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Issue 68 | March 2021

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FRAUD ALERT: CYBER FRAUD SCAMS RAMPANT



Cyber fraud attacks continue to be on the rise internationally, including in Nova Scotia. According to the federal Canadian Anti-Fraud Centre, between January 1 and February 28, 2021, there were 11,266 reports of fraud in Canada, 7,646 victims of fraud and \$34.6 million lost to fraud. And they also follow COVID-19 specifically. Between March 6, 2020 and February 28, 2021, there were 13,553 reports of COVID-19 related fraud in Canada, 11,789 victims and \$7.2 million lost.

Here are the most recent cyber alerts that we've posted, along with steps you can take to protect yourself:

[FRAUD ALERT: Ransomware Attacks Hit Three U.S. Law Firms in 24 Hours](#) (Feb 23rd, 2021)

[FRAUD ALERT: BC Law Firm Attacked by Trojan Virus](#) (Jan 25th, 2021)

[FRAUD ALERT: Negligence Lawsuit Against Law Firms Highlights Liability Risks of Wire Scams](#) (Nov 24th, 2020)

[FRAUD ALERT: Fake Law Firm "Lawman & Associates"](#) (Oct 26th, 2020)

[FRAUD ALERT: Job Application Email Scams](#) (Sep 21st, 2020)

[FRAUD ALERT: Manitoba Firms Fall Victim to Ransomware Scams](#) (Jun 24th, 2020)

A virus-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 from the CRA or Service Canada. Once an infected link or attachment is opened, the virus will begin to corrupt the victim's system files. A pop-up window may soon appear on the computer screen restricting access to the system and its files until a ransom is paid.

These warning messages may also claim to be from the RCMP or other government agencies stating that your 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 very often the computer will not be unlocked if the money is paid – the scammer disappearing once funds, often requested as bitcoin, are transferred.

The programs in these emails 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 are some ways 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.

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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HOW TO: CONVERT PDFS INTO TEXT-SEARCHABLE AND COPY/PASTE READY DOCUMENTS

Adobe PDF software can access and modify text that would otherwise be locked in paper-based and PDF documents. Using its OCR (Optical character recognition) feature, you can easily convert typed, printed, even some clearly hand printed text into editable and searchable data. This saves an incredible amount of human-powered reading, searching for keyword(s), and unnecessary retyping.

Here are steps you can take to digitally transform a document into one that you can search for keywords/phrases, or easily copy/paste a quotable passage into a new document. Note: If you need to preserve a copy of the original, unmodified document, you may want to save a new copy and OCR the new version.

If it is a paper document, you must first electronically scan the pages and save as a PDF document.

Once a PDF version is created using Adobe software, open the document and access the 'Tools' menu (typically in the top right corner), and select 'Text Recognition'.

Select 'In This File', then 'All Pages', and click OK.

You may now use your cursor to highlight and select passages of text to copy and paste into a new document.

To search the document for a keyword or phrase, type "Ctrl F" on your keyboard (or "Command F" on a Mac), and enter the desired text into the 'Find' field'

Be sure to save the OCR'd version as a new file in order to revisit the document and continue to search/copy-paste

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LIANS 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.

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 (if permitted) 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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MAKE IT SO: RECENT DECISIONS OF INTEREST

Though this newsletter typically focuses on risk, practice management and loss prevention, we are regularly asked to write on substantive topics. Like we did last year at this time, we thought we would provide a list of some, in our opinion, impactful decisions from the past 12 months. We acknowledge that those from other provinces, such as the case on employment law, though interesting, may have limited applicability here:

Contracts and the Duty of Good Faith (Ontario)

C.M. Callow Inc. v. Zollinger, [2020 SCC 45](#) – The duty of honest performance in contract requires that parties to contracts not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. Though the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created by that party's own actions.

Employment Law (Ontario) – Termination Clauses (Ontario)

Waksdale v. Swegon North America Inc., [2020 ONCA 391](#) – employment agreements are to be interpreted as a whole. As to termination provisions, the correct analytical approach is to determine whether the termination provisions read as a whole violate the Employment Standards Act. Though courts will permit employers to enforce rights-restricting contracts, courts will not enforce termination provisions that are in whole or in part illegal.

Arbitration Clauses (Ontario)

Uber Technologies Inc. v. Heller, [2020 SCC 16](#) – The claim that the arbitration clause is unconscionable requires considering two elements - an inequality of bargaining power and a resulting improvident bargain. There was inequality of bargaining power here because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and the person considering the standard form contract could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause here was also improvident because it required US\$14,500 in up-front administrative fees making the result that it is unconscionable and therefore invalid.

Bankruptcy (Alberta)

Chandos Construction Ltd. v. Deloitte Restructuring Inc., [2020 SCC 25](#) – The Court upheld the anti-deprivation rule in bankruptcy and insolvency matters.

Duty of Care and Pure Economic Loss (Ontario)

1688782 Ontario Inc. v. Maple Leaf Foods Inc., [2020 SCC 35](#) – a manufacturer's undertaking as to the safety of its goods is made to the end user and not to intermediaries such as franchisees who sell that product to the end user. The manufacturer here did not owe a duty of care to the franchisees and thus was not liable for their pure economic losses.

Contract Enforceability (Ontario)

MacQuarrie Equipment Finance Ltd. v. 2326695 Ontario Ltd., [2020 ONCA 139](#) – the Court reaffirmed the principle that in standard form contracts, reasonable measures must be taken to draw harsh and oppressive terms in a contract to the attention of the other party

Disgorgement (NL)

Atlantic Lottery Corporation Inc. v. Babstock, [2020 SCC 19](#) – Plaintiffs cannot rely on the doctrine of waiver of tort as an independent cause of action for disgorgement and moreover, the term “waiver of tort” should be abandoned. To make out a claim for disgorgement, actionable misconduct must be established. In this case, disgorgement was pled as an independent cause of action and the court concluded that the plaintiffs were thus seeking to establish an entirely new category of wrongful conduct that does not require proof of damage. Although disgorgement is available for some forms of wrongdoing without proof of damage, it was a far leap to find that disgorgement without proof of damage is available as a general proposition in response to alleged negligent conduct.

Twitter, Defamation and Jurisdiction (BC)

Giustra v. Twitter, Inc., [2021 BCSC 54](#) – The Court followed governing authority in Canada regarding jurisdiction over internet defamation cases (*Haaretz.com v. Goldhar*, [2018 SCC 28](#)) noting that the tort of internet defamation takes place where the defamatory statements are read, accessed or downloaded by a third party. As the statements at issue were read by persons in BC, that was sufficient to establish jurisdiction. It was then up to Twitter to rebut the presumption and the Court concluded it did not.

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NOVA SCOTIA SECURITIES COMMISSION CHANGES IN THE REGULATION OF SYNDICATED MORTGAGES

If you practice in securities law and real property law, specifically in the area of syndicated mortgages, you should be familiar with recent regulatory changes.

Changes to the regulation of syndicated mortgages in Nova Scotia by the Nova Scotia Securities Commission (the Commission) became effective on March 1, 2021.

The changes are described in the Commission's [Staff Notice 45-718 and Blanket Order No. 45-528](#). As a further reference to these changes that will be adopted by the securities regulators across Canada, you can refer to the [August 6, 2020 Canadian Securities Administrators' \(CSA\) Notice of Amendments](#).



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NSLAP WELLNESS: EXPERIENCING A TRAUMATIC EVENT - RECOVERY AND COPING STRATEGIES

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

"Unexpected events regardless of their nature, a serious accident, an act of violence, a natural disaster or some other incident that has left people directly or indirectly involved feeling unsettled or seriously impacted. The purpose of this handout is to help you understand some possible reactions you may be experiencing as a result of this incident and provide suggestions regarding the best ways to manage your reactions and begin your recovery."

Read "[Experiencing a Traumatic Event - Recovery and Coping Strategies](#)"

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 traumatic events, 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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PROVIDE YOUR INPUT ON DRAFT CRIMINAL LAW STANDARDS: CHARTER APPLICATIONS AND CULTURAL COMPETENCE

The Society's Criminal Law Standards Committee is seeking your feedback on the following two new proposed Criminal Law Standards:

Cultural Competence

Charter Applications

These Standards would apply to everyone practising criminal law if passed by the Society's Council. [Learn more about how these Standards are drafted.](#)

Your feedback on the draft standards is essential as we need firsthand insight from practising lawyers on how these standards would be applied.

Provide feedback by completing our online feedback form (s) at <https://bit.ly/3w2egMT> or email epink@lians.ca by April 30, 2021.

Standards are not only requirements and sources of information and resources, but they help lawyers reduce risk. In an era when claims of ineffective counsel are growing, complying with Standards helps protect you as well as your clients.



[Review the current Criminal Law Standards.](#) Questions about applying these standards to your practice? Contact Legal Services Support <mailto:lss@nsbs.org>

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SOME PRACTICE ADVICE ON ARGUING APPEALS

In the recent case of [Western Oilfield Equipment Rentals Ltd. v. M-I LLC, 2021 FCA 24](#), the Court provided this advice on arguing an appeal:

[9] Before continuing, I feel compelled to say a few words about the lack of wisdom of raising so many issues on appeal, especially so many issues that are so factually suffused, without due attention to the standard of review on such issues. Firstly, the appellants' approach suggests that they themselves cannot identify any issues that are particularly strong. This suggestion was compounded at the hearing of the appeal when, despite the Court's suggestion that the appellants focus on their strongest points, the appellants insisted on addressing all of the issues raised in their memorandum of fact and law. Not only did this approach miss an opportunity to highlight certain of the issues, but it also prevented the appellants from delving deeper into points that might have merited more discussion. In addition to hurting the appellants' own case on appeal, this approach also made unnecessary additional work for the Court and delayed the release of this decision. I have additional comments below about the appellants' treatment of the standard of review.

III. Standard of Review

[10] The appellants pay scant attention to the standard of review in their submissions, and therefore it is important to state the applicable standard here.



[11] As indicated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), the standard of correctness applies to questions of law (see para. 8), but findings of fact or of mixed fact and law are reviewable only where the Federal Court has made a palpable and overriding error (see paras. 10 and 36). The standard of palpable and overriding error is not easily met. As stated by this Court in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, and quoted with approval by the majority of the Supreme Court of Canada in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38:

Palpable and overriding error is a highly deferential standard of review. ...“Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[12] The deference given to the Federal Court on issues of fact is warranted for several reasons, not least because the judge at first instance was present throughout the trial to hear all the witnesses and see all the evidence on the many issues in this case, and was hence in a much better position than members of this Court to consider and weigh the evidence: see *Housen* at para. 12.

[13] Though the parties do not seem to disagree on the applicable standard of review, it will be necessary to address its application to certain of the issues discussed below. As a general comment, I note that the appellants could not hope to be successful on any issue in which the standard of review is palpable and overriding error applies without identifying the alleged error by the Federal Court, and explaining why the error should be considered palpable and overriding.

Even after this reality was noted at the hearing, most of the appellants' arguments failed to focus on the appropriate points, and were instead misguided attempts to have this Court re-weigh the evidence and re-characterize the facts. That is not our role.

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