

'Overbearing' lawyer criticized in discipline case



By Michael McKiernan | Publication Date: Monday, 28 February 2011

An engineer has had a complaint against him permanently stayed after a Divisional Court panel found a reasonable apprehension of bias by the Professional Engineers Ontario's disciplinary committee in a case involving the "overbearing" interference by a lawyer on its staff.

The decision ended a two-year proceeding against Paul Lim that called into question the independence of PEO's disciplinary process.

The case, described by the court as a "bizarre tale," revolved around Sal Guerriero, PEO's manager of legal and regulatory affairs. As a staff member in the tribunal office, his function was to provide administrative support to the discipline committee.

Instead, during a dispute over scheduling, Guerriero, who is an engineer as well as a lawyer, attempted to have his staff added as a party to a motion and gave legal advice to the chairman of the disciplinary committee.

Guerriero "ignored" the limitations of his role, while the committee chairman, Nick Monsour, displayed "no understanding of the independent roles of the discipline committee and its staff," according to the Divisional Court ruling.

The disciplinary committee, comprised of engineers, would normally retain independent legal counsel for advice on its adjudicative functions. Nevertheless, a string of "overbearing" correspondence from Guerriero to Lim's lawyers indicated his bias against the engineer, the court found. Still, that wouldn't have been enough on its own to grant the stay.

"His conduct, however unfortunate, would not have resulted in a stay," wrote Justice Lee Ferrier in the Feb. 8 decision. "That said, his conduct in giving advice to the chair (and therefore to the discipline committee), and in usurping the role of the chair, which the chair tolerated and with which the chair concurred, created the problem."

At one stage, Monsour overturned a ruling by one of his own committee members who ordered that the motion should continue without making PEO's administrative staff a party. "Astonishingly, despite having appointed a pre-hearing conference to address the issues raised . . . the chair of the discipline committee ignored the decision of his delegate," Ferrier said on behalf of the three-judge panel.

William McDowell, a partner at Lenczner Slaght Royce Smith Griffin LLP who acted for Lim in the matter, says he couldn't find a similar example in Canadian law. "We were kind of relieved because the order straightened things out," he says. "Then you immediately get a fax with another order that purports to undo all of his work. The process for us was surreal."

Guerriero, who is still manager of legal and regulatory affairs at PEO, declined to comment. But Kim Allen, the regulator's CEO, says things have changed at the organization since the furor. The chairman of the disciplinary committee has since completed his two-year term, and members now get extensive training from a former judge on their duties.

PEO dealt with Guerriero's conduct as a "normal management issue," Allen says, declining to provide further details. "It certainly was not welcomed," he adds. "Unfortunately, these things happen, and you deal with them. We have done a number of things to ensure there is no influence or appearance of influence. Those changes were made 18 months ago when this all occurred."

The roots of the dispute lay in scheduling problems for the hearing of a complaint made against Lim in December 2006. A hearing was to take place in December 2007, but a problem with panel availability caused a postponement.

Lim was out of the country for the new date, which was set without consulting the parties. His lawyers, who were granted an adjournment, wrote to the tribunal office asking to be consulted about the next date for the hearing. They got no reply, and the hearing was again rescheduled without consultation.

The complaint was finally heard and dismissed in November 2008, but by then PEO had received another complaint about Lim.

History began repeating itself as a date was set for the new hearing in November 2009. Lim would be out of the country, and his counsel, Ryan Breedon of Lenczner Slaght, was scheduled for a trial.

Another adjournment motion was granted and the matter went back once again for scheduling with Breedon requesting consultation on potential dates. That kicked off a chain of correspondence between Breedon and Guerriero that the Divisional

Court judges described as "astonishing." It revealed "an overbearing, unco-operative, and unprofessional attitude on the part of the tribunal office, in particular Mr. Guerriero," Ferrier wrote.

In an e-mail, Guerriero told Breedon and PEO's counsel, Aviva Harari, that trials, vacations, and "any other such disingenuous excuses, without presentation of evidence to the contrary," weren't sufficient reasons for delaying the hearing. Breedon wrote back, noting that it's routine to fix dates on consent.

He also objected to the implication that he had misled the tribunal about his unavailability in the past and demanded an apology.

But Guerriero was having none of it and instead demanded an apology of his own for Breedon's "intemperate comments."

"Any intimidation towards tribunal staff will be met by a complaint being formally filed before the Law Society of Upper Canada," Guerriero added.

Harari attempted to step above the fray by writing to the committee chairman to complain that Guerriero was "usurping the jurisdiction of the chair" in advising what constituted acceptable reasons for adjournment. She also expressed concern about Guerriero's "inappropriate and disrespectful" correspondence.

But the letter never made it to the chairman and instead hit a brick wall at the tribunal office that had been asked to pass it on.

In July 2009, Breedon filed a motion asking for a stay of the prosecution against Lim. A month later, Guerriero asked for his own staff to be made a party to the motion. In an interim decision released on Sept. 21, 2009, Monsour said it "might be quite useful" to add PEO's administrative staff as a party but referred the matter to a pre-hearing conference for another committee member, engineer Bill Walker, to decide.

At the conference on Oct. 7, 2009, Guerriero accused Lim's lawyers of "taking a certain amount of shortcuts on the law," remarks he withdrew at Walker's suggestion.

Walker ordered the motion for stay to continue without the administrative staff being made a party because it would "only further call into question the discipline committee's impartiality."

But Monsour refused to process the motion and adjourned the hearing of the main matter sine die.

"If you think of how central engineers are to Canada, it doesn't really inspire public confidence if this is how they're running their disciplinary processes," McDowell says in response.

According to Allen, the root of the problem lay in a misunderstanding over who should address scheduling concerns. Counsel now have directions to contact the disciplinary committee chair, not the tribunal office.

If that had happened in this case, the situation wouldn't have escalated because Guerriero wouldn't have been involved, Allen says. "We don't condone that kind of conduct, that kind of response. What caused the flare-up was the process. Sometimes, you shouldn't fight somebody else's fight. It's clearly the job of the chair to set dates."

PEO has also expanded the disciplinary committee to ease the logistical difficulties of putting together a panel, Allen says, noting a disciplinary task force is to report back with further recommendations in the spring.

"It's a process of ongoing improvement," he says.