

February 17, 2022

**PRIVATE AND CONFIDENTIAL  
DELIVERED BY EMAIL**

Christian Bellini, P.Eng., FEC  
President & Chair  
Professional Engineers Ontario  
101-40 Sheppard Avenue West  
Toronto, ON M2N 6K9

Dear President and Chair Bellini:

**Re: Election Issues**

Thank you for asking me to provide advice on some election issues that have arisen.

The context for this opinion is that PEO is in the midst of an election for Council. A candidate has made a complaint that certain communications by PEO during the election period were inappropriate and contrary to the Caretaker Convention employed by Canadian legislatures during election periods and constitute a conflict of interest<sup>1</sup>. The complaint is that certain communications by PEO to the membership on the proposed changes (or transformation) of PEO, including the role of Council, has had both the intention and the effect of favouring the campaign position of some candidates for election over that of other candidates. The complaint states: "Debating the issues during an election is the role of the candidates, not of the organization, which is obligated to maintain complete neutrality." The complaint requests that PEO, including its Council, take immediate steps to counter the effects of these communications in order to restore balance to the election.

The issue was taken to the Central Election and Search Committee (CESC) which, after an open meeting, concluded that there was no breach or violation of the PEO election rules. The CESC identified some issues for further consideration, particularly in respect of future elections. A report was made to Council of the CESC response. Since then, concern has been expressed that the position of the CESC was incorrect. It is suggested that the matter should be addressed by Council. There is also concern that some members of the CESC have nominated candidates for the election, including for the position that the complainant is seeking to be elected, making their participation in the CESC response inappropriate.

While a majority of Council members did not indicate support for holding a special meeting, some Councillors have requested that this matter be placed on the Council meeting agenda for February 18, 2022.

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<sup>1</sup> The conflict of interest appears to be related to PEO staff, and perhaps its Council, trying to influence who will be their future "boss" or leaders on Council.

## **Responsibility for Conducting Elections**

Your election procedures are set out in PEO's general regulation. Under s. 11.1 of that regulation, it is the Chief Elections Officer who oversees the nomination of members for election to the Council and the election of and voting for members to the Council. The Chief Elections Officer also ensures that the nomination, election and voting are conducted in accordance with the procedures established under the *Act*.

Under that regulation, the CESC has a supportive role. In particular, the CESC:

- a) encourages Members to seek nomination for election to the Council as president-elect, vice-president or a councillor-at-large;
- b) assists the Chief Elections Officer as may be required by him or her; and
- c) receives and responds to complaints regarding the procedures for nominating, electing and voting for members to the Council in accordance with this Regulation.

In the Elections Guidelines document, PEO has also asked the CESC to "conduct an annual review of election procedures".

In my view, the duty of the CESC to receive and respond to complaints does not detract from the role of the Chief Elections Officer to oversee and conduct the election.

Under the general regulation, the Council has a very limited role in the conduct of elections. It determines the manner of election (e.g., electronic or paper ballots), sets the date for the election, establishes when the freeze of the register of voters is takes effect, ensures that the positions of the Chief Elections Officer, Official Elections Agent, Returning Officers, and the CESC are filled, fills any Council positions for which no one was nominated, and directs the destruction of ballots. The Council does not make any election decisions and has no authority to review the decisions or actions of those it appoints. In fact, to the extent that the Council Elections Guide suggests processes and procedures beyond what is in the general regulation, those suggestions are not binding.

The general regulation does not provide for an appeal process for the actions of the Chief Elections Officer or the CESC. There certainly is no appeal provided to the Council. The Council cannot alter any decision of the Chief Elections Officer or any response by the CESC to a complaint. Short of any application for judicial review to the courts, the decisions of the designated election officials appear to be final.

## **Nature of the Complaint**

The complaint in this case was not directly about the nomination, election and voting process. Rather it was about some communications by PEO itself and whether those communications amounted to inappropriate interference with the election process.

I have some doubt that this is the type of matter that the Chief Elections Officer or the CESC has the authority to control. I cannot imagine that either the Chief Elections Officer or the CESC has

the authority to direct that PEO cease engaging in any of its regulatory activities, including communicating with its members on regulatory matters.

However, even assuming that such authority exists, Council has no authority to make an election ruling or recommendation. That ruling or recommendation would either be made by the Chief Elections Officer or the CESC. Given the fact that the objection was framed as a formal election complaint, the most appropriate entity to consider it was likely the CESC.

### **Caretaker Convention and Conflict of Interest**

In my view the Caretaker Convention and the conflict of interest issues raised have no application to PEO. They are based on fundamental misconceptions as to the nature of professional regulation.

The first misconception is that PEO's election is analogous to a political election; it is not. The elections are a process for choosing the board of directors of a corporation. Corporate directors have a fiduciary duty to the mandate of the corporation. They act on behalf of the public, not the profession. Council members do not represent the people who elected them. The people voting for the directors are not the constituents of elected Council members. Under the current governance model, the profession is choosing those with whom it has confidence.

The second misconception is that candidates for election are debating the issues to be addressed by PEO. As noted, the election campaign is not supposed to be about directing PEO's regulatory activities. Rather it is about electing a suitable person to help lead the regulation of the profession. But more importantly, it is the Council that debates the issues and makes decisions. While the profession is consulted on those matters, the profession does not decide them. The profession is a stakeholder in the discussions and decisions made by the Council. The profession does not control or direct those decisions. The election process does not alter the profession's role.

The third misconception is that PEO pauses its regulatory activities during an election in case the outcome of the election dictates a change in direction for the organization. As a regulator, PEO must fully continue its regulatory activities. Even on policy matters, once Council has made a decision, it speaks with one voice. The organization implements the decision without delay and even existing Council members are obliged to support those actions. Even if a new Council member is elected who disagrees with the previous decision, that Council member must support the actions implementing the decision unless and until the full Council makes a different decision.

In my view, the complaint is misguided and the response made by the CESC was quite appropriate.

### **Appearance of Bias Concern**

A separate concern has been expressed that members of the CESC had nominated candidates for election including for the position for which the complainant is also a candidate.

In my view this does not constitute an appearance of bias disqualifying them from participating in the CESC discussion and response. One of the mandates of the CESC is to "encourage Members to seek nomination for election to the Council". Thus, the members of the CESC are intended to have involvement in the recruiting of candidates.

Further, paragraph 24 of the Election Publicity Procedures document states that “Councillors may use their positions to encourage candidates to stand for PEO office and members to participate in the election process but may not endorse candidates for PEO election.” However, paragraph 8 of the Voting Procedures document states “Signatures on nomination petition forms do not serve as confirmation that a member is formally endorsing a candidate.” Thus, there was technical compliance with the specific rules.

The complaint raised an issue of general policy in which the participation of as many CESC members as possible would be beneficial.

The meeting was held publicly with the results reported promptly to Council. When inquiries were made as to whether any CESC members had nominated a candidate for the position for which the complainant was a candidate, disclosure was promptly made. The process was transparent.

Also, the nature of the action by the CESC was to provide advice. The CESC was not making a decision that would be binding on anyone. The CESC had no authority to provide any remedy other than advice. Also, as noted above, the issue did not relate directly to the conduct of the election, but rather to the actions of PEO during the election.

Having said that, the Council is the Board of Directors of PEO. It is open for the Council to specify how PEO should, or should not, communicate on an issue. While Council has no role in making an election ruling on the complaint, it can direct that in future PEO communicate, or not communicate, on certain issues so long as the direction is consistent with PEO’s governing legislation. That authority of the Council is separate and apart from the election process.

Thus, while it might be prudent to consider whether in the future any member of the CESC, or the Council itself, should nominate candidates for election, in my view there was no appearance of bias on the facts of this case.

### **Council Meeting**

It is up to Council as to whether it will entertain a discussion of this matter at its meeting on February 18, 2022. If the Council discusses the matter, it should keep in mind the following:

1. The Council has no role in this aspect of the election process. It is not an appeal body for the actions or omissions of the Chief Elections Officer or the CESC. It has no authority to make a ruling on the election issues raised in the complaint by the candidate.
2. The Council has no remedy that it can impose. It cannot direct the Chief Elections Officer or the CESC to do anything. It cannot alter or set aside the election or its outcome.
3. If Council is concerned about the events that transpired (e.g., Councillors nominating candidates, communications by PEO), it can establish a process to review the election procedures for future years. I understand that this already occurs now through the CESC annual review of the elections process.

A preliminary issue is whether any member of the Council has a conflict of interest or an appearance of bias in discussing these issues. I understand that some members of Council are currently running for election including for the position that was the subject of the complaint. I also understand that some members of the Council have nominated candidates, including for the

position that was the subject of the complaint. In addition, at least some members of the CESC, including yourself, are on the Council. In my view, given the non-existent role of the Council to intervene in the current election process or to offer any remedy for this election, the discussion is really a high-level policy one that would only affect the conduct of future elections. In my view everyone on Council should be able participate in the discussion regardless of the role that they played in the current election. In fact, having the perspective of multiple participants in the current election process could assist in the discussion. I am reassured in my view by the timing of the Council meeting as the discussion itself cannot reasonably be seen as affecting the current election outcome.

Please let me know if you have any follow up questions.

Yours very truly,

**STEINECKE MACIURA LEBLANC**

A handwritten signature in black ink, appearing to read 'R. Steinecke', written in a cursive style.

Richard Steinecke  
Counsel  
RS/hr