

College of Patent Agents and Trademark Agents
Specifications for Professional Liability Requirements
Final Report
November 9, 2020



This report is strictly for the use of the College of Patent Agents and Trademark Agents (CPATA) and its advisors in the context of their work in developing minimum insurance standards for professionals to be regulated by CPATA. Any other use or disclosure should be discussed first with Axxima Insurance Services. If this report is distributed further, it must be distributed in its entirety. All recipients of this report should be aware that Axxima Insurance Services is available to answer questions about it.

Caveat: References for the information provided in the benchmarking sections are provided. Except as noted, this information was not validated with the relevant regulator. Before arriving at final decisions, discussions with these regulators may be appropriate to understand the details of and context for the insurance requirements.

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PART 1—EXECUTIVE SUMMARY

This Report sets out recommendations and discussion points for use by the College of Patent Agents and Trademark Agents (CPATA) in establishing the professional liability insurance requirements for patent and trademark (P&T) agents in Canada.

The insurance elements addressed in this Report, which are divided into “potential coverage requirements” and “compliance monitoring considerations”, were developed by Axxima after review of the insurance requirements of six Canadian professional regulators and the regulator for UK P&T attorneys. Axxima also reviewed the insurance programs provided by two prominent insurers of P&T agents, PAMIA Limited in the UK and the Magnes Group in Canada.

The Report summarizes the approach to minimum insurance requirements used by each of the regulators and also benchmarks the specific requirements across all programs. Axxima uses this information, together with its experience with professional liability insurance programs and its understanding of CPATA’s mandate, to make specific recommendations for CPATA. For some elements, Axxima concluded that the formulation of recommendations would benefit from further discussion with CPATA and perhaps the Intellectual Property Institute of Canada (IPIC). In those cases, Axxima has provided specific questions for discussion.

Axxima makes 16 recommendations, some of which may be refined after further discussion with CPATA, including:

- Insurance requirements imposed at the firm level (including partnership and sole practitioner) as opposed to the individual level.
- Scope of coverage to be broad enough to cover claims arising from the provision of services related to intellectual property rights.
- Minimum limits of \$2 million per claim, perhaps with a double aggregate based on firm size.
- A maximum permissible deductible of \$25,000 with more flexible alternatives possible.
- Mandatory coverage for services provided and lawsuits brought in Canada and the US (with requirements for full worldwide coverage to be considered);
- Mandatory run-off coverage requirement with the duration (likely five years) to be determined.
- Proof of insurance to be provided to CPATA during annual membership renewal process, with notice required by insured if coverage is cancelled or lapses without replacement.
- CPATA should not “approve” insurers but should require that insurers be licenced to do business in the provinces/territories in which the insured professionals reside.

The above is a summary only and reference should be made to the full discussion in the body of this Report.

PART 2—INTRODUCTION AND OBJECTIVES

As part of a broader intellectual property strategy to support Canadian business and innovation, the federal government has established CPATA to promote better P&T agent governance. As an independent regulator, CPATA is responsible for the professional oversight of P&T agents in the public interest. It will administer a licencing system, enforce a code of professional conduct and implement requirements for continuing professional development. Agents will also be required to have liability insurance, with CPATA being responsible for establishing minimum amounts and terms.

CPATA intends to be a principles-based regulator, setting standards through expected outcomes, while leaving judgment as to how to achieve those outcomes in the hands of the regulated. In keeping with this, CPATA intends to establish a framework for mandatory liability insurance; that is, P&T agents will be required to maintain liability insurance which meets certain minimum standards, but they will be free to arrange that coverage in the insurance marketplace.

The objective of this Report is to provide CPATA with assistance in identifying and defining the specific elements of the professional liability insurance requirement (e.g., limits, coverage terms, compliance monitoring, etc.).

Axxima is an independent risk management and actuarial consulting firm which specializes in the design, implementation and management of self- and insurer-funded risk management solutions and has a long history in the area of professional liability insurance. We have taken the following approach to analyzing the liability insurance requirement:

- Step One: Identification of Key Elements. This step involved preparing a list of elements that, in our experience, could be addressed as part of a mandatory insurance program for professionals. This list includes both potential insurance coverage requirements and compliance monitoring considerations. This step is addressed in Part 3 of this Report.
- Step Two: Benchmarking of Existing Insurance Programs for Professionals. We reviewed a number of professional liability insurance programs to see how they handle the identified elements. We included in this review the UK regulator of P&T attorneys, and the most widely available commercial insurance programs for P&T agents in Canada and the UK. This information is summarized in Parts 4 and 5 of this Report and results are summarized in tables in Appendices II and III.
- Step Three: Considerations and Recommendations. Building on the benchmarking information, we discuss each element and provide commentary and recommendations as to how they could be best addressed in the specific context of CPATA's mandate. We have documented this in Parts 6 to 8 of this Report.

PART 3—SELECTING THE REQUIREMENTS AND PROGRAMS

As a first step, we prepared a list of elements that might be considered by CPATA as it considers mandatory insurance requirements for P&T agents. In preparing our list, we reviewed the details of a number of professional liability programs and we consulted with:

- Darrel Pink, CEO of the CPATA;
- Redvers Cunningham, CEO of PAMIA Limited, the major provider of professional indemnity insurance to patent and trademark attorneys in the UK and Ireland;
- Tim Lowman, an intellectual property lawyer at Alrd & Berlis LLP and Secretary of IPIC;
- Andy Sloan and RF Farnworth of the Magnes Group, a brokerage which, working cooperatively with IPIC, provides the major program for professional liability insurance to P&T agents in Canada.

The list is divided into two concepts: (1) Insurance Coverage Requirements (i.e., minimum terms and limits of insurance that are required by the regulator), and (2) Compliance Monitoring Considerations (i.e. mechanisms in place to ensure that minimum insurance requirements are met on an ongoing basis). Taken together, these elements describe the framework of the insurance requirements for a regulated profession. They are set out below:

Potential Insurance Coverage Requirements

1. Are insurance requirements imposed at the individual or entity (i.e. firm/partnership) level?
2. How does the regulation define who must be insured?
3. Does the regulation specify terms of coverage?
4. What are the minimum required limits (per claim)?
5. What are the minimum required limits (annual aggregate)?
6. Are defence costs within or in excess of the required limits?
7. Is there a maximum permitted deductible?
8. Is there a requirement to pre-fund the deductible?
9. Does the regulation impose any requirements on the quality of the insurer?
10. Are trainees/apprentices required to meet the minimum insurance standards?
11. Are there territorial requirements with respect to lawsuits brought outside of Canada?
12. Are there territorial requirements with respect to services performed outside of Canada?
13. Is there a requirement for run-off/extended reporting period coverage after withdrawal from practice?

Compliance Monitoring Considerations

1. How is proof of insurance demonstrated at the entity level?
2. How is proof of insurance demonstrated at the individual level?
3. What sanctions/enforcement mechanisms are in place if insurance requirements are not met?
4. Are minimum coverage standards reviewed/enforced and if so how?
5. What happens if a professional is uninsurable?
6. What happens if a professional loses coverage?
7. Are there any special requirements regarding notice of cancellation?
8. Do the insurance requirements include any special or unusual provisions worth noting?

Identification of Benchmarked Programs

The next step in the process involved benchmarking insurance requirements or programs established by regulators for other professionals in order to provide a reference point for CPATA in establishing its insurance requirements. Appendix I contains a comprehensive list of regulated professions. We considered the professions on the list and selected the following regulators as being most relevant to CPATA:

- Chartered Professional Accountants of Ontario (<https://www.cpaontario.ca/>)
- Professional Engineers of Ontario (<https://www.peo.on.ca/>)
- Engineers and Geoscientists BC (<https://www.egbc.ca/>)
- Registered Insurance Brokers of Ontario (<https://www.ribo.com/>)
- College of Nurses of Ontario (<https://www.cno.org/>)
- Intellectual Property Regulation Board, or IPReg, the UK regulator of Patent and Trademark Attorneys (<https://ipreg.org.uk/>)

Five of the regulators are located in Canada and one is in the UK. Each specifies minimum insurance requirements for the professionals they regulate. We chose two programs for engineers (Ontario and BC) because they take different approaches to the matter. In addition to regulators, we chose three insurance programs, as follows:

- Lawyers' Professional Indemnity Company or LawPRO, a wholly owned subsidiary of the Law Society Ontario (<https://www.lawpro.ca/>)
- PAMIA Limited, the dominant provider of professional indemnity insurance to patent and trademark attorneys in the UK and Ireland (<https://www.pamia.co.uk/>)
- The Magnes Program, a provider of professional liability insurance to P&T agents in Canada which works closely with IPIC (<https://magnesgroup.com/en/home/>)

LawPRO, provides the insurance program for Ontario lawyers on a compulsory basis, i.e., lawyers who are required to be insured must buy their mandatory insurance from LawPRO. As a compulsory insurance program, LawPRO will provide minimal insight into the compliance monitoring aspect of



the benchmarking exercise but the minimum insurance coverage standards applicable to lawyers are of obvious interest when considering insurance requirements for P&T agents.

The other two entities in the benchmarking exercise, PAMIA and Magnes, are not regulators. They are independent insurance programs providing coverage to P&T agents in the UK and Canada respectively. We believe that it is important to understand the coverages provided by these programs as the minimum requirements adopted by CPATA will ultimately need to be met by insurers operating in the commercial marketplace.

The next section of the Report provides an overview of each one of these programs in turn.

PART 4—THE BENCHMARKED PROGRAMS

Before reviewing the elements (e.g., minimum limits) across all programs, it is helpful to quickly look at each program on its own. The insurance requirements for each program have obviously been developed to address the nature of the work done by the professionals being regulated, and the various requirements work together in a way that presumably strikes the right balance for that profession.

The point of this Part 4 is to show, in a snapshot, how the six Canadian regulated programs work. Appendix II contains two tables that compare the elements across the programs to see what can be learned in establishing the insurance requirements for CPATA. Part 5 of the Report focuses specifically on insurance programs for P&T agents, including the requirements of the UK regulator.

Accountants (Ontario)

The accounting profession in Ontario is regulated by the Chartered Professional Accountants of Ontario¹ (CPAO, <https://www.cpaontario.ca/>). Regulation is at the firm level, including sole practitioners, and includes the concept of “Firm Representative”, an individual member who is personally responsible for ensuring compliance. Any firm engaging in the “practice of public accounting” (essentially audit or review engagements) must be insured. There do not appear to be any prescribed coverage requirements.

The minimum required limit is based on firm size and varies from \$1 million for a sole practitioner up to \$2 million for a firm of four or more professionals. The deductible must be reasonable in relation to the firm’s revenue, and must not exceed 50% of the minimum required limit. Firms are required to “set aside” funds equal to the deductible.

The regulator does not impose any quality requirements on the insurers used, nor any territorial requirements on the coverage. Firms must maintain coverage for six years after the withdrawal of a professional or the dissolution or deregistration of a firm.

In terms of compliance monitoring:

- Firms must provide proof of insurance coverage to the regulator prior to commencing practice, annually thereafter, and within five business days of the expiry of the policy;

¹ References:

Public Accounting Act, 2004:

<https://www.canlii.org/en/on/laws/stat/so-2004-c-8/latest/so-2004-c-8.html>

Chartered Professional Accountants of Ontario Act, 2017:

<https://www.canlii.org/en/on/laws/stat/so-2017-c-8-sch-3/latest/so-2017-c-8-sch-3.html>

Regulation 14-1 issued by CPA Ontario:

<https://media.cpaontario.ca/stewardship-of-the-profession/pdfs/Regulation-14-1.pdf>

- Sanctions if insurance requirements are not met include late fees and suspension of the firm and the Firm Representative; if proof is not provided within 30 days, the firm is deregistered and the Firm Representative’s membership is revoked;
- There is no mechanism in place for reviewing the insurance coverage itself; as noted previously, there do not appear to be any minimum standards with respect to coverage; and
- The insurance policy must include a provision requiring the insurer to immediately notify the regulator of the expiry, cancellation, or termination of the insurance coverage, or the reduction of the insurance coverage below the required amount.

The regulation does not address “hard-to-insure” professionals. There is a provision allowing for the use of self-insurance, with regulatory approval, but this provision appears to be aimed at permitting the use of captive insurance companies.

Engineers (Ontario)

The engineering profession in Ontario is regulated by the Professional Engineers of Ontario² (PEO, <https://www.peo.on.ca/>). Regulation is at the “certificate-holder” level. A certificate can be held by a person, a partnership or a corporation. Any person or entity offering services to the public (but not to other professional engineers) that are “within the practice of professional engineering” must hold a certificate.

The required coverage must apply to “liability for errors, omissions and negligent acts arising out of the performance of all services within the practice of professional engineering offered or provided to the public by the insured subject to such exclusions and conditions and otherwise on such terms as are consistent with normal insurance industry practice from time to time”.

Minimum required limits are \$250,000 per claim, with an annual aggregate of \$500,000 (or an automatic restatement of an additional \$250,000). The maximum deductible is limited to the greater of \$5,000 and 5% of annual fees.

The regulator requires that the insurer providing the coverage has capital and surplus of at least \$20 million or be a Lloyd’s Syndicate. There is no requirement for run-off coverage.

² References:

Professional Engineers Act, 1990:

<https://www.canlii.org/en/on/laws/stat/rso-1990-c-p28/latest/rso-1990-c-p28.html>

Professional Engineers of Ontario:

<https://www.peo.on.ca/index.php/licence-holders/offering-services-public> &
<https://www.peo.on.ca/licence-holders/offering-services-public>

In terms of compliance monitoring:

- There does not appear to be any requirement to provide the regulator with proof of insurance; this may in fact be part of an annual renewal process, but it is not addressed in the regulations;
- A complaint through the discipline process can lead to a reprimand, fine or suspension;
- The insurance policy must include a provision that neither party may cancel nor amend the policy in a way that results in non-compliance with the regulations without first giving the other party at least 45 days written notice (shorter for non-payment of premium); notice is to the insured, not the regulator.

There is an exception from the insurance requirement if written consent is obtained from the client (see sample notice at: <https://www.peo.on.ca/sites/default/files/2019-08/SampleDisclosureNotice.pdf>). In addition, the insurance requirements need not be met if:

- The firm participates in the architects' compulsory program and services are limited to those covered by that program;
- Substantially all claims arising out of the service performed would be covered by other insurance whose terms are not materially less than those required; or
- The risk is in respect of pollution, nuclear hazards, aviation hazards or shipping hazards.

Engineers (BC)

The engineering profession in BC is regulated by Engineers and Geoscientists BC³ (EGBC, <https://www.egbc.ca/>). Regulation for insurance purposes is at the individual level. Firms and employers are expected to carry liability insurance, but individuals are required to buy coverage through a "secondary program" mandated by the regulator. The secondary program covers members, licensees, engineers-in-training and geoscientists-in-training. The program provides no coverage for the firm and very limited coverage for the "decision makers" i.e., directors, officers, >10% shareholders.

The secondary program provides limits of \$250,000 per claim, with a \$500,000 aggregate per project. Costs are within the limit. The program covers work done anywhere in the world, but only for lawsuits brought in Canada or the US. The program provides run-off coverage if protection from the individual's former firm is not available.

³ References:

Engineers and Geoscientists Act, 1996:

<https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-116/latest/rsbc-1996-c-116.html>

Engineers and Geoscientists BC bylaws:

<https://www.egbc.ca/getmedia/e0c7d14c-ed74-4872-9a58-0a4bb2cd59b7/APEGBC-Bylaws.pdf.aspx>

Secondary Program:

<https://www.egbc.ca/Member-Programs/Secondary-Professional-Liability-Insurance-Program>

As noted above, firms are expected to carry professional liability coverage. The regulations require that a firm disclose to a client whether professional liability insurance is held and whether it applies to the services in question.

In terms of compliance monitoring:

- The secondary program is compulsory and is provided automatically;
- There does not appear to be any requirement on firms to provide the regulator with proof of insurance; this may be part of an annual renewal but it is not addressed in the regulations;
- A complaint through the discipline process may lead to sanctions such as a reprimand, fine or suspension.

Insurance Brokers (Ontario)

Insurance brokers in Ontario are regulated by the Registered insurance Brokers of Ontario⁴ (RIBO, <https://www.ribo.com/>). Regulation is at the firm level, including sole practitioners, and the regulations include the concept of “Principal Broker”, an individual in each firm who is personally responsible for ensuring compliance. All members must be insured. The details of the coverage are not specified but the insurance must be in a form approved by the regulator.

The minimum required limit is \$3 million per claim with a \$6 million aggregate. No maximum deductible is specified but the firm must maintain equity at least equal to the amount of the deductible.

The regulator does not impose any quality requirements on insurers used, nor any territorial requirements for coverage. It does not appear as though run-off coverage is required.

In terms of compliance monitoring:

- Any change to the insurer, deductible, etc. must be filed with the regulator within 30 days and must include supporting documentation (i.e., certificate of insurance, endorsements, etc.);
- When an individual broker leaves a firm, the regulator must be advised;
- Registration as an insurance broker automatically expires on the date insurance is cancelled or non-renewed unless the insurance is replaced and the regulator is notified;

⁴ References:

Registered Insurance Brokers Act, 1990:

<https://www.canlii.org/en/on/laws/stat/rso-1990-c-r19/latest/rso-1990-c-r19.html>

General Regulation 991:

<https://www.canlii.org/en/on/laws/regu/rro-1990-reg-991/latest/rro-1990-reg-991.html>

RIBO By-laws:

<https://drive.google.com/file/d/13BQ-cvBVZ2N5YNH7bo5GccuSu2vW--wM/view>

- The insurance policy must include an endorsement stipulating that notice to the regulator must be provided 30 days prior to the cancellation or non-renewal of coverage.

In place of insurance, the regulation allows for “some other form of financial guarantee in a form approved by” the regulator.

Nurses (Ontario)

The nursing profession in Ontario is regulated by the College of Nurses of Ontario⁵ (CNO, <https://www.cno.org/>). Regulation is at the individual level although an employer or association can provide the required insurance. All nurses must be insured unless they have formally moved to a “non-practicing” class of licence. The required insurance must cover “all errors and omissions that may occur with practicing nursing in Ontario”.

The minimum required limit is \$1 million per claim and \$2 million in the annual aggregate. The mandatory requirement is increased to \$2 million per claim and \$5 million in the annual aggregate for nurses in an “extended class”, which allows an expanded scope of practice giving the nurse authority to diagnose, prescribe medication, perform procedures and order/interpret diagnostic tests. The maximum permitted deductible is \$1,000.

The regulator does not impose any quality requirements on the insurers used. Insurance is required to cover services provided in Ontario only. There is a requirement for a minimum of a two-year extended reporting period if the coverage is claims-made (as opposed to occurrence based).

In terms of compliance monitoring:

- The primary gatekeeper for monitoring insurance seems to be the employer, although the college may request proof of insurance from a nurse at any time;
- There is an annual renewal process, but it is not clear if confirmation of insurance is part of that process;
- A complaint through the discipline process can lead to a reprimand, fine or suspension;
- Nurses are required to self-report the following to the College:
 - A finding of professional negligence or malpractice, or
 - A proceeding for or finding of professional misconduct.

⁵ Reference:

Health Professions Procedural Code (Sch. 2):

<https://www.ontario.ca/laws/statute/91r18#BK53>

College of Nurses of Ontario By-laws:

https://www.cno.org/globalassets/docs/general/46005_bylaws.pdf

College of Nurses of Ontario Information:

<https://www.cno.org/en/become-a-nurse/>

The regulation does not address “hard-to-insure” professionals. Note that membership in the Registered Nurses’ Association of Ontario (RNAO) automatically provides nurses with the required coverage through the Canadian Nurses Protective Society (CNPS). This coverage does not extend to claims for which the nurse’s defence is adequately coverage by an employer’s coverage.

Lawyers (Ontario)

The legal profession in Ontario is regulated by the Law Society of Ontario and insured through its wholly owned subsidiary, the Lawyers’ Professional Indemnity Company⁶ (LawPRO, <https://www.lawpro.ca/>). The approach to insurance for lawyers is different from the professions discussed above, as the LawPRO program is *compulsory*, meaning that if a lawyer is required to be insured, that lawyer must buy coverage from LawPRO. This means that the compliance monitoring considerations addressed by other regulators do not arise, as each lawyer deals directly with LawPRO. The insurance coverage considerations, however, will be of interest to CPATA.

Regulation is at the individual level, although consideration of regulation at the entity level is underway. All lawyers in private practice must be insured with LawPRO. Lawyers who are exempt from the insurance requirements must file an annual statement certifying the reason for their exemption. The insurance policy includes a broad definition of professional services, with the coverage subject to various exclusions and sublimits.

The basic limit is \$1 million per claim and \$2 million in the annual aggregate with sublimits for certain exposures. The maximum permitted deductible (subject to approval by the insurer) is \$25,000.

Coverage is provided for Canadian law only. Lawsuits brought outside of Canada are covered only if the services were provided in Canada or if out-of-country services make up less than 10% of the lawyer’s practice. Coverage for services provided outside of Canada applies only if the lawsuit is brought in Canada or if out-of-country services make up less than 10% of the lawyer’s practice.

Insurance is a requirement for private practice. Lawyers not in private practice must obtain an exemption. Non-compliance is subject to discipline including disbarment.

Hard-to-insure professionals is less of an issue in a compulsory program which insures the entire membership. LawPRO employs a claims history surcharge that increases the annual levy based on the number of paid claims within the past five years (<https://www.lawpro.ca/wp-content/uploads/2020/10/A3-Policy-Book-2020-AODA.pdf#page=18>).

⁶ References:

Law Society Ontario By-law 6:

<https://lawsocietyontario.azureedge.net/media/iso/media/about/governance/by-laws/by-law-6-bilingual.pdf>

LawPRO insurance policy:

<https://www.lawpro.ca/wp-content/uploads/2020/10/A3-Policy-Book-2020-AODA.pdf>

PART 5—INSURANCE PROGRAMS FOR P&T AGENTS

This Part provides an overview of the regulatory requirements for P&T attorneys in the UK and discusses the most prominent private insurance programs in the UK and Canada. Key elements of these programs are compared in the tables included in Appendix III.

IPReg – P&T Attorney Regulator (UK)

Patent and trademark attorneys in the UK are regulated by the Intellectual Property Regulation Board⁷ (IPReg, <https://ipreg.org.uk/>). Regulation is at the individual and firm level; firms must have a designated person approved by the regulator as “Head of Legal Practice” or “Head of Finance and Administration”. Each registered person must ensure that they have insurance commensurate with the risks at large arising from the extent and size of their practice.

Coverage must apply to “intellectual property business” which is defined as “[t]he provision of services relating to Intellectual Property Rights by the Insured to another party, including services of advice, acquisition, prosecution, maintenance/renewal, enforcement, defence, opposition, consulting, support, formalities, search, administration, drafting of documents, and/or ancillary services.”

The regulator has issued minimum terms and conditions (see link below) which are prescribed as the minimum insurance requirements. Further, insurance must be obtained from a “participating insurer” which is an insurer so designated by the regulator. There are currently three participating insurers, PAMIA, Allianz and RSA. The PAMIA program is discussed below.

The minimum limit specified is £250,000 but, in practice, the regulator expects a limit of at least £1 million unless, demonstrably, the practice does not warrant a limit that high. A number of disciplinary complaints relate to the failure to maintain adequate insurance. Maximum deductibles are not addressed.

The regulator does not explicitly set quality standards for insurers but as discussed above, does require that they be on its list of participating insurers. Coverage must be worldwide in scope but may exclude services provided in, and lawsuits brought in, Canada and the US. The regulator requires that a six-year run-off policy be arranged if a practice closes without its liabilities having been

⁷ References:

IPReg Rules of Conduct (Rule 17):

<https://ipreg.org.uk/sites/default/files/Rules%20of%20Conduct%20June%202020%20%282%29.pdf>

IPReg Code of Conduct:

<https://ipreg.org.uk/pro/regulations/code-conduct>

IPReg Minimum Terms and Conditions:

<https://www.ipreg.org.uk/sites/default/files/Minimum-Terms-and-Conditions-2016.pdf>

acquired; contact information for the run-off insurer must be provided to all clients and former clients within one month.

In terms of compliance monitoring:

- Contact info for primary layer insurer, including any limitations of liability, must be provided to clients and to IPReg on request;
- In practice, IPReg collects certificate numbers from insureds and validates this information with the participating insurers;
- The disciplinary process can lead to suspensions, etc. for failure to meet insurance requirements;
- On cancellation of insurance, run-off insurance must be arranged and clients/former clients must be notified.

IPReg does not specifically address “hard-to-insure” professionals.

PAMIA – P&T Attorney Insurance Program (UK)

The most prominent insurer for P&T attorneys in the UK is PAMIA Limited⁸ (<https://www.pamia.co.uk/>). It is an authorized and regulated insurer that operates on a not-for-profit basis. It insures about 400 firms and says that it covers more than 95% of UK and Irish attorneys in private practice. It was established in 1989 and therefore predates the establishment of IPReg. PAMIA was consulted when IPReg established its minimum terms and conditions and it continues to work cooperatively with the regulator today (subject, of course, to confidentiality and privacy obligations).

PAMIA insures firms and sole practitioners. To be eligible to insure with PAMIA, firms, with very limited exceptions, need to be owned and controlled by P&T attorneys. P&T services in the UK are deregulated, so one does not need to be an attorney to provide the services, but PAMIA only insures attorneys.

Minimum coverage terms, as discussed in the previous section, are prescribed by IPReg and PAMIA is a “participating insurer” with IPReg.

Limits are provided at the firm level. The minimum limit available from PAMIA is £250,000 but only a very small number of firms are at this level; most firms have limits of £1 million or higher. Costs are in addition to the limits. This means that the limit is preserved for indemnity payments and is not

⁸ References:

PAMIA Rules:

https://www.pamia.co.uk/fileadmin/uploads/pamia/PAMIA_Rules_2020_1_.pdf

PAMIA Terms of Cover:

https://www.pamia.co.uk/fileadmin/uploads/pamia/PAMIA_Terms_of_Cover_2020.pdf

Videoconference discussion with Redvers Cunningham, PAMIA CEO

eroded by legal costs incurred in defending the claim. (Note that this is unusual in Canada, except for in Quebec where it is a legislative requirement.) The basic deductible offered is £7,500. Higher deductibles are offered but are not priced attractively, so most firms opt for the basic deductible.

PAMIA's basic coverage is worldwide in scope but includes an exclusion for services provided in, or lawsuits brought in, the US. PAMIA will provide the US coverage on an underwritten basis, i.e. based on an application and typically for an additional premium.

In terms of compliance monitoring, as noted above, PAMIA works collaboratively with IPReg, subject to confidentiality and privacy considerations.

Magnes – P&T Agent Insurance Program (Canada)

The Magnes Group⁹ (<https://magnesgroup.com/en/home/>), a Canadian insurance brokerage, operates the most prominent program in Canada focused on P&T agents. The program insures both non-lawyer P&T agents and lawyer P&T agents. In the case of the latter group, the program has value because most of the provincial/territorial law society insurance programs restrict coverage for the practice of non-Canadian law, whereas many agents are in fact involved in P&T filings outside of Canada.

The Magnes program insures the firm (including sole practitioners) with pricing based on the number of professionals in the firm. Magnes has a few small clients with limits of \$500,000 but generally believes that \$1 million is the minimum appropriate limit and that \$2 million minimum is preferred given the cost of defending complicated P&T litigation, including expert fees. Defence costs are included within the limits except in Quebec where legislation requires that costs be outside of limits. Quebec agents are subject to a higher premium as a result of this coverage enhancement.

Deductibles typically range from \$2,500 to \$10,000 although a deductible for a larger firm can be as high as \$100,000. Deductibles apply to both defence and indemnity (indemnity only in Quebec). The program has a feature whereby the deductible is reduced by 50% if the matter in dispute is subject to an engagement letter that includes an arbitration clause and the matter is ultimately resolved via arbitration.

The program insures only Canadian domiciled agents. Worldwide coverage is part of Magnes' core offering and is never excluded, although US exposure may be surcharged in some cases. A distinction in exposure is whether an agent is authorized to practice before the US Patent and Trademark Office (USPTO). Insured's may undertake in the insurance application that they do not practice before the USPTO in order to reduce or eliminate a surcharge. Note that a recent rules change in the US means

⁹ References:

Videoconference discussions with Andy Sloan and RJ Farnworth of the Magnes Group and Tim Lowman of Aird & Berlis, Secretary of IPIC Board



that only US attorneys may practice before the USPTO, but some US attorneys are domiciled in Canada.

A six-year extended reporting period is available under the Magnes policy. It is exercised on termination or expiry of the policy by paying an additional premium.

In terms of monitoring insurance requirements, Magnes advises that its program insures the firm and it does not track the comings and goings of individuals throughout the policy year. It believes that it would be more effective for CPATA to deal directly with the firms themselves, as part of the annual renewal process, to track insurance coverage.

PART 6—INPUT INTO POTENTIAL CPATA COVERAGE REQUIREMENTS

Below is a discussion of each of the coverage requirements canvassed in the benchmarking exercise, together with some guidance for CPATA based on our experience in working with professional liability programs. Once decisions have been made on each element, it will be important to review the requirements as a whole to ensure that they strike the right balance between public protection, cost/availability of coverage, and administrative burden placed on the both the regulator and the regulated. For this purpose, a summary of the requirements is included in Part 8.

Requirements at Individual or Firm Level?

Most of the benchmarked programs impose insurance requirements at the firm level (in this context firm includes partnerships and sole practitioners). The two exceptions to this are Ontario nurses and Ontario lawyers which require, among other things, limits to be maintained at the individual level. Nurses tend to be employed by healthcare providers and can work in multiple environments contemporaneously. Individual insurance requirements for lawyers flow naturally from the nature of a compulsory program. These types of considerations do not apply directly to P&T agents or the framework being built by CPATA (unless it chooses to implement a compulsory program).

We believe that it would be a “tough sell” to require a commercial insurer to provide separate limits for multiple individuals within the same firm. If there is concern about availability of coverage for multiple unrelated claims in the same firm, this can be addressed through aggregate limits.

Recommendation #1: *Insurance coverage requirements should be mandated at the firm level, with “firm” including partnerships and sole practitioners. Note that insurance can be required at the firm level even if CPATA regulates agents at the individual level. This requirement is also distinct from whether compliance is monitored at the individual or entity level, which is addressed later in this Report.*

Who Must be Insured?

For the benchmarked programs, this is largely determined by the scope of regulatory authority. Typically, individuals must be registered with the regulator if they are providing specific defined services, and they must be meeting the insurance requirements if they are providing those services to the public. The exact scope of this requirement, specifically whether and how P&T agents working in-house at corporations are to be included, requires further review.

Recommendation #2: *Who must be insured will largely flow from CPATA’s mandate, with the key questions being whether an individual must be providing the defined services to the public, as is generally the case for lawyers, and*

*whether agents working in-house for corporations should be included.
The exact scope of this requirement requires further review.*

Scope of Required Coverage

In some cases, the programs reviewed in the benchmarking exercise did not define the required scope of coverage. In other cases, this element is linked closely with the definition of who is regulated. In simple terms, if you do X, you must be registered with the regulator, and you must be insured for providing X to the public.

For CPATA, PAMIA's terms of coverage provide a good starting point. PAMIA defines Intellectual Property Business as: "The provision of services relating to Intellectual Property Rights by the Insured to another party, including services of advice, acquisition, prosecution, maintenance/renewal, enforcement, defence, opposition, consulting, support, formalities, search, administration, drafting of documents, and/or ancillary services."

In turn, Intellectual Property Rights are defined as: "Rights, whether legally validly protectable or not, anywhere in the world, conferred on intangible matters generally known as intellectual property, including: inventions, designs, copyright works, trademarks, domain names, company names, plant varieties, databases, performances, encryptions, hallmarks, personal data, trade secrets, confidential information, know-how, goodwill, designations of origin, geographical indications, traditional specialty guarantees, and the like, and including claims and rights related to: passing off, counterfeiting, grey imports, comparative advertising, advertising standards, labelling, unfair competition and the like."

Recommendation #3: *The required scope of coverage should be defined broadly to encompass professional services related to intellectual property rights. The Canadian equivalent of the PAMIA definition will likely form a good starting point in defining the scope of required coverage.*

Minimum Limits (Per Claim)

This is one of the more difficult elements as it requires balancing public protection against reasonable cost and availability of coverage, and firms' exposure will vary widely based on the nature and size of their practice. It is clear that regulators do not attempt to define a limit that will cover the entirety of every possible claim. There is some reliance on the professional to determine its own requirements and arrange insurance above the minimum as needed.

Some of the benchmarked regulators impose very low minimum limits (\$250,000) but include an additional qualitative requirement that insurance limits be appropriate relative to the firm's practice. The regulator for Ontario insurance brokers, at the other end of the spectrum, imposes the highest minimum limit requirement at \$3 million.

Insurance brokers in the P&T field told us that, while there are exceptions, they typically recommend a minimum of \$2 million per claim, due to the cost of defending complex intellectual property litigation. While it is obviously generalization, at a limit of \$1 million, the sense is that the insurance is likely protecting only the agent, through payment of defence costs, with little if any limit available to compensate an aggrieved client.

In our view, a low specified limit together with a requirement that limits “be appropriate” would leave many P&T agents wondering what constitutes “appropriate” and may result in interpretations based on individual risk tolerance as opposed to exposure. We recommend a \$2 million limit minimum. If there is a sense that this limit may be an issue for certain smaller firms, there options. For example, the required limit can be \$2 million unless annual revenue is below a certain threshold, or a lower limit could be allowed if the limit is disclosed to clients. However, given the nature of the exposure, it is difficult for us to foresee circumstances where a two-tiered limit would be appropriate.

Recommendation #4: *The recommended limit is \$2 million limit per claim. Given the nature of the exposure, it is difficult for us to foresee circumstances where a two-tiered limit would be appropriate. Providing ample advance notice of the effective date of the requirement is likely a better approach from the standpoint of public protection.*

Minimum Limits (Annual Aggregate)

Some regulators specify a minimum annual aggregate, specifically Ontario Nurses, insurance brokers and lawyers, where the aggregate is double the per claim limit. (Nurses licenced for an expanded scope of practice are required to have a \$5 million aggregate.)

In particular if insurance requirements are defined at the firm level, a minimum aggregate limit of say two times the per claim limit becomes important in the event of multiple unrelated claims in the same policy year. Having said that, the aggregate is somewhat dependent on the per claim limit. If the minimum per claim limit is higher, a minimum requirement of a double aggregate may be viewed as less important, although Ontario insurance brokers are required to maintain a limit of \$3 million with a double aggregate.

Recommendation #5: *Assuming that insurance requirements can be met at the firm level, it is recommended that the aggregate limit be based on firm size, for example, a single aggregate for firms with five or fewer professionals, a double aggregate if for firms with six or more professionals.*

Defence Costs Within or in Addition to Limits?

Defence costs will clearly be an important part of the value of professional liability insurance to P&T agents. The PAMIA program in the UK stipulates that defence costs are in addition to the limit. However, none of the benchmarked Canadian programs takes this approach. (Note that in Quebec, by law, defence costs must be in addition to the limits.) To require defence costs in addition to limits risks, in our view, leading to a reduction in the pool of available insurers and an increase in the cost of coverage. We believe it is better to establish the minimum per claim limit at a level appropriate to protect the public than to require that costs be in addition to the limit.

Recommendation #6: *CPATA should not specify that defence costs be in addition to the minimum insurance limits specified. The exception to this, in our view, would be if the required minimum limit is low relative to the exposure.*

Treatment of Deductible

Most of the benchmarked Canadian programs specify a maximum deductible. The purpose of doing this is in part to avoid the prospect of a hard-to-insure professional negotiating coverage at the required limit but with an excessively high deductible. This may be a somewhat theoretical concern as, in practice, brokers and insurers will avoid agreeing to deductibles that are not appropriate to the insured (from the insurer's perspective, it can make claims management more difficult). The downside is that a maximum deductible limits flexibility of a large firm which is able to financially accommodate a larger deductible.

To balance this involves recognizing the size difference, and therefore the capacity to cover a larger deductible, between a sole practitioner and a large firm. RIBO, the regulator of Ontario insurance brokers, does not specify a minimum deductible but requires that the insured firm maintain equity (i.e. unencumbered assets) equal to the size of the deductible. RIBO also requires regular filings with respect to premiums held in trust and it monitors this requirement as a part of regular filings (which are mostly focused on monitoring premiums held in trust). We doubt that CPATA would want to take on that level of administrative activity.

Axxima's conclusion is that little is gained by complicating things. The default maximum should likely be in the range of \$25,000. Smaller firms will likely prefer a lower deductible in any event. Larger firms may prefer the option to move to a higher deductible in order to reduce premiums, and CPATA may wish to accommodate this by allowing for higher deductibles with the approval of CPATA. One approach would be to specify a lower maximum (say \$10,000) and permit a higher deductible on approval of CPATA and/or on such conditions as CPATA concludes are appropriate. Alternatively, it is possible to provide for two levels (say \$10,000 and up to \$100,000) based on something measurable like firm revenue.

Recommendation #7: *The default maximum should be in the range of \$25,000. CPATA may wish to accommodate the desire for a higher deductible on approval or based on something measurable like firm revenue.*

Requirement re Minimum Quality of Insurer?

Two of the programs reviewed included a requirement the insurance be obtained from an insurer that meets a quality standard as follows:

- IPReg lists participating insurers, at least in part to ensure compliance with its minimum terms and conditions, but this could involve an assessment of financial capacity; and
- The regulator of Ontario Engineers requires that insurers have capital and surplus of \$20 million or be a Lloyd's Syndicate.

The other regulators impose no requirement in this area. Presumably, they are content to rely on Canada's insurance regulatory regime and the prudence of insureds and their brokers in arranging insurance. Axxima's view is that it is not appropriate for CPATA to mandate minimum standards for insurers. It is possible to require a minimum financial strength rating, at time of policy inception, from AM Best or a similar rating agency. However, it should be sufficient for CPATA to require that the insurer be licenced in the provinces/ territories where the professionals are domiciled.

Recommendation #8: *CPATA should require that insurers be licenced in the provinces/ territories where the professionals are domiciled.*

Coverage for Trainees/Apprentices?

With the exception of the secondary insurance program in place for BC engineers, none of the programs reviewed explicitly required coverage for trainees. This is likely because in most professions, trainees are subject to practice restrictions and are working under the supervision of a fully licenced and insured professional.

Subject to discussion with CPATA with respect to its broader regulatory regime, and confirmation of the overall insurance requirements, Axxima does not recommend that explicit insurance requirements be imposed on trainees.

Recommendation #9: *Explicit insurance requirements should not be imposed on trainees.*

Territorial Requirements

Given the unique cross-border nature of intellectual property practice, most of the programs reviewed are unlikely to provide much precedent for the territorial requirements for P&T agents. It seems self-evident that CPATA's minimum requirements should include coverage for services

provided and lawsuits brought outside of Canada. The coverage required by IPReg (the UK P&T attorney regulator) is worldwide, although the exclusion of the US and Canada is permitted. This approach is likely to allow the insurer to underwrite US exposures and charge additional premium if appropriate. The Magnes program, which currently insures many Canadian-domiciled P&T agents, provides worldwide coverage, although we were advised that the underwriting process allows for a reduced premium for agents who can demonstrate a reduced exposure to the US.

One topic for further discussion is whether it is central to the public protection mandate that the territorial requirement be extended beyond Canada and the US, i.e. worldwide and whether, if this is acceptable, there is any benefit to insureds in terms of availability and cost, from restricting the requirement.

Recommendation #10: *Coverage for services provided and lawsuits brought in the US is essential and should be part of CPATA's minimum requirements. An open question is whether CPATA should mandate worldwide coverage, or coverage in Canada and the US only.*

Run-Off/Extended Reporting Period (ERP) Requirements

The programs reviewed dealt with the issue of claims arising after a firm has disbanded or a professional has retired (or in any event changed to a status that does not require insurance) in vastly different ways. It is fairly standard for a professional liability policy to include an ERP provision that can be exercised by payment of premium when the policy is terminated or expires. The question for the regulator is whether to require that coverage for services provided in the past be maintained for a period of time after retirement.

Ontario accountants require a six-year ERP on withdrawal of a professional or dissolution of a firm. Ontario nurses require a two-year ERP. LawPRO offers a small limit (\$250,000 lifetime aggregate) to retired lawyers, with the option to buy more. IPReg also requires six-year run-off protection if a practice closes without transferring its liabilities, and it goes further by requiring that contact information for the insurer must be provided to former clients.

Some programs (e.g. Ontario engineers and insurance brokers) do not have a run-off requirement. Regardless, our view is that run-off protection is appropriate and the main question is how long the period should be. ERPs are quite standard in professional liability policies and 12-, 24- and 36-month ERPs are often included in policy terms, available for an additional premium. The Magnes policy includes a six-year ERP.

Recommendation #11: *The appropriate duration of a prudent ERP depends on the claims profile (specifically the length of time it takes for claims to emerge). A five-year ERP may be reasonable, especially in the case of a firm dissolution. Further discussion may assist in determining the appropriate duration.*

PART 7—INPUT INTO POTENTIAL CPATA COMPLIANCE MONITORING

Below is a discussion of the compliance monitoring requirements canvassed in the benchmarking exercise, together with some guidance for CPATA based on our experience in working with professional liability programs. Once decisions have been made in this area, it will be important to review the requirements together with the coverage requirements to ensure that they strike the right balance between public protection, cost/availability of coverage, and administrative burden placed on the both the regulator and the regulated. For this purpose, a summary of the requirements is included in Part 8.

Summary of Findings from Reviewed Programs

With the limited exception of Ontario engineers (who may practice uninsured with client consent), all programs reviewed required insurance as a precondition for practicing. The regulators of the reviewed programs take different approaches to ensuring that the insurance requirements are met¹⁰.

The most “aggressive” regulator in this area appears to be RIBO, which regulates Ontario insurance brokers. RIBO requirements include the following:

- Any change to insurance must be provided to the regulator within 30 days;
- The regulator must be advised of the departure of an individual broker from a firm;
- The insurance policy must stipulate that, in the event of cancellation or non-renewal, 30 days’ advance notice must be provided to the regulator;
- A broker’s licence automatically expires when the insurance is no longer in effect.

IPReg, the UK P&T attorney regulator requires that the regulator as well as clients must be provided with details of insurance coverage on request. The CNO, the regulator of Ontario nurses, requires that proof of insurance be provided on request, and also requires nurses to self-report malpractice proceedings to the regulator.

Regulators make the failure to maintain required insurance a disciplinary matter. As insurance is a precondition to practice, disciplinary action includes suspension, revocation of licence, etc. The regulators for accountants and insurance brokers in Ontario, which regulate at the firm level, provide for sanctions for the individual professional (the Firm Representative and Principal Broker respectively) for failure to maintain compliance. These two regulators also require that the insurer notify the regulator if a policy is cancelled or non-renewed.

In terms of ensuring compliance with the details of the coverage requirements, IPRegs sets out the required terms of cover and essentially approves specific insurers through its “participating insurer”

¹⁰ LawPRO, as a compulsory insurer, is not included in this discussion.

process. RIBO specifies that insurance must be in a form approved by the regulator, but it is unclear how active the regulator is in reviewing/approving coverage. The other regulators appear to rely on the professions to ensure that the coverage they arrange is effective.

No regulator reviewed makes any formal provision for uninsurable or hard-to-insure professionals.

Recommendations for CPATA

This section includes questions and considerations for a number of elements, each of which needs to integrate with the others. Recommendations are provided for discussion purposes.

As noted, effective regulation in this area requires CPATA to set conditions that ensure appropriate public protection, while balancing the need to ensure the cost/availability of coverage and also taking into consideration the administrative burden imposed on the professionals and CPATA itself. The discussion in this section presumes that certain specific coverage requirements, e.g. limits, territorial scope, etc. will be prescribed. Key decision areas include:

Entity v Individual Regulation

Decisions in this area depend in part on the broader regulatory regime being implemented by CPATA. Discussion points include:

- a) If regulation is at individual level, are limits at entity level sufficient?
- b) If regulation is at entity level, introduce “firm representative” concept?

Recommendation #12: *Insurance requirements should be imposed at the entity level (i.e. firm/partnership/sole practitioner). The concept of “firm representative”, personally responsible for ensuring that insurance requirements are met, should be considered.*

Proof of Coverage

There is precedent for requiring that insurers to provide notice of cancellation or non-renewal to the regulator, but this would lead to notice even when insurance is replaced (i.e. insured moves to another insurer). It may be sufficient to require notice by the insured. If the latter, keep in mind that individuals leaving firms will not be insured until/unless they arrange insurance or join another firm with insurance. Discussion points include:

- a) Require proof of insurance as part of annual membership renewal process?
- b) Require notification by insurer if insurance is cancelled or non-renewed?
- c) Require notification by insured if insurance is not in effect (e.g. is cancelled or lapses without replacement)?

Recommendation #13: *Requiring proof of insurance as part of the renewal process is a sensible obligation that poses a minimal burden on the parties involved. Notice should also be required if coverage is cancelled or expires without being replaced.*

Scope of Coverage

The act of mandating insurance means that the scope of coverage will be defined, at least at a high level, because the circumstances that result in the insurance requirements (typically the provision of “professional services” to the public) will be defined. Discussion points include:

- a) Define the required scope of coverage (e.g. define “professional services”)?
- b) Set out specific terms of coverage (as done by IPRegs)?
- c) Require insurers to be approved by CPATA (as done by IPRegs)?
- d) Publish a “liberalization endorsement” that must be added to insurance policy to define minimum coverage requirements?
- e) Leave it to the professionals and the insurance marketplace to determine specifics of terms of coverage?

It is Axxima’s view that CPATA should not put itself in the position of “approving” insurers or specific insurance programs. If specific terms are important (e.g. territorial requirements) those can be documented by CPATA. In some cases, e.g. limits, determining compliance with the minimum terms will be straightforward. For more intricate requirements, CPATA could consider publishing a liberalization endorsement that insurers must add to their policies in order for the coverage to qualify.

Recommendation #14: *CPATA should not obligate itself to “approve” insurers or specific insurance programs. Specific terms that are important (e.g. territorial requirements) can be documented by CPATA.*

Consequences if Insurance Requirements Not Met

The contrasting approaches in this area can be illustrated by the rules applicable to Ontario lawyers versus Ontario insurance brokers. A lawyer is prohibited from providing services to the public without insurance. If a lawyer is “between jobs” that lawyer remains qualified but is not able to practice without insurance. (The lawyer must apply for an exemption from LawPRO’s compulsory insurance program.) On the other hand, the licence of an insurance broker is suspended if insurance is no longer in place. Therefore, an insurance broker who is “between jobs” must reapply for a licence once re-employed with insurance. Discussion points include:

- a) Automatic prohibition from (public) practice?
- b) Automatic suspension/termination of membership, requiring reapplication?

Recommendation #15: *The approach to this issue should fit with CPATA’s overall regulatory regime. From an insurance perspective, it may be sufficient to have a “non-practicing” registration category, for which insurance is not a requirement.*

Dealing with Hard-to-Insure Professionals

Beyond one program allowing its professionals to practice without insurance on client consent, the regulators reviewed did not make any formal provision for hard-to-insure professionals. A distinction should be drawn between professionals that are uninsurable (i.e., a risk that insurers are not willing to accept even at a higher premium) and those that are “expensive to insure” (i.e., a risk that an insurer is willing to accept under certain conditions, including a higher premium). In the case of the former, while an insurer’s view of risk may not dovetail perfectly with a regulator’s view of competence, it appears that most regulators, understandably, do not make any special provision to accommodate uninsurable professionals. Nor do regulators appear to relax standards for professionals for whom the insurance requirement might impose a financial burden.

- a) Should special provision be made for uninsurable P&T agents?
- b) Should special provision be made for P&T agents for whom the insurance requirements create financial hardship?

Recommendation #16: *Providing ample advance notice of the effective date of the insurance requirements is likely the best way to address hard-to-insure professionals from the standpoint of public protection.*

PART 8—SUMMARY OF RECOMMENDATIONS

Recommendation #1 – Requirements at Individual or Firm Level

Insurance coverage requirements should be mandated at the firm level, with “firm” including partnerships and sole practitioners. Note that insurance can be required at the firm level even if CPATA regulates agents at the individual level.

Recommendation #2 – Who Must be Insured?

Who must be insured will largely flow from CPATA’s mandate, with the key questions being whether an individual must be providing the defined services to the public, as is generally the case for lawyers, and whether agents working in-house for corporations should be included. The exact scope of this requirement requires further review.

Recommendation #3 – Scope of Required Coverage

The required scope of coverage should be defined broadly to encompass professional services related to intellectual property rights. The Canadian equivalent of the PAMIA definition will likely form a good starting point in defining the scope of required coverage.

Recommendation #4 – Minimum Limits (Per Claim)

The recommended minimum limit is \$2 million. It is difficult for us to foresee circumstances where a two-tiered limit (e.g. small v large firm) would be appropriate. Providing ample advance notice of the effective date of the requirement is likely a better approach from the standpoint public protection.

Recommendation #5 – Minimum Limits (Annual Aggregate)

Assuming that insurance requirements can be met at the firm level, it is recommended that the aggregate limit be based on firm size, for example, a single aggregate for firms with five or fewer professionals, a double aggregate if for firms with six or more professionals.

Recommendation #6 – Defence Costs within Limits

It is recommended that CPATA not specify that defence costs be in addition to the minimum insurance limits specified unless the required minimum limit is low relative to the exposure.

Recommendation #7 – Treatment of Deductible

The default maximum should likely be in the range of \$25,000. CPATA may wish to accommodate the desire for higher deductibles on approval or based on something measurable like firm revenue.

Recommendation #8 – Requirement for Minimum Quality of Insurer?

CPATA should require that insurers be licenced in the provinces/ territories where the professionals are domiciled.

Recommendation #9 – Coverage for Trainees/Apprentices?

Explicit insurance requirements should not be imposed on trainees.

Recommendation #10 – Territorial Requirements

Coverage for services provided and lawsuits brought in the US is essential and should be part of CPATA's minimum requirements. An open question is whether CPATA should mandate worldwide coverage, or coverage in Canada and the US only.

Recommendation #11 – Run-Off/Extended Reporting (ERP) requirements

The appropriate duration of a prudent ERP depends on the claims profile (specifically the length of time it takes for claims to emerge). A five-year ERP may be reasonable, especially in the case of a firm dissolution. Further discussion may assist in determining the appropriate duration.

Recommendation #12 – Entity v Individual Regulation

Insurance requirements should be imposed at the entity level (i.e. firm/partnership/sole practitioner). The concept of "firm representative", an individual personally responsible for ensuring that insurance requirements are met, should be considered.

Recommendation #13 – Proof of Coverage

Requiring proof of insurance as part of the renewal process is a sensible obligation that poses a minimal burden on the parties involved. Notice should also be required if coverage is cancelled or expires without being replaced.

Recommendation #14 – Scope of Coverage

CPATA should not obligate itself to "approve" insurers or specific insurance programs. Specific terms that are important (e.g. limits and territorial requirements) can be documented by CPATA.



Recommendation #15 – Consequences if Insurance Requirements Not Met

The approach to this issue should fit with CPATA’s overall regulatory regime. From an insurance perspective, it may be sufficient to have a “non-practicing” registration category.

Recommendation #16 – Dealing with Hard-to-Insure Professionals

Providing ample advance notice of the effective date of the insurance requirements is likely the best way to address hard-to-insure professionals from the standpoint of public protection.

APPENDIX I—LIST OF REGULATED PROFESSIONS

Below is a list of regulated professions in Ontario¹¹. The professions chosen to be part of the benchmarking process are highlighted in yellow.

Agrologist	Forester	Optician
Architect	Geoscientist	Optometrist
Audiologist and Speech- Language Pathologist	Homeopath	Paralegal
Accountant	Human Resources Professional	Physician or Surgeon
Chartered Chemist	Insurance Broker	Physiotherapy
Chiropodist	Kinesiologist	Pharmacist
Chiropractor	Land Surveyor	Pharmacy Technician
Dental Hygienist	Lawyer	Psychologist
Dental Technologist	Massage Therapist	Psychotherapy
Dentistry	Medical Laboratory Technologist	Real Estate Agent
Denturist	Medical Radiation Technologist	Respiratory Therapist
Dietitian	Midwife	Social Service Worker
Engineer	Naturopath	Social Worker
Engineering Technician or Technologist	Nurse	Technologist or Technician
Educator and Early Childhood Educator	Occupational Therapist	Teacher
		Traditional Chinese Medicine Practitioner/Acupuncturist
		Veterinarian

Some professions that might be seen as useful comparators, for example, Architects and Real Estate Agents, participate in compulsory programs and therefore have limited value as the “compliance monitoring” elements are not at issue. Also, many of the above professions are subject to the Regulated Health Professions Act, and therefore have requirements similar to those of the Ontario nursing profession, which was benchmarked.

¹¹ Reference:

<https://settlement.org/ontario/employment/professions-and-trades/regulated/where-can-i-find-career-maps-for-trades-and-regulated-professions/>



APPENDIX II—OVERVIEW OF THE BENCHMARKED PROGRAMS

Overview of Coverage Requirements – Benchmarked Programs

Potential Coverage Requirements	Accountants (ON)	Engineers (ON)	Engineers (BC) *	Ins. Brokers (ON)	Nurses (ON)	Lawyers (ON)
1 Requirements imposed at individual or entity level?	Firm	Individual and entity	Individuals must participate in a secondary program	Firm level	Individual (employer or association may address requirement)	Individual
2 Who must be insured?	Focused on assurance (audit) engagements	If provide professional engineering services to the public	If provide professional services to the public	All members (certificate expires on the date insurance lapses)	All members unless "non-practicing"	Lawyers in private practice
3 Define coverage?	Not addressed	General statement on nature of coverage	Focus is on "insurance applicable to the services"	Not specified but "in a form" approved by regulator	Broad requirement to cover errors/omissions in nursing	Broad definition of professional services
4 Limits (per claim)	\$1 to \$2 million	\$250,000	\$250,000	\$3 million	\$1 million/\$5 million depending on exposure	\$1 million
5 Limits (annual aggregate)	Not addressed	\$500,000	\$500,000 aggregate per project	\$6 million	\$2 million/\$5 million depending on exposure	\$2 million
6 Costs within limits?	Not addressed	Not addressed	Costs within limit	Not addressed	Not addressed	Costs within limit
7 Maximum permitted deductible?	Reasonable and <50% of required limit	Greater of \$5,000 and 5% of annual fees	No deductible	Not specified	\$1,000	\$25,000
8 Requirement to pre-fund deductible?	Yes	Not addressed	Not applicable	Yes	No	No
9 Requirements re minimum quality of insurer?	Not addressed	Yes (see details)	Not addressed	Not addressed	Not addressed	Not applicable
10 Treatment of trainees/apprentices	Not addressed	Not addressed	Explicitly covered under secondary program	Insurance is at firm level	Not addressed	Not insured
11 Territorial requirements (re lawsuits brought outside of Canada)	Not addressed	Not addressed	In Canada and US	Not addressed	Not addressed	Only for Cdn law and if services were provided in Canada or if out-of-country services <10%
12 Territorial requirements (re services outside of Canada)	Not addressed	Not addressed	Anywhere in world	Not addressed	Rquired coverage is for services provided in Ontario only	Only for Cdn law and if suit brought in Canada or if out-of-country services <10%
13 Run-off/extended reporting period requirement?	Six years	Not addressed	Limited run-off cover provided	Not addressed	Two-year ERP	\$250,000 lifetime aggregate

Notes

* Engineers in BC must participate in a "secondary program" which is excess to any other available coverage. Coverage details provided in the exhibit refer to the terms of the secondary program.



Overview of Compliance Monitoring – Benchmarked Programs

Compliance Monitoring Considerations	Accountants (ON)	Engineers (ON)	Engineers (BC) *	Ins. Brokers (ON)	Nurses (ON)	Lawyers (ON)
1 How is proof of insurance handled at entity level?	Firm must provide proof of coverage	Not addressed	Disclosure obligation only	Any change in insurance must be filed within 30 days	On request	Compulsory program
2 How is proof of insurance handled at individual level?	Not addressed	Not addressed	Secondary program is compulsory and provided automatically	When an individual broker leaves a firm, the regulator must be advised	On request	Compulsory program
3 Sanctions/enforcement if insurance requirements not met?	Firm and firm rep are suspended, 30 days' later, firm is deregistered firm rep has membership revoked	Complaint through discipline process can lead to reprimand, fine, suspension	Complaint through discipline process can lead to reprimand, fine, suspension	Notice must be given to regulator, and broker's licence expires at date of cancellation unless proof of insurance is provided	Complaint through discipline process can lead to reprimand, fine, suspension	Compulsory program
4 Are minimum coverage standards reviewed/enforced and if so how?	Not addressed	Not addressed	Not applicable	Insurance must be in a form approved by the regulator	No	Not applicable
5 What if professional is hard to insure?	Not addressed	Exception if client agrees	Secondary program is compulsory	Not addressed	Not addressed	Not applicable
6 What if professional loses coverage?	Cannot practice without insurance	Cannot practice without insurance	Secondary program is compulsory	Notice must be given to regulator, and broker's licence expires at date of cancellation unless proof of insurance is provided	Insurance is a requirement to practice	Insurance is a requirement to provide services to the public
7 Any requirements re notice of cancelation?	Insurer must notify regulator	Insurer must notify insured	Not addressed	Policy must stipulate notice to regulator 30 days prior to cancellation or non-renewal	Not addressed	Not applicable
8 Special or unusual provisions	Self-insurance permitted with approval - see details	Some exemptions from insurance requirements - see details	Secondary program provides basic coverage to individuals (not firms) on a compulsory basis	In place of insurance, the Regulation allows for "some other form of financial guarantee in a form approved by" the regulator	Nurses are required to self-report malpractice proceedings to College	Not applicable

Notes

* Engineers in BC must participate in a "secondary program" which is excess to any other available coverage. Coverage details provided in the exhibit refer to the terms of the secondary program.



APPENDIX III—OVERVIEW OF P&T AGENT PROGRAMS

Overview of Coverage Requirements – P&T Programs

Potential Coverage Requirements	IPReg (UK Regulator)	PAMIA (UK Insurer)	Magnes (Cdn Ins. Program)
1 Requirements imposed at individual or entity level?	Individual or firm	Firm (incl sole practitioners)	Firm (incl sole practitioners)
2 Who must be insured?	All registered persons/firms	Insures only attorneys	Insurance at firm level
3 Define coverage?	Coverage terms are mandated	Meets minimum terms prescribed	Broad coverage for IP services
4 Limits (per claim)	GBP1 million unless practice clearly does not warrant that limit	Minimum limit is GBP250,000 but usually GBP1 million or more	Minimum limit is \$500,000 but \$2 million is recommended
5 Limits (annual aggregate)	Not addressed	tbd	tbd
6 Costs within limits?	Costs in addition to minimum limit	Costs in addition to limit	Yes, except for Quebec
7 Maximum permitted deductible?	Not addressed	Basic deductible is GBP7,500 higher is available	Range from \$2,500 to \$100,000
8 Requirement to pre-fund deductible?	No	Not applicable	Not applicable
9 Requirements re minimum quality of insurer?	Insurers are identified by the regulator	PAMIA is a "participating insurer"	Not applicable
10 Treatment of trainees/apprentices	Not addressed	Insurance at firm level	Insurance at firm level
11 Territorial requirements (re lawsuits brought outside of Canada)	May exclude US and Canada	Coverage is worldwide with exclusion for services in US (coverage can be bought up)	Insure only Cdn-domiciled agents, but coverage is worldwide
12 Territorial requirements (re services outside of Canada)	May exclude US and Canada	Coverage is worldwide with exclusion for lawsuits in US (coverage can be bought up)	Insure only Cdn-domiciled agents, but coverage is worldwide
13 Run-off/extended reporting period requirement?	Six-year run-off required	tbd	Six year ERP available for additional premium



Overview of Compliance Monitoring – P&T Programs

Compliance Monitoring Considerations	IPReg (UK Regulator)	PAMIA (UK Insurer)	Magnes (Cdn Ins. Program)
1 How is proof of insurance handled at entity level?	Insurer info must be provided to clients and regulator on request	Regulator can confirm with insurer	Magnes does not track individuals joining or leaving firm during policy year
2 How is proof of insurance handled at individual level?	Insurer info must be provided to clients and regulator on request	Insurance is at firm level	Magnes suggests that CPATA seek proof of insurance during annual renewal process
3 Sanctions/enforcement if insurance requirements not met?	Disiplinary process can lead to suspension etc.	Not applicable	Not applicable
4 Are minimum coverage standards reviewed/enforced and if so how?	Regulator prescribes minimum terms and identifies participating insurers	Not applicable	Not applicable
5 What if professional is hard to insure?	Not addressed	Not applicable	Not applicable
6 What if professional loses coverage?	Regulator requires that a 6-year run-off policy be purchased if a practice closes without its liabilities having been acquired	Not applicable	Not applicable
7 Any requirements re notice of cancelation?	Contact info for run-off insurer must be provided to clients and former clients within one month	Not applicable	Not applicable
8 Special or unusual provisions	See above	Not applicable	Not applicable