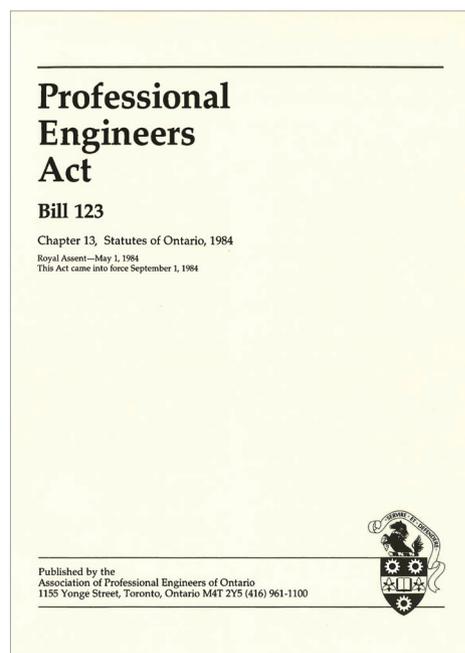


ONTARIO'S ENGINEERING ACT THEN & NOW: reflections on the past 30 years



1984

Updating the decades-old professional engineering act might not be easy. But with a markedly different regulatory landscape today, PEO remains alert to finding ways to make the act more in tune with the times. By Michael Mastromatteo

Pearls are the traditional gift marking the 30th anniversary of a wedding or other significant life-changing event.

But when it comes to marking the 30th anniversary of Ontario's latest engineering act, the jury is out on what sort of celebration might be in order.

Thirty years ago, the engineering community in Ontario was abuzz with anticipation about imminent changes to the province's *Professional Engineers Act* (PEA).

The anticipation flowed from the wide-ranging work of the Ontario attorney general's Professional Organizations Committee (POC), which, since 1976 and under the direction of the Law Reform Commission, had been examining several of Ontario's self-regulated professions with a view to modernizing their enabling statutes.

The POC's work had, in turn, been influenced by civil rights studies undertaken in the 1960s by Ontario Justice James McRuer (McRuer report), which argued, in part, that self-regulated professions (among others) should become more subject to due process and legislative oversight in exchange for their self-regulating privileges.

PEO was naturally curious about how the revised engineering act would change regulation of the profession. Among the pressing concerns for

the regulator at the time were the delineation between the work of engineers and architects; the need for mandatory professional liability insurance for Certificate of Authorization (C of A) holders; and an extension of the existing C of A for those offering or providing engineering services to the public to sole practitioners.

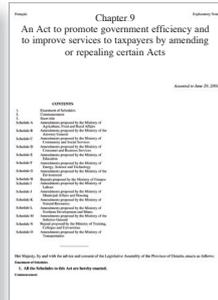
Retired lawyer Donald Smith, LLB, of the law firm McCarthy & McCarthy (now McCarthy Tétrault), had been retained by PEO in the early 1980s to provide legal opinions of existing engineering legislation and to help the regulator spell out its expectations for a new engineering act. As an engineering graduate and a member of PEO since 1956 (now resigned), Smith had good insight as to how proposed legislative amendments might translate into professional practice and regulatory issues.

In a February 6 interview with *Engineering Dimensions*, Smith recalled that, at the time,

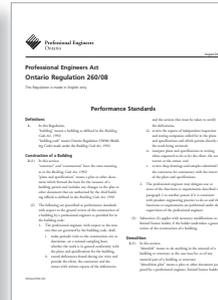
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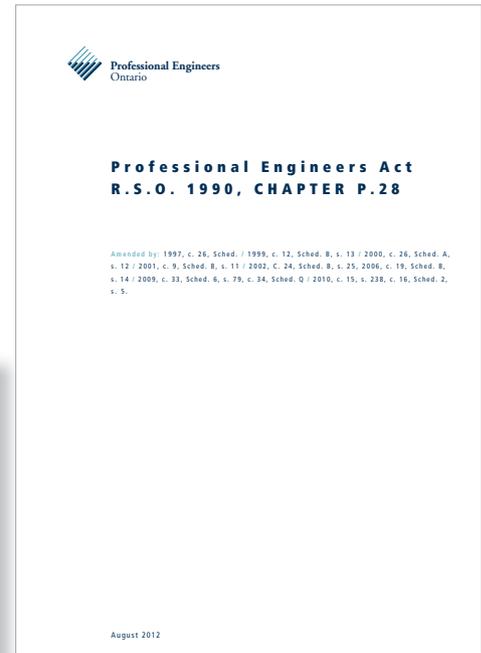
2008



2010



2014



PEO was especially concerned about clearly delineating the scopes of practice between engineers and architects, redefining the core objects of engineering regulation, and determining whether some administrative procedures should be ascribed to regulation or left under the overarching act.

“I recall that the previous act had a long laundry list of what constituted engineering and what didn’t, and that it led to a lot of arguments between engineers and architects as to who was supposed to do what,” Smith said.

In fact, a professional practice agreement, some three years in the making and covering a number of areas that had been in dispute between PEO and the Ontario Association of Architects (OAA), was jointly announced in early 1980 by then PEO President J.E. (Tim) Benson, P.Eng., FEC, and then OAA President Irving Rayman, BArch, MRAIC. Included in the agreement were principles covering overlap of areas of practice (basically, that architects should do architecture and engineers should do engineering), the selection of a consultant, and joint corporate practice. The agreement also envisioned establishing a Joint Practice Board, with equal representation

from both bodies, to settle ongoing practice issues that might arise. This PEO-OAA joint agreement was endorsed by the POC, and eventually incorporated into both the new *Professional Engineers and Architects* acts.

Finally, after years of consultation and give and take, the province introduced the new act (Bill 123) for first reading in the legislature on November 17, 1983. It received third and final reading on April 26, 1984 and royal assent on May 1.

When introducing the bill for first reading, then Attorney General Roy McMurtry said the new act was directed “to meet the particular needs of PEO [and the Ontario Association of Architects] in governing their members,” as well as containing “new and important mechanisms for demonstrating to the public that the organizations are there for public protection and not for private gain.”

The new act was new in many ways. Chief among the changes was a revised definition of professional engineering and a restructuring of council to include up to 12 councillors to be appointed by the lieutenant governor-in-council. It also established several new committees and processes in both the

licensing and complaints and discipline areas: the Registration Committee to hear licensing matters not related to academic or experience qualifications with provision of appeal to the divisional court; the Academic Requirements Committee to make determinations of academic qualifications; the Experience Requirements Committee to make determinations of experience qualifications; the Complaints Committee to investigate complaints against licence and Certificate of Authorization (C of A) holders with power to refer matters to a Discipline Committee; the Discipline Committee to hear and determine specific allegations of professional misconduct or incompetence with power to impose a wide range of penalties and provision for appeal to divisional court; the Fees Mediation Committee to mediate complaints about fees; and the office of complaints review councillor with power to examine the procedures for the treatment of complaints by PEO and to review the treatment of specific complaints. The new act also made a distinction between the practice of professional engineering, for which licences would be issued, and the business of providing engineering services, for which Cs of A would be issued; provided for the issuance of a new limited licence; enunciated new, expanded objects for PEO; and gave authority to PEO council to make regulations subject to the approval of the lieutenant governor-in-council with prior review of the attorney general, who also would be permitted to advise council on implementing the act and regulations.

REGULATIONS AND BYLAWS

Following royal assent, the government unexpectedly scheduled proclamation of the new act into force for September 1, 1984, prompting a “crash program on preparing the Regulations and By-laws as there are many significant changes to the present legislation,” according to a “Stop the Press” notice in the July/August 1984 issue of *Engineering Dimensions*. Accordingly, PEO council met in a special session on August 10 to review the latest draft of the regulation. The government had provided this draft

to PEO just three days prior to the council session, and had scheduled the regulation to go to the Standing Committee on Regulations for government approval on August 14.

At the August 10 meeting, lawyer Smith led council through the few substantial changes in the draft and assured council he and then Registrar Art Wardell, P.Eng., were satisfied most of the government’s changes were cosmetic, involving grammar and tense adjustments with no change in meaning. The two areas of substantial change in the government’s draft dealt with temporary licences for engineers who were not members of the association, and the removal from the registrar of any discretionary powers regarding granting of licences or assigning exams. Smith told council that as the regulation was written, the procedures governing the areas were not

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ALAN CAGNEY, P.ENG., PEO EXECUTIVE DIRECTOR, 1984

substantially different than those under the present legislation, and that, given the lack of time for review, he and the registrar thought it better to go with procedures that had been tested than to try for something new that might prove unworkable. In fact, he told council, it really had no choice but to approve the regulation as provided, because the new act without the regulation is “a carriage without a horse in front. It won’t go” and the August 14 meeting of the regulation committee was the only opportunity for government approval prior to September 1.

“The regulations are 99 ½ per cent what you people [council] have studied at great length and approved,” he added. “It still gives you the ability to operate on September 1.”

Along with its approval, council also sent the government a letter advising that it would be studying the regulations further and would be proposing future changes to them.

Regulation 538/84 as PEO’s regulation was filed (now 941/90) provided the details for implementing the act. It also prescribes the code of ethics to which PEO practitioners subscribe, and defines incompetence and professional misconduct for discipline purposes. PEO’s By-Law No. 1, speedily approved by member letter ballot over that same summer, was concerned with PEO’s administrative and domestic details, including specifying the annual licence fee, establishing chapters, governing meetings of council and of members, and dealing with officials and employees.

In writing about the new act and regulation in the July/August 1984 issue of *Engineering Dimensions*, then PEO Executive Director Alan Cagney, P.Eng., stated: “The new act and regulations are far from perfect in that they will not satisfy all professional engineers, and they will be much more difficult to administer than was the case in the past. But from a public perspective, the new act reflects the social realities of this decade

and embraces the principles which must underlie reservation of occupations to, and self-governance by, professionals.”

Nevertheless, PEO was generally onside with the new legislation, especially its sections 7 and 8, which define the areas in which PEO council may make regulations and bylaws, seeing them as an opportunity to bring more flexibility and responsiveness to regulation of engineering.

NUMBER OF REVISIONS

The changes of 1983-1984 were by no means the first time the engineering act had been amended. In fact, the act has been revised many times between 1937, when it became necessary to be a member of the association to practise professional engineering, and 2010—each amendment aimed at strengthening PEO’s ability to regulate the profession in a number of ways, and expanding the scope of engineering practice to account for new developments and emerging disciplines.

There have also been significant changes to the regulation since 1984, beginning in 1985 and continuing today. A recent major change came in July 2008 when PEO created a new Regulation 260, to consolidate performance standards for practitioners. The first two performance standards cover general review of construction of a building as provided for in the building code (which was previously part of Regulation 941/90) and demolition (created as a consequence of the Uptown Theatre collapse).

Additional changes to Regulation 941, some dating from 2005, are still being finalized to both PEO’s and the legislative drafters’ satisfaction. Key is to ensure the changes are, in fact, authorized by the PEA, and will not create unintended consequences when implemented.

The most recent changes to the PEA are the result of the Ontario government’s *Open for Business Act, 2010* (Bill 68/10), which sought to increase the clarity and efficiency of a number of pieces of legislation, while decreasing “red tape.” Upon the invitation of the government, PEO used the bill to make many long-desired changes, in particular a new definition of professional engineering (in tune with the national definition) and the elimination of the requirement to be a Canadian citizen or have the status of a permanent resident to become licensed. The bill also

afforded an opportunity to repeal the so-called “industrial exception,” which since 1984 had been a thorn in the side of engineering regulation in Ontario.

Enacted as section 12(3)(a) of the PEA, the exception allows non-licensed people to practise professional engineering 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 employers.

It was understood in 1984 that the industrial (or machinery) exception would 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.

In its review of self-regulated professions, the POC staff study had initially proposed 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 strenuously against such a full exemption, a position with which the POC ultimately agreed. When PEO’s new act was eventually introduced, however, important checks and balances to enable the exception to function as intended were not also put in place, making regulation in industry difficult ever since (see “How we got the industrial exception,” *Engineering Dimensions*, November/December 2013, p. 30).

To close this regulatory gap, the government included the repeal in the *Open for Business Act* amendments to the PEA, but put off proclamation of the repeal into effect to a future date, to enable PEO to alert stakeholders to the implications of a repeal and work with them to lessen potential for disruption to their operations. In January 2013, however, the government announced a March 1 date for proclamation, which it postponed in late February, changing the date to September 1. In June, the province backed away from its September 1 date and has yet to set a new date. PEO is continuing to work with the government and other stakeholders to have the amendment—which remains on the books until 2020—proclaimed.

TODAY’S PEA

Kim Allen, P.Eng., FEC, CEO of Engineers Canada, is in a unique position to evaluate the significance of the engineering act as it has matured. PEO’s CEO/registrar for 10 years prior to moving to Engineers Canada in September 2012, Allen was a key player in working with PEO council to seize Bill 68 as an opportunity to spearhead important changes to the PEA.

“The PEA has been an effective instrument to protect the public interest,” Allen said February 3. “However, the structure of the act has been a cumbersome tool for PEO to excel as a regulator. The time has come to replace the current act with a less prescriptive act that gives PEO all the tools it needs to regulate the practice of professional engineering and govern its registrants in the global economy.”

He suggests PEO council should have broader powers to create certain regulations and administrative bylaws to regulate the practice and govern licence and certificate holders. He also notes that PEO has sought several legal interpretations of the act since 1984, and established various task forces to examine the act's limitations.

"For example," Allen says, "the act was designed when the vast majority of applicants graduated from an accredited Canadian engineering school and got their experience in Canada. However, today, a large number of applicants are internationally trained. The act is [also] silent on trade agreements and mutual recognition agreements that are also in the public interest. A modern act would provide council with the authority to deal effectively and efficiently with today's realities."

Allen describes the amendments enabled by the 2010 *Open for Business Act* as "a tune-up" for a sluggishly performing 1984 engineering act. "Unfortunately, three years later the tune-up is not complete as not all amendments have been proclaimed, especially the repeal of the so-called industrial exception."

In addition, he says, he would like to see further act changes to give PEO and its members more flexibility in determining the size and composition of council, as well as the authority to create new classes of licence.

Ultimately, Allen says, he would prefer to see act changes that harmonize Ontario's engineering regulatory practices with national or even international standards: "A more enabling act would make it easier for council to achieve consistency with Canadian and international regulatory standards and practices to protect and serve the public interest. All Canadians, regardless of where they live in the country, deserve the same level of safety (see "Consistent approaches to regulation—a better way to serve public interest?," *Engineering Dimensions*, January/February 2014, p. 28).

ASSESSING THE ACT'S EFFECTIVENESS

PEO's Legislation Committee, chaired by Bob Dony, PhD, P.Eng., is involved in assessing the effectiveness and challenges imposed by the current engineering act.

In a February 7 interview, Dony said the committee is chiefly concerned at present with the progress of regulation changes proposed over the years to improve and enhance the regulatory landscape, but not yet implemented. However, providing the attorney general's office with a detailed outline of PEO's concerns with the current legislation, emphasizing the limitations or outdated sections, is also on the committee's workplan.

"There are a large number of regulation changes that are in the pipeline that may be a consequence of wording in the (old) act," Dony says, adding that it has been difficult for PEO to ensure any regulation changes remain in accord with the act as written. "In other words,

the act has to legitimize the power of the regulation [and] give us the power to pass that regulation."

Dony notes that staff in the attorney general's office have pointed out that other senior self-regulating professions in Ontario have much newer enabling legislation at their disposal. Accordingly, he says, the Legislation Committee remains alert to potential updates: "We would very much like the opportunity to take a look at the engineers act, considering that it's 30 years old, and [to determine] if it's effective for us now. Are there unintended consequences of some of the wording that the drafters 30 years ago did not anticipate?"

However, before PEO can press forward with additional act or even regulation changes, it will have to satisfy the attorney general that such changes are fully warranted, having been advised recently by the attorney general that requests to review legislation and regulations must be accompanied by a full analysis of the impact or ramifications of what is being proposed. The same advice was given to Ontario's other regulators.

Yet, despite some unfinished business, the most recent amendments to the PEA have opened the door to potential harmonization of engineering legislation and regulation across Canada, toward the goal of full national mobility for all licence holders, although the delay in repealing section 12(3)(a) remains a barrier to achieving this goal, as Engineers Canada and several of its constituent associations have noted in letters to the attorney general.

Jordan Max, PEO's policy manager, says it's important for the regulator to continually examine its act and regulations in the interest of smoother operations: "If we want to start pushing for a new act, we need to demonstrate that the tools no longer work, or that the operating environment has changed significantly."

For his part, Dony suggests that while there may be opportunities to revisit the act with a view to updating it, PEO must carefully consider such action. "Opening the PEA is very much like Canada opening up the constitution," he says. "Once you open it up, you have to make sure you get it absolutely right." Σ