

# Law for Professional Engineers and Professional Geoscientists

## Dispute Resolution and Remedies

Law and Ethics Seminar  
Fall 2018

# Dispute Resolution

# Claims and Disputes

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- Resolving disputes is time, money and energy intensive
- Most disputes involve contract law and negligence (tort) law, but procedural law is important
- Construction disputes typically involve many parties, and so are complicated
- Allocation of risk influences outcome

# Dispute Resolution – Overview

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- Four primary methods of dispute resolution:
  - Negotiation
  - Mediation
  - Arbitration
  - litigation
- What process is appropriate depends on the nature of the dispute and the attitudes and relationship of the parties
- Negotiation, mediation and arbitration may be voluntary, but litigation is only voluntary for the plaintiff

# Negotiation

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- Negotiation is discussion to resolve the dispute through compromise
- Negotiation is a skill, best learned through practice
- Advantages:
  - The parties control the process, so it can be private
  - The parties control the outcome, so it eliminates uncertainty
  - Often less costly than litigation
- Negotiations are privileged: the matters discussed during negotiations cannot be referred to in subsequent court proceedings if the negotiations fail

# Mediation

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- Assisted negotiation; a third party facilitates settlement by encouraging compromise
- Like negotiation, mediation requires the parties to be committed to settlement
- Procedure: opening statements, discussion, break-out sessions where the mediator meets with the parties individually, more discussion, etc.
- The task of the mediator is to help the parties to be objective and keep the process moving forward
- Like for negotiation, if no settlement is reached, the communications are privileged

# Arbitration

- A private trial process in which the parties set the rules
- *The Arbitration Act, 1992* applies to arbitrations in Saskatchewan unless excluded by law
- Proponents of arbitration argue that it is less expensive than litigation, but this is not always the case, especially if the parties are not cooperative
- Mandatory (binding) and voluntary (non-binding) arbitration
  - Mandatory is when the parties agree by contract, before any dispute arises, that they will arbitrate disputes that do arise (and be bound by the outcome)
  - Voluntary is when the parties agree to arbitrate after a dispute has arisen (but not be bound by the outcome)

# Arbitration (Continued)

- Advantages:
  - Privacy
  - An arbitrator with specialized knowledge can be selected
- Disadvantages:
  - Split proceedings result if not all the parties agree to arbitrate
  - Arbitrators must be paid, and their schedule accommodated
- Before arbitration starts, the parties must decide:
  - who will act as arbitrator (if the parties cannot agree on an arbitrator, the court can appoint one)
  - the terms of reference
  - the rules of procedure to be applied
  - the law to be applied e.g. Alberta Law, English Law



# Litigation

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- Litigation is the use of the court system to resolve disputes (see Courts slide in intro)
- An independent party (judge or jury) decides the case on the evidence presented at trial
- The judge controls the process (subject to the Rules of Court)
- Litigation is often the only alternative for dealing with unreasonable or vexatious parties

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# Litigation (Continued)

- Litigation is slow and expensive

*"If you want my advice, try to order your life so you never see the inside of a courtroom. It's a very expensive place to visit"*

- Mary Southin J.A., on the eve of her retirement from the British Columbia Court of Appeal, reported in the *Vancouver Sun*, October 13, 2006.

- There may be many defendants in a single lawsuit
- Burden of proof is on a “balance of probabilities”

# Litigation - Court System

- Refer back to Court System hierarchy described in Introduction presentation:
  - The Supreme Court of Canada
  - Federal Courts
    - Federal Court and Federal Court of Appeal
    - Tax Court of Canada deals with tax matters
  - Superior level court and court of appeal
    - Court of Queen's Bench
    - Court of Appeal
  - Saskatchewan Provincial Court:
    - Small Claims Court

# Drawbacks of Litigation

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- Risky: generally an all or nothing outcome
- Uncertain: it is often difficult to predict what the outcome will be
- Expensive
- Time consuming
- Emotionally taxing
- Unlike with negotiation or mediation, with litigation the parties lose control over the process and the outcome

# Technical Evidence

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- Technical evidence is required in many engineering and geoscience related cases
- Generally, each party will hire experts to explain technical evidence to the court and to provide technical opinions that are supportive of their case
- The experts do not decide the case, the judge or jury decides the case using the guidance provided by the expert evidence

# Expert Witnesses

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- Expert is a person with skill, expertise, training and experience who helps the decision maker on technical matters
- Experts are allowed to provide opinions; lay persons can only give factual evidence
- When professionals act as experts, they have a duty to be fair and neutral, rather than an advocate for the party that hired them (also ethical obligation)

# Limitation Periods

- Limitation period = time within which an aggrieved party can commence legal action
- *The Limitations Act* determines the limitation periods in Saskatchewan
- Parties to a contract can agree to a shorter limitation period than that specified by statute
- Limitation periods generally only start to run when the plaintiff could reasonably have known of their right to bring an action (i.e. discovery or ought to have been discovered)
- The limitation period in Saskatchewan is two years from discovery, subject to an ultimate limitation period of 15 years
- Professionals can purchase insurance to protect themselves against claims made within the limitation period. This is especially important for claims made by third parties because such claims cannot be limited by contract

# Joint and Several Liability

- Each province has legislation that apportions liability between negligent parties (in Saskatchewan, *The Contributory Negligence Act*)
- Under modern statutes, if the plaintiff contributes to the loss, they still have the right to claim, but the amount recoverable is reduced in proportion to the plaintiff's contribution to the loss
- If the loss is caused by more than one defendant, those defendants will be either:
  - Severally liable = Each defendant is only liable for damages in proportion to its contribution to the loss
  - Jointly and severally liable = Each defendant is liable for all of the damages regardless of its contribution to the loss



# Vicarious Liability

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- Vicarious liability is the liability of one party for the fault of another
- Vicarious liability is based on enterprise theory: those who profit from an activity should bear the losses that result from that activity
- Employers are vicariously liable for wrongs their employees commit in the course of employment
- The party vicariously liable has the legal right to recover from the at fault party

# Codes and Standards

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- Some codes are written and enforced by law, others are voluntary
- Professionals must keep up to date with developments in their field and be familiar with the latest codes and standards
- Parties to a contract may agree that particular codes must be complied with in performing the contract
- Codes are relevant when determining whether the standard of care was met

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# Codes and Standards (Continued)

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- Violation of codes mandated by law will almost always be a breach of contract
- In some cases, professionals may be found negligent even though they complied with the minimum code provisions e.g. when it was commonly known that the code was inadequate
- Professionals relying on novel design or construction methods may not be able to rely on standardized codes to justify their design

# Concurrent Liability in Contract and Tort

- Historically, it was not possible to sue in tort when the parties had a contract covering similar duties
- *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147: a duty in tort can co-exist with a duty in contract so long as the contract does not define the nature and scope of the duty of care
- Therefore, if the parties want to control the rights between them, they should exhaustively define the duty of care in their contract

# Breach of Contract and Remedies

# Breach of Contract: Overview

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- A breach of contract occurs when one of the parties fails to meet its obligations under the contract
- After a breach occurs, if the parties are unable to negotiate a settlement, a third party (e.g. judge, arbitrator) will decide the matter
- Damages are the most common remedy for breach of contract

# Simple Breach of Contract

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- Does not entitle the innocent party to put an end to the contract
- Does entitle the innocent party to sue for damages

# Repudiation & Anticipatory Breach

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- Repudiation: When one party, by words or actions, makes it known that it does not intend to perform its obligations under the contract
- Anticipatory Breach: When one party lets the other know, before the time for performance, that it will not be performing its obligations, the anticipatory breach will be a repudiation



# Remedies for Breach of Contract

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- Damages are monetary compensation the court orders the at fault party to pay the innocent party
- Specific performance is a court order requiring completion of the contract
- Injunction is a court order requiring a named party to do, or not do, something
- Declaratory order is statement by the court of the rights and obligations of the parties

# Damages

- Most common remedy for breach of contract
- Damages are calculated as the compensation required to put the innocent party in the position they would have been in but for the breach of contract
- Mitigation: the innocent party must take reasonable steps to minimize the loss suffered
- Causation: the innocent party can only recover losses that were caused by the breach of contract, speculative losses cannot be recovered
- Remoteness: only damages that are reasonably proximate to (not too remote from) the breach can be recovered
  - What was foreseeable when the contract was formed?

# Damages (Continued)

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- Consequential damages: cover indirect losses, such as business interruption losses
- Liquidated damages: compensation agreed to by the parties at the time of contract formation
  - must be a genuine pre-estimate of the damages
  - if excessive, will likely be an unenforceable penalty
- Bonus clause: additional payment for performance that exceeds minimum requirements

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# Damages (Continued)

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- Courts are hesitant to award damages unless it is clear that the money was, or will be, spent on rectifying the breach
- Quantification: typically damages are based on the cost of performance
- Diminution of value: where the cost of rectification will be excessive compared to the benefit rectification will bring, damages may be based on diminution of value

# Quantum Meruit

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- Quantum meruit: “the amount it is worth;” when it is not appropriate for the remainder of the contract to be enforced, but compensation is given for the work already done
- Requires that there be no valid contract in place for the work in issue
- May be used to compensate for constructive changes that are not within the contract

# Damages: Exclusion and Limitation Clauses

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- Exclusion clauses purport to completely exclude the damages or remedies available to the innocent party to the contract
  - Courts construe exclusion clauses against the party that drafted them, so they must be clear and identify the liabilities excluded
  - Exclusion clauses are also called exemption, exculpatory, exception, escape and protective clauses
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# Exclusion & Limitation Clauses

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- Limitation clauses are similar to exclusion clauses, but merely limit liability instead of entirely excluding it
  - If a clause is clear, it should be given full force; it should only be interpreted against the drafter when there is ambiguity
  - When deciding whether to give effect to a clause, the court will consider all the circumstances between the parties
- (Continued)

## Standard Clauses: Exclusion & Limitation Clauses (Continued)

- Exclusion and limitation clauses can be used to allocate almost any type of risk
- Consequential damages clause: exclusion or limitation clause that restricts the ability to claim for lost profit or other damages indirectly related to the claim being made (allows parties to provide products at reasonable prices even if failure of the product may lead to a large loss)



# Inability, Inadvertence and Disagreement

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- Inability: inability to perform is not a justification for breach of contract
- Inadvertence: intention is not relevant to whether a contract was breached
- Disagreement: if the parties disagree over the interpretation of the contract, the party who is later determined to have been wrong will be liable if they breached the contract based on their wrong understanding of it

# Disagreement and Performing Under Protest

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- Under the common law, harsh consequences can result for a party who misconstrues the contract and then acts upon that false belief: *Peter Kiewit v. Eakins*, [1960] S.C.R. 361
- In many provinces, legislation allows parties to continue performing under protest, reserving the right to claim additional payment later

# Lack of Profit

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- A party may intentionally breach a contract where the consequences for doing so will be less severe than for completing it
- For example, if the contractor is near bankruptcy, the additional capital needed to finish the job may exceed the payment that would be received, so the contractor may let the company go bankrupt instead of completing the project

# Tort and Remedies

# Damages - Tort

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- The purpose of monetary damages in a tort action is to put an injured party back into the position he or she was in before being harmed, as best as possible
- Monetary damages are restorative, as opposed to punitive, although punitive damages may be awarded in some cases

# Damages – Tort

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- Damages typically fall under several areas:
  - General (non-pecuniary) – non-monetary losses
  - Special (pecuniary) – monetary losses (medical bills, cost of future care, lost wages, repairs, etc.)
  - Aggravated – an increase in damages resulting from defendant’s conduct
  - Nominal – plaintiff’s right has been breached but damages are not provable

# Questions

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