



# LIANSWERS

*This newsletter includes information to help lawyers reduce the likelihood of being sued for malpractice. The material presented is not intended to establish, report, or create the standard of care for lawyers. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate legal research.*

## BEWARE OF SETTLEMENTS SUBJECT TO GST/HST

[Note to Reader – We do not see a lot of tax related claims but this recent decision of the Tax Court of Canada caught our attention. Accordingly, this is only to alert you to the decision and the issue it dealt with. For tax advice and guidance, you should refer to a tax professional.]

*THD Inc. v. The Queen, 2018 TCC 147 (General Procedure) (CanLII)* is a reminder that if your client receives a damage award under certain circumstances, it may be deemed to include GST (or HST as the case may be) and unless you have negotiated the settlement or otherwise recovered an additional amount in the settlement for the tax, your client may end up having to pay it out of their settlement.

The decision refers to [CRA Policy Statement P-218R](#) which states, in part:

*A damage payment or other amount that is paid other than as consideration for a supply that was to be made under an agreement may fall under the deeming provision in subsection 182(1) of the Act, resulting in a GST/HST liability. Subsection 182(1) may apply where, as a consequence of the breach, modification or termination of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant, an amount is paid or forfeited to that registrant otherwise than as consideration for that supply. Subsection 182(1) can also apply under the same conditions where a debt or other obligation of the registrant supplier is reduced or extinguished without payment on account of the debt or obligation.*

As we read the THD decision, GST / HST will be payable on a settlement if:

1. There is an agreement for a taxable supply of a property or service in Canada;
2. The supplier is a registrant under the Excise Tax Act;
3. There has been a breach, modification or termination of the agreement; and
4. There is an amount received or credited to the registered supplier as a result.

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NEXT ▶

Back to LIANSwers: 59

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## **BEYOND THE SCOPE: RESOURCES FOR DRAFTING AN LSR AGREEMENT**

More and more lawyers are performing work on a limited scope retainer (LSR) or 'unbundled' basis – namely performing only a portion or specific aspects of the work on a larger legal matter. For example, an unbundled approach might see a lawyer reviewing a single document or providing only one piece of advice within a larger legal matter.

Unbundling your services for your clients can be risky. The approach can force clients to make decisions on legal matters with which they are unfamiliar. In addition, unbundling usually limit a lawyer's access to case information along with their general ability to guide the matter toward a successful conclusion on behalf of a client.

### **What does the law say?**

Rule 3.1-2 [7A] "Competence" of the Nova Scotia Barristers' Society *Code of Professional Conduct* (the Code) states: "When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services."

Lawyers providing unbundled legal services are held to the same obligations of competence, diligence, loyalty and confidentiality that are provided to full-service clients.

### **Room for disagreement**

Failing to establish a proper limited scope retainer with clients may cause them to dispute your fees or to file malpractice suits or bring an ethics-related complaint. Common causes of disputes include unauthorized time spent on a client matter as well as any subsequent fees, and with clients being unsatisfied with how a court has settled the matter.

### **Managing these risks**

Offering unbundled legal services is inappropriate in certain situations. Specifically, rule 3.2-9 (Clients with Diminished Capacity) of the Code states: "When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship."

In addition, you should assess whether your client's expectations are realistic and if they readily adjust their expectations in response to new information. Should the answer to either of these questions be 'no', we suggest you consider the potential risks in accepting work on a limited retainer basis. Furthermore, if your client comes to you for further assistance after the first matter is settled, be sure to draft a new, appropriate, full or limited scope retainer as required.

A written retainer is required for unbundled services (see Rule 3.2-1A of the Code). You should draft it in unambiguous language that clearly describes the scope of the work the client is hiring you to do, especially in those instances when the client declines one or more aspects of your service offering or undertaking to handle some aspects independently. Details of these arrangements should be reviewed both verbally and in writing with the client.

Finally, well-documented and clear client communication is the best way to reduce risk when working on a limited retainer basis. Take the time to properly communicate fees and costs, expected outcomes and unexpected contingencies – and to actively listen and ask your client questions. Follow these suggestions and you'll manage both your client's expectations and your own claim-related risk confidently and competently.

The following precedents may be copied and pasted into a Word document as a basis for modification for one's own use.

[Limited Scope Representation Agreement - Sample Form](#)

[Limited Scope Agreement - Sample Checklist](#)

[Limited Scope Retainer - Sample wording for inclusion in a Fee Agreement](#)

You may also wish to review Law Office Management Standard #7: [Limited Scope Retainers](#); Family Law Standard #11: [Scope of Representation](#); and Real Estate Standard 4.5: [Limited Scope Retainers](#) for further LSR-related resources.

### **Guide to Limited Scope Retainers from CBA-Alberta**

The following publication from the Canadian Bar Association-Alberta Branch provides resources and discussion regarding the opportunities and challenges presented by the LSR:

*“Many litigants are choosing to represent themselves, believing they either do not need, or cannot afford, full service legal representation by a lawyer. Self represented litigants may not earn enough to hire a lawyer, but earn too much to access Legal Aid.*

*Limited scope retainers, or unbundling, can help alleviate, not only the strain on families and individuals, but the strain on our justice system. They are a viable option for those who cannot afford full legal representation because a one-size-fits-all approach is not going to provide the best legal representation possible.”*

Read [“Limited Scope Retainers – CBA Alberta”](#)

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NEXT ▶

[Back to LIANSwers: 59](#)

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## CALLING ALL MENTORS!

Do you have a minimum of nine years of experience and are interested in volunteering your time to provide support and guidance to another member? LIANS is currently seeking mentors of all backgrounds for its Mentorship Program, specifically in the areas of Family law, Corporate/Commercial, Wills and Estates, and Criminal law.

The Mentorship Program offers the following advantages and opportunities:

- an annual event where you can meet possible matches and learn more about the program;
- matching based on the areas of interest and criteria identified by both mentor and mentee;
- a mentorship plan created by you and your match, to identify your areas of focus and goals for the upcoming year.

Advantages of being a mentor:

- renew and revitalize your own practice and strategies;
- stay current with issues and developments in the next generation of professionals;
- expand your own personal network.

If you are interested in participating in the Mentorship Program, please visit: [http://www.lians.ca/rpm/mentorship\\_program/](http://www.lians.ca/rpm/mentorship_program/).

In order to participate, fill out the [Mentorship Program Application Form](#) online, or download the fillable [PDF form](#) and save to your desktop then forward to [Cynthia Nield](#), LIANS' Database and Information Officer.

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## **NSLAP WELLNESS: HOW TO RESTORE TRUST IN YOUR RELATIONSHIP**

*"Although it is expected that both partners committing in an intimate relationship will be sexually faithful to each other, extra-marital affairs do happen.*

*For a partner, knowledge of their mate's infidelity is a terrible emotional blow. For the other one, guilt and shame may be the dominant emotions. The following strategies help couples rebuild trust and renew their commitment to each other ... "*

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide this edition of their Life Lines newsletter, "[How to Restore Trust in Your Relationship](#)"

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Visit the NSLAP website at [www.nslap.ca](http://www.nslap.ca). For more information and support with restoring trust, along with resources and counselling to improve your health and wellness, register with Homewood Health™ <https://www.homeweb.ca>. Please note that NSLAP is your "company" name when you register.

Call in confidence, 24 hours a day: 1 866 299 1299 (within Nova Scotia) | (See the website for details about [calling from outside Nova Scotia](#)) | 1 866 398 9505 (en français) | 1 888 384 1152

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Back to LIANSwers: 59

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## **PRIVILEGE AT THE BORDERS: TRAVELLING WITH A CLIENT**

In January 2018, we published an item in LIANSwers titled [Crossing the line: Privileged information at foreign borders.](#)

In it we talked about lawyers travelling to foreign countries, be it personal or for business, and the possibility of a border agent examining an electronic device they may be carrying.

There are two other aspects of that issue we did not talk about in that article. One is when you return to Canada and your rights as a returning Canadian citizen. That discussion is for another day.

The other is one that could undermine all the steps you as a lawyer take to protect privileged information when you travel to another country. That is your client travelling with a phone or laptop, perhaps with you to a meeting, and that the phone or laptop becomes subject to a search.

This is not to suggest that you are your client's travel agent and thus aware of where or when they travel. But any electronic device, carried by anyone, could be subject to a search at a border. If you as a lawyer have the client's information you can at least raise privilege. The client may be in a different position on a border inspection, as it is their information.



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NEXT ▶

[Back to LIANSwers: 59](#)

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## REGISTER TODAY TO SAVE: LIANS & NSBS NOVEMBER 11TH ANNUAL CONFERENCE!

**Thursday, November 7<sup>th</sup>, 2019** from 9am to 4pm at the Hotel Halifax

**Early rate: \$225+HST**  
(after Oct 30th: \$275+HST)

Sessions may be eligible as CPD hours:

**Working Smarter with Outlook – Your Time Matters** with Tonya Lundrigan, CPF, CSP,  
Owner of Priority Management Atlantic

**Trust Accounts Basics, Anti-Money Laundering, and Anti-Terrorist Financing** with  
NSBS' Kate Shewan, Elaine Cumming, and Jocelyn Glynn MacNeill

**Risk Management for Lawyers and Law Firms** with LIANS' Director of Insurance, Lawrence  
Rubin

**Practical Cyber Security for Small Firms** with Steve Manley

**Introducing the NSBS Equity Toolkit** with NSBS' Equity & Access Manager, Angela  
Simmonds

**Updates from the Professional Standards Committees** with Bob Carter (LOMC), Danielle



11th Annual  
**Solo & Small Firm Conference**  
hosted by LIANS and NSBS

November 7th, 2019 · Hotel Halifax  
Sessions may be eligible as CPD hours

Visit [LIANS.ca](http://LIANS.ca) and [NSBS.org](http://NSBS.org) for more details

MacLean (Real Estate), Darlene Lamey (Family), Jeanne Desveaux (Wills & Estates), and TBD (Criminal)

**Privacy & Data Security** with NSBS Legal Counsel, Bernadine MacAulay

**Health & Wellness Session** with Homewood Health™

**Succession Planning from Another Point of View** with NSBS Legal Services Support Officer, Rob McCleave

Click here to [Register Online](#)

(or register by telephone or email with Alex at 902-423-1300 x325 or [agreencorn@lians.ca](mailto:agreencorn@lians.ca))

Sessions will benefit lawyers, office managers, paralegals and legal assistants from across Atlantic Canada. Lawyers and staff from all sized firms are welcome. *Includes free on-site parking, lunch buffet and refreshment breaks.*

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Back to LIANSwers: 59

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## REMOVE HIDDEN PERSONAL DATA (METADATA) FROM WORD DOCUMENTS



Yes, technology makes business easier. However, it also comes with hidden risks.

Documents contain metadata. It is possible to remove this potentially privacy-compromising data from Microsoft Word documents. Before sharing electronic copies of files, it is a good idea to remove hidden data or personal information that may be stored in the document or the document properties.

Metadata is not immediately visible when a document is viewed in Word. However, it is possible for others to view or retrieve comments from reviewers, revision marks from tracked changes, details about the author, the document creation date, headers, footers, watermarks, hidden text, or even custom XML data.

Microsoft offers a free "Document Inspector" for removing hidden data or sensitive information before you share a Microsoft Office file. To remove metadata, simply open the Word document you want to share.

If you use Word 2019, 2016, 2013, or 2010:

1. Select the 'File' tab and click 'Save As' to save a new copy of your original document (use the Document Inspector on a copy of your original document, as it is not always possible to restore the data once it is removed).
2. In this new copy of your original document, select the File tab > Info > Check for Issues > Inspect Document.
3. Click to select the types of hidden content you want to be inspected, and press the 'Inspect' button.
4. Click 'Remove All' next to each type of metadata that you want to remove from your document.
5. Use this newly inspected copy of the document to share – do not share the original.

If you use Word 2007:

1. In the copied file, click the start button (top left corner), Prepare > Inspect Document.
2. You will be prompted to save a copy of your file since you will not be able to restore hidden information after deleting.
3. If metadata is found, simply click the 'Remove All' buttons next to each type of metadata, resave your 'cleaned' document, and share this version, not the original.

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◀ PREVIOUS

NEXT ▶

[Back to LIANSwers: 59](#)

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## **SPACE INVADERS: CONDOMINIUM PARKING ARRANGEMENTS**

When acting for a purchaser of a condominium unit, whether in an existing or a new condominium, it is incumbent on the lawyer to review and explain to the purchaser the nature of the condo's parking arrangements.

Parking may be treated differently in different condominiums: it may be a separately deeded unit (with a separate assessment account number); it may be an exclusive use common element specifically designated in the Condominium Declaration; or it may be assigned and designated by the Board of Directors, from time to time (i.e., the location or designation of the parking space may be changed at the discretion of the Board of Directors).

First, as part of the lawyer's review of the Agreement of Purchase and Sale with the purchaser, the lawyer should review any provisions relating to entitlement to a parking space and the nature of the space (whether deeded, exclusive use, and whether a numbered space has been designated).

For new construction condominiums, the parking space may have yet to be designated. The lawyer should make inquiries of his client regarding whether the developer has made any verbal representations as to a specific location for a parking space, such as an interior instead of exterior space. The lawyer should also ensure, as part of the lawyer review clause, that any verbal

promises are added in writing to the agreement, failing which, the lawyer should warn the purchaser as to the enforceability of any verbal promises.

For existing condominiums, the Nova Scotia Realtors' standard form 402 "[Resale Condominium Schedule](#)" includes information on whether a parking space is a deeded unit or an exclusive use common element. However, the lawyer must independently verify this information as it has been known to contain inaccuracies (such as both the provision related to a deeded parking unit and the provision relating to an exclusive use parking space being completed).

Next, the lawyer must review, *inter alia*, the provisions relating to parking in the Condominium Declaration, in particular any provisions relating to there being separate parking units, provisions relating to exclusive use parking spaces (usually referenced in the Declaration under the heading 'Limited Common Elements') and Schedule C. This review should disclose whether there are separately deeded units or exclusive use common elements and, if the latter, whether the spaces are specifically designated in the Declaration or whether the Board of Directors has the discretion to assign and change the assignment of the parking spaces. This information should be carefully explained to ensure that the purchaser understands that in some circumstances, the location of the parking space the purchaser understood he or she was receiving may in fact be changed from time to time.

The Condominium Plans (found in the Condominium Common View on Property Online) must also be reviewed with the purchaser, so as to not only ensure that the purchaser is buying the unit in the correct location, but also that the actual location of any parking unit or parking space (if the designated locations of which are shown on the condominium plans) matches the purchaser's understanding of the location. If the condominium plans do not show the location of the designated parking spaces, it may be necessary to verify this information with the condominium corporation's property management.

The lawyer should also review with the client, as part of the condition for review of Condominium documents, *inter alia*, the By-laws, Rules and Regulations, and any Condominium Corporation written Policies provided with the documents relating to parking.

A few other points to remember about parking spaces:

If there is a deeded parking unit, it will have a separate assessment account number and a separate tax bill. Taxes for the parking unit must be verified and an adjustment made, similar to the taxes for the dwelling unit. If the lawyer is preparing and recording a mortgage, the legal descriptions for both the dwelling unit and the parking unit must be included in the mortgage. In certain condominiums or in certain circumstances, there will be a rental fee for the use of the parking space. The purchaser must be made aware of the amount of the rental and any necessary adjustment on closing and verification of prior rental payments by the seller (in the estoppel certificate) must be made.

Lawyers should be careful of Agreements that purport to provide more than one parking space with the unit. The Declarations may not provide any entitlement to more than one parking space, therefore any arrangements whereby a seller is promising an additional

parking space must be examined carefully to ensure that the purchaser is aware of the validity, reliability and cost of the arrangement for the second parking space.

In acting on a condominium purchase transaction, one of the many obligations of the lawyer is to verify, communicate and ensure the purchaser understands the parking arrangements. If future issues arise relating to parking, proper communication (and documentation of same) at the time of the purchase should help to avert any complaints from purchasers.

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## SUBSCRIBE TO LEGISLATION AND DECISION UPDATES FROM CANLII

An RSS feed sends current news and updates from various information and blog websites. It can also deliver images, audio or video messages, including podcasts, or recorded audio broadcasts that can be downloaded to your MP3 player or your computer.

**CanLII** (an open access database for Canadian legislation and case law) offers a comprehensive list of [RSS feeds for decisions and legislation](#) from federal and provincial courts and tribunals. Select the "RSS" link under the desired column to subscribe to that feed.

To receive current news and updates from an RSS application, locate and select this orange symbol which will prompt you to "Subscribe to this feed". Once completed, automatic updates will appear in your subscribed feeds folder.

Any questions on RSS feeds, contact Cynthia Nield [cnield@lians.ca](mailto:cnield@lians.ca).



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Back to LIANSwers: 59

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