

# ORDER IN THE COURT: BETTER ADJUDICATION A KEY TO BETTER REGULATION



Professional Engineers  
Ontario

By devoting more resources to its tribunals processes, PEO aims to maintain confidence that self-regulation upholds both public and practitioner interests.

BY MICHAEL MASTROMATTEO



With the goal of enhancing the regulatory framework under which it operates, an initiative in PEO's 2015-2017 strategic plan commits the regulator to making use of accepted smart practices in its tribunal operations so that its adjudicative function is seen to be independent and fair.

In fact, however, PEO's tribunals office, which provides administrative support to the Discipline Committee, Complaints Review Councillor, Registration Committee and Fees Mediation Committee, has long been set on a path of administrative effectiveness and continuous improvement. Its efforts are aimed at ensuring PEO runs a tight legal ship in keeping with the continuing privilege of self-regulation.

In January 2006, the tribunals group assumed responsibility for the operation and administrative support of PEO's Discipline and Registration committees, which had been supported by staff in the regulatory compliance department. This move separated PEO's enforcement and prosecution operations from its adjudicative process, to bring greater transparency to tribunal matters and ensure tribunals' independence from enforcement and prosecution, so that those involved in investigating and prosecuting complaints against practitioners were also not involved in the process of deciding on their merit.

### TECHNOLOGY AND OTHER ENHANCEMENTS

One of the more recent enhancements in tribunal operations is the use of the latest communications technology. In 2014, PEO began using Skype as a communications medium through which to conduct certain hearings and/or to receive testimony. At the time, it was believed to be the first use of Skype technology by any North American regulator.

By permitting international licence applicants, for example, to provide testimony from remote locations, Skype has become a tremendous boost to PEO's Registration Committee, whose mandate is to conduct hearings at the request of an applicant in respect to the registrar's proposal to refuse to grant a licence.

With the success of Skype for the Registration Committee, its use is now being considered for the Discipline Committee.

Earlier, PEO remodeled some of its 40 Sheppard Avenue West office space to serve as hearing and private collaboration facilities for adversarial parties to a case. It has even supplied netbook computers and tablets to panel members for use during hearings, allowing for faster and paper-free information updates.

### INDEPENDENT LEGAL COUNSEL

PEO has also actively sought to provide development opportunities to the crucial volunteer resources on which its justice system depends.



Space at PEO's 40 Sheppard headquarters has been remodeled to create separate, private hearing and collaboration facilities for adversarial parties to a case.

With the retention of independent legal counsel (ILC), the tribunals office has brought additional forces to bear in ensuring procedural fairness in the conduct of discipline hearings.

PEO's use of ILC is intended to provide discipline panels a source of impartial advice and legal guidance in the conduct of discipline hearings.

David Jacobs, LLB, is one of three ILCs retained by PEO. The two other ILCs are Sean McFarling, LLB, and M. Jill Dougherty, LLB, a partner at WeirFoulds LLP.

A partner with Watson Jacobs McCreary LLP, Jacobs has legal expertise in labour relations, human rights, professional regulation and discipline, health, administrative, insolvency, constitutional and criminal law, as well as several other areas.

Through his extensive network of legal contacts, Jacobs has been instrumental in helping to organize a number of information sessions for Discipline and Registration committee volunteers.

In an August 19 interview with *Engineering Dimensions*, he said it's extremely important for volunteers with regulatory bodies' tribunals to keep abreast of the nuances of administrative law. "The stakes are very high for these tribunals," Jacobs said, "especially as adjudicative procedures are becoming increasingly complex and the courts, which oversee such tribunals, want evidence of transparency and procedural fairness, in order, among other things, to maintain public confidence in self-regulation."

Jacobs, who provides independent legal counsel to other regulators besides PEO, says it's important for such bodies to have well-trained adjudicators who can weigh evidence and understand procedural protocols. "Today's courts are carefully scrutinizing some of the decisions of disciplinary tribunals. They are anxious to see that trial proceedings are carried out with the utmost fairness."

### PANEL COMPOSITION

PEO also recently took steps to ensure the composition of each discipline panel is as specified in the *Professional Engineers Act* (PEA).

As of 2012, the PEA mandates that PEO discipline panels must include at least one:

1. elected member of council;
2. professional engineer who is,
  - i. a councillor appointed by the lieutenant governor in council, or
  - ii. not a councillor, and approved by the attorney general (AG);
3. non-engineer who is,
  - i. a councillor appointed by the lieutenant governor in council, or
  - ii. not a councillor and approved by the AG; and
4. professional engineer with at least 10 years' experience in the practice of professional engineering.

Formerly, the non-engineer on the panel was required to be an appointed councillor. Since the maximum number of such councillors is five, this constraint often made it difficult to convene a panel with the required representation.

"Some time ago, we went to the Ontario attorney general and said the engineering act's requirements for the discipline panels were too restrictive," says Michael Wesa, P.Eng., FEC, chair of the Discipline Committee.

"Because we were required to compose the panel from members of council, lay appointees and member volunteers, we needed help in bringing in more legal expertise."

Despite PEO's long-standing use of the ILC to advise discipline panels on procedural matters, discipline panels still felt they lacked legal expertise in some of their deliberations.

To that end, the *Open for Business Act, 2010* made changes to the PEA to allow for a roster of people approved by the AG to sit on discipline panels as alternatives to non-engineer appointed councillors. This amendment to the act was proclaimed into effect in August 2012. Since then, members of a recruited roster of lawyers have taken part in a number of discipline panels and bring a higher level of legal understanding to hearing cases of professional misconduct and other matters brought to the committee.

"I can now have one of the LGA (lieutenant governor appointed) lay members or I can have one of these lawyers on the panel," Wesa says. "This has alleviated a lot of the heavy workload that Discipline Committee volunteers have been concerned about in the past."

### DECISION-WRITING SUPPORT

Kathleen Robichaud, LLB, a Manotick, Ontario-based sole practitioner with expertise in corporate, real estate and estate law, is one of the lawyers appointed by the AG to assist with PEO discipline hearings.

Since her appointment in the spring of 2013, she has sat in on three panels and has helped prepare the official decision and reasons for each of those cases.

"I share my knowledge of the law and relevant experience with panel members where it is relevant to something that is happening and point out when I see an issue that I believe

we need the assistance of ILC to address," Robichaud told *Engineering Dimensions* August 11. "Primarily, I enjoy the experience of being on the panels. I believe it is helpful to me in my work as a lawyer and in the work I do as a volunteer organizing continuing education programs as well."

Robichaud says despite the engineering profession's requirement to be judged by one's peers, it is useful to import lay or outside legal expertise. "I believe that a lay opinion is helpful to most, if not all, self-regulating professions," she says. "It adds a perspective to the issues that can be hard to see when you are a member of the profession, and I believe it is important for self-regulating professions to know and have input from the public they serve. I believe the perspective of lay people in the adjudicative process is a way of allowing that input to be part of the discussion and of the evolution of any profession."

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David Germain, JD, a Toronto-based practitioner with Thomson Rogers, is another of the AG-appointed Discipline Committee lawyers. Although he deals with professional engineers frequently in his municipal law practice, he says the PEO experience has broadened his perspective.

"My involvement with PEO's Discipline Committee allows me to see things from the other side of the table," Germain says. "In some ways, it helps me to become a better lawyer."

Besides the involvement of lawyers on discipline panels, all Discipline Committee members have had access to training to help them fulfill their roles. One key session in November 2013 was a presentation by Mr. Justice John Laskin, a 20-year veteran of Ontario's Court of Appeal, on how to write more effective and concise decisions and reasons.

Laskin, son of former Supreme Court of Canada chief justice Bora Laskin, was one of the most prestigious jurists ever to address a panel of PEO volunteers.

In another instance, Ontario Divisional Court judge Hon. Dennis Lane, QC, shared his insights on some of the fine points of adjudication. Lane focused on decision writing by administrative tribunals and how panels can extend procedural fairness to all hearing participants.



Lorne Sossin, PhD, LLM, dean of Osgoode Hall Law School, addressed Discipline Committee members June 26 about the use of expert evidence in discipline decisions.

Hon. Dennis Lane, QC, Ontario Divisional Court judge, spoke to Discipline Committee members (from left) Paul Ballantyne, P.Eng., James Amson, P.Eng., Michael Wesa, P.Eng., Ishwar Bhatia, P.Eng., and Ken Lopez, P.Eng.

Discipline Committee members also participated in a June 26 presentation by Lorne Sossin, PhD, LLM, dean of Osgoode Hall Law School, who discussed the weight of expert evidence in transparency in discipline panel decisions.

The operations of the Complaints Review Councillor and Registration and Fees Mediation committees have also benefited from similar specialized training and information.

### MORE RESOURCES MADE AVAILABLE

Registration Committee member and lay LGA councillor Bill Kossta is one volunteer who is especially appreciative of the increased support to PEO's adjudicative committees.

"I am active with the Registration Committee and sit on selected panels very frequently," Kossta says. "The committee holds quarterly meetings and training sessions. We have had

judges, justices of the peace, adjudicators from other tribunals, lawyers and other practitioners lead our training sessions, as well as attending various seminars."

Other training highlights for Kossta have included training aimed at the role of an adjudicator, administrative law and how to apply it, writing decisions and reasons, conducting a hearing, taking notes during a hearing, and how to conduct yourself as a chair and a panel member during a hearing.

"Basically, it's an understanding that you have to be fair to all parties and how to properly apply the relevant regulations to each case," Kossta adds. "Holding training sessions gives us the knowledge about procedural and substantive law. It gives us the knowledge to conduct hearings and rule on motions before us. The knowledge also allows us to understand which law or section of the regulation is pertinent. Without this knowledge we couldn't conduct professional hearings. If we had not held all those seminars, our knowledge would have been very limited."

### BETTER ADJUDICATORS

Kossta suggests that such training is a must for every volunteer who sits on the adjudicating committees: "To be a good adjudicator you must be properly trained and this training can only come by attending the appropriate training sessions."

Similarly, PEO Complaints Review Councillor Mary Long-Irwin also notes the increased resources allocated to her work at PEO. In her role, she reviews the handling of a complaint when a complainant is dissatisfied with the outcome, to ensure the process was administered correctly. Those involved in complaints review meet about four times each year to review about half a dozen cases. They comprise an LGA council member (Long-Irwin) and two others approved by the AG.

Former PEO registrar Kim Allen, P.Eng., FEC, now CEO of Engineers Canada, was at the helm of the Ontario engineering regulator when some of the enhancements to its adjudicative processes began to take hold. He believes it's natural for a self-regulating profession with licence granting (or denying) and disciplinary authority to pay heed to all its adjudicative and operational processes.

"Tribunal decisions can have significant impacts on the affected individuals and businesses," Allen says. "It is important that the affected people not only understand why a particular decision was made, but can also accept the decision as fairly made, even if they do not agree with the outcome. If decisions made by PEO's tribunals are perceived to be arbitrary or unfairly made, the people affected may feel the need to request the court or a tribunal review the decision or the decision-making process."

He expresses hope that PEO's enhanced adjudicative efforts come to be seen as a standard or example for regulators across the country to emulate.  $\Sigma$