

INSURANCE ISSUES: *Risk Management*

A publication of the Law Society of British Columbia



Lawyers
Insurance
Fund

Mobility: Managing the risk

Visitors welcome

THE WALLS ARE down, the gates are open. The National Mobility Agreement allows temporary practice in reciprocating Canadian jurisdictions for up to 100 business days each year, without a permit. (At present, the reciprocating jurisdictions are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island.) Temporary practice in another jurisdiction, or “visiting,” means providing legal services that relate to the laws of that other jurisdiction, even if you are so doing here in BC (see also Law Society Rules 2-10.1 to 2-17.2). To find out if you are eligible to visit another jurisdiction, consult that jurisdiction’s law society before you take a step (rules may differ between jurisdictions).

All of the jurisdictions will require that you:

- Carry professional liability insurance that is reasonably comparable in coverage and limits to that required by the reciprocating jurisdiction, and extends to your practice in the reciprocating jurisdiction;
- Have defalcation compensation coverage that extends to your practice in the reciprocating jurisdiction.

If you are in private practice, you can rely on the terms of our policy to meet both of these requirements.

You will also need to consult the other

jurisdiction’s law society if you are contemplating something a little more permanent, or if you plan to visit Quebec or one of the Territories. Not only do you risk sanction from that other jurisdiction if you practise in contravention of its rules, but you will lose coverage for any claim that might arise.

And travel safely

Appreciate that your journey may attract risks that are unique. Whether you are practising the law of another jurisdiction from your office here in BC or someplace else, consider the following:

It’s not just the scenery that’s different

Visiting lawyers have discovered, too late, that the law may be different as well. Consider these examples from our claim files:

- Lawyer acts for claimants injured in a car accident in Ontario. Unaware of certain statutory requirements, lawyer fails to timely serve notice of intention to sue, leaving the claimants unable to recover prejudgment interest and costs
- Lawyer advises a client on a public share offering to be made in Manitoba. The advice may be incorrect and penalties may be levied by the Manitoba Securities Commission.
- Lawyer advises a client on a separation

agreement that gives his client a share of her former spouse’s Ontario teacher’s pension. Contrary to the lawyer’s assumption, the applicable legislation operates to negate the terms of the agreement.

The fact that the other jurisdictions are all within Canada may lull you into thinking that their procedural and substantive laws are the same as ours. This misconception may be reinforced if the retainer is in an area with which you are already familiar through your BC practice. Alberta presents a particular risk given its proximity and close ties with BC. Personal injury lawyers acting on motor vehicle accidents occurring in Alberta seem especially vulnerable, as these examples demonstrate:

- Lawyer advises that the limitation was postponed for infants. In fact, the Alberta legislation did not provide postponement for children injured while in a parent’s custody, and the limitation was missed.
- Lawyer acts for personal injury plaintiff in action commenced in Alberta and fails to serve the Statement of Claim within one year of filing. Lawyer did not appreciate the different function of that pleading in Alberta.

Travel tips:

- Take the advice of one of the lawyers reporting to us and “recognize that legal differences exist between jurisdictions.”

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The need to appreciate differences is consistent with your ethical obligation to act only in areas in which you are competent:

Before accepting a retainer, a lawyer must be satisfied that he or she has the ability and capacity to deal adequately with any legal matters to be undertaken. (Professional Conduct Handbook, Chapter 3, Rule 2. See also Rule 1.)

Unless you are confident in your knowledge of a jurisdiction's specific laws or your ability to become knowledgeable, either decline the retainer or limit your involvement to those services that are not affected by local differences. Consider retaining local counsel for the client in those areas in which statutory, procedural or other differences may exist.

- If you do seek advice from local counsel on the law:
 - Be clear as to the specific advice you are seeking and receiving. Put it in writing. In one report, when the visiting lawyer misconstrued advice given by local counsel, the client lost its ability to recover certain costs. Obtaining written advice both you and your client can review avoids the risk of making a wrong decision based on any misinterpretation of the advice given.
 - Check out that counsel's ability to provide you with solid advice on which you and your client can rely. The more important the issue is to your client, the more due diligence you will want to do in selecting local counsel. Talk to the lawyer, check out the firm's website, ask for referrals to other lawyers and, if possible, clients who have dealt with the lawyer. And confirm rates to avoid a surprised, and unhappy, client when the account is sent on.

Lost in translation

In the course of your retainer, you may actually need to hire a lawyer in the other jurisdiction to act as your agent or perform certain services for your client. Communication breakdowns have led to numerous mistakes, as seen from the following files:

- Lawyer retains an agent to commence proceedings in Manitoba for injuries

suffered in a slip and fall, but fails to provide instructions or a retainer. The agent takes no further steps and the action may be out of time.

- Lawyer defending an action in Saskatchewan retains an agent in that province to file an Appearance. Lawyer doesn't clarify who is responsible for filing the defence, and none is filed. Default is taken.
- Lawyer retains an agent in Alberta to file, *but not serve*, a Statement of Claim. The Statement of Claim was inadvertently filed twice, and the agent discontinued the second action. Lawyer inadvertently



serves the pleadings from the discontinued action, resulting in the valid action not being served within the limitation period.

Travel tips:

- Reduce the risk of any misunderstanding by providing clear instructions, in writing, setting out what you are asking the agent to do and what you will or will not do. Not only does writing help avoid misunderstandings, but it can give you the necessary evidence to defend your position and ensure any liability rests where it belongs.
- Bring home the importance of your message, and ask for confirmation that it's been understood. Communicate deadlines clearly.

- Delegating only part of some tasks may create more risk than it's worth. For example, retaining the agent to file *and* serve, or appear *and* file the defence, ensures the ball isn't somehow dropped.
- If it's time sensitive, pick up the phone. Do not rely on faxes, couriers, postal services or emails to ensure that urgent messages actually come to the attention of the recipient in time. Speak to a live body, and confirm everything in writing.

Oversights, over there

For visiting lawyers, oversights occur for the same reasons that they occur in the lawyer's BC practice. Failures in the lawyer's firm or personal systems are the usual suspects. However, there are some additional risks inherent for visiting lawyers, as evident from these examples:

- Lawyer accepts a retainer to sue for damages arising out of a motor vehicle accident in Alberta on the last day available for giving notice of the claim to the government as required by Alberta law. Notice given late and the action may be statute-barred.
- Lawyer agrees to reduce the amount of a maintenance order filed in Manitoba, but delays as he does not know the process. A claim ensues.
- Lawyer agrees to defend her corporate client in a wrongful dismissal action, but fails to retain and instruct local counsel to assist. Default is taken.

Travel tips:

- Be aware that your lack of familiarity with the law of the jurisdiction may have a paralyzing effect that leads to procrastination. Either decline the retainer and refer the client to counsel in that jurisdiction or, if you accept, do so knowing that you may need to take immediate steps.
- Appreciate that physical distance may create issues that would not arise if you were physically present in the jurisdiction. Accepting a retainer on the last day to give notice to a municipality or file a Writ may not be wise, as you have no ability to physically deliver the document. Even in this electronic age, the ability to walk a document to a destination may be important.