

Nevertheless, the fact that the firm's jurisdictional arguments cut no ice with the Commissioner is worth noting. We can hope that Parliament's current review of the federal Act or future court decisions clarify how the issues of competing federal and provincial statutes should be resolved. It should be noted that there are significant differences of opinion on this matter, especially regarding how far the process of civil litigation will be affected by federal privacy legislation (see, for example, PIPEDA Case Summary #352: "Airline delays granting access to personal information, citing ongoing litigation").

On one side, this federal legislation is limited in the extent to which it can regulate property and civil rights, given that it was arguably enacted as an extension of the federal trade and commerce power. But on the other side, the Supreme Court of Canada has begun to afford privacy a quasi-constitutional status. Either way, re-characterizing legal professional privilege is not a trivial matter.

But that sort of interpretive wrangle should not detract from the serious impact of the findings. What should Ontario lawyers do?

- Prudence suggests rereading your membership contract with the credit bureau, if you rely on the bureau to help you assess the credit worthiness of potential clients.

- Familiarize yourself with the *Consumer Reporting Act*, and the provisions under which you can access credit information.
- Review the *Personal Information Protection and Electronic Documents Act*, and in particular Schedule 1, and train your lawyers to recognize the obligations it imposes.
- Treat any investigation by the Privacy Commissioner seriously. While the two law firms weren't named, it's clear that they both initially rebuffed the enquiry and then backed down.
- Recognize that in today's technologically-empowered practice, privacy will become an increasingly serious concern. Better to get your firm ahead of the law.

Model privacy policy for law firms

LAWPRO has a generic policy, which you can use as a precedent and checklist to guide you as you examine your own firm's procedures for dealing with confidential information. The policy deals with a fictitious firm called Smith & Partners. It is available at www.practicepro.ca/privacypolicy.

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Amended legislation introduces full shield protection for LLPs

by Duncan Gosnell

Full shield protection for limited liability partners appears to be well on its way to becoming a reality in Ontario.

Changes to the *Partnerships Act*, R.S.O. 1990, c. P.5 have been introduced under section 19 of the *Consumer Protection and Service Modernization Act*, 2006 (Bill 152), which received Royal Assent on December 20, 2006. As of the date of publication, section 19 remains unproclaimed.

Currently, partners of limited liability partnerships (LLP) in Ontario are provided with "partial shield" protection. They are afforded protection in respect of negligent acts and omissions of other partners and employees committed in the course of the partnership business, but are personally responsible for their own negligence and for the negligence of others under their direct supervision or control.

Partners in LLPs are not presently protected for wrongful acts or omissions of other partners and employees. They are jointly and severally liable for the general obligations of the LLP, and their interest in partnership property remains generally available to satisfy the obligations of the firm.

Once proclaimed, changes to the *Partnerships Act* will provide the following “full shield” protection for LLP partners:

- A partner will no longer be personally liable for the negligence of a person who is merely under the partner’s “control”, but will remain liable for a person under the partner’s direct supervision;
- A partner will no longer be personally liable for the non-professional debts or obligations of the LLP;
- A partner will be personally liable for the negligent or wrongful act or omission of another partner or an employee not under her or his direct supervision, if:
 - the act or omission was criminal or constituted fraud, even if there was no criminal act or omission; or
 - the partner knew or ought to have known of the act or omission, and did not take the actions that a reasonable person would have taken to prevent it.

As presently proclaimed, subsection 10(1), under the *Partnerships Act* provides that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner. Subsections 10(2) and 10(3) restrict the scope of this broad liability for the purposes of limited liability partnerships. The current amendments provide that these two subsections be repealed and the following substituted:

Limited liability partnerships

“(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

- (a) the debts, liabilities or obligations of the partnership or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or
- (b) any other debts or obligations of the partnership that are incurred while the partnership is a limited liability partnership.

LIMITATIONS

(3) Subsection (2) does not relieve a partner in a limited liability partnership from liability for,

- (a) the partner’s own negligent or wrongful act or omission;
- (b) the negligent or wrongful act or omission of a person under the partner’s direct supervision; or
- (c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner’s direct supervision, if,
 - (i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or
 - (ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it.

SAME

(3.1) Subsection (2) does not protect a partner’s interest in the partnership property from claims against the partnership respecting a partnership obligation.”

These changes are intended to bring Ontario’s provisions concerning LLPs more in line with that of other jurisdictions in Canada and the United States. They are also designed to ensure that Ontario can continue to attract and retain top professional talent by giving professionals the legal protection they need to do their jobs without fear of unfair and potentially ruinous liability.

For an earlier discussion on LLPs and firm structure, and related tax implications, see “Structuring firms to manage risk” in the Summer, 2003 issue of LawPRO Magazine (www.practicepro.ca/lawpromag/firm_structure.pdf). Note that only lawyers, chartered accountants and certified general accountants may form LLPs in Ontario.

Lawyers should be aware that the tax treatment of partial shield and full shield LLPs may be different. Once changes are proclaimed, partners and prospective partners in LLPs should be certain to obtain professional tax advice promptly, to avoid any unintended negative tax consequences.

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