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# LOSS PREVENTION BULLETIN

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## ■ Bulletin # 167

### A Handsome High Bridge Quickly Crossed

The practice of using solicitors' trust conditions has been described by the Alberta Court of Appeal as "a handsome high bridge quickly crossed every day by thousands of clients with valuable transactions" (*Carling Development Inc. v. Aurora River Tower Inc.,* 2005 ABCA 267 (CanLII) at para. 64.)

Although the use of trust conditions varies across the country, the basic rules applicable to their use are relatively consistent from province to province. In many cases, the provincial codes of conduct are based upon, or simply adopt the provisions of the Canadian Bar Association's Code of Professional Conduct (available online at: www.cba.org).

The basics are as follows:

- A lawyer should scrupulously honour any trust condition once accepted
- Trust conditions should be written or confirmed in writing
- Trust conditions should be absolutely unambiguous in their terms
- If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition unless the condition can be amended by agreement
- Amendments to trust conditions should be in writing and can be made only by mutual agreement

While the various Codes of Professional Conduct tend to deal with trust conditions and undertakings together, there are distinctions. The decision in *Carling* addresses these differences and examines the law of trust conditions with a textbook approach. Though the decision focuses on the situation in Alberta where the Code of Professional Conduct addresses trust conditions in greater detail than in many other provinces, it has broad relevance as a reminder of the extent of the obligations lawyers assume when accepting conditions of trust.

*Carling* reminds us that when a lawyer accepts a trust condition and then fails to meet the obligations imposed by that trust, that lawyer is personally liable for the breach of trust and will need to notify his/her insurer of the potential claim. In many cases, the lawyer may also face disciplinary sanctions for breaching the professional Code of Conduct.

To avoid this situation, lawyers should carefully follow the advice given by the court in *Carling:*

> The practical corollary of all this is that the recipient of trust conditions should carefully consider whether or not to accept them. Is it safe and proper to do so? Has he or she personal power to ensure their performance? If not, he or she should at once return the documents or money unused.

Trust conditions accepted must be met. If the conditions cannot be met, the subject of those conditions, whether money or documents, must be returned unless the conditions can be amended in writing by mutual agreement.

## ■ Bulletin # 168

### Sharpening Your Tools: The Value of Continuing Professional Development

Most of the lawyers I know do a remarkable job of keeping on top of the ever-changing, never-static law in their particular fields of practice. They read relevant journals and papers, subscribe to web-based update services, research the law for particular client files, participate in their local bar association activities and programs and attend online and/or in-person continuing legal education (CLE) programs.

Most of the lawyers I know understand the value of

undertaking continuing professional development (CPD) activities, whether formal or informal, whether subject to reporting requirements or simply for their own benefit. In fact some, like a sole practitioner I know, are so dedicated to the task of keeping abreast of the law that colleagues may note their absence from a CLE program with some concern.

In Ontario, lawyers are required to report their hours of continuing professional development activities to the Law Society of Upper Canada. The Law Society of British Columbia has just approved a similar requirement. The Law Society of Nova Scotia requires lawyers who want to practice conveyancing to participate in specified education programming. The Law Society of Manitoba is currently discussing the question of mandatory continuing legal education, and I suspect that other Canadian law societies are also putting this issue on their agendas.

One of the reasons that our regulatory bodies look to imposing mandatory CLE requirements is as a loss prevention initiative. Although discussion papers on the issue of mandatory CLE consistently make the point that there is no empirical evidence to support a link between attending CLE programming or engaging in other kinds of CPD activities and the capable, competent practice of law, it seems intuitive that there must be such a link. Common sense suggests that lawyers who are up-to-date and well-informed about the areas of law in which they practice (*i.e.* competent lawyers) are less likely to make errors in representing their clients.

While most insurance claims are not attributed to the insured's lack of substantive legal knowledge, some are and these are some of the easiest claims to prevent from a risk management perspective.

Law schools teach future lawyers how to identify problems, research the applicable law and apply the law to the facts before them. Throughout their careers, lawyers are continually presented with clients who have problems that must be identified so that the applicable law can be applied and appropriate advice given. As law school is now a distant memory for many of us, we need to continue to find other means to keep our problem-solving skills honed. Engaging in CPD activities, whether through legal research, reading legal periodicals, participating in local bar meetings or attending online or in-person CLE programs, effectively keeps your problem-spotting and solving abilities sharp (and your claims experience down.)

■ **Bulletin # 169**

## Slow Law?

You may have heard of the Slow Food movement wherein ordinary people are rebelling against a culture of instant noodles, fast food takeout and eating on the road by purchasing locally grown ingredients, cooking from scratch and sitting down with their families to enjoy conversation and a meal together.

Slow food principles are seeping into other areas of our society as well, from parenting to leisure time to urban planning. The book, *In Praise of Slowness* by Carl Honoré explores this movement. While recently reading this book, I was surprised to find that these principles are also finding application in work settings, and in particular, in the practice of law.

Honoré relates the story of German lawyer Erwin Heller who, like many lawyers, would rush through initial client meetings with a view to getting the client's work done. He soon noticed that as a result he frequently needed to place follow-up calls to clients for further information and that sometimes he would set off in the wrong direction altogether, taking unnecessary steps on behalf of his clients based upon his assumptions. Mr. Heller decided to change his approach and began to sit down with his clients for more comprehensive initial interviews. Honoré quotes Mr. Heller as follows:

> Most people come to lawyers with goals that they tell you about, like money, and goals that they don't like being acknowledged or getting justice or revenge. It takes time to get through to the hidden wishes that motivate clients, but you have to know these to do the best job for them.

Taking the time to listen to your clients makes good business sense, and the reason for that isn't that you're billing based on time. Erwin Heller claims he works more efficiently as a result of taking the time to listen to his clients. It only makes sense that if you have a strong sense of your client's needs up front, you'll be better equipped to focus your efforts on providing solutions that meet those needs. As well, taking time will help you to ensure client satisfaction by avoiding the mis-steps and mistakes that otherwise may lead to a negligence claim.