

By Charles Dupuis, attorney

Engineers and their employers: what becomes of professional independence?

To what extent is an employee-engineer professionally independent from his or her employer? This question, in one form or another, is very frequently put before the Office of the syndic or often comes to us through the Ordre's website. And for good reason: this topic is fundamental in engineering! Here are a few thoughts which might help you.

THE SPACE SHUTTLE CHALLENGER, A SAD EXAMPLE THAT SPEAKS VOLUMES

Who hasn't heard of the space shuttle Challenger, whose launch was discussed by NASA engineers and their superiors? Referring to an American publication, François Vandebroek, Eng., recalls that one engineer demonstrated professional independence at the time:

On the morning of January 28, 1986, NASA wishes to launch its space shuttle Challenger. Weather conditions in the area that morning lead certain engineers working for NASA to doubt that the scheduled launch could take place safely and voice this concern to their employer (NASA), who, in spite of it all, decides to proceed with the launch. Refusing to yield to the pressures of his employer, one of the engineers objects to the launch, up until lift off. NASA, disregarding this engineer's opinion, launches the spacecraft. (Unofficial translation)

We all know that Challenger exploded, killing all seven crew members on board.

THE EMPLOYMENT CONTRACT VS THE LAW

In Québec, the employee-engineer is usually bound by a "contract of employment" with his or her employer. The Québec Civil Code defines this contract as such: "a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer." (s. 2085 Q.C.C.)

With respect to employment contracts, the law firm of Ogilvy Renault published a book relating to legal perspectives in construction in Québec, which states the following:

"Doctrine and jurisprudence remind us that this agreement's dominant characteristic is the employer's right to exercise a power of supervision, control and direction over the employee's performance." (Unofficial translation)

And yet, when it comes to performing professional activities, the sheer essence of such performance is the freedom or independence to act. In other words, usually no one can force, compel or require an engineer to act in a certain way, specifically while carrying out a professional activity (be it material or intellectual) reserved for engineers under the Engineers Act. That being the case, some would say that there is a certain degree of incompatibility between carrying out a professional activity and being an employee. Is it so?

On one hand, the duties and obligations provided for in an employment contract between engineers and their employers is born from a negotiated agreement and relevant suppletive provisions from the Civil Code. As is the case with all contracts, engineers must act in good faith throughout, which is to say from the preparation of the contract to its execution. However, it bears reminding that its content is private; in other words, it only binds those who are party to it.

On the other hand, engineers are professionals bound by ethical duties pursuant to various laws, such as the Engineers Act and the Professional Code, and various regulations under these laws, such as the Code of ethics of engineers. Contrary to the employment contract, the provisions set out in these laws and regulations, namely the Code of ethics, are of public order, which means that they must be given priority and one cannot circumvent their application by way of an agreement.

PROFESSIONAL INDEPENDENCE, AN OBLIGATION

Speaking to professional independence, François Vandebroek, Eng. writes:

"Safeguarding one's professional independence means preserving one's ability to carry out those acts that are reserved for members of one's profession, free from any kind of intervention, be it real or apparent, from any person, employer or client inclusively. [...]. Without such independence with regard to clients, employers and third parties, engineers could not fulfill their obligations toward the public. What's more, professional independence helps engineers retain their clients' confidence as well as the public's esteem." (Unofficial translation)

How can we resolve the apparent conflict between the obligation to maintain one's professional independence pursuant to the Code of ethics and the hierarchical relationship inherent to employment contracts? According to the Office des professions, employee-engineers keep their professional independence. In other words, even if they are bound by contract to their employers, employee-engineers must work in accordance with engineering trade practices. "Thus, an employer cannot force an employee-engineer to relinquish his or her professional independence." (Unofficial translation)

Marie-France Bich, currently a judge with the Québec Court of Appeal, goes even further by establishing a link between the professional obligation and the employment contract's actual content:

"Being both a professional and an employee leads to an overlap that has other effects. For example, it is important to note that, since codes of ethics are of public order, they must be taken into account when it comes to defining the obligations provided for in the employment contract that binds the employer with the individual who chose to practise his or her

profession within the framework of an employment contract. In a certain way, we can say that the employer who hires a professional to work as such also inherits the array of requirements and constraints that govern the practice of the profession in question ." (Unofficial translation)

Quite recently, the Québec Court of Appeal again reiterated that the rules set out in the Code of ethics of engineers aim to maintain a high quality professional standard and protect the public, not the engineer. "In accordance with this objective, these acts and regulations have precedence over contractual terms, rules or administrative practices, and must receive a large and liberal application (Interpretation Act, R.S.Q., c. I-16, s. 41) ." (Unofficial translation)

Consequently, despite explicit terms in their employment contracts, engineers must, when needed, prioritize their professional independence pursuant to section 3.05.03 of the Code of ethics of engineers. Furthermore, let us note that if the employer is an engineer as well, he or she incurs the risk of committing an offence under section 4.02.03 b) and c) by encouraging his or her colleague (and employee) to violate the Code of ethics.

Références

1. François Vandenbroek, *L'ingénieur et son Code de déontologie*, Trois-Rivières, , Juriméga Ed., 1993, p. 94.
2. Ogilvy Renault S.E.N.C., *La Construction au Québec - perspectives juridiques*, Montréal, , Wilson & Lafleur Ed., 1998, p. 485
3. F. Vandenbroek, p. 92.
4. Op. cit.
5. Marie-France Bich, *Le défi du droit nouveau pour les professionnels*, Journées Maximilien Caron, Thémis Ed., 1995, p. 66.
6. Louis Tremblay, Eng., in his quality of syndic for the O.I.Q. v. Ghyslain Dionne, Eng., [2006] QCCA 1441, p. 9.