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Liability (part 2)
A "small" mandate that became a BIG problem!

This can happen to any engineer. A client proposes a small, uncomplicated mandate that shouldn't cost too much but should be done quickly. Our reaction… "Why not? This will help someone and may get me more lucrative contracts in the future." In this type of situation, we must be very careful and make sure that the mandate complies and is carried in accordance with generally accepted engineering practices, specifically in terms of professional liability. Here is an example which speaks volumes …

A QUICK AND CURSORY ASSESSMENT

The client, a financial institution, wanted to obtain an environmental summary for a real estate transaction that was about to close. This simple mandate was offered to an engineer who accepted it: the engineer had to visit the site and carry out a basic search to determine if there was an environmental risk and if so, if it was a high or low risk. It should be noted that the mandate did not include preparing a report or carrying out the usual environmental assessments (phases 1, 2 and 3).

For this mandate, which was supposed to take only a few days to complete, the engineer conducted a few quick searches, and asked a technician to visit the site in order to carry out a visual examination and prepare an environmental summary relating to the property. In his very brief report, he established the date of construction of the buildings at around 1950 and noted the presence of above-ground reservoirs but none underground. The transaction went forward based on this information.

Two years later, the owner of the building decided to sell the property. During a simple on-site visit, the prospective buyer noticed a supply pipe located along the building's foundation that seemed connected to... an underground reservoir!

Given these findings, a proper phase 1 environmental assessment was required. Upon its conclusion, the assessment revealed several environmental concerns namely, a 2,275 litre black oil underground reservoir. What's more, the analysis established that the buildings were erected between 1910 and 1947, not during the 1950s. The environmental study also revealed that various commercial activities took place in the building in question, such as a woodworking shop and an auto mechanics garage, and that it had been used as a warehouse.

The environmental analysis later revealed the presence of petroleum hydrocarbons as well as backfills containing heavy metals. The owner was forced to drain 2,700 litres of water, oil and mud. He also had to rehabilitate the soil, a process involving many steps, before he could proceed with the sale.

Much like the laws and regulations that govern the engineering profession, the Code of ethics of engineers must take precedence over an agreement's terms and conditions. Engineers can never invoke the terms of their mandate to exclude or limit their professional liability.

In all, the work cost over $220,000, in addition to various indirect costs incurred by those measures, and this, for a property paid $300,000.

A SEASONED ENGINEER

When the engineer took on the above-mentioned mandate, his disciplinary record was pristine; not one complaint had been filed against him. A member of the Ordre since 1968, he had acquired an impressive expertise in municipal and environmental engineering. Given the seriousness of the facts revealed by the inquiry, a complaint was filed before the Ordre's Disciplinary Council based on which the engineer was accused of:

- having omitted, before accepting the mandate to carry out a field study and prepare a document called an "environmental summary", to bear in mind the means at his disposal to carry out the mandate in accordance with his professional obligations, thereby violating section 3.01.01 of the Code of ethics of engineers;
- of having expressed, in this document, opinions which were not based on sufficient knowledge and honest convictions, and were incomplete, ambiguous and not sufficiently explicit, thereby violating sections 2.04 and 3.02.04 of the Code of ethics of engineers.

The respondent immediately admitted his guilt and fully cooperated. In his defence, he explained that he no longer accepted to prepare "environmental summaries", a type of work that is way too risky. He also mentioned that he realized completely that his report was not based on sufficient knowledge, but that he was not responsible for the soil on the property being contaminated.

As for the complainant's attorney, he argued that the respondent should always have his professional and ethical obligations in mind, pointing out the serious consequences that resulted from a professional opinion carried out in a very cursory manner and for the sole purpose of appeasing the client's concerns.

EXEMPLARY SANCTIONS

In a unanimous decision1, the Disciplinary Council showed that the actions in question were serious. The Council also took into account that the engineer had admitted his guilt freely and that he was remorseful. In order to determine the sanctions, the Council explained that it was not put in place to punish professionals, but rather to impose sanctions that carried a deterrent effect. The Council qualified the parties' recommendations as stringent yet fair and reasonable; it accepted those recommendations and sentenced the engineer to three reprimands and ordered him to pay three fines amounting to $7,500, plus costs.

Notwithstanding the duties of thoroughness and excellence imposed upon engineers pursuant to his Code of ethics in particular, the engineer in question had accepted a mandate which was not in line with his professional obligations. Having demonstrated a certain level of complacency in order to please his client, he performed subpar work and provided a deficient report, which flies in the face of the public's safety.

The Disciplinary Council reiterated a well known principle: Much like the laws and regulations that govern the engineering profession, the Code of ethics of engineers must take precedence over an agreement's terms and conditions.

In other words, engineers can never invoke the terms of their mandate to exclude or limit their professional liability, nor can they explain away their reasons for lowering the quality or thoroughness of their professional services because their mandate was not very lucrative.

According to the Québec Court of Appeal: "Rules of professional conduct aim to protect the public, not the engineer2."

It bears reminding that engineers are responsible for every opinion they provide during the course of their professional activities at all times. They must limit their opinions to areas they master, for which they were able to verify all the facts and on which they have adequate expertise. It is a question of professional liability.

1. André Prud'homme, Eng., in his quality of assistant syndic for the OIQ v. Harold Sohier, Eng., C.D.O.I.Q., file no 22-09-0373.
2. Louis Tremblay, Eng., in his quality of assistant syndic for the OIQ v. Ghyslain Dionne, Eng., (2006) QCCA 1441 (C.A.) (par. [42] in fine).

Sections of the Code of ethics relating to this case

2.04. The engineer shall express his opinion on matters dealing with engineering only if such opinion is based on sufficient knowledge and honest convictions.

3.01.01. Before accepting a mandate, an engineer must bear in mind the extent of his proficiency and aptitudes and also the means at his disposal to carry out the mandate.

3.02.04. An engineer must refrain from expressing or giving contradictory or incomplete opinions or advice, and from presenting or using plans, specifications and other documents which he knows to be ambiguous or which are not sufficiently explicit.