Taking Care of Business

by Dwight Hamilton

For over 30 years, a Certificate of Authorization (C of A) has been required by businesses in Ontario that offer engineering services to the public. Few topics concerning PEO generate as much controversy as the C of A. Some members don't know if or why they need it and it's been suggested that the public has no idea of its merits or legal requirements. Does it really protect the public interest? A PEO task group investigates.

Currently, engineering is the only profession in Ontario whose members are entitled to carry on their practices within corporations. Lawyers, doctors and accountants, although able to incorporate the business shell that provides them with administrative services, must practise their profession as individuals. Because of this ability to incorporate, engineers who sell their engineering services to the public must hold a C of A, as PEO and the provincial government consider it to be a vital tool required to prevent the illegal practice of engineering.

The C of A was intended to provide PEO with the statutory power to regulate the activities of business entities. But "although the intent is noble, the task force has concluded that the procedures that PEO has developed for the C of A must be improved if it is truly to achieve its purpose," says Norbert Becker, PhD, P.Eng., a member of the task group.

More protection?

The first question the Certificate of Authorization Review Task Group examined was whether the C of A offers any additional protection to the public. It agreed that the C of A is needed to regulate corporations and partnerships, but opinion is split on whether sole proprietorships need one. Some say that it is unnecessary to regulate these practitioners, who are already accountable under the P.Eng. "The C of A calls into question the validity of the original licence," says Paul Martin, P.Eng., another task group member. "You can't say you need the P.Eng. to practise engineering, but you can practise only as an employee, in which case you don't really need one anyway because someone else by definition is taking responsibility for the work." However, a legal opinion sought by PEO pointed out the distinction between a sole practitioner (i.e. an individual licensee) and a sole proprietorship, which is a business. The lawyer concluded that where the *Professional Engineers Act* refers to a "natural person" it meant a sole proprietorship (i.e. a business enterprise) rather than a sole practitioner, which has a "narrower meaning."

After much debate, a majority of the task group members came to the conclusion that sole proprietorships should not be exempted from holding C of As for a few reasons. First, it provides a means for ensuring that all entities engaged in offering engineering services to the public "play by the same rules,"

explains Becker. C of A holders must carry professional liability insurance (or disclose the fact that they're not insured to each client and receive a signed acknowledgement from them), define their scope and areas of practice, and accept responsibility for their business as well as professional obligations.

It's also intended to give practitioners like moonlighters and retirees from other areas of practice pause so that they will "stop and think about the legal and professional ramifications" of what they're doing, he says.

Lastly, the C of A offers a mechanism whereby PEO could, if necessary, impose more stringent requirements on a minority of its members, rather than involving every P.Eng. with matters like continuing education and specialty qualifications in response to demand-side legislation, Becker adds. This would help the profession deal with calls from government for additional qualification for P.Engs involved in such areas as brownfields remediation and building code-related projects.

PEO's enforcement department locates and acts against unlicensed people who are practising engineering or identifying themselves as professional engineers. This group also locates businesses operating without a C of A that provide or advertise that they provide engineering services, include "engineering" in the business name, or use the PEO seal in their advertising. If an unlicensed individual is found to be practising engineering, PEO can prosecute that person for violating the *Professional Engineers Act*. But if a business manufactures a customized product that involves the practice of engineering, PEO might not be able to take action without the C of A vehicle. Without a list of firms that are permitted to practise engineering, it would be a monumental task to trace those that are not.

Does the C of A extend additional public protection through its liability insurance requirements? Despite the fact that most members of the task group feel that compulsory insurance should not be considered public protection, since it offers compensation only after damage or injury has occurred (and then only after legal action has been taken), this is not the view of the Canadian courts.

The courts view the compensation of wronged parties as public protection. As a result, the task group feels that, because of its disclosure option, the C of A does not provide adequate recourse for the public. Over 30 per cent of C of As have opted for compulsory disclosure but PEO does not monitor whether these entities are providing clients with notice. If this option is retained, the task group feels PEO should have inspection powers built into the Act in order to enable it to follow up on disclosure notifications.

No substitute for P.Eng.

The *Professional Engineer's Act* defines two instruments that PEO is empowered to use for the purpose of regulating the practice of engineering. The main one is the exclusive right to practise—the P.Eng. licence. A licence is the basis for all professions as it entitles an individual, who meets standards appropriate for the profession, to perform the activities reserved for it. In the case of PEO, the licence is either the full P.Eng., or under specific conditions, the limited and temporary licences.

These are required for anyone who practises engineering, regardless of whether they practise in an area designated by legislation,offer services to the public, are sole practitioners or are employees of a corporation.

The other instrument, the Certificate of Authorization (C of A), was introduced in the 1969 version of the *Professional Engineers Act* because previous versions did not give the association any regulatory mechanisms to use in relation to corporations, partnerships or associations of persons providing engineering services to the public, except those exercised over individual P.Engs within these entities. The C of A is required for any "person" offering or engaging in the business of providing to the public services that are within the practice of engineering.

It is important to note that the legislation refers to providing or offering engineering services to the public as a "business." It clearly intends to distinguish the practice of engineering (represented by the P.Eng.) from the business of providing engineering services. Accountability to the public for the professional activities of a P.Eng. practising within a C of A firm still rests with the individual licence holder who performed the engineering work. Unlike civil liability, professional liability cannot be transferred from the individual to the business entity.

Athough the C of A is not a licence in the sense of ensuring the qualification of the holder to practise professional engineering (only the P.Eng. entitles an individual to practise), it is a licence in the sense that only those holding it are permitted to engage in the business of offering or providing engineering to the public. To ensure the qualifications of C of A holders for the services they provide, the C of A requires an applicant to identify the professional engineers that will take responsibility for the engineering work performed on behalf of the firm. The C of A is the means by which PEO assures that a business entity that claims to provide engineering to the public, actually has a P.Eng. performing or supervising that work.

What's business up to?

One of the toughest areas the task group explored was whether the current C of A process is effectively addressing the impact of the business entity on the practice of engineering. It considered whether limitations should be imposed on practitioners who are listed on multiple certificates and, if so, what those limits should be, but no consensus was reached. However, the task group suggested that:

- PEO should assist licensees by ensuring that C of A holders provide proper working conditions that prevent the overriding of P.Eng. decisions by non-P.Engs and that give P.Engs more clout in controlling engineering activities of the firm;
- every P.Eng. listed on a C of A should sign the application to indicate they are aware of their responsibilities;
- PEO should provide a document describing their responsibilities to each P.Eng. signatory of a C of A;
- all P.Engs listed on a C of A should indicate what type of employment arrangement they have with the business and whether they are listed on any other C of A;
- every P.Eng. listed on a C of A be required to notify PEO when they leave the business or the business arrangement is changed; and
- PEO should develop policies to stipulate the number of C of As that a P.Eng. can be a signatory to, whether moonlighters and volunteers require a C of A, and how many engineers must be listed on the C of A of a multi-disciplinary firm.

Since only a minority of PEO members are listed on C of As, the task group believes that the lion's share of engineering activity in Ontario is not being delivered by C of A holders. But it suggests that PEO clarify the types of entities (e.g. moonlighters, municipalities, design-build firms, universities) that can qualify for a C of A.

As well, it is recommended that PEO develop an equitable fee structure for the C of A. At present, sole practitioners pony up the same amount as large consulting firms, which has proven very controversial.

More implications

Some members of the task group suggested that the Consulting Engineer (CE) designation could be merged with the C of A to provide a more meaningful CE designation. However, the authorization to provide engineering services to the public would then sit with the practitioner rather than the firm, denying PEO any means of registering or regulating the engineering activity of business entities.

It would also mean that non-consulting firms like manufacturers of custom equipment and government agencies that need a C of A in order to carry out their business would need to have employees who were designated CEs in order to meet the requirements.

The Consulting Engineer Designation Committee (CEDC) feels that ideally these two programs should be merged but that this should not be a cause for relaxation of the CE qualifications. CEDC members suggested that all C of A holders should be Designated Consulting Engineers and that if the standards of the C of A were improved to the levels of the CE, that designation could be eliminated.

The task group suggests that the C of A would benefit from a peer review process similar to that used by the CEDC. Then PEO could attest to the qualifications of engineers taking responsibility for a C of A entity's engineering operations. The peer review process would not be able to deny a C of A to an applicant, however.

The task group also sees the C of A as a natural mechanism for processing certifications in areas of practice such as building design, brownfields remediation and water treatment. Proposed legislation that may require professional accreditation over and above the P.Eng. for engineers working in these areas could be accommodated by issuing a qualified C of A in these areas affixed to P.Engs who have been accredited.

Whatever directions PEO takes on the many issues surrounding the C of A, the debates are unlikely to end soon. "I've served on more than 20 PEO committees and task groups since the early '80s," says Becker. "This one has been more exasperating than all of the others combined. It stands as a testament to the diversity of opinion amongst PEO members on some important issues. I hope Council will appreciate and respect the difficulty of the task they assigned to us. While we anticipate they will wish to debate our conclusions and recommendations, my personal hope is that they, like us, will be willing to move from polar positions to a consensus that will give PEO staff the opportunity to flesh-out the procedural changes required for the C of A process to become an effective regulatory mechanism." ◆

In the beginning

The process that led to the Certificate of Authorization (C of A) was initiated in the early 1950s when a precedent established in a legal case meant that PEO would not be able to prosecute successfully a corporation that violated the provisions of the *Professional Engineers Act*, if it had no professional engineers among its principals and employees.

Although the Act was amended in 1952 to require corporations practising engineering in Ontario to do so under the supervision of a P.Eng., it lacked a mechanism for the association to use to ensure that this requirement was met. For a variety of factors, it took nearly 20 years for PEO and lawmakers to arrive at a satisfactory revision to the Act, and in 1969 a new Act that included the C of A was proclaimed into law.

In 1978, J.R.S. Pritchard, a law professor at the University of Toronto, wrote a paper on incorporation of professional practices for the provincial government. He examined the non-tax pros and cons of incorporation as well as limited liability, accountability and beneficial ownership. The paper recommended that professional firms obtain a certificate of authorization, similar to the one in engineering, that provides the appropriate regulatory body with information useful in regulating its activities. Another point stressed was that both the firm and the individual professional should be subject to disciplinary action in cases of misconduct.

"Indeed," he wrote, "it may well be appropriate to extend these requirements to all professional firms, *whether incorporated or not*, [emphasis added] in order to ensure equality of treatment in the provision of information and accountability to disciplinary proceedings."

In 1980, when the Ontario government was considering how to extend the right of incorporation to other professions, a report stated that "to ensure that the interests of professional governing bodies are safeguarded, legislation could stipulate that incorporation does not create a veil behind which practitioners could hide from the regulatory and disciplinary action of their governing bodies. This could be done most effectively by requiring professional firms, as well as their individual professional members, to be licensed by the governing body." PEO's C of A was suggested as the model to be used by all professions pursuing the right to incorporate.