

The C of A: Do you need one?

PEO's Certificate of Authorization is complex, misunderstood and controversial. It's time to set the record straight.

by Sal Guerriero, BCL, LLB, P.Eng.

To understand the Certificate of Authorization (C of A) regime under the *Professional Engineers Act*, a close reading of the wording under section 12 of the Act is required. There is an important distinction between holding a licence to practise professional engineering and holding a C of A. The following provisions highlight the fact that there are two distinct regimes under the Act, with their own sets of rules.

Section 12(1) states: "No person shall engage in the practice of professional engineering or hold himself, herself or itself out as engaging in the practice of professional engineering unless the person is the holder of a licence, a temporary licence, a provisional licence or a limited licence."

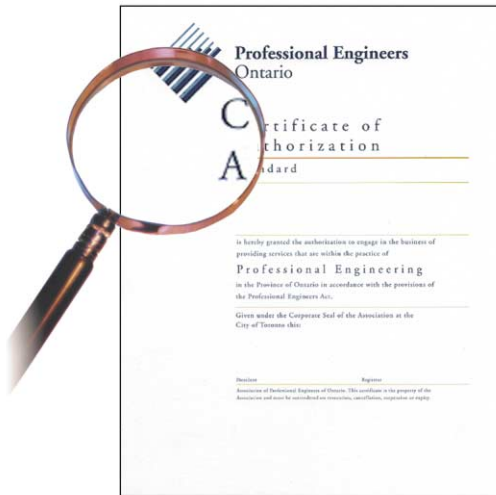
Section 12(2) states: "No person shall offer to the public or engage in the business of providing to the public services that are within the practice of professional engineering except under and in accordance with a certificate of authorization."

Whereas section 12(1) of the Act establishes a licensing regime to allow the practice of the profession, section 12(2) creates a certificate of authorization regime. Encompassed under section 12(2) are two separate legal notions—one involving the offering of professional engineering services to the public, and the other relating to engaging in the business of providing those services to the public.

Keeping in mind these key provisions, we can see that the Ontario Legislature

has not granted any legislative exclusivity to licensed professional engineers to offer or engage in the business of providing professional engineering services to the public. Therefore, as long as any unlicensed entity meets the requirements for the issuance of a certificate of authorization from PEO, it may offer and engage in the business of providing professional engineering services to the public.

The most common vehicle for engaging in business is that of the corporation.



Under the licensing regime, PEO does not issue licences to corporations to engage in the practice of professional engineering. The reason for this is simple: A licence to practise is reserved for individuals who meet rigorous academic and experience requirements, and who pass professional practice exams required under the Act. Obviously, corporations are not able to meet these conditions and are effectively prevented from engaging in the practice of professional engineering.

In contrast, a corporation, partnership or a natural person may apply for a C of A. It is issued summarily to business entities that meet the requirements under the Act and Regulation 941. The issuance of a C of A does not require writing of exams, education or experience in the practice area. In this sense, the C of A is analogous to a business permit, and a non-P.Eng. may actually be in control of the business entity.

To the public

As explained, corporations are prohibited from engaging in the practice of professional engineering. But a corporation that holds a C of A from PEO may offer or engage in the business of providing to the public services that are within the practice of professional engineering. The C of A holder is primarily limited to the business aspects of the profession. To obtain a C of A, section 17(1) of the Act and section 47 of Regulation 941 require that an applicant designate an experienced P.Eng. or temporary licence holder to assume responsibility for and supervise the services to be provided under the C of A. The professional engineer must be the applicant, employee, or partner, and devote sufficient time to the work of the applicant.

Similar principles apply to natural persons and partnerships that offer or engage in the business of providing professional engineering services to the public. Under section 15(3) of the Act, a partnership of corporations may hold a C of A if at least one of its corporate partners also holds a C of A.

Currently, the Ontario Legislature has not expressed any prohibition against

non-engineers' involvement in corporate structures that provide professional engineering services to the public. The government made such restrictions clear in other professions through legislation changes in 2001 that implemented the concept of the professional corporation

ther complicated by the intervention of a third party, such as a placement firm. Often, a P.Eng. incorporates a company that invoices a mediating placement firm for the services rendered by the P.Eng. to a C of A holder. The placement firm would subsequently invoice

under section 12(2), does not make payment a relevant factor in determining whether there has been an offering of professional engineering services to the public. Hence, volunteering services also requires the holding of a Certificate of Authorization.

Corporations are prohibited from engaging in the practice of professional engineering. But a corporation that holds a C of A from PEO may offer or engage in the business of providing to the public services that are within the practice of professional engineering

under amendments made to the *Business Corporations Act*.

Basically, a professional corporation can be owned and directed only by members of the same profession. A professional corporation is defined as a corporation that holds a certificate of authorization. It can engage in the practice of a profession only if the Act governing the profession permits the practice of the profession by a corporation, or if named at section 3.1(2) of the *Business Corporations Act*. As indicated above, corporations are not allowed to engage in the practice of professional engineering under the *Professional Engineers Act*. Hence, a professional corporation would not be a utilizable corporate structure in the engineering context, and arguably no one would consider forming a professional corporation when the common corporation is allowed and is less restrictive as to ownership and control.

So any offering of professional engineering services to the public requires a C of A from PEO. However, PEO exempts professional engineers from holding a C of A when services are provided within an employer-employee relationship. Some P.Engs believe that they do not need a C of A if they offer or engage in the business of providing services to a company that holds a C of A itself. This erroneous interpretation of the Act appears to result from a failure to distinguish the rules that govern the licences from those that govern the C of A.

The relationship between a P.Eng. and another C of A holder would be fur-

ther complicated by the intervention of a third party, such as a placement firm. Often, a P.Eng. incorporates a company that invoices a mediating placement firm for the services rendered by the P.Eng. to a C of A holder. The placement firm would subsequently invoice

the C of A holder (a large engineering firm, for example) for the services rendered by the P.Eng. There are two reasons why these arrangements fail to discharge the obligation to hold a C of A. First, the prohibition against offering without a C of A

Second, the prohibition against engaging in the business of providing services without a C of A under section 12(2), does not exclude indirect payment arrangements for those services. In the example, the engineer and the engineer's company may face two separate charges of breaching section

12(2). The engineer may be charged for offering services to the large engineering company, and the engineer's company may be charged for engaging in the business of providing professional engineering services to the placement firm. If it does not hold a C of A, the placement firm may also face a section 12(2) prosecution for both offering and engaging in the business of pro-

viding engineering services to the large engineering firm.

Section 2(3) of the Act states that PEO's role is to regulate the practice of professional engineering and to govern its practitioners, in the public interest. Any person who contravenes section 12(2) is subject to prosecution in the courts under sections 39 and 40 of the

Act. Section 40 provides for multiple and concurrent fines for a breach of section 12 of the Act. Depending on the circumstances, the courts may impose a maximum fine of up to \$25,000 for a first offence, and up to \$50,000 for each subsequent offence.

In addition, a practitioner who is found to have participated in a breach of section 12(2) is subject to PEO's complaints and discipline processes.

Although PEO allows anyone who breaches section 12(2) a reasonable chance to obtain a C of A to enter into compliance, repeat offenders are prosecuted under section 40, or made subject to an injunction application under section 39. Subsequent repeat offenders face the imposition of heavier fines and/or jail time at the discretion of the courts.

Here's where you need a C of A

You offer or engage in the business of providing services that are within the practice of professional engineering to members of the public in an arm's-length relationship. The public typically includes homeowners, manufacturers, contractors and other engineering firms or practitioners who are not your employer.

You need not be a P.Eng. for your firm to obtain a C of A. But a C of A will only be issued if you meet the requirements under Regulation 941, which include designating an experienced professional engineer, and either holding liability insurance, or disclosing the lack of insurance coverage to the public before undertaking the work.

Here's where you don't

You are an engineer offering or providing services to a member of the public, but the member of the public considers you to be his or her employee. In the event of an enforcement investigation, PEO obtains the assistance of the public in order to establish the true relationship that exists between the entity offering and providing professional engineering services and the member of the public. ❖

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