INJUSTICE FOR ONE IS INJUSTICE FOR ALL

By Patrick Quinn, P.Eng., FEC

> **"WE ARE BOUND BY AN INESCAPABLE GARMENT OF MUTUALITY, WHATEVER AFFECTS ONE DIRECTLY, AFFECTS ALL INDIRECTLY."**
> Dr. Martin Luther King, Jr.
> (letter from the Birmingham Jail, 1962)

AT OUR RECENT AGM, we were told of PEO's goal to be the global leader in regulators. A serious look at the appalling state of one of the bulwarks of regulation, our complaints and discipline process, would indicate how far we are from basic competence, let alone leadership.

The attempt here is to sustain this assertion by outlining a *prima facie* case for grievous concern by council, which should lead to considerations for immediate and drastic action.

A perusal of the cases reported in the blue pages (Gazette) will yield a litany of troubling reports: charges laid for which no evidence is entered at trial (frequently for incompetence); a standard deal of a reprimand, a token suspension and requirement to write the professional practice exam, for a plea of guilty to any bundle of charges (bundles are *de rigueur*); conclusions that are at face baffling and inconsistent, as in a recent case where the member was found not guilty of incompetence because he was only incompetent in the area complained of, no evidence having been entered for incompetence in other areas of practice.

In the Decision and Reasons for this case was the extraordinary statement that "the association felt that the conduct of the member did not meet the definition of incompetence as defined in the *Professional Engineers Act*. It would, in fact, be rare for this to be so." This begs the question of why there are so many charges of incompetence being laid.

It would appear that definitions of negligence, gross negligence, misconduct and incompetence are moving targets defined by each discipline panel.

Beyond the published cases are those available as part of the public record. One such is the appeal of a PEO discipline decision to divisional court. In *PEO vs. Caskanette*, the learned judges are devastatingly critical in their comments. Quotes from the written judgment ("In my view the Discipline Committee's decision is unreasonable"; "Moreover, the result does not fall within a range of reasonable outcomes"; "The evidence does not support a finding of unprofessional conduct"; "There is no reason to send this back to the committee"; "The complaint of professional misconduct is dismissed") show how completely wrong our discipline panel got it. The court took pains to explain the legal definition of misconduct and how wrong was the panel's understanding.

Costs awarded in the amount of $15,000 to Engineer Caskanette are a small part of what PEO spent on a dispute about the opinions of legal experts in a car accident, which took years to wind its way through the complaints and discipline process.

This finding cannot be downplayed as a technical legal challenge; it raises the issue of the competence of a discipline panel. As the panel had the advice of so-called independent legal counsel, it also raises the question of the quality of the advice or the acceptance of such advice. The concept of independent legal counsel is, in any event, in need of review. Someone paid by PEO, serving at PEO's pleasure, and instructing PEO's panels on the law according to PEO raises a reasonable concern about the perception of bias. This case also challenges the Complaints Committee's judgment in referring to the Discipline Committee a complaint in a field where we have no performance standards, and where the complainant is potentially–some would say obviously–using PEO as a blunt instrument against a competitor.

Another recent case is that of *PEO vs. D'Hondt*, where four very serious charges were brought, and a discipline panel sat only to be told that PEO would not present any evidence. The panel promptly found Engineer D'Hondt not guilty as "the association called no evidence to support the allegations." The concept that justice must not only be done but be seen to be done is obviously lacking here.

One wonders what was behind such an aberration. What happened to the evidence on which the Complaints Committee concluded there were reasonable and probable grounds for referring the matter to discipline? Who instructed the prosecuting lawyer not to call evidence? Why were the charges not withdrawn earlier? If there was a deal, who negotiated it, and who closed on PEO's behalf and under what circumstances?

Then there is the case of *PEO vs. Carlos*, where I was party to information before the complaint and through the process,

and sat in on the final arguments before a discipline panel, which acquitted Engineer Carlos of all charges. I find it hard to imagine a case more abusive of our discipline process, almost Kafkaesque.

How did it ever get to the Complaints Committee after the complainant, a former PEO president who objected to the discourse of an election campaign, had his call for action rejected by the committee in charge of elections and then by council?

Surely council's decision to take no action was the end of the matter. How did it get past the Complaints Committee and how did a charge of professional misconduct get the bundle treatment of added charges of harassment and failure to pay due fees?

Who added these charges? Why were there not the usual publication notices of hearing dates? Why did the president, as a response to a written plea signed by a dozen members that this was a lose-lose case for everyone involved, invoke a hands-off policy for cases in the discipline process, and then permit an obviously prejudicial motion relating to the case to get to PEO council? How did that motion get to be entered as evidence in Carlos' trial? Why was Engineer Carlos not faced at trial by his accusers, particularly on the harassment charge?

Professional discipline is a process to ensure the protection of the public through monitoring and ensuring the professional conduct and competence of practitioners. It is not a format for settling personal vendettas, for settling professional differences of opinion, for the exercise of professional power or for other misuses, as in the cases above. Nor is it a forum for testing new interpretations of the act, as in the Carlos case where harassment was presented as annoying repetition of reasonable questions.

In all these cases, there is much more that could be noted. What is being exposed is just the tip of the complaints and discipline process rot. It is indicative of a process so flawed that it urgently requires a major overhaul.

As governors, council has the ultimate responsibility for the integrity of all our processes, and it has a responsibility to take immediate steps to get our legal house in order. That means listening to the concerns circulating among staff and volunteers who are observing situations that are palpably wrong.

Council abrogates its responsibility when it takes a hands-off policy on cases that are "before the court," which are clearly detrimental to our profession. Allowing several council meetings to pass without serious deliberations on the implications of the Caskanette case is a failure of leadership.

There are questionable cases now in our system being vigorously defended.

One more scathing judgment would probably lead to a review by the attorney general (AG), and potentially to the loss of our self-disciplining powers. Indeed, it would appear to be appropriate for the AG to be concerned enough for his review now in the light of present circumstances.

In my time, I participated in the Justice Carruthers/Max Perera examination of our processes, commissioned the Weir-Foulds legal audit of our process, and was instrumental in many reforms. To little avail, it would appear.

I understand that at its June workshop, council discussed the discipline matter and tinkered with dates and process. Tinkering with the process will not address the fundamental issue that our process is inconsistent and prone to making a travesty of administering justice. Surely this is not tolerable.

I believe the peer concept of justice is not in keeping with the times and the progress of justice in other areas. Justice today is for professionals in the legal system, not for amateurs or dilettantes, some of who believe their life experience is all the training they need to rule on a person's future. As an informed insider, I would not, should the occasion arise, wish my career to be put in the hands of these so-called peers, or at the mercy of our discipline process.

Council needs to consider this situation very seriously, to be prepared to listen to responsible voices from outside council and to act swiftly. We live in a time of regulators under scrutiny and the concept of self-regulation being questioned as an anomaly where self interest vies with public safety.

We need to put the system on hold until a proper enquiry reviews the situation and directs us to a complaints and discipline system that can be respected and is compatible with our times.

The goal of global leadership as a regulator is long term, but it starts with council taking the small step of acknowledging the reality of a serious problem and getting our complaints and discipline house in order.

Self-regulation is not sustainable without open, consistent and acceptable standards prevailing throughout our complaints and discipline system of self-discipline, which in our case is clearly not the case.

Pat Quinn, P.Eng., FEC, is a two-time PEO president (1999-2000, 2006-2007) and a former Engineers Canada director.