Practical Law of Architecture Engineering and Geoscience (Canadian) 3rd edition Samuels Solutions Manual

SKU: 9780134145044-SOLUTIONS

Sample Course Outline

Following is a sample course outline, designed for a one-semester course in law for architects, engineers, or geoscientists. The course is described as "Law for Design Professionals." It is broken down into one-week segments, with the expectation that each week would encompass three teaching hours. The length is 12 weeks.

Law for Design Professionals is essentially an introductory course. It is intended to provide an introduction to basic principles in several areas of law that affect design professionals. Each area, *i.e.* insurance, negligence, etc., is in fact a discrete subject matter for which entire textbooks have been written, and full term courses are offered in most law schools on many of these subjects. The basic principles in most of these subject areas are derived from the law of contract and negligence, and most claims and disputes in the industries which employ design professionals are framed in terms of breach of contract and/or negligence. A full overview and study of the principles of contract and negligence should be given in the first few weeks of the course. The remainder of the course will cover related areas such as builders' liens, employment law, insurance issues, and dispute resolution.

Some instructors find it to be a worthwhile exercise, at the start of the course, to require students to read one of the standard forms of construction contracts, such as the CCDC 2 from cover to cover. This standard form of contract, included as an appendix in the textbook, provides a good overview of many areas covered in the textbook, such as termination of contracts, delay claims, agency, indemnities, and others. Of course, many of the general conditions in those contracts will not be properly understood upon first reading. But for many of the students, this review will be their first exposure to many of the concepts and some of the terminology that will be covered in the course.

One of the authors of the textbook has found it to be a useful exercise, in the first class, to ask that students identify some of the risks inherent in an engineering project, e.g., the construction of an industrial facility. Students will easily identify some of the more obvious risks, such as unforeseen subsurface conditions, nonpayment by the client, insolvency of a subcontractor, inconsistency between drawings, or between drawings and specifications, discovery of archaeological artifacts, and discovery of hazardous materials during excavation. Once this list has been created, the instructor should ask students to look through a standard form contract, such as the CCDC 2 contract appended to the textbook, to identify which clauses in the contract deal with those risks, and to which party (owner or contractor) the risk has been assigned. This exercise will emphasize the important principle of risk allocation and start the students down the path of reading the contract.

In addition, students will be referred to a number of judicial decisions (cases) which they will be expected to read. A casebook should be assembled for use by the students.

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COURSE OBJECTIVES

Upon successful completion of the course, the student should have an understanding of the basic principles of law in areas which affect the design professionals. The objectives of the course are to educate the student as to the concepts and rules which make up the law in a number of subject areas in which claims and disputes are prevalent, and secondly to allow the student to identify legal issues. More particularly, the student should (this is not an exhaustive list):

1. know which form of standard contract is appropriate for various types of projects (e.g., fixed price, cost plus, unit price, design-build);
2. understand the concept and danger of limitation periods;
3. be alive to issues of enforceability when negotiating contracts;
4. understand the role of the consultant, both as owner's agent as well as independent arbiter of a contract;
5. understand the basic principles of lien legislation;
6. understand the basic principles of surety bonds (bid bonds, performance bonds, and payment bonds);
7. understand the basic principles of insurance law;
8. be aware of the rights and obligations of both employer and employee in an employment relationship;
9. have a sufficient understanding of the concept of unfair labour practices to avoid committing any such practices;
10. be able to resolve ethical problems, or at the very least, be able to identify ethical problems as they arise and nowhere to turn for advice in resolving them; and
11. understand the different dispute resolution methods, and the advantages and disadvantages of each method.

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Week 1

Some instructors require students to carry out a research project. In such courses, an explanation of statute law and common law found in Chapter 1 of the text must be covered before the research assignment can be given. It should then be explained where statutes and case laws are found. At some universities, the librarians at the law libraries have offered to hold a short class to explain the rudiments of legal research.

As an assignment, it is suggested that students be required to find, either in the library or online, one or two cases, and one or two statutes. This will require that students familiarize themselves with some very basic research tools.

a. Introduction
b. Review course objectives
c. Review syllabus
d. Discussion of legal process
e. Statute law
f. Common law
g. Research methods and materials (case law, statute law)
h. *Stare decisis* (precedent)
i. Court structure
j. Identification of risks inherent in construction project (and clause in contract allocating those risks)

CHAPTERS COVERED

Chapter 1

COURSE NOTES

At the start of the course, the instructor should explain the importance of law in the design professional's practice, introduce the reference material and textbook, and provide an overview of other references available.

The objective of this course is to gain an understanding of the basic principles of law in areas which affect the design professional. The primary purpose is to educate the student as to the concepts and rules that make up the law in a number of subject areas in which claims and disputes are prevalent, and secondly to provide practical advice which, if followed, should allow the student to identify legal issues in common situations. In many industries involving design professionals, disputes are commonplace, and it is difficult to complete a major project without becoming involved in a dispute.

We recommend that the instructor review each topic in the syllabus, giving a very brief introduction to the subject area and discussing the interrelationship between the topics. For example, explain that delay claims are generally framed as claims for breach of contract, that insurance policies are governed by the law of contract, etc. This portion of the class may be time-consuming, but is very important in that it gives students an introduction to some of the concepts that will be covered later in the course.

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Week 2

a. Regulation of the profession – right to title and scope of practice
b. Disciplinary and enforcement proceedings
c. Sole proprietorships
d. Corporations
e. Partnerships

CHAPTERS COVERED

Chapters 2 and 5

COURSE NOTES

Explain the importance of right to title. This aspect of the regulation of professions should be taught in conjunction with an enforcement proceeding. The governing bodies of various professions will generally commence enforcement proceedings against parties who hold themselves out to the public as architects, engineers, or geoscientists, when they are not properly registered. Disciplinary proceedings, on the other hand, are brought against registered members of the profession. Such proceedings typically involve alleged incompetence, or practice outside of one's area of expertise.

In discussing business organizations, it is important to emphasize that there are two primary considerations when choosing between the various forms of organization available (sole proprietorships, corporations, and partnerships). These two primary considerations are liability and taxation. Liability issues are discussed in this chapter and throughout the textbook. Taxation is beyond the scope of the textbook, but the student should be aware that specialized taxation advice should be sought when a person is considering the appropriate business organization.

One key point to be emphasized in discussing corporations is that a corporation is a separate legal entity. There is a barrier, sometimes referred to as the "corporate veil", separating the shareholders from the corporation, which allows individuals to invest in limited corporations without incurring liability. The other key point to be discussed is the circumstances under which a court might pierce the corporate veil, for example in cases of fraud.

The *Backman* case is cited on page 36 for the proposition that if two or more partners have signed a partnership agreement, they are partners, although other indicators of partnership still have to be present. This case involved a partnership that was set up specifically for tax purposes. The taxation authorities tried to disallow the partnership. The court held that the three essential ingredients of a partnership are (1) a business (2) carried on in common (3) with a view to profit. A valid partnership does not depend on the creation of a new business. Further, in order to have a partnership it is not necessary that the partners have carried on a business for a long period of time.

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Week 3

a. Overview, types of contracts
b. Consideration
c. Offer and acceptance
d. Voiding a contract – fraud, duress, mistake, frustration
e. Remedies
f. Termination
g. Quasi-contract

CHAPTERS COVERED

Chapters 6, 7, and 8

COURSE NOTES

This class on the fundamentals of contract law is of primary importance. The textbook has been structured to deal first with required elements for enforceability of contracts, including consideration, contract formation, legal purpose, and legal capacity. After discussing the elements required for unenforceability, the textbook deals with ways in which a contract (which may have been properly created and enforceable) may be rendered unenforceable.

On the issue of privity, in footnote 1 on page 45, we cite the case of *London Drugs*. That case involved two warehouse workers who dropped and damaged a transformer. Their employer (a corporation) was protected by a contract containing a waiver of liability. The employees were sued in an effort to attract vicarious liability of the employer, and to circumvent the waiver. This case may be a bit complex for students at this stage of the course. However, once vicarious liability is taught, and disclaimers and exclusion clauses are covered, the instructor may wish to refer again to this case.

There have been recent developments in the law relating to good faith in the performance of contracts. The decision of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71 is likely to have a profound effect on this area of the law, and should be brought to the attention of students. While the law relating to duty of good faith in contractual performance is in its infancy, we expect that the courts will expand the scope of that duty in the near future.

In dealing with the principle of consideration, and its application in the context of change orders, the case of *Smith v. Dawson* is found in Chapter 6. It is very brief, and provides a good illustration of the basic principle that "past consideration is no consideration."

On page 48, the case of *Modular Windows* is discussed, also on the issue of consideration. This case involved a window subcontractor who, with no justification, made a demand for additional compensation. This case may be used to illustrate both the practical application of the principle of consideration, as well as economic duress.

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Offer and acceptance: As this is an essential element of enforceability, this area should be covered in detail. Students should be taught the effect of revocation of offers, counteroffers, and the application of these principles to the bidding process.

Voiding a contract – mistake, misrepresentation, unconscionability, duress and frustration: One area that students often have difficulty with is the type of mistake that allows a court to void a contract. No cases have been cited, but an example is given on page 51. With respect to duress, in addition to the *Modular Windows* case referred to above, there is an extract from the *Ronald Elwyn Lister* case on page 52. This extract lists all of the important factors that courts consider when dealing with a defence of economic duress.

Remedies: The basic remedies available in a breach of contract case are damages, specific performance, injunctive relief, and declaratory relief. Of these, damages is of primary importance. Specific performance is rarely granted in breach of contract cases involving design professionals, and injunctive relief and declaratory relief are equally rare. In this aspect of the course, damages should be emphasized. The instructor should explain damages, including restitution, punitive damages, damages for loss of profits, etc. Explain the principle of consequential damages, and the issue of remoteness. One example that may be used to explain remoteness is the following:

> "A contractor prepares a tender, and calls a courier company to deliver it. The courier is not told anything about the contents, but is simply instructed to deliver it before noon. If the tender is delivered after 12 o'clock, and is rejected because it is late, is the courier liable for loss of profits on the basis that the tender was low and would otherwise have been accepted? Does the answer change if the courier is told in advance that this is a tender involving a project for millions of dollars, and that failure to deliver on time may result in a loss in the millions of dollars?"

Damages: It is important to explain to students the basic principle of damages (putting the innocent party in the same position as though no breach had occurred), and why "diminution in value" is applied where there is a chance that the cost of repairs might result in a windfall. The *Safe Step* case (page 63) involved epoxy repairs to a floor. The case contains good discussion of the diminution in value concept. The court stated that "danger in awarding the cost of performance in such situations is that the injured party will, in fact, be placed in a superior position than if the original contract had been performed in a satisfactory manner. Where the cost of performance far exceeds the diminution in value and, in particular, where the cost of performance is 'grossly disproportionate' to the benefit of that performance…" Students should be asked whether diminution in value is contrary to, or consistent with, the basic principle of damages (putting the innocent party in the same position as though no breach had occurred).

Termination of contracts: Review the termination provisions of the CCDC 2.

Explain the concepts of termination for cause and breach of contract.

Quasi-contract: The basic principles of unjust enrichment and *quantum meruit* should be covered.

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Week 4

a. Structuring the team
b. Agency and authority
c. Indemnities
d. Change orders
e. Disclaimers

CHAPTERS COVERED

Chapters 9 and 11

COURSE NOTES

Structuring the team: There are at least three commonly accepted methods for an owner to structure the construction and design teams. There is the prime contractor/prime consultant method, the multiple contractor method (where the owner contracts directly with each trade), and the design build method. Each of these has its pitfalls and uses. The legal ramifications associated with each should be covered in the course. There is some discussion of these issues on page 83, as well as on pages 105 – 108 and 114 – 120. Examples of these ramifications include:

1. there are significant differences in the application of the *Builders' Lien Act* as between multiple contractors and prime contractors (with respect to limitation periods, holdback requirements, etc.);
2. the ability to sue the owner (or the prime contractor) for breach of contract; and
3. the right to claim against a labour and material payment bond.

As well, the instructor should give an overview of commonly used types of contracts, including stipulated sum, cost plus, unit price, design build, target price, construction management, and other variations. Include discussion of the advantages and disadvantages of these forms, as well as the types of projects most often associated with each type.

Agency: Explain the two legal forms of agency — actual agency and apparent agency. This topic must be covered together with the issue of conflict of interest as it applies to the dual role of the consultant. Further, the concept of exclusive agency will become relevant in discussing the role of a union in the bargaining process.

Indemnities: The basic principle of indemnity is covered in Chapter 9. An understanding of this principle is important not only as a prerequisite to insurance law, but also to understand the indemnity provisions of standard form contracts. The instructor may use GC 12.1 (page 73 of the text) as an example.

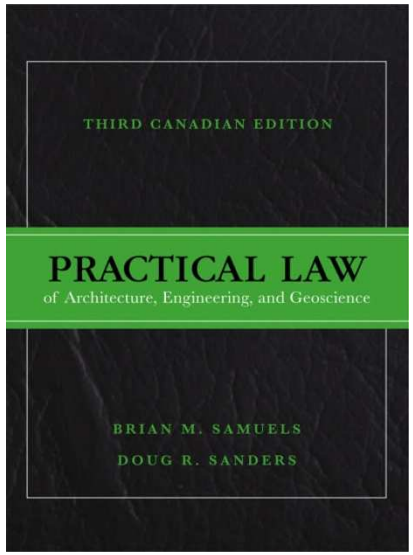
Change orders: A change order is an amendment to the contract. It must be supported by consideration, and must be done in accordance with the provisions of the agreement. The instructor should also explain the concept of a Change Directive, and how it differs from a change order. The definitions in the CCDC 2 should be referred to, as well as GC 6.2 and GC 6.3.

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Practical Law of Architecture, Engineering, and Geoscience

Third Canadian Edition



Chapter 2
Regulation of the Professions

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Key Aspects of Self-regulation

- Architecture, Engineering, and Geoscience are self-regulated in Canada
- Authority delegated to regulatory bodies by statute
- Right to Title, e.g., P.Eng.
- Scope of Practice, e.g., what constitutes the practice of Architecture

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Regulatory Bodies

- Authority to govern delegated by statute
- Elected officials
- Staff
- Tasks: register members, regulate the practice of the members, discipline members, enforce legislation against non-members

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National Organizations

- Engineers Canada
- Canadian Council of Professional Geoscientists
- Royal Institute of Architecture
- Goals:
  - Coordinate and foster recognition between provincial regulatory bodies
  - Encourage commonality of operations

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Right to Title

- Right to Title for each professional must be established through the registration process
- Obtaining educational qualifications is merely one prerequisite for registration
- Apprenticeship period: engineer-in-training, member-in-training
- Discipline and enforcement proceedings

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Scope of Practice

- Scope of practice may be defined by the regulatory body, or set out in the enabling legislation itself
- Definition may be generic or specific
- Scope of practice generally exclusive, i.e., only registered professionals may perform tasks within the definition
- In other countries, registration is "voluntary"

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Registration

- All practising individuals must register
- In some provinces, corporations employing professionals must also be registered
- Prerequisites: experience, education, examination
- Examination generally covers non-technical areas including law and ethics
- Registration is required for each jurisdiction

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The Obligations of a Professional

- Maintain technical competence and practise competently
- Continue professional development
- Abide by the code of ethics
- Regulatory bodies may audit members
- Regulatory body websites provide useful materials

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Discipline and Enforcement

- Authority delegated by legislation
- Members are "disciplined"
- "Enforcement" proceedings are taken against non-members practising illegally
- Penalties include: reprimand, suspension, fines, termination of licences, educational requirements, and mentorship requirements

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Professional Seals

- Seal: *a stamp, medallion, ring, etc., engraved with such a device, for impressing paper, wax, lead, or the like*
- Used on drawings, specifications, plans, reports, and other documents
- Improper use is a disciplinary offence
- A seal indicates that the professional has personally prepared, supervised, or reviewed the documents

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Letters of Assurance

- Warrant that the work is of a particular standard → increase the risk of liability
- Often required by government authorities at the end of a project
- Professional should determine whether a letter of assurance is required before agreeing to take on the project

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