

THIRD CANADIAN EDITION

PRACTICAL LAW
of Architecture, Engineering, and Geoscience

BRIAN M. SAMUELS

DOUG R. SANDERS

Practical Law of Architecture, Engineering, and Geoscience

Third Canadian Edition

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Samuels & Co., Barristers and Solicitors

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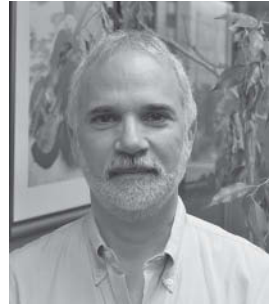
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LIST OF ABBREVIATIONS

AAA	American Arbitration Association	CCDC 17	CCDC Stipulated Price Contract for Trade Contractors on Construction Management Projects
ACEC	Association of Consulting Engineering Companies		
ACEC 31	ACEC Prime Agreement between Client and Engineer	CCPG	Canadian Council of Professional Geoscientists
AIA	American Institute of Architects	CEAA	Canadian Environmental Assessment Act
AIT	Agreement on Internal Trade	CEPA	Canadian Environmental Protection Act
AOD	Association of Owners and Developers	CGL Insurance	Commercial General Liability Insurance
APEGBC	Association of Professional Engineers and Geoscientists of British Columbia	CGS	The Canadian Geotechnical Society
APEGA	Association of Professional Engineers and Geoscientists of Alberta	CHSR	Canada Health and Safety Regulations
APEGS	Association of Professional Engineers and Geoscientists of Saskatchewan	CIM	Canadian Institute of Mining
ASCE	American Society of Civil Engineers	CITT	Canadian International Trade Tribunal
BCCA	British Columbia Construction Association	CLC	Canada Labour Code
BCCA 200	BCCA Subcontract	CM	Construction Management
CCA	Canadian Construction Association	CPD	Continuing Professional Development
CCDC	Canadian Construction Documents Committee	CPM	Critical Path Method
CCDC 2	CCDC Stipulated Price Contract	CSA	Canadian Standards Association
CCDC 23	CCDC Guide to Calling Bids and Awarding Contracts	CSA	Canadian Securities Administrators
CCDC 220	CCDC Performance Bond	CSC	Construction Specifications Canada
CCDC 221	CCDC Bid Bond	CSCE	Canadian Society for Civil Engineering
CCDC 222	CCDC Labour and Material Payment Bond	CSME	Canadian Society of Mechanical Engineering
CCDC 3	CCDC Cost-Plus Contract	DBIA	Design-Build Institute of America
CCDC 4	CCDC Unit Price Contract	DMCA	<i>Digital Millennium Copyright Act</i> (US)
CCDC 5A	CCDC Construction Management Contract	DRP	Dispute Resolution Process
CCDC 5B	CCDC At-Risk Construction Management Contract	E&O Insurance	Errors and Omissions Insurance
CCDC 14	CCDC Design-Build Stipulated Price Contract	EIT	Engineer-in-Training
		ESA	Environmental Site Assessment
		FIDIC	International Federation of Consulting Engineers

GC	General Condition	PIPEDA	<i>Personal Information Protection and Electronic Documents Act</i>
GMP	Guaranteed Maximum Price		
GSC	Geological Survey of Canada	PPP or P3	Public–Private Partnership
GST	Goods and Services Tax	RAIC	Architecture Canada (formerly the Royal Architectural Institute of Canada)
ICE	Institute of Civil Engineers		
IEEE	Institute of Electrical and Electronics Engineers	RAIC	
ISO	International Organization for Standardization	Document 6	Canadian Standard Form of Contract for Architectural Services
ISP	Internet Service Provider		
L&M Bond	Labour and Material Payment Bond	RAIC	
		Document 7	Canadian Standard Form of Contract for Architectural Services (Abbreviated Version)
NAFTA	North American Free Trade Agreement		
NCARB	National Council of Architectural Registration Boards (US)	RFP	Request for Proposals
		RFQ	Request for Qualifications
NCEES	National Council of Examiners for Engineering and Surveying (US)	RRSP	Registered Retirement Savings Plan
NI	National Instrument	Vmail	Voice Mail
OH&S	Occupational Health and Safety	WCB	Workers' Compensation Board
P.Eng.	Professional Engineer	WORM	Write Once Read Many
PFI	Privately Financed Initiative	WTO	World Trade Organization

PREFACE

New to This Edition

This third Canadian edition has been updated and enhanced in the following respects:

- Case law has been updated to include recent leading case authority in several fields, including employment law, tendering, pure economic loss, contract enforceability, disclaimers, and other areas.
- Sections on international law have been added and enhanced.
- New scenarios and questions have been added.

About This Text

This text is intended to provide the following:

- a) a broad overview of areas of the law relevant to the practice of architecture, engineering, and geoscience
- b) practical, rather than theoretical, information
- c) sufficient background to allow the reader to identify legal issues
- d) simple, easy-to-follow language

This text is *not* intended to do the following:

- a) make lawyers out of and thereby ruin perfectly good architects, engineers, and geoscientists
- b) be a master's level thesis on any of the subjects, since most if not all of the topics have multiple full-length texts written about them
- c) eliminate the need to seek appropriate legal advice

The title of this text is *Practical Law of Architecture, Engineering, and Geoscience*. Since the publication of the first edition, this practical guide to the law for design professionals has been adopted as the primary text for the professional practice exams and the entrance exam for professional engineers and geoscientists in various provinces. However, the intended audience of this text is not limited to architects, engineers, and geoscientists. Contractors, technicians and technologists, lawyers, suppliers, project managers, construction managers, software professionals, and others also may benefit from reading it.

One of the risks of creating a text that provides a broad overview is that the explanations in most areas are necessarily brief and do not contain the level of detail that would be found in comprehensive legal texts. Therefore, readers must recognize that this text is not intended as a substitute for legal advice. Legal problems are fact specific, meaning that a slight change in the facts can often lead to a different conclusion. Furthermore, the law differs from one jurisdiction to another and changes over time. Non-lawyers should obtain specific advice for specific legal problems and should not attempt to act as their own counsel.

It has been said that ignorance of the law is no excuse.¹ The time has passed when architects, engineers, and geoscientists could rely on technical competence in their fields and ignore the law. For these professionals, the likelihood of being involved in a lawsuit, whether as plaintiff or defendant, is

¹ It has also been said that this statement does not apply to trial court judges, who have court of appeal judges to correct their errors for them.

much greater now than in the past. Since the cost of prosecuting, defending, and settling claims can be high, recognizing and preventing potential legal problems early is important. Moreover, all professionals need to know the basics of contract law so that they can negotiate appropriate agreements.

Many chapters in this text apply equally to all professions. For example, the basic principles of contract law and negligence, and property law and business organizations are as applicable to architecture as they are to engineering and geoscience. However, other portions of the text will be more useful to some professions than to others. For example, geoscientists may want to pay particular attention to section 11.5 on geoscience agreements and to Chapter 25, which covers the disclosure requirements for professionals involved in mining and oil and gas exploration.

Supplements

Practical Law of Architecture, Engineering, and Geoscience, Third Canadian Edition, is accompanied by a complete supplements package:

- *Instructor's Manual*: The Instructor's Manual includes a sample course outline featuring notes on key concepts, teaching suggestions, and brief case summaries.
- *Test Item File*: A comprehensive testbank of various types of questions has been prepared in Word to accompany this Canadian edition.
- *PowerPoint® Slides*: Electronic slides are available in Microsoft PowerPoint. The slides illuminate and build on key concepts in the text.

The Instructor's Manual, Test Item File, and PowerPoint® Slides can be downloaded from Pearson Canada's online catalogue at <http://catalogue.pearsoned.ca>.

- *Companion Website*: *Practical Law of Architecture, Engineering, and Geoscience*, Third Canadian Edition, is supported by an excellent Companion Website that includes APEGA- and PEO-style examination questions, self-study questions, key terms and concepts, sample contracts, and links to relevant websites.
- *CourseSmart*: CourseSmart goes beyond traditional expectations—providing instant, online access to the textbooks and course materials you need at a lower cost for students. And even as students save money, you can save time and hassle with a digital eTextbook that allows you to search for the most relevant content at the very moment you need it. See how when you visit www.coursesmart.com/instructors.

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THE CANADIAN LEGAL SYSTEM

1.1 The Canadian Constitution

In Canada, as in many countries, the ability to create and enforce the law is derived from the Constitution. The Constitution is the source of all legal authority in Canada. The Constitution is made up of several statutes and conventions from both the British and the Canadian Parliaments. Although it is beyond the scope of this text to describe the intricacies of the Canadian Constitution, professionals in Canada must have a reasonable grasp of its content in order to work effectively.

The Constitution has three primary features: the division of powers, the creation of the courts, and the *Canadian Charter of Rights and Freedoms* (the Charter). The provisions relating to division of powers essentially assign to the federal Parliament and the provincial legislatures rights to enact certain kinds of legislation. In other words, the federal government has the right to enact laws relating to one set of areas, whereas the provincial governments have the right to do so over other areas. Matters of national importance, such as national defence, the postal service, broadcasting, criminal law, and specific fields such as patent law, fall within federal jurisdiction. Most areas of private law, such as property rights, contracts, negligence law, and construction liens, fall under provincial jurisdiction. For the most part, laws affecting architecture, engineering, and geoscience practice fall under provincial jurisdiction. Note that wherever there are direct operational conflicts between a federal and a provincial statute, the Constitution holds that federal law prevails.

While private law falls under provincial jurisdiction, there are a few exceptions to this rule. Labour law is generally a matter of provincial jurisdiction; but industries that fall under federal jurisdiction, such as airlines, railroads, and the post office, are governed by federal labour laws. Another exception is competition law: Matters such as bid rigging and unfair trade practices are governed by the *Competition Act*,¹ which is a federal statute.

Because much of the law relating to architecture, engineering, and geoscience falls within the provincial sphere, laws may differ from one province to another. For example, lien legislation in Alberta differs from lien legislation in Ontario. The acts or statutes governing professions also differ from province to province.

¹ R.S.C. 1985, c-34.

This text describes some of these legal differences. However, it focuses more on basic principles, which are in most cases either identical or very similar from one province to another.

This text generally refers to provinces, but in Canada there is another level of jurisdiction called a territory. Canada has three territories: Yukon, Northwest Territories, and Nunavut. Unlike provinces, territories are creations of federal legislation, and the federal government assigns powers to territorial governments. Despite this difference, in practice, territorial legislatures operate much like provincial legislatures and create legislation that is very similar to that of provinces. For example, the practice of engineering in Yukon is governed by Yukon legislation that has created the Association of Professional Engineers of Yukon as a regulatory body. References throughout the text to provinces should be interpreted to include territories.

1.2 The Canadian Court System

The Constitution also creates a system of courts, known as superior courts or *supreme courts*. Each province has a superior trial-level court as well as a court of appeal. The trial-level court is known by different names from one province to another, but each one has the same general powers as the Court of Queen's Bench in England. Those powers include "inherent jurisdiction," which is the power to administer justice even where there is no statutory basis for doing so. In British Columbia, the court is known as the Supreme Court of British Columbia. In Alberta, it is the Alberta Court of Queen's Bench. In Ontario and Quebec, it is called the Superior Court. While the names vary, the powers remain the same. All judges of these courts are appointed by the Governor General on the recommendation of the federal government and cannot be removed from the Bench, except for misconduct. Because the judiciary is an independent branch of government, judges must be able to function in an impartial and unbiased manner, despite being recommended by the federal government. In addition, federal courts known simply as the Federal Courts deal with federal matters such as patents and shipping disputes.

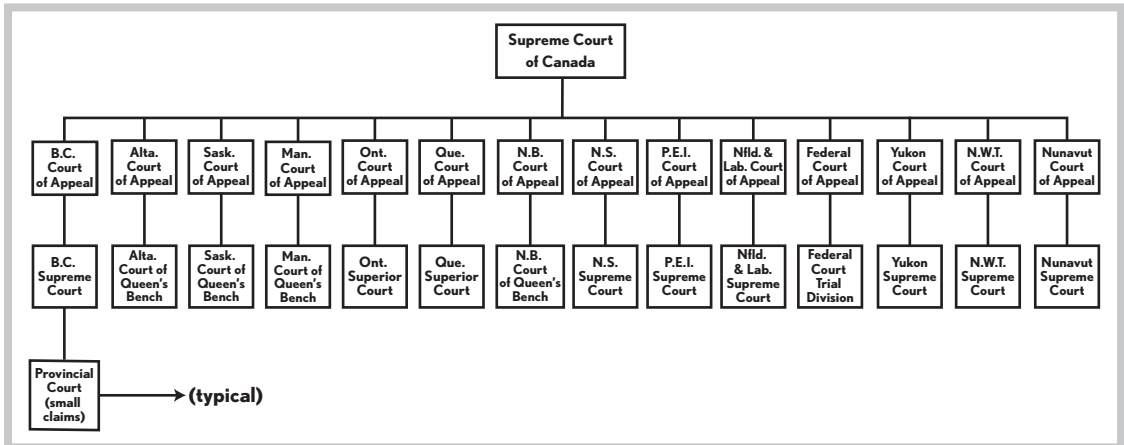
The court systems function independently of each other. Provincial litigants have the right to appeal a trial decision to the Court of Appeal of the province in which the decision was made. Litigants under the Federal Court may appeal to the Federal Court of Appeal. No court in any province has jurisdiction over courts in other provinces, and the Federal Courts have no jurisdiction over the provincial courts.

The ultimate level of appeal is the Supreme Court of Canada. But bringing a case to the Supreme Court is not fast or easy. In civil cases, litigants do not have an automatic right to bring an appeal to the Supreme Court of Canada. Instead, they must first obtain permission, or leave, from the Supreme Court to bring the appeal. In order to obtain leave, they must demonstrate that there is at least one issue in the case that is of national importance. Thus, only rarely are cases involving architects, engineers, or geoscientists granted leave to appeal to the Supreme Court of Canada.

Each province also has a lower court level, known generally as the Provincial Court. This level includes provincial criminal courts and civil small claims courts. In some provinces, this level also includes family courts that deal with divorce and custody issues. Small claims courts have limited jurisdiction, both in terms of the dollar value of awards and the subject matter. The monetary jurisdiction may vary from one province to another. For example, in British Columbia the small claims court award limit is \$25 000. The small claims court in British Columbia also has no jurisdiction over construction liens.² Figure 1-1 shows the relationship between the various levels of court.

² See Chapter 18.

FIGURE 1-1 Canadian Court System



The **Charter** is a section of the Constitution that establishes individual rights that apply to all Canadians and in many cases to non-citizens in Canada. Some of these rights apply to criminal cases, such as the right to counsel and the right not to self-incriminate. Other well-known Charter rights are freedom of religion, freedom of speech, freedom of association, and the right not to be discriminated against. The Charter lists prohibited grounds of discrimination, including race, ethnic origin, religion, disability, and age. Note that the Charter applies to acts of the government and its branches, but not to interactions between private parties. Human rights statutes in each province prohibit discrimination by private individuals.

1.3 The Creation of Law

Law is an imprecise and somewhat unpredictable field. This unpredictability may be disconcerting to clients who present to their lawyer what they regard as a clear-cut legal problem, only to be advised, for example, that there is only a 60 percent likelihood of a favourable result and the amount of recovery could fall within a wide range.

One reason for the lack of predictability and precision is that the law is not static. Law is dynamic, changing over time and from place to place. What is considered settled law today might not be the rule tomorrow. Unlike laws of nature, human laws can be rewritten by legislatures and reinterpreted by courts.

(a) Statute Law

In Canada, laws can be created in several ways. Federal and provincial governments can enact statutes. Statute laws must be compatible with the Constitution to be enforceable. Statutes relevant to architecture, engineering, and geoscience include those governing joint and several liability in negligence, construction lien rights, formalities of contracts,³ and workers' compensation requirements. Judges then interpret these statutes. In theory, judges do not make laws; they only interpret

³ In many jurisdictions, statutes require certain types of contracts to be written contracts. For example, construction contracts generally do not have to be written, whereas in some provinces legislation requires that surety contracts must be in writing to be enforceable.

them. In practice, however, the act of interpretation unavoidably results in the creation of new rights and remedies.

Legislation frequently gives certain other agencies the power to create regulations that may be considered law. For example, a provincial Association of Engineers and Geoscientists may enact bylaws, a breach of which can give rise to liability for damages as well as other consequences. Regulations created by such agencies, as well as by any entity created by legislation (such as a municipality), is often referred to as *subordinate legislation*.

(b) Common Law

Large bodies of Canadian law are not based on statutes. These laws were not created by legislatures, nor were they the result of interpretation of statutes. Rather, they are laws created by judges based upon principles of law and equity established and modified over hundreds of years, tracing their roots to England. This body of judicial precedents is known as the **common law**.

Almost all jurisdictions in Canada and in the United States are common law jurisdictions. The only notable exceptions are Quebec and Louisiana, which have civil law systems based on the Napoleonic Code of France. In civil law jurisdictions, all law is statute-based. In other words, **civil law** is a more codified version of the common law. Professionals practising in Quebec should become familiar with the Civil Code. This text does not discuss the Civil Code, with the exception of a general overview in this chapter.

1.4 Quebec Law

As stated, the province of Quebec uses a civil law system that differs from the common law system in force throughout the rest of Canada. Canadian common law does in fact apply in Quebec with respect to certain matters, such as criminal law, patent law, and other areas of federal jurisdiction. However, relationships between private individuals are governed by the Civil Code of Quebec, for the most part. The law governing private relationships includes contract law, torts, employment law, business organizations, insurance, bonds, and many of the other subject matters covered in this text. Architects, engineers, and geoscientists practising in Quebec will find that many of their business dealings, as well as personal matters, will be governed by the Civil Code of Quebec.

One essential difference between a civil law jurisdiction, such as Quebec, and a common law jurisdiction, such as any other province of Canada, is that in a common law jurisdiction there are areas of law for which no statute exists, and the basis for the law is the body of case law decided by judges in the past. For example, contract law deals with how contracts are formed, what is required to make a contract enforceable, and in what circumstances a contract may be held to be void or unenforceable. In a common law province, these essential principles may be subject to little or no statute law. Enforceability of a contract, for example, depends on the existence of certain essential elements like consideration, but there is no statute that sets out what constitutes consideration or even the fact that it is required. As will be discussed in Chapter 6, the common law regarding consideration is evolving and is not as cut and dried as it once was. In Quebec, in contrast, the Civil Code is an attempt to codify the basic principles of law in all areas.

In practice, the law does not result in much difference to a design or construction professional with respect to many aspects of practising one's profession in Quebec or elsewhere in Canada. Basic principles of negligence, contract formation, insurance, and other matters are fairly consistent across the country. There are, of course, some differences, but it is equally true that differences may exist in the law from one common law province to another.

1.5 Claims and Disputes

Claims and disputes are a fact of life in industry and business. These include claims for negligence, breach of contract, refusal to pay, and other causes of action. Disputes and claims are costly to resolve, not only in terms of the amounts paid in settlement but also in terms of legal and expert fees, preparation time for employees, and the effects of uncertainty and contingent liability on the ability to carry on a business.

Many disputes involving architects and engineers arise from construction projects. Construction projects involve many parties: owners, architects, engineers (including structural, mechanical, electrical, and geotechnical engineers), contractors, subcontractors, suppliers, individual workers, estimators, construction managers, and others. When disputes develop, many if not all of these parties become involved. Thus, one of the characteristics of construction litigation is the large number of parties involved. Another is the large number of documents generated during the project that are relevant to the case. The combination of numerous parties and extensive documents renders litigation of these cases very expensive and time consuming. In some instances, the costs of litigation can exceed the amount of money in dispute.

Yet despite the complexity, many claims and disputes are successfully resolved in accordance with a small number of legal principles, especially the law of contract and the law of negligence. Thus, a good understanding of contract and negligence law helps professionals not only in analyzing and resolving disputes but also in avoiding disputes in the first place. One of the purposes of this text is to provide the reader with a sufficient understanding of legal principles to avoid some of the pitfalls that lead to claims and disputes.

In some situations, claims and disputes are unavoidable. A party can become insolvent or bankrupt, for example, and be unable to pay. Alternatively, an accident can cause serious injury or property damage. In such instances, parties must be aware of the steps that must be taken, often quickly, to preserve their legal rights. For instance, in an insolvency dispute, an unpaid subcontractor should file a lien or assert a claim against a labour and material payment bond. Such steps must be done in accordance with the applicable legislation or in accordance with the terms of the bond. A lack of awareness that these legal remedies exist, or that **limitation periods** and procedural requirements must be met, can seriously prejudice the claimant's rights. For example, in the event of an accident, the insured party must comply with requirements of any insurance contracts or risk losing coverage. This text will help readers learn when to seek legal advice to avoid such consequences.

Allocation of risk is a common theme throughout this text. The professions of architecture, engineering, and geoscience are by their very nature risky. The risks of accident, failure, financial loss, and unforeseen results are always present. As a result, all parties in a construction project try to minimize their own risks or shift those risks to others. They may design contracts to allocate risks between the parties. They may also use insurance to shift risk to a third party, the insurer. In addition, they may use bonds to protect parties against risks of non-performance and non-payment. As well, they may include various types of contractual disclaimers in an attempt to shift risk. Readers should consider all principles discussed and explained in this text in the context of risks and keep in mind to which parties those risks are allocated.

1.6 International Law

As with each of the other areas covered in this text, international law is itself a specialized area. This section highlights a few basic principles of international law as they apply to architects, engineers, and geoscientists.

In Canada, international treaties are enforceable to the extent they have been adopted through domestic legislation. As well, international treaties may be used to interpret domestic legislation where there is ambiguity in that legislation.

The North American Free Trade Agreement (NAFTA) is an example of an international treaty. It allows Canadian engineers and other professionals to obtain work visas to work legally in the United States, regardless of state statutes. Such a work visa is often referred to as a TN visa and is relatively inexpensive to obtain. But professionals should be aware that there is a critical difference between the right to work and the right to practise a profession. For example, in order to practise consulting engineering in the United States, an engineer may need to be licensed by the applicable Board of Registration in the state where the engineer intends to consult. In other words, to practise as a consulting engineer in Oregon, a Canadian engineer would need both the licence from the applicable Oregon registration body and a TN visa allowing the engineer to legally work in the United States.

Finally, tax treaties between Canada and many countries help prevent duplication of income taxes. Professionals planning to work outside of Canada should consult a tax specialist to ensure that they do not pay extra taxes. As well, those who work in certain countries with little or no income tax should also seek advice. Liability for Canadian income tax may attach to individuals even if they are resident elsewhere for many years. Specific tax advice is essential in such situations.

1.7 Subject Areas and Principles

Most claims and disputes involving professionals deal with the principles of contract law and negligence. An understanding of the basic principles in these two areas is a prerequisite to study of related areas of law.

Contracts are voluntary agreements between two or more parties that set out the rights, responsibilities, and liabilities of the parties to each other. While contracts are often written, oral contracts are also legally enforceable, except in cases of special types of contracts.

The fundamental principles of contract law concern whether or not a contract is enforceable. Concepts such as *offer and acceptance* and *consideration* are used to determine whether a binding agreement exists and if so what the terms of that agreement are. Even if a binding and enforceable agreement exists, subsequent events may cause the agreement to become voidable. Chapter 6 explains these basic concepts of contract law.

Construction contracts are one type of contract of interest to architects, engineers, and geoscientists. Construction contracts follow the same rules of law as other commercial agreements. While construction contracts have some unique features, most features are applicable to contracts in other industries. Contract provisions and issues are discussed in Chapters 6 through 11.

In addition to contract law, professionals must be aware of the laws of torts. **Torts** are acts committed by one party in violation of the rights of another, which are considered sufficiently wrong as to give rise to liability. For example, the tort of **negligence** is the failure to take reasonable care for another person. Negligence constitutes the majority of tort claims. Professionals are less frequently involved in intentional torts, such as fraud, fraudulent misrepresentation, and trespass.

While contracts are a voluntary process, in that a party has a choice as to whether or not to sign a contract, tort obligations are involuntary and imposed by the law. A negligence claim is customarily asserted by a party who has been injured, either financially or physically, by the act or omission of another party. No contractual relationship between the plaintiff and defendant is necessary in a negligence claim; however, negligence claims often arise between parties with a contractual relationship. Such parties may sue simultaneously for breach of contract and

negligence. The existence of a contract may provide remedies in addition to those available under the law of negligence.

To prove a negligence claim, a plaintiff must show that at the time the event occurred the defendant could have reasonably foreseen that the plaintiff, or someone in the position of the plaintiff, would suffer an injury or loss as a result of the defendant's failure to take due care. The plaintiff must also show that the defendant did not meet the standard of care expected of someone in his or her position. Furthermore, the plaintiff must show that the failure to meet that standard of care was the legal cause of the loss suffered by the plaintiff. All of these elements of negligence are explained in Chapter 12.

The other half of the text deals with problematic areas and issues, such as bidding, procurement, construction liens, bonds, intellectual property rights, conflicts of interest and ethical issues, and insurance. These chapters also cover more general business topics such as business organizations, labour law, and employment law, as well as Aboriginal law and privacy law, as they relate to the architecture, engineering, and geoscience professions.

One recurring theme in this text is dispute avoidance through understanding of legal principles and recognition of common fact patterns. Despite best efforts, however, professionals cannot always avoid disputes and must instead resolve them. Chapter 14 covers dispute resolution by examining established methods of dispute resolution.

1.8 Case Citations

Case law is created by judges to create legal principles and interpret statutes. It is also used by lawyers to predict outcomes in specific circumstances. But case law is very dependent on the facts of a particular case. A slightly different set of facts can result in a very different result. In addition, the findings in one case may not be an accurate description of the entire scope of the law in a certain area. A lawyer must take into account several different cases on the same subject and determine the impact of those rulings on the facts of the new case. A lawyer also must make sure that the cases are the most current available. Thus, non-lawyers, including architects, engineers, and geoscientists, should never attempt to read a single case and assume that the outcome will be the same in their own circumstances. An important fact may be different, or another case may impact how the facts are dealt with. Moreover, newer case law, including perhaps a case under appeal, could lead to a potentially different application of the law to specific circumstances.

The cases in this text are used to illustrate key points and are by no means exhaustive of the case law in each topic. In fact, volumes of material would be needed if this text were to include every relevant case. However, this text provides the relevant legal principles as they exist at the time of publishing.

Case citations are used to find cases in law libraries. Case citations generally look like this: *Backman v. Canada*, [2001] 1 S.C.R. 367; where "*Backman v. Canada*" is the case name, 2001 is the year of the decision, 1 is the volume number, S.C.R. is the reporting series (in this case Supreme Court Reports), and 367 is the page number. Hence, *Backman v. Canada* is found at page 367 of volume 1 of the 2001 Supreme Court Reports.⁴ Recent case citations may also look like this: *Martel Building Ltd. v. Canada*, 2000 SCC 60; where 2000 is the year of the decision, "SCC" is the level of court (Supreme Court of Canada), and 60 is the number of the decision issued in that year by that court.

⁴ Case citations may also appear in a slightly different format with the date in round brackets, such as *Walter Cabott Construction Ltd. v. The Queen*, (1974), 44 D.L.R. (3d) 82 (F.C.A.). The round brackets indicate that the date is not required for locating the case in question.

CHAPTER 2

REGULATION OF THE PROFESSIONS

Overview

Most professions in Canada are self-regulated. **Self-regulation** refers to a profession's statutory authority to govern itself. The provinces have jurisdiction to regulate the professions, and each province has its own legislation governing professions.

Professional self-regulation covers two main elements: the right to title and the scope of practice. **Right to title** means that the professional regulatory authority can regulate the exclusive right for its members to use a particular title. **Scope of practice** means that the regulatory authority also has the right to regulate the exclusive right of its members to practise in a particular area or field. For example, the engineering profession has the exclusive right to the title “Professional Engineer” or “P.Eng.” and the exclusive right to practise “professional engineering.”¹ The professions of architecture, engineering, and, in all provinces and territories except Prince Edward Island and Yukon, geoscience all have right to title and right to an exclusive scope of practice. The scope of practice is defined in each province's legislation. Other professions, such as interior design, only have right to title legislation.

The legislation in each province creates a regulatory body that governs each profession. These regulatory bodies typically have elected officials and staff, with the elected officials consisting mainly of members of the profession. The principal functions of the regulatory bodies are to register members, regulate the practice of its members, discipline members, and enforce the legislation against non-members who are practising illegally.

The provincial engineering regulatory bodies have also formed a national organization known as Engineers Canada. Similarly, the provincial geoscience regulatory bodies, which are part of the engineering regulatory bodies in some provinces, have formed a national organization known as Geoscientists Canada. Architecture Canada (formerly the Royal Architectural Institute of Canada, so it still uses the acronym RAIC) plays a similar role to Engineers Canada and Geoscientists Canada, but it registers individual members of

¹ The terms *engineer*, *engineering*, *professional engineer*, *P.Eng.*, *consulting engineer*, *ingenieur*, *ing.*, *ingenieur conseil*, *genie*, and *ingenierie* are official marks held by Engineers Canada on behalf of its constituent members.

provincial associations on a voluntary basis. The principal goals of these national organizations are to coordinate and foster mutual recognition among the regulatory bodies and to encourage commonality of operations.

In addition to provincial regulatory bodies and their respective national organizations, engineers, architects, and geoscientists are members of a wide variety of technical associations. These include broader groups such as the Canadian Society for Civil Engineering (CSCE), the Canadian Society for Mechanical Engineering (CSME), the Institute of Electrical and Electronics Engineers (IEEE), and the Association of Consulting Engineering Companies (ACEC). They also include technical groups, such as Construction Specifications Canada (CSC), the Cement Association of Canada (CAC), and the Canadian Geotechnical Society (CGS). Membership in technical societies is voluntary but provides valuable technical training and transfer of knowledge. Many of the technical societies have their own codes of ethics, and some have copyright over specific titles.

2.1 Right to Title

Protection of the right to title of the various professions is one of the main obligations of the provincial regulatory bodies. For engineers, this means that graduates of an engineering program are not entitled to call themselves engineers or professional engineers without first obtaining the right to do so through registration. Obtaining a Bachelor of Science in Engineering is one of the elements of registration, but it does not of itself permit graduates to call themselves engineers. The same applies to architects and geoscientists.

Moreover, only licensed members of a profession can use the profession's title. Everyone else is prohibited from doing so by law. For each of the three professions, a period of apprenticeship is required during which members of the profession train university graduates. During this period, graduates can use interim titles such as “engineer-in-training” (EIT) or “member-in-training” (MIT). Misrepresenting oneself by using the title “architect” or “engineer” without appropriate registration can lead to enforcement proceedings, together with potential civil proceedings. The right to title is protected by the regulatory bodies through discipline and enforcement proceedings.

2.2 Scope of Practice

The architecture, engineering, and geoscience professions generally have exclusive scopes of practice. Scope of practice means that, in Canada, no one can practise within the exclusive scope of practice of these professions without being licensed. There are few exceptions to this rule because legislators have deemed the ability of the professions to maintain exclusivity to be very important. Other countries generally have systems of voluntary registration with associations, such as the United Kingdom's Institute of Civil Engineers; however, professionals often cannot find employment or gain approval for drawings from public authorities without such membership. In the United States, registration is mandatory for consulting engineers only.

Each of the provinces defines exclusive scope of practice through a definition of the practice of the specific profession. These definitions can be either generic or specific. A generic definition broadly states the types of tasks that constitute the exclusive scope of practice. A specific definition identifies in detail the individual tasks that make up the exclusive scope of practice.

For example, the Engineers Canada definition of professional engineering is a generic definition:

The practice of professional engineering means any act of planning, designing, composing, evaluating, advising, reporting, directing or supervising, or managing any of the foregoing,