

A PROFESSIONAL ENGINEER'S DUTIES UNDER OTHER LEGISLATION

By José Vera, P.Eng., MEPP

It's important for professional engineers to gain a basic understanding of their obligations under legislation other than the *Professional Engineers Act* (PEA), such as engineering equipment certifications under the *Occupational Health and Safety Act* (OHSA). The OHSA contains the following reference to professional engineers under Part VIII Enforcement, Powers of Inspector:

- 54 (1) An inspector may, for the purposes of carrying out his or her duties and powers under this act and the regulations...
- (k) require in writing an employer to have equipment, machinery or devices tested, at the expense of the employer, by a professional engineer and to provide, at the expense of the employer, a report bearing the seal and signature of the professional engineer stating that the equipment, machine or device is not likely to endanger a worker;
- (l) require in writing that any equipment, machinery or device not be used pending testing described in clause (k)...

On various occasions, PEO's practice advisory team has received the following question: What are the obligations of professional engineers providing the certification that "equipment, machine or device is not likely to endanger a worker"? The practice advisory team's role is to only comment on professional obligations of practitioners under the PEA and not provide interpretations of other acts. Consequently, practitioners seeking interpretation of the OHSA or other acts should obtain legal advice from their own lawyers. However, because the question has been raised on numerous occasions, below is a process developed by the practice advisory team for gaining a basic understanding of the obligations of professional engineers providing equipment certifications

under the OHSA. This analytical process can also be used by engineers seeking to better understand their obligations under other acts.

READ LEGISLATION IN ITS ENTIRETY

To gain a basic understanding of any act, whether it be the PEA or the OHSA, it is key to read these acts and their regulations in their entirety. A common mistake is to place too much focus on one section, and thereby miss the purpose and context of the legislation. This concept was summarized by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1581/index.do>) with the following sentence: "The words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of parliament."

In this spirit of reading acts in their entire context, note that in the OHSA the terms "equipment, machine, device or thing" and "likely to endanger" also appear under section 43(3) (a) as follows:

Refusal to work

- (3) A worker may refuse to work or do particular work where he or she has reason to believe that,
- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

From the above, it follows that in a refusal to work scenario an inspector may enforce section 54(1)(k), for example, requiring the employer to have some particular equipment tested by a professional engineer and to provide a professional engineering report stating that the equipment is not likely to endanger a worker. Therefore, it is reasonable to conclude that section 54(1)(k) can be linked to a worker's right to refuse work that is

likely to endanger himself, herself or another worker.

If the professional engineer provides the required certification that the equipment is not likely to endanger a worker and the employer notified the inspector, it could be argued as per section 57 of the OHSA that the order has been complied with and the workers can return to operate the equipment in question. However, there are other possible outcomes. For instance, the employer may decide that the required professional engineering testing and report are cost prohibitive and may choose to simply replace the entire equipment in question. Or the professional engineer may determine after testing that the equipment is "likely to endanger a worker" and recommend specific repairs or its complete replacement.

RELEVANT CASE LAW

Besides reading acts in their entirety, another way to gain a basic understanding of an act is to read relevant case law. One specific decision that is key to interpreting section 54(1)(k) of the OHSA is *Hardwall Construction Ltd. v Carpenters' United Brotherhood of Carpenters and Joiners of America*, 2011 CanLII 34961 (ON LRB) (<http://canlii.ca/t/flvj8>). Below are some passages of this decision that expand into the purpose and context of section 54(1)(k):

44. ... In my view, the word "likely," in the context of section 54(1)(k) of the OHSA, suggests that there is some probability that a danger will arise. This obviously requires something more than a mere possibility. It is also my view that the word "endanger" in s. 54(1)(k) requires there to be a substantial risk to a worker's health and safety. In the context of s. 54(1)(k) the envisioned assessment or evaluation by the professional engineer of the equipment, machine or device, does

not purport to be an absolute. It is only an evaluation or assessment that the equipment machine or device is not “likely” to endanger the worker. As such, it implies judgment, and that judgment must be understood to be based on the testing done, and best knowledge available to the professional engineer at that particular point in time.

51. ... The board agrees with the parties that the precise language of section 54(1)(k) makes it clear that the legislature selected the professional engineer as the person most qualified to test and report on affected equipment, machinery or devices... The professional engineer’s education, knowledge, skill and training in the technical subject matters that would necessarily be involved in testing and evaluating affected equipment, machinery or devices, makes it easy to understand why the legislature would place the public welfare in the hands of such a qualified individual. Likewise, the precise words of section 54(1)(k) also reflect the intention, on the part of the legislature, that the professional engineer in his or her written report is obligated by the act to provide a written assessment, based on a commonly understood standard as to whether the affected equipment, machinery or device “is not likely to endanger a worker.”

Reading relevant case law provides practitioners with clarity regarding their obligations. For example, the above decision clarifies that the wording of section 54(1)(k) does not create an absolute guarantee. And the testing and evaluating of affected equipment would involve the professional engineer’s “education, knowledge, skill and training in the technical subject matters.”

DUTIES SPECIFIC TO PROFESSIONAL ENGINEERS

Some acts other than the PEA contain duties specific to professional engineers. It is key for professional engineers to understand their duties under other acts that are relevant to their field of work. Section 31(2) of the OHSA contains the following duties specific to architects and professional engineers:

Architects and engineers

(2) An architect as defined in the *Architects Act*, and a professional engineer as defined in the *Professional Engineers Act*, contravenes this act if, as a result of his or her advice that is given or his or her certification required under this act that is made negligently or incompetently, a worker is endangered

The above indicates that if a worker is endangered because of a section 54(1)(k) test and report negligently or incompetently made by a professional engineer, the engineer in question would be in contravention of the OHSA. Furthermore, contravention by an engineer of the OHSA could trigger PEO’s complaints and discipline process since section 72 of Regulation 941/90 defines professional misconduct to include failure to make reasonable provision for complying with applicable statutes and regulations in connection with work being undertaken by or under the responsibility of the practitioner.

PEO’s practice advisory staff can only comment on the PEA, its regulations and PEO’s practice guidelines. Other acts may impose duties on professional engineers, which inform a professional’s judgment. To gain a basic understanding of these acts, a professional engineer should:

- Read the relevant legislation in its entirety to comprehend its purpose and context;
- Read relevant case law that expands into the duties of professional engineers under other legislation; and
- Find out if the relevant legislation contains duties specific to professional engineers.

Finally, PEO’s practice advisory team is available by email at practice-standards@peo.on.ca and is glad to hear from engineers looking for general information on their professional obligations. However, engineers looking for assistance on resolving legal problems occurring in specific, concrete situations should always contact their lawyer, who can best address with the practitioner who is called to exercise his or her professional judgment in particular, factual circumstances. **e**

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