

# LAWPRO

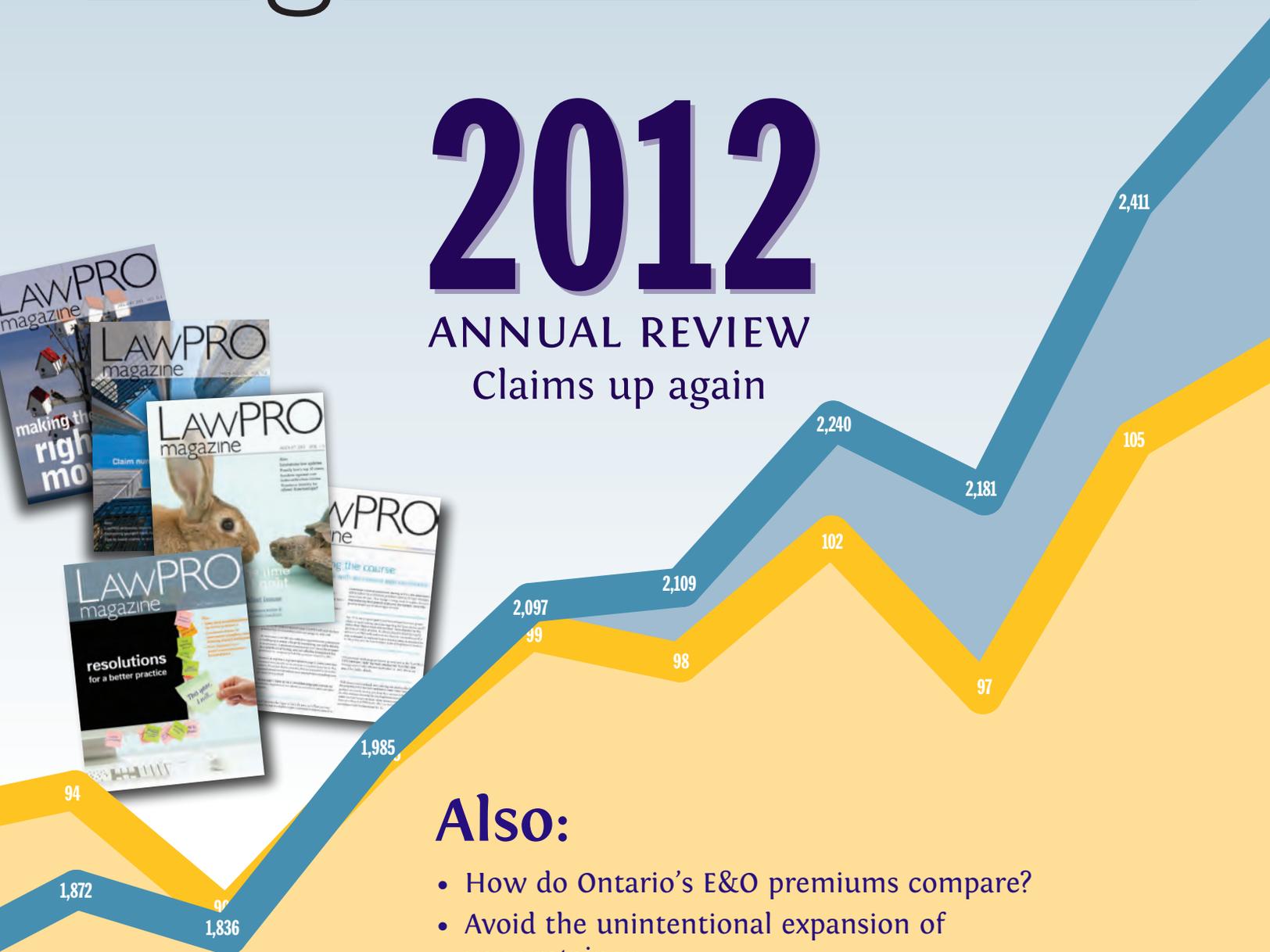
magazine

MAY 2013 VOL 12.1

# 2012

## ANNUAL REVIEW

### Claims up again



## Also:

- How do Ontario's E&O premiums compare?
- Avoid the unintentional expansion of your retainer
- Whitelist LAWPRO and don't miss important news and resources
- How and when to report a claim to LAWPRO

## upcoming events

### May 9, 2013

County and District Law Presidents' Association (CDLPA)  
CDLPA Plenary  
*Building Compliance Issues in Real Estate Transactions*  
Ray Leclair presenting  
Toronto, ON

### May 23 & 24, 2013

Law Society of Upper Canada  
Solo and Small Firm Conference CPD  
TitlePLUS exhibiting  
Dan Pinnington co-chairing  
Toronto, ON

### May 28, 2013

Canadian Bar Association Quebec – Section Immobilier  
Les Tenants et Aboutissants de l'Assurance-Responsabilité et de l'Assurance Titre pour les Professionnels du Droit Immobilier CPD  
Ray Leclair presenting  
Montréal, QC

### May 27, 2013

Ontario Association of Property Standards Officers CPD  
*Title Insurance and Building Compliance*  
Ray Leclair presenting  
Hamilton, ON

## recent events

### February 7 & 8, 2013

Ontario Bar Association  
OBA Institute  
*Apps to Create Practice Mobility and Efficiency*  
Ray Leclair presented  
*Marketing and Client Communications in the Age of Social Media*  
Dan Pinnington presented  
"Real Property Program"  
TitlePLUS sponsored and exhibited  
practicePRO sponsored and exhibited  
Toronto, ON

### February 27, 2013

Hamilton Law Association  
8<sup>th</sup> Annual Current Issues in Commercial Litigation Seminar  
*Litigation Claims and How to Avoid Them and Fraud*  
Ray Leclair presented  
Hamilton, ON

### April 16, 2013

Hamilton Law Association  
HLA Luncheon  
*Lawyers Joining a Board of Directors – What are the Considerations*  
Ray Leclair presented  
Hamilton, ON

### February 19, 2013

Ontario Association of Chiefs of Police  
OACP 2013 Crime Prevention Media Launch  
Ray Leclair presented  
Oakville, ON

### March 1, 2013

Ontario Bar Association  
Building Your Toolkit and Improving Your Practice CPD  
TitlePLUS sponsored  
Toronto, ON

### April 17 & 18, 2013

Independent Mortgage Brokers Association of Ontario (IMBA)  
IMBA Conference  
TitlePLUS exhibited  
Toronto, ON

### March 22, 2013

Internationally Trained Lawyers Program (ITLP)  
ITLP Information Session and Open House  
*Risk Management*  
Dan Pinnington presented  
Toronto, ON

### April 18, 2013

The Canadian Institute  
Practical Guide to Franchising Legal Issues for Practitioners Webshop  
*Preparation of Franchise Disclosure Documents*  
Karen Granofsky presented  
Toronto, ON

### February 21, 2013

Law Society of Upper Canada  
Ethical Red Flags for Real Estate Lawyers CPD  
TitlePLUS sponsored  
Lisa Weinstein chaired  
Toronto, ON

### April 4, 2013

Toronto Lawyers Association  
TLA Nutshell Real Estate CPD  
*Working Group and the Condominium Documentation and Ontario-Wide Standard Closing Documents*  
Ray Leclair presented  
Toronto, ON

### April 19, 2013

County of Carleton Law Association  
Family Law Conference  
*LAWPRO's Experience with Family Law Claims*  
Ray Leclair presented  
Ottawa, ON

### April 10 & 11, 2013

Law Society of Upper Canada  
Real Estate Law Summit CPD  
TitlePLUS exhibited  
*Real estate fraud – tips for avoiding the traps*  
Kathleen Waters presented  
Toronto, ON

### April 24, 2013

Muskoka Law Association CPD  
*Current Issues with Electronic Registration*  
Ray Leclair presented  
Muskoka, ON

LAWPRO and the practicePRO and TitlePLUS programs welcome invitations to speak about professional liability insurance, risk management, title insurance and other topics within our expertise. Interested in arranging for a speaker? Please contact practicePRO at [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca), or call us at 1-416-598-5800 or 1-800-410-1013.

# Contents

Volume 12  
Issue 1  
May 2013

E&O PROGRAM

FINANCIAL RESULTS

PRACTICEPRO

TITLEPLUS PROGRAM

CSR

# 2012

## ANNUAL REVIEW

### Claims up again



## 2012 In review

- 4** Editorial  
A desire for deluxe service at a compact price:  
What is LAWPRO to do?
- 6** E & O program  
Coverage: Same base premium... but Ontario lawyers saved  
\$5 million in 2012  
Convenient and responsive service for a diverse and growing bar  
We're here: Claims for 2012 top \$100 million  
Stemming the tide: Claims management track record
- 12** Financial results explained: A guide to our  
Statements of Income
- 14** Recoveries: Large or small, every recovery counts
- 15** Repairs: LAWPRO works with lawyers to  
correct errors and minimize losses
- 18** Knowing when to take a stand: LAWPRO  
defends its insureds in 2012

- 24** practicePRO year in review  
practicePRO's risk management program: outreach statistics; the  
LAWPRO Risk Management Premium Credit; new checklists; 2012  
on AvoidAClaim.com; top 10 downloads from practicePRO.ca  
*LAWPRO Magazine*
- 28** TitlePLUS program update  
Responding to market chill with service improvements,  
public relations initiatives  
Exciting changes coming in 2013
- 31** Corporate social responsibility in 2013  
LAWPRO's commitment to CSR in action

## Departments

- 2** In the news  
2013 LAWPRO charities  
LAWPRO receives a visit from OLIP interns
- 34** Insurance biz  
Why the LAWPRO base premium is only the start of the story:  
A tentative analytical model brings insight
- 38** Errors & Omissions  
Wondering when to report that claim? Do it now  
How to report – and how not to report – a claim to LAWPRO
- 41** Social Media  
LAWPRO continues the conversation – on Facebook  
Social media profile: Victoria Crewe-Nelson

## In practice

- 39** Tech tip  
Be smart about spam: Use whitelisting so you don't miss  
key messages
- 40** Practice tip  
Avoiding unintentional expansion of retainers

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< PREVIOUS

NEXT >

## 2013 LAWPRO charities chosen

As part of LAWPRO's commitment to corporate social responsibility, we strive to support the broader Canadian community. Each year employees elect five charities for which they will work as a group to raise money, with LAWPRO matching the monies raised. The 2013 voting took place in January and the results are in. The five charities that will receive LAWPRO support are: the Alzheimer Society of Canada, Fanconi Canada, Good Shepherd Refuge Social Ministries, Toronto Humane Society and Anaphylaxis Canada. LAWPRO employees also donate time through our "charity day" program, where employees can take a workday to volunteer at a designated charity. Some of the charities employees donated time to in 2012 were: PATH Clothing Drive by Yonge Street Mission, Temple Sinai Congregation of Toronto, Lawyers Feed the Hungry and Sanctuary Ministries of Toronto.

## LAWPRO receives a visit from OLIP interns

Last November, Ontario Legislative Internship Programme (OLIP) interns visited LAWPRO and sat down with Kathleen Waters, president and CEO; Dan Pinnington, vice president claims prevention and stakeholder relations; Ray Leclair, vice president public affairs and Tim Lemieux, practicePRO coordinator.

Turns out the interns enjoyed meeting members of the LAWPRO team. They posted a blog entry about their visit, where they mentioned learning about the major causes of claims, our risk management services and our outreach to legal profession stakeholders.

## keyDATES

### April 30, 2013

Real estate and civil litigation transaction levies and forms are due for the quarter ended March 31, 2013.

### April 30, 2013

Exemption forms from lawyers not practising civil litigation or real estate and wanting to exempt themselves from quarterly filings are due.

### July 31, 2013

Real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2013.

### September 15, 2013

File your **LAWPRO Risk Management Declaration** by this date to qualify for the \$50 premium discount for each LAWPRO-approved CPD program (to a maximum of \$100) completed by this date.

### On or about October 1, 2013

LAWPRO online filing of Professional Liability Insurance renewal applications for 2014 is expected to begin. If you wish to file a paper application instead, please note that paper renewal applications will not be automatically mailed out, but you can download a 2014 pre-populated paper renewal application from our website on or about October 1, 2013.

### October 31, 2013

Real estate and civil litigation transaction levies and forms are due for the quarter ended September 30, 2013.

### November 1, 2013

E-filing deadline: Applications filed online by November 1 qualify for a \$25 per lawyer e-filing discount applied to the 2014 insurance premium.

### November 8, 2013

Application filing deadline: 2014 LAWPRO insurance applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium.

## eBRIEFS

Below is a summary of electronic communications you should have received from LAWPRO this past winter. To ensure that you receive timely information about deadlines, news and other insurance program developments, please make sure you have whitelisted [service@lawpro.ca](mailto:service@lawpro.ca) with your email service provider. The full content of these newsletters is available at [practicepro.ca/enews](http://practicepro.ca/enews)

Spam filters aren't perfect. They sometimes catch legitimate messages – these are called *false positives*. The solution is also simple: In your spam filter, please *whitelist* LAWPRO, the Law Society and anyone else that you really need or want to get email messages from. Once an email address is "whitelisted" in your spam filter, it will never be stopped. The opposite to whitelisting is "blacklisting" which prompts your spam filter to always reject a message. On a regular basis, please check your spam filter for messages that it should not have caught. Doing this could help you avoid a number of things, including a malpractice claim, a Law Society complaint, or an unhappy client who didn't hear back from you because you didn't get a message they sent. For more information, please see the tech tip on page 39.

## Insurance News

### 2012 Transaction Levy Filings Overdue

February 28, 2013

A reminder to anyone who has outstanding transaction levy filings overdue, along with contact information and key dates.

### Mark your calendar: 2013 Key dates for LAWPRO filings

January 15, 2013

Reminder to make a note of the key dates for 2013 filings, links to the AvoidAClaim blog and LAWPRO Twitter and Facebook accounts.

### Homewood Human Solutions named new MAP provider

December 17, 2012

The Law Society announced that it has chosen Homewood Human Solutions as the new provider of a member assistance plan for Ontario lawyers and licensed paralegals. Plus LAWPRO's new corporate social responsibility brochure, and key date reminders.

### Transaction Levy Filings Overdue

December 14, 2012

Third quarter transaction levy filings overdue notice.

## Webzines

### Hot topics in litigation; PLUS career postings

February 26, 2013

Don't be part of the administrative dismissal claims spike, avoiding unintentional expansion of retainers, another chance to resolve to avoid litigation claims in 2013, and LAWPRO is hiring claims counsel (two positions): reporting to unit director and counsel.

### Resolve to improve your practice (and your life!) in 2013

December 6, 2012

The December 2012 issue of the *LAWPRO Magazine* was released: Resolutions for a better practice. In this issue we gathered dozens of practice management, claims avoidance, and general self-improvement tips for your consideration. Plus the Law Society selects new member assistance provider, and the LAWPRO Facebook page was launched.

## Alerts

### Firm victim of large fraud by Trojan BankerVirus

December 21, 2012

LAWPRO was notified by two firms that they were the victims of major frauds on their trust accounts. This post also revealed advice on how to protect yourself, and basic security "best practices" you should consider following.

# LAWPRO

magazine

President & CEO: Kathleen A. Waters

*LAWPRO Magazine* is published by Lawyers' Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to potential claims.

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# A desire for:



# service

# at the price of a reliable:



## What is LAWPRO to do?



*Kathleen A. Waters  
President & CEO*

The title of this editorial reflects the reality of my world. Times are tough for many legal practitioners (not to mention many would-be clients of those practitioners) and affluent times are not necessarily around the next corner. The financial reset button has truly been hit, in many ways.

LawPRO is no different from any other financial services provider: Our customers would prefer to pay less, but the services they need and the challenges in meeting those needs are not declining in any fashion.

How do we at LawPRO meet those challenges? We monitor ourselves in ways that are too numerous to review here in a comprehensive fashion, but a couple are of particular importance.

Part of the value that a mandatory captive program brings to the Ontario bar is that there is no need for broker commissions in setting up or operating the program. However, we try to do better than commission-avoidance in delivering value.

One of the metrics we have reported on for several years now is how our general expenses compare to other similarly positioned insurance companies. So, we seek data on other small insurance companies who do not pay commissions to brokers. In our “Financial Results Explained” article, we report that we ended



2012 with a general expense ratio of 21 per cent. In recent years, our comparator group has normally had an average expense ratio of 24 per cent. So, this is one of the ways we try to add value to the operation of the mandatory program. As many readers will recall, each \$1 million spent on the mandatory program adds about \$45 to the base premium, so having a lower than average general expense ratio is money in our customers’ pockets.

If you look at past years, we have often reported general expense ratios in the 19 per cent range. Because the 2012 percentage is higher, does this mean we are losing ground?

Well, it takes two figures to calculate the general expense ratio: general expenses over premium. If the premium number – being the denominator – goes down, the percentage goes up. And that is what happened in 2012.

Because the base premium (\$3,350) has remained the same since 2011, many of our primary program customers would be surprised at the idea that premiums have gone down. But there were changes to discount structures and a reduction in the Real Estate Practice Coverage Option premium announced in the fall 2011 Report to Convocation (to take effect January 1, 2012). So, in fact Ontario lawyers paid \$5 million less premium in 2012. That savings was experienced by part-time practitioners, newer calls, and lawyers in areas of practice that serve many of the more financially modest clients in our province (immigration, criminal defence and real estate).

So, our general expense ratio went up, but for the positive reason that our overall premium from the primary program was coming down. And that is money in the pockets of lawyers trying to deliver very cost-effective services to price-sensitive clients, building a first practice or maintaining one on a part-time basis.

One of the main ways LawPRO keeps its expenses under control is by being very cautious about the overall size of its operations. LawPRO ended 2012 with its lowest employee headcount in many years, although we do have some vacancies posted. Notwithstanding the barrage of new regulation hitting the insurance industry, and the increasing number of insured lawyers and the claims they produce, LawPRO has managed to remain relatively stable in terms of size.

The questioning among you may say, “That is all well and good. But why are Ontario lawyer premiums higher than the insurance levies in other Canadian jurisdictions?” In our “Insurance Biz” article on page 34, we provide some perspective on that issue. In brief, it’s the old saying that you can’t compare apples to oranges and ask why they aren’t both the same.

As to why we feel that we are providing a service that goes beyond what you may expect, I invite you to read our Year in Review content in the next several pages.

As we reflect on 2012 and work diligently for success in 2013, we will keep the interests of our insureds paramount, being sensitive to the constraints of the times we are living in while continuing to strive for excellence in all our services.

**Kathleen A. Waters**  
President & CEO

# Coverage: Same base premium... but Ontario lawyers saved \$5 million in 2012. How?

Despite claims costs in \$100 million territory, LawPRO kept its base premium stable at \$3,350 per lawyer from 2011 to 2012. Not all lawyers, however, pay the base premium. Careful claims analysis allows us to offer discounts to insureds such as newly-called lawyers, lawyers who practice part-time, and lawyers who practice exclusively in the low-claims areas of criminal and/or immigration law.

For the 2012 policy year, we increased the discounts available to these groups, to a maximum of 50 per cent off the total premium.

## New calls:

discount in each of the first four years:

year 1: **50%**                      year 2: **40%**  
year 3: **30%**                        year 4: **20%**

Part-time practice:  
**50% discount**

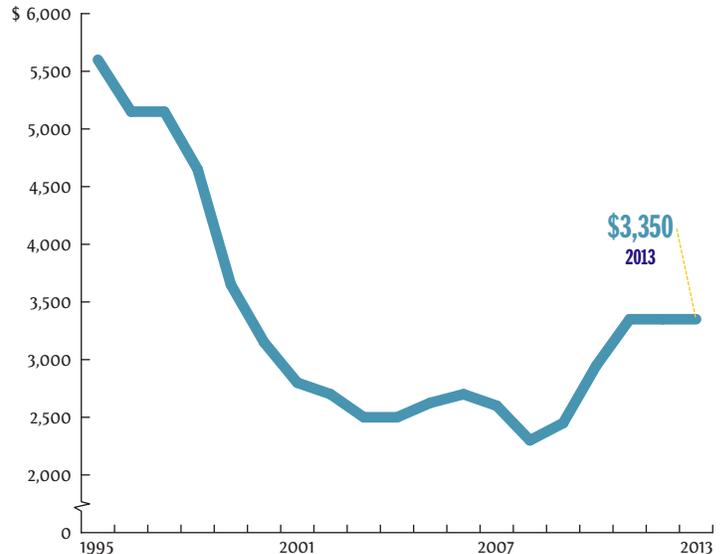
Criminal and/or  
immigration only:  
**50% discount**

We also introduced a new reduction in the premium for the Real Estate Practice Coverage Option (REPCO): **Down to \$250 per real estate practitioner.** That's just half of what this coverage cost when it was first introduced.

**The result of these cuts?  
\$5 million in savings  
for lawyers.**

What's more, the lawyers who saved money tend to either be especially vulnerable to tough economic times themselves (because they're just starting out in practice, or working part-time), or to be able to pass on those savings to clients of modest means (criminal and immigration law clients).

Base premium per lawyer



Coverage option	Feature	No. of lawyers participating as of Jan. 31, 2012	No. of lawyers participating as of Jan. 31, 2013
New call discount	20 to 50 per cent base premium discount for those called in the last one to four years	<b>3,975</b>	<b>4,690</b>
Part-time practice	50 per cent base premium discount for eligible lawyers	<b>1,463</b>	<b>1,562</b>
Restricted area of practice option	50 per cent base premium discount for immigration/criminal law practitioners	<b>1,383</b>	<b>1,484</b>
Innocent Party buy-up	Increase in Innocent Party sublimits up to as much as \$1 million per claim/aggregate	<b>3,309</b> (based on \$249/lawyer)	<b>3,471</b> (based on \$249/lawyer)
Run-off buy-up	Increase limits for past services from \$250,000 per claim/aggregate to as much as \$1 million per claim/\$2 million aggregate	<b>891</b>	<b>963</b>
Real Estate practice coverage	Required for all lawyers practising real estate law in Ontario. Sublimit coverage of \$250,000 per claim/\$1 million aggregate	<b>7,255</b>	<b>7,376</b>

# Convenient and responsive service for a diverse and growing bar

A record-breaking 24,012 lawyers filed LawPRO professional indemnity coverage applications in 2012, with 97 per cent of those choosing to file online. We invite you to visualize the reduction in environmental impact that the shift to electronic filing has made!

But electronic filing has benefits beyond saving paper: prepopulated forms let lawyers complete the process faster with less potential for error; 24/7 access lets them file any time of the day or night; and less manual data entry means we can accommodate an increasing number of filers without adding staff every year (saving you money!).

However, computers will never replace customer service. Our successful transition to electronic filing could not have happened

without constant two-way communication. Each year, our customer service department sends out more than a dozen email reminders, and places communications messaging in a wide range of internal and external publications. Customer service representatives receive tens of thousands of inbound telephone calls (29,218 in 2012) each year from insureds, and a similarly large number of written communications. Many inquiries require investigation and follow-up, often with supporting information provided.

LawPRO's customer service department is committed to providing timely, comprehensive and courteous support to each online visitor, recognizing that levels of familiarity with online processes vary.

## Excess coverage: Providing peace of mind carefully tailored to firm size and needs

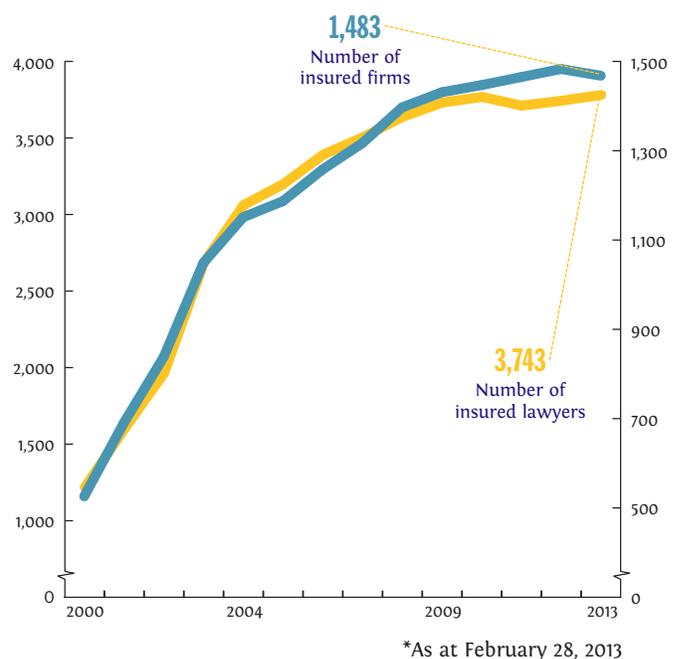
A quick skim of pages 8-10 will make it clear that the rate of claims is growing: No lawyer practising in Ontario can afford to ignore this trend. But the risk of claims is not uniform across the bar: a range of factors – area of practice, number of years in practice, dollar value of transactions, to name a few – can influence the likelihood of a particular firm's risk exposure. Even a fairly small firm can find itself at risk of a claim or cluster of claims that would quickly exhaust the coverage offered under the mandatory insurance program.

Excess coverage is not just for large firms.

LawPRO's Excess Insurance program, which offers coverage beyond the limits of the mandatory program and up to \$9 million per claim/\$9 million in the aggregate, is specifically targeted to small and medium-size firms. In 2012, 1,483 firms representing 3,743 lawyers chose to purchase their excess coverage from LawPRO. Thirty-five of those purchased LawPRO Excess coverage for the first time.

2012 brought with it the first-ever indemnity payment under our Excess program. Other claims filed under the program, though not yet resolved, have reserves applied against them. Might the members of YOUR firm benefit from the peace of mind that comes with knowing you have coverage in place for a claim that exceeds the mandatory policy limits? Contact us at 1-800-410-1013 or 416-598-5899 or via email at [service@lawpro.ca](mailto:service@lawpro.ca) for more information about Excess Insurance or to request a quote.

LawPRO Excess Insurance program\*



# We're there: Claims for 2012 top \$100 million

## The new reality

We have been bracing for this reality: 2012 marks the third year in the past four in which claims costs, once internal claims handling costs are included, have exceeded the \$100 million mark. What we hoped would turn out to be an anomaly has now solidified into an undeniable trend.

While this is bad news in itself, what gives us even greater pause is that the claims *count* that underlies these high costs is also growing: by February 28 of this year, 2,560 claims for the 2012 policy year had been reported, compared to 2,468 for 2011.

This growth in claims count is worrisome because it means that the high claims cost for 2012 cannot be dismissed as relating to a handful of specific claims that were exceptionally expensive (see Figure 1).

## The claims rate story

It may be tempting to attribute the growth in claims count to the year-over-year growth in the number of lawyers in private practice in Ontario. However, that explanation only makes sense if the rate of claims – the number of claims reported per 1,000 lawyers – remains stable over time. But as the yellow line in Figure 1 demonstrates, there were 108 claims per 1,000 practising lawyers in 2012, compared to 107 in 2011. Five years before, in 2007, the claims rate was under 100 claims per thousand.

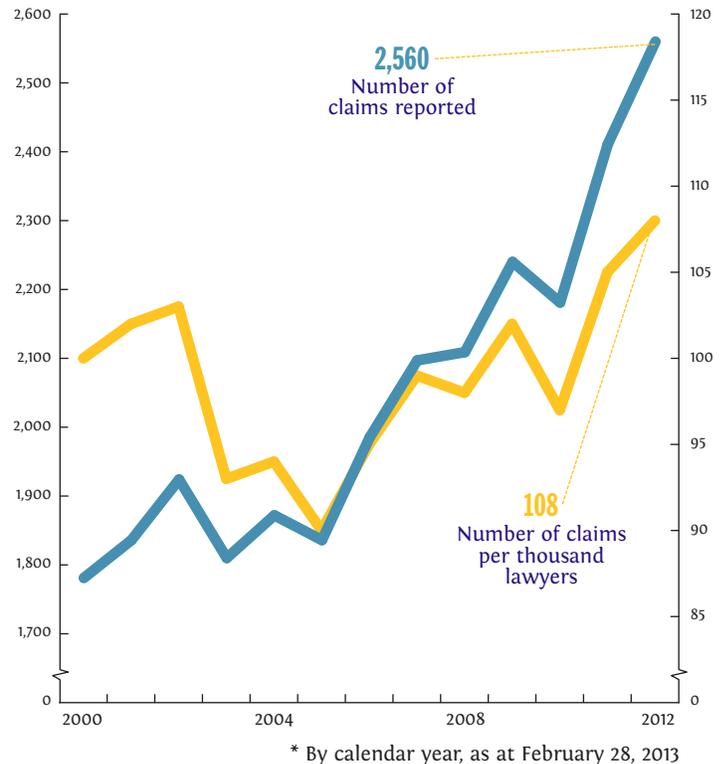
In other words, not only are there more lawyers in practice each year, but each lawyer is more likely than ever before to be subject to a claim.

## What kinds of claims are sparking the trend?

By now, lawyers should be used to hearing that communication-based claims top the list of what we call “causes of loss”. That fact remained true in 2012, with 779 of the 2,560 reported claims attributed to communication errors.

If you study Figure 2 opposite, however, you will spot two cause of loss developments that are giving us cause for concern. The pink line tracks a notable spike in the number of claims related to time management errors. These include claims that flow from, for example, expired limitation periods; or the administrative dismissal of actions under Rule 48 of the *Rules of Civil Procedure*.

Figure 1: Number of claims reported & frequency\*



The green line tracks a less dramatic but still relevant upward trend in the number of claims based on a lawyer's failure to know or apply the law.

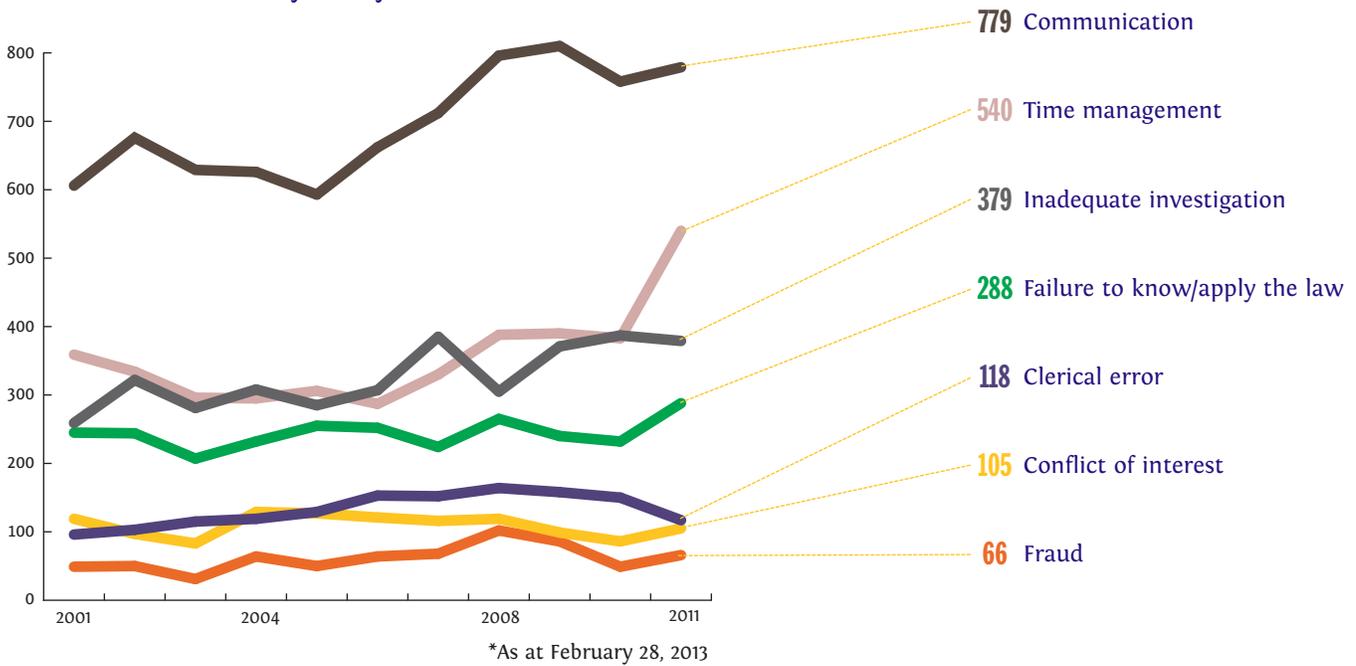
## Claims data takes time to “firm up”

It takes time to resolve a claim. For this reason, the number of claims that LawPRO has open in any given year usually exceeds by a significant margin the number of claims *reported* in that year. At the end of 2012, there were over 3,500 claims open in our system.

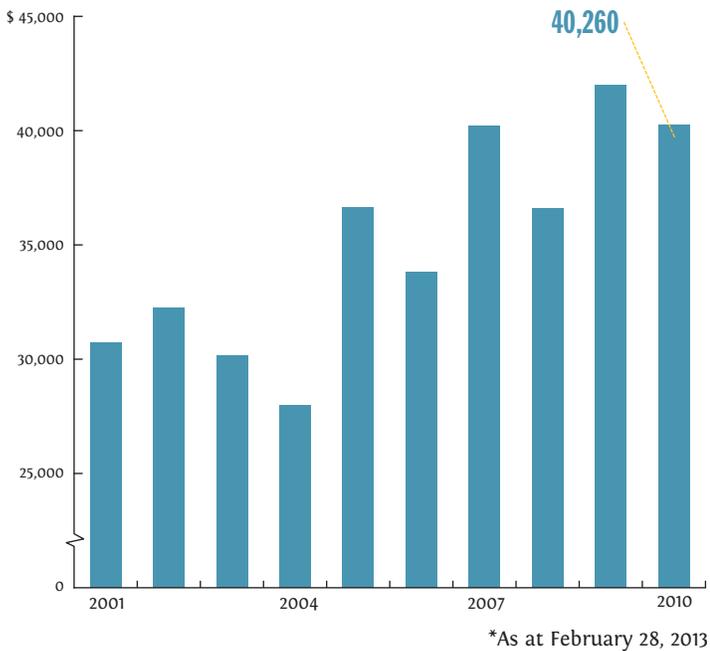
The time it takes to resolve claims (or even get a good handle on the likely cost) means that we don't have a clear picture of average claims costs for a particular policy year until well beyond the end of that year. Figure 3 below represents our best estimate of the average cost of a claim in those years for which the claim-specific reserves have begun to “firm up”.

Figure 4 provides a dramatic illustration of the recent growth in the number of claims for which costs exceed \$100,000.

**Figure 2: Reported claim count by cause of loss by fund year\***



**Figure 3: Average cost per claim at 38 months after start of year in which claim was reported\***



**Figure 4: Number of claims reported with a value greater than \$100,000\***

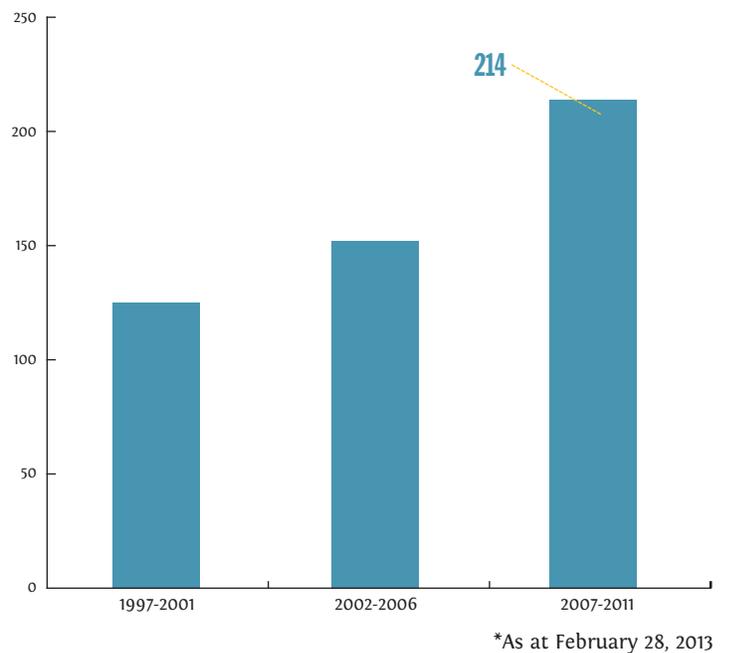
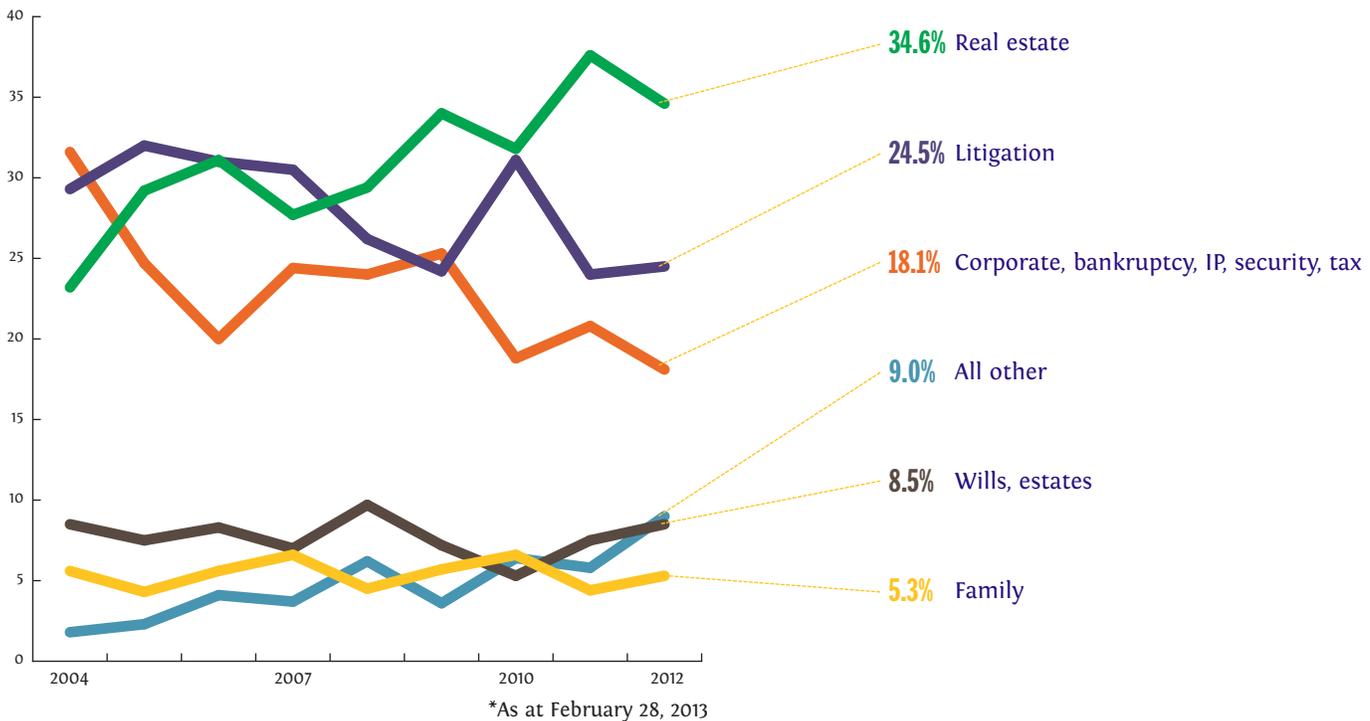


Figure 5: Distribution of claims by area of practice\*  
(% of gross claims costs)



## What about area-of-practice?

As we've reported in recent years, real estate and civil litigation continue to be the areas of law with the first and second highest count and cost of claims (see Figure 5 for costs data). The spike in time management claims mentioned above, however, has had a discernible impact on the "spread". When we compare gross claims costs for 2011 (as at February 29, 2012) and for 2012 (as at February 28, 2013), real estate claims slipped

slightly from 35.6 per cent of costs for 2011 to 34.6 per cent for 2012. Litigation claims captured more of the costs "pie", increasing from 22.9 per cent to 24.5 per cent.

Other areas of claims cost growth? Wills and estates (grew 0.6 per cent) and family (grew 0.1 percent). While we were pleased to see a decrease in claims costs in the corporate/commercial law area (down to 18.1 per cent from 22.4), this may be a temporary slip related to a slowdown in commercial deals and corporate M&A.

## Keep your clerks, assistants, and other staff in the loop!

Law office staff play a key role in risk management.

Your staff are your risk management front line: They update your tickler system, maintain your files, relay client messages, conduct searches, and handle many other tasks that have a direct impact on your firm's successful avoidance of malpractice risks.

We believe that much of the content we publish in *LawPRO Magazine* and in our webzines is just as relevant to clerks and legal assistants

as it is to lawyers. Recently, several law office staff have expressed interest in receiving our publications directly. Not only do we welcome these requests, but we're planning to create content tailored specifically to law clerks and legal assistants.

**Is there a member of your staff who might like to receive *LawPRO Magazine* and our newsletters?** Please encourage him or her to get in touch with us directly at [communications@lawpro.ca](mailto:communications@lawpro.ca), or by calling Nora Rock at 416-598-5809.

# Stemming the tide: Claims management track record

LawPRO requires lawyers to report all claims as promptly as possible, even if the likelihood that the claim will be successful is relatively low. In many cases, early reporting gives LawPRO a better shot at “repairing” an error and reduces the likelihood of an allegation of late reporting which could jeopardize coverage altogether.

## Claims costs: Indemnity costs lower than ever

The claims management efforts of our internal and external counsel led to 44 per cent of claims closed within 2012 to be closed without any payment, and 87 per cent to be closed without an indemnity payment.

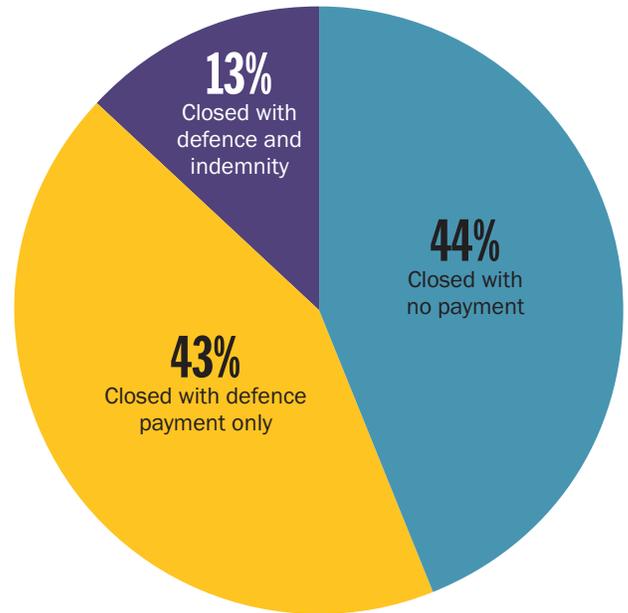
## Litigation record: Continuing success in the courts

While many claims require the expenditure of defence costs, LawPRO has an excellent track record in the courts. In 2012, LawPRO counsel:

- Was successful in all **6 of 6** matters that went to trial and for which a decision was rendered;
- Was successful in **2 of 2** appeals argued; and
- Won **18 out of 25** summary judgment applications made.

## Over \$1.7 million in costs recovered

Whenever chances of success warrant efforts to pursue recoveries, LawPRO takes active steps to enforce judgments, file writs and pursue their execution, and collect reimbursement from third parties responsible for costs. LawPRO counsel were successful in 197 such efforts in 2012, recovering over \$1.7 million. For more details, and for examples of three such recoveries, see “Recoveries: Large or small, every recovery counts” on page 14.



## LawPRO survey results

The annual survey of LawPRO E&O insureds with a closed claim indicated the following:

- **86 per cent** said that they were satisfied with how LawPRO handled the claim;
- **74 per cent** said they were satisfied with our selection of counsel;
- **79 per cent** said they would have the defence counsel firm represent them again; and
- **78 per cent** said LawPRO received good value for defence monies spent.

# Financial results explained

## INCOME STATEMENTS

### A Net premiums: \$104.7 million

Net LAWPRO revenues in 2012 were \$104.7 million, \$5 million lower than in 2011, even though the base premium remained stable at \$3,350 per lawyer. Of that \$5 million decrease, \$4.8 million was in the mandatory E&O program, and is attributable to the reduction in the Real Estate Practice Option (REPCO) premium, and to increased discounts for newly-called lawyers, lawyers practising part-time, and lawyers practising exclusively criminal and/or immigration law.

### B Net claims: \$106.1 million

Net claims increased by \$5 million over 2011, totalling \$106.1 million for 2012. This total would have been substantially higher were it not for a \$9.4 million reduction made to reserves for prior years. That reduction was made possible by a re-evaluation of the actuarial model used to calculate reserves requirements.

Also with respect to prior years, favourable claims developments led to a \$10.3 million decrease in the estimate of ultimate claims costs. Unfortunately, that reduction was almost completely offset by a \$10.2 million expense prompted by a decline in the discount rate, plus a review of adjustment expenses reserves which resulted in an increase in those reserves of \$1.4 million.

### C General expenses: \$18.3 million

While operating expenses rose by \$0.9 million compared to last year, they came in \$1.5 million under budget at \$18.4 million, and reflect the company's continued success in carefully managing operating costs. LAWPRO ended 2012 with an expense ratio of 21 per cent.

Stated in thousands of Canadian dollars

		STATEMENTS OF INCOME	
		2012	2011
<b>For the year ended December 31</b>			
<b>Revenue</b>			
Gross written premiums		\$ 110,676	115,729
Premiums ceded to reinsurers		(5,899)	(5,945)
Net written premiums		104,777	109,784
(Increase) decrease in unearned premiums (note 9)		(60)	(93)
<b>Net premiums earned</b>	<b>A</b>	<b>104,717</b>	<b>109,691</b>
Net investment income (note 5)	<b>D</b>	14,893	21,899
Ceded commissions		3,841	2,449
		<b>\$ 123,451</b>	<b>134,039</b>
<b>Expenses</b>			
Gross claims and adjustment expenses (note 8)		105,721	105,020
Reinsurers' share of claims and adjustment expenses		385	(4,031)
<b>Net claims and adjustment expenses</b>	<b>B</b>	<b>106,106</b>	<b>100,989</b>
Operating expenses (note 14)	<b>C</b>	18,390	17,461
Premium taxes		3,321	3,473
		<b>127,817</b>	<b>121,923</b>
<b>Income (loss) before income taxes</b>		<b>\$ (4,366)</b>	<b>12,116</b>
Income tax expense (recovery) (note 13)			
Current		(856)	3,616
Deferred		(596)	(206)
		<b>(1,452)</b>	<b>3,410</b>
<b>Net income (loss)</b>	<b>E</b>	<b>\$ (2,914)</b>	<b>8,706</b>

Accompanying notes are an integral part of the financial statements.

### D Investment income: \$14.9 million

Investment income for 2012 decreased by \$7 million compared to the previous year. While investment income from interest receipts increased by \$0.5 million to \$16.2 million, the company experienced a \$1.9 million decrease in net unrealized gains on the portfolio that is used to match claims liabilities. Net capital gains on disposition of assets during the year were also lower, at \$1.4 million, than in 2011. Finally, as required by an IFRS accounting change that took effect in 2011, LAWPRO was required to report a write-down of \$2.5 million on certain securities.

### E Net income (loss): \$(2.9) million

LAWPRO experienced a net loss for 2012 of \$2.9 million (compared to net income of \$8.7 million in the previous year). Nevertheless, shareholders' equity for the year increased by \$3.7 million, as the net loss was more than fully offset by other comprehensive income of \$6.6 million (see item F).

## STATEMENTS OF COMPREHENSIVE INCOME

Stated in thousands of Canadian dollars

For the year ended December 31

## Net income (loss)

Other comprehensive income (loss), net of income tax:

Net changes in unrealized gains (losses) on available-for-sale financial assets, net of income tax expense (recovery) of \$2,052 [2011: (\$576)]

Reclassification adjustment for (gains) losses included in net income, net of income tax (expense) recovery of (\$319) [2011: (\$247)]

Reclassification adjustment for impairments on available-for-sale assets, included in net income, net of income tax expense of \$650 (2011: \$770) (note 5)

## Other comprehensive income (loss)

## Comprehensive income

	2012	2011
\$	(2,914)	8,706
	5,693	(1,467)
	(886)	(626)
	1,802	1,956
	<b>6,609</b>	<b>(137)</b>
\$	<b>3,695</b>	<b>8,569</b>

Accompanying notes are an integral part of the financial statements.

## F Other comprehensive income: \$6.6 million

An increase in net unrealized gains on its surplus investments and a change in the reporting of impairments to the value of certain assets garnered “other comprehensive income” of \$6.6 million for LawPRO in 2012. This compares to a loss of \$0.1 million for the same category of income for 2011.

This income, when applied against the \$2.9 million net loss for the year, fully offset that loss for the purpose of calculating shareholders’ equity in the company, such that equity increased from \$167,876 million at the end of 2011 to \$171,571 million at the end of 2012.

## Key benchmarks

These financial results, coupled with favourable changes to the Minimum Capital Test (MCT) calculation for 2012, meant that LawPRO’s MCT stood at 223 per cent as of December 31, 2012, up from 220 per cent at the same time last year. This result continues to meet the MCT benchmarks set by our regulators.

This MCT level is expected to help LawPRO to absorb a degree of financial adversity in the short term; however, regulatory changes on the horizon are expected to place significant pressures on the company’s financial results going forward. Less favourable changes to the MCT calculation will become effective on January 1, 2015, forcing LawPRO to reassess its revenue strategy in the intervening months to prepare for compliance.

**LawPRO experienced a net loss of \$2.9 million for 2012. Nevertheless, shareholders’ equity for the year increased by \$3.7 million, as the net loss was more than fully offset by other comprehensive income of \$6.6 million.**

# Recoveries:

## Large or small, every recovery counts

**We may not be able to control the amount of claims we receive, but here at LawPRO we do actively pursue recovery of costs owing to us from third parties throughout the year. Regardless of the amount recoverable, where the cost of recovery efforts warrant, we take action to enforce judgments, file writs, and take other steps to pursue reimbursement.**

The amount recovered in 2012 was well over \$1.7 million, and was made up of 197 separate receipts of amounts ranging from \$40.00 to \$740,000.

### Post-matter disagreements

In a wills and estates claim, the claimant, a disappointed would-be beneficiary, alleged that the insured was negligent in preparing a will and did not obtain execution of the will before the testator uncle passed away. As a result, the estate went to the testator's three sons. At trial the judge found that the insured met the relevant standard of care. There was no sign that the testator had any health issues or was in a rush to have the will executed. The insured's detailed notes supported this. The action was dismissed and the court awarded costs to LawPRO. The period of time for payment passed, with no payments received from the claimant. Counsel registered writs of seizure and sale in Ontario where the claimant resides. In 2012, LawPRO received a certified cheque in the amount of \$30,000 in full payment of the award of costs.

### Recovering from a complex land transfer dispute

The insured acted to complete a complex transaction for his client which included a corporate reorganization and refinancing. As

part of the reorganization, there were transfers of the company's real estate in a specific way to enable the claimant to avail itself of section 3(9) of the Ontario *Land Transfer Tax Act*. On this basis, the unregistered transfer of beneficial ownership of the properties was then reported to the Ontario Ministry of Revenue.

As the transferor and transferee were affiliated companies, it was the claimant's intention to obtain a deferral and ultimately cancel the land transfer tax. However, a lease was entered into in connection with one of the properties. In a schedule to the assignment of lease document, there is reference to one of the transferees as the beneficial owner of the property. The Ministry took the position that the claimant was liable to remit land transfer tax of \$715,562,50. LawPRO paid the amount to stop interest and penalties from accruing, subject to a Notice of Objection submitted to the Ministry by the claimant. The insured handled this on behalf of the claimant as a self-repair, given its expertise in the area.

Ultimately, the insured was successful in proving to the Ministry of Finance that the land transfer tax was not properly payable. The Ministry reimbursed LawPRO the full amount paid in respect of the tax.

### Ten years in the making

This matter began in 2002 with the insured suing his client for unpaid fees. The client counterclaimed for several reasons, including on the allegation that the insured overbilled, and that he poorly represented the client in lawsuits and tax appeals. LawPRO moved to counterclaim and was successful on the basis of unpaid previous costs ordered in favour of the insured. The claimant appealed to the Court of Appeal. Costs were settled at the Court of Appeal and the appeal was abandoned without costs. The claimant's widow was ordered to pay \$93,000 to LawPRO, which LawPRO received in July 2012. ■

Victoria Caruso is communications co-ordinator at LawPRO.

# Repairs: LAWPRO works with lawyers to correct errors and minimize losses

“Repair” work – steps taken to correct an error or problem to minimize or avoid claims costs – is an important part of LAWPRO’s claims portfolio. Depending on the nature of the error, LAWPRO may take these steps directly, or provide support while the insured conducts a “self-repair”. The most commonly-repaired claims are in the civil litigation area, but successful repairs were also undertaken in the context of construction liens, wills, and real estate, among other areas. The following summaries illustrate some of the repairs we achieved in 2012.

## Setting aside administrative dismissals

LAWPRO is especially active in motions to set aside orders dismissing actions for delay. Rule 48 of the *Rules of Civil Procedure* permits the Registrar or the Court to dismiss actions for delay under specified circumstances. Such dismissals often lead to claims: In 2012, there were over 100 claims based on the administrative dismissal of a proceeding reported to LAWPRO. These claims can be costly; where possible, LAWPRO seeks to have these orders set aside. Success in these motions often requires the submission of exhaustive material to demonstrate that the criteria for granting relief have been met. Sometimes we are successful, sometimes we are unsuccessful because the facts are too unfavourable. Because the Court’s power to dismiss an action for delay or to set aside such a dismissal is discretionary, it is difficult to predict the outcome of these motions in advance.

Our repair of a medical malpractice action<sup>1</sup> in 2012 demonstrates the value of well-prepared materials. The Registrar in this case

dismissed the plaintiff’s medical malpractice action as abandoned pursuant to Rule 48.15. Master Hawkins set that order aside.

The plaintiff was able to satisfactorily explain the litigation delay. The surgery giving rise to the claim took place in 2005. The plaintiff claimed to have discovered her cause of action only in 2006. There was no convincing evidence to the contrary. The plaintiff’s lawyer issued a notice of action in September, 2008, and a statement of claim in October, 2008. These were not served, as the lawyer said he needed to gather medical reports and opinions.

A series of tragedies then struck the lawyer: His son-in-law was diagnosed with cancer in December and died in March. That same month, the lawyer learned that his wife had cancer; she died in August, 2010. The lawyer’s evidence was that he was unable to function rationally, or practice law at that time. The plaintiff was aware that the lawyer’s wife had cancer, and was reluctant to pressure the lawyer about the claim, though at no time did the plaintiff instruct the lawyer not to prosecute the claim.

In September, 2010, the plaintiff learned that the lawyer’s practice was being wound down. She retained new counsel immediately. New counsel received notice from the Court that the action would be dismissed as abandoned under Rule 48.15. Instead of dealing directly with the pending dismissal, new counsel had the notice of action and statement of claim served on the defendant, notwithstanding that the time for service had expired. The defendant did not deliver a defence, and the

<sup>1</sup> *Viney v. Cameron*, 2012 ONSC 4401

Registrar dismissed the action. LAWPRO was then notified, and it appointed new counsel who brought a motion to set aside the dismissal order.

Master Hawkins, who heard the motion, was satisfied that the plaintiff provided adequate evidence for the litigation delay. The lawyer's conduct in 2009 and 2010 was not a deliberate attempt to delay this action, and the plaintiff was not at fault, in the circumstances, for not putting pressure on the lawyer nor dismissing him sooner and retaining new counsel. The plaintiff's new lawyers did not deliberately ignore the threat of a registrar's dismissal order; however their response was not sufficient to prevent the registrar from dismissing this action as abandoned.

The motion to set aside the dismissal order was brought reasonably promptly. Repair counsel required substantial time to prepare the extensive motions materials, but these materials were the most thorough that Master Hawkins had ever seen.

Also in 2012, LAWPRO argued two administrative dismissal cases before the Ontario Court of Appeal, failing to sway the court in the first, but succeeding in the second.

In the first<sup>2</sup>, the Court of Appeal dismissed the plaintiff's appeal of a dismissal order. In so doing, the court reiterated that the burden on a plaintiff at status hearing pursuant to rule 48.14(13) (often called a show-cause hearing) is stringent. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there has been prejudice to the defendant. If the plaintiff is not able to provide a satisfactory explanation for the delay, it is open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant. The test, in the court's words "is conjunctive, not disjunctive." While there was little evidence of prejudice to the defendant, the plaintiff could not provide a satisfactory explanation for the delay between 2005 (when the facts giving rise to the claim occurred) and 2011, when the action was dismissed.

The second appeal<sup>3</sup> was from an order of Gorman J., who dismissed the plaintiff's action pursuant to Rule 48.14(13). That dismissal first came before Master Pope, who declined to dismiss the action, but imposed a timetable. The Court of Appeal reinstated the timetable.

The Court of Appeal held that the test for dismissing an action at a status hearing under Rule 48.14(13) is NOT the same as the test for dismissing an action under Rule 24 (also a rule permitting dismissals for delay, but on the defendant's motion). Rule 24 imposes a burden on the defendant to show why the action should be dismissed. Under Rule 48.14, the plaintiff bears the burden of demonstrating that there is an acceptable explanation for litigation delay and that, if the action is allowed to proceed, the defendant will suffer no non-compensable prejudice.

In allowing the appeal from the Master's decision, Justice Gorman had held that the plaintiff failed to satisfy her onus under Rule 48.14 because she failed to file affidavit evidence. Justice Gorman erred in so holding. The usual practice is for the initial status hearing to proceed on the basis of oral submissions. If the judicial officer conducting the status hearing forms the view, on the basis of the oral submissions, that the action is vulnerable dismissal for delay, ordinarily a full hearing will be ordered on affidavit evidence. Furthermore, the 22-month delay in this case was not exclusively attributable to the plaintiff.

It is important that dismissal orders be reported to LAWPRO promptly. Depending on the circumstances, LAWPRO's in-house counsel may simply give you some guidance and in some instances may agree that you personally handle the motion to set aside the dismissal. On more difficult cases, expert counsel may be called on to assist.

Remember, however, that the courts have become increasingly strict about plaintiffs' obligations to move actions forward. Even when successful, remedial motions are expensive. The Courts require extensive production of material to inform them in the exercise of their discretion. It is far better to carefully comply with the *Rules of Civil Procedure* than to find yourself involved in a "repair" motion.

## LAWPRO repair leads to unusual "correction" to a will



In *Daradick v. McKeand Estate*<sup>4</sup>, Justice Matheson ordered that the will of Ruth McKeand be rectified to include a bequest of McKeand's house to her daughter Virginia Daradick. This order was unusual in that an entire clause was inserted into a will, rather than simply a word or a few words.

<sup>2</sup> 1196158 Ontario Inc. v. 6274013 Canada Limited, 2012 ONCA 544

<sup>3</sup> *Bolohan v. Hull*, 2012 ONCA 121, allowing appeal from Gorman, J. who allowed the Defendant's appeal from Master Pope 2011 ONSC 2295

<sup>4</sup> 2012 ONSC 5622

Virginia had cared for both her father and her mother before their deaths. Her parents promised that Virginia would have the house. Shortly before her death, Ruth instructed her lawyer to prepare a new will. Through an error in his office, the clause leaving the house to Virginia was omitted from the new will.

After Ruth's death, the error came to light. The executor of Ruth's estate refused to consent to rectification; however, on the rectification application, the executor led no evidence to contradict that of Virginia and the lawyer. Justice Matheson found that the lawyer's error should be corrected. If this were not done, then the only other course of action would be to sue the lawyer or the estate, which could be very costly. He therefore ordered that the will be rectified by adding that the house would be bequeathed to Virginia Daradick. All other terms remained the same.



## Arguing for the preservation of a construction lien

Lawyers acting for three “finishing trades” had failed to set their construction lien claims down for trial within the time stipulated by the *Construction Lien Act*. However, LAWPRO counsel persuaded the court<sup>5</sup> that under s. 37(1)(2) of the *Construction Lien Act*, these liens were entitled to “shelter” under the lien action commenced and set down for trial by the general contractor in a timely way. Master Macleod declared that the general contractor's lien claim was an action in which the other three liens may be enforced and, because it was set down for trial in time, the “finishing” liens had not expired.

## Setting aside a real estate transfer made in error

The Court of Appeal affirmed that a conveyance may be set aside, and the parcel registration rectified, where a transfer was made in error and the transferee was not a bona fide purchaser for value<sup>6</sup>.

Through the error of a lawyer in 1994, a conveyance from a vendor to a purchaser omitted one condominium unit, which should have been conveyed along with several other units. The purchaser included the disputed unit in a new transfer to another purchaser in 2008, along with all of the remaining units which the vendor owned. It was the vendor's evidence that he understood that he had conveyed the disputed unit in 1994, and did not authorize its conveyance in 2008. It is likely that the lawyers for the second purchaser erroneously included the unit among the 88 others to be conveyed, since a title search would have shown that the vendor owned the unit and meant to dispose of all remaining units in the condominium to the second purchaser.

The first purchaser learned of the conveyance to the second in November, 2011.

Justice Moore ordered that the second conveyance be set aside, and the 1994 conveyance be rectified to include the missing unit. The indefeasibility sections of the *Land Titles Act* only protect *bona fide* purchasers for value without notice. The second purchaser was not a *bona fide* purchaser for value, having paid no consideration for the transfer of the disputed unit, which was not described in the Agreement of Purchase and Sale nor mentioned by the vendor. The Land Registrar was ordered to amend the Registers accordingly.

The Court of Appeal held that Justice Moore's discretionary order granting rectification was well supported by the evidence, and it declined to interfere. ■

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Debra Rolph is director of research at LAWPRO.

<sup>5</sup> *Deslaurier v. Le Groupe Brigil*, 2012 ONSC 3350, as to costs 2012 ONSC 5490

<sup>6</sup> *719083 Ontario v. 2174112 Ontario*, 2012 ONSC 3815, affirmed 2013 ONCA 11

# Knowing when to take a stand:

## LAWPRO defends its insureds in 2012



LAWPRO pays an indemnity to resolve a claim only in a minority of cases. In the years 2008-2012, LAWPRO made an indemnity payment in just 14.5 per cent of files, on average. However, many claims must be actively defended: over that same period, over 42 per cent of claims required the expenditure of external defence costs. Carefully-prepared arguments, when successful, help not only to minimize indemnity costs, but also to create precedents that can assist LAWPRO counsel in mounting future defences.

The following summaries illustrate our defence efforts on claims in several areas of law.

### Civil Litigation

Civil litigation was a significant “growth” area for claims in 2012. Here are some of the kinds of claims we defended.

#### Costs against a lawyer personally

The Court of Appeal set aside<sup>1</sup> a trial court order awarding costs to the Township of Russell against a solicitor personally, pursuant to Rule 57.07 of the *Rules of Civil Procedure*.

In allowing the solicitor’s appeal, Weiler, J.A. held:

- 1) When determining whether the imposition of costs against a lawyer personally is warranted, a factor for consideration is whether the lawyer’s clients have waived solicitor-client

privilege. The Court accepted the solicitor’s assertion that he was prevented from responding to some of the allegations because of solicitor-client privilege, and also that he took no step in the proceeding without the instructions of his clients.

- 2) Lawyers are not liable for costs related to advancing a weak case on their clients’ instructions.
- 3) Hindsight cannot be used to evaluate a lawyer’s decision.
- 4) The lawyer’s duty is owed primarily to the client and to the court.
- 5) Rule 57.07 is not intended to allow the frustration of the opposing party’s counsel to be taken out against a counsel personally because he or she went down a series of blind alleys with his or her clients’ instructions or approval.

#### Limited retainers

The Court of Appeal upheld a decision<sup>2</sup> in which LAWPRO counsel were successful in defending a lawyer who was retained by a woman injured in a motor vehicle accident. In the trial judgment in *Broesky*, Mackinnon J. dismissed the plaintiff’s action after finding that she did NOT retain the solicitor to prosecute her tort action or her SAB claim, but rather only her action for disability

<sup>1</sup> *Galganov v. Russell (Township)*, 2012 ONCA 410, allowing appeal from 2011 ONSC 3065 and 2011 ONSC 5609

<sup>2</sup> *Broesky v. Lust*, 2012 ONCA 701 (CanLII), dismissing appeal from 2011 ONSC 167 and 2011 ONSC 147

benefits. More importantly, Mackinnon J.'s discussion of "limited retainers", confirmation of non-retainers in writing, conflicts of evidence between solicitors and clients, and duty to provide advice outside of a retainer has been extremely helpful to counsel defending solicitors in subsequent cases.

## Class actions

Class actions are enormously expensive to defend or settle. This is true even where the merits of the claim against the solicitors are doubtful. To date, every class action claim LAWPRO has handled has hit the \$1 million per claim coverage limit of the mandatory policy. Two cases summarized here illustrate the mixed success we have had with respect to defending against class actions.

In *Allen v. Aspen Group Resources Corporation*<sup>3</sup>, Strathy J. refused to summarily dismiss a class action against a law firm, and held that the law firm may be vicariously liable under the *Partnership Act* for alleged breaches of s. 131 of the *Securities Act* by one of its partners in his capacity as a corporate director.

Strathy, J. indicated that the solicitor/director's activities as director fell within the ordinary course of the law firm's business. The firm expressly permitted its partner to act as director of Aspen, the firm's client, and accepted his directors' fees as part of the firm's revenues.

Strathy, J. held that an argument can be made that partnerships should be held accountable for the actions of those they select to sit on corporate boards. Holding law firms responsible for breaches by a director/partner affords greater protection for the public, results in higher standards and controls, and puts the risk on the party most able to control and insure it. Final disposition of the matter was, however, reserved for trial.

In *Robinson v. Rochester Financial Limited*, the Superior Court approved the settlement of the class action against tax counsel<sup>4</sup>.

The class plaintiffs were taxpayers ("donors") who participated in a "leveraged" charitable donation program with the expectation that they would obtain a tax credit in excess of their actual cash outlay. The plaintiffs alleged that the tax opinion provided by the defendant solicitors to the scheme's promoters on the efficacy of the program was negligent, and that the solicitors should have known that the tax credits would be disallowed by the Canada Revenue Agency (CRA).

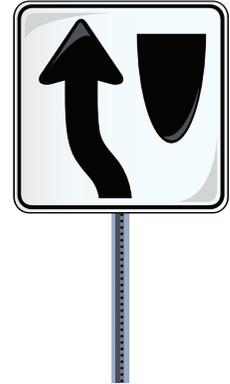
Strathy, J. approved the proposed settlement of the action for \$11 million, of which \$7.75 million was designated for class members, and the balance for fees and disbursements of class counsel and for the costs of administration of the settlement.

Some class members thought that the settlement amount was too low. However, the court noted that a significant discount

was warranted to reflect the real risk that the claim against the solicitors would fail if it proceeded to trial. The solicitors could then argue that their opinion was consistent with the state of the law as it existed at the time, and that the subsequent hardening of the position of the CRA was not something that could have been foreseen. Another factor supporting a discount was a lingering uncertainty about the extent to which the class members had relied on the solicitors' opinion.

## Limitations defences

Often, the simplest defence to a proceeding against a lawyer is to seek a ruling that the proceeding is statute barred. Here are five examples of LAWPRO's efforts on this front.



*Charette v. Trinity Capital Corporation*<sup>5</sup> was yet another claim arising from a "leveraged" charitable donation program. In this case, Trinity Capital was the promoter. Once again, the proposed class representative alleged that the solicitors' tax opinion provided to Trinity was negligent, and that the solicitors should have known that the tax credits would be disallowed by the CRA. The defendant solicitors sought to have the action dismissed as statute barred.

Charette received a notice of reassessment from the CRA in 2006. The defendant solicitors told the donors that the CRA was wrong, and that they had no obligation to pay the taxes the CRA said were owing. By 2008, Charette had retained other counsel. In November, 2009, the Tax Court of Canada released its decision holding that the donors were not entitled to the income tax credits. The donors were assessed penalties and interest, and they incurred substantial legal costs.

The donors sued Trinity Capital, the solicitors and the accountants in March, 2011.

Strathy, J. ruled that a trial would be necessary to determine whether the claim was in fact statute barred, noting that even a "sophisticated taxpayer" could be found at trial to not know that damage had occurred and that a legal proceeding against the solicitors would be an appropriate remedy, especially while the solicitors continued to advise that the CRA was wrong. Also relevant was that there was no evidence that the solicitors

<sup>3</sup> 2012 ONSC 3498

<sup>4</sup> *Robinson v. Rochester Financial Limited*, 2012 ONSC 911

<sup>5</sup> 2012 ONSC 2824 (CanLII)

<sup>6</sup> 2012 ONCA 851 (CanLII), allowing appeal from 2012 ONSC 151. *Ferrara* was recently followed by the Court of Appeal in *Lipson v. Cassels Brock & Blackwell*, 2013 ONCA 165

whom Charette had hired in 2008 advised him that he might have a claim against the defendant solicitors.

In *Ferrara v. Lorenzetti, Wolfe*<sup>6</sup>, the majority judgment of the Court of Appeal (Laskin and Sharpe, J.J.A.) held the plaintiff's claim against the defendant solicitor was NOT statute barred.

The factual situation in this case was unusual. The defendant real estate solicitor had represented Ferrara and his company for many years. He acted for Ferrara on the purchase of a property. He drafted the statement of adjustments, after settlement of a dispute with the vendor. Ferrara received a "rollover" credit. The vendor subsequently claimed that Ferrara was not entitled to the credit. The defendant solicitor took the opposite position.

The vendor sued Ferrara to recover the credit. In November 2006, Ferrara retained three high-profile litigation counsel, in succession. The defendant solicitor continued to advise Ferrara throughout the litigation that Ferrara's position was correct. In July, 2009, Belobaba, J. decided against Ferrara.

Ferrara sued the defendant solicitor within two years of this decision, but more than two years from the date that the statement of adjustments was challenged, and from when litigation counsel was retained.

The solicitor moved to have the claim dismissed as statute barred. The solicitor alleged, and Beth Allen, J. accepted, that Ferrara knew or ought to have known of his claim against the solicitor on the date that the statement of adjustments was challenged. This was true notwithstanding that Ferrara had submitted an affidavit asserting that none of his subsequent counsel advised him about a potential claim against the solicitor.

Ferrara appealed, and the majority of the Court of Appeal allowed the appeal, ruling that Ferrara learned of his claim only in July, 2009. In his reasons, Laskin, J.A. held that two circumstances in combination supported his conclusion that Ferrara's claim was not discoverable before July 2, 2009: first, the defendant's repeated assurances that he was right; and second, Ferrara's uncontradicted evidence that no one told him otherwise.

In *Johnson v. Futerma*<sup>7</sup>, sprinter Benjamin Johnson brought a malpractice claim against the estate of his former lawyer. The claim was based on various allegations including negligence, breach of fiduciary duty, and breach of trust relating to the lawyer's work on behalf of Johnson via Johnson's business agent. Most of the facts cited in support of the claim occurred between 1988 and 1993.

Carole J. Brown, J. held that the equitable claims were barred by the doctrine of laches. With respect to the allegations of negligence, Johnson argued that he was not aware of the facts in support of his claim until many years afterward. However, the court held that Johnson's business agents were aware of

these facts, and that this knowledge ought to be imputed to Johnson. She also refused to allow an extension of the limitation period on the basis that Johnson lacked the mental capacity to discover his claim, noting that Johnson was not represented by a litigation guardian in this action. Johnson had also been involved in other litigation without the intervention of a litigation guardian. There was no admissible evidence of mental incapacity before the Court.

In the 15 years between the facts alleged as the basis of the claim and the bringing of the claim, the defendant solicitor died and his accounting and trust records had been destroyed. Several other witnesses had also died. Johnson's delay was unreasonable, and it prejudiced the lawyer's defence. Brown J. ruled that the claim was statute barred.

In *Chang v. Boulet*<sup>8</sup>, more than two years before issuing a statement of claim against his former lawyer, the plaintiff accused the lawyer of altering a share purchase agreement and threatened to sue him.

The defendant lawyer had reviewed a share purchase agreement for a restaurant that was being purchased by two partners, the plaintiff and a Mr. Johnson. The agreement was prepared by the vendor's lawyer. The defendant lawyer's position was that he had acted only for Johnson; the plaintiff alleged that he had acted for both purchasers. The agreement, which the plaintiff signed without reading, provided that Johnson was to receive a 51 per cent share and the plaintiff 49 per cent.

On September 8, 2006, the plaintiff emailed Johnson and the defendant lawyer, accusing them of altering the agreement without his knowledge, and threatening to sue on the basis that the agreement was to have given each partner a 50 per cent interest. The plaintiff retained new counsel in early 2007. On September 24, 2008, the plaintiff filed the threatened statement of claim.

Metivier, J. ruled that the suit was commenced 16 days too late. In doing so, he distinguished *Charette v. Trinity Capital Corp.* (summarized above) on the basis that the plaintiff in this case did not rely on the defendant lawyer in any way after he learned that he had only a 49 per cent interest.

Finally, in *Panther Film Services Inc. v. Fred Tayar & Assoc.*<sup>9</sup>, LawPRO counsel successfully convinced Beth Allen, J. to dismiss Panther Film's action against the defendant solicitors as statute barred.

<sup>7</sup> 2012 ONSC 4092

<sup>8</sup> 2012 ONSC 6382

<sup>9</sup> 2012 ONSC 7226

The negligence action was commenced more than two years after Panther Film Services delivered a statement of defence to the solicitor's fee action. The statement of defence's allegations against the solicitor were substantially the same as those in the malpractice action. Panther Film could not point to any new material facts discovered after the two-year limitation period ostensibly expired. Panther Film merely provided additional details of the allegations pleaded in its defence to the fee action.

Once the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of the damage nor the type of damage need be known for the limitation period to begin to run.

## Vexatious litigants

The final example of civil litigation defences involves the successful effort to have a party declared a vexatious litigant.



These claimants, whose actions typically lack merit but nevertheless require attention and the expenditure of defence costs are a significant drain on resources. The decision in *Teplitsky Colson LLP et al. v. William Malamas*<sup>10</sup> was achieved via the cooperation of 27 different parties adverse to the defendant Malamas. The parties were involved in 14 different actions with respect to the litigant, who had sued 16 lawyers and their partnerships for over \$100 million. Malamas' allegations of improper activities on the part of the lawyers included fabrication of evidence, fraud on the court, making intentionally false statements, intentionally misdrafting court orders, and intentionally causing Malamas' court applications to fail.

Newbould, J. found that Malamas was clearly a vexatious litigant. He relitigated issues already decided, made unfounded allegations of fraud and conspiracy, brought 36 unsuccessful motions, persistently brought unsuccessful appeals, sued lawyers who had previously acted against him, and failed to pay costs orders made against him.

Newbould J.'s order forbade Malamas to bring any more actions without leave of the Court, and provided that costs on this action and other actions be paid as a precondition for obtaining such leave. The lawyer defendants were awarded costs totalling \$295,000. Malamas has paid nothing to date.

## Corporate, commercial and employment law

### Alleged Conflicts

In *Sheriff v. Apps et al.*<sup>11</sup>, Carole J. Brown, J. summarily dismissed Sheriff's action against the defendant solicitors.

The defendants were Integral's corporate solicitors, and they acted for Integral in the termination of Sheriff's employment. There was no solicitor-client relationship between the defendants and Sheriff at the time of the termination. Sheriff was represented by his own counsel. At no time did Sheriff or his counsel object to the defendants acting for Integral in the settlement negotiations.

Sheriff executed a release in favour of Integral, and, *inter alia*, its agents. Sheriff accepted all payments owing to him under the settlement agreement, and only then sued the defendants, alleging a conflict of interest.

The court observed that if Sheriff believed that the defendants had a conflict in acting for Integral, he should have moved immediately to have them disqualified from acting further. Integral's CEO gave evidence that Sheriff received the maximum amount that Integral was willing to pay to settle with Sheriff. Sheriff had the benefit of independent legal advice throughout. The court also ruled that the solicitors were entitled to the benefit of the release which Sheriff signed, since they acted as Integral's agents in the negotiations.

### Client use of lawyers' trust accounts not in connection with legal services

Even though the solicitors in question were successfully defended, two recent cases illustrate the danger of allowing money to be paid into and out of solicitors' trust accounts, divorced from any legal services.

In *Scott v. Valentine*<sup>12</sup>, Goldstein, J. reluctantly granted summary judgment to a firm of solicitors, dismissing Scott's action against them.

Scott made four payments totalling \$1.3 million into the solicitors' trust account in respect of a share purchase. He did so at the instigation of Valentine, one of the firm's clients. Valentine

<sup>10</sup> 2012 ONSC 3546 (CanLII), as to costs 2012 ONSC 5131.

<sup>11</sup> 2012 ONSC 565.

<sup>12</sup> 2012 ONSC 6349.

promised Scott that the law firm would hold the purchase proceeds in its trust account, pending Valentine's delivery of the shares. Scott was unaware that Valentine had previously been convicted of securities fraud.

After each of the four payments was made into the trust account, the money was immediately paid out at Valentine's direction. The firm rendered no legal services in connection with this trust money, nor did it ask any questions about the source of the funds, the purpose of the transaction, the identity of the people receiving the funds, or even why Valentine needed to use a law firm trust account, rather than a bank, for the purpose of receiving and paying out money.

When Scott received neither the shares nor his money back, he sued Valentine and the law firm.

Goldstein, J. found that the solicitors owed no duty of care to Scott, because they had no actual knowledge that Scott relied on them. Scott never met with, spoke with, or corresponded with any member of the firm. Scott relied solely on Valentine. Scott never gave the firm instructions about what to do with the bank drafts. The only evidence the firm had of Scott's existence was his name on one bank draft.

Even if the firm breached the *Rules of Professional Conduct*, such breaches, if any, do not give rise to proximity that would support a negligence claim, where no proximity exists.

The Court declined to award any costs to the solicitors.

In another trust account decision<sup>13</sup>, Kruzick J. summarily dismissed Jaystren Holding's action against a law firm on the basis that no solicitor-client relationship existed, no duty of care existed, and no trust relationship existed.

The plaintiff agreed to loan the defendant \$69,000 to be used to purchase a nightclub called Tonic, which was owned by Chat-win Services. Nigel Axton, a convicted fraudster, was a principal of Chat-win. The plaintiff drew two cheques, payable to the solicitors in trust. Axton delivered them to the law firm where they were deposited in the firm's trust account to the credit of Chat-win. They were subsequently paid out to Chat-win, at Chat-win's direction. The plaintiffs never got their money back.

The plaintiffs alleged that the solicitors were trustees of the money for them, and that the law firm owed them a duty of care. Kruzick, J., rejected these submissions. The plaintiffs were not the firm's clients. The plaintiffs did not rely on the firm, or communicate their reliance in any way. They had no communications or dealings with the firm whatsoever. The three certainties to establish a trust relationship for the plaintiffs' benefit were not met, as there was no certainty of intention, property, or objects. When a law firm receives funds in trust

from an investor for their client, the funds are held for the benefit of the client, not the investor.

## Family Law

### No recourse against lawyers re: Party's bad faith exploitation of error

In an important defence effort, LAWPRO counsel were successful in convincing a court to rule that a family law party could not look to the defendant solicitors for any shortfall with respect to damages and costs for which the other spouse was found to be liable.

In his reasons<sup>14</sup> Harper, J. held that the defendant solicitors were NOT liable to pay any part of the former wife's costs, even though the solicitors' drafting error in preparing her marriage contract was an important issue in the litigation between the two former spouses. In her instructions for the preparation of the marriage contract, the wife instructed the solicitors that in the event of a marriage breakdown, the husband should receive one-half the value of the matrimonial home. The contract erroneously provided that the husband would receive the full value of the matrimonial home.

The parties separated shortly thereafter. The wife successfully sued to have the marriage contract declared void *ab initio*. The Court found that the husband and his lawyer were aware of the drafting error, and exploited it. The husband's share of the matrimonial home was a fundamental term of the contract, and there was no consensus *ad idem* about it.

The former wife was awarded full recovery costs of \$924,057.70 from her former husband.

The Court declined to order that the wife could collect from the defendant lawyers whichever part of her costs award that she could not collect from her former spouse. The lawyers' drafting error was merely the spark that lit the flame, while the husband's bad faith and unreasonable conduct turned this litigation into the massive conflagration it ultimately became.



<sup>13</sup> *Jaystren Holdings Ltd. v. 1660557 Ontario Inc.* Handwritten endorsement, Court File No. CV-09-393687, released January 30, 2012. PDF copies available from [debra.rolph@lawpro.ca](mailto:debra.rolph@lawpro.ca)

<sup>14</sup> *Stevens v. Stevens; Epstein Cole (Added Respondents)*, (2012) 109 O.R. (3D) 421 And 2012 ONSC 706; as to costs 2012 ONSC 6881

## Lawyer not liable for failing to convince client to follow advice

LawPRO defended a claim brought by a former client who sued her lawyer for failing to prevent her from entering into a final separation agreement before receiving full disclosure from the other party<sup>15</sup>.

The client signed the agreement despite the lawyer's advice that she wait for disclosure. A year later, she moved to set aside the agreement and sued the lawyer. In dismissing the action against the lawyer, Warkentin J. held:

- 1) Where a lawyer gives appropriate advice to a client who does not accept such advice, the client cannot later assert that the lawyer was negligent for not forcing her to listen.
- 2) In addition to showing that a lawyer was negligent, the plaintiff must show that but for the negligence of the lawyer, the alleged loss would not have occurred.
- 3) The plaintiff who alleges that she would have acted differently had she received appropriate advice must show, on a balance of probabilities, that if properly advised she would have proceeded in a manner that avoided the damages suffered.

The Court awarded full indemnity costs to the solicitor.

## Criminal Lawyers

Arguments about issue estoppel and abuse of process often arise when criminal lawyers are sued by their erstwhile clients for malpractice.

*Beuthling v. Hayes*<sup>16</sup> was a claim by a party who had been convicted at first instance, had the conviction overturned and a new trial ordered, and against whom the charges were ultimately dropped. The party sued his counsel from the original trial for malpractice.

In his statement of defence, the lawyer alleged that the plaintiff was in fact guilty of the crime for which he had originally been convicted. The plaintiff moved to have the portions of the statement of defence containing this allegation struck out. The court refused, holding that an acquittal, or the ordering of a new trial, is not conclusive of the plaintiff's innocence, and does not give rise to *res judicata*, issue estoppel, or abuse of process, where the defendant solicitor asserts in the malpractice action that the plaintiff was in fact guilty. While the defendant solicitor was a witness on the appeal, he was not a party at the criminal trial or on the appeal.

In another decision involving a claim against criminal counsel<sup>17</sup>, Stevenson J. held that the plaintiff's malpractice action against his former criminal defence counsel was an abuse of process.

The plaintiff was found guilty at trial of mischief and forcible confinement arising from a domestic dispute. The defendant lawyer represented the plaintiff at trial. On his unsuccessful appeals to the Superior Court and to the Court of Appeal, the plaintiff did not allege that he had been incompetently represented at trial. However, he went on to sue his lawyer, alleging that the lawyer should have been more aggressive in his attempts to discredit the victim.



Stevenson, J. noted that these issues had been before three levels of court in the criminal proceedings, and all three courts had reached the same conclusion. He held that the criminal law itself creates the proper forum for overturning criminal convictions, and that the plaintiff's proper strategy should have been to raise the issue of quality of representation in the course of his criminal appeals. ■

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Debra Rolph is director of research at LawPRO.

<sup>15</sup> *Marcus v. Cochrane*, 2012 ONSC 146, as to costs 2012 ONSC 2331

<sup>16</sup> 2012 ONSC 4299

<sup>17</sup> *Brown v. Lee*, 2012 ONSC 4154

# practicePRO's risk management program

In 2012 practicePRO became a part of LawPRO's new Claims Prevention and Stakeholder Relations department, allowing its risk management message to be better integrated with LawPRO's communication and government/public relations efforts. The core mission of practicePRO remains the same: to help lawyers avoid claims in the first place. The practicePRO brand remains a widely-recognized and well-respected provider of tools and resources to help the practising bar identify practice risks and take steps to minimize their claims exposure.

A quick look at the numbers shows that practicePRO materials and resources reached more lawyers and their staff than ever before.

- **112 presentations** on risk management topics to law associations, law firms and continuing professional development programs in Ontario, other provinces and the United States, with total **audience over 9,000** combined. (To book a presentation for your firm or CDP program session, email [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca))

- **Over 1,600** followers of @LAWPRO and @practicePRO on Twitter



- **153 requests** for books from the Lending Library



- **191 posts** on AvoidAClaim, and **over 166,000 visits**



- **Over 322,000 downloads** of practicePRO material (up **33%** in five years)



## LAWPRO Risk Management Premium Credit

In order to avoid confusion with the Law Society of Upper Canada's mandatory CPD program, LawPRO changed the name of its CPD Premium Credit to the LawPRO Risk Management Premium Credit. The name also does a better job conveying the aim of the credit: to encourage lawyers to attend CPD programs that we feel have a strong risk and practice management component.



- **213 CPD programs** were approved for the 2013 LawPRO Risk Management Premium Credit, with total attendance of **53,000**.

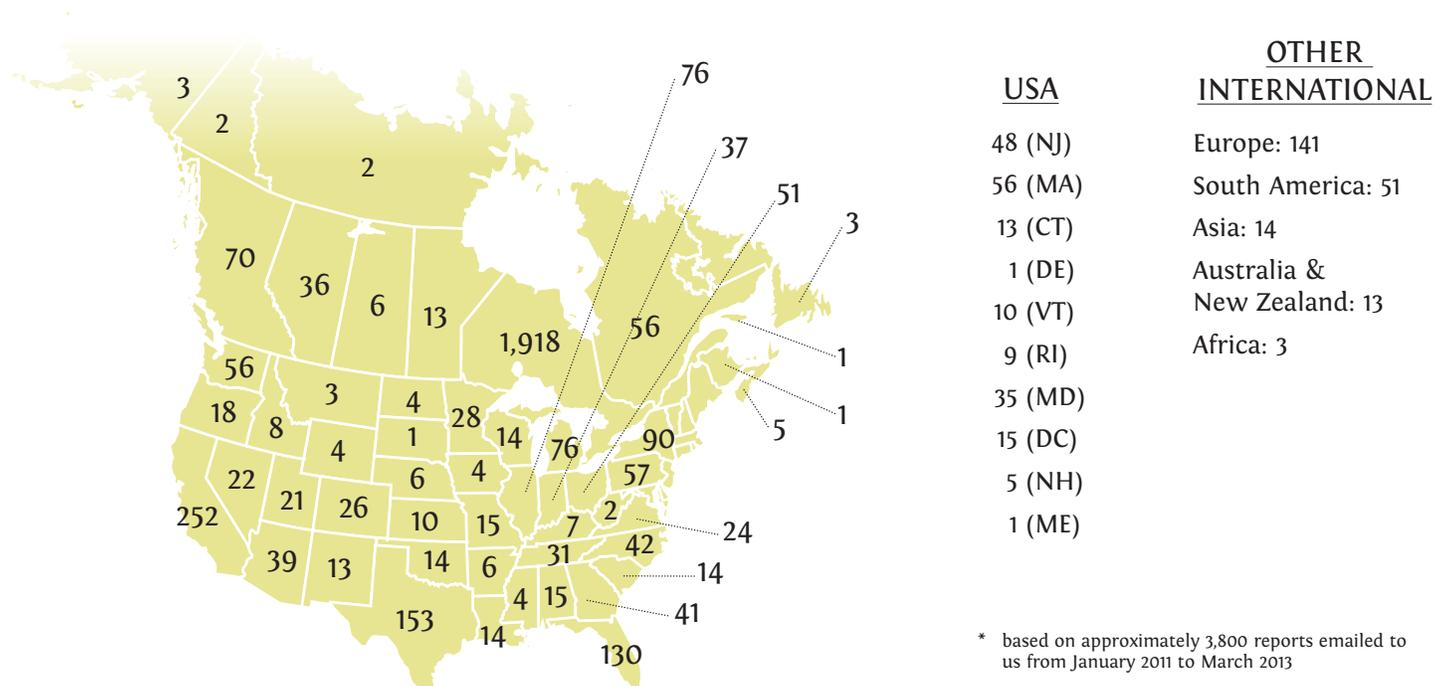
## New Checklists

In the August 2012 edition of *LawPRO Magazine* we introduced two new resources aimed at helping family law and corporate/commercial lawyers avoid claims resulting from poor communication and inadequate investigation.

- The Domestic Contract Matters Toolkit consists of a *client intake form* and *checklist*, a *client assignment sheet* and an *execution meeting checklist*. Following the steps listed in the checklists and forms will make sure nothing is missed by the lawyer, and just as importantly, that there is a paper trail documenting the work that was done and the communications with the client that occurred.
- The Commercial Transaction Checklist contains a series of questions lawyers should ask themselves to help ensure that the commercial documents they are drafting correctly reflect the client's instructions and expected results.

## AvoidAClaim Blog

2012 continued to see a steady stream of suspicious emails forwarded to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca), resulting in nearly 120 warnings posted on AvoidAClaim in 2012 (out of 191 total posts) relating to unique fraudster names. Last year we published a map showing just how widespread the problem of lawyer-targeted email frauds was. After 1,300 additional emails in 2012 (with half continuing to come from lawyers outside Ontario) we've updated the map. We've now heard from lawyers in every province and U.S. state, and 70 countries around the world.



Full details of bad cheque frauds and other kinds of fraud, as well as how you can spot the red flags, can be found in the LawPRO Fraud Fact Sheet.

In addition to the many fraud-related posts, AvoidAClaim has also begun posting content from practicePRO's extensive archive of articles and resources. Each week lawyers will find posts on a book in our Lending Library, an article from an earlier *LawPRO Magazine*, a practicePRO resource and an original post by Nora Rock, LawPRO's corporate writer/policy analyst. As well, the blog will continue to be updated with current practice and risk management news.

# LAWPRO Magazine

practicePRO continues to get out the risk management message through a variety of print and electronic media. *LAWPRO Magazine*, the flagship publication, put out issues focusing on lawyers changing firms, taking the time to slow down and avoid mistakes on client matters, and an end of the year 'New Year's resolutions issue'.

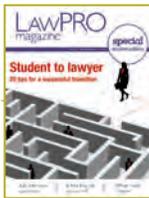
Highlights from *LAWPRO Magazine*:

January



## January 2012 – Making the Right Move

- **Recruiting & Training Top Talent:** Six law firms talk about how they recruit the best lawyers and create the right environment to retain them.
- **Is This the Job You Want?:** Advice from a career coach on how lawyers should approach an interview.
- **Unbundled Legal Services: Pitfalls to Avoid:** LAWPRO outlines the claims risks lawyers face when taking on a limited retainer.



## April 2012 – LAWPRO Magazine (Student Edition)

- **Student to Lawyer: 20 Tips for a Successful Transition**
- **Is This the Job You Want?**
- **What New Lawyers Need To Know About LAWPRO's Mandatory Professional Liability Insurance**
- **What I Wish I Knew in Law School**
- **Essential LinkedIn Do's and Don'ts for Law Students**



## May/June 2012 – Year in Review

- **Real Estate Lawyers – The Buck Stops With You:** A reminder that lawyers bear the ultimate responsibility for work that is too often delegated to clerks without adequate supervision.



## August 2012 – Taking the Time to Get it Right

- **Inadequate Investigation/Discovery Now the #1 Cause of Claims** – a look at this growing cause of claims that are the result of lawyers not taking the time to fully understand their clients' needs.
- **Diversify Without Dabbling** – A reminder to lawyers who may want to expand their practice areas to make sure they are fully competent to do so.
- **A Domestic Matters Contract Toolkit and Corporate/Commercial Checklist** to help lawyers ensure they've asked all the right questions and covered all the topics that should be asked.



## December 2012 – Resolutions for a Better Practice

- **Resolutions for a Healthier Law Practice and a Better You:** Features checklists for how lawyers can improve their practice and avoid claims in several areas of law as well as various aspects of law practice management.
- **Avoiding Communication Based Claims – Tips for Litigators:** Steps litigators can take to avoid misunderstandings with clients as to how their cases will proceed and likely outcome.

December

2012

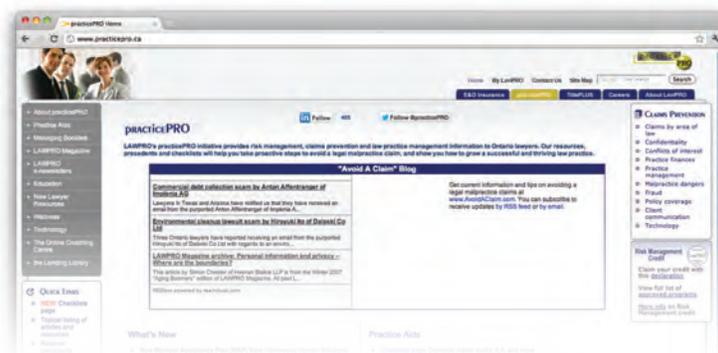
# LAWPRO Magazine Student Edition

In 2012 LawPRO launched its first magazine aimed at law students. It was distributed to the law schools in Ontario and featured both original content focused on students and newly called lawyers as well as content from *LAWPRO Magazine* adapted for this audience. This will be an annual edition and we feel it's a great way to provide articles that give students practical advice as well as introducing them to LawPRO and our claims prevention message.

special  
student edition

- **Student to Lawyer – 20 Tips for a Successful Transition:** These tips cover the new lawyer's career path from deciding what type of firm one wants, to networking and job hunting, to interviewing, to fitting in well at a new firm.
- **Essential LinkedIn Do's and Don'ts for Law Students:** A guide for new lawyers looking to use LinkedIn to network and build their online profile.

## Top 10 Downloads in 2012 from practicePRO.ca:



E-Discovery Reading List

6,698

Sample Budget Spreadsheet

6,095

LawPRO Fraud Fact Sheet

5,657

Business Plan Outline (from *Managing the Finances of Your Practice* booklet)

4,866

General Retainer Letter Precedent

4,656

Capacity Assessment article by Judith Wahl

4,655

Employee Departure Checklist

4,613

Overview of *Limitations Act, 2002*

4,031

Sitting on a Non-Profit Board: Risk Management Checklist

3,850

*The Dangers of Metadata* from *LAWPRO Magazine*

3,534

# TitlePLUS program update



## Responding to market chill with service improvements, public relations initiatives

### TitlePLUS results reflect market weakness

A cautious, sometimes pessimistic mood permeated the Ontario real estate market in 2012. Sales dipped – modestly in some markets, more dramatically in others – and warnings of a more dramatic slide dominated real estate reporting for much of the year. Because title insurance sales are so closely tied to the market, the sales slowdown translated to a modest year-over-year decrease in gross premium for TitlePLUS policy sales.

It's too early for anyone – let alone title insurers – to make solid predictions about the likely duration of current market conditions. Watchful waiting is the rule for 2013. However, we are hopeful that premium reductions for new home policies announced in February 2013 will help us make the most of the sales opportunities that do arise in the coming months.

### New management structure for TitlePLUS department

In 2012, LAWPRO announced that Mark Farrish (director of sales and marketing) and Lisa Weinstein (director, national underwriting policy) would continue on a permanent basis as co-department heads for the TitlePLUS department. Mark and Lisa had assumed this shared responsibility on a temporary basis in 2011, and their success in co-leading the department led to the formalization of this unique arrangement that benefits from their diverse and complementary skills and spirit of collaboration.

### Subscriber base remains loyal

The TitlePLUS program subscriber base remained loyal through 2012, with eligible subscribers exceeding 4,700 lawyers and Quebec notaries by December 31, 2012. The program's stability seems to demonstrate that subscribers who choose TitlePLUS coverage recognize the program's emphasis on the role of the lawyer in the real estate transaction, and value the form of legal services coverage available automatically through the TitlePLUS program.<sup>1</sup>

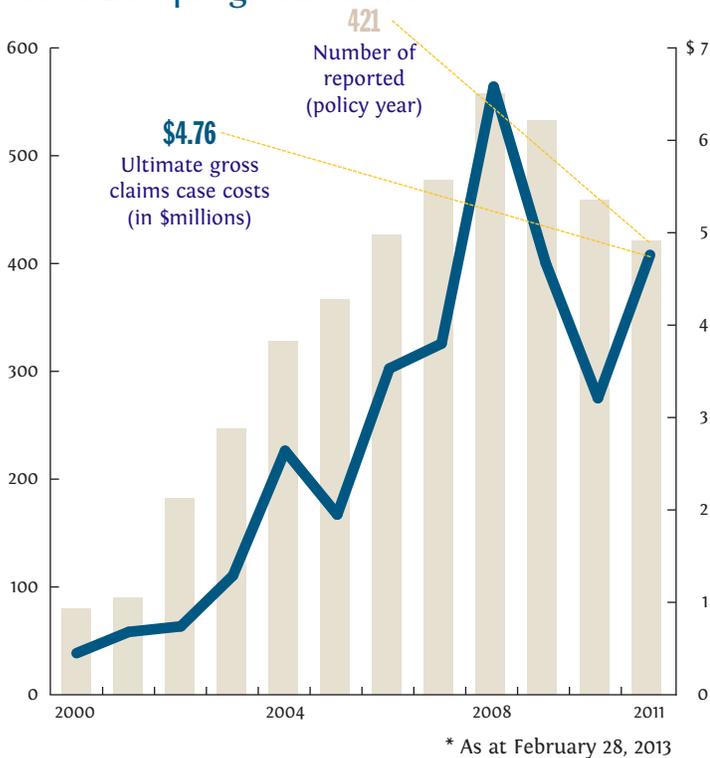
### Claims patterns in 2012

The rate of claims for the program continues to be relatively consistent year-over-year, but causes of claims do vary. Continued fine-tuning of underwriting practices has led to a decrease in the frequency of building compliance claims in the past few years. These claims account for approximately 24 per cent of the total claims count, but nearly 49 per cent of claims costs, and so they have merited special attention.

The average indemnity payment on a TitlePLUS claim is approximately \$5,000, and approximately 90 per cent of claims are closed with payment of under \$10,000.

<sup>1</sup> Excluding Quebec and OwnerEXPRESS® policies.

## TitlePLUS program claims\*



## Reaching out to subscribers and their clients in 2012

### Application process streamlined

**For lenders:** In August 2012, the TitlePLUS program introduced changes designed to streamline the process for obtaining coverage for mortgage lenders.<sup>2</sup> In brief:

- condominium status certificates and realty tax searches are not required;
- fewer items need to be entered as exceptions to coverage; and
- certain searches – for example, with respect to building, fire and zoning – are no longer required for multi-unit properties.

Changes were also introduced with respect to applications for multi-unit property coverage:

- the residential policy is now available to cover multi-unit properties with up to six dwelling units; and
- searches are no longer required for Electrical Safety Authority work orders/compliance, or Fire Department compliance.

### TitlePLUS gets social

In early 2012, the TitlePLUS program launched its Facebook page, “TitlePLUS Home Buying Guide – Canada”. The page provides resources to help educate homebuyers about the home buying

and financing processes. Other topics covered since our launch include: avoiding mortgage fraud, home design and decorating, the deductibility of moving expenses, and establishing a home maintenance schedule.

The TitlePLUS department also engages with the real estate bar via regular contributions to the Twitter conversation. Follow TitlePLUS:@TitlePLUSCanada.

### Contributing to the conversation



Since the TitlePLUS program was founded in 1997, it has been a vigorous and persistent voice in support of the role of lawyers in the real estate transaction, and has played a key role in educating the public about title insurance.

The TitlePLUS program sponsors and exhibits at conferences across the country, and LawPRO speakers regularly address title insurance topics; for example, in 2012:

- Lisa Weinstein, director, national underwriting policy for the TitlePLUS program chaired the Law Society’s “Ethical Red Flags for Real Estate Lawyers” program and lectured to students in the Faculty of Common Law (English division) at the University of Ottawa;
- Kathleen Waters, LawPRO’s president and CEO, presented on communication and insufficient investigation complaints in real estate at the Law Society’s “Six Minute Real Estate Lawyer” program; and

<sup>2</sup> Different search requirements may apply to transactions from \$1 million to \$2 million.

- Ray Leclair, vice president, public affairs for LawPRO described the ways in which title insurers can choose to respond to claims as part of the Law Society’s “Six Minute Real Estate Lawyer” program and introduced title insurance basics to students in the Faculty of Common Law (French division) at the University of Ottawa.

LawPRO and the TitlePLUS program prepare content that promotes the role of lawyers and the benefits of title insurance for use by the media. Media professionals regularly make contact to interview spokespeople about these issues, and the prepared content is picked up by media outlets across the country. This public and media relations program was very successful in 2012:

- **311 articles** were published in **105 newspapers** (compared to 116 articles in 18 sources in 2011);

- **50 websites** featured content about the TitlePLUS program; and

- In total, this exposure generated

**over 19 million impressions:**

more than double the number in the previous year.

## Exciting changes in 2013

### Premium reductions effective February 26

TitlePLUS program administrators regularly review premiums to ensure that the program remains adequately funded while providing value for customers. The most recent such review led to the announcement of premium price reductions for certain transactions:

- purchases of new homes from builders (“New Home Direct”) under the standard purchase program; and
- purchases, of new homes under the Ontario New Home Program, which applies to particular new home developments.

For details about the price reductions, please visit [titleplus.ca](http://titleplus.ca).

### TitlePLUS applications now integrated with RealtiWeb® in Alberta

In March of this year, applying for TitlePLUS coverage in Alberta became simpler than ever with the introduction of the integration of the TitlePLUS application into the RealtiWeb real estate transaction management system from the LawyerDoneDeal web-based legal applications suite. This integration was the product of a substantial research, planning and programming effort. Now, Alberta subscribers can save time and minimize errors by entering many transaction details in one place. The information

can then be used to generate multiple documents within the RealtiWeb system. In the background, a TitlePLUS application is automatically assembled for submission by the lawyer.

Plans for a similar integration in Manitoba and Saskatchewan are underway, with launch dates for both those provinces expected before the end of 2013.

### Supporting innovations to simplify refinancing

Another service innovation for the TitlePLUS program involved the streamlining of the application process for lender coverage for certain mortgage refinance transactions. LawyerDoneDeal’s Virtual Intermediary Program (“VIP”), in place since 2004, facilitates the exchange of instructions, information, and approvals between lenders and their lawyers. Work in 2012 paved the way for the creation of several new credit union programs that embed work in local law firms, retaining the benefit of a lawyer’s involvement.

For more details, please visit [titleplus.ca](http://titleplus.ca), or call the Customer Service Centre at 1-800-410-1013 or 416-598-5899.

\* RealtiWeb is a registered trademark of LawyerDoneDeal Corp. and is used under licence.

# LAWPRO committed to corporate social responsibility

2012 was the first full year of LawPRO's Corporate Social Responsibility (CSR) program. To help familiarize our staff, the bar, and other external stakeholders with our CSR commitment, we created a Corporate Social Responsibility brochure. Please get in touch with us to request copies, available both in print and in PDF format.

The LawPRO CSR program helps to maximize employee satisfaction/retention, minimize claims (for example, in terms of the lawyer wellness and education aspects), and represents both LawPRO's, and the legal profession's, interests with the insurance industry and the government.

Here's a summary of how we're supporting the many communities we serve:

## 1. Fostering the legal community and access to justice

### Outreach

In our quest to better understand the work and priorities of all segments of the bar, our staff actively pursue opportunities to contribute to the activities of a wide range of legal and other professional associations. LawPRO staff serve on many different boards and committees, distribute continuing professional education content, make submissions to commissions of inquiry, and help organize and deliver continuing professional development programs, among other activities.

A new audience targeted in 2012 was law students.

In 2012, LAWPRO staff:

- delivered 4 presentations at Ontario law schools
- published our first Student Edition of *LAWPRO Magazine*
- participated in the University of Windsor Faculty of Law Job Shadowing Day
- exhibited at the Law Society of Upper Canada's "Articling and Beyond" program.



The Caron Wishart Memorial Scholarship, initiated by LawPRO and supported by many members of the bar and the Government of Ontario's matching funds program, was awarded for the first time in 2012, to University of Toronto Faculty of Law student Robin McNamara.

## Public Affairs

LAWPRO actively monitors legislative, regulatory and policy developments that affect lawyers and their clients. Where appropriate, staff provide submissions, consultation and other assistance to groups working on initiatives that support lawyers' work. In 2012, LAWPRO activities included:

- making a submission to the Ontario Ministry of Infrastructure on the ministry's proposed management framework for forfeited corporate properties
- lending support to legal-related public service organizations, such as the Women's Legal Education and Action Fund (LEAF) and the International Justice Mission (IJM)
- making a presentation at the Ontario Chief of Police Association's launch of its annual crime prevention campaign
- hosting a visit from participants in Ontario's Legislative Internship Program
- mailing to all Ontario MPPs to make them aware of consumer stories highlighting the role of the lawyer
- undertaking surveys measuring the public's understanding of home equity lines of credit and canvassing the prevalence of will-making by the Canadian public and motivations/timing for making a will. The data collected in these surveys was used and reported in media interviews, *LAWPRO Magazine*, and electronic newsletters to call attention to the important role of the lawyer.

## Lawyer wellness

Finally, LAWPRO lent both strategic and funding support to the Law Society's transition to a new provider of lawyer wellness services, permitting Homewood Human Solutions to begin offering counselling, peer support and other wellness services to Law Society licensees by the end of 2012.

## 2. Providing a healthy and rewarding workplace

Each year, LAWPRO encourages its employees to improve their skills through professional development and training, and to participate in professional and industry association activities. LAWPRO staff are represented in professional associations in the law, insurance, information technology, communications, human resources, and financial/accounting sectors. In 2012, the company:

- celebrated 15 employees who achieved 5, 10, 15, 20 and 25-year long-service milestones
- recognized eight employees for outstanding service or leadership via the company's Spot Rewards program.

Employee wellness is also an important company priority. In 2012, LAWPRO:

- made company facilities available for the activities of our wellness, social, and green committees
- conducted a compliance review of the health and safety program
- compiled a list of fragrance-free products to help employees comply with the Fragrant Products Policy
- ran an in-office flu shot clinic
- promoted lunch-hour Wednesday Wellness Walks and group skating events.

## 3. Respecting the environment

In the spring of 2012, the company replaced its existing printers with a smaller number of more efficient printers. The result: a reduction in power consumption, and easier double-sided (paper-saving) printing.

As LAWPRO's technology needs evolve, the company regularly donates unneeded and unsaleable equipment (after elimination of company data) to charitable organizations in exchange for tax receipts. Late in 2012, after the elimination of internal servers, LAWPRO made a substantial donation of equipment to Reboot Canada, an organization that refurbishes hardware for use in the public school system.





LawPRO staff pitch in to assist at the Lawyers Feed the Hungry program.

LawPRO is proud of the work of its employee-led green committee. In 2012, the committee:

- held regular transit raffles to encourage employees to use public transit
- screened environment-friendly films via a lunch hour Movie Mondays series, and hosted guest seminars on environmental protection and natural wellness topics
- arranged a vegetarian potluck lunch

## 4. Supporting the broader Canadian community

Each year, LawPRO staff nominate and vote on five charities for inclusion in the company's program of matching donations raised by staff through on-site, employee-led events and Denim Friday contributions. In 2012, a total of \$26,000 was available for distribution under this program, giving \$5,200 to each of:

- Crohns and Colitis Foundation
- Fanconi Canada

- Good Shepherd Ministries
- Toronto Humane Society
- Tree Ontario Foundation

Besides the formal staff charity program, LawPRO employees regularly enlist support from their fellow employees on a personal basis for individual charitable initiatives. This year's employee-led initiatives included donating meals to the Good Shepherd Homeless Shelter; selling daffodils in support of cancer research; volunteering with the Law Society's Lawyers Feed the Hungry program; and helping organize the International Justice Mission's NourishHOPE event.

LawPRO staff also give back to the community by sharing their expertise via involvement with insurance industry associations. In 2012, LawPRO staff participated in insurance industry initiatives and policy development via several associations including the National Association of Bar-Related Title Insurers (NABRTI), the National Association of Bar Related Insurance Companies (NABRICO), the Insurance Bureau of Canada, and the Canadian Insurance Accountants Association.

## Why the LAWPRO base premium is only the start of the story:

# A tentative analytical model brings insight

by Kathleen A. Waters, LAWPRO president and CEO



Why is Ontario lawyers' professional liability insurance more expensive than other provinces? It's a legitimate question, and easy enough to formulate. The answer is either very simple or very complicated and detailed, because it means comparing apples to oranges.

### The simple answer

A simple answer points to the fact that a person asking the question is probably thinking of the base premium announced each fall. As a single figure, it gives Convocation (and the profession) some sense, year over year, of overall premium direction. However, the base premium is really an underwriting construct, a starting point for determining individual charges.

Rarely does anyone focus on examples (or categories) of Ontario lawyers, reviewed every year in Appendix "C" of the Report to Convocation, who pay in the range of \$1,300 to \$1,900 for their primary insurance coverage. Only three jurisdictions in Canada have insurance levies cheaper than \$1,300. Those categories of insureds paying significantly less than base premium include the criminal law and immigration bars, new calls, and part-time practitioners. And in 2012, as a group they paid \$2.8 million less than in 2011, due to a change in the risk-rating discounts under the program. So, nearly 4,200 lawyers saved money even though the base premium did not decline.

Another simple answer would use auto insurance as a proxy. The 2011 Ontario Auditor General's report noted that while Ontario

has one of the lowest *per capita* figures for automobile accident deaths and injuries in the country, it has the highest average premium in Canada and the largest claims cost of any auto insurance system.<sup>1</sup> In 2012, the Insurance Bureau of Canada stated the following: "While four years ago Ontario premiums were on average 25% higher than the next highest province – Alberta – today the average Ontario premium is now more than 45% higher than Alberta's and almost twice as high as premiums in the maritime provinces"<sup>2</sup> This suggests that systemic or environmental issues may be coming into play across the Ontario insurance industry.

At least the LAWPRO base premium has been stable in the 2011-2013 period, whereas some other provinces' lawyers primary professional liability programs have seen increases of 10 to 20 per cent or more over the same period.<sup>3</sup>

### Limitations to the more detailed answer

The more detailed answer certainly takes longer to explain and comes with many qualifications. LAWPRO recently undertook an analysis designed to give an indication of some reasons why lawyers' professional liability insurance is more expensive in Ontario. In other words, we developed an analytical model to provide some

<sup>1</sup> [www.auditor.on.ca/en/reports\\_en/en11/2011ar\\_en.pdf](http://www.auditor.on.ca/en/reports_en/en11/2011ar_en.pdf)

<sup>2</sup> [www.abc.ca/en/Car\\_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee\\_May28-12.pdf](http://www.abc.ca/en/Car_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee_May28-12.pdf)

<sup>3</sup> [www.lawsociety.mb.ca/forms/insurance/ProfClaimsFund2012.pdf](http://www.lawsociety.mb.ca/forms/insurance/ProfClaimsFund2012.pdf); [www.lawsociety.mb.ca/forms/members-forms/Annual\\_Member\\_Report.pdf/view](http://www.lawsociety.mb.ca/forms/members-forms/Annual_Member_Report.pdf/view)

insights, not actuarially specific numbers. Being limited in the amount and detail of data available from other provinces (and in some cases, from our own claims history), we focused on areas where at least some data is available.

For example, some provinces have wholly “no fault” auto regimes which means their lawyers’ professional liability programs experience few motor vehicle-related claims. For 2011-2012, Ontario accounts for 52 per cent of Canada’s more than 931,000 active civil cases. Motor vehicle cases represent the largest identifiable category of cases commenced each year and the number launched annually continues to grow. Ontario, alone, had more than 54,000 active cases involving motor vehicle claims in the civil courts in 2011-2012.<sup>4</sup>

Remember that Ontario auto insurance premiums are 45-200 per cent higher than in other provinces and that is attributed to claims costs.<sup>5</sup> The 2011 Ontario Auditor General’s Report demonstrated that Ontario had the highest average total claim cost per insured vehicle of any province.<sup>6</sup>

That higher cost flows directly into the LAWPRO program (instead of being borne by the auto insurer) each time there is a perceived motor vehicle-related legal error for which there is liability at law. LAWPRO has not previously had any particular reason to code its data specific to motor vehicle files. So, without extensive re-coding, we cannot precisely quantify the impact of this issue.

It must also be remembered that other provincial lawyers’ programs do not necessarily cover the same pool of risks: Where the risks being insured are not the same, the likelihood of a comparable premium is low. For example, we understand that in British Columbia the risk for approximately 50 per cent of residential conveyancing is in the notaries’ program, instead of the lawyers’ program. In Quebec, much of the serious solicitors’ risk (such as real estate, wills & estates, and family law) is in the notaries’ program.<sup>7</sup> So, simple comparisons between the Ontario lawyers’ program and those of British Columbia or the Barreau in Quebec are flawed from the outset.

### The correct starting point for a more detailed answer

Before looking at the reasons why, in LAWPRO’s view, the base premium is higher in Ontario than insurance levies in other provinces, let’s ask ourselves the following question: Is base premium the correct starting point?

In fact, it is not. One must add to the base premium of \$3,350 a “per lawyer” share of the transaction levies that LAWPRO receives every year, because those transaction levies are another form of premium that supports the primary program. Once the transaction levies are factored into the equation, the revised premium starting point is approximately \$4,325 per lawyer, instead of \$3,350. (An astute reader will note that I have not mentioned charges arising from the Real Estate Practice Coverage Option (REPCO) or Claims History Levy Surcharges (CHLS). That is because in other provinces, the REPCO coverage is more akin to a Compensation

Fund issue and the aim of the CHLS is addressed through variable deductibles in some jurisdictions. So, they are both more difficult to include in any comparison.)

## How do we make Ontario primary program premiums comparable to other provincial programs?

**Take Base Premium**  
+ Transaction Levies

**Less:**

- Higher Ontario real estate values
- Ontario limitation period & administrative dismissal regime
- Higher legal fees
- Higher economic activity

Then decide how to divide up the balance: To risk-rate or not to risk-rate?

### Ontario’s legal and financial environment

First let’s consider features of the Ontario legal or financial environment that drive our premium higher. We have identified four such features: higher Ontario real estate values; a stricter limitation period and administrative dismissal regime; higher legal fees; and higher volume of economic activity.

For each of these factors, our model allocates a portion of the LAWPRO premium per lawyer, on a hypothetical basis. Add up the tentative allocation for the four factors and you have approximately \$950 in premium related to Ontario-specific environmental factors.

#### (1) Real estate values

For the years 1999 to 2012 the average Ontario house price was 41 per cent higher than the average house price in all other provinces

<sup>4</sup> [www5.statcan.gc.ca/cansim/a03?lang=eng&pattern=259-0011..259-0016&p2=31](http://www5.statcan.gc.ca/cansim/a03?lang=eng&pattern=259-0011..259-0016&p2=31)

<sup>5</sup> [www.ibr.ca/en/Car\\_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee\\_May28-12.pdf](http://www.ibr.ca/en/Car_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee_May28-12.pdf)

<sup>6</sup> [www.auditor.on.ca/en/reports\\_en/en11/301en11.pdf](http://www.auditor.on.ca/en/reports_en/en11/301en11.pdf)

<sup>7</sup> [www.cnq.org/en/notariesInQuebec/essence.html](http://www.cnq.org/en/notariesInQuebec/essence.html)

combined.<sup>8</sup> Only the British Columbia values are higher on average, but in B.C. (as noted above) 50 per cent of residential conveyancing is done by notaries and is thus outside the Law Society insurance program. The average annual LAWPRO indemnity cost (paid and reserved) for real estate files over a five-year period is \$14.7 million. If LAWPRO's costs for real estate indemnity claims were 41 per cent less, insureds could save approximately \$4.3 million per annum.

Of course, this analysis does not take into account the extent to which higher real estate values also drive higher indemnity amounts in some family, wills and estates, and commercial claims. That level of detail has not been captured over the years, but if it were available, it would only make the impact of Ontario real estate values on the claims portfolio greater.

## (2) Limitation period and administrative dismissal regime

Ontario limitation periods are shorter than in many other jurisdictions, we have more administrative dismissal risks, and fewer opportunities for repairing claims based on either of these factors in light of our statutory provisions and case law.<sup>9</sup> Other provinces may now be following Ontario's lead in this direction, but Ontario has been ahead of the curve and our claims experience reflects that, in LAWPRO's view.

We analyzed the number of missed limitation period cases reported per jurisdiction in 2011. Ontario had 400 reported cases, while other jurisdictions averaged 20 (from a low of 1 to a high of 95).<sup>10</sup> Although based on only one year's worth of data, this analysis suggests that Ontario has on average 20 times the activity in this area than the other Canadian jurisdictions combined. The average annual LAWPRO cost for plaintiff and defence time management claims (indemnity and expense, paid and reserved) is approximately \$7.3 million. If one assumes that the other jurisdictions would on average have an annual cost equal to 1/20<sup>th</sup> the Ontario cost and subtracts that, one could argue that Ontario insureds pay approximately \$7 million in premium costs because of our more stringent limitation period and administrative dismissal regime.

## (3) Ontario Legal Fees

Based on published sources, the cost of a two-day Ontario trial is 39 per cent higher than the average equivalent trial cost of other provinces (using a three-year survey average)<sup>11</sup>. Ontario's average hourly rate for lawyers (using 2010-2012 survey results) is 14 per cent higher than the rates of other provinces. It is difficult to combine those two metrics, but for purposes of this exercise assume LAWPRO's legal costs are on average approximately 20 per cent higher than other Canadian jurisdictions. Given that we spend an average of \$36 million per annum on defence costs, that extra 20 per cent translates into \$6 million of insurance premium each year.

This calculation does not take into account the extent to which LAWPRO sometimes also pays for claimants' lawyers' fees as part of indemnity payments. Including that analysis would only make the impact of the higher legal fees in Ontario more acute.

## (4) Ontario level of economic activity

On a variety of metrics, Ontario may be viewed as the leading corporate-commercial jurisdiction in Canada. For example, in 2011 Ontario had 35 per cent of all retail sales in Canada and 46 per cent of all manufacturing sales.<sup>12</sup> Both British Columbia and Alberta had lower shares of the market in each category. Ontario is the seventh largest economy in North America as of 2012<sup>13</sup> and was ranked third for attracting foreign direct investment projects in 2011 (behind California and New York).<sup>14</sup> Ontario's share of Canada's real gross domestic product was the largest by province or territory in 2011, at 37 per cent.<sup>15</sup>

All of this data supports an assumption that corporate-commercial claim costs may be higher in Ontario than in any other Canadian jurisdiction, based on greater economic and financial activity. Based on the limited data available (from only two of the top four Canadian jurisdictions by percentage of real GDP), Ontario has approximately 70 per cent more corporate-commercial claims per annum. At an average indemnity for such claims of approximately \$19,000 (over a ten-year period), those claims add extra indemnity costs to the program of approximately \$1.65 million per annum, when compared to some other leading Canadian business jurisdictions.

So, if you were able to strip away all the environmental factors described above, our analytical model would suggest a revised premium per lawyer closer to \$3,380 than to the \$4,325 figure we provided as our correct starting point.



<sup>8</sup> [www.cmhc-schl.gc.ca/odpub/pdf/66663.pdf](http://www.cmhc-schl.gc.ca/odpub/pdf/66663.pdf); [www.cmhc-schl.gc.ca/odpub/esub/61500/61500\\_2012\\_Q01.pdf](http://www.cmhc-schl.gc.ca/odpub/esub/61500/61500_2012_Q01.pdf)

<sup>9</sup> [www.canlii.org/en/on/onca/doc/2008/2008onca469/2008onca469.html](http://www.canlii.org/en/on/onca/doc/2008/2008onca469/2008onca469.html); [www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02124\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02124_e.htm)

<sup>10</sup> [www.canlii.org/eliisa/search.do?language=en&searchTitle=Search+all+CanLII+Databases&sortOrder=relevance&searchPage=eliisa%2FmainPageSearch.vm&text=%22limitation+period%22&id=&startDate=2011&endDate=2011&caselaw=courts](http://www.canlii.org/eliisa/search.do?language=en&searchTitle=Search+all+CanLII+Databases&sortOrder=relevance&searchPage=eliisa%2FmainPageSearch.vm&text=%22limitation+period%22&id=&startDate=2011&endDate=2011&caselaw=courts)

<sup>11</sup> [www.canadianlawyermag.com/images/stories/pdfs/Surveys/2010/cl\\_june\\_salary%20survey.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2010/cl_june_salary%20survey.pdf); [www.canadianlawyermag.com/images/stories/pdfs/Surveys/2011/legalfeessurvey.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2011/legalfeessurvey.pdf); [www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeessurvey2012.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeessurvey2012.pdf)

<sup>12</sup> [www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/trad17a-eng.htm](http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/trad17a-eng.htm) and [www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/manuf33g-eng.htm](http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/manuf33g-eng.htm)

<sup>13</sup> [www.gov.on.ca/en/initiatives/progressreport2012/ONT05\\_040343.html#1.1](http://www.gov.on.ca/en/initiatives/progressreport2012/ONT05_040343.html#1.1)

<sup>14</sup> [www.gov.on.ca/en/initiatives/progressreport2012/ONT05\\_040343.html#1.1](http://www.gov.on.ca/en/initiatives/progressreport2012/ONT05_040343.html#1.1)

<sup>15</sup> [www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ50-eng.htm](http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ50-eng.htm)

## Defining the pool of insureds: Who should pay premiums?

Our final level of analysis makes it very clear that comparing the Ontario base premium to other provinces' insurance levies is comparing apples to oranges, due to the impact of Ontario's strong commitment to risk-rating within the primary program. The movement to risk-rating resulted from the insurance crisis of the mid-1990s and was expressly mandated by the *Report to Convocation of the Insurance Task Force and the Insurance Committee*.<sup>16</sup>

This means we have to consider structural differences between Ontario's program and those of the other Canadian jurisdictions: our discount structure; and our exemptions for temporary leave of absence, legal aid clinic work, estate trustees, and in-house counsel.

### (1) Value of discounts

Our program in Ontario has significant premium discounts for those qualifying in the "new lawyer", "restricted area of practice" (i.e. criminal, immigration) and "part-time practice" categories. Except for one other province which has a part-time discount, none of the other Canadian jurisdictions has equivalent discounts to the Ontario program.<sup>17</sup> As of 2012, actual discounts were granted worth approximately \$10 million per annum due to the Ontario program structure.

### (2) Exemptions: Premium waived

Ontario's program has a more elaborate exemption structure than most other provinces. If you consider, for example, Alberta, British Columbia, Manitoba and Nova Scotia, their programs do not allow exemption for estate trustees, three of the four do not grant exemption from buying insurance for temporary leave of absence, three of the four do not exempt lawyers in education, and two of the four don't exempt in house counsel or legal aid clinic lawyers.<sup>18</sup> So, in those provinces, the overall insurance levy is being spread, due to the structure of the program, over more categories of payors.

In real life, LAWPRO forgoes approximately \$2.3 million per year because the approximately 700 lawyers in temporary leave of absence,

legal aid clinic, or estate trustee exemption categories do not pay premiums. Although as insureds they could be expected to present some risk to the program, it would not be appreciable.

LAWPRO also forgoes \$11 million per year because approximately 3,400 lawyers in the corporate in-house exemption category do not pay premiums. Their risk is being assumed by their employers, the employer being the only client.

## The bottom line

So, as the old saying goes, you can't compare apples to oranges and expect them to look or taste the same. The premiums or insurance levies in each of the provinces and territories reflect very different environments and influences. And, depending on the size of the pool you are spreading the necessary premium over, you get radically different "per lawyer" results. With a different discount and exemption structure as described above, the hypothetical environmentally adjusted premium of \$3,380 might start to come down to the \$2,300 to \$2,800 range. At that range, about half of the other provinces' programs would have insurance levies in approximately the same range or higher than our hypothetical premium for purposes of this modelling exercise.

LAWPRO remains committed to running a risk-rated insurance program that operates on a commercially reasonable basis (a key element of LAWPRO's mandate).<sup>19</sup> ■

With thanks to Victoria Crewe-Nelson, assistant vice president, underwriting and Tim Lemieux, practicePRO co-ordinator.

<sup>16</sup> Law Society of Upper Canada, October 28, 1994, amended November 15, 1994

<sup>17</sup> [www.lawsociety.bc.ca/page.cfm?cid=199&t=Part-time-Insurance-Discount](http://www.lawsociety.bc.ca/page.cfm?cid=199&t=Part-time-Insurance-Discount)

<sup>18</sup> [www.lawsociety.bc.ca/page.cfm?cid=203&t=Exemptions](http://www.lawsociety.bc.ca/page.cfm?cid=203&t=Exemptions); [www.lawsociety.ab.ca/files/forms/Form\\_7-2.pdf](http://www.lawsociety.ab.ca/files/forms/Form_7-2.pdf); [www.lawsociety.mb.ca/for-the-public/frequently-asked-questions/?searchterm=exempt](http://www.lawsociety.mb.ca/for-the-public/frequently-asked-questions/?searchterm=exempt); [nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf](http://nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf)

<sup>19</sup> *Report to Convocation of the Insurance Task Force and the Insurance Committee*, op. cit., page 16, para. 54.

## Did you know: Restricted area of practice option

LAWPRO offers a premium reduction of 50 per cent off the base premium to lawyers who practice exclusively in the areas of criminal and/or immigration law. If you are or will be practising only in these areas of law, this option may be available to you when completing your renewal application for Professional Liability insurance. Be sure to

read the Program Guide for more information regarding the official definitions of criminal and/or immigration law while completing your application. Note that if you opt to have this option removed from your coverage part-way through the year (to expand your coverage to other areas of law), it will not be possible to opt back in later in that year.

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# errors&omissions

## Wondering when to report that claim or potential claim? Do it now.

Do you think you may have a claim to report, but are wondering about timing? There are no good reasons to delay in reporting a claim, and many excellent reasons to do so as early as possible.

Under the current mandatory program of insurance for lawyers, the policy that responds is the one in force when a claim is first made, and not necessarily the policy that was in force when the error took place. However, if the lawyer knew or ought to have known of the claim circumstances in a previous policy year, then it may not be the current policy that will respond. The result? There is nothing to be gained by aiming to engage a particular year's policy. In fact, a delay in reporting a claim can actually jeopardize your coverage. Immediate written notice of any claim or circumstances of an error, omission or negligent act that would reasonably give rise to a claim is a condition of coverage (see Part IV, general condition E of the policy).

Insured lawyers are required to cooperate with LAWPRO in handling their claims. If LAWPRO becomes aware that a lawyer has failed to report, LAWPRO will generally contact the lawyer to encourage reporting. If that fails to prompt a claim, we may be forced to deny coverage – which we are entitled to do if LAWPRO has been prejudiced by the delay. Why does LAWPRO take delays so seriously?

- Policy provisions and terms change from one year to the next. It is important to have the right coverage respond.

- A lawyer's failure to report promptly can lead to missed limitation periods, adverse judgments, imprudently-brought appeals or lost appeal opportunities, and other negative outcomes that could have been avoided or mitigated if LAWPRO had been notified sooner.
- Even if the lawyer thinks she or he is reporting out of an abundance of caution, if LAWPRO has the opportunity to act early – even before a claim is asserted – we have a better opportunity to gather and secure evidence, seek settlement, and assist the insured in avoiding a claim being made at all.

If you report a claim and nothing develops, your deductible won't be triggered and there won't be any surcharged increase in your premium. It's far riskier to delay and have your coverage denied, especially since delaying could jeopardize even your firm's excess insurance coverage. You should also consider that it may not just be your insurance coverage that is at risk, but also your licence to practice. The *Law Society Act* and O.Reg. 167/07 make it clear that a lawyer's failure to report a claim or circumstances reasonably expected to give rise to a claim can warrant disciplinary action by the Law Society.

Remember that LAWPRO is *your* insurer. If a mistake occurs, let us know right away. ■

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Victoria Crewe-Nelson is assistant vice president underwriting at LAWPRO.

## How to report – and how not to report – a claim to LAWPRO

Whether you make your report using our useful online Claim Notice Report or in some other manner, in order for us to properly investigate evaluate your claim:

1. **Tell YOUR side of the story:** Do not just send us a copy of the statement of claim, if you've been served with one; send us your rebuttal – or comments – so we can better understand the situation and how we can defend you.
2. **Be concise:** No stream-of-consciousness letters, please! Send us a well-organized summary ( a page or two is likely enough) and include the key facts, details, and dates.
3. **Tell us what's at stake:** Remember, LAWPRO is an insurance company. We need to understand, as early as possible, the dollar value of the claim or your best estimate (even if it is zero) so that we can dedicate appropriate resources and set reserves for the claim or potential claim.

4. **Do not send the whole file:** We may not need it. Please wait until one of our claims professionals contacts you to discuss necessary documentation. If a decision is made to engage outside counsel to handle the claim, you may then need to send your file materials to that lawyer directly.
5. **Report promptly, and be available for our questions:** Do not wait to report your claim until the day before you leave on holiday! If you will not be reachable and an urgent response or action is required, be sure to brief a partner or junior about the claim details.

The sooner we have the information we need, the sooner we will be in a position to consider a resolution, or pursue repair or defence efforts on your behalf. ■

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Douglas Scott has been a claims counsel at LAWPRO since 1987.

## Be smart about spam: Use whitelisting so you don't miss key messages



Spam is a problem that never seems to go away. Email service providers are always coming up with new ways to identify suspected spam to try to keep it out of your inbox. This often involves assigning points to certain words or phrases, and enough points will get the email blocked. Sometimes simply sending an email to a large number of recipients can get an email flagged as spam. It's a never-ending battle between spammers and service providers.

Unfortunately every now and then a legitimate email is caught in a spam filter and never makes it to your inbox. There is often no notification when this happens, and you may only discover the email if you look through your junk folder. In some cases, it doesn't even appear there.

If you want to ensure that email from a particular address is never mistaken for spam, you need to 'whitelist' it. In other words, tell the service provider that the sender's email address is legitimate and the emails are not spam.

Follow the instructions below to whitelist email addresses in the more popular email services. Remember: If you are on a network, whitelisting on your own computer may not be sufficient. You may have to ask your IT department to whitelist the address on the main server.

### Outlook 2010

1. Click the Home tab.
2. Click Junk.
3. Click Junk Email Options.
4. Click Safe Senders.
5. Click Add.
6. Enter a particular email address or an entire domain name if you want to whitelist all their email addresses (e.g. [service@lawpro.ca](mailto:service@lawpro.ca) or just [lawpro.ca](http://lawpro.ca))
7. Click OK to finish.

### Outlook 2007

1. Right-click on the email you received (in the list of emails).
2. Click Junk Email
3. Click Add Sender to Safe Senders List to finish.

### Outlook 2003

1. Open the email message from the sender you want to add to your address book.
2. Right-click Click here to download images in the gray bar at the top of the message.
3. Click Add Sender to Senders Safe List to finish.

### Gmail

1. Follow the *Settings* link in Gmail.
2. Go to *Filters*.
3. Click *Create a new filter*.
4. Type the desired email address under *From*: Enter a particular email address or an entire domain name if you want to whitelist all their email addresses. (e.g. [service@lawpro.ca](mailto:service@lawpro.ca) or just [lawpro.ca](http://lawpro.ca))
5. Click *Next Step* ».
6. Make sure *Never send it to Spam* is checked.
7. Click *Create Filter*. ■

# Avoiding unintentional expansion of retainers

Here's the scenario: A lawyer is retained to assist a client with a tort claim and an accident benefits claim. The client, meanwhile, has been informed that the long-term disability (LTD) benefits provided by her employer's group plan are about to be terminated. In an effort to forestall the termination of benefits, she asks the lawyer to send a copy of a medical report that the lawyer has on file to the LTD insurer. The lawyer does so, enclosing a cover letter that reads "my client has requested that I forward the enclosed to your attention."

After the tort litigation has concluded, the time for pursuing an LTD claim lapses. The client then alleges that the lawyer was supposed to be representing her with respect to pursuing the claim for LTD benefits. The lawyer asserts that dealing with the LTD insurer was never part of the retainer, and points to the written retainer letter, which refers only to the tort and accident benefits claims.

Can the lawyer be found to have been retained to handle the LTD claim? *LAWPRO* claims counsel Yvonne Diedrick warns that the answer may sometimes be yes.

Not all retainers are in writing, and there is no reason why a lawyer and client could not agree to a change in the retainer without putting that change into writing. The danger for lawyers lies in situations where the client assumes (mistakenly) that something the lawyer has said or done amounts to an agreement to expand the retainer.

Diedrick points out that the LTD benefits example cited above is only one of many possible scenarios in which a client can misunderstand the scope of a retainer. For example, corporate lawyers who never litigate might discover that a client has assumed that they will handle

litigation arising out of a corporate transaction; or a client working with a lawyer to resolve a return-to-work issue might assume that the lawyer will also take responsibility for filing an action against the employer or against a benefits provider.

In the previous (December 2012) issue of this magazine, claims counsel Jordan Nichols explained how careful management of the retainer process can help lawyers avoid communication-based claims. Diedrick recommends that, in addition, lawyers revisit the scope of the retainer with the client when appropriate.

When might a review of the retainer be appropriate?

Sometimes the unexpected expansion of a retainer arises when a new issue emerges and the client brings that issue to the attention of the lawyer – whether or not the lawyer commits to acting on the new information. In the personal injury example above, the client presumably told the lawyer that she'd received some kind of notice of a change to her benefits, and asked the lawyer to do the favour of forwarding the medical report. In a situation like this, a useful approach might be for the lawyer to confirm to the client (in writing) that the report has been sent, and in that communication, to include a reminder that the lawyer has not been retained to handle the LTD issue. Should the client wish for the lawyer to act in this regard, the lawyer may request additional written instructions.

Of course, a lawyer cannot anticipate every possible incorrect assumption that a client might make. It would be going much too far to suggest that any communication of new information from any client should prompt a restatement of the terms of the retainer, or to suggest that any of the above examples mean that the lawyer has been negligent. We're simply suggesting that maintaining good general two-way communication throughout the course of a matter can reduce the potential for misunderstandings. It can also help to occasionally consider the professional services you provide from perspectives other than your own. Is there anything you've said or done that might lead a client (or a third party) to assume you will be performing work you have not agreed to do? You may think it's obvious that, as an IP specialist, you aren't thinking about the client's tax exposure or franchise disclosure obligations... but to some clients, a lawyer is a lawyer. Be clear. ■

Yvonne Diedrick is claims counsel and Nora Rock is corporate writer and policy analyst at *LAWPRO*.

## Correction and Apology

The case book column at page 41 of the August 2012 edition of *LAWPRO Magazine*, "Lessons learned: The Limitations Act 2002," contained a summary of the case of *Isailovic v. Vojvodic* (2011 ONSC 5854 (CanLII)). Due to the placement of names in the style of cause, one could have concluded that Vojvodic represented the plaintiff when the alleged improvident settlement was signed. In fact, the plaintiff was represented by another lawyer at the time of settlement. We apologize for any negative implication on the reputation of lawyer Vojvodic which this article may have caused.

# social**media**

## LAWPRO continues the conversation: on Facebook



LAWPRO is on Facebook: stop by for a visit! In the fall of 2012, LAWPRO launched its own Facebook page. While our Twitter and LinkedIn channels highlight risk management content and company updates, the Facebook page showcases more of the softer side here at LAWPRO – with pictures from internal events, information and news in the industry and our corporate social responsibility initiatives. Take a look and like us at [www.facebook.com/LAWPROinsurance](http://www.facebook.com/LAWPROinsurance). Don't forget the TitlePLUS program has a Facebook page too! ■

Victoria Caruso is communications co-ordinator at LAWPRO.

## Social media profile: Victoria Crewe-Nelson



Victoria Crewe-Nelson  
AVP underwriting



In each issue of *LAWPRO Magazine* we feature a profile of one of our staff members who is active on social media.

**Time at LAWPRO:** One and a half years

Victoria has been on LinkedIn for six years – part of the first wave of members to join the site. When asked what Victoria thinks about LinkedIn, she responds:

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