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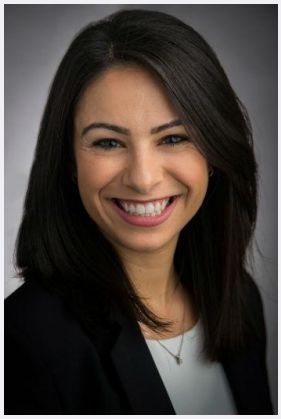

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Certification in Latest Data Breach Class Action

By *Mouna Hanna*, DWF Toronto, Email: mhanna@dolden.com and *Travis Walker*, DWF Toronto, Email: twalker@dolden.com

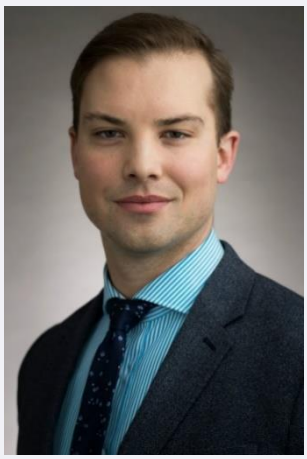
Class action lawsuits in the wake of widely publicized data breaches are becoming commonplace, if not automatic. The Ontario Superior Court of Justice recently certified a class action stemming from a 2017 data breach in *Grossman v. Nissan Canada Inc.*,[1] involving a rogue employee's use of their credentials to access and steal personal information of thousands of Nissan customers. The ruling is particularly noteworthy, as the same judge (Justice Belobaba), declined to certify a class action proceeding in relation to a separate data breach incident only a few months earlier in *Kaplan v. Casino Rama*.[2]

While the number of data breach class actions appear to be growing in step with the number of reported breaches, we continue to await a decision on the merits, which to date, has not occurred in Canada.

The *Nissan* Class Action

In *Nissan,* a rogue employee who stole personal information of thousands of Nissan customers sent a sample of the stolen data to Nissan's executives and demanded payment of a ransom in exchange for a promise not to release the information publicly. Nissan refused to pay the ransom and instead, notified all of the individuals listed in the database (roughly 932,000 people).

[1] 2019 ONSC 6180
[2] 2019 ONSC 2025



Nissan also offered the affected individuals free credit monitoring services.

The personal information involved: (1) names and addresses; (2) vehicle model and vehicle identification number (VIN); (3) terms of the lease/loan and monthly payment amounts; and (4) customer credit scores.

By the time the certification motion in *Nissan* was heard in 2019, no evidence had emerged that any of the stolen information was made public, or that the rogue employee misused the information. Nissan argued that the collective damages of the proposed class were so minimal that a class proceeding was not justified. The Court disagreed.

Class counsel was successful in getting four of six proposed common issues certified, namely: (1) whether the rogue employee was liable for the tort of intrusion upon seclusion and, if so, whether Nissan was vicariously liable; (2) whether Nissan was negligent; (3) whether the class' damages could be assessed in the aggregate; and (4) whether class members were entitled to punitive damages.

Nissan at Odds with _Casino Rama_?

In *Casino Rama,* an unidentified third party gained access to Casino Rama's computer systems and obtained personal information of 11,000 of Casino Rama's customers, employees, and suppliers. When Casino Rama refused to pay a ransom, the unidentified third party posted the information online. Casino Rama notified the affected individuals of the breach and offered one year of credit monitoring services. A class action followed soon after. However, certification was denied due to a lack of commonality of the issues proposed.

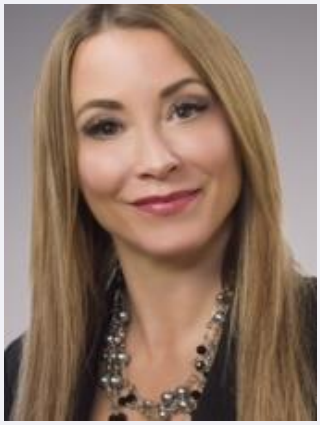
One key distinction between the *Nissan* and *Casino Rama* cases was the nature and volume of personal information at issue. In *Nissan*, the personal information that the rogue employee obtained was the same for each affected individual, whereas in *Casino Rama*, the nature and amount of personal information at issue varied widely for each individual class member, ranging from simple contact information to sensitive banking information.

The Court also appeared to make inconsistent findings in *Nissan* and *Casino Rama* as to whether or not evidence was required at the certification hearing about the class members' feelings of humiliation or embarrassment stemming from the disclosure of their information. While in *Casino Rama*, Justice Belobaba found that individual inquiries of class members were required, in *Nissan*, Justice Belobaba rejected the idea of a subjective analysis of an individual's sensitivities and, in fact, found that such sensitivities ought to be ignored altogether.

The nature of the breach may have also played a role in the outcomes of both certification motions. Although both threat actors were not identified or sued, it is possible that the Court in *Nissan* was more comfortable with the idea of holding an organization accountable for the acts of their rogue employees versus those of a hacker, over which the organization had no control.

Take Away

While we wait for a decision on the merits in a class action proceeding involving a data breach, we expect that class action proceedings following large scale data breaches will continue to gain further popularity in Canada. A sufficient number of certification hearing decisions now exist, which have undoubtedly helped create a roadmap for future class counsel.



Employer Discrimination Even Though No Knowledge of Employee's Mental Disability

By *Cecilia Hoover*, DWF Calgary, Email: choover@dolden.com and
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In *Pratt v University of Alberta*, 2019 AHRC 24, the Alberta Human Rights Tribunal found that an employer had discriminated against one of its employees when terminating her during her probationary period, even though the employee did not directly inform the employer of her mental disability.

The complainant had just begun work with the University of Alberta ("U of A") and was in her probationary period when she learned of her brother's untimely passing, which impacted her ability to focus at work. Subsequently, she requested modifications in her job duties, and informed the U of A that she

was having difficulty with concentration and memory, and was seeing a counselor. She did not, however, directly inform the U of A that she was suffering from a mental disability. The U of A proceeded to terminate her employment.

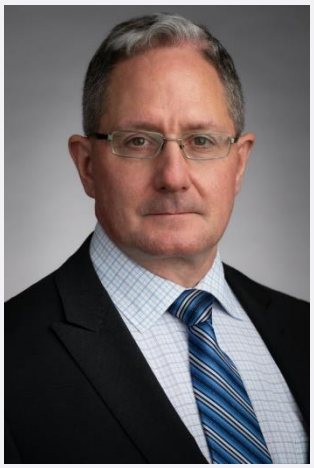
Various documented performance issues had been identified both before and after the passing of the complainant's brother. The Tribunal Chair concluded that despite these performance issues, the mental disability was a factor in the complainant's termination. The Tribunal further concluded that once the complainant had requested a modification of her job duties, the U of A had a corresponding duty to make further inquiries about the complainant's condition. Additionally, the Tribunal found that although the U of A told the complainant it would work with her to accommodate her issues, it did not do so.

The Tribunal concluded that the mental disability played a part in the termination. Despite the U of A's claim that it did not know the complainant had a disability, the Tribunal found that it ought to have been clear to the employer that the complainant had a disability.

Finally, the Tribunal not only awarded damages but also ordered reinstatement, an available but rarely employed remedy. The Tribunal reasoned that the complainant had been unable to locate comparable employment and that the U of A was a large and sophisticated employer capable of accommodating the complainant's disability.

Take Away

The decision in *Pratt v University of Alberta* serves to highlight a number of key considerations including (a) the imputed knowledge of a disability, (b) the duty on the employer to make further inquiries when an employee requests job modification, (c) the fact that even if performance issues exist, as long as the disability plays a factor in and is connected to the impugned conduct of the employee, this is sufficient to trigger the legislation, and (d) a warning that reinstatement remains an available remedy in certain cases.



No Coverage When No Timely Notice of a Loss

By *Mark Barrett*, DWF Toronto, Email: mbarrett@dolden.com

An insured's failure to provide timely notice of a loss constitutes unreasonable conduct and results in substantial prejudice to an insurer which will result in no obligation to indemnify the insured. In *Monk* v. *Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616, the Ontario Court of Appeal recently dismissed an appeal under a homeowners' policy of insurance, holding that the trial judge was correct in finding that the insured was not entitled to coverage because she was in breach of policy condition (late notice), and was not entitled to relief from forfeiture under section 129 of the Ontario *Insurance Act*.

The insured owned a log home that was insured by Farmers' Mutual Insurance Company ("Farmers'"). She had hired a company, Pleasantview, to restore the exterior surfaces. This involved powerwashing, grinding and sanding, and then finishing the exterior surfaces. Pleasantview commenced its work in August of 2008, but ultimately did not complete the entirety of the work it had contracted to perform.

In April/May 2009, the insured noticed that a number of the glass panes in exterior windows and doors were scratched and pock-marked. Further, finishing fluid had spilled on a number of surfaces. During the 2009-2010 winter, the insured noticed condensation forming between the panes in many of the thermalseal windows.

Knowing that her three-year warranty was about to expire, the insured submitted a detailed claim to Plesantview in July of 2011. Pleasantview took no steps to address the issues.

On September 2, 2011, the insured inquired of her insurance broker about submitting a claim to Farmers'. On September 8, 2011, the insured was informed that Farmers' had denied the claim on the basis that the damage had occurred more than two years before the report of the damage. The insured then commenced two actions, one against the insurance broker and Farmers', and the other against Pleasantview. In the action against Plesantview, Pleasantview advanced a limitations period defence.

After a nine-day trial against Farmers' and the insurance broker, the trial judge found that the exclusions relied upon by Farmers' did not preclude coverage for resulting damage, but dismissed the insured's claim because the insured's "*failure to provide timely notice of her damages constitutes unreasonable conduct on her part and has resulted in substantial prejudice to the insurer*." The trial judge also found that the insured was not entitled to relief from forfeiture because her conduct was unreasonable and she had not provided a reasonable explanation for her failure.

The Ontario Court Appeal, accepted that there had only been imperfect compliance. However, the Court of Appeal found no reason to interfere with the finding that the insured had provided no reasonable explanation for her failure to provide notice of her potential claim to Farmers' "*forthwith*", as was required by the Farmers' policy of insurance.

The Court of Appeal also agreed with the trial judge's finding that the insured's delay had prejudiced Farmers' ability to subrogate against Pleasantview, finding that the evidence amply demonstrated that the delay lead to Pleasantview asserting a strong limitations defence. The breach was therefore serious or "*grave*."

With respect to the disparity between the value of the property forfeited (the damage) and the damage caused by the policy breach, the Court agreed with the trial judge's finding that while property forfeited by the insured as the result of her breach was significant, timely reporting would have enabled Farmers' to pursue Pleasantview "*unburdened by the ability of the contractor to advance a strong limitations defence*."

Take Away

An insured who fails to provide timely notice of a loss to an insurer, and provides no reasonable explanation for such delay, risks losing the coverage that the insured could have been entitled to. In this scenario, a relief from forfeiture argument may not assist the insured. Apart from emphasizing the importance of timely reporting of losses and claims to insurers, the decision further clarifies the analysis that must be undertaken in considering whether relief from forfeiture is available to an insured.

Strata Corporations Must Comply With Notice Provisions To Recover Cost Of Repairs

By *Cayleigh Shiff*, DWF Vancouver, Email: cshiff@dolden.com

Strata corporations in British Columbia can enter an owner's unit without consent to effect necessary repairs. The *Strata Property Act*, SBC 1998, c. 43 (the "Act") allows strata corporations to recover the cost of those repairs, but only when the strata strictly complies with the Act's notice provisions.

In *The Owners, Strata Plan NW 307 v. Desaulniers*, 2019 BCCA 343, a strata corporation believed there was a flood originating in Ms. Desaulniers' unit. Contemporaneously, police took Ms. Desaulniers into psychiatric care to treat severe mental health issues. The strata corporation obtained an order permitting them to enter the unit, remove the owner's possessions, and remediate damage. The order granted the strata the ability to recover all reasonable uninsured expenses the strata would incur in relation to the remedial work, pursuant to s. 133 of the Act.

Section 133 of the Act allows a strata to do "*what is reasonably necessary to remedy a contravention of its bylaws or rules*." Further, s. 133(2) allows a strata to require the person responsible to pay the reasonable costs of remedying the bylaw contravention. However, s. 135 prohibits a strata corporation from imposing a fine or requiring a person to pay costs of remedying a contravention unless the strata has given written notice to the person as soon as feasibly possible.

Additionally, s. 84 of the Act allows the strata corporation to commence repairs to a unit where a public authority requires remedial work and the owner of the unit has failed to do so. Except in emergencies, strata corporations must provide owners at least 1-week notice before commencing repairs under s. 84.

When the strata corporation ultimately entered Ms. Desaulniers' unit, they found little evidence of a flood emanating from her suite. Instead, they discovered Ms. Desaulniers had made significant and alarming alterations to her unit, which posed considerable safety hazards. Among other things, she dismantled every electrical outlet, light switch, light fixture and smoke alarm. She tampered with heat registers, her toilet, water lines, and caused damage to the unit.

The municipality prohibited occupancy of the unit and ordered repairs. The strata wrote to the Public Guardian and Trustee alerting them that Ms. Desaulniers' unit was closed until repairs were complete. However, they did not provide Ms. Desaulniers with notice that they would be undertaking repairs.

After the repairs were completed, Ms. Desaulniers failed to pay repair costs. The strata applied for a judgement against Ms. Desaulniers for the cost of the repairs. The BC Supreme Court ruled in favour of the strata and ordered Ms. Desaulniers pay $12,217.87 for the repairs.

On appeal, the strata argued their oversight of the notice requirement was a mere technical breach that should be set aside in this case because the owner would not have been capable or willing to involve herself in the repairs to the unit had she been informed. Further, the strata argued they did what was reasonable and necessary to protect both Ms. Desaulniers and other owners' interests.

The Court of Appeal held that the strata corporation could not recover the uninsured costs of repairing Ms. Desaulnier's unit because they did not provide her with notice that the strata would commence the necessary repairs. The Court viewed the letter sent to the Public Guardian and Trustee as insufficient notice for the purpose of recovering costs from Ms. Desaulnier. The Judge found that strata corporations must strictly comply with notice provisions set forth in the Act if they want to later recover costs for remedying repairs to an owner's unit.

Take Away

The Desaulniers decision reinforces the importance of abiding by legislative notice provisions. Additionally, it is a useful reminder to strata corporations to adhere to all notice requirements set forth in the Act. A court order allowing a strata to recover its uninsured expenses will not necessarily overrule the notice requirements in the Act. Courts will not view an omission of written notice as a mere technical breach.

British Columbia Changes to Contribution Or Indemnity Rules

By *Samuel McDonald*, DWF Vancouver, Email: smcdonald@dolden.com

The Supreme Court of British Columbia confirmed that section 22(2) of the new *Limitation Act*, SBC 2012, c 13 (the "*Act*"), overturns decades of case law to bar contribution or indemnity proceedings after two years from the discovery of the claim.

In *Sohal v Lezama*, 2019 BCSC 1709, the Court held that section 22(2) was a substantive legal defence that overrode judicial discretion under Rule 3-5(4) of the *Supreme Court Civil Rules*, BC Reg 168/2009 (the "*SCCR*"), to allow third party proceedings for contribution or indemnity "*at any time*".

In *Sohal*, the defendants sought to third party a film company and its subsidiary four years after the claim was filed. The insured driver and rental car company were sued for colliding with the plaintiff's vehicle during a film production. Two years later, the defendants filed a response which identified the film companies. Almost another two years passed before the insurer applied to third party the film companies who raised section 22(2) of the *Act*. The master found that the limitation period ran from the filing of the response or, in the alternative, exercised her discretion under Rule 3-5(4) of the *SCCR*. The film companies appealed and the chambers judge re-heard the case on its merits.

On appeal, the film companies relied on *Dhanda v Gill*, 2019 BCSC 1500, a recent decision citing publications from the Ministry of Justice that section 22(2) was "*intended to radically change the law*". Previously, tortfeasors had six years from the date they were found liable to seek contribution or indemnity from a third party. Section 22(2) relies on section 16 of the *Act* which deems discovery to occur on the *later* of the service of the underlying lawsuit or the first day that the tortfeasor knew or reasonably ought to have known that contribution or indemnity could be claimed.

The defendants relied on *Klingele v Lee*, 2019 BCSC 1407, where the master read down section 22(2) to only prevent a separate court action for contribution or indemnity as opposed to issuing a third party notice within an existing proceeding. The Court

rejected this interpretation because (1) it contradicted the plain meaning of section 22(2); (2) a "*third party notice*" is defined as an "*originating proceeding*" in the *SCCR*; and (3) it made "*no practical sense*" to impose a limitation period for a separate court action for contribution or indemnity while permitting third party notices.

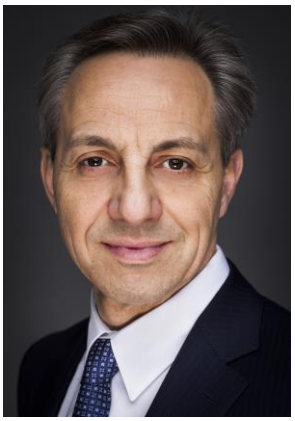
The Court set aside the master's decision and replaced it with the following approach:

1. If the limitation period has expired, the application to issue a third party notice must be dismissed despite Rule 3-5(4) of the *SCCR*;
2. If the limitation period has not expired, then the application to issue a third party notice may be granted after considering the factors under Rule 3-5(4) of the *SCCR*; and
3. If the parties disagree on whether the limitation period has expired and the Court is unable to determine this issue but is inclined to exercise its discretion under Rule 3-5(4), then the merits of the limitation defence must be decided at trial.

The Lawyers Insurance Fund is appealing this decision.

Take Away

Insurers and their counsel must be vigilant in issuing contribution or indemnity proceedings within two years of discovery of the claim. This date will usually occur when the insured is served with the claim. If there is disagreement concerning the date of discovery, then delaying the issue until trial may provide sufficient time for settlement.



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