

# “YOU AND THE LAW”

## WHAT IS A BREACH OF CONTRACT?

By Janice Mucalov, LL.B.

Say you want to hire a landscaping firm to put in a new garden. After discussing the details, the landscapers promise the garden you want by a set date. You promise to pay a deposit up front and the rest when they've finished. That would be a contract. A contract is a legally binding agreement between competent parties that a court will enforce.

So what is a “breach” of contract? That's when one party breaks the contract – the landscaping firm plants cedar trees instead of the magnolia trees called for by the contract.

What can you do if the other side breaches the contract? Most often, if the other party doesn't do what they promised in the (hopefully written) agreement, you can get compensation (called “damages”). Occasionally, if things go really sideways, you may also be able to cancel the contract.

But do you have to wait until the other side doesn't do as promised before there's a breach? What if, well beforehand, the other side makes it clear they have no intention of going through with their part of the bargain? If there's no acceptable reason for that (e.g. they say they won't do the work because it's a bad deal for them), you may be able to treat the contract as breached.

You then have the option to accept the breach or to insist that the other party perform. If you accept the breach, you should try and minimize your loss. Using our landscaping example, you'd want to try and hire a replacement outfit to do the landscaping work, for the best price then available. Alternatively, if you insist that the other party perform their side of the deal, you must be ready to perform your part of it too. In either case, you can claim

compensation for the other party's failure to perform.

In a few rare cases, where money wouldn't adequately compensate for a breach, a court may order “specific performance,” forcing the other side to do what they promised. Your lawyer can advise you if this is available in your particular case. Specific performance is generally restricted to contracts for the sale of land and wouldn't be available to force the landscapers to perform their contract.

Sometimes the agreement itself spells out pre-agreed consequences of a breach (e.g., it could say that the innocent party can cancel the contract in certain situations and keep a reasonable deposit put up by the other side).

Timing can be critical. The contract may say that a specific time for performance is essential (e.g., May 31 for completion of the garden). Without such a “time is of the essence” clause (or even with it if you casually let the set date pass without objection, and don't fix another date as critical), you may find that a delay doesn't count as a breach and you cannot get compensation for it. The other side could then carry out the work later than promised without penalty (unless the contract specifies a penalty).

A whole lot of wrinkles and special rules come into play when there's a contract dispute and a supposed breach of contract. If the agreement is important enough, you may want to talk to your lawyer up front for help with preparing it. Your lawyer can also help if you are facing a breach of contract situation. Be mindful there are time limits for enforcing a contract or seeking compensation – so don't delay seeking help.

**This column has been written with the assistance of Frey & Company. The column provides information only and must not be relied on for legal advice. Please contact Michael Frey for legal advice concerning your particular case.**

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. “You and the Law<sup>SM</sup>” is a registered trade mark. ©Janice Mucalov.



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