
Law Reform Notes

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Law Reform Notes is produced in the Legislative Services Branch of the Office of the Attorney General. It is distributed to the legal profession in New Brunswick and the law reform community elsewhere, and is available on the Office of the Attorney General's website. The Notes provide brief information on some of the law reform projects currently under way within the Office, and ask for responses to, or information about, items that are still in their formative stages. We welcome comments from any source.

Opinions expressed in these Notes merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Office of the Attorney General or the provincial government. Where the Office or the government has taken a position on a particular item, this will be apparent from the text.

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. Enforcement of money judgments

The *Enforcement of Money Judgments Act* and *An Act Respecting the Enforcement of Money Judgments Act* were in Bill form, awaiting debate in the Committee of the Whole, when the last issue of these Notes was published. The *Enforcement of Money Judgments Act* creates a complete new framework for the enforcement of money judgments. The *Act Respecting the Enforcement of Money Judgments* contains a large package of consequential and related amendments, including the repeal of antiquated Acts such as the *Absconding Debtors Act*, *Arrest and Examinations Act*, *Creditors Relief Act*, *Garnishee Act* and *Memorials and Executions Act*,

Both Bills were passed without amendment. Their substance therefore remains as described in *Law Reform Notes* #33.

The legislation is subject to proclamation, and we are currently working on the forms, regulations and procedures that need to be in place before the Acts are brought into force. We are not yet in a position to indicate when that will occur, but we do not expect it to be for at least six months.

If, during this preparatory period, we identify provisions that require amendment, we hope to be able to deal with them during the 2013-14 legislative session. We are reviewing the details of the legislation closely as we work on it, and are currently considering some comments we have received from the

Canadian Bankers Association about the provisions relating to seizure of accounts. If any of our readers have had the opportunity to read the Acts and have noticed issues that they think deserve attention, we would be pleased to be informed of them.

2. A new *Trustee Act*

Law Reform Notes #33 mentioned that we are considering recommending that the Uniform Law Conference of Canada's *Uniform Trustee Act* should be enacted in New Brunswick, with minor modifications. The *Uniform Act* and the final report of the Conference's working group are available on the Conference's website at www.ulcc.ca, listed as civil section documents for the 2012 annual meeting. We summarized the contents of the *Uniform Act*, while it was still under development, in *Law Reform Notes #28*. Those *Notes* and *Law Reform Notes #33* include information about the modifications we are considering.

Comments on this subject are still welcome. It is the next major item on our workplan, and serious work on it should begin in 2014. Now would be the best time to receive any specific comments or suggestions for issues to be considered.

3. International interests in mobile equipment

Another subject discussed in *Law Reform Notes #33* was the possible adoption in New Brunswick of the *Convention on International Interests in Mobile Equipment* and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*. New Brunswick is the only Canadian jurisdiction that has not adopted these instruments, which establish an international PPSA-type system for the registration and enforcement of interests associated with the financing and purchase of many aircraft.

We received no comment, and have now submitted our recommendation that New Brunswick adopt the Convention and Protocol. Further information is available in *Law Reform Notes #33* and the documents referred to there.

4. *Inquiries Act*

In *Law Reform Notes #22* we mentioned that we were considering replacing the *Inquiries Act* with new legislation based on the Uniform Law Conference of Canada's *Uniform Public Inquiries Act*, which the Conference adopted in 2004. New Brunswick's Act dates from the late 1800s, and has been changed very little since then.

Since the *Uniform Act* was adopted, Newfoundland (2006) and Saskatchewan (2013) have enacted legislation closely based on it. British Columbia (2007) and Ontario (2009) have adopted modern public inquiries legislation that is similar to the *Uniform Act* in many respects, but also contains some other elements.

We returned to this project this year and, after considering these models, submitted recommendations for a new *Inquiries Act* that would bring New Brunswick's legislation into line with modern standards.

Inquiries ordered by the Lieutenant-Governor in Council under the *Inquiries Act* are rare. There are, however, approximately 50 other Acts and regulations that contain cross-references to the *Inquiries Act* and rely on it, to varying extents, to provide powers to a wide range of statutory bodies and officials. The effects of a modernized *Inquiries Act* will therefore extend beyond the limits of the new Act itself.

B. NEW ITEMS

5. Limited liability partnerships

Service New Brunswick is considering proposing amendments to the provisions of the *Partnership Act* and the *Partnerships and Business Names Registration Act* that govern limited liability partnerships (LLPs). They have provided the following note and asked us to invite comment.

New Brunswick has allowed for the creation of LLPs since 2004. The key distinguishing characteristic of LLPs from a general partnership is that in an action regarding an act or omission by a partner, a plaintiff can exercise a judgment against only the partnership assets and the personal assets of the culpable partner. The personal assets of the non-culpable partner(s) are not available to satisfy the judgment. This liability shield protects “innocent” partners from personal liability that they would normally have based on “joint and several” liability.

The liability shield for innocent partners regarding negligence, wrongful act or omission, malpractice and misconduct (including theft and misappropriation of funds) is premised that the required mandatory insurance will provide the compensatory funds to the aggrieved client for the non-innocent partner’s actions or omissions (in conjunction with the assets of the partnership and the personal assets of the non-innocent partner).

It is viewed that the existing legislative provisions should be amended as they can be interpreted to require insurance that is too broad in coverage and is unattainable based on public policy grounds. The culpable partner is unable to get insurance to cover his or her own theft or fraud.

Based on an examination of other Canadian jurisdictions, it would seem potential solutions may exist by following either the Nova Scotia or Ontario approaches to LLPs.

The Nova Scotia approach

Nova Scotia’s legislation was originally very similar to New Brunswick’s existing legislative provisions. Nova Scotia amended its legislation to remove the requirement of insurance coverage for misconduct and the wrongful act or omission on the part of the “partner,” but to require such coverage in favour of “the partnership.”

Section 48 of the Partnership Act sets out the definition of “professional liability claim”:

"professional liability claim" means a claim against a partnership with respect to an act or omission of a partner occurring in the ordinary course of practising a profession in a Nova Scotia LLP or an extra-provincial LLP;

It is our understanding insurance is available to cover a claim against a partner for his or her negligence or malpractice, however it is not available to indemnify a partner who commits, for example misconduct, theft or a fraud. Nevertheless, insurance is available to cover the “partnership” for the claims relating to a culpable partner.

It appears that in Nova Scotia the partnership will have insurance in place that will cover off the culpable partner’s negligence, wrongful act or omission, malpractice or misconduct occurring in the ordinary course of practicing a profession.

We would like to have feedback on the suitability of the Nova Scotia approach to New Brunswick. Is the change made by Nova Scotia in defining “professional liability claim” to be a claim against a “partnership” instead of the claim against a “partner” sufficient at law to resolve the issue?

If it does resolve it, are there any remaining issues for a LLP in obtaining the required insurance to cover off the culpable partner’s negligence, wrongful act or omission, or malpractice or misconduct occurring in the ordinary course of practicing a profession?

The Ontario approach

Ontario made changes to its LLP provisions to move it from a partial shield to full shield liability type jurisdiction. New Brunswick and Nova Scotia are considered full shield jurisdictions.

The current Ontario legislative provisions have the following attributes:

It requires LLPs to have liability insurance but does not define it

The liability shield for the innocent partner is in relation to the negligence or wrongful act or omission of another partner

Where the act or omission by a partner is criminal or fraudulent, the innocent partner does not have a liability shield and thus has the same joint and several liability that he or she would have in the normal course as a partner in an ordinary partnership

This approach eliminates the need to have mandatory insurance to cover off criminal or fraudulent acts. For criminal or fraudulent acts, the partners in a LLP will have the same joint and several liability that partners in an ordinary partnership would have. Basically, this means that the assets of the partnership and the personal assets of all partners are available to satisfy such a liability.

Some uncertainty exists as how to adapt this approach to New Brunswick. Ontario’s shield is for “negligence or wrongful act or omission” whereas New Brunswick’s shield is for “negligence, wrongful act or omission, malpractice or misconduct.” If adapted to New Brunswick, there would seem be a grey zone where insurance coverage would not apply (e.g. misconduct) but that the partners are not exposed to joint and several liability (because the act or omission by the culpable partner was not within the concept of being criminal or fraudulent).

Is the Ontario approach suitable for New Brunswick to follow? If so, how can the issue of this grey zone be resolved via insurance or other mechanism so that compensatory funds are available to the aggrieved client?

Summary

We would like comments as to both options. Is one more preferable to the other, and if so, why? Are there deficiencies in either or both approaches that need to be addressed before proceeding with a recommendation to government? If so, what do you suggest? Other than the above two options, is there an alternative approach that should be considered?

If further information is required before replying, please contact Charles McAllister at Charles.mcallister@snb.ca or 453-5802.

Responses relating to limited liability partnerships should be sent to Charles.mcallister@snb.ca. Responses on other items be sent to the address at the head of these Notes, marked for the attention of Tim Rattenbury, or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than February 1st, 2014, if possible.

We also welcome suggestions for additional items which should be studied with a view to legislative reform.