

A magnifying glass with a blue frame is positioned over a scale of justice. The scale is made of metal and has two pans hanging from a central beam. The background is a light, neutral color. The magnifying glass is focused on the central part of the scale, where the beam and the two pans meet.

# Improving a finely tuned complaints process

By Michael Mastromatteo

Responding to complaints against those it licenses or those it authorizes to provide services invites all sorts of introspection for PEO. In exchange for the privilege of self-regulation, the regulator must ensure its processes to deal with complaints are fair, timely and transparent. Regular scrutiny over the past decade has had positive results.

**P**EO's treatment of complaints against licence or Certificate of Authorization holders formed a significant portion of the 1998-1999 study by PEO's Admissions, Complaints, Discipline and Enforcement (ACDE) task force. Headed by Judge Douglas Carruthers, the task force was struck in part to address suggestions that PEO's complaints and discipline processes were directed to the activities of less than one-quarter of the membership, primarily those offering services to the public. In the complaints area (see sidebar "Making a complaint" for a primer on the process), it examined the staff role in processing formal complaints, the overall fairness of the process, the role of the Complaints Committee (COC) and the potential for alternative dispute resolution (ADR).

Although the task force identified some concerns relating to the length of time to address complaints, and the use of expert reports in the course of investigations, its recommendations aimed to enhance and improve what it saw as a smoothly operating procedure overall.

### No process changes necessary

In summing up the observations of the ACDE task force, Judge Carruthers wrote in 1999, "It is my considered opinion that there is nothing wrong with the processes relating to complaints and discipline as they are found in the [*Professional Engineers*] Act. Apart from amendments that would make the Discipline Committee hearings presumptively open and enable the appointment to discipline panels of a lay LGA councillor...no other changes to the complaints and discipline processes in the Act are necessary to provide processes that will serve PEO's purposes. The significant problems that have arisen have been due solely to the manner in which the statutory provisions have been employed, applied, or interpreted.

The areas in which this has occurred have been

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identified and either have been or will be eliminated. The processes will then work as they are intended to and, in my opinion, must do."

PEO Council approved 66 of the ACDE task force's 68 recommendations, including training for COC members and creation of an ADR program. PEO subsequently prepared guidelines for the COC to help it deal with the time delay issue, and created additional opportunities for periodic reviews of the process.

A further review of the complaints process was conducted between 2002 and 2005 by PEO's then Complaints Review Councillor, David Sims, QC. Sims identified some concerns about the timeframes for complaint investigation and disclosure of initial letters of complaint. He also suggested the initial withholding of expert reports could put a complained against practitioner at a disadvantage, should the case proceed to the Discipline Committee (DIC).

Nonetheless, Sims regarded his review as an effort to fine tune a process that otherwise operates efficiently and well.

"I have found that complaints had been handled expeditiously and competently from the time the complainant signs the formal complaint until it is disposed of by the Complaints Committee," Sims said. "However in the course of [complaint reviews], I have noted that there appeared

to be lengthy periods between the time when the complaint first came

to the attention of PEO and



the time the formal complaint was signed. To be fair, however, there seems to have been a significant improvement in the last two years.”

One of Sims’ major concerns about the complaints process had to do with early notification of a complained against practitioner about the substance of the original complaint. “There are practical reasons why the person should see the original complaint itself,” Sims wrote. “First, it is only fair that the professional should have the right to see the specific allegations at the earliest possible time...Second, although not obliged to do so, the professional engineer may see fit to respond to the allegations, which may shed considerable light on the complaint and focus and shorten the subsequent investigation.”

Despite these concerns and another about whether expert reports should be disclosed to anyone other than the COC during the complaints process, Sims remains convinced the system operates effectively.

“I am satisfied that PEO’s complaints process works well and that the public interest is well served,” he said. “I am also convinced that PEO’s complaints staff and the members of the Complaints Committee are conscientious, objective and fair. As with any system, there is always room for improvement.”

### Opportunities for improvement?

Gary Gibbs, LLB, an attorney experienced in defending PEO licence holders before the DIC, says the regulator might consider changes to the way it views expert reports as a way to improve the system.

“It is my opinion that the existence of this expert report will generally tip the scales at the Complaints Committee in favour of the matter proceeding to the discipline process,” Gibbs told *Engi-*

### neering Dimensions.

“Once that occurs, the practitioner is caught in an expensive and time-consuming situation that is difficult to escape.

I, therefore, believe that the lack of disclosure of expert reports at the complaints stage is absolutely prejudicial to the ability of practitioners to put forward a fair and frank response to the Complaints Committee.

“I understand PEO has a concern that the early disclosure of reports may lead to abuse by complainants, but this concern could be dealt with by having complainants enter into a legal undertaking to keep the report confidential, with a damages provision in the event the undertaking is breached. Alternatively, disclosure should be made to the [complained against] engineer only, who requires it to make a full answer and defence, whereas the complainant has no such justification for receipt of the report.”

Although the legal requirements of the complaints process are spelled out in the *Professional Engineers Act (PEA)*, there have been recent initiatives to streamline the process within the legislated parameters. One is the introduction of an ADR mechanism for matters meeting specific criteria and that do not involve allegations of incompetence.

Officially launched November 1, 2005, for a two-year pilot test period, ADR allows the use of specially appointed mediators to interact with the complainant and the practitioner in hopes of coming to a mutually satisfactory resolution of the dispute without the need for a formal complaint. Complainants are still able to proceed with a formal complaint if the mediation does not result in a resolution. Using the ADR process will not prejudice either the complainant’s or practitioner’s posi-

tion should the mediation fail and a formal complaint be pursued.

### Other forms of resolution

The tension inherent in fine tuning a process that already meets most expectations is not lost on current COC Chair Jane Phillips, P.Eng. Phillips discounts suggestions the committee is falling short on expectations, despite the heavy work load it demands of committee members.

“I have no concerns about the performance, and the effectiveness of that performance, of the COC in meeting its mandate as set forth in the *Professional Engineers Act*,” Phillips says. “The efficacy of the COC and of the complaints handling process was independently confirmed by the Complaints Review Councillor in his February 2005 report. Also, the complaints process was well regarded by the [1999] Task Force on Admissions, Complaints, Discipline and Enforcement.”

Phillips says that although the committee serves a screening or filtering function, it is unfair to suggest its key role is simply to separate legitimate complaints from frivolous ones. She says the committee treats seriously all complaints

it receives, and a decision not to refer a complaint to the DIC does not indicate the complaint was considered trivial at the

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outset. “Committee members take their responsibilities very seriously, making themselves familiar with all of the documents in the file for each complaint on the sometimes very lengthy agenda, and bringing their professional experience to the general discussion. The members certainly understand the definitions of incompetence and professional misconduct as set out in the Act and the Regulations.”

To move forward in response to the CRC’s scrutiny of the complaints han-

dling process, in June 2005 PEO Council approved establishing internal guidelines for the processing of complaints, which have now been developed. As well, Council supports ongoing training for COC members in the writing of Decisions and Reasons for complaints that are not forwarded to the DIC. Council also directed Regulatory Compliance staff to explore some form of quality assurance program for the complaints process, the outcome of which was reported to Council at its June meeting.

On the issue of expert reports, the COC determined the complaints process can be administered fairly without disclosing the reports to all parties, a view upheld by Council, so that the current practice of not releasing expert reports obtained by PEO in the investigation of complaints, except as directed by the COC, will continue.

It's natural that some of the parties involved in an adversarial complaint-investigation-resolution process would have cause, from time to time, to disparage elements of the process. And while PEO remains sensitive to the need to review its processes for fairness, transparency and due diligence, the volunteers serving on the COC believe that, fundamentally, the process is sound.

As Jane Phillips points out, "the Complaints Review Councillor in his review of individual complaints has never identified a fundamental breach of process or protocol that would require the complaint to be reconsidered. Over the past six years, in the 60-plus discipline hearings held at PEO, there has only been one that resulted in a not guilty finding, and in that case, the Discipline Committee agreed that the Complaints Committee had a legitimate basis for referring the case to discipline."

Phillips says that although complainants are often not happy when their complaint is not referred to discipline, the strength and integrity of a well-established process have withstood repeated scrutiny.

"We have over 67,000 licence holders and only about 35 filed complaints per year," said Phillips, "which encourages confidence in the effectiveness of

PEO's licensing regime with its current emphasis on ethics and standards of practice for licence holders. Divesting advocacy and member service activities to OSPE [the Ontario Society of Professional Engineers] in 2000 allowed

PEO to focus on its regulatory role and we have seen more complaints, which were referred to discipline. However, there has been no suggestion of any systemic problems with the way that PEO regulates the profession." 

## Making a complaint

The complaints process is governed by sections 23 and 24 of the *Professional Engineers Act*, which outline the composition, duties and procedural requirements of the Complaints Committee (COC). At present, there are 14 professional engineers serving on the COC, with a quorum defined as three members, one of which must be a Lieutenant Governor-in-Council appointed Councillor.

PEO deals with an average of 32 formal complaints each year (based on 2001-2005 data), but conducts many more preliminary investigations. When an inquiry is received, the staff of the Regulatory Compliance department answer questions about the conduct expected from a practitioner, review the concerns, and advise on the evidence needed to support allegations of professional misconduct and/or incompetence. The first step in making a formal complaint is submitting a letter to PEO, which should include a description of the concerns, their timeframe, and any supporting documentation.

PEO staff investigators then complete a preliminary investigation, in which they examine the complaint in the context of the *Professional Engineers Act* and Regulation 941, and help to identify the evidence required. Staff might also engage an independent engineer to review and comment on the work of the practitioner. Depending on the evidence, staff investigators may also assist complainants in preparing a formal complaint document.

If the evidence does not support a formal complaint going forward to the COC, staff may suggest other means of addressing a complainant's concerns. However, complainants always have the right to insist their complaint be submitted to the COC.

Once a complaint is formally filed and proceeds to the COC, one member of the committee becomes the "lead

reviewer" who sifts through the evidence to make a recommendation to the committee on whether there is sufficient evidence for the complaint to be referred to the Discipline Committee (DIC). The COC does not make a finding on the facts presented in the evidence, it just determines whether there is cause for the complaint to proceed to a discipline hearing. Investigative staff offer no opinion or recommendation to the committee members.

After making its decision on the sufficiency of the evidence, the COC may refer the complaint, in whole or in part to the DIC; refer the complaint in whole or in part via Stipulated Order, which is a streamlined process for less serious matters whereby the complaint is considered by a single representative of the DIC, as an alternative to a full discipline hearing; dismiss the complaint; send a "letter of advice" to the practitioner or interview the practitioner, without referring the case to the DIC; or direct staff to obtain more information, which it then considers. The COC refers an average of 17 complaints a year to the DIC.

For every complaint considered by the COC, both the complainant and the practitioner are sent a copy of the committee's written decision, with reasons where applicable. If the complainant is dissatisfied with the way the complaint has been handled, the complainant may request that it be reviewed by PEO's Complaints Review Councillor (CRC), a position held by a non-engineer member of PEO Council. The CRC is empowered to review only the procedures and process followed by staff and the COC, not the merits of a complaint. The CRC has no authority to relaunch a complaint, nor is CRC activity a form of appeal. At the conclusion of each CRC review, a report, which may include recommendations, is provided to the complainant, the practitioner and to PEO Council.