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'CUSTOM' MADE: INTERNATIONAL TRAVEL AND ELECTRONIC PRIVACY

In prior issues, we mentioned the potential perils when returning to Canada after travelling internationally with your work phone and computer, in particular the ability of border agents to examine those devices without reasonable and probable grounds of an issue.

In *R v Canfield*, 2020 ABCA 383, a recent decision of the Alberta Court of Appeal, the court concluded that groundless searches of personal electronic devices conducted pursuant to paragraph 99(1)(a) of the *Customs Act* infringed on Section 8 of the *Charter* and further that the infringement could not be saved under Section 1. Accordingly, the search power under S. 99 (1) (a) of the *Customs Act* was deemed unconstitutional. But there are two caveats in the decision. The first is that only routine searches of personal electronic devices at the border were deemed unconstitutional. If the agent has reasonable and probable grounds of an issue the search is permitted. The second caveat is that the Court suspended its declaration of invalidity of the legislation for one year to provide Parliament the opportunity to amend the legislation should it wish to do so.

It should also be added that the appellants have sought leave to appeal as their convictions were upheld.



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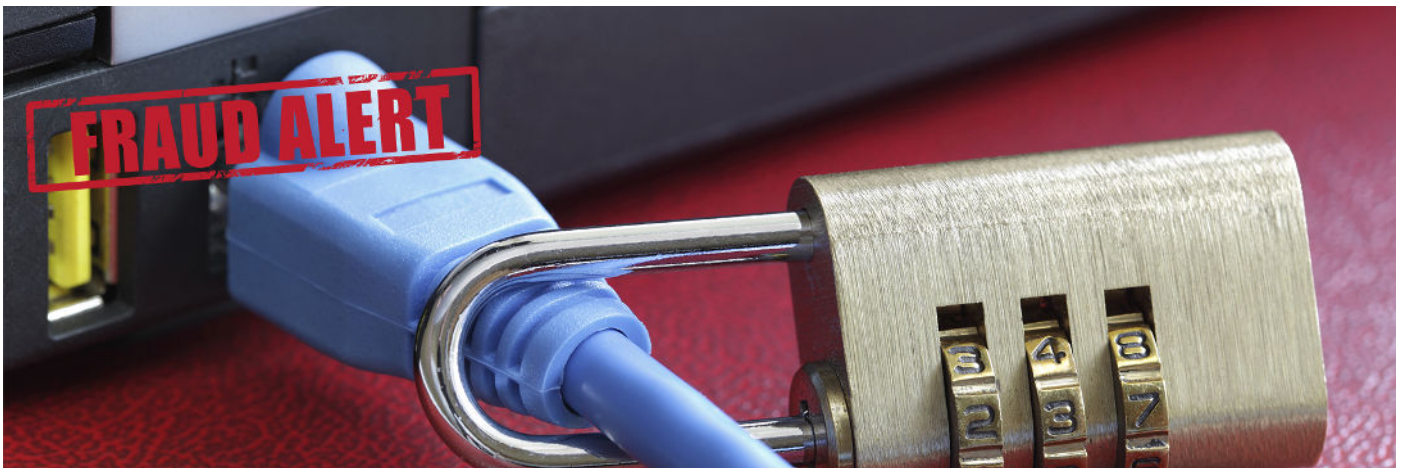
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FRAUD ALERTS: CURRENT TRENDS IN CYBER SECURITY



The occurrence of fraud attempts continue to grow exponentially. We are all particularly vulnerable due to the pandemic, when scammers are targeting distracted staff and impermanent workplaces in the hopes that these vulnerabilities will delay detection of scams. In November 2020, [Canada's National Cyber Threat Assessment](#) report was released by the Federal Government's Canadian Centre for Cyber Security, as "Canadian individuals and organizations increasingly rely on the Internet for daily activities. In a COVID-19 context, this trend has accelerated to enable Canadians to work, shop, and socialize remotely in accordance with public health physical distancing guidelines. However, as devices, information, and activities move online, they are vulnerable to

cyber threat actors. Cyber threat actors pose a threat ... through the theft of personal information, which facilitates additional criminal behaviour including identity theft and financial fraud. As physical infrastructure and processes continue to be connected to the Internet, cyber threat activity has followed, leading to increasing risk to the functioning of machinery and the safety of Canadians."

Of the numerous Key Judgments outlined in the report, some are specifically relevant to lawyers and their practices:

"The number of cyber threat actors is rising, and they are becoming more sophisticated. The commercial sale of cyber tools coupled with a global pool of talent has resulted in more threat actors and more sophisticated threat activity. Illegal online markets for cyber tools and services have also allowed cybercriminals to conduct more complex and sophisticated campaigns.

Cybercrime continues to be the cyber threat that is most likely to affect Canadians and Canadian organizations. We assess that, almost certainly, over the next two years, Canadians and Canadian organizations will continue to face online fraud and attempts to steal personal, financial, and corporate information.

We judge that ransomware directed against Canada will almost certainly continue to target large enterprises and critical infrastructure providers. These entities cannot tolerate sustained disruptions and are willing to pay up to millions of dollars to quickly restore their operations. Many Canadian victims will likely continue to give in to ransom demands due to the severe costs of losing business and rebuilding their networks and the potentially destructive consequences of refusing payment."

Among the numerous sections of this report, you may choose to review in particular the list of "[Useful Resources](#)" on Cyber Security.

Similar ransomware virus attacks have been reported in Nova Scotia. A ransomware-infected email link or attachment may appear to be from a financial institution or company (e.g. a package delivery service), or, in recent times, with regard to COVID-19 related matters. Once an infected link or attachment is opened, the virus will begin to corrupt the victim's system files. A pop-up window will soon appear on the computer screen, restricting access to the system and its files until a ransom is paid to the creator of the virus.

These warning messages may also claim to be from the RCMP or other government agencies stating that their computer has been frozen for a criminal investigation involving 'child pornography' or 'illegal music downloading'. This is an attempt to scare victims into sending money to unlock their system, although the computer will not be unlocked if the money is paid – the scammers will disappear once the funds are transferred.

These programs install themselves and encrypt files on the computer's hard drive, and are extremely difficult to remove, with no guarantee that your data can be recovered. Here's how to protect yourself:

Be vigilant about the legitimacy of all emails received – do not open email attachments or click links from unverified senders

Never click on a pop-up that claims your computer has a virus

Turn on your browser's pop-up blocking feature

Keep your anti-malware and firewall programs up-to-date and perform scans on a regular basis

Schedule regular system updates and maintain backups of your data to ensure that your files are protected

Never download anti-virus software from a pop-up or link sent to you in an email

If you've received a ransomware message, contact the Canadian Anti-Fraud Centre (1-888-495-8501) to report it

If your computer becomes infected, do not pay the scammer's ransom request – have it cleaned by a computer repair service to remove any malware.

As we've warned in the past, we bring this to your attention for several reasons. Social engineering fraud is not part of the cyber coverage we offer in our policy. In the similar cases, coverage has been denied by a cyber insurer when the lawyer/firm did not have the social engineering rider on its commercial cyber policy. Second, depending on the facts, there may not be coverage for such a fraud under the professional liability part of your insurance policy either. Accordingly, a lawyer falling victim to such a fraud who lacks appropriate insurance coverage and whose trust account is compromised could be in the position of having to reimburse their trust account for any lost funds.

For tips to avoid being victimized, or to report or seek advice on dealing with fraud and scam attempts, contact Cynthia Nield at cnield@lians.ca or 902 423 1300, x346.

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INTRODUCING LOMC STANDARD #9: SUCCESSION PLANNING

The new [Succession Planning Professional Standard](#) introduced here, effective February 2, 2021, is a result of work ongoing since 2017, when Council appointed a Working Group to consider the implications for the profession if lawyers and firms do not have effective plans in place to deal with any unplanned practice interruption. The Succession Planning Working Group found that the lack of support and preparation for lawyers to wind-up practices at the end of their careers is a significant challenge for the profession and a major regulatory risk for the Society.

A consultation process followed and in May 2018, Council approved amendments to the [Regulations](#) made pursuant to the *Legal Profession Act* to include a requirement for lawyers and law firms to develop and maintain succession plans for all lawyers associated with the firm. (See subregulations 4.6.1 (law firms) and 4.6.2 (sole practitioners), and subregulations 4.6.4 through 4.6.6 providing a framework for the development of a succession plan.)

Rather than taking a compliance-driven approach, the Society has focused since on developing resources and supports to help lawyers and firms realize these obligations in ways that make sense for their practices and circumstances. Initiatives include:

A [Succession Planning Toolkit](#) was developed by NSBS Legal Services Support (LSS). Staff work with lawyers to help them interpret guidance and customize the Toolkit's policy and plan templates to reflect their unique circumstances. Meetings are held regularly with lawyers to

work through file retention and other questions relating to practice succession and wind-up planning. Please [contact the LSS team](#) at any time.

The Law Office Management Standards Committee developed the new [Succession Planning Practice Standard](#), reflecting requirements set out in [Regulations](#) for a succession plan and providing clear guidance 'below the line' to assist lawyers and firms in fulfilling their obligations.

Work is ongoing both at Council, Committee and staff levels to identify and break barriers to effective practice succession. The Law Office Management Standards Committee is working toward amending professional standards to make file retention and destruction easier. The Trust Account Working Group continues working on solutions to enable timely access to trust funds for successors. A Working Group is being struck to consider, among other issues, the additional pressures on rural lawyers to find practice successors.

Legal Services Support is interested in your ideas for ways the Society can help you comply with your obligations. Please [reach out](#). Feedback relating to the Standard will be brought back to the Law Office Management Standards Committee. 'Below the line' guidance on the new Succession Planning Standard will be updated as work across the Society evolves and new solutions are developed.

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NSLAP WELLNESS: OVERCOMING FINANCIAL FATIGUE AND CONCERN

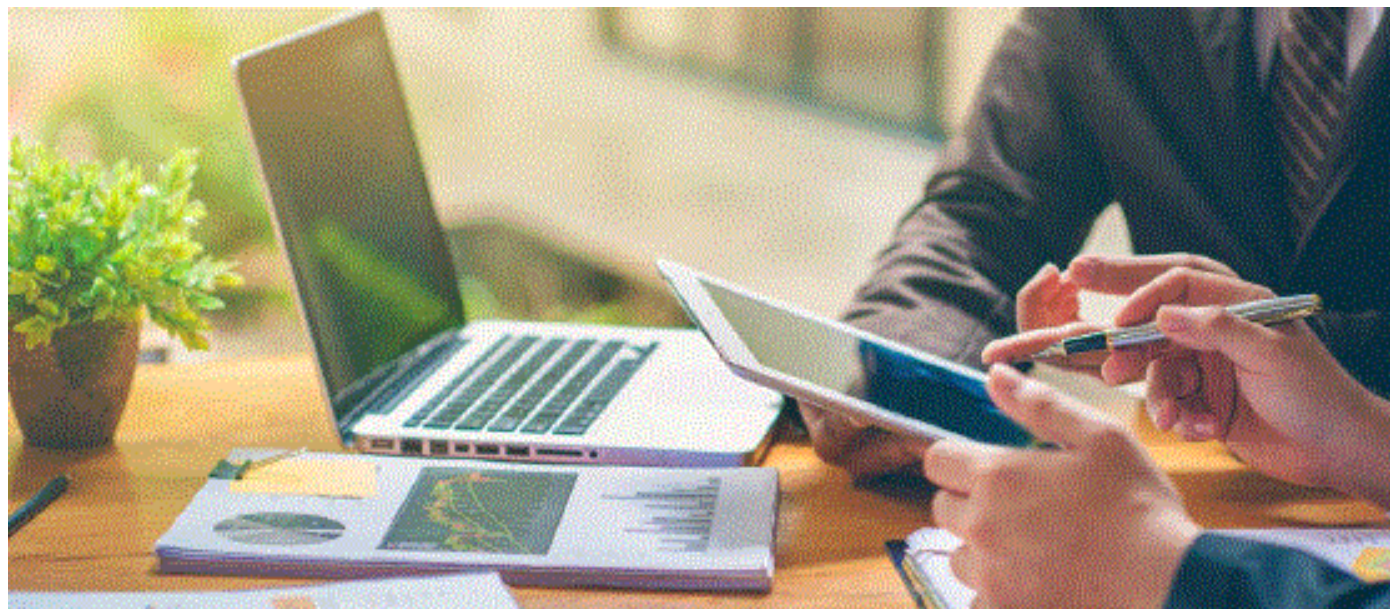


Photo credit: © 2020 Homewood Health™

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide the following:

"Starting a new calendar year can be exciting and refreshing, but it can also be stressful. January 1st typically brings renewed motivation with the gift of a clean slate and the desire for a promising year ahead. It's often fulfilled with a focus on healthy eating and exercise to get back on track after the holiday season's indulgence. But January can also be full of transitions that can influence anxiety and concern. For some, it's having to head back to work or school after enjoying some time away. For others, it's increased pressure related to personal finances and how to manage expenses and income in the coming year, especially as bills for holiday spending start to arrive. For many more, the ups and downs of living through the COVID-19 pandemic and the unique financial challenges have given rise to the need for new ideas and thinking about financial preparedness. In this article, we'll look at ways to acknowledge and manage financial fatigue. We'll also share some tips that could help alleviate some of your concerns about money management in the coming year."

Read "[Overcoming Financial Fatigue and Concern](#)"

If you have wellness questions, or are looking for wellness information, visit the NSLAP website at www.nslap.ca. For more information and support available 24/7, along with resources and counselling on dealing with financial fatigue, register with and visit Homewood Health™ <https://homeweb.ca/>. Please note that NSLAP is your “company” name when you register.

Call in confidence, 24 hours a day: 1 866 299 1299 (within Nova Scotia) | (See the website for details about [calling from outside Nova Scotia](#)) | 1 866 398 9505 (en français) | 1 888 384 1152 (TTY)

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SEEKING MENTORS

Do you have a minimum of nine years of experience and are interested in volunteering your time to provide support and guidance to another member? LIANS is currently seeking mentors of all backgrounds for its Mentorship Program, specifically in the areas of Family law, Corporate/Commercial, Wills and Estates, and Criminal law.

Advantages of being a mentor:

- renew and revitalize your own practice and strategies;
- stay current with issues and developments in the next generation of professionals;
- expand your own personal network.

The Mentorship Program offers the following advantages and opportunities:

- a semi-annual event where you can meet possible matches and learn more about the program;
- matching based on the areas of interest and criteria identified by both mentor and mentee;
- a mentorship plan created by you and your match, to identify your areas of focus and goals for the upcoming year.

If you are interested in participating in the Mentorship Program, please visit: http://www.lians.ca/rpm/mentorship_program/.

In order to participate, fill out the [Mentorship Program Application Form](#) online, or download the fillable [PDF form](#) and save to your desktop then forward to [Cynthia Nield](#), LIANS' Database and Information Officer.

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'SORRY TO INTERRUPT': BUSINESS INTERRUPTION INSURANCE DURING THE PANDEMIC

One issue currently facing businesses dealing with the impact of the pandemic is business interruption insurance (if they have some coverage). This is not just a Canadian issue as it is being discussed and litigated in the U.S., U.K. and elsewhere. For those of you who may be dealing with such a claim for a client, the U.K. Supreme Court recently released its decision in a test case that looked at a representative sample of business interruption policies available in the U.K. – [FCA v. Arch Insurance \(UK\) Ltd., \[2021\] UKSC 1.](#)

As with any insurance claim, it is always important to review one's specific policy. Though the Court in FCA found in favour of coverage, the decision may have limited applicability here because U.K. coverages differ in several respects to that available in Canada. But FCA is, nonetheless, a significant ruling that could influence and guide a Canadian court considering COVID-19 related business interruption claims.



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'SURE' THING: STAYING CURRENT WITH BOND LEGISLATION

Some matters require the posting of a surety bond. In such cases, you have to make sure the bond reflects the relevant and current legislation, starting with the [Sureties Act](#), RSNS 1989, c 451. In addition, you can review Nova Scotia Civil Procedure Rules [36 - Representative Party](#); [43: Temporary Recovery Order](#); [44 - Attachment](#); and [71 - Guardianship](#).

Finally, a reminder for lawyers who represent clients seeking to act for persons lacking capacity should by now be aware that in 2017, the [Adult Capacity and Decision-making Act](#) repealed the *Incompetent Persons Act*. However, if the bonding company / insurer was unaware of the change or is slow to update its forms, it is possible that a bond they issue still cites the repealed statute. Courts will not accept such instruments. Surety bonds should reflect the legislation they are issued pursuant to.

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TORT OF ONLINE HARASSMENT

In the recently released decision of *Caplan v. Atas*, 2021 ONSC 670, the Ontario Supreme Court recognized, as a new tort, online harassment.

After doing a jurisdictional scan of the law in other jurisdictions, including specific reference to subsections 3(c) and 6(1) of Nova Scotia's *Intimate Images and Cyber-Protection Act*, the Court stated at paragraph 104:

As should be clear from this brief review, this is a developing area of the law. The law of defamation provides some recourse for the targets of this kind of conduct, but that recourse is not sufficient to bring the conduct to an end or to control the behaviour of the wrongdoer. The reasons that follow explain this conclusion, which provides a foundation for this court's conclusion that the common law tort of harassment should be recognized in Ontario. "Harassment" describes what Atas has been doing, and ordering Atas to stop harassment provides remedial breadth not available in the law of defamation.

As a test, the Court stated at paragraph 171:

The plaintiffs propose, drawn from American case law the following test for the tort of harassment in internet communications: where the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go

beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.

and concluded that the facts in the case met the test.

The Court ended its discussion on this issue as follows:

[174] However, the facts of the case before me are very different from the facts in Merrifield. They are much closer to the situation in which the Court of Appeal recognized the tort of intrusion on seclusion, Jones v. Tsige, in which Sharpe J.A. stated: “we are presented in this case with facts that cry out for a remedy”. As I said at the outset, the law’s response to Atas’ conduct has not been sufficient, and traditional remedies available in defamation law are not sufficient to address all aspects of Atas’ conduct. Harassment, as a concept, is recognized in the criminal law. It is well understood in the context of family law. In the Judgment I considered making a non-harassment order and rejected it because it had not been requested by the applicants. The concept of “harassment” as wrongful conduct is known to the law and is a social ill. The concern, of course, on the other side of the question, is that people are not always on their best behaviour, and not all, or perhaps even most, conduct intended to annoy another person should be of concern to the law. It is only the most serious and persistent of harassing conduct that rises to a level where the law should respond to it.

[175] The facts of these cases fit within that description.

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