

The following provides a brief summary of the underlying mandatory coverages and changes introduced by the underlying insurance carriers:

### Ontario

Insurer: The Lawyers' Professional Indemnity Company ("LawPRO")  
Limits: \$1,000,000 per claim/\$2,000,000 in the aggregate per lawyer  
Sub-Limits: \$250,000 aggregate for innocent partner/vicarious liability coverage  
\$250,000 (lifetime aggregate) on all retired lawyers

- Clarification that mortgage brokering would not be an insured activity.
- Elimination of "receiver or any similar fiduciary capacity" as insured activities from the policy language.

(CLLAS conducted a survey of its members at the time of the changes to determine the extent of the risk in the areas affected by the change. Less than 1% of CLLAS claims fell into the above two areas of coverage.)

- Retired lawyers have the option to purchase additional coverage from LawPRO so that the individual limit can be increased to \$500,000 each claim and in the aggregate or \$1,000,000 each claim/\$2,000,000 in the aggregate.

(CLLAS provides coverage for all former partners and associates on a Drop-down/Difference in Conditions basis to cover the additional exposure presented by exhaustion of underlying limits etc. Also, LawPRO has confirmed that whenever the firm and current partners or associates of the firm are also named in a suit, the full \$1,000,000 limit would apply.)

- LawPRO introduced a governance structure for multi-disciplinary partnerships ("MDP"). It is the intent of LawPRO to monitor non-lawyer professionals by requiring that they work under the supervision of a lawyer within the firm and that the head of a specific practice area within the firm be a lawyer.
- LawPRO also extended coverage to professional corporations through which a lawyer may provide legal services but only to the extent that the individual lawyer would be covered under the LawPRO policy.
- Effective 2007, LawPRO expanded its exemption provisions to allow lawyers who retire or change to a non-practising status to continue to act as estate trustee, trustee for *inter vivos* trust, or attorney for property, as residual work from those lawyers' former law practice, while exempt from having to pay the LawPRO insurance premium. LawPRO also introduced an optional insurance coverage for these services yet to be provided as estate trustee, trustee for *inter vivos* trust, or attorney for property.
- Effective April 1, 2008, any Ontario lawyer who intends to practise real estate law in Ontario must be eligible for, apply for, and be granted real estate practice coverage. This mandatory LawPRO coverage provides specific protection against the registration of fraudulent instruments under the Land Titles Act and satisfies new requirements as the Ontario government introduces fraud-prevention reforms in relation to the registration of documents through its land registry system. In terms of mobility, if a lawyer is exercising his/her mobility rights by practising real estate law in Ontario, as it is a requirement that lawyer licensees carry this protection under the Ontario program, LawPRO would expect this to

trigger the expanded coverage provision (i.e. Inter-jurisdictional Considerations) under the reciprocating jurisdiction's policy to reflect the scope of coverage required of Ontario lawyers.

- LawPRO effected a fine-tuning change on July 1, 2008 concerning the mortgage broker exclusion. Essentially, LawPRO continues to exclude claims arising out of mortgage brokering activities but will cover claims arising out of legal services that were provided in conjunction with such.
- Effective January 1, 2010, LawPRO enhanced its policy to provide some overdraft protection for fraud against Ontario lawyers while they are providing professional services involving the deposit of counterfeit certified cheques and bank drafts into lawyers' trust accounts, subject to a number of restrictions. LawPRO's coverage before the change provided protection in situations where funds of legitimate clients were inadvertently paid out to fraudsters prior to the lawyer discovering that he/she was dealing with a fraudster. CLLAS' policy would similarly respond. However, to the extent that a shortfall resulted between the lawyer and the bank (i.e. the funds disbursed to the fraudster exceed the funds belonging to legitimate clients), no coverage was available for that shortfall. LawPRO is now providing coverage for such shortfall, with a sub-limit of \$500,000 per claim and in the annual aggregate, provided that the funds were disbursed either at least eight days after having been deposited or after the lawyer received appropriate verification from the bank of the validity of the instrument. The CLLAS Policy Committee reviewed this issue and concluded that the coverage was intended to benefit smaller firms which might experience cashflow difficulties in the event of such fraud and it was not appropriate for CLLAS to provide similar coverage in excess of LawPRO's limits. It should be noted that LawPRO's coverage, to the extent it responds, applies towards its \$1,000,000 per claim/\$2,000,000 annual aggregate.
- Effective January 1, 2010, LawPRO provided coverage for misappropriation by Ontario lawyers arising from temporary practice in or with respect to the law of another Canadian jurisdiction. This coverage is needed to satisfy new requirements under the National Mobility Agreement with respect to trust fund defalcation.
- Other enhancements to the 2010 LawPRO policy include:
  - a) Coverage for Ontario lawyers working as special Canadian legal advisors (CLA) in Québec – Subject to necessary changes by others concerning CLAs, LawPRO will allow CLAs who are otherwise dual calls and insured under another law society program policy as home jurisdiction to exempt themselves from paying the LawPRO premium, if called in Ontario. This regime is intended to facilitate mobility of lawyers to/from Québec and other Canadian jurisdictions.
  - b) Clarity of coverage for locum work – The policy wording specifically refers to locum work (i.e. where a lawyer stands in for another lawyer to cover his/her practice while away) to ensure that lawyers fully understand the basis on which they are insured for locum work.
- Effective January 1, 2014, LawPRO introduced a \$250,000 sublimit for losses related to cybercrime, i.e. the incursion, penetration, impairment, use or attack of a computer system by electronic means. LawPRO also introduced changes to support the new mobility agreement with Quebec (see the discussion on Mobility, below).

- Effective January 1, 2017, LawPRO clarified its policy with respect to lawyers on secondment with a corporate client. The LawPRO policy now explicitly limits coverage for claims brought by corporate clients against seconded lawyers for professional services provided while under secondment with that client, to \$250,000 per claim and in the aggregate defence-only coverage. This change applies where the claimant meets the definition of a “corporate employer”, i.e. a corporation (or its affiliates) for which the lawyer temporarily acts in the capacity of in-house corporate counsel. LawPRO advises that If the corporate client does not meet the test for a “corporate employer” and the normal employment laws do not arise that would stop it from recovering against an employee, the normal coverage terms will apply.

### Québec

On January 1, 2002, Québec introduced a sub-limit of \$1,000,000 per claim per lawyer to Québec lawyers practising in Canadian jurisdictions outside the province of Québec.

On July 1, 2003, the mandatory limit was increased from \$5,000,000 to \$10,000,000 per claim which was a positive development for CLLAS resulting in CLLAS attaching at a higher level for lawyers resident in Québec. Insurance covering the misappropriation of funds deposited in trust together with coverage of \$1,000,000 for related legal costs were also added. At the end of 2003, coverage of \$1,000,000 was added for proceedings instituted worldwide outside Canada.

On January 1, 2007, Québec initiated the following changes to its policy:

- Article 1.04 which contained the definition of “Professional Services” was amended in order to underscore the fact that the policy would not insure claims for services rendered by a lawyer in his/her capacity as a member of another law society outside Québec.
- Article 2.01 (d) of Coverage B was redrafted in order to clarify that a lawyer would also be defended for the services rendered by another member from within the company or limited liability partnership in which the lawyer practiced.
- Article 2.04 respecting exclusions was amended in order to clarify that the policy would only reimburse the costs of defence in a case where there was no requirement of payment and no liability with respect to an act excluded from the policy.

In May 2007, the Barreau required any out-of-province lawyer who was making an occasional appearance in their Courts to have limits of at least \$10,000,000 per claim.

In 2008, the Barreau changed its policy period from January/January to April/April.

In late 2008, the Barreau no longer requires lawyers practising on a file by file basis from outside Québec to have excess coverage provided they advised their clients in writing that they did not have these limits.

Since January 1, 2011, the Barreau has offered coverage to its members for acting as directors and officers of Canadian entities (whether or not the entity is a non-profit group) other than their law firm or employer. This is a “last resort” claims-made policy which is excess of (a) all other valid and collectible insurance; and (b) any indemnification provided by the outside entity or from any other source.

The Barreau changed its policy with respect to fee disputes effective June 18, 2011 by adding coverage for counter-claims for damages related to the process of an insured member collecting fees. The policy has historically responded to counterclaims alleging negligence but the expanded coverage means that the policy will respond, for example, to counterclaims alleging injury to one's reputation or an abuse of process.

In the recent past, the Barreau has been considering a reduction in its limit, currently \$10 million, to \$2 million. Once again, it was decided not to make that change for the policy year commencing April 1, 2018.

### **British Columbia**

In 2002, the British Columbia policy wording was changed relating to the extension of coverage for approved *pro bono* services. The mandatory policy provides coverage, without payment of an insurance fee, to insurance exempt, non-practising and retired lawyers who are members in good standing of the Law Society for their performance of "sanctioned services".

In addition, there have been the following minor changes:

- Item (d) of the definition of "Additional Insured" was amended in 2001 and further amended in 2002 to clarify that only those employees acting in a supporting role to and not independent of the Individual Insured, as well as under the Individual Insured's supervision and within the scope of their duties, were included as Additional Insureds under the policy.
- Business Interest Exclusion 6.2 was amended, not to alter the application of the Exclusion but merely to simplify the language.
- Clause 6.2.3 of the Business Interest Exclusion was amended in 2001 and further amended in 2002 to clarify that the Clause extended to all partners, associates and associate counsel.

2002 also saw the introduction of an optional business "innocent insured" coverage being offered by British Columbia for an additional fee. The optional coverage was considered to protect innocent partners in law firms who might face claims that were otherwise uninsured because the business interests of another lawyer in the firm triggered the "Business Interest Exclusion" clause in the mandatory liability insurance policy. The exclusion operated to exclude from coverage a claim in any way connected or relating to any organization in which the lawyer, his family or law firm partners or associates had effective management or control or a greater than 10% ownership interest at the time of the error.

The coverage provides \$1,000,000 of protection, both for defence and indemnity costs, subject to a deductible of 10% of the total amount of any such costs or payments. If a firm opts for the additional coverage, all partners in the firm must pay the additional premium. The coverage will apply only when partners are unaware, despite reasonable and regular enquiries, that another lawyer in the firm was providing legal services when the Business Interest Exclusion would apply. We understand that the cost is \$300/lawyer.

Of interest is that British Columbia confirmed to their membership that the sale of real estate was covered under their definition of "professional services". This is not a change but merely a confirmation.

On May 1, 2004, the mandatory policy wording was amended to provide “Trust Protection”, i.e. a dishonest appropriation of money or other property entrusted the Insured. There is an exclusion in the CLLAS policy to exclude such coverage.

Effective July 1, 2010, the Law Society of British Columbia amended its rules to permit lawyers to form partnerships with non-lawyers in limited circumstances, provided that lawyers have actual control over the delivery of legal services and the services provided by non-lawyers support or supplement the delivery of legal services to clients of the law partnership.

Effective January 1, 2012, British Columbia amended its policy to clarify that the policy will not respond to a claim against a lawyer who is holding personal property of a client as a bailee. The policy also includes a new exclusion to clarify that claims arising out of the collection, use or discussion of any information by a third party are not covered. Finally, the policy was amended to provide for limited coverage (subject to a sub-limit, a higher deductible and compliance with client verification procedures) for the payment of legitimate client funds out of a trust account due to reliance on a certified cheque, bank draft, credit union official cheque, money order or solicitor’s trust cheque that ultimately proves to be counterfeit, forged or materially altered.

Effective January 1, 2014, British Columbia amended its policy to clarify that there is no coverage for claims arising out of the receipt or transmission to a third party of malware or malicious code. BC also introduced changes to support the new mobility agreement with Quebec (see the discussion on Mobility, below).

Effective January 1, 2016, British Columbia made a minor amendment to its policy to clarify that compensatory damages include a claimant’s interest and costs only to the extent they relate to covered allegations.

Effective January 1, 2017, British Columbia expanded the terms of its Part C trust shortage liability coverage for “bad cheque” scams so that it includes trust shortfalls arising from other social engineering frauds, i.e. where fraudsters try to trick lawyers into willingly paying funds out of trust through the intentional misrepresentation of some material fact. Coverage for these claims (which arguably in the past could have fallen under the traditional liability provisions of the LSBC policy) is limited to \$500,000 per claim, subject to a 35% lawyer deductible.

Effective January 1, 2018, British Columbia amended Declarations 3(a) and 3(e) to set out the per-claim limits for Parts A and C to clarify that for any given claim, the limits of coverage include all related claims expenses and deductibles. In addition, revisions were made to the definition of “professional services”. Lawyers in private practice are sometimes asked by clients to act as executors or in similar fiduciary capacities, or as patent or trademark agents. In order to attract coverage for these services, both the services provided and the related appointment or retainer must be connected with and incidental to the lawyer’s practice of law. The revisions clarify that the policy does not respond to claims against lawyers who are appointed as a result of, for example, a familial relationship as opposed to a solicitor-client relationship.

### **Alberta**

On July 1, 2001, the Alberta mandatory program deleted its exclusion relating to the practice of laws of a non-Canadian jurisdiction or the rendering of expert advice on those laws. However, it did maintain the

exclusion relating to services provided in the lawyer's capacity as a member of a non-Canadian law society.

Alberta has a similar business interest exclusion clause to that used in British Columbia but the ownership attachment point is more liberal – 50%. Unlike British Columbia, there are no plans in Alberta to provide an optional “top-up” coverage.

Effective July 1, 2005, Alberta instituted a process similar to British Columbia to extend coverage to its insured members for approved *pro bono* services. The mandatory policy provides coverage, without payment of an insurance fee, to insurance exempt, non-practising and retired lawyers who are members in good standing of the Law Society for their performance of “sanctioned services”.

Effective July 1, 2014, Alberta withdrew from the Canadian Lawyers Insurance Association, the reciprocal through which Alberta has provided its mandatory insurance program since 1988. Alberta established its own insurance reciprocal. Policy wordings for the mandatory program in Alberta are in line with historical policy wordings issued by the Canadian Lawyers Insurance Association.

### **CLIA Provinces and Territories**

Canadian lawyers Insurance Association “CLIA” provinces and territories include all those except Ontario, BC, Quebec and Alberta. Effective July 1, 2017 CLIA made a change to Mandatory policy. The Personal Information Protection and Electronic Documents Act (PIPEDA) was amended in 2017 to include breach notification provisions. The amendments provided for penalties to be assessed for deliberately failing to report a data breach to the Privacy Commissioner, or failing to notify an individual of a data breach. While CLIA does not cover fines or penalties, the policy allows for the reimbursement of reasonable expenses incurred in the successful defence of a penalty assessed under the “tax preparer” provisions of the Income Tax Act, and a fine or penalty assessed under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. CLIA introduced similar coverage for successfully defending a penalty under the PIPEDA provisions.

### **Cyber Coverage (CLIA Provinces and Territories)**

Effective July 1, 2017, CLIA introduced cyber coverage for lawyers insured under its Mandatory Program. CLIA provinces and territories include all those except Ontario, BC, Quebec and Alberta. There are four main heads of coverage in the policy: damages to a third-party arising from the disclosure of confidential information; privacy breach notification expenses; system & data rectification costs; and reasonable expenses required to deal with, contain, mitigate, and/or pay ransom by a third party to regain access to system. Limits and deductibles for each coverage vary by firm size at time of discovery.

The policy contains aggregate limits for all claims/losses involving a sole practitioner or single law firm in a policy period. Also, there is an aggregate program limit per occurrence of \$500,000 applicable to all cyber attacks executed by the same attacker, using the same method of attack.

### **Nova Scotia**

The Lawyers Insurance Association of Nova Scotia (LIANS), which provides the mandatory program in Nova Scotia, is a member of the CLIA so the policy wording is very similar. The key differences are that Nova Scotia's policy does not contain a business interest exclusion and it does contain an additional

exclusion relating to non-Canadian law, i.e. the policy does not respond to claims arising from the practice of laws of a non-Canadian jurisdiction or the rendering of expert advice on those laws, as opposed to the provision of general information on those laws incidentally to an Insured's Canadian practice.

### Mobility

In 2002, the provincial law societies began work on a mobility agreement pursuant to which lawyers qualified in a Canadian province or territory may practise on a temporary basis in other Canadian jurisdictions and through which permanent transfers to other Canadian jurisdictions are greatly facilitated. This initiative has moved forward in steps over the years to the point where by the end of 2010, there are arrangements in place for lawyers to work permanently in all provinces and territories, and temporarily in all provinces. As a result, mobility across Canada, with appropriate insurance protection in place, has largely been achieved.

The mobility of lawyers in Canada is governed by three agreements:

- The National Mobility Agreement ("NMA");
- The Territorial Mobility Agreement ("TMA"); and
- The Québec Mobility Agreement ("QMA").

The first milestone was reached in late 2006 when all provincial law societies, with the exception of Québec, became signatories to the National Mobility Agreement. The NMA is an agreement which facilitates:

- permanent mobility, i.e. the transfer of lawyers who are of good character from one Canadian jurisdiction to another without requiring the writing of exams, and allowing for mandatory law society insurance in one, rather than both, jurisdictions; and
- temporary mobility, i.e. the ability of lawyers from one Canadian jurisdiction (the "home jurisdiction") to practise in another Canadian jurisdiction (the "host jurisdiction") for up to 100 days in a year without being a member of the host jurisdiction's law society and without paying an additional fee. The insurance coverage in the home jurisdiction will respond to claims arising out of the work done in the host jurisdiction.

The three territorial law societies (representing the territories) did not sign the NMA but work began on the Territorial Mobility Agreement to facilitate the participation of territorial law societies in the national mobility initiative. The TMA has been signed by all jurisdictions except Québec, with the result that permanent mobility provisions of the NMA now apply between the territories and the other signatories to the TMA (i.e. lawyers can transfer between these jurisdictions and apply for an exemption from paying for mandatory insurance in two jurisdictions). The territories do not participate in the temporary mobility provisions of the NMA.

Due to the differences between civil law (in Québec) and common law (in the rest of Canada), discussions with respect to mobility with Québec have proceeded on a different track, leading to the preparation by the Federation of Law Societies of Canada of the Québec Mobility Agreement. Starting in 2010, the Barreau created a new membership category, the Canadian Legal Advisor ("CLA") which permits to members of other Canadian law societies to become members of the Barreau with restricted practice status to the extent that those law societies offer reciprocal privileges to members of the Barreau. Necessary changes to accommodate the QMA have been implemented in Ontario and it is expected that other jurisdictions will

take the necessary steps to implement the regime in the near future. It should be noted that the QMA facilitates mobility but does not allow a lawyer from outside of Québec to practise Québec law nor does it allow a Québec lawyer to practise the laws of, for example, Ontario (without, in either case, becoming fully qualified). The CLA regime will be discontinued when the “NMA 2013”, discussed below, is implemented. In March 2012, the Québec Mobility Agreement was amended to extend mobility rights to members of the *Chambre des notaires du Québec* on the same basis as they are available to members of the *Barreau*.

Another initiative that has been underway for some years relates to defalcation coverage for mobile lawyers. Effective January 1, 2010, LawPRO provides coverage for misappropriation by Ontario lawyers arising from temporary practice in or with respect to the law of another Canadian jurisdiction. This coverage was implemented to satisfy new requirements under the NMA with respect to trust fund defalcation. The Law Society of British Columbia implemented a new limit for theft by lawyers engaged in temporary mobility for the “Trust Protection” cover as agreed by all of the law societies. We understand that other provinces and territories have also implemented the required changes.

The Federation of Law Societies of Canada has issued a revised National Mobility Agreement (NMA 2013) with the intention of extending the permanent mobility provisions to mobility between the *Barreau du Québec* and the Canadian common law jurisdictions. The NMA 2013 is currently being considered for adoption by the various law societies, although no effective date for formal implementation has been established. Unlike mobility between the common law jurisdictions (where the permanent mobility provisions allow a lawyer who is a member of two provincial/territorial law societies to be insured in the jurisdiction in which he/she is resident and exempted from the insurance requirements in the other jurisdiction), a lawyer who is a member of the *Barreau* and another Canadian law society will be required to be insured in both jurisdictions. This is necessary due to the substantial differential in limits provided in Québec versus the other jurisdictions, and also due to technical legislative requirements in Québec which essentially prevent the *Barreau* from insuring members of other law societies. Given that the *Barreau’s* insurance program has a \$1 million sub-limit for work done outside of Québec, it is expected that the NMA 2013 will have no impact on the CLLAS coverage. The NMA 2013, when implemented, will replace the CLA regime discussed above.

The NMA 2013 has been ratified by all ten provincial law societies. Implementing the agreement will take some time as each provincial law society must formally adopt the terms and conditions in their by-laws or regulations. It is not clear at this point where this process stands in Quebec itself, as the changes first require approval of the *Office des professions du Québec*, and also require approval from the Quebec government. NMA 2013 does not make any changes to the regime for temporary mobility, but it removes the distinction between lawyers from Quebec and other Canadian lawyers for the purposes of permanent mobility between the signatories to the agreement.

As a consequence of differences between the *Barreau’s* program and those in the common law jurisdictions, NMA 2013 provides that where a lawyer is called in Quebec and at least one common law jurisdiction, that lawyer will be required to be insured under the *Barreau’s* program and in one of the common law jurisdiction. As a result of this requirement, the *Barreau* will continue to insure the lawyer for services rendered as a member of the *Barreau* and the common law program’s insurance will cover services provided by the lawyer for all the other common law jurisdictions. As a result of this, many law society programs are amending their policies to ensure that (1) they are clear that coverage limits are \$1 million per claim and \$2 million in the annual aggregate, regardless of the number of policies that may be involved, and (2) that their policies will not respond in the case of services rendered while acting in the capacity of a member of the *Barreau* (since the *Barreau’s* program will respond in that case).