



The industrial exception has been cited for much of what ails Ontario P.Engs.

WHAT IS TO BE MADE OF THE INDUSTRIAL EXCEPTION?

BY MICHAEL MASTROMATTEO

PEO's current initiative to step up its enforcement efforts and measure the extent of unreported violations of the *Professional Engineers Act* (PEA) invites speculation as to the impact of the so-called industrial exception on the practice of professional engineering by unlicensed people.

As evidenced by member comments over the last 24 years, the exception

How valid are the concerns? As PEO steps up its overall enforcement efforts, the industrial exception will undoubtedly come under new scrutiny.

appears to be an issue that refuses to go quietly into that good night, having been described as ranging from a giant loophole for unlicensed practice, to a red herring for those generally dissatisfied with PEO's enforcement of the licensing provisions of the PEA. Reference to the industrial exception often crops up at Council election time, and is cited by candidates, past and present, as a challenge PEO should take up with utmost urgency.

Industrial exception 101

Included as part of a 1984 revision to the PEA arising from a 1977-1980 review of the professions of engineering, architecture, public accounting and law by the Professional Organizations Committee (POC) of the Ontario Law Reform Commission, the industrial exception was intended to allow a narrow and well-defined exception to the requirement that professional engineers take responsibility for all work falling within the practice of professional engineering as defined in the Act.

The exception was the result of fairly intense negotiations involving PEO, industry groups and the Ontario government as to how much regulatory oversight is required of engineering practice in industry, especially that which has less appreciable impact on public safety and protection. In its staff study of the professions, the POC's research secretariat floated the idea of a full industrial and government exemption from the requirement to be licensed for engineering practice, similar to the exemptions that exist in the United States. PEO argued vigorously against a full exemption, using public safety and licence protection arguments.

The result, as described in section 12(3)(a) of the PEA, is something of a compromise, allowing non-licensed people to practise professional engineering only in relation to machinery or equipment, other than equipment of a structural nature, for use in their employer's facilities in the production of products by their employer.

In essence, the exception means non-engineers can design machinery or equipment to produce products for their employer at their employer's facility. However, other legislation (often called demand-side legislation) also exists, specifying requirements for professional engineers to design electrical systems, buildings or other structures, and pressure vessels, no matter where used. Under regulations to the *Occupational Health and Safety Act*, a P.Eng. must sign a Pre-start Health and Safety Review attesting industrial production machinery and equipment is safe to use, no matter who designs, alters or installs it.

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The industrial exception does not apply to the design of products, if such design is within the practice of professional engineering. It also does not apply to those designing, evaluating, commissioning or otherwise practising engineering in relation to production equipment and facilities for someone other than their employer. In this situation, not only would the person taking responsibility for the engineering need to be a professional engineer, but the entity offering the service would need to hold a Certificate of Authorization.

A heated debate

Although PEO Council recently chose not to include tackling the industrial exception as one of its priority projects for 2007-2008, the exception continues to generate heated debate within the wider engineering community.

PEO President-elect David Adams, P.Eng., in a January 2007 address to the York Chapter, suggested the exception is a factor in why many engineering graduates do not seek licensure.

"Every year, our engineering family in Ontario commences with 4500 new graduates, of whom at least 70 per cent turn their backs on us, do not enter our internship program, or seek registration as professional engineers," Adams said. "What has gone wrong with our profession to the extent that, in each year, only from 17 to 30 per cent of new graduates seek to practise under the engineering Act?"

Adams said an analysis of the situation points to the industrial exception as the culprit. "Since the industrial exemption was inserted into our Act in 1984, there has been a steady decline in the number of engineers seeking a licence to practise," he said. "It is time we made the

government fully aware of this lapse in public protection and the folly it has wreaked on our profession."

But not every engineer shares Adams' depth of feeling on this issue.

In 1997, PEO convened a focus group of engineers employed in industry to discuss the exception, its impact on public safety, and whether PEO should more actively enforce the PEA's requirements for licensure in industry. At the session, some participants acknowledged there might be instances of engineering work in industry being done by unlicensed people, but said such situations do not, in themselves, constitute a significant regulatory lapse or a public safety concern. In fact, focus group participants expressed more concern with a possible backlash against PEO should the regulator vigorously pursue an issue with no public safety ramifications.

Some participants also expressed the view the issue could be interpreted more in terms of a struggle over turf and PEO fighting to broaden the base of work for engineers. The issue could well be seen, they said, as one of economics rather than licensing.

Meanwhile, a 2002 survey of enforcement issues by Engineers Canada (then the Canadian Council of Professional Engineers) noted that most Canadian engineers have only a limited appreciation of their licensing bodies' enforcement efforts, and tend to assume that abuses of the legislated licensure requirements are widespread.

Busting the myth

Former PEO President Ken McMartin, P.Eng., chaired a PEO strategic plan task group on the industrial exception in 1997-1998, and was subsequently the first chair of the Enforcement Committee. While chair, he wrote a position paper on the



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industrial exception, which was endorsed by the committee and published in the January/February 2003 issue of *Engineering Dimensions* to raise awareness among all members about the extent of the exception.

McMartin acknowledged the confusion surrounding the question, but said there is little evidence to indicate the exception is abused in industry. And, as emphasized often by PEO enforcement staff, successful prosecution of PEA violations relies on solid evidence, rather than assumptions and perceptions. His comments were in line with research undertaken by a communications consultant who prepared a plan for PEO to raise awareness of the licensure requirements of the PEA and their value.

In a January 2008 interview with *Engineering Dimensions*, McMartin expanded on his original position paper, and says he stands by his use of the word “myth” in describing many members’ belief there is a blanket exemption from licensure for engineering practised in industry.

“The term ‘myth’ is applied because we felt that PEO has all the power it needs, and we as a profession and our members are propagating the idea of an industrial exemption,” McMartin said. “In Ontario, we have the exception under section 12(3)(a) of the Act, which is very narrow in scope, and now with the requirement for a P.Eng. to sign off on Pre-Start Health and Safety Reviews under the *Occupational Health and Safety Act*, the exception is even tighter.”

McMartin speculated the low number of recent engineering graduates applying for a P.Eng. licence may not necessarily be the result of the industrial exception. “Members jump to the conclusion that an ‘engineer’ in an industrial setting, by not becoming a member [of PEO], is using the exception as a way of not becoming licensed,” he said. “In fact, the engineer may just not want to become licensed, or feels he or she is not doing professional engineering. He or she may not understand that, technically, all those taking responsibility for professional engineering work should be licensed.”

He said informing members of the true, very limited, scope of the industrial exception is aimed at helping engineers within industry come to the decision on their own that they’re required to be licensed for the work they do. “The courts are not the way to move forward, and will only alienate us more with non-licensed engineering graduates,” he says.

For his part, President-elect Adams believes the existence of an industrial exception fosters uncertainty within industry about who needs to be licensed and who doesn’t. In a February 22 interview with *Engineering Dimensions*, he said he feels the current situation “is very deceiving to the public. With that loophole—big enough to drive a truck through—how can we pretend that we license the profession?”

Adams says that despite some indications that reviewing the PEA is not a high

priority for the Ontario attorney general, PEO must continue to push for changes to the industrial exception. “It’s been 24 years since the Act was significantly reviewed and the time is ripe for this matter to be opened again,” he said.

McMartin, however, points to a potential downside to tinkering with the industrial exception. “If you seek to eliminate section 12(3)(a) of the PEA, you also must seek to eliminate section 12(3)(b),” McMartin warns, “because this latter section is likely a bigger problem for public safety. Under section 12(3)(b), one professional engineer can supervise and take responsibility for the engineering work of 10, 20 or 200 unlicensed people. By trying to change this section of the Act, you may inadvertently create a full-blown industrial and government exception, because there are groups and lobby organizations out there looking for any opportunity that may arise when an Act is opened up. By doing what might be deemed a simple task or Act change, you may end up with a can of worms and a much weaker Act.”

Walking a fine line

The ongoing debate on what we’re to make of the industrial exception underscores the fine line PEO must walk in determining whether an issue is advocacy or regulation of engineering practice in the public interest. If unlicensed people in industry are responsible for professional engineering work that is a danger to public safety, clearly PEO is required to step in and enforce the licensing provisions of the PEA. In the absence of such a demonstrable public safety case, however, PEO must walk softly or risk being perceived as protecting turf for professional engineers, a clear advocacy issue. Such a perception could be damaging to PEO should it eventually request the attorney general to reopen the PEA with a view to at least making clearer—and at best eliminating—the industrial exception. To proceed in this direction without chancing the taint of self-interest, PEO needs to ascertain if the industrial exception, as it currently exists, is a threat to the public interest, and be able to prove it. ❖