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Law for Professional Engineers and Professional Geoscientists

**Law and Ethics Seminar
Spring 2016**

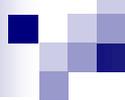
Purpose

- Our purpose is to create an awareness of legal principles and issues that impact professional engineers and professional 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)
- We are **not** attempting to make lawyers out of engineers and geoscientists



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Question:

What is the difference
between a lawyer and an
engineer?



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The Canadian Legal System



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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*



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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 decisions (precedent)
- As judges interpret and apply statutes and common law rules, more law is created



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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



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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)



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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)



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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



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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 \$20,000)
 - 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



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Case law

- As the law changes, past cases 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



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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



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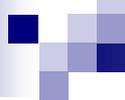
Subject Areas and Principles

- Most legal disputes for professionals 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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Answer:

Lawyers don't try to practice engineering!



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Professional Regulation And Ethical Considerations



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Professional Regulation and Ethical Considerations

- Professional Regulation is covered in these presentations:
 - Introduction to Professionalism
 - Investigation & Discipline
 - Prohibition
- Ethical Considerations are covered in these presentations:
 - Ethics Presentation & Discussion
 - Case Study & Group Assignment
 - Continuing Professional Excellence
 - *Gilbane Gold* & Discussion
 - “The Hearing”



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Property Law



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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

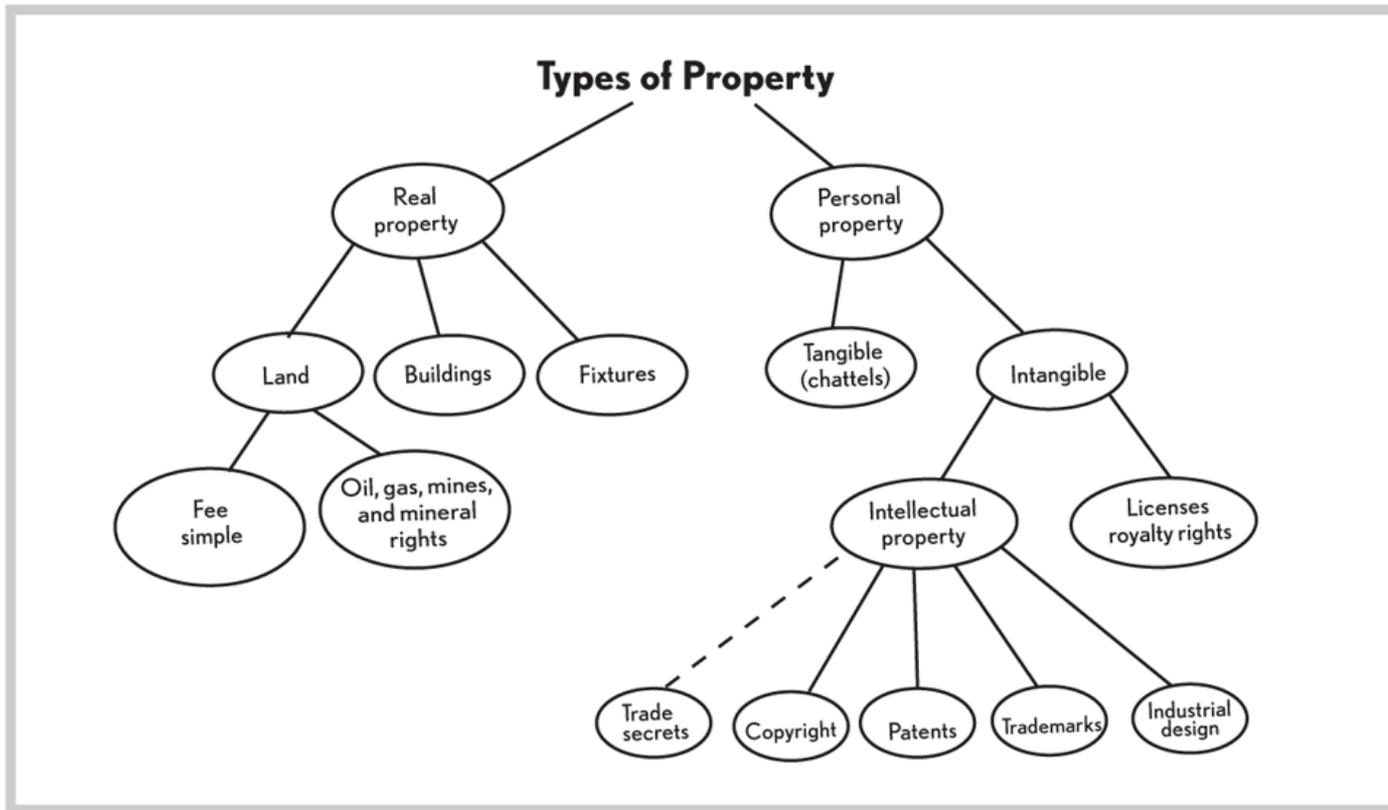


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Types of Property

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



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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



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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)



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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



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Chattels

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



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Intellectual Property

- Protects the expression of ideas
- Can be viewed as a bundle of rights
- Governed by federal legislation and international treaties
- Categories include:
 - Copyright
 - Patents
 - Trademarks
 - Industrial designs
 - Integrated circuit topographies



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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 = 50 years
- Copyright can be contractually assigned (sold or licensed); moral rights cannot assigned (but can be contractually waived)
- Protection not dependent upon registration



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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)



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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 = 15 years, renewable



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Industrial Designs

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



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Integrated Circuit Topographies

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



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Business Organizations



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Overview of Business Organizations

- Many different forms of business organization, each with strengths and weaknesses
- Main types:
 - Sole proprietorship
 - Partnership
 - Corporation (Company)



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Sole Proprietorship

- An individual carrying on business (but may have employees)
- Unlimited liability for owner
- Required to register a business name
- Not tax efficient for high income levels
- Low set up costs



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Partnerships

- Governed by provincial legislation, in Saskatchewan it is *The Partnership Act*
- Partnership agreements not required, but advisable (if no agreement, provisions of *Act* apply)
- Partners can be individuals, corporations or other legal entities
- Each partner jointly liable for the debts and obligations of the partnership; liability of partners is not limited to the partner's proportionate share (special case is limited partnership)
- Profits of partnership attributed to partners in accordance with agreement and taxed in hands of partner



Partnerships: Fiduciary Duty

- Partners owe each other fiduciary duties
- Fiduciary duty:
 - Special relationship of trust
 - Required (where there is a conflict) to put the interests of the partnership ahead of one's own interest
- Partnership agreement cannot negate the fiduciary duty



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Limited Partnerships

- Require at least one general partner and at least one limited partner
- Limited partners liable only to the extent of their investment
- General partner has unlimited liability (but the general partner could be a corporation)
- Limited partners not entitled to manage the business



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Corporations: Introduction

- The corporation is a separate legal “person”
- Limited liability – for shareholder, liability is limited to amount invested (unless also acting in another capacity such as director, officer, guarantor)
- Requires registration of a name, and that name must warn the public of the limited liability nature of the enterprise (ex. Corp., Inc., Ltd., Limited)
- Can be incorporated federally or provincially



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Corporations: Separate Legal Entity

- The corporation has a separate legal identity from its shareholders and directors
- Shareholder's may be required to guarantee the obligations of the corporation
- Corporation is responsible for payment of taxes under corporate tax rules
- Payments to shareholders, directors, employees taxed in their hands



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Corporations: Organization & Control

- Owned by shareholders
- Shareholders elect directors, who in turn appoint officers
 - Officers and directors must be individuals i.e. a corporation cannot be an officer or director
- Articles of incorporation define the nature of the business, and the ownership structure
 - the corporation can enter into contracts in its own name, but the articles of incorporation may restrict the activities the business can engage in, or specify special approval procedures for certain contracts



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Corporations: Public v Private

- Private (closely held) corporation:
 - shares held by a small group of shareholders
 - shares not traded on a public market
 - more limited disclosure requirements than for public corporations
- Public corporation:
 - shares traded publicly (ex. TSX)
 - stringent filing and disclosure requirements



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Corporations: Officers & Directors

- Officers and Directors owe fiduciary duties to the corporation; must disclose conflicts
- Risk of personal liability for officers and directors:
 - Derivative action (ex. shareholder sues director or executive officer on behalf of corporation)
 - Liability under statute e.g. environmental regulations, OH&S, employment standards, tax, criminal
- Due diligence defence: Acted reasonably and took reasonable precautions?
- Mitigate risk: corporate indemnity; insurance



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Corporations: Insider Trading

- Unlawful insider-trading is trading in reliance of information not disclosed to the public
- Stock tipping also prohibited
- Insider trading rules apply to share and commodities markets
- Civil and criminal liabilities



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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 **privy** to the contract can sue on it



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Essential Elements

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



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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)



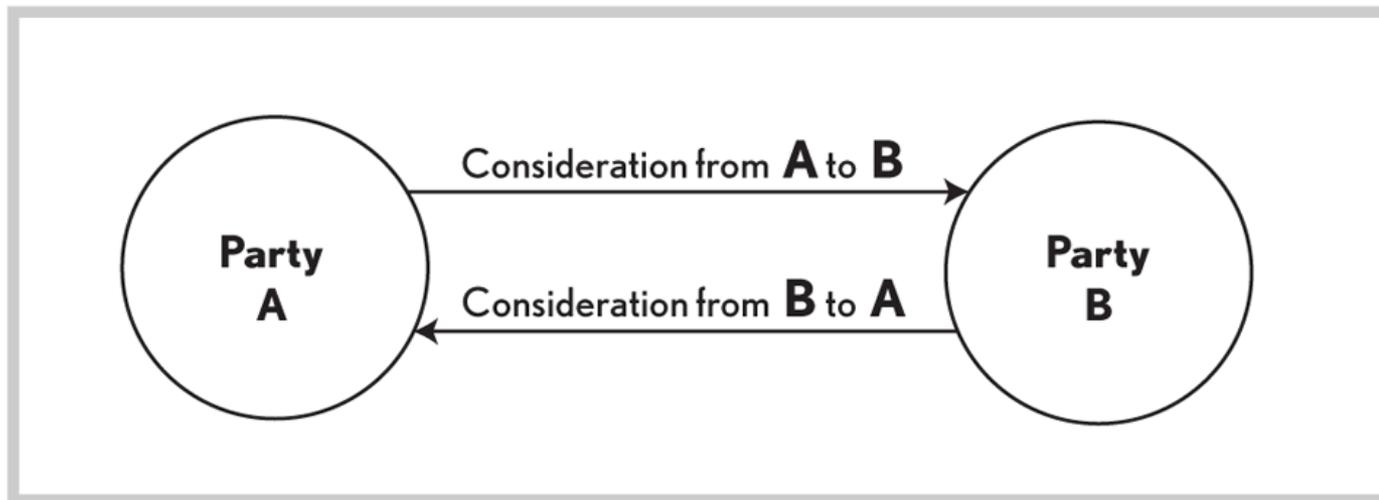
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Consideration

- Something of value: each party must give, or promise to give, something of value

FIGURE 6-1 Contractual Consideration



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Consideration (Continued)

- 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



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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
- 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



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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



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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



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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



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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



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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



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Breach of Contract and Remedies



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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



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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



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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



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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?



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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)



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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



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)



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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)



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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)



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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



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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



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Contract Termination

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



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Termination Clauses

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



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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



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Drafting and Interpretation of Contracts



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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



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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)



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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



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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



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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



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Other Contract Issues and Special Clauses



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Agency and Authority

- An agent is 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



Principles of Agency

- Agency may be limited in scope
- Agents are not personally liable for the obligations they commit their principals to
- If an "agent" does not have actual or apparent authority, they will be personally liable for the contracts they purport to enter into on behalf of their principal



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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



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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



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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



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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



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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



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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)



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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



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Contract Administration: Authority

- The contract administrator is typically the owner's agent: architect or engineer
- The administrator may have limited authority; the law of agency applies
- The scope of duty of the administrator should be clearly defined
- Administrators must be impartial at times e.g. when interpreting contract documents
- The administrator must not interfere with the right of the contractor to choose the method & order of work



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Consultant as Agent and Arbiter

- 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
- Conflict of interest: a consultant's decision in favour of the contractor may have financial consequences for the owner, or even the consultant (insurance issues arise)
- You may also lose the client



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Contract Administration: Timeliness

- The administrator must perform tasks in timely manner:
 - inspect shop drawings
 - conduct field reviews
 - provide advice
 - make decisions
- If the administrator fails to act in a timely manner, impact & delay claims may result



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Contract Administration: Field Reviews

- The administrator's field review duties may not be clearly detailed in the contract
- Courts will impose a requirement of reasonableness: frequency and scope
- The administrator and owner should agree on the purpose of the reviews: to check for general conformance with specifications, or, to guarantee the work?

(Continued)



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Contract Administration: Field Reviews (Continued)

- Regardless of the number of reviews, the timing of reviews must be adequate considering the function of the reviews
- The standard of review expected of the administrator is defined by the contract documents, not by the fees the owner pays the administrator
- If the fees are inadequate for the reviews required, the administrator should decline working on the project



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Getting to Contract



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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, sole source; 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



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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



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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



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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



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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



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Methods of Project Delivery

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



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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



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Specific Contracts and Clauses



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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



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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



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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



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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



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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



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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



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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



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Standard Clauses

- Scope of Work
- Contract Time
- Changes
- Damages and Bonuses
- Warranties
- Termination
- Indemnification
- Exclusions and Limitations
- Dispute Resolution



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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



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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)



Torts



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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

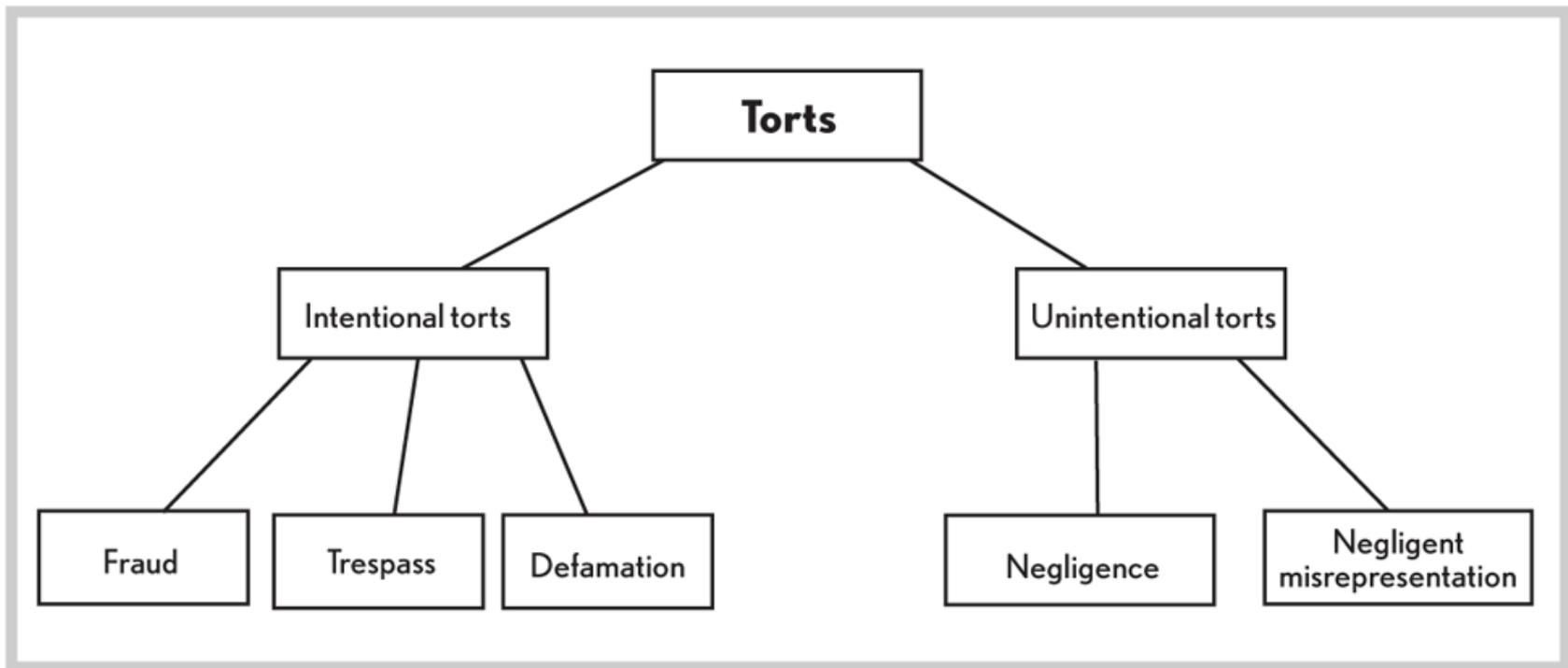


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Categories of Tort

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



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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, Engineers and Geoscientists

- 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 project, 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)



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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



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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**

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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



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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



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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



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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



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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

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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*



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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



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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



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Common Issues in Contract and Tort



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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



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



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Joint and Several Liability

- Each province has legislation that apportions liability between negligent parties (in Saskatchewan, *The Contributory Negligence Act*)
- Historically, if the plaintiff contributed to the loss (i.e. the plaintiff was "contributorily negligent), their right to claim was lost
- 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



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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



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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

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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



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Dispute Resolution



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Claims and Disputes

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



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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



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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



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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
- An independent party (judge or jury) decides the case on the evidence presented at trial
- The judge controls the process (subject to the Rules of Court)
- Litigation is often the only alternative for dealing with unreasonable or vexatious parties

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Litigation (Continued)

- Litigation is slow and expensive

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

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

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



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Litigation (Continued)

- The QB litigation process in Saskatchewan consists of:
 - Pleadings
 - Mandatory mediation
 - Disclosure of documents
 - Discovery
 - Pre-trial conference
 - Trial
 - Appeal (maybe) (Appellant and Respondent)



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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



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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



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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)



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Labour and Employment Law



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Labour Law

- Labour law deals with two categories or relationship:
 - Union-management
 - Employee-union
- Most labour law is governed by provincial legislation; in Saskatchewan it is *The Saskatchewan Employment Act*
- 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



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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



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Implied Terms in the 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)



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Trade Secrets and Confidential Information (Continued)

- 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



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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)



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Human Rights

- Every province 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. only that which is prohibited by statute

(Continued)



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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



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Health and Safety Law



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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

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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



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Occupational Health and Safety

- OH&S legislation improves working conditions through mandatory safety requirements, enforceable by fines imposed on employers and their officers and directors
- Harassment is also included in OH&S legislation
- When accidents 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
- Ensure safety is considered in design – reducing commissioning deficiencies



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Criminal Law



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Bill C45 Amendments

- The Criminal code was amended in 2004 to create a legal duty for persons directing work to protect workers and the public
 - **217.1** 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."
- Individuals are subject prosecution and imprisonment for criminal negligence



Environmental Law



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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

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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
- Environmental legislation contains proactive measures to prevent future contamination and aims to balance the need for environmental protection with the desire for economic development



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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



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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



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Environmental Audits

- Audits involve objectively assessing environmental compliance and risks for due diligence purposes
- Audits may be statutorily required, but may also be done to:
 - provide defences against environmental claims or prosecutions
 - protect the health and welfare of the public
 - reduce remediation expenses
 - ensure the marketability of property
- The Canadian Standards Association sets guidelines for environmental audits. Also ISO.



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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



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Aboriginal Law



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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



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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
- 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



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Questions

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