

# The Code of Ethics

## What weight does it carry in the courts?

Can a client argue that a Code of Ethics is an implied term of the consulting contract? What rights do non-clients have in relation to disciplinary complaints? What is the purpose of a Code of Ethics? The three cases discussed below provide answers to these questions.

In the *Terra Energy v. Kilborn Engineering* case in Alberta from the late 1990s, the court heard how Terra retained Kilborn, a consulting engineering firm, to provide engineering services relating Terra's commercial licence to develop a technology for extracting bitumen from oil sands. The process was known as the solvent extraction spherical agglomeration process.

Unknown to Terra, Kilborn had an established internal strategy of diversification, which involved developing and promoting ideas, innovations and inventions for the benefit of Kilborn. Kilborn took the view that the diversification strategy was a private matter and it consciously maintained a policy of not disclosing it to its clients.

While Kilborn was engaged in carrying out its contracts with Terra, during a slow period in the mid-1980s one of the Kilborn engineers, working on his own, conceived an idea for a new and different technology for the extraction of bitumen from oil sands. Based on caustic soda, it involved a device he invented called the strand separator and a process known as the counter-current drum separator process. Kilborn resolved to develop and promote the new technology for its own commercial benefit.

When Terra saw the press release announcing Kilborn's new technology, Terra decided to sue Kilborn, and the engineer personally, claiming that they had breached their fiduciary duties and that Kilborn had breached its contract.

At trial in 1997, the judge found that neither Kilborn nor the engineer had misappropriated any of Terra's confidential information in the course of creating and developing the new technology. The trial judge also found that the parties were not in a fiduciary relationship. However, he did find that there was a breach of the professional engineering code of ethics, which constituted a breach of contract.

The Alberta Court of Appeal overturned this finding in 1999 and decided that any possible breach of the code of

ethics was a matter only for disciplinary proceedings by the professional association of engineers. The Court of Appeal also found that there was no express or implied term in the consulting contract that would give the code of ethics a contractual effect.

In arriving at its decision in the Kilborn case, the Court of Appeal clearly identified the professional engineering association's disciplinary body as the appropriate venue for this kind of client complaint. The Court of Appeal said that professional conduct rules, such as the code of ethics, are not designed or intended to serve as the basis for civil proceedings against members of the profession.

It is clear from the decision, however, that if any engineering consulting

firm decides to extend its practice in order to explore new technologies for its own profit, that activity may be construed as being in competition with its clients. In such cases it is advisable when you are retained by a client to disclose such practices to them.

In a different and earlier case settled in 1994, the Alberta Court of Queen's Bench found the Province of Alberta liable in damages to Opron Construction for cost overruns incurred in the construction of the Paddle River Dam. The court found that as the "owner," the province had made misrepresentations and nondisclosures to the contractor in the pre-contractual and contractual stages of the work. Because the Court found the province had actual knowledge of the misrepresentations and nondisclosures, or at least showed a lack of honest belief or recklessness, it was enough to establish civil fraud. Furthermore, the judge made negative comments about the conduct of the individual engineers involved.

For environmental reasons, the Friends of the Old Man River Society had opposed the construction of the dam. Based entirely on the comments of the trial judge, the organization made a complaint to the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) about the conduct of the engineers. After reviewing the matter, APEGGA terminated the investigation as the discipline committee did not find any evidence of

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unskilled practice or unprofessional conduct.

The contractor then submitted a complaint to APEGGA. When the discipline committee's decision was upheld, the contractor and Friends of the Old Man River decided to appeal to the courts.

The Alberta Court of Appeal came to the following conclusions:

- (a) the disciplinary process is a matter between APEGGA and the individual member whose conduct has been questioned;
- (b) the Engineering, Geological and Geophysical Professions Act of Alberta is directed solely to APEGGA and its members and the rights, duties and responsibilities contained in the legislation relate only to them;
- (c) a complainant is not a party to the investigation or the disciplinary process as the only parties are APEGGA and the member whose conduct is under investigation; and
- (d) the committee's decision to terminate the investigation of the engineers could have no detrimental impact on either Friends of the Old Man River or the contractor as it did not affect their personal or economic rights or obligations.

Historically, it was commonly thought that the purpose of legislation regulating self-governing professions was to grant a monopoly for members of the profession. Now, such legislation is viewed as being a "social contract." The monopoly to practise is granted on condition that the profession undertakes to regulate itself in the public interest. The primary objective of such legislation is to protect the public by ensuring that licensed engineers practise with an acceptable standard of skill and care.

In 2004, in the case of *Bouhamdani v. the Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB)*, the New Brunswick Court of Appeal considered what should be the appropriate sanction against a consulting engineer found guilty of unprofessional conduct as a result of performing services below the acceptable standard of skill and care.

The matter came before the APEGNB because a representative of the Magnetic Hill Esso station filed a complaint concerning Bouhamdani's design for a high-rise sign, alleging that the foundation would not support the steel structure. The association's discipline committee ultimately found the engineer guilty of professional incompetence and professional misconduct in relation to the design drawings for the sign. This decision was arrived at because the sign structure, as designed by the engineer, could have failed when subjected to design loads and the discipline committee determined that the consequences of such an error in structural engineering were too severe for mistakes such as these to be made, let alone repeated.

Bouhamdani was the subject of an earlier finding of incompetence by his professional association in 1997. At that time all of his work for the following two years was to be reviewed until November 1, 1999.

When the discipline committee rendered its decision in 2003, one of the penalties imposed required Bouhamdani to submit a list of all his projects completed after November 1, 1999. The engineer was then required to allow access to the APEGNB for them to audit for correctness designs that required engineering design expertise similar to the sign work. The engineer was required to pay for a third party engineer to perform the audit.

The New Brunswick Engineering and Geoscience Professions Act states that the objectives of the professional association are to regulate and govern the professions in accordance with the Act and bylaws, and to establish and maintain standards of knowledge, skill and professional ethics among its members.

The New Brunswick Court of Appeal upheld the discipline committee's penalty because the Court found that the intention of the Act is to ensure that the public interest is to be served. It decided the penalty balanced the disciplinary committee's duties to the public and the engineer whose livelihood was in its hands.

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A code of ethics helps to establish confidence in the profession. Two types of confidence are required:

- the personal confidence of the client in the technical competence of the engineer; and
- the confidence of the public at large in the integrity and ethical conduct of the profession as a whole.

As the above cases show, a professional code of ethics is not an implied term of a consulting contract. For a code of ethics to be contractually enforceable by a client it must be expressly stated. However, remember that any member of the public can complain, including a client, to the disciplinary committee of an association. If deemed appropriate, the disciplinary committee may impose broad penalties for misconduct or unprofessional conduct.

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