

CBA-NB: REPORT OF CIVIL LITIGATION SECTION TO COUNCIL
(July 11th 2008)

Injury Regulation 2003-20/Charter Challenge

The various New Brunswick cases which have raised as an issue the constitutionality of the above Regulation have not, since my last report, moved forward to any appreciable degree towards a resolution of this issue. In the meantime, the Minor Injury Regulation in Alberta has been struck down on constitutional grounds at the trial level, and has been "fast tracked" to the Alberta Court of Appeal. The trial of the constitutional issue in Nova Scotia (where the regime is more similar to the New Brunswick law than the Alberta law), is scheduled for October 2008. The Canadian Bar Association, at the National Level, is engaged in lobbying efforts at this time for amenable alternatives to the Minor Injury Regulation in Alberta, and also for a new tort compensation scheme in the Province of Ontario (where 2003 legislative changes increased the deductible on pain and suffering damages from \$15,000.00 to \$30,000.00, where the deductible on Family Law claims was increased from \$7,500.00 to \$15,000.00 unless over \$50,000.00, and where the verbal threshold of permanent, serious impairment was more stringently defined.) New Brunswick is therefore one of four Provinces where there is a great deal of restlessness on this issue, and where the constitutionality of the present law is, at least, questionable. At our annual meeting with the Minister of Justice on April 21st 2008, Minister Burke advised us that the Province of New Brunswick was not interested in initiating any sort of reference case to bring this matter to a head more quickly, but that it was cooperating in case

management efforts to try to move the existing cases along expeditiously. We advised the Minister of Justice that should the Government intend to consider any revision of the New Brunswick Regulation or implementation of a new scheme in this area, we would appreciate the opportunity to have a designated member of CBA-NB liaise with the Minister to provide input before any changes are made in the law by the Government. The undersigned has recommended to the president and executive of CBA-NB that one senior insurance practitioner who is familiar with Plaintiffs' concerns should be appointed for this purpose.

Limitations Law Reform

Members of Council will recall that we presented a written submission to the Attorney-General of New Brunswick and the Law Reform Branch in late 2006. We have been advised that a Bill on this subject is expected to be introduced in the Fall 2008 Session of the New Brunswick Legislature.

Law Reform: Bill 48, An Act To Amend The Coroner's Act

The present Government introduced and enacted the above Bill in the Spring 2008 Session to honour a commitment made in their Speech from the Throne to institute mandatory Coroner's Inquests for workplace fatalities in some circumstances. In February 2003, CBA-NB had submitted to the Government a submission entitled "*Bringing Death Investigations In New Brunswick Into The 21st Century: A Review And Recommendations For Necessary Changes In The Coroner's System*". The Government of the day in 2003 told us they were not interested in this issue. We used the introduction of the recent Bill 48 as an opportunity to remind the present Government of our previously expressed position: that the current Coroner's system in New Brunswick is both completely inadequate, and

outdated when compared to the similar systems operating in most other Canadian Provinces. We provided on April 21st 2008 a written submission to the Minister of Public Safety requesting his commitment to amend Bill 48 to **immediately create standing for victims and other interested parties at Inquests, and to initiate a comprehensive review of the Coroner's Act with a view to modernizing it as almost all other Provinces have already done.** The Minister of Public Safety declined to accept our recommendations, at least in respect of Bill 48 (which was enacted unchanged), but Minister Foran subsequently advised us that our submission would be reviewed in more detail by the Assistant Deputy Minister, Mike Comeau. Our detailed submission and background documents can be obtained from CBA-NB for those who may be interested. I strongly urge all members when they have the opportunity to support our efforts in this regard and to utilize any opportunity to explain to Members of the Legislature the need for reform in this area of law.

Law Reform: Bill 44: An Act To Amend The Municipalities Act

The above Bill, which received Royal Assent and became effective as of April 30th 2008, adds to the **Municipalities Act** of New Brunswick, Section 193.3, which purports to create an **immunity from lawsuit "... by reason of anything in good faith done or admitted to be done by a member or former member of a Fire Department"**. This legislative immunity from lawsuit is drafted so as to **also extinguish the vicarious liability of a Fire Department, Municipality, and the Crown.** No alternative compensatory mechanism is created for innocent victims whose right of action has been taken away. We provided a written submission dated April 25th 2008 to the Minister of Local Government opposing this measure. We drafted and submitted a proposed alternative provision based on the law of Ontario which would operate so as to create immunity for individual members of Fire De-

partments, but so as to specifically recognize and preserve vicarious liability of the Crown or Municipality, and also to specifically stipulate that the immunity would not extend to accidents involving the use or operation of motor vehicles. The Minister of Local Government declined our request to meet with her, and declined our request to have the Bill referred to a Standing Committee to allow further study and input from the public. She has however in June written to us, and stated that "the object of the Bill was not to limit victims' rights to obtain compensation." The extent of the immunity created, and the specific intention of the Government in creating it, is therefore unclear, and will have to be sorted out by the Courts. Our Submission and the exchange of correspondence is, again, available to members through CBA-NB.

National Civil Litigation Section Meeting

The undersigned attended on behalf of New Brunswick at the National Civil Litigation Section Meeting on March 8th 2008 of the Canadian Bar Association in Montreal. The main topic of this meeting was to what extent the National Civil Litigation Section should continue to provide continuing legal education opportunities in view of the plethora of CLE opportunities which are already being provided by the Provincial Law Societies, Canadian Bar Sections, and increasingly, the private sector. The consensus reached was that there is a role for the National Civil Litigation Section in CLE, but that programs would have to be more finely tailored, perhaps in conjunction with related sections (for example, health law).

Civil Litigation CLE: October 17th 2008

Civil Litigation practitioners should plan to attend "The Don't Miss CLE" at the Wu conference Centre in Fredericton on October 17th 2008. This is a "multiple topic" program designed to be of benefit to junior practitioners, and also as a refresher for experienced practitioners.

Respectfully submitted,



David G. O'Brien
Chairperson,
Civil Litigation Section

Barry Spalding
Lawyers - Avocats
P.O. Box 6010
55 Union Street, Suite 710
Saint John, New Brunswick
Phone: (506) 633-4221
Direct Fax: (506) 652-7861
E:Mail: dgo@barryspalding.com