



Cyber Liability

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Guiding Principles of Privacy

- There are three guiding principles to using information:
 - Confidentiality: access to data must be limited
 - Integrity: the data must be authentic and complete
 - Availability: the data must be accessible to those authorized to access it.

Rising privacy breach litigation

- Class action litigation arising out of cyber and privacy risks is increasing
- Cases involve portable storage and improper disposal of equipment, to cybercrime
- The Ontario Court of Appeal recognized “intrusion upon seclusion” as a tort



Recent Case Law

Certification / Rule 21 Motions

Agnew-Americanano v. Equifax

Canada

- Highly Publicized breach of privacy; millions affected
- cyber criminals accessed personal information through a security vulnerability on Equifax's website.
 - names, addresses, social insurance numbers and some credit card numbers.
- Didn't have policies or procedures in place to react.
 - Widely seen as bungled response
 - created new website instead of using normal site: equifaxsecurity2017.com; Easy to spoof, accidentally tweeted spoofed site address, securityequifax2017.com
 - Took a long time to disclose
 - Executives claim coincidentally sold \$2 million in Equifax stock before announcement
- Class Action in Ontario for "intrusion upon seclusion"

Condon v. Canada

2014 FC 2135 (March 17, 2014), Justice Gagné

- Unencrypted external hard drive went missing from Human Resources and Skills Development Canada office in Québec
- Hard drive contained personal information of 583,000 student loan participants (including SINs, addresses etc.)
- Federal Court certified class action on basis of *Jones v. Tsige*, as well as breach of contract and warranty

Several types of damages were claimed:

- Damages for intrusion upon seclusion
 - Accepted by Court as primary basis for claim
- Nominal damages for breach of contract and warranty
 - Court accepted that plaintiffs may be entitled to nominal damages to recognize a breach of a contract (novel in class actions)
- Damages for negligence
 - No compensable damages; claims in negligence must fail (no identity theft)



Recent Case Law

Settled Class Actions

Lozanski v The Home Depot, Inc., 2016 ONSC 5447

- 6 Class actions in Canada, ~500,000 Canadian customers affected
- Payment card system hacked by custom-made malware
- Not found in violation of privacy legislation by provincial privacy commissioners
- Home Depot immediately informed privacy commissioner and customers, offered all affected customers free credit monitoring, identity theft insurance, and credit repair
- Compare to Equifax response

- Judge approving settlement noted Home Depot's lack of culpability

Terms of settlement included:

- credit monitoring up to \$250,000; and
- Reimbursement up to \$5,000 per person for proven losses as a result of the breach, including time remedying the breach, up to 5 hours at \$15/hr (2 hours if not documented)
- Totaled approx. \$400,000
- Settled for counsel fees of \$460,00, judge cut down to \$120,000

Rowlands v. Durham Region Health

2011 ONSC 719 (February 4, 2011), Justice Lauwers

- Nurse lost a digital USB key
- The USB key contained the unencrypted personal and confidential information of 83,524 individuals who received H1N1 shots
- The plaintiffs' claims included negligence, breach of fiduciary duty, breach of confidence, breach of privacy and breach of statutory duty under the PHIPA and punitive damages.

The settlement included:

- Any member who suffered economic loss could make a claim within a specific claim period.
- The settlement also provided for the payment of the plaintiffs' legal costs estimated at over \$500,000 plus 25% of claims paid in the future.



Recent Case Law

Recently Issued Proposed Class Actions

Peoples Trust Proposed Class Action

- On November 18, 2013, a proposed national class action was commenced against Peoples Trust Company, an online banking firm arising from a privacy breach in which confidential personal information stored in an online application database was compromised by cybercriminals.
- Peoples Trust notified 12,000 to 13,000 individuals who may have been affected after discovering the breach when its customers complained of phishing attempts.
- The action claims \$13 million in damages.

Montford Hospital Proposed Class Action

- \$40 million class action brought against Ottawa's Montford Hospital
- Lost USB stick had confidential personal information of 25,000 patients
- The class members allege breach of contract, negligence, breach of privacy and violations of hospital by-laws and the *PHIPA*.

IIROC Proposed Class Action

- Investment Industry Regulatory Organization of Canada (IIROC)
- Class action in Québec dealing with accidental loss of laptop containing personal information relating to 52,000 clients of investment firms
- Claim seeks \$1,000 per person (\$52 million)

MacEachern and Ford Motors

- Ford notified employees that their personal information had been inadvertently posted to an unsecured website
- Information included names, addresses, phone numbers, birth dates, and seniority dates of 10,000 current and former employees
- Claim seeks \$13 million

Douez v. Facebook

2014 BCSC 953 (May 30, 2014), Justice Griffin

- The British Columbia Supreme Court certified class proceeding against Facebook
- Alleges Facebook used names and images of users without their consent contrary to BC's *Privacy Act*
- Size of the class was estimated to be over 1.8 million

Conclusion

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