

CBA-NB: REPORT OF CIVIL LITIGATION SECTION TO COUNCIL
(February 4th, 2010)

1. Limitations Law Reform: Bill 28

Bill 28 received Royal assent on June 19th 2009, and will come into force on a date to be fixed by proclamation. While this is expected to be sometime in the first half of 2010, no date had yet been set as of the time of writing of this report. We have requested that the Department of Justice advise us as to same, so that an Email can be done by CBA-NB to all members advising them of the effective date, in advance of same. The changes to limitations law will be the subject of a CLE Session to be presented by the undersigned, Richard Scott Q.C., and Tim Rattenbury at the CBA Mid-Winter on February 6th, 2010. **While some areas of limitations law within the Province (most importantly that pertaining to insurance policies) remain to be addressed, the *Limitation of Actions Act* has been a clear law-reform success for CBA-NB.**

2. Insurance Act/Insurance Limitations Reform

In a related development, the Office of the Superintendent of Insurance has been reviewing the New Brunswick *Insurance Act* with a view to reforming it in a similar fashion to the insurance reforms which have been enacted within the last year in British Columbia and Alberta. On September 18th, 2009, the undersigned along with David Gauthier (Insurance Section Chairperson) and Ed Keyes

met with Superintendent of Insurance, Deborah McQuade and Deputy Superintendent, David Weir to discuss this potential reform. Based on the general directions which we were advised the Superintendent of Insurance was considering moving in, Mr. Gauthier and the undersigned subsequently reviewed the recent *B.C. Insurance Act Amendments Bill* and the Alberta Legislation. We advised Deputy Superintendent David Weir on November 20th, 2009 that, having liaised with our colleagues in B.C. and Alberta, we had no specific comments or suggestions to make regarding the various provisions in those other two provinces, but that we would appreciate the opportunity to review the actual New Brunswick *Insurance Act Amendments* at the earliest available opportunity. The Superintendent and Deputy Superintendent did make it clear in our September meeting that they were well aware of the concerns which we had expressed in our 2006 written submission to the Government of New Brunswick regarding insurance limitations, and that they were considering that reform in this Province might move along the lines of harmonization of the various insurance limitation periods in general conformity with the basic limitation in a new *Limitation of Actions Act*. Mr. Weir advised the undersigned in late November that the input from CBA-NB had been very helpful to them, and he asked our permission to forward our comments along to the project manager for the Harmonized Insurance Act Project and the Superintendents of Insurance in Nova Scotia and Prince Edward Island (as there is still some hope of a harmonized Insurance Act for the Maritime Region). We agreed to this suggestion. Since that time, we have had no further discussions with the Office of the Superintendent of Insurance, but it was very clear from our September meeting that they are well aware of our concerns regarding the limitations issues and, whether they move in the direction we suggested or not, they are certainly cognizant of the issues.

3. **Minor Injury Regulation (Report of Deputy Chairperson Stéphane Viola)**

The debate relative to the “minor injury regulation” is being waged on two fronts.

Public And Government Awareness

On the one hand, the CBA-NB is trying to raise awareness as to the injustice created by the poorly drafted definition of “minor personal injury” with the public and the government of New Brunswick. This question was raised successfully with the public in 2009 by releasing the CBA economic report on auto insurance to the public in January. This release was followed avidly by the press and a lot of air time was granted to the question. Concurrently to this release, an intensive lobby campaign was undertaken with every single MLA for NB irrespective of their political affiliation. The entire PC caucus was met as a group and favorable comments were heard from the attendees. Although the PC’s support came more in the form of a quiet endorsement with the press, it greatly limited negative comments against the efforts of the CBA.

With respect to the Liberal MLAs, every single one of them was met with the notable exception of the Premier. To this day, the Premier as refused to meet with the CBA. Most meetings with Liberal MLA were resolved with favorable endorsements of the proposed amendments to the *Injury Regulation*. As a result of the CBA’s efforts, Justice Minister Burke publicly acknowledged the reasonableness of our demands for amendments to the definition and indicated that changes would follow. A series of meeting took place with the Minister of Justice and proposed

amendments were provided. Unfortunately, the Minister of Justice was rebuked by the Premier and eventually he was shuffled out of the Justice portfolio.

The next Minister of Justice was Michael Murphy. Again the CBA met with Minister Murphy and explained the injustice resulting from the poorly drafted definition. Because of the Minister's background, he was well aware of the injustices and expressed his personal support. Copies of the amendments provided to his predecessor were given to Justice Minister Murphy and he indicated further meetings would follow. Several chance meetings occurred with Justice Minister Murphy with various members of the CBA group and he reiterated his support of our requests for changes. In December 2009, the CBA was contacted by the Justice Minister for additional copies of the proposed amendments and a lunch meeting was scheduled for January 4, 2009. The proposed attendees to the meeting were myself, Ed Keyes (president CBA-NB) and Robert Goguen (President of the PC Party). This meeting was cancelled a few days before taking place. We now know that the meeting was cancelled because Justice Minister Murphy announced his resignation from cabinet on that very day of our meeting.

The new Minister of Justice is Bernard LeBlanc. He is a non lawyer and was met before during our intensive lobby campaign. At the time his comments were favorable towards changing the legislation but in his new capacity he may now have a different point of view. A congratulatory email was sent to him and a request for an opportunity to meet and continue the dialogue undertaken with his predecessor.

Constitutional Challenge

On the other front, the CBA-NB is engaged on a legal battle with respect to the constitutionality of the *Injury Regulation*. There were very little developments on that front during 2009 in light of the lobby campaign undertaken and the pending decisions from each Nova Scotia and Alberta on the constitutionality of their insurance cap legislation. It was decided to wait the outcomes of those cases before pursuing the NB constitutional case.

Now both the NS case and the Alberta case have proceeded through all provincial echelons of their respective court system with Alberta also seeking leave to appeal to the Supreme Court of Canada.

Nova Scotia

The NS legislation was deemed to be constitutional at both the Trial and Appeal level. The case and ensuing Trial and Appeal decisions are extremely driven by the particular facts of the case and therefore have very little value for our case in New Brunswick. Also it must be kept in mind that the reforms undertaken in Nova Scotia in relation to the Insurance Act were quite different than those in New Brunswick. The NS government did use a cap of \$2500 to limit the awards for non pecuniary general damages just like NB but that is where the similarities between the two reforms end. In NS the Insurance Act was also amended to include the principles of compensation for net loss of income instead of gross. Also, double recovery was eliminated by allowing deduction for moneys received from LTD insurers and eliminating their rights of subrogation and many more similar issues. In addition, the cap

was limited to minor injuries but same was defined quite differently from NB as including soft tissue injuries in some circumstances and excluding them in others. The actual impact of the definition of what constitute a minor injury is an exercise of interpreting many facets and provisions of the NS legislation and much too complicated for the purpose of this report. The NS definition of minor injury is quite opposite to that of NB which is a verbatim reproduction of the 1990 definition of catastrophic injury used by the Ontario government. Finally, the NS reforms have included an escape clause from the application of the cap if the symptoms objectively persist for more than 12 months. Therefore, based on all of the above facts, both the Trial and Appeal decision have little if not any value to the constitutional case being put forth for NB.

Alberta

In Alberta, the reforms that led to a \$4000.00 cap on general damages were extremely comprehensive. First off, the cap was limited for “soft tissue injuries” only. Secondly, an entire legislative scheme providing alternative recourses and remedies was implemented for victims having suffered soft tissue injures. These Albertan reforms in opposition to NB are quite different. In NB, the government simply adopted a 5 paragraphs regulation that essentially imposes a cap of \$2500 on general damages for all “minor personal injuries”. There is no alternative remedies or resource available to victims having deemed to have suffered a “minor personal injury”.

At the Trial level, the Alberta case was found to be unconstitutional. The Trial judge concluded that by singling out individuals having suffered soft-tissue injuries as opposed to other injuries, the legislation created different treatment based on disability and this was a violation of section 15 of the Charter. It then concluded that the violation could not be safeguarded under section 1 and thereby struck the reforms as null and void from the date of enactment. This decision of the Trial judge was appealed.

The Court of Appeal for its part reversed the Trial decision and found that the reforms to the Insurance Act were not unconstitutional. In reaching that conclusion, the CA found that by proceeding with a comprehensive overall of the Insurance Act and thereby adopting a separate system with recourses and remedies for people suffering soft tissue injuries, the government had not violated section 15 of the Charter. As a result, it deemed the reforms constitutional and thereby there was no need to look under section 1 of the Charter.

The decision of the CA to consider the alternative schemes available to soft tissue injury victims within the analysis under section 15 was considered by some scholars as a departure from the recommended approach under Section 15. It was felt that the first step of the analysis should be limited to a review as to whether a distinction in treatment and recourse was created based on disability. And then consider if that alternative scheme could be saved under a section 1 Charter analysis. As a result, leave to appeal to the Supreme Court of Canada was sought. In December 2009,

the SCC refused leave to appeal, thereby putting an end to the constitutional debate in Alberta.

New Brunswick

The impact of these two decisions on the NB constitutional challenge is mixed.

The NS decisions, in my opinion, has no impact on the viability of the NB constitutional challenge. The decisions are fact driven and the reform undertaken are totally different. Because the decision on whether the reforms in NS were unconstitutional are based predominantly on the facts of the case, they have no values for us in NB or anywhere else where the factual circumstances are different.

The Alberta decisions, in my opinion, have a favorable impact on the NB constitutional challenge. A review of the dictas from the Court of Appeal reveals that because the imposition of a \$4000 cap stemmed from a comprehensive reform of the Insurance Act, it supported that the reforms were constitutional. The CA highlighted that because there was an alternative scheme of compensation, remedies and recourses created by the government specifically for soft tissue injury victims, this saved the reforms from being considered unconstitutional. This is obviously not the case in NB where the reforms were limited to a 5 paragraphs regulation. The government did not adopted other legislation or make further amendments specifically aimed at victims deemed to have suffered "minor personal injuries". All the NB government did was to cap at \$2500 the amount of general damages accident victims having suffered minor personal injuries could get. This situation, based on the Al-

berta CA decision, would be considered an unconstitutional reform in violation of section 15 which prohibits distinction based on disability.

Conclusion

Therefore, it is felt that the course adopted so far by the CBA should be maintained. The lobby campaign should be continued with the new Minister of Justice and the constitutional challenge proceed ahead fortified by the Alberta decision.

– Stéphane F. Viola,
Deputy Chairperson

4. Coroner's Act Law Reform

On August 20th, 2009, CBA-NB presented a written submission to the Minister of Public Safety entitled "*Reforming the Coroner's Act of New Brunswick: A Submission to the Government of the Province of New Brunswick*". Our written submission suggested an immediate amendment of the existing Statute in five respects, with a more exhaustive revision of the complete Statute over time. Most of the immediate changes which we have suggested have been law in most other Canadian jurisdictions since the 1970's and 1980's. An exhaustive review of the Statute could consider more far-reaching reforms, such as were enacted by the Province of Ontario in 2009 (S.O. 2009,c.15) to create an "Oversight Council", establish a forensic pathology service, create a "complaints committee", expand the type of "types of death" which fall under the *Ontario Act*, and expands the investigative powers of Ontario coroners. Although the Minister of Public Safety informed us in October that we would be invited to engage in further discussions with the Department, there has been no follow-through by the Department since then. **It is suggested CBA-NB continue to press for reform in this area.**

5. Immunity of Firefighters and Fire-Fighting Authorities from the Courts

Effective April 30th, 2008, Section 193.3 of the *Municipalities Act* created a Statutory immunity from lawsuits for firefighters, their departments, their municipalities, and the Crown (and by extension, also their liability insurers), for all claims for loss, injury or damage suffered by reason of anything done in good faith or omitted to be done by a member of a fire department while "acting as a member of the fire department ...". The immunity is "not" limited to "emergency situations", and so therefore is potentially of great breadth. CBA-NB opposed the enactment of this provision and has since sought to have it repealed or modified. As stated in the undersigned's Report to Council of July 3rd, 2009, the undersigned wrote to the Deputy-Minister of Justice in the spring of 2009 suggesting there might be scope for productive dialogue toward amendments which might achieve the goals of both the Government and CBA-NB. Since then, Deputy Minister Bonny Hoyt-Hallett wrote the undersigned on July 20th, 2009 to advise that she had asked the Department Policy Branch to undertake a review and provide a response once the review had been completed, notwithstanding that the position of the Department of Local Government remained as originally stated. The Department was provided with further background information by the undersigned on July 31st, 2009 summarizing our concerns and suggesting possible alternatives. The undersigned wrote again to the Deputy Minister on November 30th, 2009 to inquire as to the status of this matter. However, there has been no further response from the Department. **The undersigned respectfully submits to CBA-NB council that Section 193.3 of the *Municipalities Act* represents an unwarranted and over-broad regression of the law to Crown immunity, and that CBA-NB continue to advocate revision.**

6. National Class Action Working Group

CBA (National) has now created a "National Class Action Working Group", in close conjunction with the Ontario Bar Association Class Action Subcommittee, based on an initiation by Chief Justice Winkler of Ontario. The idea is to coordinate similar class action lawsuits originating in different jurisdictions of the country. At the present time, the working group is in its infancy stages. A steering committee has been created to establish the terms of reference.

7. National Civil Litigation Section Executive Meeting

The meeting of the Section National Executive occurred on October 22nd, 2009 in Banff, Alberta. The undersigned attended as Deputy Chairperson of the National Executive. New Brunswick Deputy Chairperson, Stéphane Viola, represented New Brunswick at this meeting. It was a very useful exchange of information on caselaw developments and rule changes across the country, particularly with respect to "Simplified Procedure" problems and the substantial changes to the Ontario Rules of Court which came into effect on January 1st, 2010.

8. National Civil Litigation CLE Program: Banff, Alberta - October 23rd, 24th, 2009

The National Civil Litigation Section held a "two-track" CLE program in Banff. While most registrants were from the Western Provinces, there was good representation from Ontario lawyers and five registrants from New Brunswick, including George McAllister, who was a presenter at the program. The organizing committee was very happy with both the program and the number of attendees. It is hoped a similar National Civil Litigation CLE program can be organized for sometime in the Year 2011.

9. CBA-NB Civil Litigation CLE Program: November 6th, 2009, Fredericton

The "Ultimate Trial Advocacy CLE" took place at the Woo Conference Centre in Fredericton. It was co-chaired by Justice Barbara L. Baird, Justice Fred Ferguson, and George A. McAllister. The program attracted yet another "close to sell-out" attendance, and seems to have been very well received. Congratulations is certainly due to the conference organizers, and in particular, to George McAllister, for his continued dedication to excellent quality CLE programs in New Brunswick.

Respectfully submitted,



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