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.

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 of our business and integrity, the keystone in all our dealings. At Stewart Title, we know it’s our relationship with our customers that determines our success. That’s why service is the foundation of our business and integrity, the keystone in all our dealings.
The craft: contract drafting: an interview with Kenneth Adams

By Michael Rappaport Toronto

A single comma in a contract between Bell Aliant and Rogers Communications could clarify a clause two possible interpretations and spark 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.

"An enormous amount of litigation has its roots in deficient drafting," Adams says. He ralled 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 wasn't any." In effect, the mere existence of clauses is completely pointless. According to Adams, it would be best simply to omit it.

"Paring the boilerplate which is used to construct contracts discloses numerous issues with the individual words used. Often the clauses are assembled from pieces. For instance, many terms used in contractual language are archaic. It's just that the need 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, WITNESSES, WHEREAS, NOW THEREFORE, and IN WITNESS WHEREOF. All overused and outdated, and best retired. Yet contract drafters seem to be wedded to life such archaic words. "Many lawyers like the idea of contract sounds mysterious," Adams points. "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.

"A matter of semantics that's an area and 'or,'" Adams sighs. 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 $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" or "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.

"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-assemble software," Adams preaches.

Kenneth Adams

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