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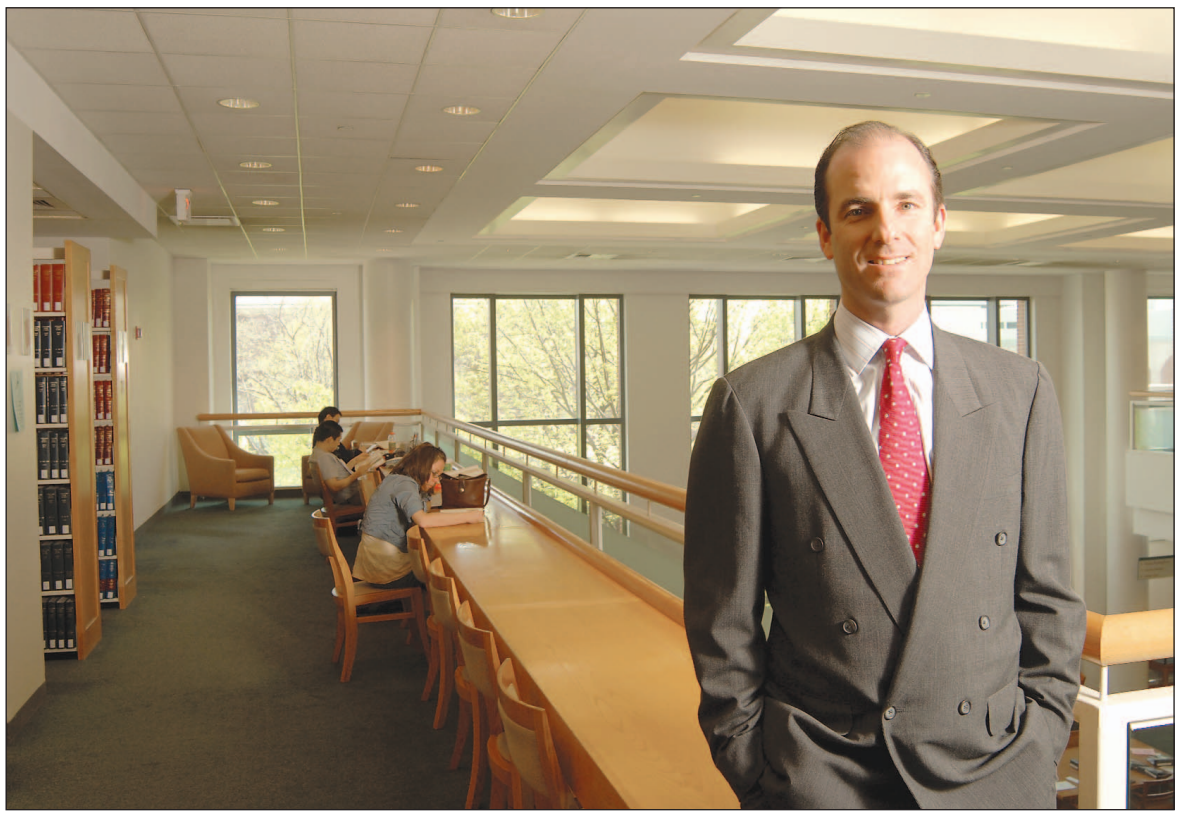

Internationally renowned contract drafting guru, Kenneth Adams, spoke in Toronto on Dec. 10 to deliver a sold out workshop on his specialty. Read a feature on him on p. 20.

'Safe third country' deal violates refugees' rights

By Cristin Schmitz
Ottawa

A Canada-U.S. deal which dramatically cuts the number of refugee claimants who can enter Canada from the U.S. has been implemented illegally and unconstitutionally because America is not a "safe country" to which to return asylum seekers, a Federal Court judge has ruled.

On Nov. 29, Justice Michael Phelan ruled that a trio of advocacy groups for refugees had made out their case for a declaration that the federal cabinet's Oct. 12, 2004, designation of the U.S. as a "safe third country" for asylum seekers, under paragraph 159.3 of the Regulations to the two countries' reciprocal *Safe Third Country Agreement* (STCA), is invalid and unlawful because the U.S. doesn't adequately respect the international conventions that prohibit refugees from being returned to places where they will be persecuted or tortured.

The STCA scheme makes ineligible for refugee protection in Canada thousands of would-be claimants who enter by land from the U.S.

As part of the so-called "Smart Border" agreement, the STCA stipulates that a non-American desiring refuge in Canada and who arrives by land (and only by land) from the U.S., is immediately returned to the U.S., without consideration of the refugee claim in Canada (with some exceptions).

see REFUGEE *p. 15*

Canadian criminal lawyers export expertise

By Tim Wilbur
Toronto

Imagine you are a criminal lawyer representing a client accused of a serious criminal offense. You are not allowed to meet your client after the police and prosecutors have fully interviewed your client and investigated the crime. Your client tells you that he was encouraged to plead guilty to get a more lenient sentence. You suspect much of the evidence against your client was obtained illegally but there is nothing you can do to have it excluded. You cannot cross-examine the prosecution's witnesses because their testimony is submitted only by sworn affidavits in a trial that is highly secretive.

This not the description of the trial of an accused terrorist, but of a typical criminal trial in China. Currently, China operates under a continental, or inquisitorial, model for its criminal trials, where judicial independence and the basic rights of the accused are far less entrenched than in Canada. But as with everything in China, this is changing, and new ideas, approaches and philosophies are seeping into the country's criminal justice system. Thanks to a group of criminal lawyers in Canada, Chinese lawyers are learning about our adversarial model for criminal justice, and Chinese criminal defence lawyers are hoping to incorporate some of these ideas into their evolving system.

Heather Perkins-McVey is a criminal defence lawyer in Ottawa who has travelled to China three times since she helped found the criminal law reform & advocacy project. This project, which is run as part of the Canadian Bar Association's international development program, has created links between Canadian and Chinese criminal defence lawyers by sending Canadian lawyers to China and hosting visits by Chinese lawyers in Canada.

"There is very little you can do if all you are doing is exchanging affidavit materials," Perkins-McVey told *The Lawyers Weekly*, in describing the challenges faced by Chinese defence lawyers. Perkins-McVey has witnessed some reforms in China's criminal law, but the changes are much slower than the radical revolution in China's economy. "There was a period of time when it seemed that they were really moving forward at quite a heady pace," said Perkins-McVey. "However, it also seemed that perhaps they flew too far, too high, too quickly, and then there seemed to be a slight retreat. It is still dangerous to be a criminal defence lawyer in China. But I do see that they are sticking with stronger conviction about the need for reform and about the need for legal counsel."

The CBA China project has been around since 2003, and in late November, two Chinese lawyers visited Canada to plan the next visit by Canadian lawyers in China at the Criminal Law Committee's annual meeting in January 2008.

see CHINA *p. 7*

'Homosexual agenda' letter found contrary to human rights

By Gary Oakes
Victoria

The Concerned Christian Coalition Inc. (CCC) and its executive director, Stephen Boissoin, have been found in contravention of Alberta's human rights legislation for writing a letter to the editor which was "likely to expose homosexuals to hatred or contempt because of their sexual preference."

The issue of remedy will be decided later, stated Lori Andreachuk, chair of the Human Rights Panel that heard the complaint of Dr. Darren Lund, a University of Calgary professor.

Lund requested the panel order Boissoin and/or the CCC to pay him $5,000 to compensate him for his legal costs and to donate $5,000 to the Diversity, Equity and Human Rights Committee of the Alberta Teachers Association.

He also sought an order directing Boissoin to publish a full apology in the *Red Deer Advocate* which ran the letter in question on June 17, 2002. It was entitled "Homosexual Agenda Wicked."

Andreachuk pointed out that the paper was "not a part of this complaint. Due to a settlement of a prior human rights complaint against its publication of Mr. Boissoin's letter, it has expanded its 'letter policy.' Commencing on April 10, 2004, the newspaper now includes a policy statement that states:

"*The Advocate* will not publish

see BOISSOIN *p. 5*

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LEGAL BUSINESS

The craft of contract drafting: an interview with Kenneth Adams

By Michael Rappaport
Toronto

A single comma in a contract between Bell Aliant and Rogers Communications Inc. gave a clause two possible interpretations and sparked a heated battle before the CRTC. When the commission handed down its initial ruling in August 2006 in favour of Bell – in a case dubbed "the comma dispute" – Rogers' legal team knew exactly who to call for back-up.

Kenneth Adams is a world renowned expert in contract drafting, who has penned two books and countless articles and blog postings on that topic. When not gallivanting around the globe giving seminars on contract drafting to lawyers or acting as a consultant, he teaches a course on the subject at the University of Pennsylvania Law School.

Without delay, Rogers' outside counsel called Adams to act as an expert on the appeal. Springing into action, Adams dashed off a 69-page affidavit about the implications of comma usage. Regrettably, the CRTC had no need to consult Adams' heroic effort. In its second decision, the commission sidestepped the pernicious punctuation problem altogether. Referring to the French version of the contract, which didn't suffer from the comma-induced confusion, the CRTC ruled in favour of Rogers. At least, Adams did learn a valuable lesson from the affair.

"If you allow ambiguity to seep into your contracts, this is what can happen," Adams said with a hint of exasperation.

Frustrations of this kind led Adams to begin jotting down his thoughts on contract drafting a decade ago while working as a corporate lawyer in Switzerland. His note-taking culminated in his decision to leave the practice of law to spend more time honing his expertise in contract drafting.

In an interview with *The Lawyers Weekly*, Adams discussed what led him to devote his life to studying the craft of contract drafting. "Due to some quirk of genetics, or upbringing or something in the water, I really like things to work. I like things to be efficient. I don't like chaos, incoherence or when people don't understand each other," he says with a laugh.

Adams certainly has his work cut out for him. As most lawyers would readily admit, the typical contract is chock full of archaic terms, myriad redundancies, awkward phrasing, unintended ambiguity and meaningless boilerplate. Yet lawyers tend to be reasonably well-educated, literate and analytical. Which begs the question: why are contracts so poorly written?

Adams offers three of many factors which have combined to push contract drafting to the bottom of the barrel of legal writing.

"First, because any given transaction will likely be similar to many that have gone before, lawyers use as models contracts from previous deals," Adams says. "In the process, they invariably import a lot of irrelevant and suboptimal language just as a matter or expediency."

The second factor is the lack of training in contract drafting. Adams notes that only about a quarter of law schools in the U.S. offer courses on the subject, and he doesn't seem too surprised on being told that no law school in Canada teaches contract drafting.

"Junior lawyers are expected to learn drafting by osmosis without rigorous training and without reference to any set of rules. That results in junior associates' learning all sorts of bad habits and before too long those bad habits become the normal way of doing things," Adams explains.

Expediency and economics are the third reason for the sorry state of contract drafting. "Because of the time and cost pressures involved, corporate transactions aren't conducive to pausing to consider whether a bit of contractual language that you've never understood, but that has been around forever, really makes sense," Adams contends.

"If you allow ambiguity to seep into your contracts, this is what can happen."

Contract drafting flaws

"An enormous amount of litigation has its roots in deficient drafting," Adams says. He rattled off a few of the most egregious flaws to be found in contract language.

One culprit is standard clauses that are slapped into just about every contract but serve no useful function. Consider for instance the traditional "recital of considerations" at the beginning of most contracts. It states, with much verbiage, that the agreement is supported by "good and valuable consideration." Ostensibly, it serves to ensure that the contract would not be found unenforceable due to lack of consideration. However, as Adams notes, "You can't create consideration where there was none simply by saying there was consideration."

Kenneth Adams

In effect, the recital of considerations is completely pointless. According to Adams, it would be best simply to omit it.

Parsing the boilerplate which is used to construct contracts, one discovers numerous issues with the individual words which the clauses are assembled from. For instance, many terms used in contractual language are archaic. Fortunately, these antiquated words are simple to spot and remove or replace.

"The easiest thing to fix is the overt archaisms, which tend to stick out like a sore thumb, in part because they tend to announce themselves in all capitals," Adams says. Think of all the contract drafters' old favorites, WITNESSETH, WHEREAS, NOW THEREFORE, and IN WITNESS WHEREOF. All overused and outdated, and best retired. Yet contract drafters seem to be wedded for life to such archaic words. "Many lawyers like the idea of contracts sounding mystical," Adams posits. "You'd be doing yourself and your reader a favour by getting rid of such stuff."

A more pressing problem with contractual language is ambiguity. Adams notes three broad categories of ambiguity.

First, a word itself may be ambiguous. For example, the word "material" as understood by the judiciary has one meaning, but as used by practitioners it can have two meanings, according to Adams.

"The courts invariably look at 'material' as meaning sufficiently important to change someone's decision, for instance someone's decision to buy stock or enter into a transaction. So it represents a high threshold of significance," Adams explains. By contrast he continues, practitioners use "material" also to just mean "significant," in other words, important enough to merit attention, which is a much lower threshold of significance. This ambiguity surrounding use of the term "material" has the "potential to lead to grave misunderstandings," Adams warns.

A second kind of ambiguity is the confusion which arises over whether a single member of a group of two or more is being referred to or the whether the entire group is being referred to. Adams labels this kind of ambiguity "the part versus the whole" debate. Words to watch out for include plural nouns and conjunctions such as "and," "or," "every," "each" and "any."

Consider the conjunction "or." "According to the logic embraced in legal literature on legal drafting, if the law imposes a penalty of one year in prison *or* a $100,000 fine, a court can impose both," Adams says. However, he quickly points out the flaw in this reasoning. "As a matter of semantics that's an impossible notion. If it's one year in prison or a $100,000 fine, it's one or the other, but not both."

"The courts and commentators have made a complete hash of the ambiguity associated with 'and' and 'or,'" Adams sighs.

A third kind of ambiguity is referred to as "syntactic ambiguity," which according to Adams is a fancy term for ambiguity that relates to the order in which words appear and how they relate to each other. For example, Adams offers the following clause in a contract: "any fast food restaurant or restaurant facility whose principal food product is chicken."

Does the term "fast food" in the clause modify just "restaurant" or does it also modify "restaurant facility"? Adams asks rhetorically. The answer to this question was the subject a recent Illinois case, *Regency Commercial Assocs., LLC v. Lopax, Inc.*

Behold the future?

Like Alexander the Great, Adams believes that he has a sword to sever the Gordian Knot that is the tangled mess of mainstream contract drafting. "This may sound paradoxical coming from someone who roams the land giving seminars on contract drafting, but I'd be happy if most lawyers were freed of the time-consuming work that has always been a part of traditional contract drafting," Adams confides. In contrast to those who regard drafting contracts as a craft, Adams hopes to turn contract drafting into a commodity.

"Significant change is not going to be accomplished one lawyer at a time. We are only going to see significant improvement when institutions buy into a more rational approach to contract drafting — essentially the widespread use of document-assembly software," Adams preaches.

An organization that uses document-assembly software would prepare authorized template language, including alternative provisions to address different scenarios, then load it on the document-assembly system. For any given transaction, a user would generate a contract by answering an online questionnaire. As a result, users would be able to generate a first draft much more quickly than they would otherwise. And if the language were to follow his recommendations, says Adams, the resulting contracts would be much clearer than they likely would be otherwise. Adams asserts that such a system would offer dramatic efficiencies to companies with a high volume of contracts and would offer nimble law firms a significant competitive advantage.

In the future, the heavy lifting of contract drafting will no longer be part of regular corporate practice, Adams argues. "Instead, lawyers will focus attention on tasks that really add value, such as devising strategy and negotiating."