# The Revay Report

Volume 23
Number 2
September 2004

Published by
Revay and Associates
Limited

Construction Consultants
and
Claim Specialists


*Geza R. Banfai*

# OPTING OUT


***by Geza R. Banfai***
***Partner and Chair of the ACES Group***
***Blaney McMurtry LLP, Toronto***


## INTRODUCTION

The reader will appreciate this irony: English common law, the origin of our own legal system, initially wanted nothing to do with contracts!

Times changed. Several centuries ago, litigating contractual disputes before the courts of the Crown became the norm, and litigation remains our default system for enforcing contracts today. By "litigation" I mean the publicly available and state-supported mechanism whereby an independent third party (the judge) receives each party's competing statements about the history of the dispute, both oral and documentary (called "evidence"), decides which portions of each party's statements are worth accepting and which are to be rejected or simply ignored (called "making findings of fact"), determines which among several rules (called "legal principles") should be invoked, and by applying those chosen legal principles to the accepted portions of the evidence, makes a decision (called a "judgement"). Litigation is therefore a process whereby a judge applies the law to the facts to reach a conclusion.

It will be a thesis of this article that litigation, thus described, has serious limitations which diminish its utility as a mechanism for resolving contractual disputes in the construction industry. These limitations lie at the core. While they can be mitigated somewhat by modern developments intended to streamline the process and introduce alternative methods as an adjunct, such as mandatory mediation, they can never be overcome.

It will be a further thesis of this article however, that although freedom of contract remains very much alive and well in Canada, parties to construction contracts sometimes do not appreciate the full implications of that freedom. Contractual freedoms include not merely the ability to stipulate rights and liabilities in connection with the performance of the project work *per se*, but also the ability to determine how they will govern their relationship generally, including the process by which they will handle disagreements between themselves during performance of the work. To the extent contracting parties overlook their ability to legislate their relationship in this way, they are both missing valuable opportunities to enhance competitive advantage and needlessly increasing financial risk.

A final thesis of this article will be that practitioners of the best practices of the construction industry tend to avoid this error, and instead take full advantage of their contractual law-making ability. Whenever possible, they do not allow themselves to default to litigation. Rather, they "opt out" during the contract formation phase, considering and then implementing dispute-avoidance mechanisms which promote self-enforcement of their contractual obligations. In appropriate cases, this will involve third parties to their relationship, contributing independence, objectivity and special expertise. These dispute-avoidance mechanisms are then supplemented by dispute resolution procedures appropriate to the project, but again with an emphasis upon self-enforcement. Third party enforcement is relegated only to the last step, when all else has failed, and even that is tailored to suit.

## THE EMERGENCE OF FREEDOM OF CONTRACT

In its earliest days, English common law was concerned only with serious crime and matters involving the ownership and use of land. The commentator Glanville, writing in 1180, observes "it is not the custom of the court of the Lord King to protect private agreements".[1] Still, private agreements required protection of some sort, and in the days before the state-sanctioned courts of England assumed the authority to enforce private contracts, there existed "a bewildering diversity of courts outside the common law system, enforcing a variety of bodies of law. Thus there were county courts, borough courts, courts of markets and fairs, courts of universities, courts of the Church, courts of manors, and courts of privileged places such as the Cinque Ports."[2]

Three hundred years were to pass before this hodgepodge of legal systems was to begin to coalesce around one, that of the Crown. Beginning in the early 16th century, the royal courts of England began to assume authority over formal agreements, which were considered more important because they were written down and, in the custom of the day, affixed with a wax seal. Soon thereafter the courts began hearing claims then known as "actions of *assumpsit*", which involved informal agreements, reached by word of mouth alone. With that development English common law governing contracts began to evolve. And ever since, contract law has enjoyed a warm and symbiotic relationship with litigation.


**Geza R. Banfai** is a partner and the founding chair of Blaney McMurtry's ACES Group (Architectural / Construction / Engineering Services). He is certified by the Law Society of Upper Canada as a Specialist in Construction Law, and is a Fellow of the Canadian College of Construction Lawyers. Geza's construction law practice ranges from the negotiation of construction contracts and alliancing and joint venture agreements, to contract claims and disputes including lien and trust claims. His industry involvement currently includes the boards of the Canadian Construction Association and Consulting Engineers of Ontario, and he is a frequent speaker at professional and industry events on various aspects of construction law and practice.

It took another 300 years of litigation though before the English courts began in earnest to develop the rules governing contracts to the point to which they became familiar to modern ears. Cheshire, Fifoot and Furmston, the authors of a leading English text on contract law, observe that this coincided with the emergence in the 19th century of "a powerful school of thought, originating in the work of Adam Smith, [who] saw in the extension of voluntary social cooperation through contract law, and in particular through 'freedom of contract', a principal road to social improvement and human happiness, and one distinct from the static conditions involved in the possession of private property."[3] They summarize the origins and meaning of "freedom of contract" as follows:

> "Individualism was both fashionable and successful: liberty and enterprise were taken to be the inevitable and immortal insignia of a civilized society. The state, as it were, delegated to its members the power to legislate. When, voluntarily and with a clear eye to their own interests, they entered into a contract, they made themselves a piece of private law, binding on each other and beneficial alike to themselves and to the community at large. The freedom and sanctity of contract were the necessary instruments of *laissez-faire*, and it was the function of the courts to foster the one and to vindicate the other."[4]

This state-sanctioned power to legislate a private relationship, this right of contracting parties to make themselves "a piece of private law", was an enormously important development in the history of ideas, with implications that continue to reverberate today. Participants in the construction industry should appropriately see themselves as inevitably at the leading edge of a continuing evolution. Because for better or worse, that is precisely where they are.

## LITIGATION AND ITS LIMITATIONS

The usual criticisms of litigation — that it is unpredictable, expensive and slow — are familiar to anyone who has been involved in litigating a construction dispute. The point needs no elaboration, except perhaps to restate the obvious: as much as some participants in construction may casually boast of their gambling prowess, "betting the company" on one project or another, the truth is that construction executives, like other business people, prize not their luck in games of chance but precisely the opposite - their ability to predict, control and manage. Competitive success lies in being able to pre-assess risk, being able to control it, and being able to manage a dynamic process better than others. It's small wonder that litigation is anathema to such people!

It may be argued that it is the *threat* of litigation which, practically speaking, assures contract performance in the real world of construction. However, the threat of invoking an inappropriate remedy does nothing to legitimize the remedy. More to the point: to view contractual performance as ultimately secured by threat alone is to overlook opportunities for better solutions.

There are at least two other characteristics of litigation which render it unsuitable as a method of securing the enforcement of a construction contract. They are both intrinsic to the process itself and to litigation as but one example of third-party dispute resolution processes generally.

**1. Litigation is a "statically factual" process, almost always invoked after the fact, while the performance of a construction contract is "dynamically relational", occurring in real time. The *ex post facto* remedy of a judgement at trial comes too late to protect the relational interests of the parties.**

All of litigation — all of the pleadings, the voluminous and meticulously organized documentary production, the days or weeks of examinations for discovery, the intensive trial preparation, all of the evidence at trial and the submissions made to the court, and finally all of the effort spent by the judge in analyzing the evidence and writing the judgement — is directed towards answering these basic questions: "What happened, and what consequences legally follow?"

In large part, litigation is an archaeological exercise, looking backward in time and sifting through the artefacts of past events, supplemented by the oral history of those who were there, to determine the factual matrix upon which the applicable legal principles play out to a logical conclusion. A cynic might suggest that litigation as waged within our adversarial system in North America might better be described as an archaeological exercise conducted by a highly dysfunctional team, with one group digging furiously while the other is just as furiously covering up or trying to smash what's found! (Query whether the same might be said of inquisitorial systems of justice, like those used in much of continental Europe.) In any event, it is necessary that in the course of trial those facts underlying the dispute be rendered static, fixed, in order that the evidence can be "weighed". This is what "making findings of fact" is all about.

It should be noted in passing that "facts" as legally found in court are not invariably the same thing as the facts which may have actually occurred. Apart from deliberate deception, there are limits on the ability of people to perceive events accurately, remember them, and convey that information to others. There is a considerable body of psychological literature on the human failings of memory, including our tendencies to attribute a recollection of an idea to the wrong source, to recall as reliable memory that which had actually been implanted as a result of leading questions or comments made previously, and to biased distortions and unconscious influences upon past events which are later recalled as Gospel truth[5].

Although judges go to great lengths to listen to all of the evidence and absorb it accurately, to "get it right" in other words, they are subject to the same limitations of memory, perception and understanding as anyone else. Judicial misapprehension of the evidence to some degree in any given trial is almost inevitable, particularly if the trial is lengthy and complex. Where that misapprehension is serious enough to suggest an injustice, an appellate court will interfere. However the test that must be met on such an appeal is onerous, and appellate courts accord great deference to the trial judge on such matters.

It must also be acknowledged that litigation has a forward-looking aspect. Every judgement is simultaneously a determination of a specific dispute in the past and a precedent potentially influencing the outcome of other disputes in the future. It would be an error to overlook the significance of this — after all, precedent constitutes the bricks and mortar of the common law. But while each piece of decided case law has usefulness as precedent, its utility has something of the same quality as that of an autopsy: potentially life-enhancing to others, but of precious little help to the deceased himself.

Each piece of decided case law then, is a snapshot, a representation in present time of a dispute grounded in the past, with something inevitably lost in the graininess of the print. But parties engaged in an ongoing construction project have little patience for photography or archaeology, and no desire whatsoever to set legal precedents. While such parties in dispute are certainly interested in "What happened, and what are the legal consequences that follow?", their ongoing relationship inevitably prompts another question which is at least as pressing: "Where do we go from here?" If the only possibility be "To court!", the implications are usually negative, the possibilities certainly limited, and the outcome occasionally perverse.

For example, consider the position of Eakins Construction, the unfortunate subcontractor in the landmark Supreme Court of Canada decision in **Peter Kiewit Sons' Co. of Canada v. Eakins Construction Ltd.**[6] Kiewit, the general contractor, retained Eakins for a pile driving job in connection with the Second Narrows Bridge project in Vancouver. The plans and specifications upon which Eakins bid required it to drive piles to a safe bearing capacity of 20 tons. After the subcontract was let, the project engineer introduced a new requirement: "Bottom of timber piles to be driven below bottom of sheet piling". The effect of this was that Eakins was required to overdrive a number of piles. Eakins protested that this requirement resulted in extra work beyond that contemplated in the subcontract, but the project engineer denied the extra, and instructed Eakins to proceed at no additional cost or be thrown off the job and suffer a call on its performance bond. Eakins then proceeded under protest and later sued to recover its extra costs.

The trial judge dismissed Eakins' claim. The B.C. Court of Appeal overturned the decision and allowed the claim. The matter then went to the Supreme Court of Canada which in a 4-to-1 split decision, allowed the appeal and denied Eakins recovery.

Each level of court spent considerable effort trying to interpret the contract, coming to

differing conclusions along the way. In the end, the majority in the Supreme Court of Canada ruled that Eakins, when faced with the engineer's refusal to order the overdriving as an extra, should have refused further performance except on its own interpretation of the contract (i.e. that the work was extra) and if that interpretation was rejected, ought then to have treated the contract as repudiated and sued for damages. Not having done this, and without any provision in the contract allowing the matter to be dealt with later, Eakins had no right to recover.

The lone dissenter in the Supreme Court, Justice Cartwright, could barely contain his indignation:

> "It is said that the respondent [Eakins] (who held what turns out to be the right view as to the meaning of the subcontract) should have had the courage of his convictions and refused to perform any work beyond that which was required by the subcontract, and when this resulted in its being put off the job should have sued the appellant [Kiewit] for damages. It must, however, be remembered that the subcontract was so difficult to construe that there has been a difference of judicial opinion as to its true meaning. The appellant (who held what turns out to be a mistaken view as to the true meaning of the subcontract) threatened the respondent with what might well amount to financial ruin unless it did the additional work which the subcontract did not obligate it to do. To say that because in such circumstances the respondent was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous [and] the appellant may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character, which … can and should be prevented by imposing upon the appellant the obligation to pay…"[7]

Unfortunately for Eakins, Justice Cartwright was but one voice among five. For our present purposes, this decision starkly illustrates a serious problem that arises when the 20/20 hindsight of the litigated solution is the only available mechanism to resolve a dispute amid an ongoing construction contract. With impeccable logic, the majority of the Supreme Court of Canada came to a legally correct conclusion that crashed head-on into what I suspect most contractors might have expected in similar circumstances. It is deeply troubling to be told, after the fact, that a party in the position of Eakins had no remedy because the contract didn't expressly contain a provision allowing disputes to be parked while the rest of performance could continue, and that he had only two options left — accept the other side's position (which may be wrong) or terminate the relationship mid-stream and take his chances in court. Disputes or not, contractors do not readily walk off jobs, not simply because of potential legal exposure but also because of reputational, credit history and other factors which are just as significant.

There are other problems of course if litigation be the only answer to "Where do we go from here?". Experienced contractors and construction lawyers are well familiar with what happens when it becomes clear to all midway through a project that a dispute is inevitably destined for a courtroom. In effect, the lawsuit starts at that moment, the issuance of the claim later being a mere formality. Each party begins to protect itself and the common objective becomes secondary. Any sense of team play tends to evaporate, as does mutual trust. Gone too is the informal give and take amid the day-to-day exchanges of information, replaced by self-serving letters, increased energy spent on note-taking and a tendency to rewrite history. Everyone is all too acutely aware of the archaeological exercise to come.

Perhaps the keenest loss however is *the capacity for the imaginative solution* that was inherent in the parties' relationship at the outset. Even the most hard-bitten construction executive knows what the capacity for the imaginative solution feels like: consider the creativity that goes into competitively tendering the project at the outset, the value engineering that may be done, the many adjustments in sequencing, equipment and manpower allocation, perhaps even changes in elements of the design, all of which routinely take place every day in well-functioning projects where the parties are working together dynamically in a relationship focused upon common objectives. It is this capacity for the imaginative solution which underlies the performance of every successful construction contract and the productive resolution of every disagreement under it.

But the imaginative solution that might have been is of little relevance in litigation. True, the imaginative capacity might be resuscitated amid a mandatory mediation session conducted in mid-litigation. But most contracts are completed by this point, leaving little scope for the imaginative process beyond structuring the settlement payment terms. Furthermore, by the time court-sponsored mandatory mediation takes place, the parties have been strained by accusation and counter-accusation, and have already invested heavily in winning the fight. If the mandatory mediation is unsuccessful, the dispute proceeds to trial - and by that time the capacity for the imaginative solution is usually exhausted for good.

**2. Litigation is a highly imperfect mechanism for determining the real deal as distinct from the paper deal.**

The perfect construction contract does not exist.

For a number of reasons, handily summarized by University of Wisconsin law professor Stewart Macaulay[8], it is not possible to create a document which completely, comprehensively and unambiguously captures the mutual intention of the parties, flawlessly expressing in written form the totality of their expectations of one another. These reasons include:

- words mean different things to different people. "We create the meaning of written language by bringing to the words some measure of context, background assumptions, our experiences, and, too often, our bias, ignorance and stupidities"[9];
- there are limitations on the ability to predict the future and account for future contingencies contractually;
- there are limits on the time and money available to create the written contract. Sooner or later, the document must be considered "good enough";
- there is a reluctance to engage in excessive and detailed negotiation of contract terms if that risks signaling distrust, particularly in circumstances in which the parties wish to rely upon strong relational ties going forward;
- the people drafting the contract are often different from those who negotiated the business deal originally or those who must actually perform the contractual obligations operationally. There are varying limitations in the ability of each of these groups to fully grasp the needs and wants of the other and to communicate them to the other;
- contractual terms are sometimes deliberately left unaddressed for strategic reasons, for example, because raising the issue may prompt a demand for a concession elsewhere; and
- people often accept detailed technical contractual terms written in "legalese" on the assumption that exceptions or qualifications, not worth spelling out in advance, will apply as needed.

In short, there is the real deal and there is the paper deal, and there is inevitably a gap between them. Contracting parties are usually aware of this gap (although they may not know precisely *where* it lies) and typically assume that discontinuities between what is written in the contract and what is actually experienced during performance will be dealt with in a mutually satisfactory way as they are encountered.

It is in this gap of course where most contractual disputes originate. There has long been debate within the legal community about the proper role of the court in such matters. There are the black-letter strict constructionists, who favour predictability and therefore focus upon the letter of the document to the exclusion of conflicting evidence about actual intention. And then there are the relativists, who maintain that the justice of the specific case demands that the expectations of the parties should be paramount even if those expectations be imperfectly recorded in the written document. There is considerable room along this spectrum and much scope for judicial ingenuity, the parole evidence rule notwithstanding. And this leads to the most immediate of the problems encountered when submitting such disputes to a third party: the resolution will heavily depend upon where the trier of the case sits along that spectrum. It is not unusual in a dispute involving the interpretation of a written contract for the black-letter judge and the relativist judge to come to widely differing conclusions — conclusions which the parties probably have less ability to influence than they might suspect.

But here again, the problem runs deeper. There is a reason why parties to a construction contract are more or less comfortable embarking upon their relationship in awareness that their written deal is not necessarily perfect: they trust the assumptions they make about one another. Each party reasonably brings to the relationship a constellation of expectations involving past experience, technical expertise, organizational ability, integrity and trustworthiness, few of which may actually be expressed in the written contract except in the most generalized and prescriptive way. But these assumptions and expectations, together with the plans, specs, general conditions and other writings, constitute the real deal.

When a disagreement is negotiated directly by the parties during contract performance, the real deal tends to occupy centre stage. Everything is relevant, not simply the written terms but also those unwritten expectations and assumptions, in all their fresh, unrehearsed and unqualified form. Parties negotiating during a project — in other words, self-enforcing — do so within the context of a relationship which usually remains important to them and which usually extends beyond the boundaries of the particular issue in dispute. Along the way, many of those tacit expectations and assumptions will inevitably become articulated, and will either be verified (with corresponding changes in behavior) or acceptably modified if the relationship is to continue. It's difficult to look the other in the eye and deny the real deal under such circumstances.

Litigating a construction case in court, one does not have to look the other in the eye at all. One need merely look at the page. When parties litigate their dispute, it is the documentation which usually becomes the focus of attention, since the writing is considered to be a more reliable record of the now-historic event. And so, one party harps on all the ambiguity and incompleteness within the written contract, while the other stresses the clarity and succinctness of the language. Evidence about expectations and assumptions, to the extent this remains relevant at all, has by now been well packaged for judicial consumption. Much has been forgotten, and that which is recalled is now polished. Everyone is now a paragon of contracting virtue, or had better be.

The reader can well imagine how difficult is the judge's task under these circumstances. Now add this to the mix: being a generalist, the judge probably knows little or nothing about construction. Recall the comments above about expectations and assumptions. In construction these include dozens, perhaps hundreds, of unspoken but widely accepted tenets about such things as: how general contractors are supposed to properly behave towards their subs and vice versa; the professionalism of the architect/engineer; the degree of involvement and responsiveness one can reasonably expect of any responsible owner; what project coordination really means; how jobs get disrupted by changes, weather, excessive overtime, overbearing site supervisors, etc.; what delay does to a contractor; what labour productivity really means and what an adverse impact upon productivity does to the employer financially; and so on. This lore held in common and with a surprising degree of consensus (at least off the record) is part of the real deal too.

A subtle thing often happens in connection with the real deal when a dispute is taken to a third party for resolution. If it is perceived to be tactically advantageous to do so — and it usually is — one or both of the parties will be tempted to distort it. And so, a dispute that begins life as a controversy over a seemingly straightforward construction deficiency transforms itself into prolonged debate about whether the owner's specification was adequate in the first place and the designer's role in all of that, the extent of the contractor's obligation to review in advance and supervise construction, the role of the preceding subcontractor in failing to make ready as well as it might have, and so on and so on.

I have long suspected that the true reason why people prefer arbitration before someone with life experience in the construction industry (apart from the usual reasons of speed and privacy) is that they expect the savvy arbitrator to get to the heart of the matter, with little tolerance for the dissembling that often takes place inside a courtroom. And while agreeing to mandatory arbitration in advance carries a price in terms of surrendering the opportunity to perhaps do a little dissembling of one's own, it's considered a price well worth paying if the alternative, litigating in court, is an unreliable method of invoking the real deal in all its inarticulate complexity and richness.

## OPTIMIZING CONTRACTUAL ENFORCEMENT

The reader should not infer from the foregoing that the paper deal is unimportant. On the contrary, the "piece of private law" evidenced by the written construction contract assumes a significance far beyond merely setting out price, scope and schedule. Thoughtfully crafted, the written contract can hold the keys to its own enforcement.

A *balanced* written contract is the single most powerful dispute-avoidance tool available to construction contracting parties. Each party to a construction contract has a set of core competencies which are already part of its business. In a balanced contract, each of the project responsibilities and their attendant risks is allocated to the party whose business it is to manage it. In other words, contractual risks are aligned with core competencies. In contrast, an off-balance contract attempts to force one of the parties to assume responsibilities which fall outside its competencies with inadequate compensation for the additional risk. (Compensation is related to contract balance. A contractor asked to build a $1 million building for $1 million, but to assume extraordinary risks in doing so, would consider such a contract to be unbalanced. The

same contractor asked to build the same $1 million building and to assume the same extraordinary risks, but for $10 million of compensation, might question the sanity of the owner but would never consider the contract to be off-balance.)

An off-balance contract gets in the way of optimal performance because the party affected by the off-balance will inevitably be devoting energy to managing its exposure upon a risk for which it is neither qualified nor compensated. On the other hand, a balanced contract is operationally transparent (consider how infrequently the parties to such contracts actually feel the need to consult them during performance). With a balanced contract, self-enforcement tends to proceed naturally, while the off-balance contract is much more likely to require third-party intervention to force a reluctant and resentful compliance.

If there is benefit to articulating those tacit assumptions and expectations that comprise the elements of the real deal, it then follows that there is benefit to structuring the written agreement so as to dovetail with such partnering activities as may be appropriate to the project. Much has been written about partnering, though its considerable potential may yet to be realized in Canada[10]. Partnering (or teaming, or whatever other label one wishes to use) is primarily an exercise in which the parties bring to the surface and flesh out the unwritten expectations within their contractual relationship in an orderly way at the outset, while that relationship is intact and perceived as having maximum value, through the facilitation of an experienced and authoritative third party. It should properly be seen as a mechanism for securing self-enforcement by the parties of their own contract, "doing the job right", and not simply as a mediative process for resolving real or potential disputes. (It may be that one reason why partnering is sometimes less than effective is because it is approached as nothing more than "mediation-by-other-means" — a mistaken objective in my opinion, and one that confuses and alienates the participants.)

Finally, the parties should take the opportunity to legislate their own dispute resolution. Failure to do this will result in a default to litigation as the only compellable mechanism. The objective here is that the contract clearly set out the roadmap for all parties to use once a dispute has arisen, in order that everyone is always clear about "Where we go from here".

This roadmap should include the following characteristics:

- it should be specific, with no room for controversy about the procedures themselves. Once people are in conflict, it is not realistic to first require them to agree upon the mechanism for resolving that conflict. (This is why "optional" mediation and arbitration clauses are of very limited practical use, in my view);

- it should aim for real time dispute resolution as much as possible. Recall the comments earlier about the limitations of perception and memory, as well as the relevance of the real deal while negotiating amid a relationship which remains alive and important. Real time dispute resolution lies at the heart of "stepped" dispute resolution procedures now in common use, whereby disagreements are first required to be dealt with at the project level immediately when they arise, and if not successfully resolved there, to be quickly escalated up to senior management, and only from there to outside intervention;

- it should compel the parties to talk to one another, as directly as possible, for as long as reasonably necessary, before allowing a submission to a third party for a ruling. Again, the objective is to keep the real deal front and centre between the people who know it best, while the relationship remains intact, and to preserve their capacity for the imaginative solution;

- third party intervention should be carefully considered and explicitly structured. There is much room for qualified third parties to render valuable assistance in contract enforcement, with roles ranging anywhere from fact-finding in a non-binding way, to mediation (sometimes called "assisted negotiation"), refereeing of discrete issues, and full-blown arbitration. There is a crucial difference between non-binding, mediative roles, and adjudicative processes such as refereeing and arbitration: in the former, the parties make their own peace (with outside assistance) while in the latter, the peace is imposed upon them. Stipulating how this third party intervention is to take place is limited only by the complexity and value of the project, and the creativity of the parties. In more substantial or complex projects, multiple third parties can appropriately assume differing roles. It is prudent, however, to nominate in advance the specific third party or parties, or alternatively settle upon a roster of acceptable candidates, in order that they may be called upon as needed without undue delay.

These are some of the key elements that all construction contracting parties should consider as they legislate their relationship in a way that will promote the enforcement of contracts while opting out of litigation.

In closing, it's fitting to contemplate one more irony: while the common law would have nothing to do with private agreements 900 years ago, we may now be entering an era in which contracting parties can return the favour, and comfortably lessen their dependence upon the litigation process underlying the common law as the primary method of securing their bargains. The interesting implications of *that* are best left to another time!

---

[1] Cheshire, Fifoot and Furmston, Law of Contract, Thirteenth Edition (Butterworths, 1996), p. 1

[2] ibid, p. 2. Incidentally, Cinque Ports is the name given to a group of seaports in southeast England that formed a maritime and defensive association in the 11th century.

[3] supra, p. 11

[4] supra, p. 18

[5] see, for example, Schacter, D.L., "The Seven Sins of Memory", American Psychologist, Vol. 54, No. 3, March 1999, p. 182; Loftus, E. F., "Make-Believe Memories", American Psychologist, Vol. 58, No. 11, November 2003, p. 867

[6] [1960] S.C.R. 361

[7] ibid, pp. 379, 380

[8] "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules", in Implicit Dimensions of Contract (Campbell, Collins and Wightman eds, Hart Publishing, 2003), pp. 51ff

[9] ibid, p. 54

[10] see, for example, the comments in Gillan, W.R., "Facilitating the Construction Dispute Resolution Process", Revay Report, Vol. 23, No. 1, March 2004

**The Revay Report** is published by Revay and Associates Limited, a national firm of Construction Consultants and Claims Specialists, assisting owners and contractors in achieving profitable and trouble-free construction projects.



Édition française disponible sur demande.

**Please advise the Montreal office of any change of address.**

**CONTACT INFORMATION**

Please visit **www.revay.com** for current office locations.
If you would like to subscribe for **The Revay Report**, click here.

Publications #40042162