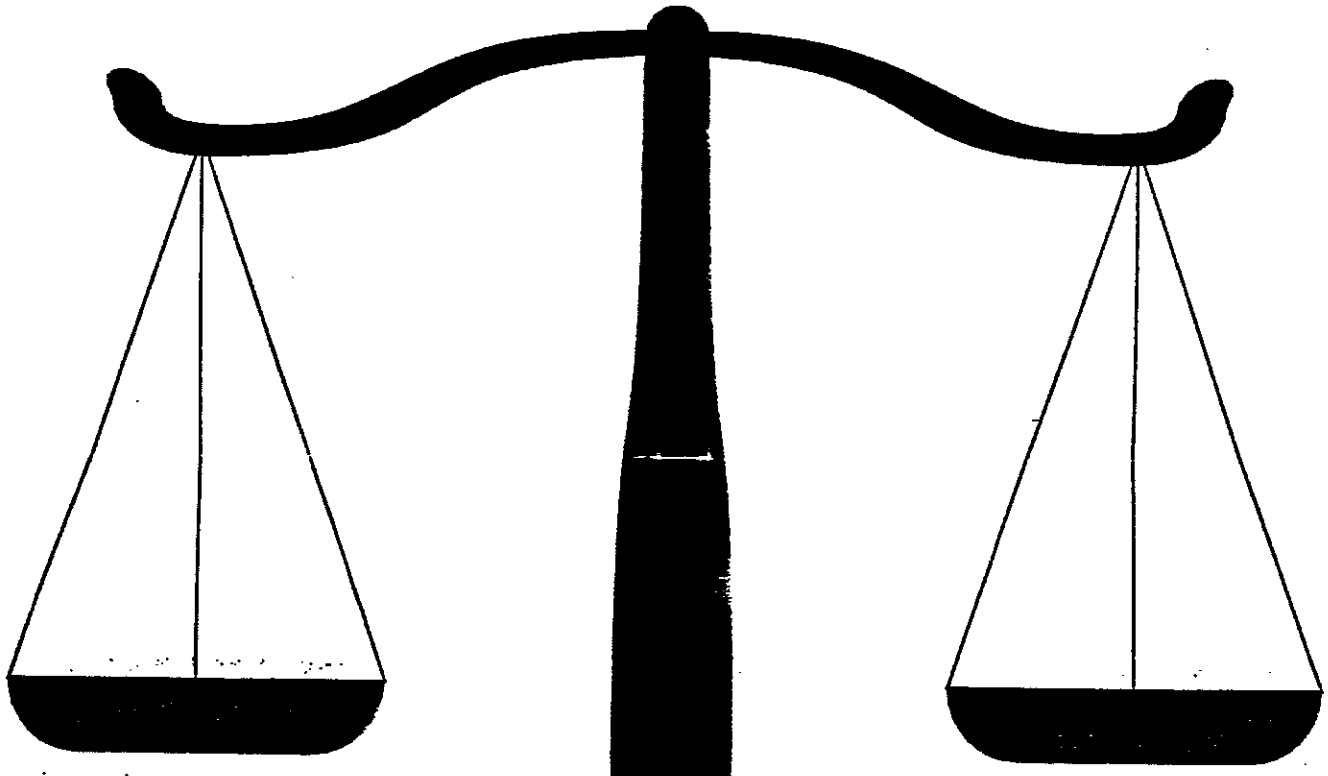
In years past many clergy did not receive fair treatment in kangaroo courts , but now the old expression 'first the fair trial and then we hang them' is common. I thought that natural Justice would help the cause of clergy. It hasn't. It is just something for the churches to get around to help them put the lid on congregational conflict and keep the cash flow moving up to them to fund their jobs and special projects.

The iron clad dictum of the Church is that there shall be peace at any price. Sadly the fired clergy is that price. Clergy still are destroyed and we still work for Justice.

We face the terrible irony that the Church stands for Justice everywhere in the world except within its own bureaucratic body. A bureaucratic body laypeople seldom know, care about, or visit. A toxic place where kind caring Christians suddenly change to the hideous Rev Hyde and destroy colleagues caught in conflicts without batting an eye. All in the name of God.

As I said above Dr Ogilvie's article still has currency and should be studied keenly so I recommend it to you as an important step in your conflict survival education. Just be warned that the use of Natural Justice principles are being used primarily to protect the Church from being sued.

When one examines the outcome of a church fight it is clear that these important principles are not being used to help a local cleric caught up in an unjust, unfair conflict situation. Bottom line, the pastor leaves, nothing changes, the evil cycle begins again but our battle continues.
Casey
March 2008.



Church Discipline:

Doing What Comes Naturally

by M. H. Ogilvie

The case of *Lakeside Colony v. Hofer* began with a dispute between a Hutterite colony and an individual Hutterite elder about patent ownership of a new hog-feeder. It ended six years later, in November 1992, when the Supreme Court of Canada found not only that the disciplinary procedures of religious organizations are subject to judicial review by the civil courts but also that the rules of natural justice developed in those civil courts are to be followed by church tribunals in Canada. Earlier decisions by lower courts had suggested that civil supervision of church tribunals was developing. *Lakeside Colony* stamped the imprimatur of the top court on its development.

This comes as no surprise to those familiar with the Canadian legal system. But for many in The Presbyterian Church in Canada (PCC), especially clergy who vaguely remember theologies of the "two kingdoms" from their seminary days, the intrusion of the "state" into their alleged spiritual jurisdiction is unwelcome and unsettling. Of course, from the perspective of the state, no such jurisdiction has ever existed in Canada. Whereas the Church of Scotland enjoys the separate and virtually independent status for which it struggled from 1560 onward, the PCC exists in the entirely different constitutional regime of a Parliament, both sovereign and supreme, over all persons and institutions within its territorial jurisdiction.

That reality is only now sinking into the Protestant churches in Canada. They have faced an increasing volume of litigation over the past decade, which shows no signs of abatement. In a society where judges have been transformed from being merely oracles of law to sometimes wise arbiters of all social problems, it was inevitable that ecclesiastical disputants would resort to the civil courts. Equally inevitable was the willingness of the civil courts to adjudicate. The common law has long regarded religious institutions as mere voluntary associations, little different from trade unions or sports clubs. Lawyers and judges are doing justice when ecclesiastical tribunals have failed to do so.

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The reported cases to date demonstrate how frequently and how blatantly the rules of natural justice are breached by church tribunals. Several recent cases against The United Church of Canada are on point. In *McCaw* (1991), a minister whose style of ministry caused concern was dismissed by the presbytery without his being told of the nature of the complaints, without notice of the hearing and without being present at the hearing. The court reinstated him to the roll and awarded substantial damages. In *Davis* (1992), a minister charged with sexual harassment was again removed by presbytery, although the original complainant did not even lay a formal charge, the minister was not informed of the allegations made against him and a hearing was held in his absence. The court reinstated him, with a formal hearing to follow. In *Hobbs* (1992), another minister was charged with sexual harassment and removed. Again, he did not receive written charges until 2 1/2 months later and was given no opportunity whatsoever to reply, although the complainant was not even a member of the church and, therefore, without standing before the church courts. The court reinstated him, with a formal hearing to follow. At the subsequent formal hearings for Davis and Hobbs, decisions were made to remove them again, but in accordance with sexual harassment guidelines which had not been approved by the General Council. This is also a breach of natural justice and civil actions have been filed against the United Church for almost $3 million in damages.

In all these cases, not only did the church courts fail to follow the rules of natural justice, but they did not even comply with the procedures set out in the *Manual* (the equivalent to our *Book of Forms*). Whatever the substantive merits of the allegations made against the ministers, procedural unfairness and procedural errors precluded their full and proper resolution.

And, reported cases are the tip of the iceberg. A prominent Toronto lawyer was recently quoted in the *Globe and Mail* as stating he had nine actions filed against the United Church alone, and it is common knowledge in most Protestant churches, despite shrouds of secrecy, that complaints are being made to and heard by lower tribunals. The PCC is no exception.

Church members should not find these developments unsettling. Rather, they should be greeted as a temporary phenomenon by which some much needed correction is being made by the civil courts to procedures and practices which, for too long, have perpetuated unfairness and injustice in the exercise of church discipline. It is past time for a major shake-up.

The issue, then, becomes how best to ensure procedural fairness is present in our church courts sitting in their judicial capacity. I would propose four steps that might be taken to initiate change.

1. Chapter 9 of the *Book of Forms*, although periodically reviewed, should be thoroughly revised to ensure that current rules of procedural fairness are incorporated and that sections which either offend or insufficiently incorporate these be amended or removed accordingly. The overall procedures could be streamlined, simplified and presented in a better order, and more attractively, for use by legally untrained persons. The language could be brought into line with contemporary Canadian legal terminology. Antique Scots Law terms and concepts which Scots lawyers no longer employ today could be easily replaced without damaging Presbyterian polity.

Court cases demonstrate how church tribunals blatantly breach natural justice

2. Where a church court is struck to deal with a complaint, it would be useful to require all members who will deliberate to attend a training session to review both procedural and substantial requirements. Many procedural errors result from ignorance and bewilderment as to how to proceed. People unaccustomed to acting in a judicial fashion are prone to emotional over-reaction to unproven charges, by forming unreasonable opinions, and then acting immediately upon them to the detriment of the accused person, without a full and proper hearing.

3. Church courts should be assisted by an attending lawyer conversant with both Presbyterian polity and the civil law relating to religious institutions. [At the present time, the law of the church would not allow this. See section 333, *Book of Forms*.] There are precedents for this. The General Assembly of the Church of Scotland is assisted by the procurator, who is a member of the Scottish Bar, and present throughout Assembly to advise on both church and civil law. Each presbytery could easily retain a suitable local lawyer to perform similar functions.

4. The level of consciousness of teaching and ruling elders should be raised in relation to the need for fairer procedures in the church. A variety of educational approaches may be taken, ranging from substantial upgrading of the content of Presbyterian government courses in our colleges to ensure a professional level of instruction in both church law and the civil law relating to the church, to continuing legal education sessions for clergy and laity, especially clerks of presbytery and the Assembly clerks. Even lawyers and judges voluntarily undertake continuing legal education courses to upgrade their knowledge. Preventive lawyering, like preventive medicine, is not only cheaper, safer and faster, but also significantly contributes to a healthier and happier ecclesiastical body.

The Scots Confession of 1560 states there are three marks of the true church: the gospel purely preached and heard, the sacraments administered according to Christ's institution, and church discipline justly exercised. Perhaps it is time to ensure that The Presbyterian Church in Canada bears the third mark as well.

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What kinds of cases are now found in the law reports or before the courts? Many concern clergy who have been wrongfully dismissed from pastoral charges or who have been accused of sexual harassment. Some disputes have involved problems with deviant clerical life-styles, while others have concerned lay church employees dismissed for leading lives at variance with the teachings of the employer religious institution. And the reported cases represent only the tip of the iceberg. Regardless of the merits and legal issues in these cases, in all cases appealed to date to the civil courts, the churches have been found to be at fault for one reason only: failure to conduct their internal tribunal procedures in accordance with the rules of natural justice. That means the final decisions of the church courts have been overturned because their procedures were unfair.

What is "natural justice"? Why has the Supreme Court of Canada required all church tribunals to comply with it? Why should Christians be happy to comply with the mandate of a civil court?

Where American law talks of "due process," Anglo-Canadian common law talks about the "rules of natural justice." Procedural rules are not, as many church people like to think, meaningless technicalities concocted by lawyers to create business or cause trouble. Rather, they are rules which contain substantive principles of fairness and justice for the hearing of a dispute. A procedural rule which prevents a defendant from responding to false charges is as unfair and unjust as a decision based solely on allegations. Fair procedures are as equally necessary as fair principles to produce a fair result.

"Natural" justice evolved in medieval English common law courts when both judges and barristers were still clerics. It connotes much the same meaning as the older understanding of natural law; that is, the law of God, those unalterable and fundamental moral principles which are discernable by the exercise of right reason. In other words, procedural fairness is a divine mandate with which all earthly courts must comply. In this sense, natural justice lingered on into the late 17th century but retreated with the rise of the modern theory of parliamentary sovereignty. After several false starts at the end of the 19th century, it has enjoyed a revival in this century, first in England and subsequently in Canada, as courts increasingly resorted to procedural fairness to protect individuals against the high-handed and arrogant conduct characteristic of the agencies and administrative boards of the socialist state. In recent years, its application has been extended to a wide variety of other tribunals, with religious institutions constituting one of the last types of organizations to be subjected to the rules.

In *Lakeside Colony*, the Supreme Court stated that natural justice was composed of three aspects, or rules: (i) the right to an unbiased tribunal; (ii) the right to know the case against one; and (iii) the right to be heard in reply on one's own behalf. While the precise content of each rule may vary with the circumstances of the case, the courts require more stringent compliance when the consequences of a decision are serious. Thus, more exacting compliance is required when questions of employment or reputation are at stake because economic self-sufficiency and a good reputation are highly valued in our society. Both are especially important in ecclesiastical disputes since a minister wrongfully removed from one congregation may never get another, thereby losing his profession and livelihood. Reputation is regarded as a reflection of Christian commitment and faith and ought not to be wrongfully called into question.

Common law sees churches as voluntary associations, like unions or clubs

The rights to know the allegations and to present a defence involve a number of corollary rights: the right to adequate and full prior notice of the allegations, preferably in writing, and in sufficient time to prepare a defence prior to the hearing; the right to a full hearing, exploring all aspects of the case, including all relevant evidence the parties wish to submit, usually by a hearing in person with the right to hear, call, examine and cross-examine all witnesses in most cases; the right to adjournments of the hearing so as to provide an opportunity to prepare responses to arguments made; and the right to a decision made by the members of the tribunal and based substantially on the evidence submitted at the hearing. The right to legal representation is also sometimes mandated by the requirements of natural justice, in particular, when the allegations are serious and the consequences of a decision grave, and may be insisted upon even where the procedural rules governing a tribunal purport on a literal reading to exclude legal counsel. Issues of livelihood and reputation are sufficiently serious for this purpose.

The third rule, the right to an unbiased tribunal, is sometimes the most difficult rule of which to prove breach. The test for bias is whether or not there is a "reasonable apprehension of bias." This standard may be satisfied where a tribunal member shows "attitudinal bias" by conduct toward a party before or during a hearing; for example, by expressing opinions either in the course of the hearing or outside it about a party. Bias may be present by reason of pecuniary interest or a family, personal or professional relationship. Or, bias may take the form of "institutional bias"; that is, a desire to reach a decision to protect the institution, rather than to do justice between the parties. Bias is also present when the same person plays the roles of complainant, prosecutor and judge, or some combination of these concurrently, and where the actual procedural rules are so designed as to favour one party or the institution itself. Bias is particularly difficult to counter in a small church where many members think they are familiar with and certainly gossip about one another. Where the institution, itself, is generally under siege in an inhospitable society, the tendency to act first to protect it is difficult to resist. But the rules of natural justice require such resistance.

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Letter to the Editor

Ogilvie's 'Church Discipline: Doing What Comes Naturally' in my view is the singular most helpful article which has appeared on the topic of clergy-congregation relationships that are in trouble. (Record, Jan 94 pp 27-29)

It will define future contributions to the field of conflict management within the pastorate. Without natural justice or 'due process', as some call it, there is nothing but an unjust process which leads to unfair suffering in many a minister's heart.

I have been studying what the literature calls 'church fights' or 'clergy abuse' for over a decade. This piece should be required reading by everyone serving any court of the Church. As a pastoral relations guide it will prove second to none in bringing fairness to all sides in a conflict situation.

Ogilvie gives us the Hope that says justice can be done in every "church fight', the cancer of conflict on the Body of Christ can and will be healed. When we learn and apply the rules of natural justice, the time wasted on costly and painful conflicts will be reduced and we can get on with proclaiming the Gospel message.

Thank you Presbyterian Record for having the discernment and wisdom to print it!

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