

MODERNIZING THE INVESTIGATIVE PROCESS

Fall 2015 Consultations

The Engineering and Geoscience Professions Act



The Association of Professional
Engineers and Geoscientists of Alberta

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Overview

To better protect the public APEGA must have the ability to quickly and properly investigate allegations of unskilled practice or unprofessional conduct by its Members or Permit Holders. The new legislation must make changes to the investigative process to improve efficiencies by:

- clarifying the role and authority of investigative panels,
- being able to compel witnesses and produce documents for an investigation and,
- extending the length of time for which a complaint will be accepted against a former Member.

Clarifying the Role and Authority of Investigative Panels

Background

- Currently, investigations into complaints are conducted by APEGA's investigation panels who are made up of volunteer Members drawn from the Investigative Committee.
- The panels conduct the preliminary investigations and prepare reports for the Investigative Committee. The Investigative Committee then decides whether to dismiss the complaint, propose a recommended order, or refer it to a discipline hearing.

Why this is important

- It is in the public interest that trained investigators quickly and thoroughly investigate complaints against Members and Permit Holders.
- Although the volunteer Members of the investigative panels have expertise in their fields of engineering or geoscience, few if any are experienced in conducting disciplinary investigations. As a result, their investigations may not be as thorough and complete as investigations conducted by highly trained investigators.
- For this reason the panels are supported by qualified investigators in conducting investigations, but the volunteer panels are still accountable for conducting the investigations and preparing the investigation reports.
- The speed at which investigations are completed and decisions made needs to be improved. Volunteer panel Members are typically practicing professional Members and as a result of competing demands on their time there are often delays associated with conducting investigations and preparing reports. There are further delays associated with the timing of meetings of the Investigative Committee as a whole.

Proposed
Legislative
Changes

To amend the *Engineering and Geoscience Professions Act (EGP Act)*, to allow:

- Investigators, rather than investigative panels, will conduct investigations into complaints and report the findings of their investigations to investigative panels.
- Investigative panels will become the decision makers and have the same powers and decision making authority as the Investigative Committee currently has. The panels will review the investigation reports and decide whether to dismiss a complaint, propose a recommended order, or refer it to a discipline hearing.
- The Investigative Committee will become the pool or roster from which members of the Investigative panels are drawn.

Effect of the
proposed
changes

- Using highly trained investigators to conduct the investigations will result in more thorough, more timely and more consistent investigations. This will improve public protection and also improve APEGA's regulatory efficiency and effectiveness.
- The decision on what to do with the complaint will be a peer review done by an Investigative Panel made up Members of the profession and a public member.
- By separating the investigation function from the decision-making function, the roles of those involved will be better aligned with their skills.
- Using panels rather than the Investigative Committee as the decision maker will make better use of APEGA's volunteers' time and will result in quicker decisions.
- These changes will make the structure and operation of the Investigative Committee consistent with the Discipline Committee and Appeal Board in their use of panels.
- It will bring APEGA in line with other modern self-regulatory, professional associations in Alberta.

Discussion

Currently, when the Registrar refers a complaint to the Investigative Committee, the committee must appoint Members from the committee to an investigation panel to conduct a preliminary investigation, the results of which are passed on to the Investigative Committee for decision (Appendix 1).

The Investigative Committee creates investigation panels to conduct investigations. Membership on the panels is made up of trained volunteer Members of the Investigative Committee. Although they have expertise in their fields of engineering or geoscience, they are not consistently highly skilled in conducting investigations. For this reason, the panels are supported by investigative staff in conducting investigations.

It is recommended that the *Engineering and Geoscience Professions Act* be amended to better define the different roles involved in the investigations process as follows:

- qualified investigators would conduct investigations into complaints. The Registrar would refer a complaint to an investigator, who would investigate the complaint and prepare a report on the matter for the investigative panel's review, consideration and decision,
- investigative panels would have the same powers and authority as the Investigative Committee. The panels would decide whether to dismiss a complaint, propose a recommended order, or refer it to a discipline hearing,
- the Investigative Committee would become a pool or roster from which the investigative panels would be chosen. Their role as a full committee will be to oversee the overall effectiveness of the investigative work processes and outcomes.

Using qualified investigators to conduct the investigations will result in more thorough, more timely, and more consistent investigations than using less skilled volunteers for investigations. The function of the investigators will be to gather information and prepare corresponding reports. The decision on what to do with the complaint, based on the findings of the investigation, will rest with the investigative panel.

By separating the investigation from the decision-making duties for complaints, the roles of those involved will be better aligned with their skills. This makes the process more thorough and efficient and leads to more consistent and fair investigations and decisions. These changes also make the structure of the Investigative Committee consistent with other APEGA statutory bodies in their use of panels.

Research Summary

APEGA reviewed the legislation of other engineering and geoscience constituent associations as well as several professional associations in Alberta to analyze similarities, differences, and trends regarding the role and authority of Investigative Committees.

Canadian engineering and geosciences associations are divided between those who conduct investigations by committee and those who appoint individual investigators. The associations that use committees are:

- The Association of Professional Engineers and Geoscientists of British Columbia
- The Association of Professional Engineers and Geoscientists of Alberta
- The Association of Professional Engineers and Geoscientists of Saskatchewan

- The Association of Professional Engineers and Geoscientists of Manitoba
- The Association of Professional Engineers and Geoscientists of New Brunswick
- Engineers Nova Scotia
- Northwest Territories and Nunavut Association of Professional Engineers and Geoscientists

The associations that have the ability to appoint an individual to investigate are:

- Professional Engineers Ontario
- The Association of Professional Geoscientists of Ontario
- Ordre des ingénieurs du Québec
- Ordre des géologues du Québec
- Engineers PEI
- Geoscientists Nova Scotia
- The Association of Professional Engineers of Yukon

The Professional Engineers and Geoscientists of Newfoundland and Labrador allow for investigations by committee or individuals (Appendix 2 and 2A).

The majority of Alberta professional associations reviewed have now moved towards appointing individuals or employees to carry out investigations. APEGA and the Architects Association of Alberta still undertake investigations through committees or panels (Appendix 3 and 3A).

3 Compelling Witnesses, Producing Documents and Entering Premises

Background

- Currently the Discipline Committee and the Appeal Board have the authority to compel any person to appear before them, to produce documents, and to bring contempt of court proceedings against a person who fails to cooperate.
- Currently the Investigative Committee may only require the investigated person or another Member of the Association to produce documents. The Investigative Committee cannot compel a non-member to produce documents related to an investigation and cannot compel a Member or non-member to submit to an interview as part of the investigation.

Why is this important

- Investigators need to be able to conduct thorough investigations and gather relevant information from all possible witnesses and sources in order to have a complete investigation.
- It is in both the public interest and the interest of the investigated person that the most complete information possible be gathered and taken into consideration by the relevant decision making bodies.

Proposed
legislative
change

It is recommended that as part of the complaint investigation process APEGA investigators be given the authority to:

- require any person, whether a Member or non-Member, to produce documents related to the complaint.
- require any person, whether a Member or non-Member, to submit to an interview as part of the investigation.
- bring civil contempt-of-court proceedings for failing to cooperate.
- as part of the investigation the investigator should be allowed to enter and inspect any place where a Member works,

Effect of change
proposed

- It would allow APEGA to conduct more thorough investigations and obtain more complete information during the investigation phase.
- It is in the public interest to ensure that APEGA investigators have the ability to conduct thorough investigations by being able to enter and inspect any place where a Member works.
- It would give investigators the ability to gather the same information as Discipline Panels and Appeal Panels so that a complete picture can be presented to the Investigative Panel when that panel is deciding what to do with a complaint, rather than that information only coming to light during a discipline hearing or appeal.
- Having the same information available to the investigative panel, discipline panel and appeal panel will result in more consistent decisions and may help eliminate unnecessary discipline hearings and appeals which will improve APEGA's regulatory effectiveness and efficiency.

Discussion

The current legislation states that an investigation panel may require the investigated person or other APEGA Member to appear as a witness or produce documents. However, unlike the Discipline Committee and Appeal Board, the panel does not have the authority to call upon any other person to produce documents and appear as witnesses nor do they have the ability to bring civil contempt-of-court proceedings against someone who does not comply (Appendix 1).

It is important to note that currently, the Discipline Committee and the Appeal Board do have the authority to compel any individual, including non-Members, to appear before them and to produce documents. They may also bring contempt-of-court proceedings against an individual who fails to cooperate.

It is recommended that investigators be given the authority to require anyone, whether they are a Member or non-Member, to produce documents and to participate in an interview, as well as have the ability to bring civil contempt-of-court proceedings for failing to cooperate. Investigators should also have the authority to conduct investigative visits by entering and inspecting any place where a Member works.

As part of the investigative process, investigators need to be able to gather relevant information from all possible witnesses, not just from Members. Investigators should be authorized to gather the same information as discipline panels and appeal panels so that a complete picture can be presented to the investigative panel when that panel is deciding what to do with a complaint. For example, a non-Member may have information that is relevant to the complaint and that would have led the investigative panel to reach a different decision had complete information been available as part of the investigation, rather than that information only becoming known during a discipline hearing or appeal.

Having the same information available to the investigative panel, discipline panel, and appeal panel will result in better and more consistent decisions and may help eliminate unnecessary discipline hearings and appeals.

In addition, in order to develop a more complete investigation, investigators should also have the authority to conduct investigative visits by entering and inspecting any place where a Member works.

Research Summary

APEGA reviewed the legislation of other engineering and geoscience constituent associations as well as several professional associations in Alberta to analyze similarities, differences, and trends regarding compelling witnesses and producing documents.

All of the engineering and geoscience constituent associations have some authority to compel witnesses and to request documents. The legislation is not always clear on how to compel witnesses to appear. Some use the courts to issue summons, whereas others can issue summons themselves. There also lacks clarity as to whether the ability to compel witnesses exists for all parts of the complaint process: investigation to discipline hearing. This could leave potential inconsistencies that make the processes less effective (Appendix 2 and 2A). Other Alberta professional associations have some kind of legislative mechanism to compel witnesses and to demand documents. In some cases, the association uses the court to issue summons, whereas others can issue summons themselves. There also lacks clarity as to whether the ability to compel witnesses exists for all stages of the complaint process: investigation to the final hearings. This could leave potential inconsistencies that make the processes less effective (Appendix 3 and 3A).

Eleven of 15 Canadian engineering and geoscience constituent associations do not have the legal right to give investigators the right to enter and inspect the premises of their Members (Appendix 2 and 2A).

The Ordre des ingénieurs du Québec investigators have an explicit right to enter premises.

The Professional Engineers Ontario investigators have the explicit right to enter premises under a Registrar's investigation and are backed by the courts in cases of non-compliance.

While the Association of Professional Engineers and Geoscientists of Saskatchewan require a court order for its investigators and peace officers to enter premises.

Among the Alberta professional associations researched, only the Chartered Professional Accountants of Alberta does not have the legal right to give investigators the right to enter the premises of its Members. The other associations have the right to allow their investigators to enter the premises of their Members and may seek assistance from the courts to gain access if the Member does not cooperate (Appendix 3 and 3A).

Examples of regulatory investigators being able to enter premises without notice as part of an investigation exist among the Chartered Professional Accountants of Ontario and the Chartered Professional Accountants of Manitoba. Prince Edward Island Chartered Professional Accountants can have practice inspectors inspect premises as part of a practice review if they provide 10 days' notice. Similarly, investigators for the Association of Science and Engineering Technology Professionals of Alberta Practice Review Board may, with notice, conduct practice visits and enter and inspect any place where the regulated Member works (Appendix 4 and 4A).

4 Complaints Against Former Members and Permit Holders

Background

- Currently, complaints against a Professional Member, Licensee, Permit or Certificate Holder whose registration has been cancelled must be dealt with within two years of the date of cancellation.
- APEGA has the authority to regulate complaints against former Members only within that timeframe.

Why it is Important

- The length of time for issues to surface relating to work by Professional Engineers and Professional Geoscientists may often be longer than two years.
- It is in the public interest that a former Member or Permit Holder be accountable for conduct that occurred while they were a Member.
- A former Member should not be able to avoid professional accountability for prior conduct simply by waiting out the two year period and then applying for reinstatement without suffering consequences for that prior conduct.
- The current wording that a complaint “must be dealt with” within two years is confusing and could mean the entire investigation, discipline and appeal process related to the complaint must be completed within two years.

Proposed Legislative Changes

- It is recommended that the timeframe within which a complaint against a former Member or Permit Holder may be commenced be increased to 10 years from two years following the date of cancellation of Membership.

Effect of the Proposed Changes

- The ten-year limitation would be comparable to construction or other engineering or geoscience limitation periods.
- It would hold a former Member or permit holder accountable for prior conduct for a longer period of time and would prevent them from being able to wait out a two-year period and then be reinstated without suffering consequences.
- It would clarify that as long as APEGA receives the complaint within 10 years following the date of cancellation, APEGA would have the authority to investigate and pursue the complaint.

Discussion

Currently, complaints against a Professional Member, Licensee, Permit or Certificate Holder whose registration has been cancelled must be dealt with within two years of the date of

cancellation. APEGA only has the authority to regulate and accept complaints against former Members and Permit Holders within that timeframe. The length of time for issues to surface relating to work by Professional Engineers and Professional Geoscientists may often be longer than the two-year limitation.

It is recommended that the timeframe within which a complaint can be made against a former Member or Permit Holder be increased to 10 years from two years following the date of cancellation of membership.

It is in the public interest that former Members or Permit Holders be accountable for conduct that occurred while they were Members. A ten year period would be comparable to construction and other engineering or geoscience related limitation periods.

The current wording that a complaint “must be dealt with” within two years of cancellation may be interpreted in different ways, and its meaning is confusing. It could mean the complaint must be received by APEGA within two years, or it could mean the entire investigation, discipline, and appeal process related to the complaint must be completed within two years.

The recommended change that a complaint against a former Member or Permit Holder can start within 10 years following the date of cancellation of membership would clarify that as long as APEGA receives the complaint within 10 years following the date of cancellation, APEGA would have the authority to investigate and pursue the complaint.

Research Summary

APEGA reviewed the legislation of other engineering and geoscience constituent associations as well as several professional associations in Alberta to analyze similarities, differences, and trends regarding complaints against former Members and Permit Holders.

The majority of engineering and geoscience constituent associations define what it means to be classified as a former Member, and typically, the legislation specifies that any complaint must be undertaken within two years of the lapse in membership. Several associations (The Association of Professional Geoscientists of Ontario, Ordre des ingénieurs du Québec, Ordre des géologues du Québec, The Association of Professional Engineers and Geoscientists of New Brunswick, and The Professional Engineers and Geoscientists of Newfoundland and Labrador) do not specify any time limitation for a complaint against a former Member. Professional Engineers Ontario, Engineers PEI, Engineers Nova Scotia, and Geoscientists Nova Scotia make no reference to a time limit for former Members (Appendix 2 and 2A).

Of the Alberta professional associations reviewed, all but the Law Society of Alberta have a definition for a former Member. Usually the legislation specifies that any complaint against a former Member must be lodged within one to two years of the lapse in membership. Only the Chartered Professional Accountants of Alberta has a longer period of six years so that it aligns with the time the federal government requires tax records to be retained (Appendix 3 and 3A).

5 Appendices

Appendix 1 Existing Legislation

Appendix 2 Summary and Analysis of Canadian Engineering and Geoscience Associations

Appendix 2A Relevant Provisions from Legislation of Canadian Engineering and Geoscience Associations

Appendix 3 Summary and Analysis of Alberta Professional Associations

Appendix 3A Relevant Provisions from Legislation of Alberta Professional Associations

Appendix 4 Summary and Analysis for Other Professional Associations - Right to Enter Premises

Appendix 4A Relevant Provisions from Legislation for Other Professional Associations - Right to Enter Premises