

Brief narrative on open CLLAS claims with total incurred in excess of \$2,000,000 (December 31, 2019):**2005-177**

This is a Quebec claim, so there is \$10 million in underlying insurance available from the Barreau. The claimant is a large company for which the insured acted in defending a series of product's liability claims that extended over many years. Several actions were defended without the claimant's insurers contributing to defence costs. The claimant instructed our insured to sue those insurers. The allegation is that the insured may not have amended the actions against the insurers to include additional insurers as time went by, and limitation periods have now expired. The legal costs associated with the protracted litigation have been significant.

The primary insurer attended a mediation in December 2018 and made an offer well within the primary limits. The matter did not settle but the claimant has asked that the tolling agreement be extended three months in order to obtain instructions for a counter-offer.

The claimant subsequently made a proposal under the *Companies Creditors Arrangement Act*. The Ontario Courts stayed all proceedings by or against the claimant. The claimant has not renewed the tolling agreement and there has been no further response from its counsel to the primary's offer.

2008-113

Between 1999 and 2003, the insured was retained to provide tax opinions about the syndication of several charitable donation programs to Canadian residents. The charitable donation program was built on the concept that leasehold timeshare weeks at various resorts were gifted to a Trust. Canadian residents could apply to become beneficiaries of the Trust. The trustee of the Trust (the "Trustee") was responsible for reviewing and accepting applications for beneficiaries and making distributions of time share units to qualifying beneficiaries ("Participants"). Participants were then requested, but not compelled, to make a donation of timeshare units to one of a select number of charities. Participants would then receive a tax credit for the donation.

In 2004, the Canadian Revenue Agency (CRA) took an increasingly aggressive stand on charitable donation programs. Many ensuing judicial decisions disallowed donations made through these and other programs. The primary basis of disallowance or reduction of the tax credit was that the actual fair market value of the donation was less than the appraised amount put forward by the promoters.

A class proceeding was commenced against the firm by donors who were reassessed by CRA. The basis of the claim is that the donation programs could not have proceeded without the insured's opinion. CLLAS has brought Third Party Claims against several advisors to members of the class. A damages expert has been retained. Further examination is required in order for the expert to provide a damages estimate.

The deadline for the claimant to set this matter down for trial was reset for November 1, 2020. Given the Covid-19 pandemic, that date will likely be extended. A mediation will need to be conducted. CLLAS has indicated to counsel that it must be in receipt of the damages expert's report well in advance of any scheduled mediation.

2010-165

The firm represented the claimant in a dispute with a builder for faulty construction of a warehouse facility under a Design-Build Agreement. The firm commenced an action against the builder in 2004. In 2009, the builder brought a motion to the court to strike the action on the basis that the dispute should have proceeded by arbitration under the

Design-Build Agreement. The provincial Court of Appeal agreed and the claimant's action was struck. By this time, the limitation period had tolled and the claimant was unable to commence an arbitration proceeding. The claimant has sued the firm for loss of its right of action against the builder.

The firm was unsuccessful on a motion for summary judgment on the issue that the limitation tolled while the matter was with other counsel. The firm appealed that decision to the Court of Appeal. The appeal was heard by the Court of Appeal on January 15, 2020. The decision was reserved.

2011-145

This claim concerns a class action brought on behalf of participants in a charitable donation program that operated from 2001 to 2003. The program (which was of a nature that was quite common at the time) was structured such that the amount of the tax deduction exceeded the actual cash donation made by the taxpayer. The Canada Revenue Agency subsequently took a dim view of these types of programs and reassessed the participants based on Canada's general anti-avoidance rule. The insured firm had provided advice to the promoter of the charitable donation program, who has also been named in the class action. The insured firm has third partyed the financial advisors who advised their clients to participate in the program.

This matter was settled at mediation for \$37 million of which CLLAS paid \$27.75 million. The Third Party Claims were settled on the basis of a dismissal without costs. The settlement has now been implemented. CLLAS will be closing its file in the next quarter.

2014-131

The insured firm acted for a pay-day lender. Pay-day lending is regulated under provincial statute. The provincial government had taken aim at the lender for alleged predatory lending practices. The lender began marketing a different product which it believed put it beyond the ambit of the provincial statute. The lender voluntarily did not renew its provincial licence. The provincial government brought an application for a declaration that the lender's new product did not put the lender beyond the government's regulation. The court found for the government. The court's decision led to the immediate collapse of the lender leaving many investors and creditors hanging.

The lender's receiver commenced an action against the insured firm, the lender's financial advisor and the lender's auditor for alleged negligent advice.

All defendants brought motions for summary judgment. The court denied the motions for summary judgment.

The parties are proceeding with documentary disclosure. The parties have tentatively scheduled to complete Examinations for Discovery by the end of 2020.

2014-134

The insured acted for the Board of Trustees for a real estate investment trust (REIT) on the purchase of certain investment properties.

The REIT is publicly traded on the Toronto Stock Exchange ("TSX"), and is managed by the Board of Trustees. The purchase in question had been authorized by the Trustees, without a vote of unitholders of the REIT. The transaction was subsequently unwound by the Trustees when they learned certain facts after closing that persuaded them that the interim CEO of the REIT and the Vendor of the subject properties were "related persons" or "acting together" as defined under the applicable TSX rules and *Securities Act* regulations. Because of this revelation, the Trustees determined that a unitholder vote on the transaction ought to have been held.

The price of the units declined after the unwind. A class proceeding has been commenced on behalf of a class comprised of unitholders of the REIT for the loss of unit value arising from the revelations. The insured was released from the class action but there remain pending claims by the Trustees for alleged negligent advice with respect to the transaction and the former CEO for breach of fiduciary duty and reputational damages.

The underlying class proceeding was settled by the D&O insurers for the REIT. The REIT's claim against the insured firm was settled for \$2.5 million of which CLLAS paid \$1.9 million. The only matter not covered by the settlement was a personal claim by the former CEO.

After a long period of dormancy, the personal claim of the former CEO has reactivated. Counsel is in the process of negotiating a Discovery Plan. Examinations for Discovery will likely take place in early 2021.

2016-107 and 2016-108

These claims relate to two class proceedings commenced in the Provinces of Saskatchewan and Ontario with respect to a charitable donation and tax shelter program which involved taxpayers making cash and in-kind donations to charities in exchange for tax receipts. The insured in 2016-108 assisted the promoter in setting up the program. The insured in 2016-107 assisted the promoter in implementing the program.

Taxpayers claimed charitable donation tax credits under the program beginning in or about the 2004 tax year. The Canada Revenue Agency (CRA) delivered Notices of Reassessment in respect of the tax credits beginning in or about 2007 and, ultimately, disallowed them. Taxpayers advanced test cases challenging the CRA's decision. The Tax Court of Canada released reasons for judgment regarding two taxpayers on October 19, 2015 that upheld the reassessments.

More than 100 donors, including the Representative Plaintiff in the class proceeding, sued the CRA in the Federal Court for negligence. In early 2016, the Federal Court of Appeal struck the Statement of Claim and dismissed the action.

In March 2016, the proposed class proceeding in the Province of Saskatchewan was commenced on behalf of donors against 38 defendants, including the CRA, the promoters and administrators of the program, and various accountants and lawyers. In September 2017, another proposed class proceeding was commenced in the Province of Ontario.

The Ontario action was certified upon the agreement of the parties. The Saskatchewan action proceeded to a certification hearing in December 2019. The Saskatchewan court reserved its decision.

2017-091

This is a social engineering loss. The firm acted for the vendor of condominiums. A unit sold for \$2.5 million and the insured was instructed to wire the closing funds to the client's mortgage company in partial discharge of its mortgage. Someone managed to get in the middle of the email traffic and advised the firm (via an email address that closely, but not exactly, matched that of the client) to wire the funds to a Hong Kong bank account. Of the \$2.5 million, about \$800,000 has been recovered from the Hong Kong bank. We are working to see if the mortgage company and/or the firm's crime insurer will contribute to the settlement.

The firm's crime insurer successfully resisted a coverage application by the firm. The mortgage company rejected efforts to negotiate a settlement short of litigation. Counsel has commenced an action against the mortgage company. CLLAS has instructed counsel to press the action against the mortgage company forward.

2020-001

The insured acted for the claimant, a producer of agricultural products, in the sale of its Canadian and U.S. distribution rights to a large U.S. entity. The agreement provided that the distributor would commit to minimum annual purchases of product from the claimant. Due to a market downturn, the distributor has fallen far short of the minimum purchase requirements.

The claimant made demand for payment of the minimum purchases. The distributor has taken the position that, pursuant to the language of the distribution agreement, its liability is limited to the amount of product actually purchased in the previous year. This position is at odds with the claimant's intention and another provision of the agreement.

The claimant has retained new counsel who takes the position that the insured was negligent in the drafting of the agreement such that there is an ambiguity which severely prejudices the claimant's bargaining power and ability to recover from the distributor. Defence counsel has provided claimant's counsel with arguments the claimant can make in opposition to the distributor.