DOLDEN WALLACE FOLICK LLP

FALL 2017

INSURE UPDATES

IN THIS ISSUE

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

Unit 302 – 590 KLO Road
KELOWNA, BC. V7Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

500 – 18 KING ST E
TORONTO, ON. M5C 1C4
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Proposed PIPEDA Regulations: What To Include In Notifications

By Sinziana Gutiu, DWF Vancouver, Email: sgutiu@dolden.com

On September 2, 2017, the Ministry of Innovation, Science and Economic Development Canada published the Personal Information Protection and Electronic Documents Act ("PIPEDA") proposed Regulations for mandatory breach notification.

The proposed Regulations outline the required form, content and manner for notifying individuals and the Office of the Privacy Commissioner of Canada ("OPC") about privacy breaches, and require organizations to keep a record of all known breaches.

What to Include in the Notification to Individuals and the OPC

Once an organization discovers a privacy breach that creates a real risk of significant harm to affected individuals, it should consider notification to those individuals and the OPC.

Under the proposed Regulations, an organization's notice to individuals must include:

1. a description of the circumstances of the breach and date or period of time when the breach occurred;

2. a description of the personal information affected by the breach;

3. a description of the steps that the organization took to reduce the risk of harm;

4. a toll-free number or email address that the affected individual can use to obtain further information about the breach; and,

5. information about the organization's internal complaint process and about the affected individual's right to file a complaint with the OPC.

According to the proposed Regulations, notification to affected individuals should be done in a "*direct*" manner. This means that the organization should contact affected individuals by email or letter delivered to the last known home address, by telephone, or in person.

"*Indirect*" notification may be appropriate if direct notification could cause further harm to individuals, if the cost of direct notification is prohibitive for the organization, or if there is no contact information for the affected individuals. In those situations, an organization could post a conspicuous message on its website for at least 90 days, or run an advertisement.

The organization's notice to the OPC under the proposed Regulations should include:

1. a description of the circumstances of the breach and date or period of time when the breach occurred;

2. a description of the personal information affected by the breach;

3. a description of the steps that the organization took to reduce the risk of harm;

4. an estimate of the number of affected individuals;

5. a description of steps taken to notify affected individuals; and,

6. contact information for someone who can answer questions about the breach on behalf of the organization.

This list is similar to the information requested in the voluntary Privacy Breach Incident Report form, which organizations can use to self-report breaches to the OPC.

Breach Record-Keeping

The proposed Regulations will also make it mandatory for organizations to create and maintain a record of every privacy breach it experiences, regardless of the extent or impact of the privacy breach. The record must be kept for two years, and the OPC will be able to review it upon request.

Not Yet in Force

The proposed Regulations are not yet in force. They will only become law after the PIPEDA sections that create the mandatory breach notification obligations (ss. 10.1 and 10.3) are brought into force. This is welcome news as it will provide organizations with time to ensure compliance.

Implications

The proposed Regulations reaffirm what is already good business practice in Canada. In the right circumstances, reporting breaches to the OPC and to affected individuals can go a long way to mitigate a potential negative decision by the OPC if an individual complains, as well as to reduce the likelihood of litigation.

The impending Regulations also provide an excellent opportunity for organizations to review their cyber breach response protocols and ensure that their responses to breaches are swift, effective and conform with PIPEDA's mandatory breach notification requirements.

Ontario Court Uses Its Teeth To Dismiss A SLAPP Suit And Award Damages: *United Soils Management v. Mohammed*

By Brett Stephenson, DWF Toronto Email: bstephenson@dolden.com

In the Fall of 2015, the Ontario government passed an amendment to the *Courts of Justice Act* ("CJA") providing an important tool for a defendant to combat strategic litigation against public participation or what are commonly known as SLAPP lawsuits. A SLAPP lawsuit is a lawsuit initiated against an individual or group that speaks out or takes a position on an issue of public interest. SLAPP lawsuits use the court system to limit the effectiveness of the opposing party's speech or conduct.

The legislature determined that in some circumstances an expedited procedure for the dismissal of the action should be available to a defendant in order to promote and protect expression on matters of public interest. This is clear by the stated purposes of the legislation which seeks to encourage free expression and participation on matters of public interest while at the same time discouraging the use of litigation as a means to limit or hamper this public discourse.

Legislation With Teeth

This SLAPP legislation has teeth. Once a SLAPP motion has been advanced, Section 137.1(5) of the CJA provides that no fresh step in the litigation can be taken until the motion is decided. Further, if a defendant is successful on a SLAPP motion, the defendant is entitled to damages and costs on a full indemnity basis for the entire action.

Section 137.1(3) of the CJA allows a judge on a motion brought by a defendant to summarily dismiss an action where the "*expression*" of concern relates to a matter of public interest (the "SLAPP Motion").

If the defendant is able to establish that the expression is a matter of public interest, then, under section 137.1(4), the onus shifts to the plaintiff to establish that the action should not be dismissed because: the proceeding has substantial merit; the defendant has no valid defence; and the harm suffered by the plaintiff is sufficiently serious that it outweighs the public interest in protecting the expression. This is a

high standard to meet because the test is conjunctive meaning that all elements of Section 137.1(4) of the CJA must be satisfied by the plaintiff to avoid having a claim dismissed as a SLAPP suit.

United Soils Management Ltd. v. Mohammed

The court recently dealt with the SLAPP legislation in *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450. In this case, the plaintiff brought a claim against Katie Mohammed alleging that she made false, malicious and defamatory remarks concerning an agreement United Soils reached with the Town of Whitchurch-Stouffville (the "Town") to allow for the deposits of acceptable fill from hydro excavation trucks in a gravel pit located near a drinking water source (the "Agreement").

Based on her review of several tweets made by councillors of the Town as well as a story published in a local newspaper, Mohammed was concerned that the Agreement could result in contaminated drinking water for residents of the Town. She made several posts on the internet that the plaintiff argued were defamatory (the "Words Complained Of").

The defamation lawsuit was commenced even after Mohammed acquiesced to United Soils' demand that she retract the statements made and apologize for the alleged defamatory words.

Mohammed brought a motion to dismiss United Soils' action as a SLAPP suit pursuant to Section 137.1(3) of the CJA.

United Soils conceded that Mohammed's expression was related to a matter of public interest. However, United Soils argued that the Words Complained Of were slanderous based on Mohammed's use of the word "poison", that suggested that United Soils intended to, and was, poisoning the children living in the Town.

Having found that there was no dispute that the Words Complained Of were an expression of a public interest, the court focused its analysis as to whether the defendant could satisfy the test provided by Section 137.1(4) of the CJA.

Plaintiff's Action Had No "*Substantial Merit*"

The court concluded that Union Soils' action had no merit much less any "*substantial merit*" as required by Section 137.1(4) of the CJA.

Justice Lederer found that the context in which the Words Complained Of were made, was based on Mohammed's concern that the Agreement meant there was a risk that the ground water could be contaminated and endanger those who used and drank the water. This was a risk that Mohammed believed the Town should not take.

Although Mohammed could have used more careful language, Justice Lederer found that the Words Complained Of did not demonstrate the basis upon which an action in defamation could be said to have "*substantial merit*".

In addition, the court determined that the action had no merit because Mohammed had apologized and with the apology made there was little or no purpose in Union Soils continuing the action.

The court concluded that the only reason that Union Soils sought to continue the action was to place an impediment to public discussion and debate on the issue.

Although not required to do so, the court went on to find that the four defences; justification, fair comment, qualified privilege and responsible communication, plead by Mohammed, were all valid.

Plaintiff's Harm Was Not Sufficiently Serious That It Outweighed The Public Expression

The court further found that the harm likely to be suffered by United Soils as a result of the Words Complained Of was not sufficiently serious that it outweighed the public interest in protecting Mohammed's expression because there was no evidence of any particular harm or damage caused to the Plaintiff. The court found that if Union Soils' action was to proceed, there was no way of knowing how many members of the public interested in the issue, or for that matter, any other public concern, would feel intimidated and not take part in the discussion for fear of being the subject matter of a similar law suit.

Damages

In addition to dismissing the action by Union Soils, the court exercised its jurisdiction pursuant to Section 137.1(9) of the CJA to award damages to Mohammed.

The court found that there was sufficient evidence before the court to find that Union Soils acted with improper purpose. Prior to the hearing of the SLAPP Motion, Union Soils advanced three interlocutory motions including to strike Mohammed's defence, an appeal of that decision, a motion for refusals and a motion to examine the Mayor of the Town. Justice Lederer found that each of the motions, and in concert, were an objective demonstration of an improper purpose by Union Soils and constituted an abuse of the court process.

The court awarded $7,500 in damages to Mohammed finding that the action by Union Soils unnecessarily caused Mohammed stress that affected her day to day life.

Take Away

United Soils Management Ltd. v. Mohammed is an important decision because it signals the court's willingness to use the teeth granted by the CJA to summarily dismiss claims that are intended to silence opposition rather than advance legitimate rights. Further, the decision shows that in circumstances of bad faith or improper purpose, the court will award damages to punish or deter the use of SLAPP suits.

Broker Beware: *Marsh v. Grafton Connor* Is Little Relief

By Jonathan Weisman, DWF Vancouver, Email: jweisman@dolden.com

Background

In *Marsh v. Grafton Connor*, 2017 NSCA 54, The Grafton Connor Group of Companies owned a number of properties, including the North End Pub that was destroyed by fire. Its broker, Marsh Canada Limited, obtained property coverage for Grafton Connor's properties with a group of Lloyd's Underwriters. The application for the property policy indicated that the North End Pub building was built of masonry and was "*100% sprinklered*". Neither of these things was true.

While clearing the debris, Lloyd's learned the truth about the North End Pub's construction. It ceased work on remediation and denied coverage on the grounds of material misrepresentation. Grafton Connor sued Lloyd's for coverage and Marsh for negligence. Marsh claimed contribution from Lloyd's. Lloyd's countersued Grafton Connor for the cost of its truncated debris removal.

Trial Decision

The trial judge found that the misrepresentations had originated when Marsh combined information pertaining to two different buildings on a sheet listing insured locations in 1999. Grafton Connor was asked to review the location sheet annually when its applications were submitted, but the employees involved in risk management did not know about the buildings' construction and assumed that the information from previous years' applications must have been correct.

Grafton Connor had obtained inspection reports for two of its properties, one of which was the North End Pub. Marsh knew that these reports existed, and obtained the report for the other property, but not for the North End Pub. The report for the North End Pub did not identify the true nature of its construction, but clearly indicated that the building was not "*sprinklered*".

The trial judge dismissed the claims against Lloyd's and allowed Lloyd's claim against Grafton Connor. To round matters off, the trial judge found Marsh 50% liable for Grafton Connor's losses. He concluded that Grafton Connor's risk management personnel were unsophisticated and that the risks involved were complex. The trial judge concluded that Marsh needed to assess Grafton Connor's representatives' ability to provide accurate information and to recommend ways of investigating the building's construction. Had Marsh done so, Grafton Connor's personnel would have checked on the building's construction and discovered the error.

Court of Appeal Decision

The Court of Appeal found that there were two errors in the lower court's reasoning. First, Grafton Connor's level of sophistication was not relevant. A broker is entitled to rely on the information provided to it by an applicant. The fact that Marsh had created the error did not matter because Grafton Connor knew the true nature of the building and had been given an opportunity to review the information for

correctness. Secondly, the risk was not complex. The Court of Appeal did not disagree that insuring a complex risk may increase the work expected of a broker and heighten the importance of good advice. However, the trial judge confused the risk with the description of the property. The risks were the ordinary risks against which property insurance protects.

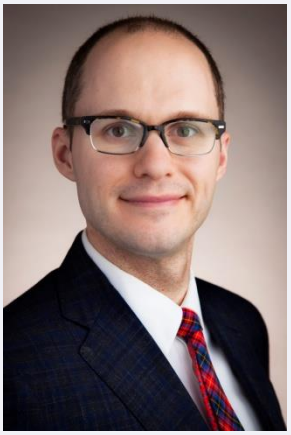
There was another wrinkle in Marsh's work. Marsh knew that an inspection report was available for the North End Pub. It obtained a report for one of the other insured locations, but did not request the North End Pub report, which would have shown that the premises were not "*sprinklered*".

The trial judge concluded that Marsh should have requested the second report and that its failure to do so was negligent. However, no evidence was presented to show that the change in the report would have resulted in a different premium for coverage, and the masonry representation would have persisted. In the circumstances, the trial judge found that the failure to obtain the second report, although negligent, did not cause the loss of coverage. The Court of Appeal agreed with the trial judge's conclusions.

Having set aside the trial judge's finding of negligence, Marsh was relieved of liability, but that relief sounds a cautionary note. If the report had properly identified both the building's structure and the absence of sprinklers, Marsh may well have been held liable for its negligent failure to obtain it.

Take Away

Even if brokers are entitled to rely on client representations, they must consider whether they have obtained copies of relevant records which they know are available. Information in those records, unknown to the broker, could have serious consequences if it is at odds with information provided by an applicant. *Marsh v. Grafton Connor* warns that a broker's ability to rely on its client's information has its limits.



The Limits Of Expert Evidence In Slip And Fall Litigation: *Tondat v. Hudson's Bay Company*

By Robert Smith, DWF Toronto, Email: rsmith@dolden.com

Christmas time is just around the corner, which means busy, harried shoppers will flock to stores to try to get all of their shopping done in a single day. Not only does this yearly influx of humanity raise the stress level of the shoppers, it also raises the stress level of insurers and of defence counsel, as the combination of distracted patrons, inclement weather and overworked employees increases the risk of slip and fall injuries.

Background

The recent decision of Justice André of the Ontario Superior Court of Justice in *Tondat v. Hudson's Bay Company*, 2017 ONSC 3226 ("Tondat"), shows that the best way for stores to avoid liability for slip and fall claims is to have regular cleaning schedules that are adhered to and documented. In addition, retailers are wise to adapt their cleaning schedules during periods of increased traffic and wet weather.

The facts of Tondat are straightforward. Ms. Tondat entered a Hudson's Bay department store on December 2, 2012 to return a vacuum cleaner. It had been raining lightly all day and there was water on the floor of the store's vestibule. Ms. Tondat slipped after she stepped off of a black mat and onto the vestibule's tiled floor. The force of the fall broke her knee cap. Ms. Tondat did not notice any water or debris on the tile before she stepped off the mat.

The store was operating on extended Christmas hours, which increased the number of people coming in and out of the vestibule. In spite of this, the Bay only assigned one employee to clean the 118,348 square foot store. The only documentation of this cleaning was that it had been "*light duty*". There was no evidence that the employee had cleaned the vestibule.

Trial Decision

Justice André noted that the Bay had a duty under the *Occupiers' Liability Act* to keep its premises reasonably safe in the circumstances. Justice André cited the earlier decision of *Morash v. McAllister Place Ltd.* for the proposition that retailers must provide "*reasonably safe premises for the purposes contemplated*", which means it will be frequented by patrons of all ages, strengths and infirmities, who are wearing a variety of footwear and who might also be carrying parcels.

Justice André found the Bay liable because there was no evidence of the existence of a regular cleaning system, let alone a cleaning system that responded to inclement weather and increased foot traffic.

The most interesting part of this decision is Justice André's treatment of the defence's expert evidence, which reveals the age-old tension between "*common sense*" and scientific testing in judicial decision making. The defence retained a slip and fall expert to test the slip resistance of the tiles in the vestibule to determine if they posed an unreasonable hazard when wet. The expert witness tested the tile under a variety of conditions and concluded that the material possessed a sufficient coefficient of friction to not be a slipping hazard, even when wet. The defence therefore argued that the Bay should not face liability because it was not required to keep the floor dry in order to maintain a reasonable level of safety.

Justice André rejected the expert evidence because there were "*simply too many variables to conclude that the floor was inherently safe*" in the circumstances. As examples, Justice André mentioned that the weather conditions, the wetness of the floor, the nature of Ms. Tondat's footwear and the presence of oil on the floor were all relevant to the question of liability and were not taken into account by the expert.

Earlier in the decision Justice André stated "*it is well known within the sphere of human experience that the presence of water on a floor will increase the likelihood of a slip and fall*." It is very interesting that Justice André worded his statement in this manner, as it appears he took judicial notice of the fact that wet floors are more dangerous than dry ones. Even if this statement is not controversial, the occupier's duty is not to eliminate increased risks of falls, but to take reasonable steps to ensure that the premises are reasonably safe. The question becomes, though, how do we know what poses an unreasonable risk if

not through scientific testing? If scientific testing proves that a flooring material is safe when wet and if there is no evidence that the floor was anything other than wet (for instance, the decision does not mention proving the presence of oil on the floor), then on what basis can we determine that the floor was not reasonably safe, other than by simply accepting the untested belief that wet floors are inherently dangerous?

Take Away

All pedantic arguments aside, the lesson that retailers and defence counsel can draw from Tondat is that there is no substitute for a schedule of regular cleaning when defending slip and falls. Courts are typically lenient to a retailer if it can produce records showing that its cleaning schedule was appropriate in the circumstances and was adhered to on the date of loss. Justice André's rejection of the expert evidence shows that post-facto rationalizations, even if supported by expert evidence, may not make up for substandard preventative care.

EDITOR

Chris Stribopoulos
Tel: 647.798.0605 Email: cstribopoulos@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.

CONTRIBUTING AUTHORS

Sinziana Gutiu
Tel: 604.891.0357 Email: sgutiu@dolden.com

Brett Stephenson
Tel: 647.798.0602 Email: bstephenson@dolden.com

Jonathan Weisman
Tel: 604.891.0360 Email: jweisman@dolden.com

Robert Smith
Tel: 647.798.0609 Email: rsmith@dolden.com