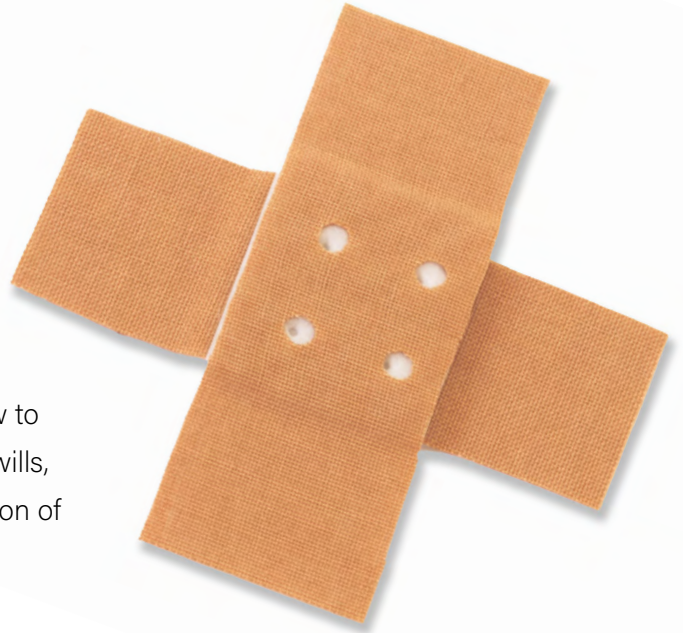


Repairs

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 rectification of wills, restoration of lawsuits to the trial list, extension of notice periods, and other repairable matters.



Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2024.

1) Taking issue with issue: Rectification of a will

One of the most common causes of malpractice claims is inadequate investigation—a failure to inquire as to all salient facts pertinent to a client’s file. For example, when drafting a will, a lawyer should ask things like: What assets are to be distributed? Who will be the beneficiaries? Does the client have a secret, second family?

Asking the unlikely questions may seem silly in the moment, but they can often unearth key information. While an entire “second family” may not be common, estranged children or descendants originating from before the client’s current family arrangements can go unmentioned if a lawyer does not specifically probe the subjects.

A recent repair handled by LAWPRO illustrated this scenario. In the case, the Insured Lawyer drafted a will for their Client, which expressly distributed much of the residue of their estate to the Client’s “grandchildren” and “issue” alive at the time of their death.

The Client’s issue included the children and grandchildren of their marriage, all of whom were explicitly brought to the Insured Lawyer’s attention. However, unbeknownst to the Insured Lawyer, the Client also had a Third Child, and two more grandchildren, through a relationship prior to their marriage. The Client had only become aware of the existence of this Third Child later in life, when the child sought them out as an adult. While the Client never had a close relationship with this Third Child, the Client had acknowledged them and had communicated with them on multiple occasions. Despite this, the Client’s will made no mention or provision for this Third Child.

Upon the Client's death, the Third Child sought to be declared a beneficiary, along with their own children, as "issue" of the Client as set out in the will. The Client's other children opposed this distribution on the basis that it was the Client's intention for only the children and grandchildren of their marriage to be beneficiaries.

LAWPRO assisted the Insured Lawyer to obtain rectification of the Client's will on the basis that it did not reflect the Client's intentions.

The judge acknowledged that rectification cannot be used to alter a will to avoid unforeseen outcomes or a testator's misunderstanding as to the consequences of the document. It is only appropriate where there is evidence that the document as drafted does not conform to the testator's intentions.

In this case, the Client had provided the Insured Lawyer with written notes that only named the two children and three grandchildren of their marriage, and explicitly made clear that they were to inherit the residue of their estate. The will's use of the broader terms "issue" and "grandchildren", without restriction, was an error made by the Insured Lawyer and did not conform to the written instructions in the Client's notes.

Because the Insured Lawyer did not follow the Client's intentions, the judge found it was appropriate to rectify the will and repair the Insured Lawyer's error.

2) Experts, inadvertent errors, and the experts* in repairing inadvertent errors

*That's us

One of the most common repairs LAWPRO is able to assist with is the extension of time for serving an expert's report. Courts are generally loathe to punish a client for their lawyer's inadvertent error.

As in past years, LAWPRO was once again able to help lawyers repair an error when they inadvertently failed to serve an expert report in time. In one recent case, this error was due to miscommunication between the Insured Lawyer and the retained expert as to the provision of key information the expert deemed necessary. This miscommunication delayed the delivery of the report past the deadline for service.

Because of this delay, opposing counsel took the position that the Insured Lawyer could not rely on the expert report because of this failure to comply with the service requirements.

LAWPRO successfully assisted the Insured Lawyer in having the time for service of the expert report extended. The court agreed that the failure to comply was due to the lawyer's simple inadvertence, and there was no prejudice to the opposing party that could not be compensated through costs.

Amendments to the Rules of Civil Procedure in March of 2022 regarding the service of expert reports sets out a new discretionary test designed to reduce the number of adjourned trials due to late expert evidence.

3) When leisure suits are not a good look: Motions to restore struck actions

Sometimes, neither the defendant nor the plaintiff show much urgency in moving litigation forward. Files can all too easily take on a languorous pallor as they succumb to delays, rescheduling, or lack of urgency. But when files languish in the court system for too long, they are susceptible to being struck from a trial list, or administrative dismissal.

One recent case illustrates the dangers of leisurely paced litigation and how LAWPRO can help get things back on track.

Between 2003 and 2005, the Plaintiff rendered invoices to the Defendant totalling almost \$78,000. These were never paid, and the Defendant entered bankruptcy in 2005. In 2006, the Plaintiff launched a claim against the Defendant under the *Bankruptcy and Insolvency Act* for the amounts owing.

In 2008 the matter was struck from the trial list for the first time, as it was not yet ready for trial. At that time, Plaintiff's Counsel informed Defendant's counsel that a motion to restore the action to the trial list would be brought after examinations for discovery were completed. These examinations were not completed until late 2012.

In early 2017, Plaintiff's Counsel brought a motion to have the action restored to the trial list. At that time, the judge directed that a pre-trial conference should be scheduled before June 30, 2019. In keeping with pace of the action established thus far, scheduling for the pre-trial conference took place very near this deadline, in late June 2019. The pre-trial conference was set for January 2021.

In late 2019, Plaintiff's Counsel informed Defendant's Counsel that they would be bringing a motion to be removed as Plaintiff's lawyers of record. After this, Plaintiff's Counsel did not take necessary steps to ensure the pre-trial conference proceeded, and the action was once again struck from the trial list.

The Plaintiff obtained new counsel, and in early 2022, Plaintiff's New Counsel once again filed a motion to have the action restored to the trial list. In response, the Defendant's Counsel sought to have the action dismissed for delay

LAWPRO assisted the Plaintiff's New Counsel (and prevented a potential claim against Plaintiff's Previous Counsel) by successfully arguing that the deadline for setting a trial date should be extended.

The Court found that the delay during the earlier periods of the litigation was explained in part by the "leisurely pace at which both parties seemed content to proceed." The subsequent delays following the scheduling of the pre-trial conference for January 2021 were reasonably explained by the transition between Plaintiff's Previous and New Counsel as well as poor communication between Plaintiff's Counsel and Defendant's Counsel. This poor communication meant that Defence Counsel was not "absolved of all responsibility for the situation."

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

4) Noticeably unfair: Disputing unjust consequences for failing to comply with notice requirements

To state the obvious, lawyers must follow a voluminous set of rules when navigating a dispute from commencement to enforcement. These rules protect the interests of both parties, as well as the efficient operation of judicial and enforcement resources. Failing to follow any of these rules, such as failing to notify the Defendant of steps taken to enforce a decision, inevitably trigger consequences. But what consequences are appropriate when they are unspecified?

A recent case illustrates how excessively severe consequences imposed by a court can be reversed if found to be draconian and unnecessary. In this case, the Plaintiff had obtained an adjudication under the Construction Act for amounts owing from the Defendant. The Act allowed for the adjudicator's decision to be enforced as a court order if filed with the court. However, the Act also required the Defendant to be notified of such a filing within 10 days. Plaintiff's Counsel failed to provide such a notice within the proscribed 10 days.

The Defendant brought a motion to void the writ of enforcement for failure to comply with the notification requirements. The motion judge agreed and not only voided the writ, but ordered that the Plaintiff could not enforce the adjudicator's award moving forward. The Plaintiff appealed.

LAWPRO assisted the Plaintiff in successfully arguing that the motion judge's order preventing any enforcement of the adjudicator's award was inappropriate and not justified under the framework of the Construction Act.

The appeal court found that the legislative scheme prioritized prompt payment of any adjudicator's award. Filing the award with the court for enforcement purposes was only necessary because the Defendant had not already complied with the adjudicator's decision. Prompt payment was "far more central" to the scheme than the notice provisions.

Since the Act did not specify the consequences for failing to provide required notice, it was within the discretion of the motion judge to provide a fair and appropriate sanction. The court observed that, in general, if a defendant suffered no prejudice, a simple declaration of non-compliance may be appropriate. If there was prejudice from the failure to notify, other consequences such as voiding enforcement steps, suspending interest, or an order for costs may be appropriate, but the court found that it was "difficult to imagine" any scenario where preventing enforcement of the adjudicator's decision outright would be warranted.

The Court overturned the motion judge's decision and permitted the Plaintiff to recommence enforcing the adjudicator's decision.

5) Unappealing appeals and suitable suits: The scope of judicial review and appropriate alternative remedies

The rule of law depends on the principle of judicial review. Administrative decisions are subject to judicial oversight to ensure fairness and protection of the rights of Canadians. However, this process of judicial review can be lengthy, complicated, and delay just outcomes. Therefore, many legislative schemes are accompanied by legislative dispute resolution processes that are simpler, speedier, and employ knowledgeable decision makers, in lieu of traditional judicial review.

In this case, the Plaintiff was contesting the denial of their insurance benefits under the *Insurance Act*. The Plaintiff was injured in an automobile accident and had originally received accident benefits under the *Statutory Accident Benefits Schedule*. Approximately one year later, the benefits were halted by the Insurance Provider due to the absence of a disability certificate. The Plaintiff received a letter directing them to obtain a medical examination. The letter also contained a dispute resolution form.

Following the medical examination, the Insurer provided the Plaintiff with two more letters. The first letter set out that benefits for housekeeping and home maintenance would no longer be provided. Approximately 7 months later, the second letter advised the Plaintiff that all further benefits were denied and payments would be stopped. Neither letter contained a dispute resolution form.

Seven years later, after initially pursuing unsuccessful mediation with the insurer and commencing an action in the Superior Court of Justice that was later dismissed, the Plaintiff sought adjudication with the *Licence Appeal Tribunal*, which at this time had exclusive jurisdiction of the resolution of such disputes, and whose decisions could only be appealed on pure questions of law.

The *LAT* found that the claim was time barred, as the statute set out a limitation period of 90 days following the conclusion of mediation. The *LAT* concluded that the dispute resolution form contained within the first letter received by the Plaintiff constituted proper notice of the dispute procedures, and there were therefore no grounds to extend the limitation period for contesting the decision. The Plaintiff appealed the *LAT* decision and simultaneously sought judicial review of the underlying denial of benefits on the basis that the 90-day limitation period does not apply since the Plaintiff never received proper notice of the dispute resolution procedures.

The Court of Appeal found that the *LAT* made no errors on pure questions of law. Further the Court of Appeal determined that it would not be appropriate to permit judicial review on a question of mixed fact and law (that being whether the first letter received by the Plaintiff constituted proper notice of the dispute resolution procedures), as the statutory scheme provided the Plaintiff with an alternative remedy.

The Plaintiff appealed to the Supreme Court of Canada.

LAWPRO assisted the Plaintiff in arguing before the Supreme Court that the legislative appeal scheme did not prevent the availability of judicial review on questions of mixed fact and law. While the court has discretion to decline judicial review if there is an available alternative appeal procedure, the court must also consider whether the alternative remedy is suitable and appropriate. Since the statutory appeal procedure did not permit appeals on questions of mixed fact and law, it was not a suitable alternative remedy to judicial review in this circumstance.

The appeal was allowed, and the matter was sent back to the *LAT* adjudicator to reconsider whether the initial letter constituted sufficient notice of the dispute resolution procedures for the purposes of triggering the limitation period.

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.

