

Owner: Assistant Director of Registration

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Welcome and Introduction

Law and Ethics Seminar

Seminar Format

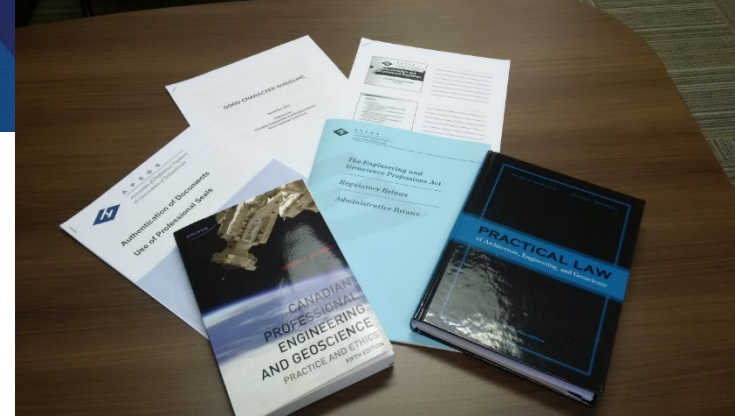
- Series of 16 presentations of varying lengths
- Case studies – supplied as attachments
- Mix of law, professionalism and ethics
- Order of presentations
- Can take 16 hours or more
- Presentation slides are posted on APEGS website

Additional Study Materials

- List posted on Seminar Platform – some info only on APEGS website.
- [NPPE Blueprint](#)
- [NPPE Practice Tests](#) and other sources for NPPE
- [NPPE Candidate Guide.](#)
- Responsible to be familiar with all of the content provided
- Share your questions
- Seminar does **NOT** “teach to the exam”, but covers a wide range of topics to prepare you for your professional career

Materials to note...

- Good Character Guidelines
 - [APEGS Good Character Guideline](#)
 - [Engineers Canada Good Character Guideline](#)
- “[Blue Book](#)”
- Text books:
 - *Canadian Professional Engineering and Geoscience: Practice & Ethics, Fifth or Sixth Edition, 2014/2018* by Gordon C. Andrews, Patricia Shaw, John McPhee
 - *Practical Law of Architecture, Engineering, and Geoscience, Second or Third Canadian Edition, 2011/2015* by Brian M. Samuels and Doug R. Sanders



Ask Questions

- Likely that more than one of you have the same question
- Send questions to APEGS
- Respond / update weekly until the exam

Seminar Evaluation Survey

- Sent after the seminar
- Survey Monkey

Professionalism and Professional Regulation

Law and Ethics Seminar

Regulating the professions. Protecting the public.



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Outline

- Characteristics of a profession
- How professions and occupations are regulated
- Historical overview of engineering and geoscience in Canada
- Engineers Canada and Geoscientists Canada Organizations
- APEGS Organization
- Professional Obligations - CPD

CHARACTERISTICS OF A PROFESSION

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Reputation

Your reputation as a professional will be ---

Finish the statement

Professions

- What is a profession?
 - try to define the word
- Who are professionals?
 - lawyers?
 - doctors?
 - athletes?
 - police?
 - sanitation workers?
 - politicians?
 - engineers/geoscientists?

Senses of a Profession

- What is a profession?
 - In one sense . . . a job or occupation for which payment is received. . . .

BUT

- There is another sense

What is a PROFESSION?

From Canadian Professional Engineering and Geoscience [Andrews (5th Edition) – page 17]:

Profession: a calling requiring

- specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical or scholarly principles underlying such skills and methods*
- maintaining by force of organization or concerned opinion high standards of achievement and conduct*
- committing its members to continued study*
- a kind of work which has for its prime purpose the rendering of a public service*

WRIGHT: Canadian Bar Review – 1951

- Elements present for a vocation to be called a profession:
 - Holding out to the public, offer of public service
 - A professional is assumed to have a special skill
 - Training and education
 - Privilege of state recognition
 - Self-disciplined group
 - Unselfishness or freedom from purely personal considerations

Legal Definition of Profession

- Black's Law Dictionary

- An occupation requiring special, usually advanced, education and skill. The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.
- Originally contemplated only theology, law and medicine but extended as applications of science and learning were extended.
- Attainment of special knowledge as distinguished from mere skill.

Definitions of the Practice of Engineering and Geoscience

- Professional Engineering:
 - Refer to the Act sub-section 2(m)
- Professional Geoscience:
 - Refer to the Act sub-section 2(n)

In summary – What is a Professional?

- extensive training
- specialized knowledge
- professional association
- ethical code
- certification or licensing



Senses of a Profession

- Concerning Engineering and Geoscience
 - obtaining a bachelor's degree
 - doing work commonly recognized as ...
 - being registered and licensed as a professional
 - acting in a morally and an ethically responsible manner while practicing

SELF-REGULATION & APEGS

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Occupational and Professional Regulation

- Some types of professional and occupational regulation in Saskatchewan are:
 - Fee for “right-to-work” (door-to-door salespeople)
 - Self-administered but government regulated (insurance agents)
 - Licensed by government (various trades)
 - Associations under Non-Profit Corporations Act (mediators)
- Self Regulated:
 - Right-to-title (interior designers, technologists)
 - Right-to-title and right-to-practice (engineers and geoscientists)

The Public Interest

- The primary purpose of self-governing professions is the protection of the public
- The profession must ensure that its members are qualified and competent
- Members must conform to appropriate standards of professional conduct

Why do Professions Want Self-Regulation?

- The members of self-regulating professions best understand their profession
- It is in the interest of a profession to only allow qualified individuals to practice
- Regulation of a profession enhances the reputation of all members
- Exclusive use of title and right to practice

Self-regulation

- Engineering and Geoscience meet the criteria for self-regulation with right-to-practice status:
 - Commitment to safeguarding the public interest is paramount
 - Engineering and Geoscience are identifiable professions and are accepted by the public as professions
 - Code of Ethics (Regulatory Bylaws, S 20(2))
 - Specialized Academic and Experience standards
 - Administered by APEGS, which ensures only qualified persons practice engineering and geoscience

HISTORICAL OVERVIEW OF ENGINEERING AND GEOSCIENCE IN CANADA

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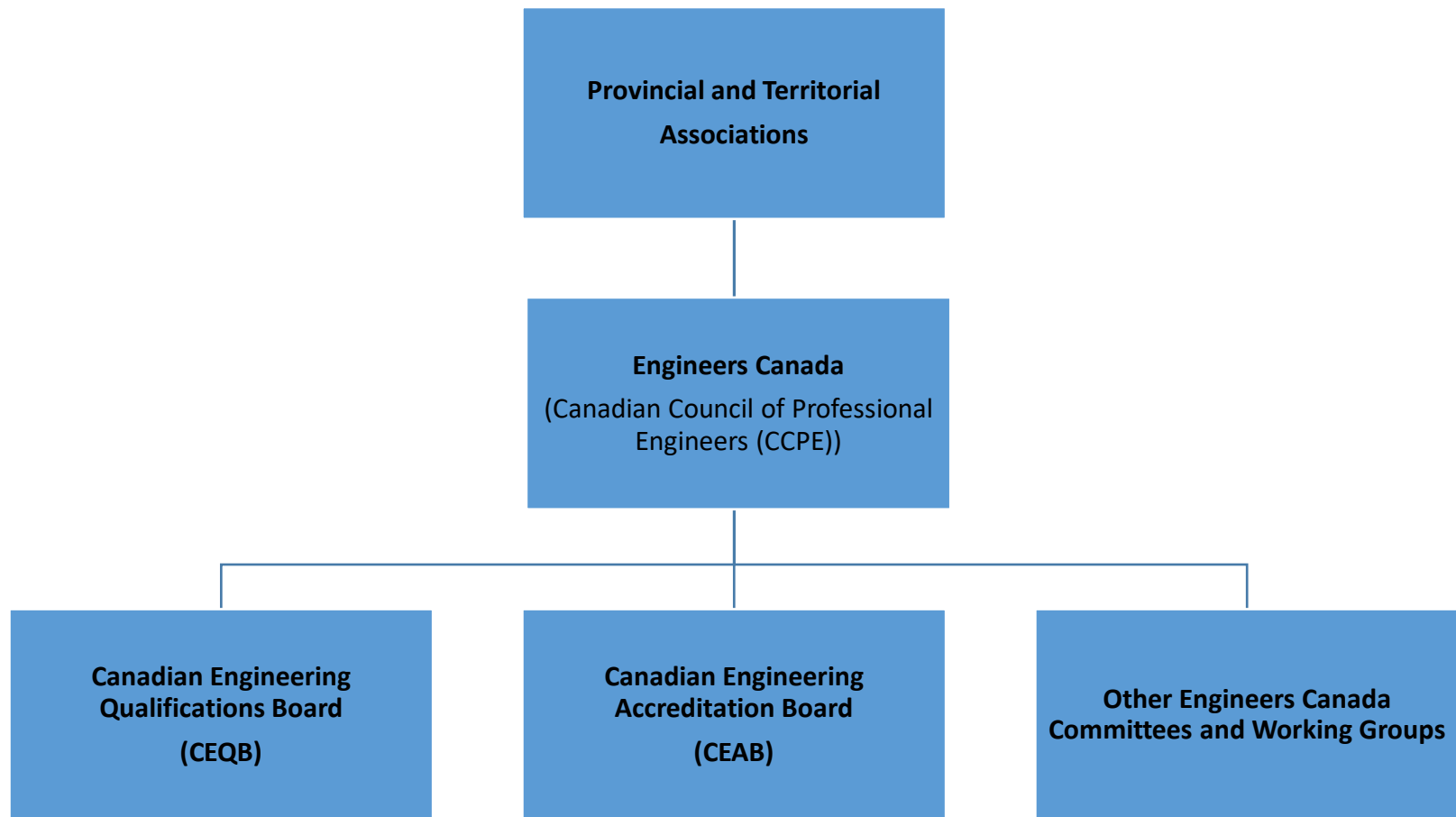
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Historical Overview of Engineering in Canada

- Engineering has existed since ancient times
- Canada has a rich history of engineering and geoscience achievement
- Canadian Society of Civil Engineering – 1887
- Engineering Institute of Canada – 1918
- Provincial Acts – in Canada began 1920
 - APES in 1930 and APEGS in 1997
- Engineers Canada (formerly Canadian Council of Professional Engineers) – mid 1930's

Engineers Canada Organization



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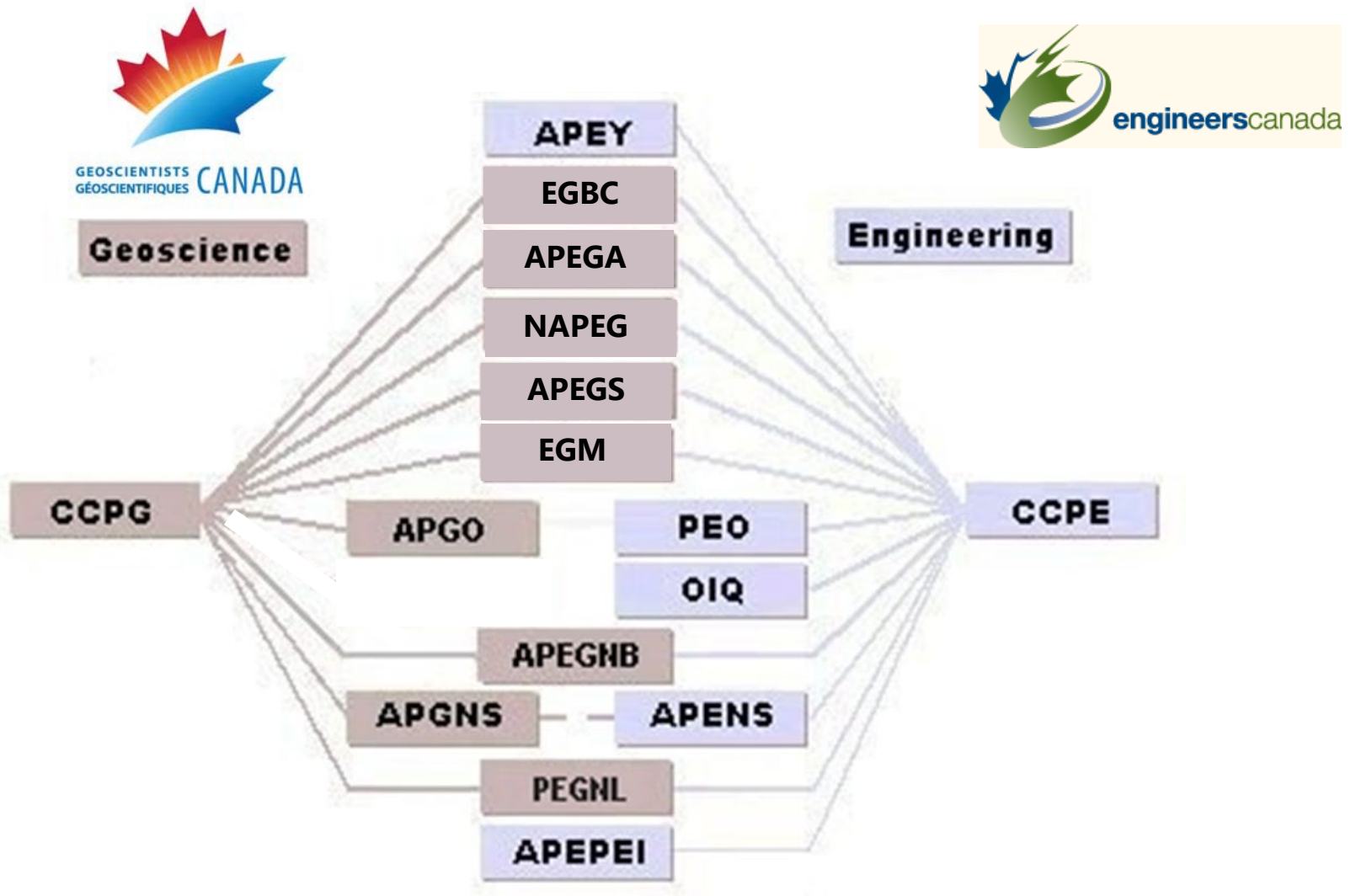
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CEAB and CEQB

- The Canadian Engineering Accreditation Board accredits engineering education programs in Canada
- The Canadian Engineering Qualifications Board develops guidelines which seek to bring about uniform requirements for registration across Canada - (licensing is a provincial responsibility)
- Refer to Engineers Canada documents provided on the APEGS website under Professional Practice Exam

Historical Overview of Geoscience in Canada

- Regulation of geoscientists was first started in Alberta
- Saskatchewan first regulated geoscientists with the new Act in 1997
- No regulation in PEI and Yukon (yet)
- Regulated with engineering in BC, AB, SK, MB, NB, NL and NWT and Nunavut
- Regulated separate from engineering in ON, QC and NS



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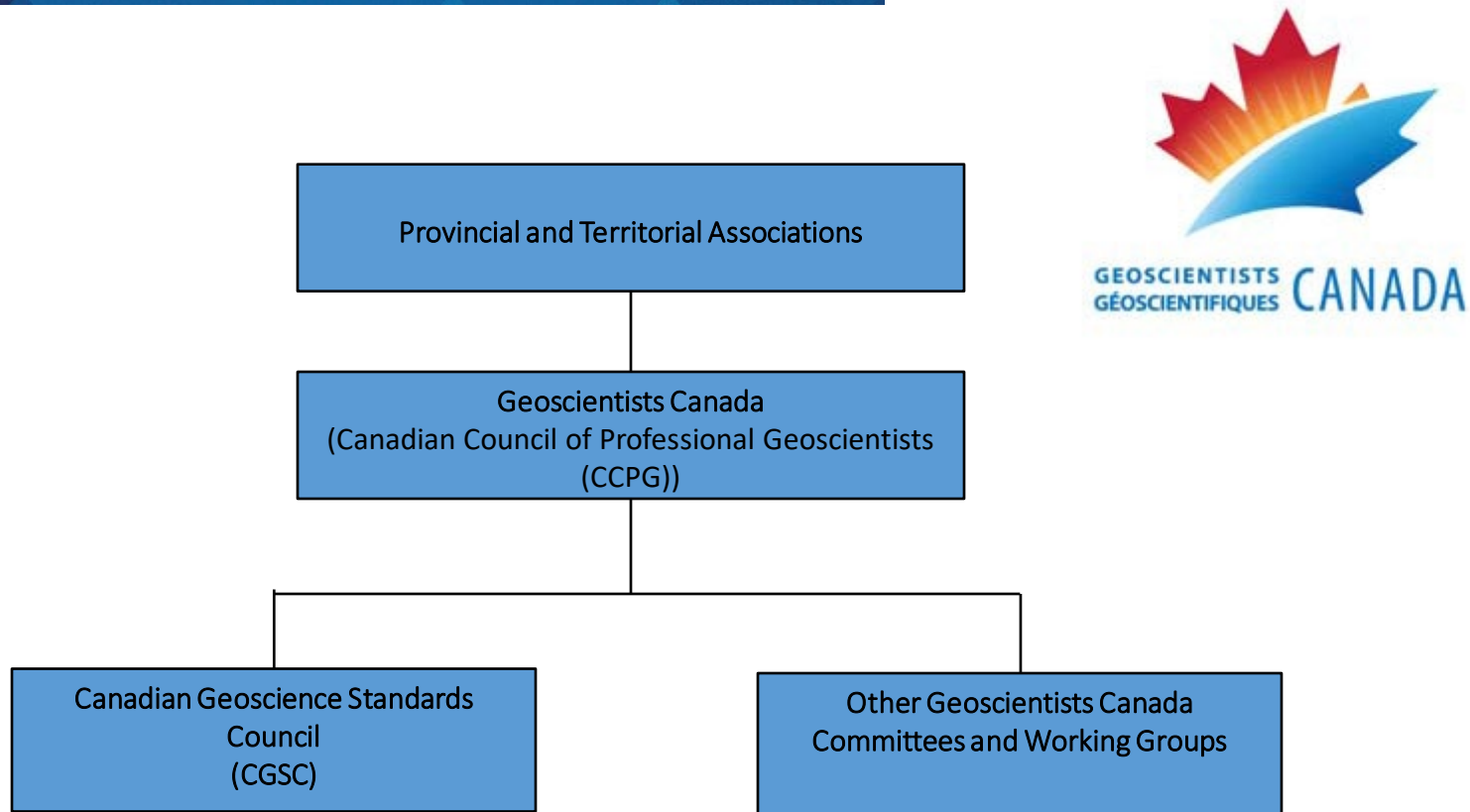
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Geoscience at the National Level

- “Geoscientists Canada” was adopted as the business name for the CCPG in 2010
- Legal name remains Canadian Council of Professional Geoscientists (CCPG)
 - CGSC - The Canadian Geoscience Standards Council

Geoscientists Canada Organization



APEGS ORGANIZATION

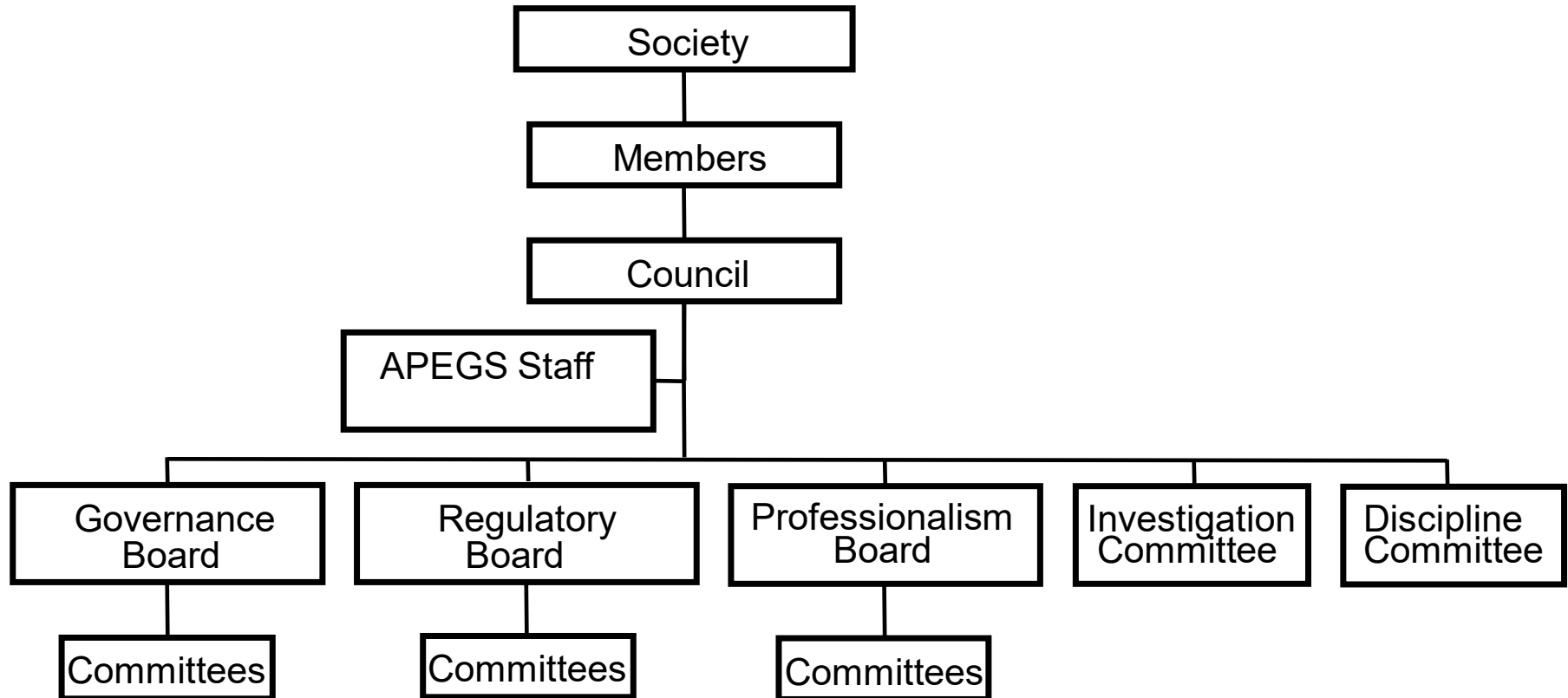
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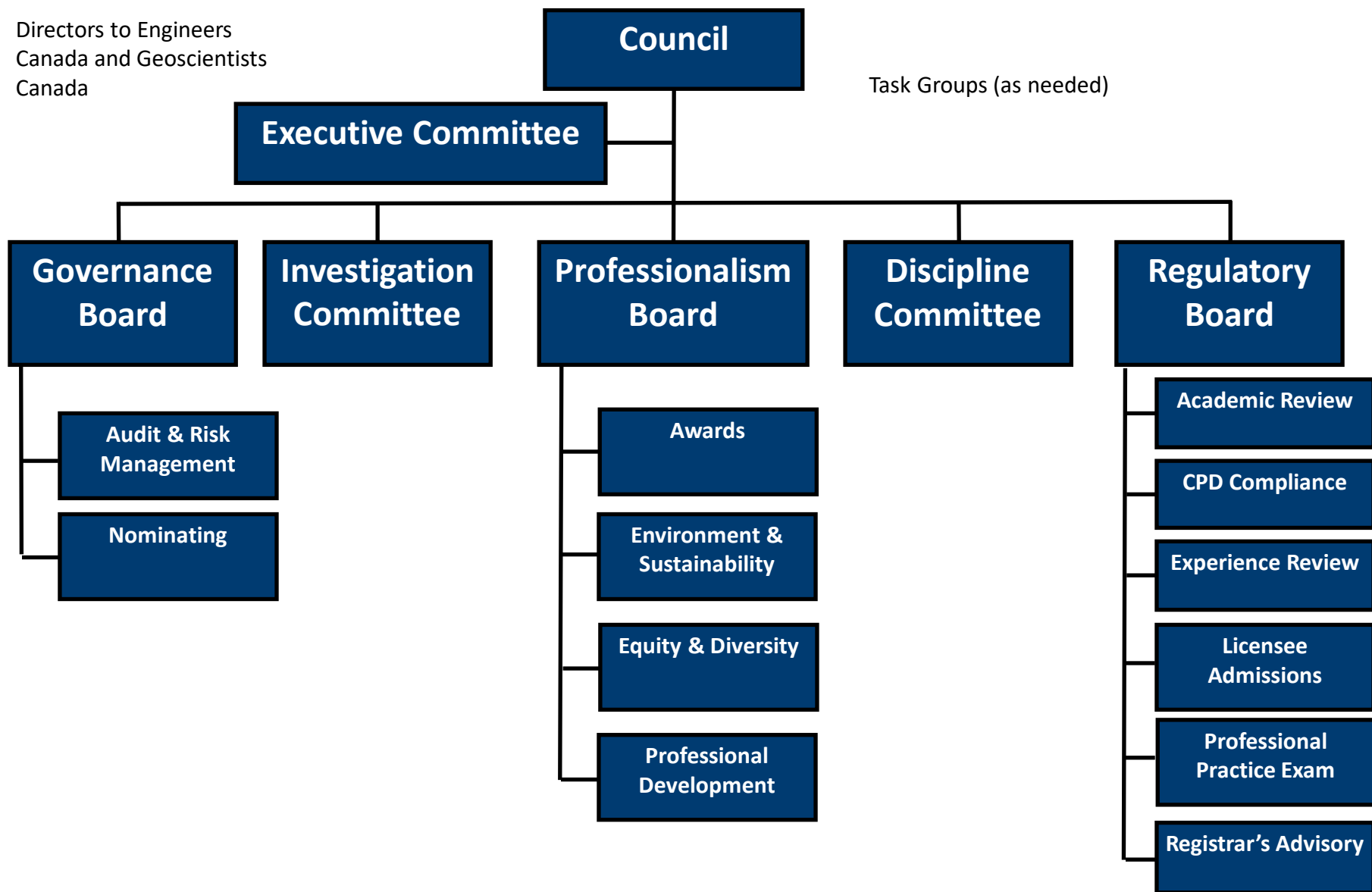
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APEGS Organization



Directors to Engineers
Canada and Geoscientists
Canada



PROFESSIONAL MOBILITY

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National Mobility

- Professional Engineers and Geoscientists registered with one Association often must work in other regions of Canada
- Canadian Agreement on Free Trade
 - Formally the Agreement on Internal Trade
 - Labour mobility provisions effective April 2009.
 - The labour mobility chapter aims to ensure any worker certified to perform a profession by a regulator in one province will be granted certification upon application in another province without additional training, work experience, exams or review.

National Mobility – continued

- Once a professional in one province, apply directly as such in other provinces
- Must be a “member in good standing”, otherwise an assessment of qualifications is required
- Must meet “good character” guideline
- Agree to exchange of personal information (between host and home Associations)
- Meet the continuing competency/professional development requirements of the host Association and/or home Association

International Mobility - Engineers

- Academic level agreements:
 - Korea, Russia, Malaysia, China, South Africa, New Zealand, Australia, Ireland, Hong Kong China, Chinese Taipei, Singapore, Sri Lanka, Japan, India (not all), US, Turkey, UK, Pakistan, Peru
- Professional level agreements:
 - US (check with the State Board), Hong Kong, Australia, Ireland, Mexico
- These agreements have been negotiated by Engineers Canada

International Mobility - Geoscientists

- A mutual recognition agreement exists with Ireland
 - Not all constituent associations signed on
- No further work is being done at this time with other countries

PROFESSIONAL OBLIGATIONS

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Maintaining Registration (1)

- Be of Good Character – refer to Guideline
- Adhere to the Code of Ethics!
 - More on this later in the seminar

Maintaining Registration (2)

- Maintaining your professional registration is YOUR responsibility
- Your membership with APEGS ceases for failure to pay your annual fees by January 31 of the year for which they are due
- Approximately 700 members cease annually for non-payment of their fees

Maintaining Registration (3)

- Comply with the Continuing Professional Development (CPD) Program
- Refer to the CPD Program Document:
 - Hard copy sent in mail
 - E-copy available on APEGS website

Your Annual CPD Obligations

1. Create/Update your CPD Plan
2. Earn the minimum number of credits
3. Obtain credits in the minimum number of activity categories
4. Obtain 1 hour of verifiable ethics training
5. Record your CPD activity online

Credit Requirements

Licensed Members need:

80 CPD credits a year

License Waiver Holders need:

30 CPD credits a year

*Excess credits can be banked
for up to 2 years

Activity Categories

- ❖ There are 6 CPD categories plus annual verifiable ethics training
- ❖ Time spent in ethics training can be counted as Formal Activity
- ❖ Licensed members need credits in 3 of the 6 and must complete ethics training
- ❖ Waiver holders need credits in 2 of the 6 and must complete ethics training

Overview of “The Blue Book”

The Engineering and Geoscience Professions Act, 1997 (EGPA)

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Professional Regulation

- Refer to the “Introduction to Professionalism” presentation
- The practice of professional engineering and professional geoscience in Saskatchewan is regulated pursuant to *The Engineering and Geoscience Professions Act*
- Section 15 and 16 of the Act enables APEGS to create Regulatory Bylaws and Administrative Bylaws (note limitations of this power)

Three Parts:

- The Act (page numbers found on top corners)
- Bylaws (page numbers found on bottom of the page (middle)):
 - Regulatory
 - Administrative

Important Parts of the *EGPA*

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Definitions (Sec. 2)

- Look to section 2 for definitions used within the Act and Bylaws, and in particular:
 - practice of professional engineering
 - practice of professional geoscience

Objects of APEGS (Sec. 5)

- Ensure the proficiency and competency of the members in order to safeguard the public.
- Regulate the practice of engineering and geoscience in accordance with the Act and Bylaws.
- Promote and improve the proficiency and competency of members.
- Foster the practice of professional engineering and professional geoscience in a manner that is in the public interest.

Council (Secs. 9 & 10)

- Council governs the Association
- Made up of:
 - Not less than 10 elected by the members, at least 4 P.Eng. and at least 2 P.Geo. & 1 member-in-training
 - Two persons appointed by the Lieutenant Governor in Council – “Public Appointees”

Membership, Registration and Licenses (Secs. 20, 21, 22)

- Requirements for registration (individual)
- Seals
- Registration of Corporations, partnerships, etc. (Certificate of Authorization)

Other Topics in the *EGPA*

- How to make, amend bylaws (Secs. 15 -17)
- Prohibition (separate topic on Saturday) (Secs. 26 – 28(1))
- Discipline (separate topic on Saturday) (Secs. 28.1 – 45)
- Sets out penalties (Secs. 46 – 51)

Important Parts of the Regulatory Bylaws

(Note that all of the bylaws must fall within the authority granted in sections 15 and 16 of the Act.)

Categories of Membership (Secs. 3 – 6)

- Engineer-in-training
- Geoscientist-in-training
- Professional Engineer
- Professional Geoscientist
- Engineering Licensee
- Geoscience Licensee
- Life Member (engineering)
- Life Member (geoscience)

Qualifications for Registration (Secs. 8 – 12)

- Member-in-Training
- Engineering and Geoscience Licensees
- Professional Engineer
- Professional Geoscientist

Licences and Registrations (Secs. 13 – 19)

- Annual Licence:
 - Member-in-Training
 - Professional Member
- Restricted licence
- Temporary licence
- Registrations:
 - Permission to Consult
 - Certificate of Authorization

Professional Conduct (Sec. 20)

CODE OF ETHICS

(Sec. 20(2) – Page 10 in the Regulatory Bylaws)

Discipline (Secs. 21 – 23)

- Investigation and Discipline processes
- Make up of committees
- Review process
- Separate presentation on Saturday

Continuing Professional Development (Sec. 23.2, App. 5)

- Establishes defined CPD Program
- Defines consequences for non-compliance
- Appendix 5 – details of program

Important Parts of the Administrative Bylaws

(Note that all of the bylaws must fall within the authority granted in sections 15 and 16 of the Act.)

Elected Councillors (Secs. 9 & 10)

- Positions on Council
- Terms of Office

Procedures for Election (Secs. 11 – 15)

- Classification of electoral groups
 - Eligibility for nomination
 - Nominations for Council Election:
 - Nominating committee chaired by the immediate past president
 - Nominated by peers
 - Eligibility to vote
 - Conducting the election
-

Other Topics in the Administrative Bylaws

- Officers and Employees (Secs. 16 – 19)
- Meetings (Secs. 20 – 23):
 - Council
 - Association (meeting of members – Annual Meeting)
 - Quorum and meeting procedures
- Establishment of Committees (Sec. 24)
- Sets Fees (Secs. 25 – 30)

Law for Professional Engineers and Professional Geoscientists

Introduction

Law and Ethics Seminar

Purpose

- Our purpose is to create an awareness of legal principles and issues that impact professional engineers and professional geoscientists
- We are **not** attempting to make lawyers out of engineers and geoscientists
- We will try to make the presentation relevant to all disciplines of engineering and geoscience (although we recognize the law text is heavily weighted towards construction law)

The Canadian Legal System

- Canada is a “Constitutional Monarchy” and the Constitution is the source of legal authority in Canada
- The Canadian Constitution is made up of statutes and conventions from both the British and Canadian Parliaments
- The Canadian Constitution has three primary features:
 - the division of powers between the federal and the provincial/territorial governments;
 - the creation of the Courts; and
 - the *Charter of Rights and Freedoms*

The Creation of Law

- Law is **dynamic**, leading to uncertainty
- Federal and provincial statutes and regulations:
 - must be constitutional
 - statutory authority can be delegated
 - ex. municipal governments (bylaws), professional regulation
- Common law: rules established by previous court decisions (precedent)
- As judges interpret and apply statutes and common law rules, more law is created

Common Law vs. Civil Code

- Most provinces and territories, and most states in the United States, use the British “common law” system
- Quebec and Louisiana have civil law systems based on the Napoleonic Code of France
 - civil law is codified, or statute-based, rather than common law based

Types of Law

- Private vs Public Law
 - Public law relates to the public as a whole, such as constitutional law, administrative law, criminal law and international law
 - Private law relates to definition, regulation and enforcement of rights among individuals
- Criminal Law – deals with crimes and penalties
- Civil Law – dual distinction
 - As distinguished from criminal law
 - As distinguished from common law
- Administrative Law – administrative agencies of government, including rulemaking, adjudication and enforcement (often boards and commissions)

Constitutional Framework

- The *British North America Act* – now the *Constitution Act, 1867* – provides for federal and provincial powers respectively:
 - s. 91 provides exclusive jurisdiction to the federal government
 - examples include criminal law, money and banking, international trade, interprovincial trade
 - s. 92 provides exclusive jurisdiction to the provincial governments
 - Matters of a provincial nature – property and civil rights in a province, including regulation of professions
- Private law is generally within provincial jurisdiction (exceptions include federal labour law, competition law)
- In cases of operational conflict, the federal statute prevails
- Law within provincial government jurisdiction may vary between provinces (examples: lien legislation, employment and labour legislation, professional regulation, consumer legislation)

Charter of Rights and Freedoms

- The *Canadian Charter of Rights and Freedoms* is part of the Canadian Constitution
- The *Charter* codifies individual rights as related to **government action**, including organizations such as APEGS
- The *Charter* does **not** apply to interactions between private parties

Court System

- The Supreme Court of Canada hears matters of national importance
 - Leave is required to appear at the SCC
- Federal Courts deal with matters in the federal realm (ex. national security, immigration, intellectual property)
 - Federal Court and Federal Court of Appeal
 - Tax Court of Canada deals with tax matters
- Each province has a superior trial level court and court of appeal
 - judges are federally appointed and paid
 - in Saskatchewan, it is the Court of Queen's Bench and the Court of Appeal
- Saskatchewan Provincial Court:
 - Small Claims Court – jurisdiction limited by subject matter and value of claim (e.g. Saskatchewan has claim value limit of \$30,000)
 - most criminal matters and some family law matters

Courts Bound / Persuaded by Precedent

- Courts are bound by precedent (decisions) set by a higher level court
 - All courts in all provinces/territories are bound by decisions of the Supreme Court of Canada
 - The Court of Queen's Bench in Saskatchewan and the Provincial Court of Saskatchewan are bound by decisions of the Saskatchewan Court of Appeal
 - The Provincial Court of Saskatchewan is bound by decisions of the Saskatchewan Court of Queen's Bench
- Decisions from other provinces/territories or countries may be persuasive but are not binding

Case Law

- As the law changes, past cases may become less applicable
- Beware of relying on cases currently being appealed
- All relevant cases must be considered
- Construction disputes are fact specific
- Case reports are available at www.canlii.org

International Law

- International treaties; must be ratified
- NAFTA (North America Free Trade Agreement)
- Regardless of treaties and agreements, professionals such as engineers must be licensed or authorized in each jurisdiction in which they work
 - ex. temporary licence for engineers wishing to work in Saskatchewan pursuant to NAFTA
- Tax treaties: minimize double taxation

Subject Areas and Principles

- Most legal disputes for engineers and geoscientists will result from either:
 - Contracts
 - Contracts are voluntary, often need not be in writing, define rights and responsibilities
 - Key area of law for construction disputes
 - Torts
 - Duty to not harm those in the community, intentionally or unintentionally
 - Negligence is just one type of tort, but is common in engineering and construction disputes

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Property

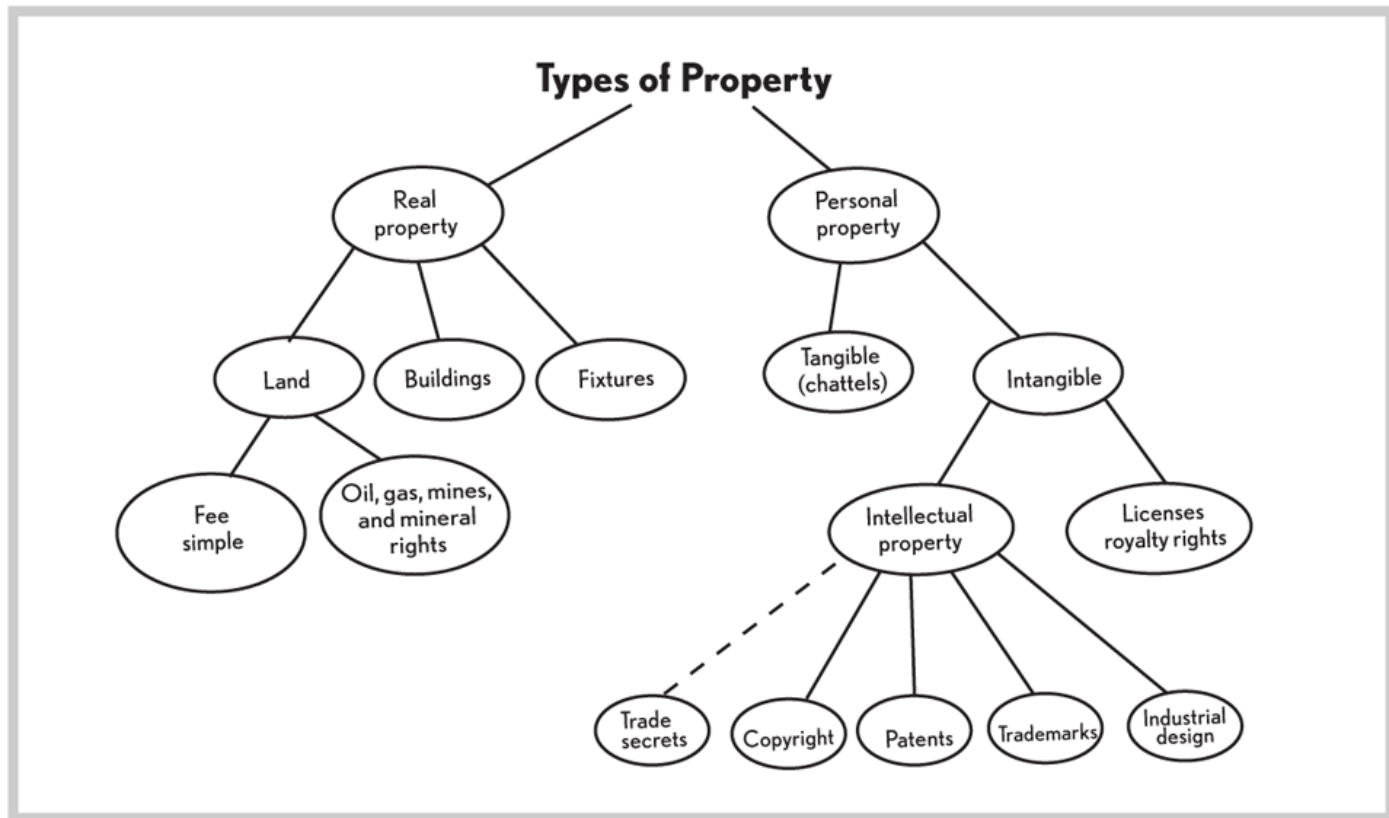
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Property Law

- Two categories:
 - real property, and
 - personal property (an item can change from being one to the other)
- Personal property is either tangible (chattels), or intangible
- Property should be viewed as a collection of rights: different people may own different rights in the same item of property

Types of Property

FIGURE 4-1 Types of Property



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Real Property

- Real property law derived from English law
- Government has transferred rights in real property to private owners
- Government typically retained the right to expropriate, and the right to extract specified resources such as minerals
- Fee simple is the greatest right an individual can have in real property
 - includes the right to sell, lease, occupy, mortgage
 - can be held jointly: joint tenancy or tenancy in common

Real Property: Mines, Minerals, Oil, and Gas

- Minerals often viewed as Crown or Freehold
 - Rights to resources generally excluded from fee simple rights
 - Crown rights retained may be held by either the provincial or federal government, which may grant licence to third party to extract the resources
 - Freehold minerals were often granted with early land grants (ex. CPR, HBC, early settlers)
- Right to the resources generally includes the right to access the land to extract them

Real Property: Registration of Rights

- Torrens system of registration:
 - Used in Saskatchewan (but not in all provinces)
 - Certificate of title shows all rights and owners
 - Act of registration creates legal rights
 - The order of registration of interests bears on priority
 - Land Titles Registration in Saskatchewan is through Information Services Corporation (ISC)

Real Property: Specific Rights

- Lease: exclusive right to occupy
- Mortgage: property as security for a debt
- Easement: the right to use in some way
- Restrictive covenant: conditions of use
- License: contractual right to use in some way
- *Profit à prendre*: right to extract value
- Lien: statutory right to register a debt against land (*The Builders Lien Act*)

Chattels

- Tangible personal property
- Often called goods
- No registry for ownership, only for registration of security interests (priority determined partly on order of registration)
- Saskatchewan Personal Property Registry
- Sale may be governed by legislation e.g. *The Sale of Goods Act*

Intellectual Property

- Protects the expression of ideas
- Can be viewed as a bundle of rights
- Governed by federal legislation and international treaties

Copyright

- Protects “works” e.g. literary, musical, dramatic, artistic, computer software, engineering drawings
- The “work” must be original, permanent, published and the product of skill
- Term of protection in Canada = life of author + 50 years
- Copyright can be contractually assigned (sold or licensed); moral rights cannot be assigned (but can be contractually waived)
- Protection not dependent upon registration

Patents

- Protect inventions: process, machine, composition of matter, or an improvement on one of those
- Invention must be new and useful
- No protection without registration
- No protection if publicly disclosed before registration
- Term of protection in Canada = 20 years (non-renewable)

Trademarks

- Protects marks used to distinguish goods or services (ex. Coca-Cola)
- Must be distinctive, and actually used, to be registerable
- Registration gives the right to exclusive use of the trademark throughout Canada
- Term of protection = 10 years, renewable

Industrial Designs

- Protects the shape, configuration and general look of mass produced items
- Term of protection = 10 years

Integrated Circuit Topographies

- Protects the design of integrated circuits in electronic equipment
- Term of protection = 10 years

Law for Professional Engineers and Professional Geoscientists

Contracts

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Contracts: Overview

- Enforceable voluntary agreement
 - Enforceable – will the courts uphold the contract?
- Sets out rights, responsibilities and liabilities of parties, but also allocates risk and obligations between parties
- Terms: express or implied
- Most contracts need not be written
- Only parties **privity** to the contract can sue on it

Essential Elements

- Essential elements of a contract to be enforceable:
 - offer and acceptance
 - consideration
 - capacity to contract
 - intention to create legal obligations
 - lawful purpose

Contract Formation: Offer and Acceptance

- Offers must contain all essential terms
- Acceptance must be unequivocal agreement, or else it will be a counteroffer
- Invitation to treat: call for offers (advertisement)
- Rejection: must be communicated to the offeror; counter-offer has effect of a rejection
- In the past, no general duty to negotiate in good faith (unless required by agreement or by statute) but courts may be reconsidering this (*Bhasin* case at SCC)

Consideration

- Each party must give, or promise to give, something of value
- Is a prerequisite for an enforceable contract
- Lack of consideration will result in an unenforceable promise to give a gift
- The consideration given by each party does not have to be of equal value
- Forbearance (e.g. giving up the right to sue) may be valid consideration
- Amendments: must have fresh consideration

Other Elements

- Capacity
 - Minors, drunks and lunatics
 - Contract may be voidable by person lacking capacity
- Intention to Create Legal Relations
 - court will not enforce “agreement to agree”
- Legal purpose
 - Void if contrary to statute (ex. cannot contract out of Worker’s Compensation) or common law (ex. contrary to public policy in restraint of trade)

Agreements to Agree

- Agreements to agree are not enforceable as contracts
- Letter of intent or MOU: expression of intention to form a contract in the future
 - Reference: Lethal Energy Inc. v Kingsland Energy Corp, 2014 SKQB
- Dangers of letters of intent or MOU:
 - Parties may not appreciate they are unenforceable
 - Parties may commence performance without ever creating a formal contract
 - On the urging of one of the parties, it may be interpreted by the court as an enforceable contract

Voiding a Contract

- Mistake
- Misrepresentation
- Duress
- Unconscionability
- Frustration

Mistake

- Three prerequisites to void a contract for mistake
 - The mistake must be material (significant)
 - The mistake must be mutual (both parties must have been mistaken)
 - Mistake must have been made at the time the agreement was made
- There is no remedy for a mistaken party if the mistake was not mutual

Misrepresentation

- Misrepresentation: untrue factual statement that induces the other party to enter the contract
- Three categories:
 - fraudulent (intentional false statement, most serious)
 - negligent (statement carelessly made)
 - innocent (difficult to obtain a remedy)
- Damages are generally available for fraudulent and negligent misrepresentation
- Common case arises with subsurface soil conditions

Duress, Unconscionability and Frustration

- **Duress:** improper pressure, threats or coercion used to induce a party to enter into a contract
 - Must be extreme pressure: "coercion of will so as to vitiate consent"
- **Unconscionability:** so unfair, oppressive and one-sided that the courts won't enforce it
 - Generally requires extreme inequality of bargaining power at the time of contract formation. Fine line between legitimate business pressure, and duress
- **Frustration:** occurs when an unforeseen event makes performance impossible, or of no value
 - Event must not be a risk that was anticipated by the parties
 - *Force majeure* clauses: prescribe the consequences of unlikely events

Amendment of Contracts

- Amendments must be agreed upon by both parties
- Original contract may specify formalities for amendment, and these should be obeyed
- Requirements for contract apply: agreement, consideration, certainty of terms, intention to create legal obligations
- Amendments may be voided e.g. for duress

Waiver and Estoppel

- Waiver: when a party, by words or conduct, relieves the other party of the duty to perform
- Estoppel: "to be stopped"; a party is estopped from enforcing rights that it has waived
- Estoppel requires a clear expression that the waiving party intended to waive its rights, and reliance by the party benefiting
- Formalities for amendments often waived

Repudiation and Anticipatory Breach

- 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

Drafting and Interpretation of Contracts

Principles of Interpretation

- Key principles of interpretation:
 - give effect to the objective intention of the parties
 - apply the canons of contract construction
 - if necessary, consider additional evidence
- The court should not re-write the contract for the parties, but rather, interpret the contract the parties made

Interpretation: The Intention of the Parties

- Courts aim to give effect to the intention of the parties
- Establish the *objective* intention of the parties by reviewing the terms of the contract
- Objective intention is what reasonable parties would have intended by agreeing to the specified terms; what the parties subjectively intended is not relevant

Canons of Construction

- Are not rules of law, but guiding principles
- Canons include:
 - Plain and ordinary meaning: the "golden rule"
 - Special Meaning: if the context requires it
 - Reading the contract as a whole
 - Giving effect to all parts of the contract: don't read one part in a way that makes another part redundant

(Continued)

Canons of Construction (Continued)

- Canons (Continued)
 - Restriction by express provisions: special conditions trump general provisions
 - Commercial purpose: presume the parties did not intend a commercially unreasonable result
 - Context: read the words in context
 - Contra proferentem: construe ambiguous provisions against the party that who drafted the contract

Additional Evidence

- The contract itself is the primary evidence
- Parol evidence rule: where the contract is clear and unambiguous, extrinsic evidence of the parties intentions will not be considered
- The parol evidence rule does not preclude evidence of the factual matrix i.e. background
- Where the contract is ambiguous, subsequent conduct of the parties may be considered

Drafting Contracts

- Three principal purposes of drafting:
 - Reflect the business arrangement between the parties
 - Clearly allocate risk between the parties to minimize the likelihood of disputes
 - Provide protections and incentives for the parties
- Carefully consider the fundamental elements
- Consider "what if" scenarios

Getting to Contract

Overview

- Goals for all contracts: to be completed on time, within budget, to a high quality
- There are different methods for getting to contract e.g. call for tenders, negotiation, request for proposals; each has advantages and disadvantages
- Buyers must choose the delivery system and the method of payment e.g. fixed price, cost plus, public-private-partnership

Transfer of Risk and Obligation

- A key aspect of contract negotiation is distributing risks (e.g. cost increases) and obligations (e.g. design responsibility) between the parties
- Risks can be assigned to a party, shared between the parties, or transferred to a third party e.g. supplier, insurer, bonding company
- Generally, costs are minimized when risks are optimally distributed

Choosing a Procurement Process: Overview

- Buyers generally start by appointing a consultant
- Early on, the buyer must select a suitable procurement process
- Some buyers, e.g. government institutions, may be obligated to use a formal tender process because it is fair and transparent
- Using a tender process precludes negotiation

Tendering

- The law of contract applies
- Large amounts of money at stake: failure to abide by the rules of the process may result in lost contracts for bidders & liability for buyers
- Law of mistake applies, but courts are reluctant to allow bidders to withdraw bids
- Bid depositories resolve some of the problems inherent in tendering
- Know the process if it is within your field of practice

Selection of Method of Project Delivery

- The nature of the project drives the choice of project delivery model
- Transparency and fairness requirements for public projects may necessitate a tender process
- Labour and materials markets may influence the choice of project delivery model
- Innovative delivery models are sought to alleviate the adversarial relationship that has traditionally existed between buyers and sellers

Methods of Project Delivery

- Design-Bid-Build
- Construction Management
- Design-Build
- Design-Build-Operate
- Design-Build-Operate-Finance

International and Interprovincial Trade Agreements

- Set rules for the transfer of goods and services
- May influence procurement and dispute resolution processes
- International agreements: NAFTA, WTO
- Interprovincial agreement: Agreement on Internal Trade (AIT), New West Partnership
- Treaties have criteria for determining which transactions they cover

Specific Contracts and Clauses

Overview

- The method of payment often defines the form of contract e.g. lump sum, cost plus
- Other contracts are defined by the roles the parties will perform e.g. design-build
- Some contracts confer rights (e.g. licensing agreements); others provide for the provision of services (e.g. professional service agreements)
- In all contracts, the roles and duties of the parties must be clearly defined

Standard Form Contracts

- Created by industry groups for use by their members, and generally favour the interests of their members over the parties their members will contract with
- Most standard form contracts require modification to suit the particular context
- Standard form contracts are often used without modification to save costs, but this can lead to far greater costs if litigation results

Examples of Contract Types

- Fixed price contracts (CCDC2)
- Cost Plus Contracts
- Unit Price Contracts
- Construction Management Contracts (CCA5)
- Design Build Contracts (CCA14)
- Public Private Partnership

Professional Service Agreements: Introduction

- Should define the scope of work and expected outcomes
- May be fixed price, cost plus, or a percentage of the actual construction costs
- Often have limitation of liability clauses that protect the consultant from claims in excess of the available insurance coverage
- May give the owner alternative remedies in the event the claim is not covered by insurance
- Field review clauses are often contentious: the scope and purpose of the review should be clearly set out

Engineering Service Agreements

- Commonly used standard form contract: ACEC 31
- The parties should address the following issues in detail when using ACEC 31:
 - Site inspections
 - Copyright
 - Limitation of liability
 - Termination

Geoscience Service Agreements

- Commonly used standard form contract: AAPG Contract for Geoscience Services
- The parties should give special attention to the following clauses:
 - The scope of services
 - The responsibility for workers' compensation insurance premiums
 - Termination of the relationship
 - The liability of the Geoscientist

Licensing Agreements

- A license is a grant of rights
- Exclusive license: licensee obtains the exclusive right to use the rights granted by the licensor
- The "grant provision" is the most important in a license agreement; it defines the scope of the license
- Commonly used in intellectual property and real property
- The license fee may be based on profits made by the licensee

Geoscience Agreements

- Define rights and responsibilities in exploration projects
- Take many forms e.g. joint ventures, limited partnerships
- Grubstake agreement: contributions are made to the prospector's exploration costs in return for a stake in the resources discovered
- Option agreements: provide the optionee with the right to purchase land at a specified price within a specified time frame

Requirement of Writing

- Some contracts must be in writing to be enforceable
 - *Statute of Frauds* (1677)
 - Examples:
 - Transfer of an interest in land
 - Contract in which one party becomes a surety (ex. guarantee the debt of another)

Other Contract Issues and Special Clauses

Agency and Authority

- An agent is a person authorized to act on behalf of another party; the principal
 - Engineer is often the agent of the owner
- Agency relationship can be created by
 - Actual authority is an actual agreement between the agent and the principal
 - Apparent authority is the representation by the principal to a third party
- The principal is bound by the acts of the agent that are done within the scope of the agency

Indemnities

- An indemnity is an agreement to bear the financial loss of another party for a specified event
- Insurance policies are contracts of indemnity
- Many indemnities simply reflect the common law that each party is responsible for the harm it causes; these clauses add clarity to avoid litigation, and give the indemnified party contractual remedies

Change Orders

- Changes to the scope of work frequently occur on construction projects
- Extra: increase in the contract price
- Credit: decrease in the contract price
- Change Orders result from
 - Design changes (design error, cost saving, changes to building regulations)
 - Unforeseen conditions

Extras for Design Negligence

- Contractors are entitled to extras resulting from design changes
- Owners may have the right to recover the costs of design changes from the consultant, but generally waive this right if the amounts are relatively small

Impact Costs

- Impact costs occur when extra work is requested that may impact the schedule and efficiency of the rest of the work
- When agreeing to a price for an extra, contractors are expected to incorporate all impact costs arising from that extra
- However, the parties may agree that the contractor retains the right to claim impact costs at some later time

Performing Under Protest

- Ideally, the parties agree on the cost of the extra before the work is done
- In reality, the owner may instruct the contractor to do the extra work before a price is agreed upon: change directive
- To reserve the right to dispute payment for a change directive, the contractor should file a notice of performance under protest

Unforeseen Conditions

- "Unforeseen" refers to conditions that are known to be possible, but are not expected to occur e.g. large amounts of subsurface rock
- Unforeseen conditions commonly result in extras, but may also lead to credits
- The owner is required, at the tender stage, to divulge all available information regarding unforeseen conditions

(Continued)

Unforeseen Conditions

- The contract documents may shift the risk of unforeseen conditions onto the contractor
- Bidders will seldom have time to thoroughly assess the risks associated with unforeseen conditions e.g. by doing a soils investigation
- It is often economically inefficient to have the contractor bear the risk of unforeseen conditions

Contract Administration

- The contract administrator is typically the owner's agent: architect or engineer
- Consultant may play a dual role: owner's agent and initial arbiter of disputes
 - As arbiter, the consultant must act fairly to the contractor, and not favour the owner's interest
- The administrator must perform tasks in timely manner
- The administrator's field review duties may not be clearly detailed in the contract, but must be adequate in frequency and scope giving consideration to the purpose
- The administrator must not interfere with the right of the contractor to choose the method and order of work

Contract Termination

- Contract may end by:
 - Complete performance
 - Frustration
 - Mutual agreement
 - Breach

Termination Clauses

- The parties may incorporate a termination clause into the contract
- Termination clauses specify acts that justify termination of the contract

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

Law for Professional Engineers and Professional Geoscientists

Torts

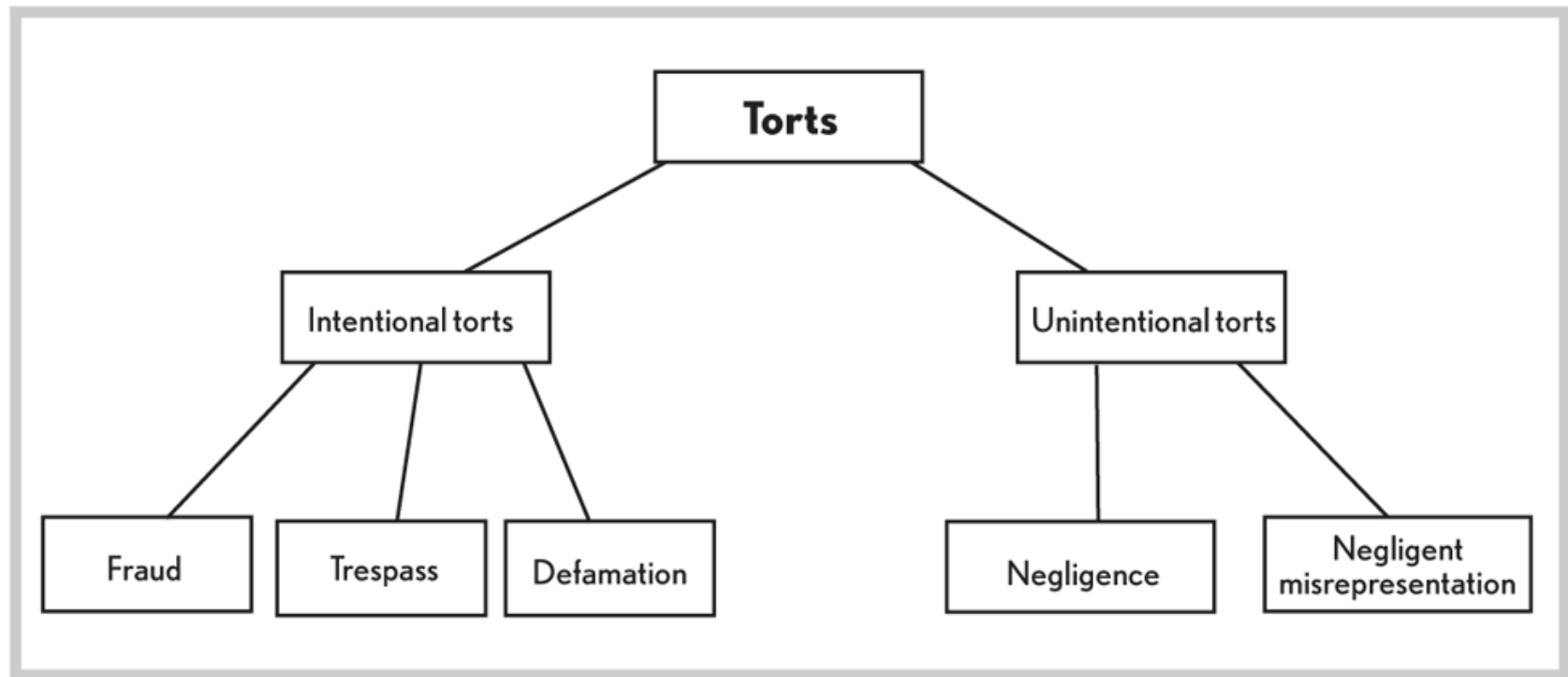
Law and Ethics Seminar

Overview

- Tort is the breach of a duty of care owed to another party that causes injury or loss to that other party
- Negligence is the tort engineers and geoscientists are most commonly sued for
- Two categories of tort: intentional and unintentional
- Tort law evolves continually as new cases are decided
 - ex. – new common law tort of “invasion of privacy” (Ontario CA in *Jones v. Tsige*; but not in BCSC in *Demcak v. Vo*)

Categories of Tort

FIGURE 12-1 Types of Tort



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Overview of Negligence

- Negligence is an unintentional tort
- Basic elements:
 - The defendant owed the plaintiff a **duty of care**
 - The defendant **breached that duty**
 - The **plaintiff suffered a loss**
 - The breach of duty by the defendant was the **proximate cause** of the plaintiff's loss
- Negating any element will be a complete defence to a claim of negligence

Duty of Care

- Duty of care is an unsettled area of law
- Whether a duty exists is based on **reasonable foreseeability**
- A duty of care is more likely to exist where there is a pre-existing relationship between the parties
- A tort duty of care can co-exist with a contractual duty of care

Duties of Care for Architects and Engineers

- Professionals owe a tort duty of care to the owner even if there is no contractual relationship with the owner e.g. when an engineer is hired by the architect
- A consultant who prepares specifications owes a duty of care to bidders
- Generally, consultants hired by the owner do not have a duty of care to the contractor, or to the contractors employees, but if the consultant supervises the construction, such duties may arise
- Third parties to the construction process may have tort claims against consultants if the harm was foreseeable

Pure Economic Loss

- Pure economic loss is financial loss without any associated personal injury or damage to property
- Historically, courts in Canada have barred negligence claims for pure economic loss because of the large amount of liability that would result if such claims were allowed
- Exceptions: pure economic loss can be recovered for some torts e.g. negligent misrepresentation, dangerous defects
 - (5 categories see: Design Services Ltd. v. Canada)

Reducing the Risk of Negligence Claims

- Contractual limitation clauses can limit tort duties of care
- Contractual limitations only apply between the parties to the contract, but may be relevant to whether a party to the contract owed a duty of care to a third party e.g. if the owner's contract with the consultant states that the consultant is not responsible for work methods, it is less likely that the consultant owes a duty to a person injured by dangerous work methods

Breach of Duty

- A breach of duty occurs when the standard of care is not met
- The standard of care is defined by what a reasonable and competent member of that occupation would have done in the situation
- Expert evidence is used to establish the standard of care in a particular case
- The standard of care is determined considering the state of the art **at the time of the alleged breach**

(Continued)

Breach of Duty (continued)

- Commonly practiced norms are relevant to, but not determinative of, the standard of care
- Professionals who hold themselves out as specialists will be held to a higher standard of care
- Most breaches of duty occur due to lack of care, not incompetence
- Continuing professional education programs guard against incompetence
- Checklists and other quality control procedures should be used to prevent lack of care

Causation

- Only losses caused by the defendant's breach of duty are recoverable i.e. losses which, **but for the breach**, would not have occurred
- The loss must also be proximate to (not too remote from) the breach
- The plaintiff must prove causation on a balance of probabilities

Negligent Misrepresentation

- Misrepresentation is a false statement
- Negligent misrepresentation is a false statement made in breach of a duty of care
- A duty of care is owed to those who it is reasonably foreseeable will rely on the statement; but the duty is limited by proximity
- Causation is established by proving reliance on the misrepresentation
- Pure economic loss is recoverable for negligent misrepresentation

Fraud

- Fraud is an intentional tort
- Fraud is also known as deceit
- Where there is a positive obligation to disclose information, a fraudulent misrepresentation can occur by omission
- Negligent statements may be made carelessly, without an intention to deceive, but fraudulent statements are those made intentionally, with knowledge that they are untrue

Fiduciary Duty

- A fiduciary duty exists when there is a special relationship of trust in which the party owing the duty (the fiduciary) is required to put the interests of the party owed the duty (the beneficiary) ahead of its own interests
- The categories of relationship in which fiduciary duties exist are not clearly defined, although they often exist in particular cases e.g. doctor-patient, lawyer-client

(Continued)

Fiduciary Duty (Continued)

- The following are indicia of fiduciary relationships:
 - The fiduciary has the ability to exercise discretion or power
 - The fiduciary can unilaterally exercise that power so as to affect the beneficiary
 - The beneficiary is peculiarly vulnerable to the power of the fiduciary
- Fiduciary relationships do not normally exist between arm's length commercial parties

Trespass

- Trespass is unauthorized entry onto the land of another person
- Trespass is a strict liability tort: the plaintiff is not required to prove intention or neglect
- Property rights extend from below the surface of the land up into the sky above the land → use of rock anchors and tower cranes may lead to a claim of trespass
- Also be aware of *The Trespass to Property Act in Saskatchewan*

Rylands v. Fletcher

- *Rylands v. Fletcher* is a land-related strict liability tort
- *Rylands v. Fletcher* arose from a case where water escaped onto neighbouring property
- Elements of *Rylands v. Fletcher*
 - Defendant made a non-natural use of his land
 - Defendant bought something onto his land which was likely to do mischief if it escaped
 - Escape occurred
 - Damages resulted to the plaintiff's property

Duty to Warn

- A tort duty that obliges professionals to warn others of impending damage to persons or property
- Professionals are held to a high standard, especially when there is a danger to persons
- The duty is fulfilled by taking reasonable steps to warn the appropriate persons of the danger

Products Liability

- The liability of the manufacturer to a consumer for a defective product
- Used when the consumer does not have a direct contractual relationship with the manufacturer; which is the case for most products
- Consumers may have a cause of action for negligent manufacture and / or duty to warn
- Learned intermediary rule: when the person dispensing the product (e.g. a doctor) has a duty to warn the consumer of the dangers associated with the product

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

Law for Professional Engineers and Professional Geoscientists

Dispute Resolution and Remedies

Law and Ethics Seminar

Dispute Resolution

Claims and Disputes

- 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

- 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

- 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

- 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

- 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

(Continued)

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

- 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

- 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

- 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

- 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

- 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

(Continued)

Codes and Standards (Continued)

- 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

- 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

- 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

- 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

- 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)

- 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

(Continued)

Damages (Continued)

- 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

- 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

- 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
- (Continued)

Exclusion & Limitation Clauses

- 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

- 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

- 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

- 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

- 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

- 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

Law for Professional Engineers and Professional Geoscientists

Labour and Employment

Law and Ethics Seminar

Labour Law

- Labour law deals with two categories or relationships:
 - Union-management
 - Employee-union
- Most labour law is governed by provincial legislation; in Saskatchewan it is *The Saskatchewan Employment Act*
 - Federally regulated entities may be subject to Canada Labour Code
- Under labour legislation, unions are the sole bargaining representative for the employees they represent
- The Labour Relations Board has been established as a forum for labour law issues

Employment Law

- Employment law deals with employer-employee relationships where there is no union representation of employees
- Employment is governed by the basic principles of contract law combined with provincial/federal employment legislation
 - For example, in Saskatchewan, *The Saskatchewan Employment Act*
- Employment contracts may be written, oral, or partly written and partly oral
- Issues which are not expressly dealt with by the parties in the employment contract will be read in as implied terms e.g. length of notice for termination

Implied Terms in Common Law Employment Contract

- Unless there are express terms to the contrary, certain terms are implied into every employment contract:
 - the obligation to mitigate after a breach has occurred
 - the employee's duty of loyalty
 - the employee's duty of competence
 - the employer's duty, upon termination, to give adequate notice or severance in lieu of notice

Trade Secrets and Confidential Information

- The duty of fidelity (loyalty) which is imposed on all employees, regardless of whether there is an express term to that effect in the contract of employment, requires employees keep confidential information secret
- Non-disclosure of confidential information is often considered to be a fiduciary obligation
- Confidential information is data, industrial secrets or information obtained or learned through the employment relationship (ex. exploration libraries)
- Trade secret is information that is valuable because it is not widely known and which the company tries to maintain secret

(Continued)

Trade Secrets and Confidential Information

- If disclosure of information would be valuable to a competitor business, then that information is likely impressed with a duty of confidentiality
- Although the duty of confidentiality exists without them, confidentiality agreements help protect confidential information by making it clear what information is confidential
- The duty of confidentiality extends beyond the termination of employment, although an employee can rely on experience gained in a previous job when performing their new job
- The APEGS' Code of Ethics also contains an obligation to maintain confidentiality

Restrictive Covenants

- Restrictive covenant is an agreement whereby the employee agrees that, for a specified period after the employment relationship ends, to not work:
 - for a competitor;
 - in a specified geographic area; and / or
 - in a particular business
- Courts interpret restrictive covenants restrictively and apply a test of reasonableness, particularly as to duration and geographic area

Independent Contractor or Employee

- Unlike employees, independent contractors do not have rights to reasonable notice, overtime compensation etc.
- The distinction is important in many areas including tax, vicarious liability, insurance, workers' compensation, and the duty of loyalty
- The test for distinguishing employees from independent contractors considers many factors, but focuses on the control the employer has over the worker (check CRA guidelines)

Human Rights

- Every province and territory has human rights legislation that deals with human rights complaints both in the employment relationship and generally
- Tribunals are set up under the legislation to deal with complaints
- Not all discrimination is prohibited; the *Saskatchewan Human Rights Code* prohibits discrimination on the basis of: religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race and receipt of public assistance.

Human Rights (Continued)

- Human rights legislation also prohibits harassment
- Employers are required to promptly address all complaints of harassment and may be vicariously liable for the acts of the harassing employee

Law for Professional Engineers and Professional Geoscientists

OH&S, Environmental and Criminal Law Issues

Law and Ethics Seminar

Overview

- Health and safety law is made up of common law tort principles in combination with provincial and federal legislation
- Occupational health and safety (OH&S) and workers' compensation legislation is designed to protect workers from injury and to compensate those that are injured – in Saskatchewan, it is *The Saskatchewan Employment Act* and Regulations and *The Workers' Compensation Act, 2013*
- In exchange for compensation under this legislation, workers give up their right to sue their employers for personal injury

(Continued)

Overview (Continued)

- OH&S legislation is based on three fundamental rights of workers:
 - the right to be informed of hazards;
 - the right to participate in accident prevention; and
 - the right to refuse to do dangerous work
- OH&S regulations are enforced by site visits by government enforcement officials
- **Everyone** is responsible for safety

Occupational Health and Safety

- OH&S legislation improves working conditions through mandatory safety requirements, enforceable by fines imposed on employers and their officers, directors and supervisors
- Harassment is also included in OH&S legislation
- When incidents do occur, employers are required to follow strict documentary procedures
- Engineers and geoscientists may have responsibility in a number of ways – personally, as a manager, as an employer, as an owner, as an agent for an owner, as a contractor, or as an agent for a contractor

Environmental Law

Overview

- Modern environmental law is mix of common law and statutory regulation
- The principles of trespass, nuisance, negligence, misrepresentation, and strict liability are commonly used in environmental claims
- A broad range of provincial and federal statutes create funds to clean up environmental contamination and impose criminal and quasi-criminal penalties for environmental breaches

(Continued)

Overview (Continued)

- Environmental contamination is usually discovered and remediated through a three stage environmental site assessment (ESA)
- Environmental audits are distinct from ESAs, and assess corporate environmental liability based on compliance
- Environmental legislation contains proactive measures to prevent future contamination and aims to balance the need for environmental protection with the desire for economic development

Environmental Impact Assessments

- Environmental impact assessments may be required for new projects, or for modifications to existing projects
- Depending on the nature of the project and the sensitivity of the location, one of four levels of environmental impact assessment will be appropriate:
 - screening
 - comprehensive study
 - mediation
 - panel review

Environmental Site Assessments

- ESAs are divided into three stages:
 1. Information gathering
 2. Site investigation and assessment of contamination
 3. Detailed description of contamination and formulation of remediation options
- Surrounding properties are often included in ESAs because pollution often migrates

Environmental Audits

- Audits involve objectively assessing environmental contamination, compliance, and risks - independently
- Audits may be statutorily required, but may also be done to:
 - provide defences against environmental claims or prosecutions
 - protect the health and welfare of outside persons
 - reduce remediation expenses
 - due diligence for stakeholders
- The Canadian Standards Association and ISO set guidelines for environmental audits

Environmental Offences

- The federal and provincial statutes combined create a large number of environmental offences
- The offences cover a variety of behaviour including discharging contaminants, failing to report, failing to keep proper records, failing to assist in investigations
- Both corporations and their employees may be liable to prosecution, and imprisonment is possible for serious offences
- Most offences are strict liability: the only defence is for the defendant to show that it was duly diligent

Criminal Law

Bill C-45 Criminal Liability of Organizations

- Reaction to the Westray Mine Disaster
 - Explosion in Westray Mine in Plymouth, Nova Scotia on May 9, 1992
 - 26 miners killed; 11 miners remain in mine
 - Anecdotal evidence of unsafe practices and safety infractions
 - RCMP opened a criminal investigation
 - 52 charges of non-safe practice against Curragh (mine owner), but dropped to facilitate criminal investigation
 - Criminal charges of manslaughter and criminal negligence laid against Curragh and two managers, but later stayed due to uncertainty over the precise cause of the explosion

Government Reaction – Bill C-45

- An Act to Amend the Criminal Code (**Criminal Liability of Organizations**)
- Criminal responsibility in addition to Occupational Health and Safety regulation
- It is not just health and safety – it provides a legal duty for all persons directing work
- It sets out sentencing factors, including probation orders
- Effective March 31, 2004

Adds s. 217.1 & 22.1 to *Criminal Code of Canada*

- “Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”
- This section imposes a “duty” within the meaning of s. 219 CCC
- Section 22.1 outlines requirements for imposing criminal liability on an organization for negligence

Charges under Bill C-45

- To date, the courts have dealt with several cases of criminal charges laid under Bill C-45
- In some cases, there is a trade-off between OH&S offences and criminal charges (ex. Fantini)
- Convictions have been obtained against both corporations and individuals

Case Law

- There are several cases of note:
 - Transpave - manufacturing
 - Metron Construction – scaffold collapse
 - Kazenelson – project manager
 - Hritchuk – fuel pump
 - Scrocca – backhoe maintenance
 - Williams Engineering – agent
- The defence to these charges is due diligence

Law for Professional Engineers and Professional Geoscientists

Duty to Consult

Law and Ethics Seminar

Overview

- Aboriginal people occupied the land of Canada prior to the arrival of European settlers
- Aboriginal claims are acknowledged and the governments are attempting to resolve outstanding issues
- It is important to be aware of these claims and obligations arising therefrom

Issues

- Duty to Consult
 - The Supreme of Canada has held there is a duty to consult and accommodate the interests of Aboriginal people affected by proposed activities in the *Haida*, *Taku River* and *Mikisew Cree* decisions
 - The duty to consult is based upon the honour of the Crown and requires that the Crown consult with and potentially accommodate the interests of Aboriginal peoples when the Crown has knowledge of the potential existence of an Aboriginal or treaty right and contemplates decisions or actions that might adversely affect it.

Issues (Continued)

- Treaty obligations
 - Many Bands have signed Treaties and have Treaty rights
- Contracts with Band Councils
 - A Band Council Resolution authorizing a contract is necessary to ensure its enforceability
 - Many of the traditional forms of security are not available
 - Obtain legal advice

Ethics

Law and Ethics Seminar



Quick Overview from Earlier

- What is a Professional?
 - extensive training
 - specialized knowledge
 - professional association
 - ethical code
 - certification or licensing



Overview (Continued)

- Professionalism:
 - Duty and Responsibility
 - Higher Standard of Personal Conduct
 - Code of Ethics

Overview (Continued)

- You are responsible to:
 - Society and Public
 - Employer and Client
 - Colleagues and Peers
 - Employees and Subordinates
 - APEGS
 - Yourself



Definition of Ethics

- Conforming to accepted and especially professional standards of conduct (*synonymous with virtuous, moral, principled*)
- Is relative to the environment you are working in (*the culture/the society in which you work*)

History of Professional Ethics

- Hippocratic Oath
- Primum non nocere
 - First, do no harm.
- Honour Pin Ceremony
 - Some engineering student societies
- Iron Ring Ceremony
 - Calling of an Engineer
- Earth Ring Ceremony
- Engineering Regulated in Sask 1930
- Geoscience Regulated in Sask 1997



Where do we Learn Ethics?

- Age 0 to 5
 - Parents, Siblings, Grandparents, other relatives
- Age 5 to 18
 - Home, School, Media, Friends, Coaches
- Age 18 Plus
 - Employers, Peers, Professional Associations, Service Groups, Spouse
- Plus many more. The important thing is to reflect on the reasons for our decisions
- Your approach may change over time as you age

Basic Ethical Questions

RIGHT

VS

WRONG

GOOD

VS

BAD



Difficult Ethical Questions

RIGHT

VS

RIGHT

GOOD

VS

GOOD



Ethics of a Professional

- Advanced knowledge and abilities from specialized education and practical experience.
- Limit activities to areas of knowledge and experience.
- Ensure competence is maintained.
- Practice according to the Code of Ethics.
- Recognize and support the role of their Association as delegated by society.
- Refer to section 20 of Regulatory Bylaws.

The Highest Obligation

The Engineers Canada guide to professional practice states:

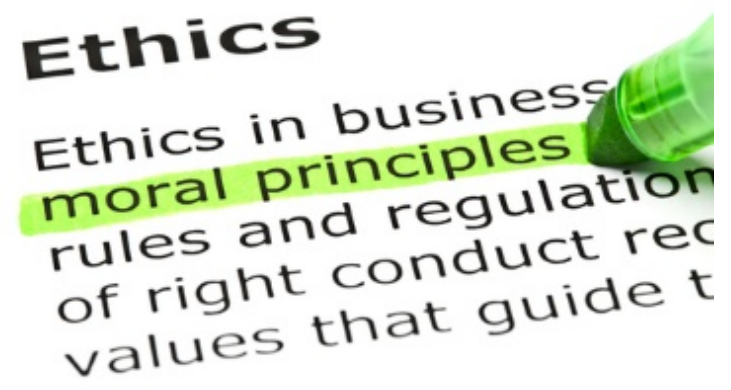
“.... the highest obligation of a profession is to society, which it serves; the members of a profession shall protect the interests of society in the areas of the professional’s specialized expertise. This obligation rises above all others when there are conflicting responsibilities...”

The Highest Obligation (Continued)

“...As a part of this ‘social contract’, the recognized professions in Canada have been given the authority and responsibility to be self-regulating under their respective provincial and territorial legislation, and to ensure only qualified professionals are licensed to practice.”

Engineering & Geoscience Ethics

“Ethics are the moral issues which we relate to how people and organizations involved in engineering and geoscience should act in given situations.”



Ethics
Ethics in business
moral principles
rules and regulation
of right conduct rec
values that guide t

Code of Ethics

- Section 20(2) of the Regulatory Bylaws
 - Protection of the public and the environment is paramount
 - Provide services only in area(s) of competence
 - Act as faithful agent to clients and employer
 - Maintain confidentiality and avoid conflicts of interest
 - Maintain competence

Code of Ethics

- Ethical conduct toward all people
- Advise consequence of ignoring good engineering principles
- Report illegal & unethical practice
- Be accountable and assume leadership

Resolution of Ethical Situations

1. Recognition that there is a problem
2. Define the problem
3. Identify critical ethical duties and responsibilities
4. Build an action plan
 - Alternatives
 - Decisions
 - Act
5. Take a Leadership Role

Resolution of Ethical Situations

DOCUMENT!

DOCUMENT!!

DOCUMENT!!!

Suggested Questions to Ask Yourself

- Know which approach you are using and periodically reflect on that
- What harm to whom and how much? (sometimes you have to offend to be ethical)
- Will it cause you, your family or your profession, embarrassment?
 - step back and re-evaluate
- The public expects professionals to be objective (watch for personal bias)
- **If in doubt, ask** (without violating confidentiality)

Know This Process Well

- It will help you pass your exam
- Help you avoid APEGS investigations
- Keep you out of court
- Help you to conduct yourself as a professional

Principles of Professional Practice Exam

Law and Ethics Seminar

NPPE

- APEGS offers the NPPE in November and June
 - AM/PM
 - Approximately 3 hours
- Mark your calendars for the date of the Exam!
- Don't be late – Any sign in after the scheduled exam will be denied.



Virtual/Remote Proctoring & Test Centers

- Virtual Exams

- In the case of exams done remotely, candidates will receive a booking confirmation from Yardstick of your exact exam date and time 3-4 weeks prior. The confirmation will explain the virtual process.
- It is important to check your SPAM folder.
- Choose your time zone carefully!

- Testing Centers

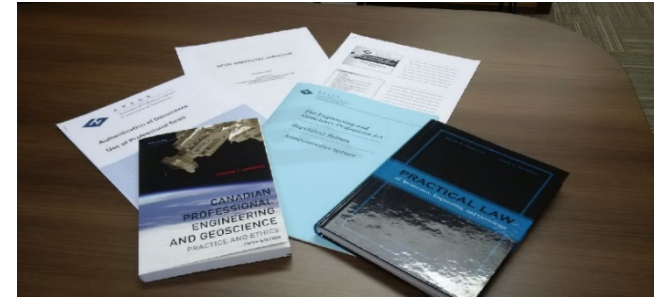
- You will be asked to provide your preferred test centre location, and date/time to take the exam.

What if the Date/Location Doesn't Work for Me?

- You can arrange to write on alternate dates or at alternate locations
- Special accommodations can also be requested – must apply for consideration well in advance of exam date
- See information and application processes on the APEGS website

How should I prepare?

- Study:
 - Materials presented at this seminar
 - Act and Bylaws (blue book)
 - Textbooks:
 - Canadian Professional Engineering and Geoscience Practice and Ethics
 - Practical Law of Architecture, Engineering and Geoscience
 - NPPE Reference Material
 - [NPPE Candidate Guide](#)
 - [Practice Tests](#)
 - [NPPE Blueprint](#)



What should I bring?

- Water in a clear water bottle
- Old-school analog or digital watch
- Snacks are only allowed for pre-approved medical reasons

**Please read the booking confirmation email from Yardstick carefully as it specifies items that will be allowed or not allowed

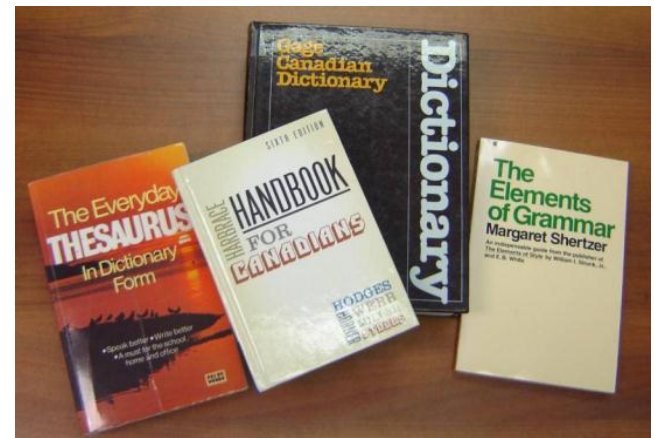
- **Alternate Exam only**

The Exam must be written in ink, so bring a pen (or two)

What should I not bring?

- Textbooks, notes, dictionaries, electronic devices* and friends must be left outside the exam room

*Electronic devices (i.e. calculators, smartphones, iPods, Blackberrys, smart watches)



Signing in for the exam

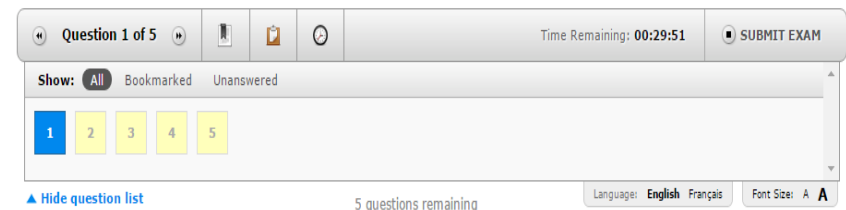
- For (NPPE) Virtual or Testing Center:
 - read the confirmation email carefully. It provides all the details and how to sign in for the exam.

- For Alternate Arrangement exams:
 - Sign in:
 - Bring Letter of Confirmation
 - Government issued picture ID required
 - Sign confidentiality declaration



The NPPE

- Have a copy of your confirmation email sent by Yardstick as well as a piece of valid (non-expired) government issued photo ID.
- The first and last name on your confirmation email and your ID must match exactly.
If it does not you may not be permitted to take the NPPE.
- For the Virtual Exam: Make sure to Run all the computer checks that are suggested, to ensure that all the computer requirements are met, including a webcam, Cellphone is **NOT** acceptable.



During the examination, your task will be to select the correct answer to the question from a list of alternatives. Which of the following is the **correct** method of selecting your answer?

- ☐ A) Clicking on the radio button (circle) corresponding to your answer.
- ☐ B) Clicking on the Bookmark Icon at the top of the screen.
- ☐ C) Clicking the Pause Button on the exam interface.
- ☐ D) Clicking the "Go To Next Question" button on the bottom right of the screen.

Go To Next Question »

The Virtual Exam (NPPE)

- The ProctorU exam program cannot be downloaded until the day of your exam
- There is a short video tutorial that may be helpful, that you can watch through the Yardstick FAQ page here <https://www.getyardstick.com/online-proctoring-faq/>.
- It is best to take the exam in your home, as taking the exam at work requires having IT support staff on hand to ensure that the program is not blocked by a firewall.
- You will have a 15-minute window to log on to the ProctorU program, or the exam will be cancelled. It may take up to 30 minutes after candidates log on.
- **Read the NPPE Candidate Guide for More information on the Virtual Exam and Testing Center Protocols.**

The NPPE consists of the following:

- The exam format is 110 multiple choice questions, each with four options and only one correct answer per question.
- Multiple choice questions are scored 0 (incorrect) or 1 (correct) with no penalty for guessing. This section will account for 85% of the mark.
- An additional APEGS-specific Essay question will be included and will account for 15% of the mark.
- The time to take the exam is approximately 3 hours.

The Alternate Exam - Package

- Inside the envelope, you will find the exam instructions, the exam, and exam booklets



The Alternate Exams booklets

Do not write your name
on any of the exam
materials being handed
in, only your exam
number

The Alternate exam MAY consist of the following:

- Part A:

- True/False (20 questions, 1 mark each)
 - Correct answer = +1
 - Incorrect answer = -½
 - Unanswered = 0 (no credit or penalty)

- Part B:

- B1 - Short answer (8 questions, 3 marks each)
- B2 - Multiple Choice (6 questions, 3 marks each)
 - Correct answer = +3
 - Incorrect answer = -1
 - Unanswered = 0

The Alternate exam...

- Part C: Essays (8 marks each)
 - Question 1: required to be answered
 - Questions 2, 3, 4, 5: complete ANY 2
 - If you answer more than 2, indicate which answers to be marked, otherwise, the first two will be marked
 - Answers must include explanation and/or justification of answer
- Part D: Long Essay (14 marks)
 - One question: required
 - Include good description of the reason for your answer – why you think your answer is “correct”

ESSAY FORMAT (Applies to both NPPE and Alternate Exam)

Introductory Paragraph

The introductory paragraph should include the thesis statement, a kind of mini-outline for the paper: it tells the reader what the essay is about. The last sentence of this paragraph must also contain a transitional "hook" which moves the reader to the first paragraph of the body of the paper.

Body — First Paragraph

The first paragraph of the body should contain the strongest argument, most significant example, cleverest illustration, or an obvious beginning point. The topic for this paragraph should be in the first or second sentence. This topic should relate to the thesis statement in the introductory paragraph.

Body — Second Paragraph

The second paragraph of the body should contain the second strongest argument, second most significant example, second cleverest illustration, or an obvious follow up the first paragraph in the body

Body — Third Paragraph

The third paragraph of the body should contain the weakest argument, weakest example, weakest illustration, or an obvious follow up to the second paragraph in the body

Conclusion Paragraph

This paragraph should include the following:

1. an allusion to the pattern used in the introductory paragraph,
2. a restatement of the thesis statement, using some of the original language or language that "echoes" the original language
3. a summary of the three main points from the body of the paper
4. a final statement that gives the reader signals that the discussion has come to an end

Essay Question (Applies to both NPPE and Alternate Exam)

- State your assumptions or re-state the question in your own words if you are not sure what it means
 - The marker will take this into account
- You will *not* be penalized for being critical of the Association in any of your answers
- Spelling and grammar will count!

Typical Distribution of Content on the Alternate Exam

- Law 25%
- Ethics 20%
- Professionalism 29%
- Policy/Regulations 26%

NOTE – this is a ***Professional Practice*** Exam

During the Alternate Arrangement Exam

- The invigilator may provide simple clarification for questions
- State your assumptions or re-state the question in your own words if you are not sure what it means
 - The marker will take this into account
- Double space your written answers in a neat format large enough for the marker to read easily
- You will *not* be penalized for being critical of the Association in any of your answers
- Spelling and grammar will count!

When you are finished the alternate arrangement exam...

- Review the exam to make sure you haven't missed anything
- Re-read your answers – you will be marked on your ability to communicate
- Turn in all exam pages, booklets, and papers when you have completed the examination in the envelop provided
 - Make sure your exam number is on all papers being turned in
- All candidates must turn in all exam materials at the end of the 3 hour exam period

Questions?

- **No** examples of the alternate exam are available
- Pass mark is 65% for both exams
- The scope of the exam is:
 - law,
 - ethics,
 - professional obligations,
 - use of seals, the **BLUE BOOK** (the Act and Bylaws)..., and
 - topics related to professional practice within Canada
 - **NPPE Blueprint**

WARNING!!!!

DO NOT CHEAT ON THE EXAM!!!

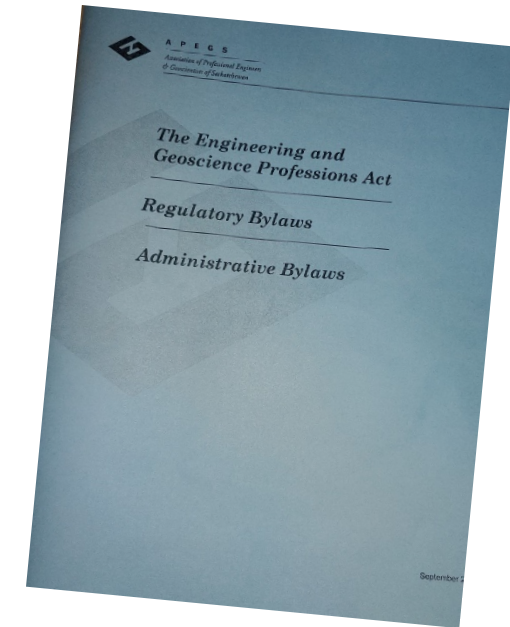
- Getting caught doing so will result in you being:
 - removed from the exam room and not allowed to complete the exam
 - assigned a mark of zero
 - reported to the Investigation Committee

Investigation and Discipline

Law and Ethics Seminar

Resources

- *The Engineering and Geoscience Professions Act (Act)*
- *The Engineering and Geoscience Professions Regulatory Bylaws, 1997 (Reg. Bylaws)*
- The Code of Ethics (s.20 Reg. Bylaws)



Agenda

1. Investigation:

- Authority
- Process

2. Discipline:

- Process
- Decisions and Orders

3. Duty to Report

- Code of Ethics

Two Aspects to Self-Regulation

- **Registration** - qualified persons are registered and licensed as members, and are subject to investigation and discipline for professional incompetence and professional misconduct
- **Prohibition** - unqualified persons are prohibited from using title and practicing professional engineering or professional geoscience (i.e. non-members)

How Does APEGS Regulate the Professions?

- All licensees and holders of Certificates of Authorization are subject to the Act and Bylaws
- The Bylaws contain a “Code of Ethics” to be followed by all members
- Complaints may be received about the competence and conduct of members
- The Investigation and Discipline Committees deal with professional incompetence and professional misconduct of members

Investigation

Investigation Committee

- Responsible for the investigation of allegations of professional incompetence (s.29 Act) or professional misconduct (s.30 Act).
- Purpose of the investigation is to determine whether there is a basis for laying a charge and proceeding with a hearing. (Buglass)

Investigation Committee

- At least nine members of APEGS s.21(1) Reg. Bylaws
- Includes one of the Councillors appointed by the provincial government s. 10(6); 31(2) Act
- No elected members of Council s. 31(3) Act
- No members of the Discipline Committee s. 31(3) Act

Professional Incompetence

The display by a member of:

- (a) a lack of knowledge, skill or judgment; or
- (b) a disregard for the welfare of members of the public served by the profession;

of a nature or to an extent that demonstrates that the member is unfit to continue in the practice of the profession, is professional incompetence within the meaning of the Act.

s.29 Act

Professional Misconduct

Any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of the *Act* if:

- (a) it is harmful to the best interest of the public or the members;
- (b) it tends to harm the standing of the profession;
- (c) it is a breach of the *Act* or bylaws; or
- (d) it is a failure to comply with an order of the investigation committee, the discipline committee or the Council.

s.30 Act

Natural Justice

- All investigation and discipline hearings must be undertaken pursuant to the principles of natural justice.
- Natural justice requires:
 - Members to be advised of allegations and of findings.
 - Members to have the opportunity to be heard or respond.
 - Impartial investigation and discipline committees (no conflicts or bias)

Duty of Fairness

- Investigation Committee is required to act fairly.
- Fairness is exhibited by:
 - Notice of the allegation and formal charges
 - Disclosure of information to member
 - Confidentiality
 - Knowledge and use of facts
 - Freedom from partiality and bias
 - Declaration of Conflict of Interest

Key Processes

- Investigation Initiated
- Threshold Review
- Notification & Request for Information
- Information Gathering and Review
- Establish Findings and Recommendation
- Reporting
- Review by Council (if application is made)
- Pre-hearing Conference (if a discipline hearing is recommended)

Initiation



Investigation process starts with either:

- A request from Council to consider a complaint

Or

- A written complaint (from a member or the public)

s. 32(1) Act

Threshold Review

- APEGS member/licensee?
- Actions within Saskatchewan?
- Allegations, if proved, could reasonably be regarded as professional incompetence or professional misconduct?
- Jurisdiction over remedy requested?

Notification Process

- Advise the member that a complaint has been received and of the nature of the complaint and invite response.
s.21(2)(a) Reg. Bylaws
- Acknowledge receipt of complaint.
- Explain Investigation Committee procedures.

Information Gathering & Review

- Information is gathered through interviews, examination of documents and records, field observations.
- Information sought from complainant, member, employers, others.
- Technical and other information may be solicited from third parties.

Investigative Powers

- Act requires partnerships, associations of persons or corporations that engage in the practice of professional engineering or professional geoscience to provide records, property, etc. required for investigation s.23; s.43 Act
- Association can apply to Provincial Court for an order to obtain records, property, etc. required for investigation s.43 Act

Establishing Findings & Recommendations

- Review of the information gathered.
- Discussion by Committee Members.
- Weighing of evidence.
- Establish findings.
- Input from legal counsel.
- Development of a recommendation and basis.

Investigation Committee Report

- On completion of the investigation, the Investigation Committee makes a written report to the Discipline Committee recommending:
 - That the Discipline Committee hear and determine the formal complaint set out in the report; or
 - That no further action be taken with respect to the matter under investigation s. 32(3) Act
- Report must be signed by a majority of members of Investigation Committee s. 32(5) Act

Reporting

Report generally includes:

Summary of the
allegations

Findings of the
Committee

Recommendation of the
Committee

Signatures of Committee
Members

Issuance of the Report to:

Discipline Committee

When report recommends
no further action,
copies provided to:

Complainant

Member

Council

Review by Council

- Complainant may apply to Council to review a recommendation of the Investigation Committee that no further action be taken. s. 32(7) Act
- Council may:
 - Confirm the decision of the Committee; or
 - Refer the matter back to the Investigation Committee to:
 - further investigate the matter, or
 - prepare a written report recommending a discipline hearing s. 32(8) Act

Pre-Hearing Conference

- If the Investigation Committee recommends that the discipline committee hear and determine a complaint, a pre-hearing conference is conducted prior to the hearing.
s.21.1(1) Reg. Bylaws
- Provides an opportunity to make full disclosure to the member.

Pre-Hearing Conference

- Attendance includes:
 - Representative from the Investigation Committee, or designate and/or their Legal Counsel
 - Member and/or their Legal Counsel
 - Independent mediator
- The meeting is facilitated by the independent mediator

Pre-Hearing Conference



Items that may be discussed:

- Wording of formal complaint
- Scheduling of hearing
- Agreed statement of facts or conduct
- Joint Submission on Disposition
- Agreement on evidence



Outcomes:

- Report is issued that recommends no further action be taken; or
- Complaint is referred to the Discipline Committee

Issues Underlying Allegations



Dissatisfaction with product, scope or schedule (business conflict)



Conflict of interest



Unauthorized use of documentation



Misaligned expectations



Misunderstanding of APEGS' jurisdiction and role

(i.e., not a mechanism for resolving disputes nor a substitute for the courts)

Discipline

Discipline Committee

- Provides an inquiry and judgement capability to enable the Association to meet its responsibilities under the discipline sections of the Act. s.33 Act
- Hears and determines formal complaints referred to it by the Investigation Committee
 - Essentially a “judge and jury” function

Make-up of Discipline Committee

- At least nine members of APEGS
- No elected members of Council
- No members of the Investigation Committee
- One of the Councillors appointed by the provincial government

s.33 Act

Discipline Hearings

- Discipline Committee appoints up to five members to hear and determine a formal complaint (always includes public appointee)
- The discipline hearing is open to the public (except in special cases)
- The Investigation Committee and the member may be represented by legal counsel
- The Discipline Panel will also have Legal Counsel
- Proceedings are recorded by a Court reporter

s.34 Act

Procedures at a Hearing

- The hearing panel can determine its rules of evidence
- Witnesses may be called on behalf of the Investigation Committee and the member
- Testimony is provided under oath or affirmation
- The complaint may be dismissed, amended, added to or substituted

Agreed Statement of Facts / Conduct

- During the Pre-Hearing Conference, the member and the Investigation Committee may come to an agreement of the facts or alleged conduct in the complaint
- They may also come to the hearing with a Joint Submission of Disposition – agreed acceptable penalties

Decision of Hearing Panel

- The panel will hear the testimony and review the evidence and decide:
 - If the actions do not constitute professional incompetence or professional misconduct, that the complaint be dismissed and no further action be taken; or
 - If the actions constitute professional incompetence or professional misconduct, the appropriate order.

Orders of Discipline Panel

- On a finding of professional incompetence or professional misconduct, the hearing panel may issue an order:
 - expelling the member and striking their name from the register
 - suspending the member for a specified period
 - suspending the member subject to conditions
 - a reprimand, restrictions on practice, or penalized in any other way the panel considers just
 - a fine not exceeding \$15,000
 - that the member pay costs of the investigation and discipline hearing

s.35 Act

Appeal to Court



An order of a discipline panel can be appealed by the member to the Court of Queen's Bench

s.39 Act

Most Common Reasons for Discipline Hearings

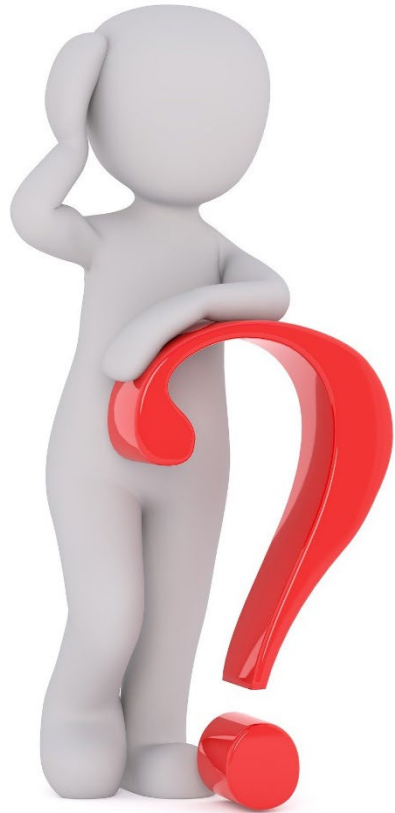
- Criminal offence
- Improper issuing of documents
- Failure
- Misrepresentation of qualifications
- Unauthorized use of other's documents

Publication of Hearing Decisions

- After the 30-day appeal period
 - On APEGS website
 - In *The Professional Edge*
 - Possibly in local newspapers

Duty to Report

When should I report?



- Observe professional misconduct (s.30 Act) or professional incompetence (s.29 Act)
- Observe illegal practices

Why should I report?



Ethical duty to report
Code of Ethics – s.20(2)(g) Reg. Bylaws

“report to the Association any alleged illegal practices, professional incompetence or professional misconduct by members”

What should I report?

Examples:

- Misuse of professional seals
- Breaches of the Act or Bylaws:
 - Including the Code of Ethics (s.20 Reg. Bylaws)
- Practicing outside area(s) or competence
- Falsifying records
- Cheating on the Professional Practice Exam

How to report?



WRITTEN REPORT



VERBAL REPORT

Duties of Employers to Report

- Report of termination of employment (s.49 Act)

“Any employer who terminates for cause the employment of a member shall report the termination to the association where the employer reasonably believes the cause is professional incompetence or professional misconduct.”

Prohibition

Law and Ethics Seminar

Prohibition : Non-Members

- Prohibition sections of the Act deal with:
 - Protection of “Title” (section 26)
 - Scope of Practice (sections 27 & 28(1))
- Violators of the Prohibition sections are prosecuted in the Provincial Court of Saskatchewan

Protection of “Title”

- Only professional engineers may use the title “Professional Engineer”, “Engineer”, “Consulting Engineer” or the abbreviation “P.Eng.” to imply that he or she is a professional engineer
- Only professional geoscientists may use the title “Professional Geoscientist”, “Geoscientist”, “Consulting Geoscientist” or the abbreviation “P.Geo.” to imply that he or she is a professional geoscientist

Protection of “Title”

- No sole proprietor, partnership, association of persons or corporation shall use the word or phrase “engineer”, “engineering”, “P.Eng.” “consulting engineer”, “P.Geo.”, “consulting geoscientist” or “geoscience” without the written authorization of APEGS to imply that the sole proprietor, partnership, association of persons or corporation or any of its members are professional engineers or professional geoscientists.

Scope of Practice

- No person who is not a member shall hold himself or herself out as being a member
- No person who is not a licensed professional engineer shall engage in the practice of professional engineering
- No person who is not a licensed professional geoscientist shall engage in the practice of professional geoscience
- Note exceptions in s. 28 of Act

Exceptions (section 28 of the Act)

- ...variety of work directly supervised by a P.Eng. or P.Geo.
- Working on property owned and to be used by self
- Member of the Canadian Forces
- Practising his/her profession, trade or calling

Exceptions (section 28 of the Act) (cont'd)

- Practicing as one of the following within the meaning of their legislation: architect, agrologist, Saskatchewan Land Surveyor, Canada Lands Surveyor, planner, applied science technologist, certified technician, prospectors
- Design, construction, installation of appliances, works, plants not exceeding \$30,000

Notice and Investigation of Prohibition Cases

- Done by APEGS staff
- Review newspapers, Sask. Gazette, etc.
- Correspondence with other Associations/ordre
- Staff follows up on inquiries and information
- Members and public inquire about registration or advise APEGS of misuse of title or non-engineers/geoscientists providing services
- Engineers Canada - registered trademark on “engineer”

Interesting Prohibition Case

- William Kurk
 - Also known as (Will Koch, T.W. Koch, Will Moldenhauer)
 - 2004 - Kurk initiates L.W. Construction, and L.W. Engineering and Developments
 - 2005 - Titan Environmental, Kurk known as an “environmental engineer” by co-workers

Interesting prohibition case (cont'd)

- January 2006 - Kurk produces 3 engineering reports on Regina home foundation assessments with engineering seal (member “T.W. Koch”)
- March 2006 - member of public inquires with APEGS about lack of payment by “Koch” to subcontractors. Staff finds that Koch is not registered with APEGS.
- May 2006 - APEGS requests summons to be served to Kurk on prohibition charges regarding illegal use of “engineer” title

Interesting prohibition case (cont'd)

- May 10, 2006 – Parisian house collapse makes the Regina news
 - Couple upgrading wooden foundation with concrete
 - Found Kurk through an insurance agent referral
 - Kurk claimed he was an engineer with 25 years of experience
 - \$15k down, \$15k after completion
 - House jacked, but not braced laterally



Interesting prohibition case (cont'd)

- Nov 2006, Kurk fined in Provincial Court \$1,000 for each of the 3 engineering reports (first offence), plus restitution to client; 6 months probation.
- Other fraud, forgery and theft charges were brought against him which resulted in a four-year prison sentence

Common Prohibition Investigations

- Members or companies struck from roster continuing to practice
- Non-qualified persons offering to or performing engineering or geoscience services
- Qualified person resident in Saskatchewan but not member of APEGS
- Misuse of “engineer” in title (particularly in the IT field)
- Engineer or geoscientist resident and registered outside Saskatchewan providing services in Saskatchewan

Penalties

- Violating the Protection of Title or Scope of Practice sections of the Act is a summary conviction offence, liable to a fine:
 - for a first offence, not more than \$5,000;
 - for a second offence, not more than \$10,000; and
 - for each subsequent offence, not more than \$15,000.

Conclusion

Law and Ethics Seminar



ACT Tour

- Read it, know it, love it!
- Definitions of practice – S2 (m and n)
- Objects of the Association – S5
- Protection of Title – S26
- Scope of Practice – S27
- Exceptions to Scope of Practice – S28

Regulatory Bylaws

- Code of Ethics – S20
- Your responsibilities/obligations as an APEGS member

Exam Reminders

- Monitor your email as additional instructions will be sent from APEGS or Yardstick. Also Check **SPAM** folders.
- Don't be late signing in
- Closed book exam – no reference materials or electronic access

Housekeeping

- Seminar and post exam survey
- Allow 6 weeks for exam marking
- Applying for professional member
- Monitor the APEGS website for the calendar of events – hope to see you at some!
- Good luck on the exam!