



## Riding the Real Estate Roller Coaster



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- Real Estate Market
- Claims
- Fraud
- Impact of COVID
- Tips and Resources
- Questions

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## Real Estate Markets



Ontario Real Estate Association – October 2020

- Residential sales up 26.5% over October 2019
- Year to date, home sales up 5.3% over same time last year
- Average price of resale residential homes sold in Ontario was \$742,101
  - up 17.2% over October 2019
  - 4<sup>th</sup> consecutive month recording highest average resale price
- National average resale price up 15.2% from last year to \$607,250
- Largest increase in number of new listings added in October in history
  - Number of active listings at month end – 24.7% lower than last year
- Largest increase in sales numbers and value in Northeastern Ontario Region
  - Bancroft, Barrie; Kawartha Lakes; Muskoka Haliburton Orillia, Norththumberland Hills, Parry Sound, Peterborough & Kawartha, Quinty
  - Number of residential sales up 17.9% over last year
  - Average residential price up 20% from last year
  - Muskoka cottage sales in June and July up 73% over last year

Value of homes sold in Ontario in October was \$18.4B, up 48.3% from October 2019



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## GTA Housing Market

Healthy real estate market as MOI – Months of Inventory = 4-6 months

- September 2020 – GTA MOI = 1.2
- MOI since July relatively steady = very competitive market
- Strong demand & low inventory = average prices up 13% over last year

Condo market

- Sales down 8% YTD
- October sales up 2% from last year
- Active listings up 125%
- Prices down 4% from peak in Q1 2020
- Prices in core down 9%
- Sales of microunits (condo under 500 sqft)
  - Listings up 165%
  - Sales down 20%



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## Ottawa Housing Market

CMHC says market is overheating

- based on sales-to-new-listings ratio of 81% in Q2 2020

MLS average price in Q2 2020 up 13.4% over last year



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## Renovations Market



Canadian homeowners spent \$80.1B on home renovations in 2019

- 76% on home upgrades & 24% on necessary repairs
- Ontario homeowners spent \$34.2B on home renovations in 2019

More money spent on renovations in 2019 than building new

- Ontario: Renos - \$34.2B / New dwellings - \$22.2B
- Canada: Renos - \$80.1B / New dwellings - \$57.7B

2020

- Renovation spending slowed dramatically at start of pandemic
- Expect spending to be 5.2% lower than 2019



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## New Residential Construction

New construction up from last year

Number housing construction projects started in 1<sup>st</sup> 3 quarters

- In Ontario – up 15.4% over last year
- In Canada - down 0.6% over last year



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## First-Time Home Buyers Incentive

Launched in September 2019

As of December 2019

- 2,950 applications approved (value \$56M)
- Target – assist 20,000 first-time buyer in first 6 months

Mid-April 2020

- 3,708 applications approved
- Only 2,061 money advanced

GTA – 116 applications but only 57 approvals – Sept 2019 – January 2020

Maximum purchase price – between \$500-600k



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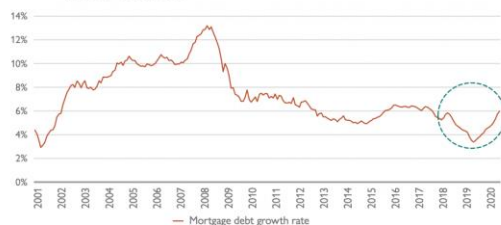
## Mortgage delinquency

Nationally and in Ontario – constant at pre-pandemic levels

Ontario Q2 2020 – rate = 0.14% - same as last year

Canada Q2 2020 – rate = 0.29% - 0.30 last year

Figure 1.1 Growth of residential mortgage debt has accelerated from January to May 2020



Source: Statistics Canada, Table 10-10-0129-01 Residential mortgage credit, outstanding balances of major private institutional lenders, Bank of Canada (Year-over-year change)



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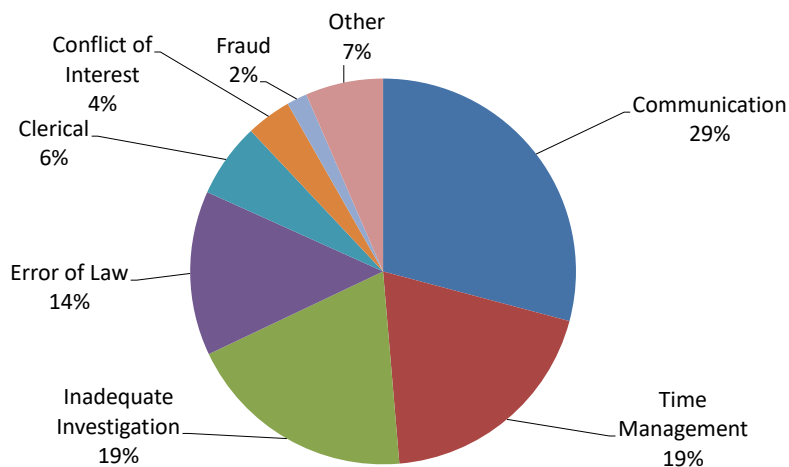


# CLAIMS OVERVIEW

Real Estate is the 2<sup>nd</sup> most active area of law with claims

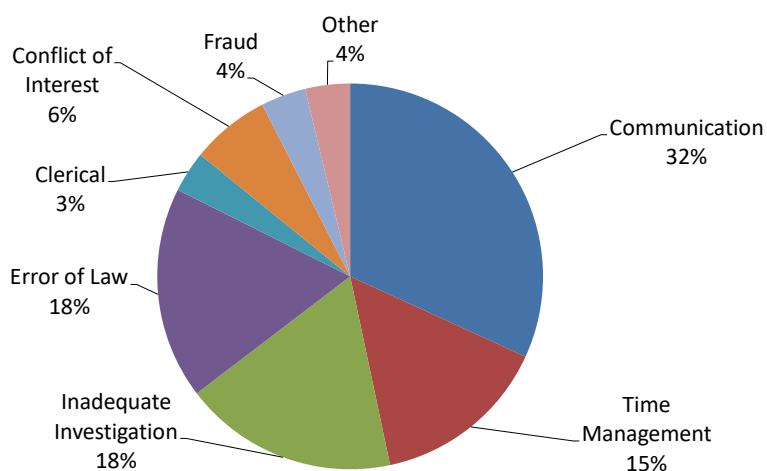
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## 'Global' Descriptions of Loss (2009-19 by count)



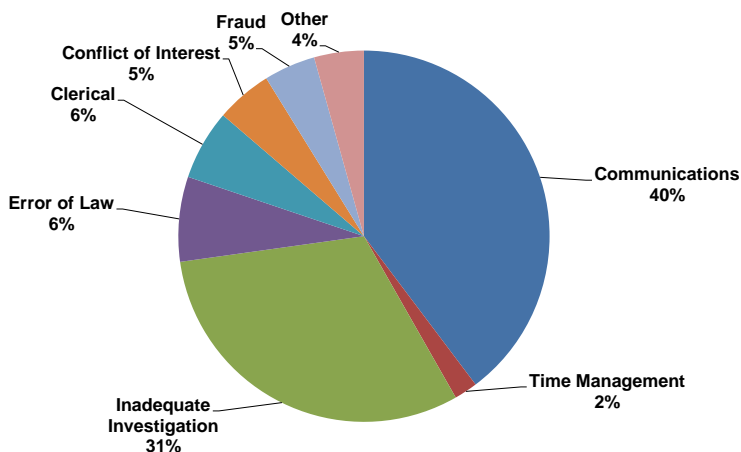
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## 'Global' Descriptions of Loss (2009-19 by cost)



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## Real estate claims (2009 to 2019)



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## Failed Communication



### Inadequate communication

*Zarei...*, 2017 CanLII 145092 (ON SCJM) – lawyer failed to advise purchaser of closing date of new build condo; called old number; did not call new number, did not email, did not send a letter; did not even open a file for the closing on receipt of developer’s lawyer’s date notification letter, until day before closing!

### Clearly establish responsibilities

*Outaouais*, 2013 ONCA 526 – purchase of vacant undeveloped land; client agreed it was responsible for development issues; title subject to reserve, which had a cost recovery clause; Court said access is the solicitor’s responsibility & “Not having established the “bright line” between the roles of solicitor and client”.

### Ensuring the client gets what they expect

*Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2014 ONCA 855 – client purchasing 3-storey condo townhouse; illegally built 3<sup>rd</sup> floor; condo documents dedicate only 2 floors; Court ordered closing of 3<sup>rd</sup> floor and lawyer liable

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## Failed Justifications



### Failure to adequately investigate

*Kings Lofts Toronto* 2014 ONCA 215 – search reveals lane owned by city under building; lawyer advised client it could be easily resolved for a few thousand dollars & covered by title insurance; title insurer declined coverage; client later required to purchase lane from city (over \$100k) to be able to sell; Court said solicitor negligent in failing to inform client of serious consequences

### Argument - Change in market forces amounts to frustration of APS

*Perkins v. Sheikhtavi*, 2019 ONSC 1595 – unconditional APS; failure to secure financing or sell home; CA stated that 20-30% decrease in home prices is not a “radical change” that relieves the purchaser of obligations under the APS

### Technical objections

*Haghollahi v. Butt*, 2020 ONSC 4082 – buyer backs out due to 2 storm & sanitary easements; argue prevents desired backyard renovations; easements under p.10 & noted in APS & buyer made no inquiries; court found easements do not materially affect use of property or affect enjoyment of property in any significant way & questioned real motive; \$75k deposit refund denied

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## Consequences of a Cooling Market

*Gamoff v. Hu* 2018 ONSC 2172

- APS \$2.25M, no financing condition, no financing, failed to close, seller resold for \$1.78M; Court found seller took reasonable steps & awarded \$470k in damages

*Azzarello v. Shawqi* 2019 ONCA 820

- similar case, seller sold for \$309k less (including lost costs); seller awarded \$309k; debate on forfeiture of deposit; court also rejected argument seller failed to mitigate by rejecting buyer's offer to buy for 10% less, being more than ultimate sale

*Degner v. Cabral* 2019 ONSC 1610

- seller awarded over \$100k after selling at reduced price because buyer failed to close



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## Duty of Good Faith!

*Bhasin v. Hrynew*, 2014 SCC 71 (CanLII), [2014] 3 SCR 494  
Supreme Court of Canada – “A summary of the principles:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.”

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## Bhasin cited over 600 times!

*Deangelis v. Weldan Properties Inc.*, 2017 ONSC 415

Purchaser requested a 3-day extension of closing & builder declined

Purchaser argued Duty of Good Faith established in Bhasin obliged builder to accept extension

Court – “it would be wrong in law to find that insisting on compliance with a term of the agreement, agreed to by both parties with the assistance of counsel, amounts to bad faith depriving a party of the ability to strictly enforce an agreement where time is of the essence”

*Xu v. 2412367 Ontario Limited*, 2017 ONSC 4445

Purchasers paid first 2 deposits on time but asked for an extension of a month for payment of the 3<sup>rd</sup> (final) deposit

Vendor declined & terminated agreement when payment deadline passed.

Court - stating that the duty of good faith “does not preclude parties from relying on and enforcing clear terms of a contract”

Overall, real estate cases that refer to Bhasin acknowledge that duty of good faith applies to real estate contracts, but cases also show that parties to an agreement are not prohibited from exercising rights under the contract in their own interest

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## Risks for the Lawyer

### Communication

- Retainer
- Regular updates
- Get direction / acknowledgments
- Report
- Involve the client

### Inadequate investigation

- Get the relevant information – ask questions
- Client intake information questionnaire
- Searches – review with clients (title insurer is not your client)
- Buyer's intention for the property
- Copy of PIN is not a title search
  - Get deleted documents
  - Look at documents on title (notices)
  - *Planning Act* is still a required search



Golden Rule: Document, Document, Document

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## Types of fraud

- ID theft - individual or corporation
- Power of Attorney (abuse or forgery)
- Straw buyer
- Fraud for profit or for shelter
- Bad cheque; cyber risks & internal

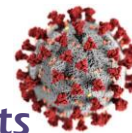


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## COVID-19 Related Risks: Communication / Investigation of Facts



### Shift to video conference meeting/closing

- Meeting netiquette
- Adjusting client relationship
- Adjusted timeframe for tasks
- Ask, ask, ask!
- Take the time required!

### Limitation periods

- Changed quickly/often
- Not universal  
(general/construction/*Planning Act*)

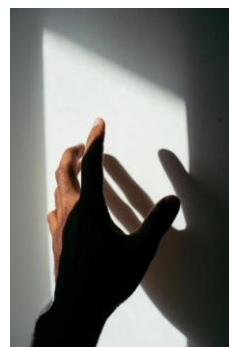
### Need to confirm instructions in writing



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## COVID-19 Related Risks:

- Increased risks
- Remoteness may reduce ability to read client
- More difficult to review & authenticate documentation (e.g. ID)
- Harder to evaluate undue influence
- Harder to know who is there!
- Complications because of technical issues (missed signals/instructions)
- More difficult to establish rapport with client
- Uncertainty/confusion re: limitation suspensions



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## COVID-19 Related Claims:

- Damages due to delays (lost opportunity or liquidation values)
- Missed limitation period
- Confusion over limitation period tolling
- Misinterpreted court directions
- Errors due to new office procedures
- Economic downturn losses being attributed to the lawyer



**2007-08 - LAWPRO saw 15% increase in claims against lawyers associated with the deflating economy**

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## Helpful Articles

Avoiding 'Inadequate Investigation' Claims in Real Estate  
<https://avoidclaim.com/2015/avoiding-inadequate-investigation-claims-in-real-estate/>

Steer clear of real estate claims by asking these five questions on every deal  
<https://avoidclaim.com/2016/lawpro-magazine-practice-tip-steer-clear-of-real-estate-claims-by-asking-these-five-questions-on-every-deal/>

Requisition: a process, not just a letter  
<https://avoidclaim.com/2016/requisition-a-process-not-just-a-letter/>

Title insurance is not an autopilot licence  
<https://avoidclaim.com/2016/title-insurance-is-not-an-autopilot-licence-2/>

No negligence where lawyer relies on client's waiver of searches  
<https://avoidclaim.com/2014/lawpro-defends-lawyers-no-negligence-where-lawyer-relies-on-clients-waiver-of-searches/>

Title Insurance – Not a Panacea for Due Diligence  
<https://avoidclaim.com/2013/from-titleplus-today-title-insurance-not-a-panacea-for-due-diligence/>

When waiving a search comes back to haunt you  
<https://avoidclaim.com/2014/when-waiving-a-search-comes-back-to-haunt-you/>

When it comes to cottage properties, due diligence is particularly important  
<https://avoidclaim.com/2014/when-it-comes-to-cottage-properties-due-diligence-is-particularly-important/>

Know thy property: Four easily avoidable errors made before closing real estate transactions  
<https://www.practicepro.ca/2019/06/know-thy-property-four-easily-avoidable-errors-made-before-closing-real-estate-transactions/>

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## Resources

**Checklists:** (<https://www.practicepro.ca/practice-aids/checklists/>)

- Commercial Transactions / Construction Lien Flowchart / Generic ILA / Non-Resident Sale Holdback Flowchart / Real Estate File Management / Using Title Insurance Safely / Video Conferencing
- Real Estate Malpractice Claims Fact Sheet - <https://www.practicepro.ca/practice-aids/claims-fact-sheets/real-estate-malpractice-claims-fact-sheet/>

**Working Group on Lawyers and Real Estate** - <https://www.lawyersworkinggroup.com/>

- Standard Closing Documents; Condo documents; Suggested Fee Schedule & Calculator; OREA APS; Mentoring;

**CBA Mortgage Instructions Toolkit** - <https://www.cba.org/Publications-Resources/Practice-Tools/Mortgage-Instructions-Toolkit>

**TitlePLUS.ca**

Precedents; information; order a policy

**AvoidAClaim.com**

Lenders accepting wire payments to discharge mortgages -

<https://avoidaclaim.com/2020/lenders-accepting-wire-payments-to-discharge-mortgages/>

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## Thank you

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