

Why the LAWPRO base premium is only the start of the story:

A tentative analytical model brings insight

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Why is Ontario lawyers' professional liability insurance more expensive than other provinces? It's a legitimate question, and easy enough to formulate. The answer is either very simple or very complicated and detailed, because it means comparing apples to oranges.

The simple answer

A simple answer points to the fact that a person asking the question is probably thinking of the base premium announced each fall. As a single figure, it gives Convocation (and the profession) some sense, year over year, of overall premium direction. However, the base premium is really an underwriting construct, a starting point for determining individual charges.

Rarely does anyone focus on examples (or categories) of Ontario lawyers, reviewed every year in Appendix "C" of the Report to Convocation, who pay in the range of \$1,300 to \$1,900 for their primary insurance coverage. Only three jurisdictions in Canada have insurance levies cheaper than \$1,300. Those categories of insureds paying significantly less than base premium include the criminal law and immigration bars, new calls, and part-time practitioners. And in 2012, as a group they paid \$2.8 million less than in 2011, due to a change in the risk-rating discounts under the program. So, nearly 4,200 lawyers saved money even though the base premium did not decline.

Another simple answer would use auto insurance as a proxy. The 2011 Ontario Auditor General's report noted that while Ontario

has one of the lowest *per capita* figures for automobile accident deaths and injuries in the country, it has the highest average premium in Canada and the largest claims cost of any auto insurance system.¹ In 2012, the Insurance Bureau of Canada stated the following: "While four years ago Ontario premiums were on average 25% higher than the next highest province – Alberta – today the average Ontario premium is now more than 45% higher than Alberta's and almost twice as high as premiums in the maritime provinces"² This suggests that systemic or environmental issues may be coming into play across the Ontario insurance industry.

At least the LAWPRO base premium has been stable in the 2011-2013 period, whereas some other provinces' lawyers primary professional liability programs have seen increases of 10 to 20 per cent or more over the same period.³

Limitations to the more detailed answer

The more detailed answer certainly takes longer to explain and comes with many qualifications. LAWPRO recently undertook an analysis designed to give an indication of some reasons why lawyers' professional liability insurance is more expensive in Ontario. In other words, we developed an analytical model to provide some

¹ www.auditor.on.ca/en/reports_en/en11/2011ar_en.pdf

² www.abc.ca/en/Car_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee_May28-12.pdf

³ www.lawsociety.mb.ca/forms/insurance/ProfClaimsFund2012.pdf; www.lawsociety.mb.ca/forms/members-forms/Annual_Member_Report.pdf/view

insights, not actuarially specific numbers. Being limited in the amount and detail of data available from other provinces (and in some cases, from our own claims history), we focused on areas where at least some data is available.

For example, some provinces have wholly “no fault” auto regimes which means their lawyers’ professional liability programs experience few motor vehicle-related claims. For 2011-2012, Ontario accounts for 52 per cent of Canada’s more than 931,000 active civil cases. Motor vehicle cases represent the largest identifiable category of cases commenced each year and the number launched annually continues to grow. Ontario, alone, had more than 54,000 active cases involving motor vehicle claims in the civil courts in 2011-2012.⁴

Remember that Ontario auto insurance premiums are 45-200 per cent higher than in other provinces and that is attributed to claims costs.⁵ The 2011 Ontario Auditor General’s Report demonstrated that Ontario had the highest average total claim cost per insured vehicle of any province.⁶

That higher cost flows directly into the LAWPRO program (instead of being borne by the auto insurer) each time there is a perceived motor vehicle-related legal error for which there is liability at law. LAWPRO has not previously had any particular reason to code its data specific to motor vehicle files. So, without extensive re-coding, we cannot precisely quantify the impact of this issue.

It must also be remembered that other provincial lawyers’ programs do not necessarily cover the same pool of risks: Where the risks being insured are not the same, the likelihood of a comparable premium is low. For example, we understand that in British Columbia the risk for approximately 50 per cent of residential conveyancing is in the notaries’ program, instead of the lawyers’ program. In Quebec, much of the serious solicitors’ risk (such as real estate, wills & estates, and family law) is in the notaries’ program.⁷ So, simple comparisons between the Ontario lawyers’ program and those of British Columbia or the Barreau in Quebec are flawed from the outset.

The correct starting point for a more detailed answer

Before looking at the reasons why, in LAWPRO’s view, the base premium is higher in Ontario than insurance levies in other provinces, let’s ask ourselves the following question: Is base premium the correct starting point?

In fact, it is not. One must add to the base premium of \$3,350 a “per lawyer” share of the transaction levies that LAWPRO receives every year, because those transaction levies are another form of premium that supports the primary program. Once the transaction levies are factored into the equation, the revised premium starting point is approximately \$4,325 per lawyer, instead of \$3,350. (An astute reader will note that I have not mentioned charges arising from the Real Estate Practice Coverage Option (REPCO) or Claims History Levy Surcharges (CHLS). That is because in other provinces, the REPCO coverage is more akin to a Compensation

Fund issue and the aim of the CHLS is addressed through variable deductibles in some jurisdictions. So, they are both more difficult to include in any comparison.)

How do we make Ontario primary program premiums comparable to other provincial programs?

Take Base Premium
+ Transaction Levies

Less:

- Higher Ontario real estate values
- Ontario limitation period & administrative dismissal regime
- Higher legal fees
- Higher economic activity

Then decide how to divide up the balance: To risk-rate or not to risk-rate?

Ontario’s legal and financial environment

First let’s consider features of the Ontario legal or financial environment that drive our premium higher. We have identified four such features: higher Ontario real estate values; a stricter limitation period and administrative dismissal regime; higher legal fees; and higher volume of economic activity.

For each of these factors, our model allocates a portion of the LAWPRO premium per lawyer, on a hypothetical basis. Add up the tentative allocation for the four factors and you have approximately \$950 in premium related to Ontario-specific environmental factors.

(1) Real estate values

For the years 1999 to 2012 the average Ontario house price was 41 per cent higher than the average house price in all other provinces

⁴ www5.statcan.gc.ca/cansim/a03?lang=eng&pattern=259-0011..259-0016&p2=31

⁵ www.ibr.ca/en/Car_Insurance/documents/ON-reform/RPlumbo-Remarks%20to%20ON%20Standing%20Cmttee_May28-12.pdf

⁶ www.auditor.on.ca/en/reports_en/en11/301en11.pdf

⁷ www.cnq.org/en/notariesInQuebec/essence.html

combined.⁸ Only the British Columbia values are higher on average, but in B.C. (as noted above) 50 per cent of residential conveyancing is done by notaries and is thus outside the Law Society insurance program. The average annual LAWPRO indemnity cost (paid and reserved) for real estate files over a five-year period is \$14.7 million. If LAWPRO's costs for real estate indemnity claims were 41 per cent less, insureds could save approximately \$4.3 million per annum.

Of course, this analysis does not take into account the extent to which higher real estate values also drive higher indemnity amounts in some family, wills and estates, and commercial claims. That level of detail has not been captured over the years, but if it were available, it would only make the impact of Ontario real estate values on the claims portfolio greater.

(2) Limitation period and administrative dismissal regime

Ontario limitation periods are shorter than in many other jurisdictions, we have more administrative dismissal risks, and fewer opportunities for repairing claims based on either of these factors in light of our statutory provisions and case law.⁹ Other provinces may now be following Ontario's lead in this direction, but Ontario has been ahead of the curve and our claims experience reflects that, in LAWPRO's view.

We analyzed the number of missed limitation period cases reported per jurisdiction in 2011. Ontario had 400 reported cases, while other jurisdictions averaged 20 (from a low of 1 to a high of 95).¹⁰ Although based on only one year's worth of data, this analysis suggests that Ontario has on average 20 times the activity in this area than the other Canadian jurisdictions combined. The average annual LAWPRO cost for plaintiff and defence time management claims (indemnity and expense, paid and reserved) is approximately \$7.3 million. If one assumes that the other jurisdictions would on average have an annual cost equal to 1/20th the Ontario cost and subtracts that, one could argue that Ontario insureds pay approximately \$7 million in premium costs because of our more stringent limitation period and administrative dismissal regime.

(3) Ontario Legal Fees

Based on published sources, the cost of a two-day Ontario trial is 39 per cent higher than the average equivalent trial cost of other provinces (using a three-year survey average)¹¹. Ontario's average hourly rate for lawyers (using 2010-2012 survey results) is 14 per cent higher than the rates of other provinces. It is difficult to combine those two metrics, but for purposes of this exercise assume LAWPRO's legal costs are on average approximately 20 per cent higher than other Canadian jurisdictions. Given that we spend an average of \$36 million per annum on defence costs, that extra 20 per cent translates into \$6 million of insurance premium each year.

This calculation does not take into account the extent to which LAWPRO sometimes also pays for claimants' lawyers' fees as part of indemnity payments. Including that analysis would only make the impact of the higher legal fees in Ontario more acute.

(4) Ontario level of economic activity

On a variety of metrics, Ontario may be viewed as the leading corporate-commercial jurisdiction in Canada. For example, in 2011 Ontario had 35 per cent of all retail sales in Canada and 46 per cent of all manufacturing sales.¹² Both British Columbia and Alberta had lower shares of the market in each category. Ontario is the seventh largest economy in North America as of 2012¹³ and was ranked third for attracting foreign direct investment projects in 2011 (behind California and New York).¹⁴ Ontario's share of Canada's real gross domestic product was the largest by province or territory in 2011, at 37 per cent.¹⁵

All of this data supports an assumption that corporate-commercial claim costs may be higher in Ontario than in any other Canadian jurisdiction, based on greater economic and financial activity. Based on the limited data available (from only two of the top four Canadian jurisdictions by percentage of real GDP), Ontario has approximately 70 per cent more corporate-commercial claims per annum. At an average indemnity for such claims of approximately \$19,000 (over a ten-year period), those claims add extra indemnity costs to the program of approximately \$1.65 million per annum, when compared to some other leading Canadian business jurisdictions.

So, if you were able to strip away all the environmental factors described above, our analytical model would suggest a revised premium per lawyer closer to \$3,380 than to the \$4,325 figure we provided as our correct starting point.



⁸ www.cmhc-schl.gc.ca/odpub/pdf/66663.pdf; www.cmhc-schl.gc.ca/odpub/esub/61500/61500_2012_Q01.pdf

⁹ www.canlii.org/en/on/onca/doc/2008/2008onca469/2008onca469.html; www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02124_e.htm

¹⁰ www.canlii.org/eliisa/search.do?language=en&searchTitle=Search+all+CanLII+Databases&sortOrder=relevance&searchPage=eliisa%2FmainPageSearch.vm&text=%22limitation+period%22&id=&startDate=2011&endDate=2011&caselaw=courts

¹¹ www.canadianlawyermag.com/images/stories/pdfs/Surveys/2010/cl_june_salary%20survey.pdf; www.canadianlawyermag.com/images/stories/pdfs/Surveys/2011/legalfeessurvey.pdf; www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeessurvey2012.pdf

¹² www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/trad17a-eng.htm and www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/manuf33g-eng.htm

¹³ www.gov.on.ca/en/initiatives/progressreport2012/ONT05_040343.html#1.1

¹⁴ www.gov.on.ca/en/initiatives/progressreport2012/ONT05_040343.html#1.1

¹⁵ www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ50-eng.htm

Defining the pool of insureds: Who should pay premiums?

Our final level of analysis makes it very clear that comparing the Ontario base premium to other provinces' insurance levies is comparing apples to oranges, due to the impact of Ontario's strong commitment to risk-rating within the primary program. The movement to risk-rating resulted from the insurance crisis of the mid-1990s and was expressly mandated by the *Report to Convocation of the Insurance Task Force and the Insurance Committee*.¹⁶

This means we have to consider structural differences between Ontario's program and those of the other Canadian jurisdictions: our discount structure; and our exemptions for temporary leave of absence, legal aid clinic work, estate trustees, and in-house counsel.

(1) Value of discounts

Our program in Ontario has significant premium discounts for those qualifying in the "new lawyer", "restricted area of practice" (i.e. criminal, immigration) and "part-time practice" categories. Except for one other province which has a part-time discount, none of the other Canadian jurisdictions has equivalent discounts to the Ontario program.¹⁷ As of 2012, actual discounts were granted worth approximately \$10 million per annum due to the Ontario program structure.

(2) Exemptions: Premium waived

Ontario's program has a more elaborate exemption structure than most other provinces. If you consider, for example, Alberta, British Columbia, Manitoba and Nova Scotia, their programs do not allow exemption for estate trustees, three of the four do not grant exemption from buying insurance for temporary leave of absence, three of the four do not exempt lawyers in education, and two of the four don't exempt in house counsel or legal aid clinic lawyers.¹⁸ So, in those provinces, the overall insurance levy is being spread, due to the structure of the program, over more categories of payors.

In real life, LAWPRO forgoes approximately \$2.3 million per year because the approximately 700 lawyers in temporary leave of absence,

legal aid clinic, or estate trustee exemption categories do not pay premiums. Although as insureds they could be expected to present some risk to the program, it would not be appreciable.

LAWPRO also forgoes \$11 million per year because approximately 3,400 lawyers in the corporate in-house exemption category do not pay premiums. Their risk is being assumed by their employers, the employer being the only client.

The bottom line

So, as the old saying goes, you can't compare apples to oranges and expect them to look or taste the same. The premiums or insurance levies in each of the provinces and territories reflect very different environments and influences. And, depending on the size of the pool you are spreading the necessary premium over, you get radically different "per lawyer" results. With a different discount and exemption structure as described above, the hypothetical environmentally adjusted premium of \$3,380 might start to come down to the \$2,300 to \$2,800 range. At that range, about half of the other provinces' programs would have insurance levies in approximately the same range or higher than our hypothetical premium for purposes of this modelling exercise.

LAWPRO remains committed to running a risk-rated insurance program that operates on a commercially reasonable basis (a key element of LAWPRO's mandate).¹⁹ ■

With thanks to Victoria Crewe-Nelson, assistant vice president, underwriting and Tim Lemieux, practicePRO co-ordinator.

¹⁶ Law Society of Upper Canada, October 28, 1994, amended November 15, 1994

¹⁷ www.lawsociety.bc.ca/page.cfm?cid=199&t=Part-time-Insurance-Discount

¹⁸ www.lawsociety.bc.ca/page.cfm?cid=203&t=Exemptions; www.lawsociety.ab.ca/files/forms/Form_7-2.pdf; www.lawsociety.mb.ca/for-the-public/frequently-asked-questions/?searchterm=exempt; nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf

¹⁹ *Report to Convocation of the Insurance Task Force and the Insurance Committee*, op. cit., page 16, para. 54.

Did you know: Restricted area of practice option

LAWPRO offers a premium reduction of 50 per cent off the base premium to lawyers who practice exclusively in the areas of criminal and/or immigration law. If you are or will be practising only in these areas of law, this option may be available to you when completing your renewal application for Professional Liability insurance. Be sure to

read the Program Guide for more information regarding the official definitions of criminal and/or immigration law while completing your application. Note that if you opt to have this option removed from your coverage part-way through the year (to expand your coverage to other areas of law), it will not be possible to opt back in later in that year.