

LAWPRO

magazine

MAY 2018 VOL 17.2

Annual Review

**2017
Financial
Results
Explained**

E&O Program
Repairs & Defenses
practicePRO Initiative
Rent Control
TitlePLUS Program
Corporate Social Responsibility



upcoming events

May 2, 2018

Law Society of Ontario
8th Annual Business Law Summit
Recent developments in D&O liability
Ray Leclair presenting
Toronto, ON

May 16, 2018

Barrie Real Estate Law Association
Luncheon CPD
Handling funds for real estate transactions
Ray Leclair presenting
Barrie, ON

May 17, 2018

Hughes Amys LLP Professional Development Day
Future of law and legal technology
Dan Pinnington presenting
Toronto, ON

May 22, 2018

TitlePLUS Title Insurance
Steps to closing a resale residential purchase
Mahwash Khan presenting
Toronto, ON

May 29, 2018

Ontario Bar Association
Your First Residential Real Estate Transaction
Top 10 real estate claims
Ray Leclair presenting
Toronto, ON

May 31, 2018

Law Society of Ontario
Professional Conduct & Practice
Your LAWPRO policy
Michael Kortess presenting
Toronto, ON

recent events

April 21, 2018

Canadian Bar Association
Immigration Law Conference
Practicing in the year 2020...what could your practice look like?
Ian Hu presented
Ottawa, ON

April 19, 2018

Canadian Bar Association
Immigration Law Conference
Claims of Incompetence of Counsel
Katie James presented
Ottawa, ON

April 18, 2018

Law Society of Ontario
15th Annual Real Estate Law Summit
Understanding the risks of the web and how to avoid them
Ray Leclair presented
Toronto, ON

April 26, 2018

Durham Region Law Association
Annual General Meeting
Cybercrime and the cloud
Ian Hu presented
Oshawa, ON

April 9, 2018

Durham College Law Clerk Program
Lawyers' professional indemnity insurance: What you need to know
Nora Rock presented
Oshawa, ON

April 23, 2018

Association of Ontario Land Surveyors
5th Annual Boundary Law Conference
The role of title insurance: What are expectations from title insurers when use of, and title to, the beach are disputed?
Ray Leclair presented
Mississauga, ON

March 26, 2018

Law Society of Ontario
Motor Vehicle Litigation Summit
After the event insurance: Ethical considerations
Ian Hu presented
Toronto, 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 us at practicepro@lawpro.ca, or call us at 416-596-4623.

LAWPRO
magazine



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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 malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LAWPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

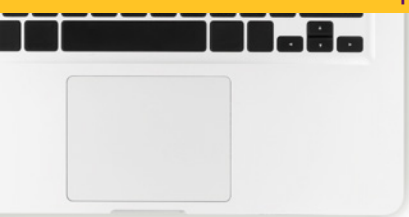
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FAQ: How do I determine if the new civil litigation levy applies?

The 2018 Policy changes included an increase in the civil litigation transaction levy amount:

- For files opened in 2017 or earlier, the levy is \$50, even if the proceeding is commenced in 2018.
- For files opened in 2018, the levy is \$100, except for matters that entirely pertain to family law issues for which there is no levy.
- If a family law matter was opened in 2017 or earlier, the \$50 levy continues to apply.

Please refer to the October 2017 issue of *LAWPRO Magazine* or lawpro.ca for more information.

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Retiring President & CEO



This is my last editorial for *LAWPRO Magazine*. After 10 years as CEO it is time for me to retire from LAWPRO. The title of CEO comes with a certain reputation. One knows that opportunities for growth and development will be offered but also great expectations will need to be met. I faced both to the best of my ability and am grateful for all that I learned, the people from across the country and the world I met, and even the challenges I faced.

I became President & CEO at the beginning of 2008, just prior to the crisis that rocked the financial world. At the time, the real estate market was being scrutinized, trust in financial institutions was being severely questioned and malpractice claims were on the rise. It was a challenging environment and I am honoured to have served this company through a decade of growth and opportunity.

As I hand over the reins to my successor, LAWPRO is a modern, accountable insurance company that can stand proudly among its peers. We have looked inward and evaluated what we stand for and the resulting Vision and Values Statement published in 2010 has provided us with a compass to guide our work. With our values of Professionalism, Innovation, Integrity, Service and Leadership as key touch points we created a template to pursue our vision: To be regarded as the preferred insurer in all markets and product lines in which we do business.

During my tenure, all LAWPRO programs celebrated significant anniversaries: the 20th anniversary of operating the E&O insurance program, 20 years running TitlePLUS title insurance – the only all-Canadian, bar-related title insurance product, 20 years offering Excess insurance to law firms in Ontario, and 15 years of the practicePRO program helping lawyers avoid claims. But above all else, I personally took seriously the responsibility to ensure a safe and healthy workplace for the amazing LAWPRO staff.

I have great faith in Dan Pinnington, who will bring his energy, experience, and vast knowledge to a company I cherish. What I most want to say is thank you – to employees, suppliers, the Board of Directors and the legal community that LAWPRO serves.

Kathleen A. Waters
Retiring President & CEO



Incoming President & CEO



As a young litigator in Niagara more than two decades ago, I had to report my first claim to LPIC (as it was then known). I remember my feelings like it was yesterday. It was a simple and preventable error – missing a notice period on a slip and fall. I felt embarrassed. I felt the other lawyers in the firm would think less of me. I felt badly about the extra hassle my client faced.

With the hindsight of 17 years of claims prevention work at LAWPRO, I now know that many lawyers make mistakes, and that many more lawyers face allegations of negligence in circumstances where no errors were made. Thankfully, in both cases, LAWPRO is there standing behind lawyers to set things right when a client suffers damages due to an error by their lawyer, and to defend the lawyer when no error was made or no damages were suffered by the client. More than 80 per cent of the time, we defend lawyers successfully, often with the assistance of our excellent external defence counsel. Less than 20 per cent of LAWPRO claims ultimately require an indemnity payment.

Over the years, I have had hundreds of interactions with lawyers. Some of these interactions were easy, providing lawyers with information on technology or practice management issues, or giving them a nudge to report circumstances that might give rise to a claim. Some of these interactions were challenging, in particular, talking to lawyers who have just been duped into transferring large sums of money out of their trust account, or someone dealing with personal issues. My LAWPRO colleagues have similar interactions on a daily basis. These conversations have shown us that Ontario lawyers face a wide variety of issues and challenges as they handle files and manage their practices and firms. Knowing and understanding the day-to-day circumstances lawyers face has helped us build an insurance company that responds in practical ways to the needs of Ontario lawyers. My goal is to keep LAWPRO approachable and responsive. We want to remain an organization that our insureds think of as a trusted associate they can turn to in the difficult and stressful time of dealing with a claim.

I am thrilled to have the amazing opportunity to serve as President & CEO of LAWPRO during this time of change for the legal profession. I thank Kathleen Waters for the extraordinary passion and service she showed over her 21 years with the company. She has been an incredible leader and mentor to me, as well as to the other members of our executive team and our amazing employees. In particular, I thank her for the work she has done to ensure a smooth transition.

LAWPRO is a strong and financially healthy company that is known beyond Ontario's borders. We have fantastic people on our team and our leadership on risk management, claims services, technology and title insurance is recognized across Canada and abroad. I will work to continue that leadership so LAWPRO can maintain responsive malpractice coverage and embrace change to help members of the profession succeed and thrive in these changing times. I am honoured to be the new President & CEO at LAWPRO and I look forward to serving the lawyers of Ontario.

Daniel E. Pinnington
Incoming President & CEO



Financial results explained

Income Statements

A | Net premiums: \$108.5 million

LAWPRO net earned premiums in 2017 were \$108.5 million. As expected, premiums from the mandatory insurance program were considerably lower than in 2016 (\$115.8 million) following a reduction in the annual base premium from \$3,350 to \$2,950. Nevertheless, they were still higher than the amount budgeted for the year (\$105.3 million). While the number of practising lawyer full-time-equivalents (FTEs) was as projected, transaction levy income was \$1.8 million higher than budget due to strong real estate levy collections. Finally, in 2017 the TitlePLUS program was able to maintain the solid level of insurance premiums achieved in the prior year.

B | Net claims: \$106.2 million

Incurred claims and adjustment expenses for 2017 were \$106.2 million. This represents an increase of \$5.5 million compared to 2016. The increase is related in part to the recent rise in claims count. After five years at the 2,500 level, the count has risen to well over 2,600 for Fund Year 2016 and more than 2,700 for the current policy period.

The discount rate used to value claims liabilities increased, at December 31, 2017, to 2.67 per cent; up from 2.40 per cent at December 31 of the previous year. In other words, given there was an increase in investment yields, reserves could be lowered as more investment income will be earned between collection of premiums and payment of claims.

C | General expenses: \$20.3 million

LAWPRO's general expenses of \$20.3 million in 2017 were higher than the 19 million

Statement of Profit or Loss

Stated in thousands of Canadian dollars

2017
Annual Report

Lawyers' Professional Indemnity Company

FOR THE YEAR ENDED DECEMBER 31		2016
Income		
	Gross written premiums	123,329
	Premiums ceded to reinsurers (note 11)	(7,386)
	Net written premiums	115,943
	(Increase) decrease in unearned premiums (note 10)	(167)
A	Net premiums earned	115,776
D	Net investment income (note 5)	17,409
	Ceded commissions	1,721
		134,906
Expenses		
	Gross claims and adjustment expenses (note 9)	101,707
	Reinsurers' share of claims and adjustment expenses (note 9)	(995)
B	Net claims and adjustment expenses	100,712
C	Operating expenses (note 15)	19,015
	Premium taxes	3,701
		123,428
	Profit (loss) before income taxes	11,478
	Income tax expense (recovery) (note 14)	
	Current	2,852
	Deferred	(13)
		2,839
E	Profit (loss)	8,639

Accompanying notes are an integral part of the financial statements.

incurred in 2016, but under the \$20.7 million budgeted. LAWPRO is proud of its success in maintaining an expense ratio of approximately 20 per cent, which compares favourably to the 28 per cent industry average for similar small insurance companies that don't pay commissions.

gains of \$8.2 million over the prior year's \$3.3 million result.

D | Investment income: \$20.5 million

Investment income in 2017 was \$20.5 million, \$3.1 million more than in 2016. Bonds values remained low, but were offset last year by strong results for equities. The company enjoyed an increase in realized

E | Net income: \$0.6 million

Largely as a result of the \$400 per insured premium reduction introduced for the 2017 policy year, LAWPRO experienced total net income of \$0.6 million in 2017, \$8.0 million less than in 2016. This result was consistent with what was budgeted for the year, as the company took steps to move its MCT score into its preferred range of 215-240 (read more about the MCT on the next page).



Statement of Comprehensive Income

Stated in thousands of Canadian dollars

2017
Annual Report

Lawyers' Professional Indemnity Company

FOR THE YEAR ENDED DECEMBER 31	2017	2016
Profit (loss)	\$ 616	8,639
Other comprehensive income (loss), net of income tax:		
<u>Items that will not be reclassified subsequently to profit or loss:</u>		
Remeasurements of defined benefit obligation, net of income tax expense (recovery) of (\$44) [2016: \$36] (note 13)	(122)	99
<u>Items that may be reclassified subsequently to profit or loss:</u>		
<u>Available-for-sale assets</u>		
Net changes unrealized gains (losses), net of income tax expense (recovery) of \$1,693 (2016: \$3,834)	4,694	10,632
Reclassification adjustment for (gains) losses recognized in profit or loss, net of income tax (expense) recovery of (\$2,256) [2016: (\$1,663)]	(6,256)	(4,612)
Reclassification adjustment for impairments, recognized in profit or loss, net of income tax expense of \$461 (2016: \$236) (note 5)	1,280	655
F Other comprehensive income (loss)	\$ (404)	6,774
Comprehensive income	\$ 212	15,413

Accompanying notes are an integral part of the financial statements.

F Other Comprehensive loss: (\$0.4 million)

The solid results that the Company experienced on the equity portion of its surplus investment portfolio were offset by adverse bond results due to the rising market yields observed during the year.

After including \$0.6 million in net income (see E for details), shareholder's equity was \$253.7 million at the end of 2017, up from \$253.4 million at the end of 2016 – for a year-over-year increase of \$300,000.

Minimum Capital Test: In the zone

2017 was the final year of a three-year phase-in period for new Minimum Capital Test (MCT) requirements. The MCT is designed to ensure that a financial institution's assets are sufficient to meet its present and future obligations.

Having successfully navigated the tough new capital adequacy rules introduced by regulators in recent years, LAWPRO found itself with a MCT in the low 240s, slightly higher than the preferred operating range

of 215 to 240 established by its Board. After careful consideration, the Company made the conscious decision to lower its base premium by \$400, a move which would lower its net MCT score into the upper portion of its preferred range. The financial results for 2017 confirm that this has had the desired effect: LAWPRO's MCT score on December 31, 2017 stood at 237 per cent. ■

After careful consideration, the Company made the conscious decision to lower its base premium by \$400, a move which would lower its net MCT score into the upper portion of its preferred range.

Claims report

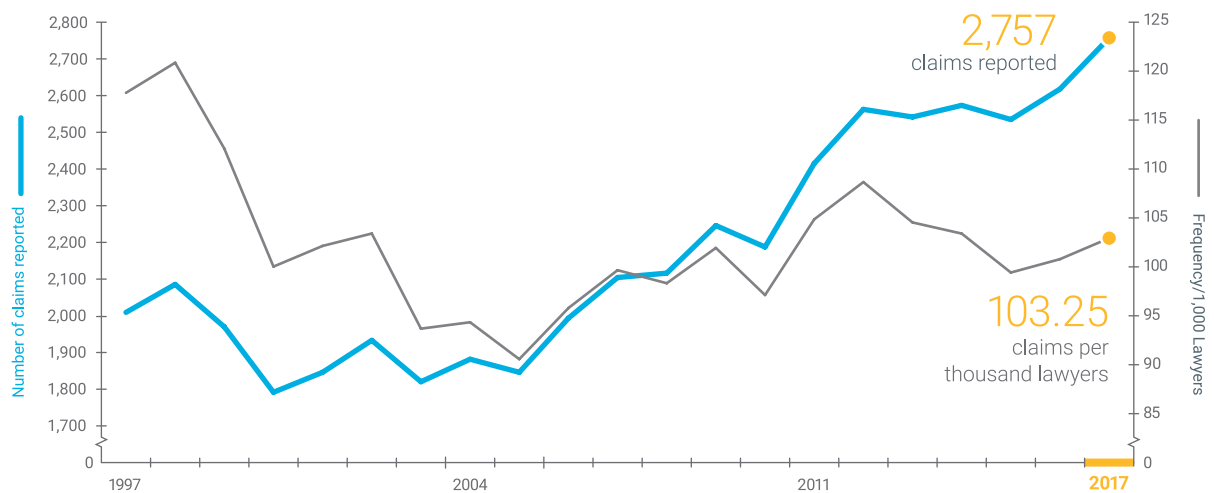
The slow erosion of old truths

Loyal readers of this magazine know that at this time of year we highlight the areas of law and the malpractice errors responsible for the largest share of claims. The highlight reel for 2017 does not forsake familiar leaders: litigation claims continue to lead the pack, and poor communication is still the easiest way to get sued by a client. But just outside the spotlight, claims pattern change is brewing in the form of gentle upward trends, both for areas of law and for causes of loss. These subtle trends have not escaped our attention, and you can expect to hear more about them in coming issues of this magazine.

Claims count and frequency

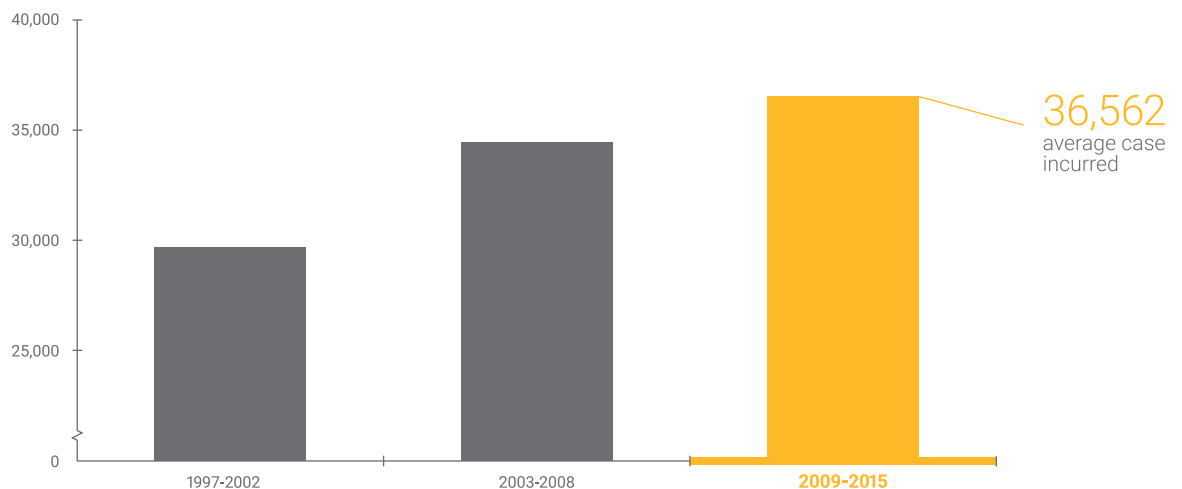
The annual new claims count continues to grow. As of February 28, 2018, there were 2,757 claims reported in 2017. It's important to keep in mind, however, that the number of lawyers in private practice has also grown. Claims frequency – the ratio between the number of practising lawyers and the number of claims – continues to hover close to the 100 claims per 1,000 insureds. In other words, while the overall cost of claims continues to be pushed upward, lawyers are not, on average, becoming more negligent.

Figure 1
Number of
claims reported
and frequency*



* By report year, as at
February 28, 2017

Figure 2
Average cost
per claim at 38
months after
start of year
in which claim
was reported*



* As at February 28, 2017



Claims by cause of loss

The investigation of newly-reported claims takes time. It can take up to a year or more for the causes of newly reported claims to come into focus. The figure below reports cause of loss trends to the end of fund year 2017, based on the information that was available at February 28, 2018.

We used to report that lawyers know the law and apply it correctly

And they (mostly) still do: only 14 per cent (by count) of claims reported in 2017 were based on a failure to know or properly

apply the law. However, 10 years ago, such errors accounted for 11 per cent of claims. The prevalence of this area as a cause of claims has grown in the interval – not enough to set off any alarm bells, but it still merits reflection. What's going on? Are efforts to contain fees putting the squeeze on legal research? Are lawyers becoming too isolated? We don't claim to know for certain, but we're paying attention.

Though time management errors have settled down as lawyers have adjusted to the amendments to Rule 48, inadequate investigation errors continue to show an upward trend. Problems with lawyer-client communication remain the most important cause of claims, accounting for 27 per cent of claims in 2017.

Figure 3

Reported claim count by cause of loss by fund year*

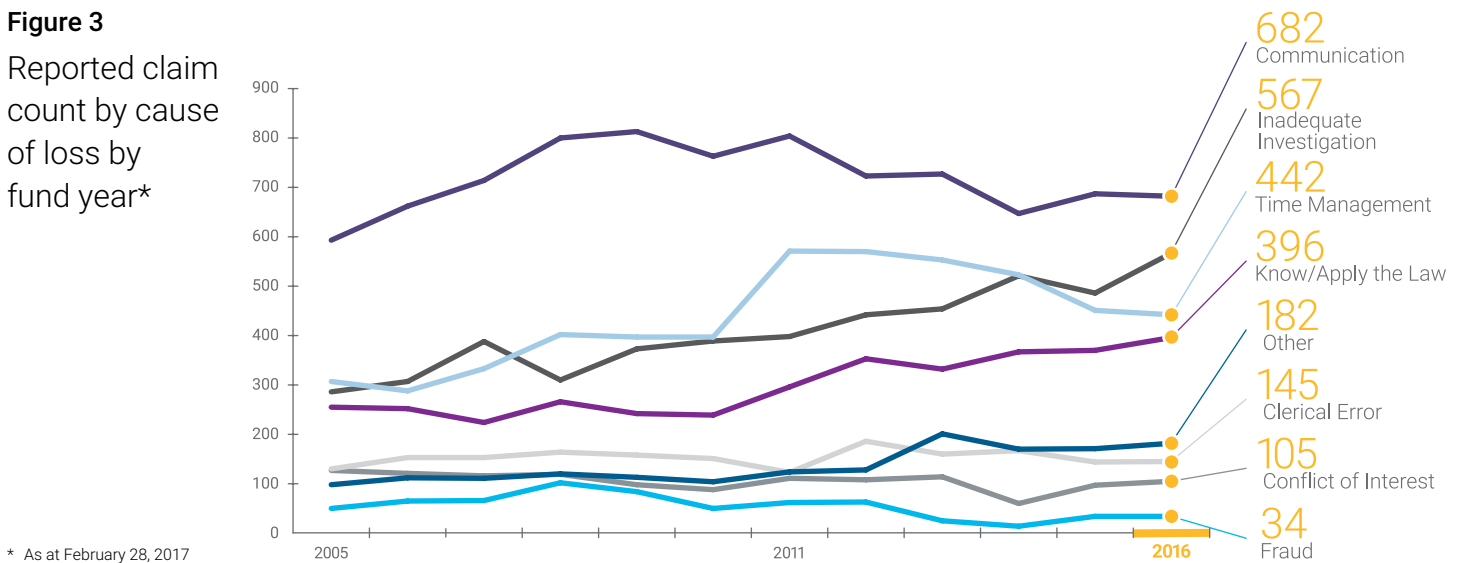
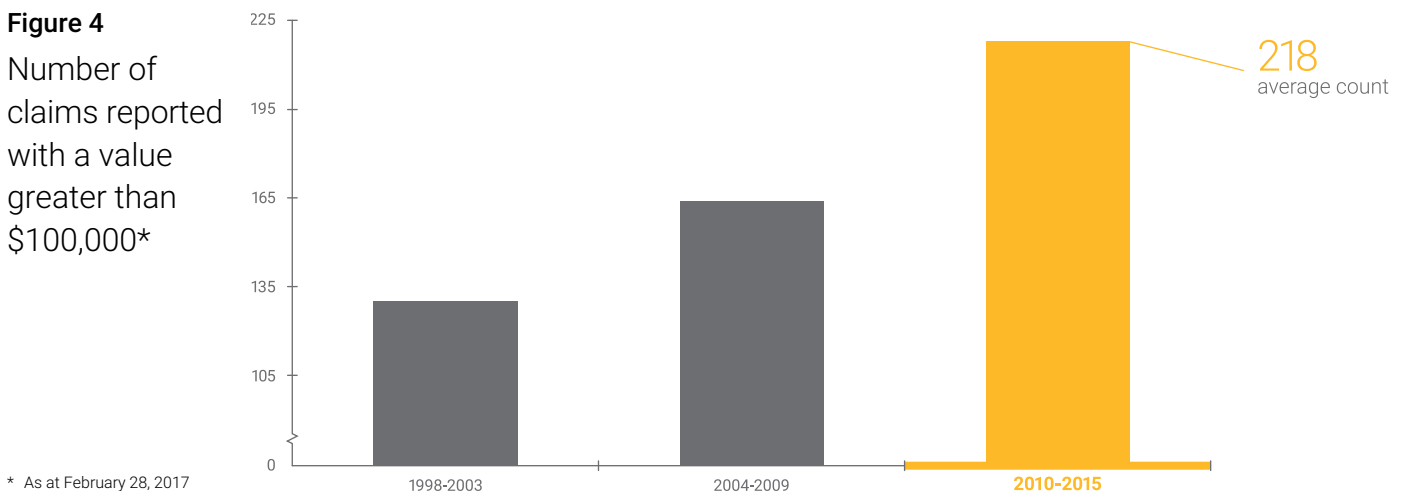


Figure 4

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



Claims creeping up in traditionally “safer” areas of practice

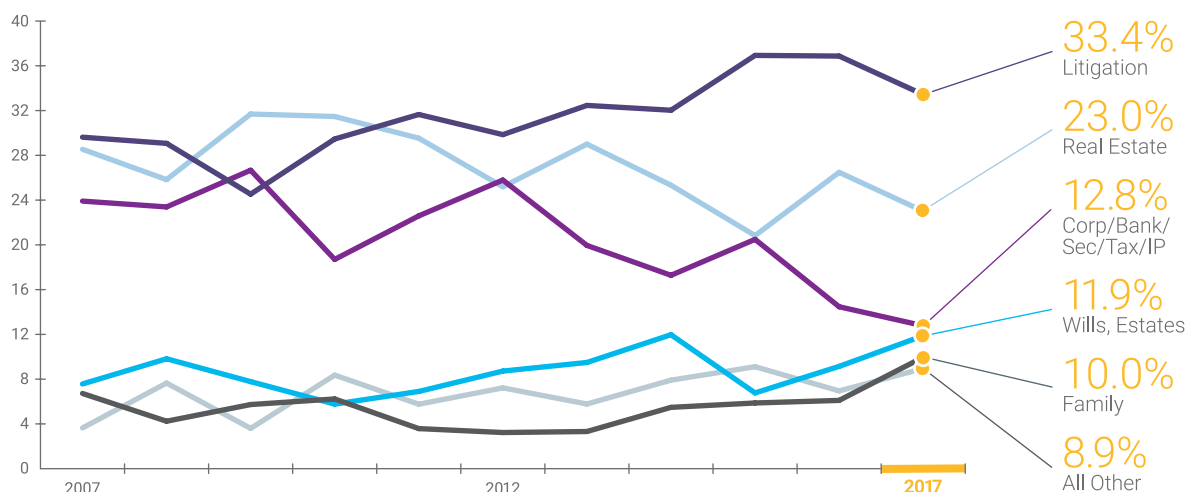
Litigation is the area of practice responsible for the highest count and cost of claims in 2017, with real estate not far behind. LAWPRO continues to monitor claim developments in these areas. However, as is demonstrated in Figure 5 below, there has been a gradual but noticeable upward trend in other claims areas, including family law and wills. Growth in the cost of claims in these areas may reflect increases in the value of real estate, especially in urban centres, and

growth in the number of wills and estates claims may be stimulated by an increase in the relative age of the overall population. As the “baby boomer” cohort begins to bequeath significant assets to the next generation, will drafting grows more complex: lawyers may be asked, for tax purposes, to create dual wills for individual testators, or to draft wills that reflect the needs of blended families, children from multiple unions, and other special situations. Sometimes, these efforts end in litigation. At LAWPRO, we are paying close attention to the growth in wills and family law claims so that we can develop appropriate risk management responses.

Figure 5

Distribution of claims by area of practice* (% of gross claims costs)

* As at February 28, 2017



Our claims handling report card for 2017

In 2017, 96 per cent of insureds who completed a satisfaction survey reported that they were satisfied with our efforts in resolving the claims. LAWPRO defense counsel received high approval ratings, with 86 per cent of insureds stating that they were satisfied with

our selection of counsel. The LAWPRO claims resolution process involves close collaboration between the insured, internal counsel and staff assigned to the file, and in some cases, external counsel.

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

96% said they were satisfied with how LAWPRO handled the claim.

87% said they would have the defence counsel firm represent them again.

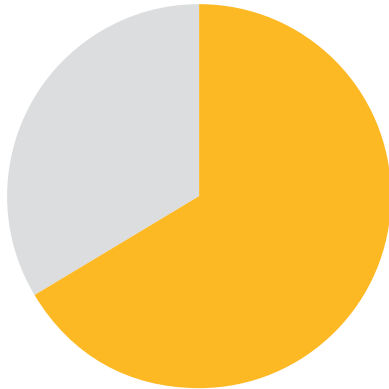
86% said they were satisfied with our selection of counsel.

85% said LAWPRO received good value for defence monies spent.

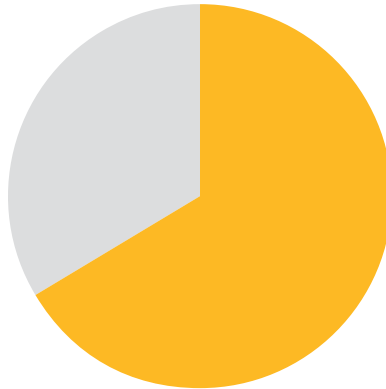
Managing claims costs requires that LAWPRO counsel make strategic dispute resolution choices. While many claims are resolved through negotiation, mediation or arbitration, we go to trial

where the circumstances warrant, typically in an effort to establish precedents that will protect lawyers in the long term. ■

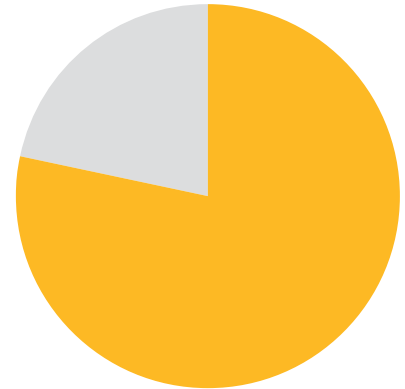
Here is a summary of our litigation results in 2017:



Succeeded in
2 out of 3
matters that went
to trial and for
which a decision
was rendered



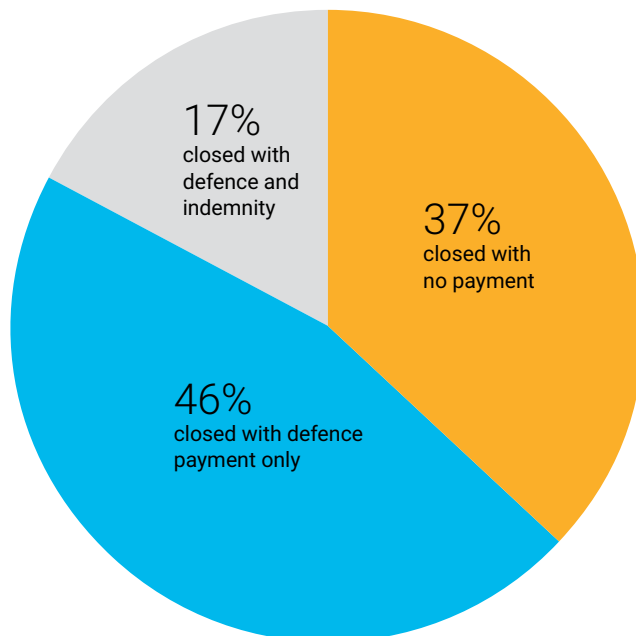
Succeeded in
2 out of 3
appeals argued



Won
22 out of 28
summary judgment
motions completed

Figure 6

Claims by
disposition
(outcome)



Coverage

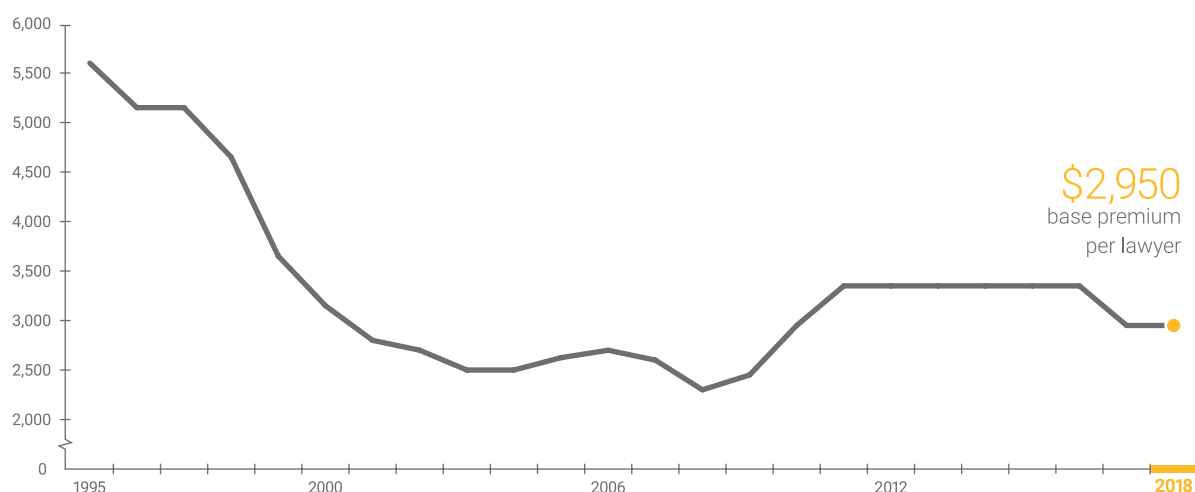
Lowered premium proves successful; maintained for another year

For the 2017 professional indemnity insurance renewal, LAWPRO introduced a \$2,950 base premium, a \$400 reduction from the year prior.

Despite the lower premium, the company was able to meet its claims obligations on a roughly “break-even” basis – an approach made possible by the achievement of a robust MCT ratio (see page 5 for more details) in the past few years. LAWPRO’s ongoing success in controlling growth in claims handling expenses means that the \$2,950 base premium was offered for the 2018 renewal as well.

Figure 7

Base premium per lawyer



Premium reduced by \$400 for the 2017 policy year

By early 2016, it had become clear that the upward trend in claims growth seen in the four or five previous years had begun to abate. This factor, as well as the company’s strong fiscal performance in 2015 and 2016 made it reasonable and appropriate for LAWPRO to introduce a premium reduction for the 2017 year. The premium was set at \$2,950, down from \$3,350 the year before. LAWPRO experts were confident that the lower premium would appropriately recognize any uncertainties in emerging claims experience and economic conditions, and would allow the program to operate on a self-sustaining basis for 2017.

Other program changes for 2017

Seconded lawyers face different risks than either employed corporate counsel or lawyers in traditional private practice. For 2017, the program policy was clarified to explicitly exclude claims brought

by corporate clients against seconded lawyers for professional services provided while under secondment with them. This exclusion applies whenever the claimant meets the definition of a “corporate employer” under the Program Policy. The policy was also amended to extend the \$250,000 per claim and in the aggregate defence-only coverage under the endorsement for “Claims brought by corporate employers” to include coverage for seconded lawyers in those circumstances.

Prior to 2017, lawyers working for government agencies created to improve access to justice by providing services to members of the public did not qualify for exemption because their practice was not restricted “for and on behalf of the employer.” However, LAWPRO has found that these lawyers are at a very low risk for claims compared to lawyers in general private practice. To reflect this, a new premium discount equal to 75 per cent of the base rate was introduced in 2017 for lawyers employed by designated government agencies. These lawyers were also made exempt from payment of the civil litigation transaction levies.



Another change made for 2017 was to the circumstances under which LAWPRO is permitted to report insured conduct to the Law Society of Ontario. These reports are infrequent, averaging four or fewer each year in recent years. The reporting terms were changed to reflect significant changes to Rule 7.1-3 of the *Rules of Professional Conduct*.

Finally, to minimize coverage gaps for lawyers who miss the deadline for renewing their policies, the renewal process was amended to allow LAWPRO to reinstate most program options previously elected by insureds that would otherwise have been removed when no fully completed renewal application for Policy coverage was received when due.

Coverage option participation rates

The LAWPRO program premium is customized to respond to a variety of practice circumstances. New lawyers, part-time practitioners, and lawyers who restrict their practice to criminal and/or immigration law pay reduced premiums, while lawyers exposed to additional risks, or who have stopped practising but want enhanced run-off protection can tailor their coverage accordingly. Figure 8 provides an overview of lawyer participation in various coverage options:

Figure 8

Coverage option	No. of lawyers participating as of Jan. 31, 2018	No. of lawyers participating as of Jan. 31, 2017
New call discount 20 to 50 per cent base premium discount for those called in the last one to four years	5,090	5,028
Part-time practice 50 per cent base premium discount for eligible lawyers	2,072	1,922
Restricted area of practice option 50 per cent base premium discount for immigration/criminal law practitioners	1,649	1,611
Innocent Party buy-up Increase in Innocent Party sublimits up to as much as \$1 million per claim/aggregate	3,508 (based on \$125/lawyer)	3,432 (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	1,326	1,182
Real Estate Practice Coverage Required for all lawyers practising real estate law in Ontario. Sublimit coverage of \$250,000 per claim/\$1 million aggregate	8,356	8,132

Service

Easy-to-navigate online processes backed by knowledgeable Program Coordinators

LAWPRO's Underwriting & Customer Service (UCS) Department handles applications and renewals for the primary professional indemnity insurance program, which provided coverage to over 26,700 insureds in 2017. Over the past few years, LAWPRO has been fine-tuning the My LAWPRO online portal to make it easy and convenient to renew insurance online. We recognize, however, that when making changes to your practice you may have questions about your coverage. For this reason, our team of Program Coordinators is trained to provide support when needed.

Insureds communicate with our UCS Department for a wide range of reasons, including obtaining advice about coverage options, needs, and eligibility. In 2017, the department, which provides services in both English and French, handled approximately 42,000 telephone calls and reviewed 24,566 written communications.

Service initiatives in 2017

Each year, the UCS Department undertakes an analysis of the previous year's renewal season processes to identify areas of potential improvement. In response to that analysis, a number

of initiatives were undertaken by the UCS Department in 2017. These changes were implemented to provide better service and to ensure that LAWPRO fully meets its obligations in relation to the Law Society insurance program.

2017 initiatives included:

- updating the firm renewal filing process to incorporate credit card tokenization functionality;
- making it possible for designated government agencies to file a single renewal application for policy coverage for all members of their agency online, with appropriate discounts;
- investigating system requirements for the provision of a Certificate of Insurance for those firms carrying Excess coverage with LAWPRO;
- making changes to programming for the Claims History Surcharge to improve the efficient application of the surcharge; and
- updating internal systems to support the earlier identification of insureds' language communication preferences. ■

Request and receive proof of coverage online

You can request and receive a Certificate of Insurance to provide to a client, a Law Society or anyone else via lawpro.ca. Login to My LAWPRO and go to the Primary Policy Documents tab.

This functionality allows you to obtain proof of coverage without having to contact LAWPRO Customer Service. My LAWPRO is available 24 hours a day by entering your Law Society number and confidential online password (follow the online instructions to reset or request a password).

Firms can also request proof of coverage for all or some of their lawyers at My LAWPRO under the Primary Policy Documents tab by logging in using the firm number and firm's master password.

Now, firms with Excess coverage in place can also log into My LAWPRO under the Excess Coverage tab to obtain proof of Excess coverage with LAWPRO. ■

Reminder

For your credit card security, you must log into your secure My LAWPRO account at lawpro.ca and enter your credit card details and instructions when paying premiums or levies by credit card. LAWPRO is unable to accept credit card numbers or an updated expiry date verbally or in writing via email, fax or other mail.



Repairs: Putting things right

for our insureds in 2017

The ideal way to handle errors is to repair them before they can cause any harm. Claim repairs have the potential not only to limit costs to the insurance program, but also to restore clients' faith in the legal profession and to protect lawyers' reputations. LAWPRO counsel repair claims in all areas of law, using a wide range of strategies. For instance, our counsel have: taken steps to remedy litigants' failure to comply with the *Rules of Civil Procedure*; demonstrated that claims are *not* statute barred; added new defendants despite initial findings that it was too late; rectified documents; and, argued issues of contractual interpretation.



Contractual interpretation

In a case about the interpretation of a title insurance policy,¹ the title insurer failed in its attempt to deny coverage to a lender on the basis that the lender's solicitor disbursed the mortgage proceeds to the borrower's solicitor "in trust," rather than to the borrower directly. The court found that Law Society requirements permit this arrangement and that it is common practice among conveyancing solicitors. Furthermore, the title insurance policy did not expressly forbid this manner of payment.

Regularizing service of statements of claim

LAWPRO counsel have salvaged at-risk cases by obtaining orders regularizing service. In one instance, turnover in counsel employed by a firm obscured the fact that a statement of claim had been improperly served (by fax). LAWPRO was successful in convincing the court that the plaintiff ought not to be prejudiced by the lawyers' inadvertence, and validated the service *nunc pro tunc* (retrospectively).² In two other cases,³ the courts extended the time for serving statements of claim *nunc pro tunc*.

Setting aside default judgments

A default judgment granted at an undefended trial was set aside. The defendant received no notice of the trial, and the plaintiff failed to make full and fair disclosure to the Court.⁴

Restoring actions to the trial list

A claim arose when an action was struck from the trial list in December, 2014.⁵ The defendants initially agreed to restore the action to the trial list, but then withdrew their consent. The action was commenced in April 2010, examinations for discovery were completed by November, 2010, and then the action stagnated because of the plaintiff's impecuniosity.

The court found that the plaintiff adequately explained the litigation delay, and that the defendants, who had never complained about the pace of litigation, would suffer no compensable prejudice as a result of the delay.

¹ 2017 ONSC 890

² 2017 ONSC 6673

³ 2017 ONSC 3711, 2017 ONSC 1112

⁴ 2017 ONSC 2697

⁵ Court File No.: CV-10-1445-0000 (unreported). PDF copy available from debra.rolph@lawpro.ca. See also 2017 ONSC 1742

Fighting dismissals at status hearings

Attempts to revive long-dormant matters at status hearings have met with mixed results. In one instance,⁶ Master McGraw dismissed a plaintiff's motion to extend the time to set its action down for trial. The action was commenced in 2001, and had been dormant for 10 years. The defendant's cross-motion to dismiss the action under Rule 24 was allowed. In another,⁷ Master Pope declined to dismiss the plaintiff's action at a 2017 status hearing, notwithstanding that the action was commenced in September, 2008. The defendants were not prejudiced by the delay, and they did little to move the action along.

Non-compliance with timetables

While the Rules permit the use of mutually-agreed timetables to hold off the dismissal of actions, Rule 60.12 affords the court some discretion in enforcing the "consequences." In a LAWPRO repair matter,⁸ the plaintiff consented to a preemptory timetable, and to an order entitling the defendant to dismiss the action without notice for non-compliance with that timetable. Master Mills declined to dismiss the plaintiffs' action on that basis. She also set aside the Registrar's dismissal of the action, and she declined to dismiss the action for delay under Rule 24, on the grounds that plaintiffs should not suffer because of their counsel's inadvertence.

Setting aside administrative dismissals

In a matter involving a numbered company's lawsuit against a bank,⁹ Heeney, J. set aside the Registrar's dismissal order. The changes to Rule 48.14, effective January 1, 2015, were a significant factor. The new rule provides that actions are to be dismissed for delay only five years after the action is commenced. The Rules Committee evidently felt that five years is not prejudicial delay. Less than five years had passed since this action was commenced.

In another matter, where the Registrar dismissed an action on the basis that two years had passed since it was struck off trial list – despite there being no documentation in the court records of the date on which the action was struck off¹⁰ – Master Jolley set aside the Registrar's administrative dismissal.

Finally, LAWPRO was successful in having a matter restored to the trial list where the defendant had early notice of the accident, the plaintiff had always intended to prosecute the action, and the delay, based on an overlooked set-down date, was adequately explained.¹¹

Amendments to pleadings

Where problems with pleadings stand in the way of litigants' exercise of their rights, LAWPRO is often asked to seek amendments. In one matter, a plaintiff was allowed to add a dog owner as a defendant more than two years after the plaintiff was bitten, because the plaintiff was initially led to believe that the dog was owned by the added defendant's boyfriend.¹² In another matter, amendments to a statement of claim were allowed after the limitation period had ostensibly expired, where the amendments did not constitute new causes of action.¹³

In an unreported case,¹⁴ Glithero, J. ordered that three individuals be added as defendants in an action claiming damages for assault, even though the motion was launched just over three years after the assault occurred. The plaintiff's brain injuries sustained in the assault impacted his ability to discover his claims. The added defendants were given leave to plead limitation defences.

One repaired case¹⁵ considered the date on which a minor is represented by a litigation guardian for the purpose of ss. 6 and 8 of the *Limitations Act 2002*. The Court of Appeal held that the limitation period began to run against the proposed defendant when the litigation guardian issued the statement of claim on the minor's behalf. On that date, the plaintiff's mother held herself out to be the litigation guardian. The application to add the city in which the accident happened as a defendant was dismissed, because timely notice under s. 44(12) of the *Municipal Act* had not been given to it. The relevant 10-day notice period also ran from the date that the statement of claim was issued against the motorists, but the city was not given notice until nearly one year later.

Misnomer

LAWPRO counsel convinced the Court of Appeal to use the law of "misnomer" to permit a plaintiff to properly plead a representative action against a labour union after expiration of a limitation period.¹⁶ In considering whether to grant relief, a court may take the defendants' "tactical conduct" into account – in this case, waiting until the limitation period had expired before moving to dismiss the claim as a nullity, after having fully participated in the litigation up until that point. The Court of Appeal noted that the concept of "nullity" is to be narrowly interpreted, or avoided.

⁶ 2017 ONSC 2645

⁷ 2017 ONSC 3784

⁸ 2017 ONSC 3186

⁹ 2017 ONSC 6943 this judgment does not appear on CanLII. PDF copies are available from debra.rolph@lawpro.ca

¹⁰ 2017 ONSC 7582

¹¹ 2017 ONSC 5098

¹² 2017 ONSC 4074

¹³ 2017 ONSC 4740

¹⁴ C-370-12, October 30, 2017. PDF copy available from debra.rolph@lawpro.ca

¹⁵ 2017 ONCA 385

¹⁶ 2017 ONCA 321 Leave to appeal to the SCC has been granted



Other limitations issues

The Court of Appeal removed road-blocks for plaintiffs by overturning three limitations decisions and affirming two others. In the first of the four cases, the court reversed a finding that an environmental contamination claim was statute barred.¹⁷ The finding was made in the court below on the basis of the date by which the plaintiff began to suspect contamination. The Court of Appeal held instead that mere suspicion that a property might be contaminated does not start the limitation period running.

The second overturned case was a \$500,000 personal injury matter arising from a slip and fall in a residential rental unit. The Court of Appeal held that the claim was not governed by the one-year limitation period in s. 29(2) of the *Residential Tenancies Act*.¹⁸ Because the damage claim exceeded \$25,000, the Superior Court, rather than the Landlord and Tenant Board, had jurisdiction. The one-year limitation period in the *Residential Tenancies Act* did not apply in the Superior Court action.

The third case involved the appeal of a lower court ruling that a father's action against his daughter and two other defendants was statute-barred.¹⁹ The father sought to prove that the defendants were holding assets (taxi licences) for him in trust. The claim was discovered in 2002. Under s. 43(2) of the *Limitations Act*, in force at that time, there was no limitation period for such actions;²⁰ as a result, the Court of Appeal held that the action had been commenced in time.

Earlier in the year the Court of Appeal affirmed a lower court decision that held that an estate trustee was not entitled to rely on s. 38(3) of the *Trustee Act* to defeat a testator's former wife's claim against the estate.²¹ The trustee had fraudulently concealed material facts relating to the claim against the estate. The court also affirmed a lower court decision finding that the two-year limitation period for a mortgagor's claim for improvident sale ran from the date the sale closed, and not from the date of signing of the agreement of purchase and sale.²²

Trial courts also grappled with discoverability issues in 2017. In another case about suspicion versus knowledge of harm,²³ Lemon, J. refused the defendants' motion to dismiss the plaintiff's claim as statute barred. The Court declined to treat the plaintiff's "demand letter" as proof that it had discovered the claim. The fact that subsequent investigations confirmed what the plaintiff already suspected did not mean that the limitation period ran from the date of the initial suspicions.

In a motor vehicle accident matter,²⁴ the court summarily dismissed the plaintiff's action against his father as statute barred. The plaintiff and his solicitor knew or should have known shortly after the accident that the plaintiff's father owned the motor vehicle in which the plaintiff was injured.

Interpreting rule 30.1.01(6)

The Divisional Court held that a lawyer defending a civil claim for sexual assault did not breach the implied undertaking rule by providing the plaintiff's discovery evidence to his client's criminal lawyer for impeachment purposes. Rule 30.1.01(6) of the *Rules of Civil Procedure* permits this. No judicial preclearance is required.²⁵

Rectification of wills

The Court of Appeal upheld Mesbur, J.'s order rectifying a testator's will to reflect the instructions the testator gave to the solicitor who drew it. The solicitor's error arose from drafting the will in accordance with a proposed corporate reorganization which was never implemented, but rather superseded by a slightly different reorganization plan.²⁶

Conclusion

As soon as a claim is reported, LAWPRO counsel begin assessing potential repair strategies, bringing to bear many years' worth of experience in performing this kind of work. Early reporting of claims maximizes the chances that they can be repaired. Successful repairs can benefit the individual insured, who may be able to avoid a claims history surcharge; and they also support the profession as a whole in that they help limit the cost of operating the insurance program. As you can see from these selected summaries, LAWPRO's "repair" portfolio is extensive and varied: from setting aside administrative dismissals, to adding parties to actions, to rectifying wills – there is no shortage of effort expended on behalf of our insureds. ■

Debra Rolph is Director of Research at LAWPRO.

¹⁷ 2017 ONCA 16

¹⁸ 2017 ONCA 442

¹⁹ 2017 ONCA 957

²⁰ R.S.O. 1990 c. L-15

²¹ 2017 ONCA 9, dismissing appeal from 2016 ONSC 2377

²² Unreported endorsement, CV-10-410353, May 1, 2017, affirmed 2018 ONCA 6

²³ 2017 ONSC 6683

²⁴ 2017 ONSC 6328

²⁵ 2017 ONSC 5566 (Div.Ct.)

²⁶ 2017 ONCA 831



In defense of our insureds

LAWPRO defends actions against lawyers and licensed paralegals practising in every area of the law. In our February issue, we highlighted 2017 civil litigation claims; refer to that issue of the Magazine at practicepro.ca/lawpromag for another look at those.

Family law

A plaintiff hired a lawyer to handle certain financial matters, including the drafting of a prenuptial agreement, in preparation for her upcoming marriage. It eventually came to light that her new husband was not the person he held himself out to be; in fact, he was a convicted fraudster, and had convinced the plaintiff to transfer significant money (including the proceeds from the sale of her house) to him. The plaintiff sued the lawyer along with other defendants, alleging that they had a duty to protect her from her spouse's wrongdoing. With regard to the lawyer, the plaintiff alleged that a background check before the marriage might have disclosed that the husband was a convicted fraudster. In granting the lawyer summary judgment, the court accepted LAWPRO counsel's argument that the lawyer could not have been expected to investigate the background of a client's future spouse without instructions to do so. Furthermore, the plaintiff had paid out almost all of her money to the fraudster before the lawyer was retained.¹

In another case, this one dealing with child custody, the Court of Appeal held that ineffective assistance of counsel as a ground of appeal is not a springboard from which an appellate court engages in a retrospective analysis of every aspect of a lawyer's conduct. This is more properly done via a civil negligence action or a Law Society disciplinary investigation.² The solicitor had represented her client at an Ontario Court of Justice proceeding, where the client lost custody of her daughter. She also represented the client for a further six month period, during which time they launched an appeal of the custody decision. The mother then retained new counsel. The Superior Court judge who heard the appeal ordered costs against the solicitor because of her "ineffective assistance" to her client. The Court of Appeal set aside this costs order.

Corporate and commercial law

A women's fitness business brought an action against its former lawyer. The business became insolvent and hired as its lawyer the spouse of an employee. As part of a reorganization, the lawyer arranged for the sale of the business's assets to another fitness company. The solicitor also gave loans and guarantees personally to the business to permit it to rent new premises. One of the business's two principals (a pair of sisters) later sued the lawyer, his wife, and his firm, alleging conversion of the business's assets.

In dismissing the action, Perell, J. found that while the lawyer had a fiduciary relationship with the business, he did not take advantage of his position or profit at its expense. The sale of assets was better than could have been achieved by an agreement with a third-party. This litigation merely proved the old adages that no good deed goes unpunished, that a cobbler's children have no shoes, and go slow and you'll get there faster.³

Another successful summary judgment involved a claim alleging negligent independent legal advice. A businessperson who was being sued on a series of mortgages and guarantees he signed counterclaimed against the lawyer he consulted for ILA prior to signing the documents. The court found that regardless of the business merits of the transactions, the businessperson understood their legal import. Therefore, even if the lawyer had failed to meet the standard of care for giving ILA, as was alleged, there was no causal connection between the ILA and the businessperson's obligation to pay as provided by the terms of the mortgages and guarantees. The court held that in commercial transactions between arm's-length parties, there is no requirement that a lawyer providing ILA advise on the merits of the proposed transaction.⁴

¹ 2017 ONSC 6140

² 2017 ONCA 931, allowing appeal from 2017 ONSC 3188

³ 2017 ONSC 4158

⁴ 2017 ONSC 2699 The solicitor received substantial indemnity costs. 2017 ONSC 4545



Finally, in the continuing saga of a large-value lawsuit against a law firm based on alleged conflict of interest in advising two sets of differently-placed car dealership franchisees, the Ontario Court of Appeal reduced the amount of the judgment against the firm from \$45 million to \$38 million, but otherwise affirmed the trial judgment, which arose from the lawyers' failure to protect the interests of certain franchisees.⁵

Tax law

In a case based on allegations of negligent legal advice with respect to the creation of a family trust, the Superior Court of Justice granted the plaintiffs partial summary judgment against a law firm, finding that its admitted negligence caused the plaintiffs' loss. Outstanding issues of breach of fiduciary duty and the determination of damages would be decided at a later trial, as would the firm's third-party claim against accountants involved in the transaction.⁶

Real estate law

A lawyer unsuccessfully sought summary dismissal of a mortgage lender's claim against him.

The lawyer had provided independent legal advice to the putative borrower, and signed a certificate of ILA accordingly. The mortgagor was an imposter. The lender had no solicitor. The plaintiff's expert, Reuben Rosenblatt Q.C. stated that reviewing a driver's licence is not enough in these circumstances. Additional inquiries should have been made to confirm that the individual in question was actually the owner of the property. The judgment does not say what these additional inquiries should have been.⁷

In a case that turned on a misrepresentation about what had happened to a vendor's funds set aside to satisfy a potential tax liability, the vendors sued the purchaser's lawyer, alleging negligent or fraudulent misrepresentation. Gomery, J. struck out the vendors' claim for negligent misrepresentation, though the allegations based on fraudulent representation were allowed to proceed. An important factor in striking out the claim was the fact that the vendors were represented by their own solicitors, who were also sued in the same action.⁸

Litigation

We highlighted some of the most important litigation matters we defended last year in our February issue, which can be found online at practicepro.ca/lawpromag. There are four other matters of interest not included in that overview:

FAILURE TO ADVISE

In our February issue, we reported on a case about a law firm that obtained, by summary judgment, an order for payment of its legal fees in the amount of \$182,569.63 and an order dismissing a former client's counterclaim alleging negligence against it.⁹ That case has since been overturned on appeal¹⁰ and the counterclaim has been ordered to go to trial. In overturning the lower court decision, the Court of Appeal disagreed with the motions court finding that the plaintiffs had been made aware of the value of the damages available and the risks and costs of litigation.

RULE 57.07

Rule 57.07 of the *Rules of Civil Procedure* allows a court to award costs against a lawyer personally where the lawyer "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default." LAWPRO defended a claim in which a party was pursuing such costs. Hainey, J. declined to award Rule 57.07 costs,¹¹ relying on the stringent test set by the Supreme Court of Canada in *Quebec (Criminal and Penal Prosecution) v. Jodoin*.¹² In the matter involving the LAWPRO insured, the lawyer had failed to ascertain that her corporate clients had been dissolved, and never reinstated to the corporate register. However, her error could not be characterized as having "seriously undermined the authority of the courts or seriously interfered with the administration of justice." She did not "abuse the judicial system" or deliberately engage in "dishonest or malicious misconduct."

UNREPRESENTED CLAIMANTS

The cost of defending actions brought by unrepresented plaintiffs is vastly out of proportion to the value of these claims. LAWPRO recently obtained summary dismissal of an unrepresented plaintiff's action against three solicitors, but at a cost approaching \$250,000.¹³

VEXATIOUS LITIGANTS

LAWPRO counsel was successful in having a claimant declared a vexatious litigant on the basis of s. 140(1)(b) of the *Courts of Justice Act*. Section 140(1) (b) allows for the designation "vexatious litigant" even though the litigant conducted only ONE claim in a vexatious manner.¹⁴

Conclusion

LAWPRO is called upon to defend claims in a wide variety of practice contexts. Current concerns are the lack of predictability with summary judgment applications, and the costs associated with a large number of unrepresented claimants. ■

Debra Rolph is Director of Research at LAWPRO.

⁵ 2017 ONCA 544, allowing in part appeal from 2015 ONSC 3824

⁶ 2017 ONSC 6

⁷ 2017 ONSC 3384 PDF copies are available from debra.rolph@lawpro.ca

⁸ 2017 ONSC 7191

⁹ 2017 ONSC 3391

¹⁰ 2018 ONCA 164

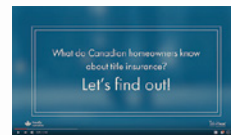
¹¹ 2017 ONSC 3177. PDF copies available from debra.rolph@lawpro.ca

¹² 2017 SCC 26

¹³ 2017 ONSC 7451

¹⁴ 2017 ONSC 4846

practicePRO program year at a glance



JANUARY

What do homeowners really know about title insurance? We stopped commuters in downtown Toronto to ask. The results were amusing and illuminating, and the video is available on LAWPRO's YouTube channel as part of our public awareness campaign to educate the public on the role of lawyers.



FEBRUARY

We released two issues of LAWPRO Magazine. The student issue, *Not your mother's law career* provided tips on making the transition from student to lawyer in a changing legal world. *The good decision/bad decision* issue of the Magazine examined the ways in which understanding how the mind works can help lawyers improve their practice and avoid claims.



MARCH

The IP malpractice claims fact sheet. Find quick claims facts, the main causes of claims against lawyers, hot topics, tips for avoiding claims, and links to practicePRO resources. LAWPRO claims fact sheets are available for many areas of law. If you are organizing a continuing professional development session, they are great program material and can be used as a program insert.



APRIL

Our always up-to-date NRST/LTT frequently asked questions page on AvoidAClaim.com was created in response to sudden changes to tax and residency rules that caught the real estate bar by surprise. We worked with contacts at the Ministry of Finance to clarify the new rules and continuously update the information.



MAY

Inspiration & resources for new lawyers. This webzine was sent to recently called lawyers and provided articles and tips to help get their practice off on the right foot. Check out the practicepro.ca New Lawyer Resources page for more information.



JUNE

Reflections on technology changes in real estate practice. This article examines how rapid advances in technology are changing the practice of real estate law. Some developments are challenging (e.g., pressure from clients for more electronic services), while others can help lawyers avoid claims (e.g., software that facilitates better time management and communication).



JULY

Risk management resources for corporate/commercial lawyers. This webzine provided an overview of the latest claims trends and practice tips from our corporate and IP malpractice fact sheets, our commercial transactions checklist and a look at changes to escheats and PPSA law.



AUGUST

Managing change was the theme of this issue of *LAWPRO Magazine*. It looked at how technology is changing the practice of law, how lawyers can make changes in their day to day habits, and how to smoothly make the biggest change of all: retirement. Also featured was an in-depth look at the rising cost of litigation claims.



SEPTEMBER

The refreshed **practicepro.ca website was launched** with a modern look and layout. Articles and resources are easier to find, available in a web-friendly and accessible format and easier to share on social media.



OCTOBER

A record 350 CPD programs were approved for the **LAWPRO Risk Management Credit** for the 2018 policy year. With a combined attendance of over 52,000 the Credit ensures that risk management and claims prevention content is widely available to Ontario lawyers when they attend CPD programs.



NOVEMBER

The **Criminal law in context webzine** provided practical advice for managing risks both to clients dealing with the criminal justice system and to the lawyers representing them. It gave an update on the Gladue principles for sentencing Indigenous clients, advised lawyers to promptly report allegations of ineffective assistance of counsel, and provided a list of resources to better navigate cases where criminal and family law intersect.



DECEMBER

Presentations and speaking engagements by LAWPRO staff passed 100 in 2017 for the first time. Staff spoke at CPD events, law firms, and conferences on topics such as claims trends, practice management, cybercrime and other issues of concern to LAWPRO insureds. ■

Everything old is new again:

Will the return of a broader rent control regime haunt the Ontario real estate bar?

For decades the existence of rent control has posed a risk to Ontario real estate lawyers acting on the purchase and mortgaging of residential rental property. The range of affected properties is immense: From a basement apartment to a rented single family house to the largest multi-residential complexes in the province, many real estate files can involve residential rental issues like rent control.

The *Rental Fairness Act, 2017* introduced amendments to the *Residential Tenancies Act, 2006* (“RTA”). The amendments were largely focused on expanding rent control and ensuring the continued availability of affordable and predictable rentals in Ontario. The changes forced many landlords of small and large residential real estate properties to pay attention to rent control for the first time from an operational perspective. They also constitute a red flag for lawyers involved in the conveyancing of residential real estate where tenancies are in place or anticipated.

Exemptions disappear and lawyer risk increases

The primary element of the *Rental Fairness Act* was a removal of the exemptions to rent control for private rental units. Under the earlier legislation, the following rental units were not generally subject to rent control (except for rules related to increase notices and anniversary dates):

- (1) unit in a building no part of which was occupied for residential purposes before November 1, 1991,
- (2) unit never occupied before June 17, 1998, or
- (3) unit never previously rented since July 29, 1975.

Those exemptions are now repealed, and such units are subject to the rent increase guidelines that dictate how much a landlord can increase the rent charged to a tenant. For 2018, the guideline amount is 1.8 per cent.

A property’s cash flow has a direct effect on its value and the ability of its owner to finance the property. Although it is tempting to argue that obtaining good title to the land is the only obligation of a real estate lawyer, case law suggests that there is also an obligation to investigate the reliability of the cash flow from a legal perspective for a rent controlled property, at least in some circumstances.¹ Lawyers should make sure clients planning to become landlords are aware of the expansion of rent control and any impact it may have on the ability to generate revenue. Purchasing clients may even be liable when assuming residential tenants who were previously

charged illegal rents, such as amounts above the guideline increase or resulting from increases at a rate more frequent than every 12 months. Lawful rents can even be automatically reduced if there have been property tax decreases (RTA, ss. 131(1)).

Two aspects of the RTA moderate, to some extent, the extreme potential impact of illegal rents: (a) the concept of vacancy decontrol, meaning that a new lawful rent can be set when there is a new tenant (RTA, s. 113); and (b) a one-year limitation period applicable in some cases to tenant applications for rent reductions and refunds of money collected or retained in contravention of the RTA (e.g., ss. 130(5) or 135(4)), although if the landlord fails to meet the 90-day rent increase notice requirement, there is an argument that the increase is totally void and not saved by the one year limitation period (RTA, ss. 116(4)).

What’s a real estate lawyer to do?

Of course, advising a client about the risks may be the easy part of the lawyer’s job. Actually determining whether the rents are legal can be a complicated exercise. For a period of years in the past Ontario had a rent registry where one could search for information on maximum rents. That has not been re-introduced. So, any investigation of rent legality will likely have to depend heavily on a review of the vendor’s records, to the extent such records exist and production can be required under the terms of the agreement of purchase and sale. Landlord and Tenant Board files are considered private by the Board and there is no information publicly available from the Board about past or pending proceedings affecting a property. That means the only source is the Canadian Legal Information Institute (CanLII) website, where some Board decisions are posted.

If a lawyer is retained before the agreement of purchase and sale is finalized, it is prudent to seek protection for the purchaser by inserting the following, at a minimum:

- a right to terminate the agreement if the purchaser is not satisfied as to the legality of the rents, currently and in the past (unless rebates have already been paid and rents rolled back); and

¹ For example, see 669283 *Ontario Ltd. v. Reilly*, [1996] O.J. No. 273 (Gen. Div.); affirmed on appeal, [1998] O.J. No. 2780 (C.A.).

- a requirement that the vendor produce documentation that demonstrates the legality of the rents.

For larger complexes, there may be a need for extensive representations and warranties in the agreement, along perhaps with security to stand behind them and obligations to co-operate post-closing if rent legality issues emerge.

A prudent lawyer may want to exclude rent legality from the purchase or mortgage retainer if they are not providing an opinion on the legality of the property's current rents. This should be done as early in the transaction as possible and be in writing to ensure no confusion at a later stage of the process.

However, when implementing such a limitation on the lawyer's retainer, it is good practice to consider clients' ability to satisfy themselves about rent legality. For less sophisticated purchasers and first-time buyers, the lawyer may need to explain the ways rent could be illegal and the possible negative repercussions for the purchaser, both in terms of building value and exposure for rent rebates. It is preferable that lawyers engage in a discussion with each client about the options available, recording the details of the conversation and the client's choice in their files. There are lawyers and paralegals who specialize in rent control law – for some clients that may be a good path to take.

Mortgage documents (including the instructions to solicitor) often have very broad statements to the effect that the property complies in all ways with the RTA (or all applicable laws). Be careful when advising the borrower or lender if such requirements are present. Who is assuming the responsibility to the lender for this issue? Should the lawyer for the lender be carefully circumscribing the terms of the opinion that can be given, in light of what is known about the rents and/or the lawyer's personal comfort with this area of the law?

Other pitfalls to be avoided

Though the expanded applicability of the annual rent control guideline was the most widely publicized change to the RTA, there are other new and modified provisions that are relevant to the real estate bar.

As of January 1, 2018, landlords can no longer apply for rent increases above the guideline amount because of an increase in utility costs (e.g., hydro, water, or heat). Landlords can still apply for an increase above the guideline amount where there is an "extraordinary" increase in municipal tax costs (RTA, ss. 126 (1)). For real estate purchases where clients are assuming existing tenancies, lawyers should review whether utility costs are already included in the rents and advise their clients of the inability to raise the rent if utility prices increase.

For purchasing clients who require vacant possession on closing, there could be additional liability. If the client requires vacant possession of the property and the vendor serves the tenant with

60 days' notice on behalf of the purchaser, the purchaser will be liable if he/she chooses not to occupy the unit within a reasonable time (RTA, ss. 57(1)). Additionally, if the purchaser lists any units for rent to new tenants, enters into a tenancy agreement with a new person, advertises the unit or building for sale, demolishes the unit or the building, or takes any steps to convert the unit or building to a non-residential use, the landlord is presumed to have given notice in bad faith (RTA, ss. 57(5)). Conveyancing lawyers should ensure clients are aware of the associated penalties (RTA, ss. 57(3)) and any related timelines or prohibitions if the client is intending to occupy the property on or after closing.

There will soon be a standard lease applicable to most residential tenancies in Ontario. The impetus for this change is to decrease landlord-tenant disputes and bring Ontario in line with most other provinces. Landlords will still be free to negotiate and include additional clauses, but if these conflict with the legislation or the standard form, they will not be enforceable. Landlords will be required to provide the standard lease within 21 days of receiving a tenant's written request, after which the tenant can withhold a month's rent (RTA, ss. 12.1(6)). If the landlord does not provide the lease within 30 days, the tenant does not have to pay the withheld rent (RTA, ss. 12.1(9)). Lawyers would do well to notify their purchasing clients about this additional legal obligation and the potential associated financial burden. Lawyers who are asked to assist a client with a form of residential lease also need to be up-to-date on this requirement. The form, which can be found on the Ontario government's Central Forms Repository at forms.ssb.gov.on.ca, is mandatory for private residential leases signed on or after April 30, 2018 and applies to tenancies in single and semi-detached houses, apartment buildings, rented condominiums, and secondary units (e.g., basement apartments).

Time to update office systems and precedents

Conveyancing lawyers should use this change in the law as an opportunity to review and update any checklists or systems they may have in place for real estate files. Residential tenancies present unique complications for lawyers and landlords when compared to other types of residential real estate transactions. The possibility of financial success and a great return on investment are not typically elements of a solicitor's opinion, but when legislation directly affects the value and cash flow of a property, it is risky for the real estate bar to blithely assume that the impact of the statutory regime is beyond the scope of the purchase or mortgage retainer. It is important to be clear with clients from the start of a transaction about what can and cannot be assured as a part of the retainer. Real estate lawyers in the past have been on the frontlines when it comes to rent control and its impact on a wide range of residential properties – staying aware of any updates helps ensure your clients are receiving the best possible advice. ■

Kathleen Waters, former President & CEO and Madeleine Tyber, Compliance Counsel, LAWPRO.

Pre-underwritten title insurance for new builds

New Home Program and New Condo Select were developed with you in mind. With the TitlePLUS department underwriting specific new home and residential condo developments in Ontario, it's quick and easy for you to obtain title insurance policies for your purchaser and lender clients – while saving on disbursement costs for them.

Prepopulated underwriting
Most due diligence already done
Built-in Legal Services Coverage

What are New Condo Select and New Home Program?

When you are acting for purchasers buying specific newly constructed houses or condos from the developer, and you apply for TitlePLUS insurance through TitlePLUS New Condo Select or New Home Program, you do not prepare or send requisitions, send search letters or confirm occupancy.

**We underwrote 121 new
construction residential developments in 2017**

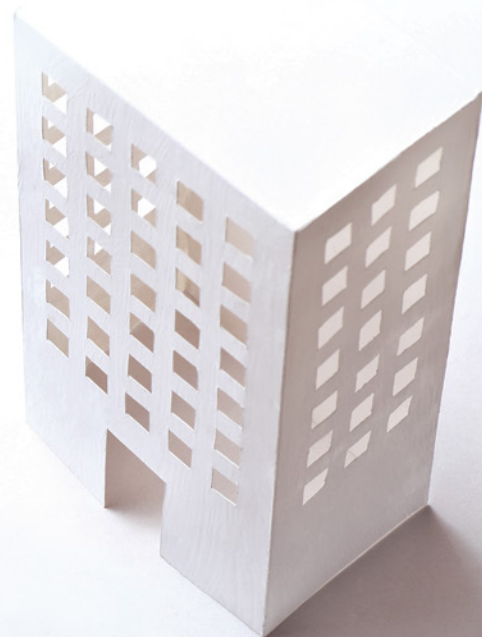
How to access:

You can access New Home Program and New Condo Select if you are a TitlePLUS subscriber.

Let technology do the work for you:

1. Log-in to titleplus.lawyerdonedeal.com and choose the development
2. Follow the prompts for developments in New Home Program or New Condo Select
3. Order the policy

If you are not a subscriber, but want to take advantage of this process, you can apply at titleplus.ca or contact us 1-800-410-1013 or titleplus@lawpro.ca ■



The never-ending fight to stop fraud

The TitlePLUS department is always alert to the red flags of fraud. In 2017, the department declined \$4 million in policy coverage for potentially fraudulent transactions.

Claims update

Over the last number of years, the rate of claims for the program has remained relatively flat. Proving excellent customer service, 421 TitlePLUS claims files were closed in 2017.

Just like our New Home Program New Condo Select is quick and easy

Selected new condominium developments in Ontario qualify for an easy title insurance¹ application process.

- Prepopulated underwriting
- Streamlined searches
- Saves time and money

To learn more,
call 1-800-410-1013
or visit titleplus.ca



¹ The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LawPRO®). Please refer to the policy for full details, including actual terms and conditions.

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Corporate social responsibility

comes into its own

LAWPRO's corporate social responsibility (CSR) experience has grown with our business. Our wellness, outreach, and charitable programs are evolving organically, driven by employee interest and engagement. Simply put, our CSR program is a natural and self-sustaining part of our corporate culture and identity. The following article highlights our activities in 2017.



LAWPRO employees volunteered at the Daily Bread Food Bank.

Fostering the legal profession and access to justice

- LAWPRO encourages employee involvement in a wide range of professional associations and groups that represent diverse segments of the legal profession. These activities help us gain insight into members' priorities and concerns and allow us to highlight how LAWPRO's efforts and activities are supporting the bar.
- In 2017, LAWPRO supported the development of entrants to the profession by making presentations to the French language common law program at the University of Ottawa, the English language Law Practice Program (LPP) at Ryerson University, and the French language LPP at the University of Ottawa; and by making presentations to students in the Law Clerk/Legal Assistant programs at Durham College and Georgian College.



LAWPRO employees volunteering with Bruce Trail Conservancy.

Promoting wellness and balance

- LAWPRO promotes well-being by providing approximately one-half of the funding for the operation by Homewood Human Solutions of the Law Society's arm's-length Member Assistance Program (MAP). LAWPRO promoted the program and services in presentations, print publications, online and through social media.

- In November 2017, LAWPRO's Human Resources Department offered its annual flu shot clinic for employees.
- Green & Wellness Committee programming in 2017 included a healthy potluck lunch (in cooperation with the Social Committee), two Wednesday Wellness Walks, and a presentation on common health myths from a Holistic Nutritionist.

Supporting the broader Canadian community

- LAWPRO hosted a breakfast meeting at Queen's Park on September 28 to launch a series of public-facing webpages with information about consumer issues in real estate, legal and financial literacy. A collection of brochures was developed to promote the online information. Over 50 cabinet ministers, MPPs and key government staff attended the launch.
- Each year, LAWPRO staff nominates charities for inclusion in the company's Denim Friday charitable giving program and staff vote on the nominees. Employee donations are matched by the Company. LAWPRO raised a total \$31,300 for its five chosen recipient charities in 2017, up from \$29,963 the previous year. Donations of \$6,260 went to each of Fanconi Canada, Ovarian Cancer Canada, the Toronto Humane Society, the Good Shepherd Refugee Social Ministries, and the Equality Effect.
- LAWPRO encourages employees to take a paid day off each year to volunteer their services in support of an eligible charity. In 2017, employees donated 15 days in support of their chosen charities. Charities that benefited from help by LAWPRO staff included Bruce Trail Conservancy, International Justice Mission, Toronto Star Santa Claus Fund, and the Daily Bread Food Bank.
- LAWPRO sponsored Lawyers Feed the Hungry Bowl-a-Thon team and Billiards with the Bar events, which helped raise the funds to serve meals.
- Participating in fundraisers for Ernestine's Women's Shelter, the Women's Legal Education and Action Fund and the Women in Insurance Cancer Crusade Relay for Life were opportunities LAWPRO seized with enthusiasm. ■

e-briefs

Don't miss out – have you seen our recent emails?

To ensure you receive timely information about deadlines, news and other insurance program developments, please make sure LAWPRO has your up-to-date email address and that you have added service@lawpro.ca to your contacts.

LAWPRO Magazine

Top legal disruptions

January 30, 2018

The January 2018 issue of *LAWPRO Magazine* explored some of the most exciting technological innovations on the horizon, and examined how lawyers should respond. Other topics covered included coverage for virtual GC work, dispelling myths about LAWPRO insurance coverage, safe cloud storage, how to assess a firm's cybercrime coverage needs, and how lawyers can cope with changes outside their control.



Alerts

Southwest region must be on Teraview on the Web by end of day today

February 16, 2018

By request from the Director of Titles, we sent a last-minute reminder to lawyers in Southwest Ontario to register for Teraview on the Web if they hadn't already.

Reminders

February 6 is the last day to qualify for \$50 off your 2018 insurance premium

January 18, 2018

Along with the reminder of the lump sum payment discount, this reminder included a full list of LAWPRO's Key Dates for 2018.

Key Dates

April 30, 2018

Real estate and civil litigation transaction levies and forms are due for the quarter ended March 31, 2018.

April 30, 2018

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

July 31, 2018

Real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2018.

September 15, 2018

File your LAWPRO Risk Management Declaration by this date to qualify for the \$50 premium discount on your 2019 premium for each LAWPRO-approved CPD program (to a maximum of \$100) completed by this date.

Has your firm grown?
Are you taking on
more risk?



It may be time to consider Excess insurance. Learn more at lawpro.ca/excess or call us at 1-800-410-1013



Risk management
practicepro.ca



Additional professional
liability insurance
lawpro.ca/excess



Title insurance
titleplus.ca



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