



DRAFT Position Statement

ISSUE: *Clarification of the Practice of Professional Engineering Related to the Ontario Building Code*

PEO POSITION—April 2009

1. The comprehensive licensing and regulatory scheme afforded by the *Professional Engineers Act* (PEA), under which PEO licence holders are fully governed by PEO, protects the public well.
2. PEO licence holders must always make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under their responsibility.
3. Qualifications, scopes of practice, and standards of practice for PEO licence holders are the exclusive jurisdiction of the *Professional Engineers Act*.
4. Building Code Identification Numbers (BCINs) are not needed by any holder of any licence or certificate issued under the *Professional Engineers Act*.
5. The use of a seal by PEO licence holders is not replaced by the use of a BCIN. The two forms of identification are not synonymous.
6. The use of the seal is governed by section 53 of Regulation 941/90, made under the *Professional Engineers Act*. PEO licence holders who provide to the public a service that is within the practice of professional engineering must sign, date and affix the holder's seal to every final drawing, specification, plan, report or other document prepared or checked by the holder as part of the service before it is issued. PEO licence holders are required to sign and seal all submissions to building officials for the purpose of seeking a permit, including the following exceptions listed in sections 12(4) and 12(5) of the *Professional Engineers Act*, which provide exceptions to the requirement to be licensed and/or hold a certificate to practise professional engineering:
 - the preparation or provision of a design for the construction, enlargement or alteration of a building,
 - (a) that is not more than three storeys and not more than 600 square metres in gross area as constructed, enlarged or altered;
 - (b) that is used or intended for one or more of residential occupancy, business occupancy, personal services occupancy, mercantile occupancy or industrial occupancy; and
 - (c) is not designed to house and is not part of an apparatus, process, facility or works the design of which is within the practice of professional engineering.

- the preparation or provision of a design for the construction, enlargement or alteration of a building that is not more than three storeys and that is used or intended for residential occupancy and,
 - (i) that contains one dwelling unit or two attached dwelling units, each of which is constructed directly on grade, or
 - (ii) that is not more than 600 square metres in building area as constructed, enlarged or altered and contains three or more attached dwelling units, each of which is constructed directly on grade, with no dwelling unit constructed above another dwelling unit; or
 - the preparation or provision of a design for alterations within a dwelling unit that will not affect or are not likely to affect fire separations, firewalls, the strength or safety of the building or the safety of persons in the building.
7. Section 34 of the *Professional Engineers Act* requires that as a condition of every Certificate of Authorization (CofA) that the holder of the certificate shall not offer or provide to the public professional engineering services unless the holder is insured in respect of professional liability in accordance with section 74 of the regulations s.74. Section 74(2) and 74(3) provides for exceptions where a holder of a certificate of authorization is not required to be insured against professional liability.
 8. The requirement for a BCIN under the Building Code has no bearing on whether a C of A is needed. The *Professional Engineers Act* governs the requirement to hold a C of A if an entity is in the business of offering or providing professional engineering services to the public. Building officials are not required to ensure that a design professional holds a C of A.
 9. PEO and the Ontario Association of Architects (OAA) are legislated to resolve practice disputes between the two professions. Such resolution is not an issue for a Building official to be concerned with. Where a dispute arises between an architect and a professional engineer or a Certificate of Authorization holder as to whether a service is the exclusive practice of architecture or professional engineering, the Registrar of either PEO or OAA may refer the matter to the Joint Practice Board established under s 52(7) of the *Architects Act* or section 47(4) of the *Professional Engineers Act*. The Joint Practice Board will consider the matter and assist the architect and professional engineer or C of A holder to resolve the dispute in accordance with the rules prescribed in sections 11 and 12 of the respective acts.
 10. PEO and the OAA issued a Joint Bulletin, entitled *Design and General Review Requirements for Buildings in the Province of Ontario*, which encapsulates the scopes of practice contained in their respective acts. This Joint Bulletin was sent to Chief Building Officials on January 3, 2008 to be used as a guide. <http://www.peo.on.ca/Program/PEO-OAAJointBulletin2008.pdf>.
 11. On correspondence related to permits, PEO licence holders may wish to sign their names, followed by their P.Eng. designation (if applicable), and include their PEO licence number on the work, so building officials know the work has been prepared by a PEO licence holder and does not require a BCIN.
 12. Building officials and the public may check a licence holder's licence status and qualifications with PEO by consulting the online directory at www.peo.on.ca, which can be searched by name, or by licence or certificate number.
 13. To seek clarification on matters related to the *Professional Engineers Act* or to file a complaint against a PEO licence or certificate holder, contact PEO.

THE ISSUE OF CLARIFICATION OF THE PRACTICE OF PROFESSIONAL ENGINEERING RELATED TO THE BUILDING CODE

Background

On March 20, 2006, PEO applied to the Ontario Superior Court of Justice to clarify the application of amendments to the *Ontario Building Code* that became effective on January 1, 2006. The amendments purported to require licensed professional engineers to qualify and register under a housing ministry certification scheme to engage in building-related design and general review of construction activities. PEO had long argued the *Building Code* amendments duplicated, contradicted and otherwise interfered with its statutory role to license, discipline and regulate its members and were not authorized by the *Ontario Building Code Act*, 1992.

On May 17, 2007, the court ruled for PEO, finding that certain articles of the *Building Code* are invalid. It also held that certain provisions of the *Building Code Act* and the *Building Code* conflict with the exclusive regulatory jurisdiction of PEO and do not apply to any holder of any licence or certificate issued under the *Professional Engineers Act*.

The court found:

1. Article 2.3.1.1 of the *Building Code* is not authorized by s. 34(1)(10) of the *Building Code Act* and is invalid to the extent that it purports to allocate responsibility for designs between professional engineers and architects and therefore does not apply to PEO and its licence and certificate holders;
2. Article 2.3.1.1(4) of the *Building Code* is not authorized by s. 34 and is invalid and therefore does not apply to PEO and its licence and certificate holders;
3. Clause 1.1(1)(c), subsection 1.1(2), clause 8(2)(c) and subsections 15.11(5) to (7) of the *Building Code Act* conflict with the exclusive regulatory jurisdiction of PEO and do not apply to any holder of any licence or certificate issued under the *Professional Engineers Act*, and
4. Article 2.17 of the *Building Code* conflicts with the exclusive regulatory jurisdiction of PEO and does not apply to any holder of any licence or certificate issued under the *Professional Engineers Act*.

(Note: Renumbering took place in the 2006 Building Code, such that Article 2.3.1.1. of the former Building Code is Article 1.2.1.1. of Division C of the 2006 Building Code; sentence 1.2.1.1.(4) of the former Building Code is sentence 1.2.1.1.(4) of Division C of the 2006 Building Code; section 2.17. of the former Building Code is section 3.2. of Division C of the 2006 Building Code.)

On May 30, 2007, PEO was informed by the province's legal counsel that the province would not be appealing the decision and advised that the ministry intended to work with stakeholders, including engineers, architects and building officials, to monitor the implications of the court's decision on the administration and enforcement of the *Building Code Act*, 1992, and the *Ontario Building Code*.

In September 2007, the Ontario Superior Court of Justice (Divisional Court) found that PEO was entitled to "substantial indemnity costs" for its defence of engineering self-regulation and awarded PEO \$75,000.

Issues

PEO members have reported that some Building Departments will not accept their work in support of a building permit application without a BCIN, if the work is not sealed.

It has been reported to PEO that there is concern that the striking down of the former Article 2.3.1.1. of the *Building Code* as invalid to the extent that it purports to allocate responsibility for designs between professional engineers and architects has left a regulatory gap in relation to who can undertake building design.

Impact on Public Interest

PEO is concerned that there is a belief that the court decision has led to a lack of clarity on the necessary qualifications for undertaking building design. It is unclear to PEO how the court decision has had any affect in this area, since it said only that holders of PEO licences no longer require BCINs and the allocation of responsibility between engineers and architects is properly within the jurisdiction of the *Professional Engineers Act* and the *Architects Act*.

PEO is troubled that there appears still to be a call to include within the *Building Code Act* or the *Building Code* sections or articles establishing qualifications for PEO licence holders for the purpose of issuing a building permit and allocating responsibility to engineers and/or architects. In striking down sections of the *Building Code Act* and of the *Building Code*, the court upheld the exclusive regulatory jurisdiction of PEO over holders of any licence or certificate issued under the *Professional Engineers Act*. The decision of the three Justices was very clear that it is the responsibility of the Ontario Association of Architects (OAA) and PEO to establish and enforce standards of practice and scopes of practice for architects and PEO licence holders.

As a regulator, PEO cannot support overlapping legislative responsibility for its licence holders. Overlapping and/or conflicting legislation is confusing to practitioners and the public, and unnecessarily increases regulatory burden. The *Building Code* and the *Professional Engineers Act* are meant to be complementary: the *Building Code* deals with the public safety objectives of buildings; the *Professional Engineers Act* deals with the qualifications of the professionals who interpret the *Building Code* safety requirements and establishes public accountability mechanisms for their professional practice.

PEO Council is willing to use its regulation-making powers under the PEA to ensure the protection of the public, if there are identified problems with the qualifications, scopes of practice or standards of practice of the holder of any licence or certificate issued by PEO.

PEO Actions to Date

- PEO publishes *Position Statement on Clarification of the Practice of Professional Engineering Related to the Building Code* on its website. Position Statement to be distributed to Building Officials.
- PEO continues to participate in Engineers, Architects and Building Officials (EABO) committee and discuss the implications of the court decision with stakeholders.
- PEO updates its Questions and Answers document on the Building Code legal challenge victory with the subsequent issues arising and republishes on its website at: www.peo.on.ca/registration/Building_Regulation_Registration_Program.htm. The website page also includes links to the legal decision (<http://www.peo.on.ca/Legal/2007canlii.pdf>) and the Ministry of Municipal Affairs and Housing's Questions and Answers (<http://www.obc.mah.gov.on.ca/Page2955.aspx>).
- PEO and the OAA issue a Joint Bulletin, entitled *Design and General Review Requirements for Buildings in the Province of Ontario*, which encapsulates the scopes of practice contained in their respective acts. This Joint Bulletin was sent to Chief Building Officials on January 3, 2008 to be used as a guide. Building Officials were advised they could submit all permit application documents that do not conform to the chart in the bulletin to either OAA or PEO; a Joint Liaison Committee was created to deal with matters that are forwarded.