



The American model of licensing only for public practice would seem to be based on seeking redress for injury via the courts. In contrast, it's long been argued that the Canadian engineering model of universal licensing is designed to offer public protection by preventing harm. But do the pressure of professional liability, the discipline regimes of Canadian engineering regulators and the free market system really ensure that the public is protected from the consequences of sub-standard engineering?

Entry qualifications for the engineering profession in Canada are deliberately high: four years of specific, verifiable experience after a demanding university engineering program or equivalent education, and the passing of an exam in engineering law, ethics, and professional practice. Self-regulating licensing bodies bestow a licence to practise professional engineering on those who have made the grade. With the licence comes an exclusive right to practise in the areas the *Professional Engineers Act* reserves for the profession. The rub is that although such high entry qualifications almost certainly ensure initial competence, engineering today demands practitioners devote a lifetime to learning. PEO Past President Richard Braddock, P.Eng., has written that continuing professional development is “sec-

public is looking for assurance that an engineering firm does what it says it can, and there’s a sense in the marketplace that PEO, as a regulator, should be able to tell them this,” says John Gamble, P.Eng., president of Consulting Engineers Ontario, the organization representing the interests of firms providing engineering services to the public.

Gamble bases his statement on such evidence as the government’s Bill 124, which when proclaimed will require that practitioners pass government-set exams on code knowledge to qualify to work in areas involving the building code, and the draft regulation to define a “qualified person” to sign the records of site condition under the *Environmental Protection Act*. In the latter example, the government’s draft regulation defines a qualified person as any of a professional engineer,

neering disciplines. In my opinion, the present situation is no longer adequate.”

Open markets

Today, professional engineering services are bought and sold in an open, competitive market. With any perfectly competitive situation, economic pressures act naturally to squeeze less competent firms from a sector. And there appears to be a consensus among practising P.Engs that this is true.

But does a perfectly competitive situation exist anywhere outside of an economic model? “The market would weed out the poor players,” says Harry Angus, P.Eng., a PEO Past President who runs a consulting engineering firm with about 160 employees. “But most of the poor players arrive in a recession after they’ve lost their regular jobs. They’ll take

Punishment as Competence Assurance

by Dwight Hamilton

ond nature” to P.Engs, forming an integral part of their working lives. Yet ongoing competence assurance and the related idea of mandated continuing professional development have been issues of debate in the profession and with government for over two decades.

As long ago as 1980, the Ontario government’s Professional Organizations Committee (POC) stated: “No system of regulation, either entry regulation, post-entry regulation or some combination of the two, will ever be error free in the sense that the public can expect never to encounter a competence problem.”

Since then, the public itself has also begun to be less inclined to accept professional qualifications at face value. “The

professional geoscientist, certified engineering technologist, or applied science technologist.

“Fortunately, the vast majority of the profession maintains their professional competence,” says David Sims, a retired lawyer and a government-appointed PEO Councillor. “But apart from the cumbersome complaints and discipline process, PEO has no satisfactory mechanism to measure whether this is true. Moreover, the association has no mechanism to determine whether a P.Eng. who returns to active engineering after a prolonged absence has maintained his or her skill. The P.Eng. designation doesn’t even tell the consumer whether the holder has been trained in any of the recognized engi-

on anything because it’s a dollar, and then they may disappear again [before the market can weed them out],” he says. Or as Peter Hart, P.Eng., who worked for about 40 years in various consulting engineering firms puts it, the market isn’t “going to stop anyone hanging up his or her shingle as a structural engineer and someone walking in and expecting to have a water plant designed. If the engineer is not familiar with waterworks, the client’s in trouble.”

However, according to PEO’s former Registrar Roger Barker, P.Eng., the likelihood of such a scenario is pretty slim: “The purchaser of a water plant or bridge or condominium is almost certainly a sophisticated client who will obtain several

Incompetence or misconduct, what's the difference?

In a nutshell, the main difference has to do with intent. Misconduct is intentional, incompetence unintentional. Section 28(3) of the *Professional Engineers Act* allows a PEO discipline panel to find a member or holder of a Certificate of Authorization to be incompetent if the member or holder:

- ◆ has displayed in the member's or holder's professional responsibilities a lack of knowledge, skill or judgment, or disregard for the wel-

fare of the public, of a nature and extent that demonstrates the member or holder is unfit to carry out the responsibilities of a professional engineer; or

- ◆ is suffering from a physical or mental condition or disorder of a nature and extent making it desirable in the interests of the public or the member or holder, that the member or holder no longer be permitted to engage in the practice of professional engineering, or that his or her

practice of professional engineering be restricted.

Section 28(2) states that a discipline panel can find a P.Eng. guilty of professional misconduct if the P.Eng.:

- ◆ has been found guilty of a criminal or civil offence relevant to the suitability to practise; or

- ◆ has been guilty in the opinion of the discipline panel of professional misconduct as defined in Section 72 of Regulation 941.

proposals. A review of these will quickly ascertain which of the proponents has the necessary experience. There's a stronger point with smaller unsophisticated clients and practitioners operating outside their areas of expertise. Maybe licensing by discipline is one alternative, but that doesn't guarantee competence either."

On the client knowledge question, the report of the POC's study of the professions of accounting, architecture, engineering and law suggested that if clients "possessed a degree of sophistication required to make reliable judgments as to the quality of services received as a prelude to suit in the event that the services were unsatisfactory, the case for any kind of professional regulation—other than civil liability—would disappear."²

On the flip side, P.Eng.s would be wise to exercise professional judgment in selecting their clients. As Ian Eng, P.Eng., PEO's deputy registrar, complaints, discipline and enforcement puts it: "While the current Act and regulation do not provide for licensing of engineers in a particular discipline, PEO relies upon the professionalism and judgment of its licence holders to practise only in those areas where they are competent. There will always be individuals who, knowingly or otherwise, push the envelope of their competence."

Liability concerns

Besides market competition to keep P.Eng.s on their toes, providers of profes-

sional services are required in Canada to adopt reasonable standards of care when providing their services, or risk a professional liability lawsuit, either directly or as a third party to a contract. And the threat of a lawsuit can be a strong incentive to remain current in one's field. As Gamble puts it: "Liability is a fact of life in this business. If you can't take the heat, get out of the kitchen."

Still, professional engineers do wind up in court on occasion, powerful incentive aside. "When we see people making mistakes, it's mostly new materials and techniques, and no one knows what the causes may be," says Peter Needra, P.Eng., of DPIC, a major provider of professional liability insurance to engineers. "But another cause is simply that someone will add one and one together and get three. It's not rocket science. If it were, they'd be careful and think it through. Very seldom will you see a bridge collapse, but you will see someone forgetting to put a plate under a footing that leads to a \$2 million claim. It's usually double-checking. Is that technical or non-technical? It's procedural really," he says.

As for the cause of rapidly rising professional liability insurance premiums? At least some of the blame has to fall on the concept of joint and several liability, which may draw innocent engineers into a litigation minefield. According to Needra, it's often not the practice of engineering, but the practice of the engineering firm that precipitates an insurance claim. "Engineers and architects have deficien-

cies in executing their jobs in terms of client selection, the negotiation of proper contracts, and in communications," he has observed. In today's fiercely competitive arena, "everyone's willing to do more with less and accept things that they shouldn't," he says. "This has been going on for years, and I think the customers themselves are just realizing that when something goes wrong, there's some money to be recovered."

In such a tricky environment, adherence to PEO practice guidelines can become very important. "The development and maintenance of standards of practice is one of the objects of PEO," says Bruce Matthews, P.Eng., senior investigator for PEO's Complaints, Discipline and Enforcement department. "PEO's existing practice guidelines are often referenced in the course of civil actions arising from professional liability claims, as well as within the PEO discipline process." Regarding professional misconduct, Section 72 of Regulation 941 spells out in clear and simple language how PEO members should conduct themselves to avoid a close encounter with the complaints and discipline processes.

In the dock

The fact that many PEO members "turn to the 'Blue Pages' first" when receiving *Engineering Dimensions* shows the importance P.Eng.s place on staying out of them. "The time, cost and stress of responding to a complaint and defending against allegations of professional misconduct or

incompetence are strong motivating factors for an engineer to stay competent and ethical," says Deputy Registrar Eng. He points out that the penalties formulated and ordered by the Discipline Committee are generally intended to have all of remedial, punitive and deterrent elements. The Discipline Committee's formal Decision and Reasons, which is published in the *Gazette*, deals only with the course of and results of a discipline hearing, and thus does not fully convey the length and complexity of the process.

As the POC report stated in 1980, discipline proceedings "are extremely blunt,"³ a view echoed in the 1999 *Report of the Task Force on Admissions, Complaints, Discipline and Enforcement*, which stated:

"The proceedings before the Discipline Committee are adversarial in nature—and for good reason. They are not gentle hearings, held as an inquiry into the truth of some matter Because Discipline Committees have powers that can destroy a man or woman's professional life, in order to ensure fairness to the Member charged, a high onus exists on the professional body pursuing the complaint, which must be met before any allegation can be proven."⁴ Eric Newton, PEO's manager, legal affairs, points out that a licence suspension would likely have a direct impact on a professional engineer's ability to make a living. "Even having your name made public in connection with some proceeding would be bad for business," he adds.

Not everyone agrees. Axel Uderstadt, P.Eng., a sole practitioner in the structural engineering sector, says fines are "not nearly tough enough," and that government initiatives like Bill 124 are part of a trend toward demanding greater professional accountability to the public. On fear of adverse consequences as competence assurance, then, it seems the jury may still be out. ❖

Endnotes

1. *The Report of The Professional Organizations Committee*, Ministry of the Attorney General of Ontario, April 1980, p. 171.
2. *Ibid.*, p. 175.
3. *Ibid.*, p. 181.
4. *Report of the Task Force on Admissions, Complaints, Discipline and Enforcement*, Association of Professional Engineers of Ontario, 1999, addendum, December 20, 2001.

Public eye now on hearings

With recent changes to the *Professional Engineers Act*, PEO's disciplinary hearings are now open to the public. In addition, notices for upcoming discipline hearings are now posted in advance on PEO's website (www.peo.on.ca). The notices include the name of the member and/or C of A holder against whom the allegations have been made, the nature of the allegations, and the hearing date. It should be noted that these are allegations only. It is PEO's burden to prove these allegations during the discipline hearing. As a result, no adverse inference regarding the status, qualifications or character of the member or C of A holder should be made based upon them. That PEO discipline hearings be opened to the public was a recommendation of PEO's 1999 *Task Force on Admissions, Complaints, Discipline and Enforcement*. As the task force report states: "The public has a right to know, and to do otherwise could appear to be improperly protecting the member's interest at the public's expense. Such an approach is inconsistent with PEO's principal object, to ensure that the public interest is served and protected."¹

The legal parties to a PEO discipline hearing are PEO and the member and/or C of A holder against whom the allegations have been made. The complainant is not a party.

Hearings are conducted before a panel of PEO's Discipline Committee. A panel

comprises five members of the committee, one of whom is an elected Councillor, one of whom is an LGA appointed Councillor, one of whom is a member of the committee with at least 10 years experience in the practice of professional engineering, and one of whom may be a non-engineer LGA-appointed Councillor. Also present at the hearing are the prosecuting legal counsel for PEO and defence counsel for the member and/or C of A holder, if counsel has been engaged. A court reporter records the proceedings verbatim and marks any exhibits used as evidence.

Discipline panels have independent counsel to give legal advice in such areas as objections to admission of evidence or matters of legal procedure and to instruct the discipline panel on what the appropriate standard of proof should be.

"When I give my advice, I don't pay any attention to whether it is favourable to PEO," says independent counsel Nancy Spies, LLB, of Toronto-based law firm Stockwoods LLP. "The advice is so the panel operates under the best legal basis, so that if there were ever an appeal, a court couldn't say the panel did something wrong as a point of law. I have no stake in the outcome and I call it like I see it." Under the changes to the *Professional Engineers Act* that became effective on February 28, 2003, hearings can still be ordered closed, but Spies feels this will be unlikely. "Since the principle to open public access to hear-

ings is such a strong one, it would take an unusual set of facts, I think, for a member to persuade the panel to close it," she says.

How well must PEO prove its case for a finding of guilt? In a civil trial, there is usually only money at stake and the standard of proof is a balance of probabilities as to which story is more likely, says Michael Royce, LLB, of law firm Lenczner Slaght Royce Smith Griffin, and a PEO counsel. With penalties that range up to licence revocation within the authority of a discipline panel, "there's much more at stake in a real sense for the engineer. It's much closer to a criminal trial. We can't imprison anybody, but the courts regularly refer to the revocation of a licence as professional death," he says. "In proceedings like these, one is required to persuade the panel on clear and cogent evidence," he says.

So does the discipline process promote competent and ethical practice? Royce believes that it does: "The fact of the matter is that professional engineers who don't maintain their competencies and practise in a consistently ethical manner will probably get to meet me—and they're almost certain to thoroughly dislike that particular experience."

1. *Report of the Task Force on Admissions, Complaints, Discipline and Enforcement*, Association of Professional Engineers of Ontario, 1999, p. 35.