

# DEFENDING

## lawyers in court

Despite any attempts to resolve claims without litigation, sometimes court is inevitable. Every year, LAWPRO steps in to defend licensees from unwarranted lawsuits and accusations.

BELOW ARE A FEW EXAMPLES OF DEFENCES SUCCESSFULLY ADVANCED BY LAWPRO IN 2023 ON BEHALF OF INSUREDS.

### Sale of business and contract dispute – Alleged failure to flag contractual ambiguity

When selling a business, the negotiation of key terms will often be done with the direct involvement of lawyers on both sides of the transaction. However, some business owners take it upon themselves to not only lead, review, and approve key elements in principle, but propose and negotiate the language used in documents. When those key elements include language that will govern the valuation of the business, the lawyer may be left out of the loop.

In this case, the Plaintiff was a successful business owner that was also qualified as a chartered professional accountant and had substantial experience in the business world. The Plaintiff was selling the business to retire and had found a willing purchaser.

While the Plaintiff's lawyer had been made aware of the plan to sell the business, the Plaintiff had taken it upon themselves to conduct the negotiations themselves. These negotiations took place over many weeks and multiple draft agreements. A key point of contention was the method of valuation of the business.

Only near the end of negotiations did the Plaintiff send draft language to their lawyer for review. The lawyer suggested that the Plaintiff should ensure they understood the definitions used throughout the contract, particularly with respect to the valuation provisions. The lawyer advised the Plaintiff to consult an accountant to ensure there was no misunderstanding.

The Plaintiff did not, in fact, consult an accountant, and did not inform their lawyer that they were not planning to do so. The agreement was signed, and subsequently a dispute arose over the interpretation of the valuation provisions. Specifically, two provisions of the contract appeared to be in conflict.

The parties took the dispute to arbitration, and the arbitrator found in favor of the purchaser's interpretation of the agreement, a conclusion that reduced the purchase price by approximately \$1 million. The Plaintiff thereafter sued their lawyer for negligent legal advice with respect to the contract.

LAWRO successfully assisted the Lawyer in rebutting the Plaintiff's allegations of negligent legal advice. The Lawyer had not negotiated the agreement, and when presented with the draft agreement for review, had advised the Plaintiff to consult an accountant regarding the very provisions that were later disputed. The lawyer had reasonably satisfied their duties to their client and the Plaintiff's misunderstanding with respect to the valuation provisions was of their own doing.

## Employment law – Alleged failure to advise client about tax implications of termination provisions

Tax advice should be left to the experts. Unfortunately, most complex transactions have even more complex tax implications, requiring the application of such expertise. Generally, if a lawyer is not retained to give tax advice, and the lawyer is not confident in their abilities to give such advice, the client should be advised to speak with a tax lawyer or accountant regarding the tax implications of any course of action. This advice should be properly documented and retained in the lawyer's file.

In this case, the Plaintiff had previously obtained a demand loan from their employer in 2012 in the amount of \$125,000. In 2016, the Plaintiff was terminated from their position with the employer. As part of the termination, the employer agreed to forgive the loan in exchange for the Plaintiff's acceptance of a Release and Indemnity Agreement regarding the termination.

The Plaintiff met with their lawyer ("Defendant Lawyer") regarding the termination and Release and Indemnity Agreement. The Defendant Lawyer practiced in multiple areas, including some wrongful dismissals, but did not practice tax law.

Unfortunately, no written retainer was created, and the Defendant Lawyer did not take contemporaneous notes regarding the meeting with the Plaintiff. The Defendant Lawyer recalled that they informed the Plaintiff that the forgiveness of the Demand Loan was a taxable benefit. The Plaintiff acknowledged this and, according to the Defendant Lawyer, was primarily concerned with whether they could be obligated to repay the demand loan in the future.

In 2017, the Plaintiff was assessed by the CRA for approximately \$70,000 in unpaid taxes flowing from the debt forgiveness. The Plaintiff then sued the Defendant Lawyer for negligent tax advice, claiming that they would not have accepted the Release and Indemnity Agreement if they had known of the tax consequences.

According to the Plaintiff, they had met with the Defendant Lawyer to seek advice specifically pertaining to the agreement's tax implications, and the Defendant Lawyer had failed to properly explain those implications to the Plaintiff.

LAWPRO successfully assisted the Defendant Lawyer in contesting the Plaintiff's account of their meeting. While documentary evidence is always of benefit when defending malpractice claims, in this case, the Plaintiff's evasive responses to questions and illogical narrative led the court to accept the Defendant Lawyer's version of events. The court consequently found that the Defendant Lawyer met their duties by properly answering the client's questions regarding the enforceability of the debt forgiveness and alerting the client to the potential tax implications.

## Real estate law – Alleged improper registration of caution on property

It is well established that lawyers have a duty of care toward their client. Their professional obligations towards third parties, or the opposing side in a dispute, are less obvious. Nevertheless, LAWPRO invariably sees claims brought by non-clients alleging that a lawyer's professional actions wronged them in some way.

In this case, the Plaintiff was the mortgagee of a property. The mortgagee obtained judgment against the owner and took possession of the mortgaged property. The Plaintiff then attempted to sell the property.

Before the Plaintiff's sale could close, the lawyer of another interested part ("Defendant Lawyer") registered a caution on the property on behalf of their client. The Plaintiff's sale of the property then failed to close, which the Plaintiff attributed to the registration of the caution.

The Plaintiff then sued the Defendant Lawyer for losses arising out of the registration of the caution and subsequent failure of the Agreement of Purchase and Sale to close. The Plaintiff alleged that the Defendant Lawyer's actions constituted professional negligence, and, further, that they were liable under section 132 of the *Land Titles Act*, which reads:

"A person who registers a caution without reasonable cause is liable to make to any person who may sustain damage by its registration such compensation as is just, and the compensation shall be deemed to be a debt due from the person who has registered the caution to the person who has sustained damage."

The Plaintiff alleged that the Defendant Lawyer constituted a "person" as described under s. 132, notwithstanding the fact that the sought legal advice from their lawyer ("Defendant Lawyer") was registering a caution on behalf of their client.

LAWPRO successfully assisted the Defendant Lawyer in defending the claim as pleaded. The court found that "person," as used in s. 132, could only refer to the person who asserts for themselves a right or interest in land. Since the Defendant Lawyer was not asserting any right or interest for themselves, but was instead acting on behalf of their client, it was plain and obvious that they could not be held liable under s. 132 of the LTA.

With respect to the claim in negligence, the court agreed with the Defendant Lawyer that the claim as drafted disclosed no cause of action, as the Defendant Lawyer was not acting as the Plaintiff's lawyer at any time. The court granted leave to amend the pleadings to clarify the claim in tort, but otherwise dismissed the claim as disclosing no cause of action.

## Criminal law – allegations of ineffective assistance of counsel

In this case, the Criminal Defendant pleaded guilty to possession of a controlled substance and the proceeds of crime. They were sentenced to two years in custody in addition to the 228 days they had already spent in pre-trial custody.

After serving two months of their sentence, the Criminal Defendant obtained new counsel and appealed the conviction on the grounds that their guilty plea was involuntary, and they received ineffective assistance from their Trial Lawyer.

Specifically, the Criminal Defendant asserted that they were under the erroneous understanding that their guilty plea was dependent on a sentencing agreement with the Crown that provided for a sentence of two years including the time already spent in pre-trial custody. The Criminal Defendant's sentence, in fact, provided for two years in addition to time spent in pre-trial custody.

The Trial Lawyer informed LAWPRO of the potential malpractice claim flowing from the appeal and assertion of ineffective assistance of counsel.

LAWPRO successfully assisted the Trial Lawyer through the Criminal Defendant's appeal. The Trial Lawyer had maintained records of their interactions with the Criminal Defendant, which noted that the Criminal Defendant had been informed of the Crown's position of two years in addition to time served. Furthermore, the sentencing judge had conducted a plea inquiry, where the Criminal Defendant had confirmed their voluntary guilty plea and their understanding of the consequences of such.

The appeal court therefore dismissed the Criminal Defendant's appeal, and there was no remaining potential claim against the Trial Lawyer.

# Civil procedure and contempt of court - Negligence claims dismissed as collateral attacks

When things go wrong, it's often easy to blame the lawyer—even when the client is themselves a lawyer. But asserting malpractice by a lawyer generally cannot be used as a vehicle to attack an underlying judgment or order that didn't go the client's way.

In this case, the Plaintiff Lawyer was representing a client in a separate cause of action, wherein the Plaintiff Lawyer had received a production order for documentary evidence. Specifically, 14 boxes of documentary evidence allegedly relevant to the ongoing dispute. After receiving this court order for production of documents, the Plaintiff Lawyer contacted their client and offered to return the 14 boxes of documents so long as their outstanding fees were immediately paid.

The Plaintiff Lawyer's bill was paid, and the 14 boxes were delivered to the client rather than the opposing side in the underlying dispute. Subsequently, the client delivered only 5 of said 14 boxes pursuant to the production order.

The opposing side asserted that the conduct of the Plaintiff Lawyer and the Plaintiff Lawyer's client amounted to contempt of court and an attempt to hide prejudicial evidence from the opposing party. The Plaintiff Lawyer sought legal advice from their lawyer ("Defendant Lawyer") with respect to the resulting contempt hearing.

Following the contempt hearing, the Plaintiff Lawyer discovered that an Exhibit was missing from the materials provided in their defence. The Defendant Lawyer wrote to the opposing counsel to inform them of this oversight and bring it to the court's attention. However, at the same time, the court rendered its decision against the Plaintiff Lawyer, finding them in contempt.

The Plaintiff Lawyer unsuccessfully attempted to appeal the contempt finding with the Defendant Lawyer continuing to represent the Plaintiff Lawyer on appeal. After said appeals also failed, the Plaintiff Lawyer surrendered to serve a custodial sentence as punishment for the contempt.

After serving this sentence, the Plaintiff Lawyer sued the Defendant Lawyer for negligent legal representation, asserting that the Defendant Lawyer's failure to notice the missing exhibit during the contempt hearing led to the finding of contempt.

LAWPRO successfully assisted the Defendant Lawyer in showing that the Plaintiff Lawyer's claim of negligence was, in fact, a collateral attack on the original finding of contempt. Since the Plaintiff Lawyer had not raised ineffective assistance of counsel as grounds for the appeals of the contempt finding, a subsequent malpractice lawsuit on those grounds constituted an abuse of process. The Plaintiff Lawyer was, in fact, attempting to relitigate the contempt finding with additional evidence. The action was therefore dismissed.



## Lawyers for lawyers

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence still needs to be raised. LAWPRO provides effective assistance and prides itself on defending licensees.