

REPAIRS



When LAWPRO is quickly alerted to potential claims, we can often rectify the problem, and prevent loss and further lawsuits from arising. Our counsel know how to best address issues such as withdrawing admissions, rectification of trusts, extending the time to set a matter down for trial, and other repairable matters.

[HERE ARE A FEW EXAMPLES OF CASES WHERE LAWPRO SUCCESSFULLY REPAIRED POTENTIAL LOSSES IN 2023.](#)

Withdrawing admissions and amendment of pleadings

When is an admission not an admission? Or rather, when is an alleged withdrawal of an admission merely a clarification of a position? The difference can mean success or failure in a motion to amend pleadings.

In this case, the Plaintiff sought payment of both short term and long term disability payments from the Defendant Insurance Company, pursuant to a group insurance policy.

The Defendant Insurance Company denied liability, alleging, first, that the short term disability payments were solely the responsibility of the Plaintiff's employer, and second, that the Plaintiff was not disabled to the extent required for payment of long term disability payments.

The Defendant Insurance Company further alleged that the Plaintiff had failed to submit an application for benefits and proof of claim within the time period for doing so under the policy. Since that period had expired, the Plaintiff could no longer assert their claim.

A key point at issue was a line in the Plaintiff's pleadings that read "[the Plaintiff] did not submit an application for LTD benefits... pending resolutions of [their] STD benefit with [their] employer."

In February 2022, the Plaintiff moved to amend their Pleadings to clarify that the Defendant Insurance company was put on notice that the Plaintiff was seeking both short term and long term benefits, and this notice was provided within the required time period.

Unfortunately, the motion judge dismissed the Plaintiff's motion on the grounds that the Plaintiff was seeking to withdraw an admission and assert a new cause of action that was statute barred. The Plaintiff appealed this decision.

LAWPRO assisted the Plaintiff in successfully arguing on appeal that the motion judge erred in concluding the amendments sought to withdraw an admission.

The appeal court agreed that the Plaintiff's original pleadings admitted the Defendant Insurance Company's factual allegation that the Plaintiff did not submit an application for long term benefits. However, the original pleadings did not admit the Defendant's position that this fact had fatal consequences to the Plaintiff's claim. The proposed amendments merely confirmed and clarified the Plaintiff's original position that notice was given despite a formal application for benefits.

Therefore, the proposed amendments did not attempt to withdraw an admission, the motion judge should have allowed them to occur, and the appeal was allowed.

Drafting errors and rectification of trust deeds

Despite lawyers' best efforts, drafting errors will inevitably occur. Sometimes, these errors don't just create ambiguity in a contract or trust, but may seem to undermine the entire purpose of the trust.

In this case, the Applicants had formulated a family trust for the purpose of receiving dividends from a family operating company and distributing said proceeds to a Corporate Beneficiary holding company. In order to avoid application of the "Attribution Rule" (s. 75(2) of the Income Tax Act), the trust was drafted with the intention that the Corporate Beneficiary would not be entitled to any income or capital that was derived from itself.

Unfortunately, the trust deed contained a drafting error, whereby the Corporate Beneficiary was, in fact, barred from receiving any income or capital derived from itself as well as the family operating company. This was in direct contravention to the purpose of the trust.

This error was not discovered until many years later, when the CRA reassessed the trust on the basis that the trust deeds prohibited distribution of dividends received from the family operating company to the Corporate Beneficiary.

Although the CRA did not oppose rectification of the trust documents to comply with their original intent, the CRA required a court order to avoid negative tax consequences.

The Applicants therefore sought a rectification order from the courts, correcting the drafting error.

LAWPRO successfully assisted the Applicants in obtaining a court order for rectification. The court agreed that, while rectification will not be granted to implement retroactive tax planning or to avoid unintended negative tax consequences, rectification is appropriate when correcting documents that erroneously fail to accurately record the original agreement.

In this case, the evidence was clear that the parties originally agreed to allow the Corporate Beneficiary to receive dividends from the family operating company. As such, rectification was an appropriate remedy.

A series of unfortunate errors: Avoiding administrative dismissals

Bad things come in threes—including, it seems, inadvertent errors by a lawyer.

In this case, a negligence action regarding the assessment and remediation of property contamination was issued in February 2017, with the statement of defence and a crossclaim delivered in September 2017.

After the delivery of pleadings, Plaintiff's counsel proceeded to retain an environmental consultant to review and discuss materials necessary to proceed with the claim and prepare documents. Plaintiff's counsel also began retaining and preparing experts with respect to the claim in early 2018. Document collection and preparation of experts continued through 2020, when the COVID pandemic delayed preparation for some time.

As the claim was originally filed in 2017 the deadline for setting a trial date, and thereby avoiding an administrative dismissal, was mid-September 2022 (incorporating the tolling of limitation periods in 2020 due to the pandemic). Unfortunately, Plaintiff's counsel inadvertently set their calendar reminder for the 5-year administrative dismissal deadline for September 2023—one year late.

Plaintiff's counsel realized this error on March 7, 2022. At that time, Plaintiff's counsel attempted to email opposing counsel to discuss a timeline to proceed expeditiously, compile affidavits, and finalize expert reports. Unfortunately, Plaintiff's counsel erroneously sent these communications to the wrong email address.

On July 20, Plaintiff's counsel discovered and rectified the erroneous email address and sought Defence counsel's consent to a timetable order. A few weeks later, on August 7, Plaintiff's counsel served the Plaintiff's motion record seeking a timetable order by motion hearing. Shortly after that, on August 12, Defence counsel informed Plaintiff's counsel that the Defence would oppose the Plaintiff's motion for a timetable to continue the action.

Unfortunately, an inadvertent error struck again as Plaintiff's counsel was informed on September 6 that the Plaintiff's motion record was not filed due to a technical issue with the forms. At that time, Plaintiff's counsel reported the matter to LAWPRO, which assumed carriage of the motion.

LAWPRO's counsel then requisitioned a motion date before an associate justice to extend the time to set the action down for trial and set a timetable for completion of the remaining steps.

LAWPRO assisted the Plaintiff's counsel in extending the deadline for setting a trial date. The court agreed that the Plaintiff provided an acceptable explanation for the delay. Steps had been taken throughout the previous five years to advance the claim, and Plaintiff's failure to set a date for trial, or schedule a hearing to extend the time period before the deadline, was due to inadvertent errors on the part of counsel.

Since the Defendant would not suffer any non-compensable prejudice by extending the time, the motion was granted.

The continuing story of the rule in Handley and Aecon

In this case, the Plaintiff construction company was retained to do work on four properties owned by three related Defendants. With one of the Defendants ("Defendant One"), the Plaintiff held a joint venture agreement granting the Plaintiff an interest in one of the properties in exchange for financing.

The Plaintiff later alleged non-payment and breach of trust for work done on the various properties. The Plaintiff then registered liens and had statements of claim issued for three of the properties in 2020.

In late 2021, the Plaintiff was paid the full amounts owing on one of the projects by Defendant One. Shortly thereafter, the Plaintiff agreed to discharge the lien on one of the properties so that Defendant One could sell it to an arm's-length purchaser.

The Remaining Defendants (other than Defendant One) then brought a motion to dismiss the action as an abuse of process. The Remaining Defendants alleged that the Plaintiff and Defendant One had entered into at least six agreements that entirely altered the litigation landscape and were not immediately disclosed. This was alleged to be in breach of the rule in Handley and other similar cases.

The Plaintiff took the position that the alleged "agreements" between the Plaintiff and Defendant One did not "entirely alter the litigation landscape" as contemplated by the rule, and therefore were not grounds for dismissal regardless of any lack of disclosure.

LAWPRO assisted the Plaintiff in successfully opposing the motion for dismissal. Of the "six agreements" that allegedly should have been immediately disclosed, one (the joint venture agreement) pre-dated the litigation and therefore could not be seen as altering the landscape.

Of the remaining agreements, the court accepted that the "landscape of the litigation" was not entirely altered and was instead only minimally altered. A portion of the claim was resolved as between the Plaintiff and Defendant One; however, there was no evidence that Defendant One had otherwise altered its position and was now co-operating with the Plaintiff.

The motion was therefore dismissed.

Where to sign? Obtaining declarations that a will is valid

This matter involved an unopposed application for a declaration and order that a will met the formalities of execution set out in the Succession Law Form Act.

The testator signed their will in May 2020. The testator's lawyer arranged to have the will delivered to the testator along with written instructions on how it should be signed and witnessed.

The will was then signed by the testator in the presence of two neighbours. The neighbours then initialed or signed every page of the will themselves, except the last page. The will was then returned to the testator's lawyer.

After the testator's death, their lawyer realized that the neighbours failed to sign the final page of the will. The estate then sought a declaration that the will was valid, despite this lack of witness signatures on the final page.

LAWPRO assisted the estate in obtaining an order that the will was formally valid. The court agreed that the provisions of the Succession Law Reform Act do not require the witnesses to sign or initial every page and does not specifically require a signature on the final page of the will, so long as the witnesses otherwise "subscribe" the will in the presence of the testator.

The signatures and initials of the witnesses on all but the final page met this requirement, and the order was therefore granted.



Small fixes now prevent big problems later

Immediately notifying LAWPRO of potential errors or omissions means steps can be taken to resolve the situation before it develops into a malpractice claim. If you make an error or believe you could be accused of making an error down the road, don't try to resolve the problem on your own. A call to LAWPRO means we can provide expedient and experienced advice and assistance.