

## FOCUS ON CONTINUING LEGAL EDUCATION

### Can lawyers be trained in contract drafting?

Kenneth A. Adams gives a number of reasons why law firms would benefit from a CLE seminar on contract drafting. Deficient drafting can deprive a party of an anticipated benefit under a contract and is the source of countless lawsuits.

**By Kenneth A. Adams**

In my discussions with lawyers and professional-development personnel at law firms in the U.S. and Canada, I've gotten the sense that some law firms are lukewarm to the idea of bringing in a speaker to do a CLE program in contract drafting. (Company law departments seem generally more open to the idea.) Below are some of the reservations that lawyers have expressed to me, along with the responses I could imagine giving.

*We always get Frank to give our junior associates a talk on contract drafting.*

I suspect that at a large proportion of law firms with a couple of dozen or more corporate lawyers, once a year a partner volunteers, or is prevailed upon, to spend a lunchtime, or longer, giving a talk to junior associates on contract drafting. However interesting or thoughtful such talks may be, they tend to consist of a grab bag of insights and war stories rather than a systematic treatment of the subject. They also tend to be quite narrow in scope—those I've sat in on could have been entitled "some things to think about when drafting M&A contracts." An outsider who

specializes in contract drafting can bring to bear a different perspective.

*We have our own way of doing contracts and we're not about to listen to an outsider.*

Some lawyers feel that their firm has developed a particular drafting expertise that they're loath to monkey with—at the prospect of change, they offer a response to the effect that "that's not the way we do it around here."

But while a few law firms—particularly those in Commonwealth countries—have established a degree of centralized control over contract drafting, at the overwhelming majority of law firms the process remains essentially an artisanal one, with lawyers willing to use form contracts from a variety of sources both within and outside the firm. One result is that in any given firm you'll see a wide variety of drafting usages, with questions of language and layout largely being left to personal taste.

And it follows that it's unlikely that any law firm will have a proprietary drafting style. If that was ever the case, it no longer is, now that the work product of hundreds

of law firms (including Canadian law firms) is available on the SEC's Edgar database, to be copied at will by anyone who is so inclined. Instead, it's safe to say that a broad set of contract-drafting usages are used throughout the legal profession.

The upshot is that there's little point in worrying about an outside CLE expert adulterating your firm's drafting style, because it likely is a thorough mishmash.

*Our lawyers don't need instruction in contract drafting—they're already proficient.*

I suspect that if you were to ask lawyers to list areas of concern in contract drafting, the quality of contract prose would not be among the issues most frequently cited. Nonetheless, it is generally accepted among commentators that the prose of contracts is at the bottom of the legal-writing barrel. Any given contract will likely feature archaisms, redundancies,

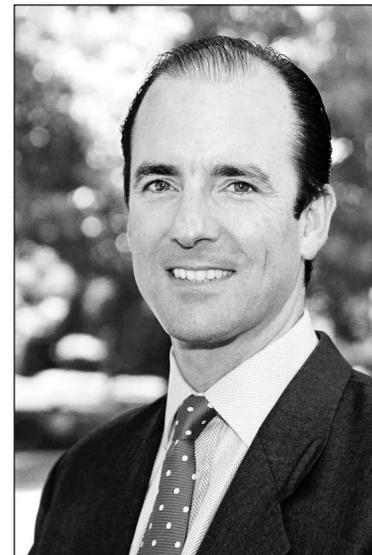
unnecessary lawyerisms, idiosyncratic grammar, structural flaws, an inefficient layout, and other problems.

These shortcomings are hardly trivial. Deficient drafting can deprive a party of an anticipated benefit under a contract and is the source of countless lawsuits. And it wastes vast amounts of time and money, in that it makes contracts more time-consuming to draft, read, negotiate and interpret.

To draft effective contract prose, you need to be able to avoid problematic usages and select the most efficient alternatives. A CLE course would provide a good introduction to this process.

*We like CLE programs that are engaging, and contract drafting is dull.*

While I'd maintain that contract drafting is more accessible than many a CLE subject, I can understand someone having reservations about making it the topic for a lunchtime CLE program, a format best suited to big-picture discussions. But considering how lawyers go about drafting contracts brings into play all sorts of weighty issues, such as how law firms staff their work and bill for it, whether drafting should be a commodity task, and how tech-



**Kenneth A. Adams**

nology can help make the drafting process more efficient—all topics that should give participants in a lunchtime CLE program plenty to think about.

*Kenneth A. Adams is a lecturer in law at the University of Pennsylvania Law School, where he teaches contract drafting. He is also a consultant to companies seeking to improve the quality and process of their drafting. He is the author of "A Manual of Style for Contract Drafting" (American Bar Association 2004).*

### To date, nine countries have adopted the *Model Law*

TRANSPARENCY  
—continued from p. 12—

tors as a monitor in the company's CCAA proceedings, a practice which, mercifully, was already in decline before the legislation was introduced. Canada's bankruptcy legislation will still lack even an "independence" requirement that insolvency representatives should be free of conflicts of interest. In transparency, Canada has a long way to go, but, evidently, no legislative desire to go there.

Internationally, it is claimed that Canada has adopted the UNCITRAL *Model Law on Cross-Border Insolvency*, which provides an international set of procedures for recognition of foreign insolvency proceedings and foreign insolvency representatives. To date, nine countries have adopted the *Model Law* including, most recently, the United States, and the U.K. is poised to do so. The folks in Ottawa, for inexplicable reasons, took it upon themselves to devise their own form of *Model Law* which doesn't

resemble any other adaptation of the *Model Law* anywhere in the world. In dealing with cross-border cases abroad, Canadian insolvency representatives will be hard-pressed to persuade foreign courts that Canada has adopted the *Model Law*.

Those who hope that Canada can have the proper insolvency legislation it deserves have had their hopes dashed on previous occasions and again this time. There is only a slim hope that a Parliamentary Committee review of the shortcomings of the new legislation will produce modest improvements in it. *The Lawyers Weekly* will keep readers up-to-date on developments.

*Bruce Leonard is the chair of the Business Reorganization Group at Cassels Brock & Blackwell LLP in Toronto and the chair of the International Insolvency Institute, a non-profit Canadian association of insolvency professionals. The views expressed above are those of the author alone.*

#### Keep up with Planning and Development Law

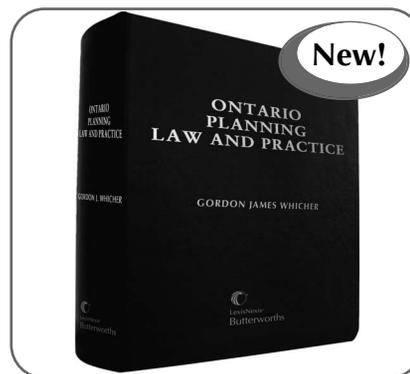
LexisNexis® Butterworths

### Ontario Planning Law and Practice

Gordon James Whicher

The land development approval process in the Province of Ontario is complex and potentially confusing. Those involved must understand a range of technical disciplines and numerous laws and regulations. They must deal with a series of specific land development approvals from a host of approval authorities.

**The new Butterworths Ontario Planning Law and Practice covers the full spectrum of land use planning issues.**



In one resource, you have a comprehensive overview and detailed analysis of the legislative framework for land use planning and development in the Province of Ontario, including:

- Analysis of the division of land use powers between Canadian federal and provincial governments
- Detailed review of the respective roles and powers of the Province of Ontario and its local government approval authorities
- Review and discussion of major legislation affecting land use planning
- Analysis of key legal principles affecting land development approvals

**Plus:** Supplements will be published regularly to expand coverage and follow emerging issues.

**\$165** • August 2005 • Looseleaf • 1 Volume  
Updates Billed As Issued • ISBN: 0 433 44295-6

**Order Today and Take Advantage of Our 30-Day Risk-Free<sup>†</sup> Examination!**  
Call 1-800-668-6481 or Visit Us Online at [www.lexisnexis.ca/bookstore](http://www.lexisnexis.ca/bookstore)

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Other products or services may be trademarks or registered trademarks of their respective companies. Copyright 2005 LexisNexis Canada Inc. All rights reserved.

Please quote Reservation Code 3306 when ordering.  
(Price and other details are subject to change without notice.  
We pay shipping and handling if payment accompanies order.)

<sup>†</sup> Pre-payment required for first time purchasers