LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

LIANSWERS

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CYBERSECURITY DURING THE PANDEMIC

With so many working remotely from home, we can expect cyber security risks to increase. Working remotely and from home increases the risk that data will be lost (e.g. misplacing a thumb drive). Moreover, home computers are often less protected than those in the workplace and when out of the office people often use unsecured wifi.

Added to that, an event like COVID-19 will cause an increase in unsolicited phishing emails. Playing on the public's desire for information you may receive emails asking you to click here to read the latest from the World Health Organization, Health Canada, or the Canada Revenue Agency. We would suggest that if you want information from the WHO, Health Canada, or the CRA, that you go direct to their websites and not click unsolicited attachments.

With people working remotely, authenticating and confirming instructions becomes more challenging. Lawyers and their firms should be closely monitoring financial transactions and confirm that any new approval protocols allow for proper verification and documentation of instructions. Preventing fraud requires constant diligence as does maintaining proper cyber security.

We recognize the importance of helping you appreciate and mitigate against potential cyber issues. Our solution is two-fold – awareness and insurance coverage. Regarding the latter, as you know, Part D of your LIANS insurance policy provides cyber coverage. As part of your regular risk

management, you should take a few minutes to review your LIANS insurance policy to satisfy yourself that the coverage and limits we provide are sufficient for your particular practice. The reality is that a data breach or ransomware attack could adversely affect your business and reputation more than a single professional liability claim.

Should you have any questions, please feel free to contact the Director of Insurance.

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FORCE MAJEURE CLAUSES IN CONTRACTS: WHEN WAS THE LAST TIME YOU CONSIDERED THEM?

In the face of an event like COVID-19, issues rarely considered often arise. One such example is the force majeure clause in contracts.

Clients may ask if they can rely on it in this circumstance to end or renegotiate a contractual relationship. Force majeure occurs when business is disrupted due to factors beyond one's control. The provision excuses non-performance should a covered event occur.

Contracts often have clauses dealing with this situation. But it is probably fair to say they are rarely looked at, falling into the boilerplate category of terms. And even if they are considered, chances are it is in the context of the usual events that can give rise to force majeure such as weather and war.

If a party to a contract seeks to rely on the clause in the face of COVID-19 or any external event to get out from under their contractual obligations, they will have to satisfy various factors including

1. whether the event falls within the scope of the force majeure clause noting that the clause is narrowly interpreted and has to expressly capture the event;

2. whether the event has sufficiently impacted the obligations of the relying party such as preventing or rendering performance impossible; performance being more expensive as the sole factor is rarely sufficient to pass the threshold;
3. whether the relying party has taken sufficient steps to avoid and mitigate the event's impact; and
4. whether additional contractual conditions, such as notice and requirements for supporting documentation, are necessary to trigger the clause.

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FRAUD ALERT: "BUSINESS EMAIL COMPROMISE"

We have written in the past about social engineering fraud - receiving an email that causes you to voluntarily part with funds.

We have noted that just because frauds such as social engineering involve the use of a computer (e.g. email), that use does not automatically make the fraud into a cyber incident contemplated by cyber insurance. There is a range of seemingly similar frauds that some now refer to collectively as "Business Email Compromise". These frauds take various forms and though all involve a fraudulent transaction, they have subtle differences that present different insurance risks.

A session on Business Email Compromise at NetDiligence's recent Cyber Risk Summit identified four types:

Computer fraud which involves hacking into somebody's system, manipulating data and steal money
Fund transfer fraud which is hacking into a system, pretending you're the organization, making a fraudulent communication to a financial institution and the institution then sends the money to the fraudster
Payment diversion fraud or social engineering which occurs when a person gets an email that dupes them into voluntarily parting with funds

Organization impersonation fraud such as a fake website where people try to defraud third parties by pretending to be your organization.

Though the result in all these examples is similar – the fraudulent transfer of funds – the mechanism varies and it is that variation that presents different insurance and risk issues.

If the fraud is successful, oftentimes it is because of human error. Some ways to minimize (though no one can eliminate) the risk are:

Multi-factor authentication
Knowing and using the security features that are built into your software
Making sure your software is updated
Tagging external emails with a message such as “this email originated from outside the organization.” This alone can flag an email that otherwise looks legitimate and from within your organization.

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LET'S BE CLEAR: THE IMPORTANCE OF CLEAR AND TIMELY COMMUNICATIONS

The recent case of *Mahadeo v Blue Cross Life Insurance Co.*, 2019 ONSC 6611 involved an application to strike a Jury Notice. The Defendant sent the Jury Notice to the Plaintiff after the close of pleadings thus it was out of time unless a Court were to order otherwise. On receiving the Notice, the Plaintiff acknowledged receipt but, noting the close of pleadings, asked the Defendant if they were going to bring a motion. The response was to advise that they would prefer the

Plaintiff consent to late Notice rather than have to seek leave to file it and that they looked forward to hearing back. Nothing further was said on the matter until the Plaintiff filed the trial record.

When it came time to file the trial record, the Plaintiff included the Jury Notice in the record, on, the Court found, an incorrect assumption and read of the Rule. That aside, the Plaintiff then brought a motion to strike the notice as being out of time advising the court that including it in the trial record was not consent to it. In response, the Defendant argued that the Plaintiff's initial response indicated agreement or acquiescence to the Notice.

The Court struck the Notice. It disagreed with the Defendant concluding that it was immediately advised, politely, by the Plaintiff that it should bring a motion for leave to file a late Jury Notice. The Defendant failed to do so. Presumably, had the Defendant followed up at the time of the initial communications rather than assuming agreement when there was none, it would have been able to bring its motion in a timely manner.

As an aside, in disagreeing with the Defendant's interpretation of the Plaintiff's initial response, the Court cited lines from Macbeth, Merchant of Venice and Romeo and Juliet to explain why the Defendant's, what the Court called "literalist", interpretation of the Plaintiff's response was wrong.

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PANDEMIC UPDATE: A MESSAGE FROM LIANS' DIRECTOR OF INSURANCE, LAWRENCE RUBIN

In this time of business disruption and uncertainty, we want to reassure you that LIANS continues to operate, albeit with some disruption. Though we are working remotely, we are picking up phone messages and emails. To the extent possible, we would prefer you email us rather than call.

We continue to process and assign new claims and work on existing matters. If you are submitting a new claim, we ask that you complete our online Notice of Claim.

As for our responding to you, we ask that you be patient with us as our response time for some matters may be slower than usual. If you have a question on an existing matter, feel free to contact the person handling your file.

We know that the current disruption is taking a toll. Many of you, like us, are working remotely. We know that being unable to meet with clients means you have to work in new ways. We know that some of you have stopped working entirely for the time being.

We are working with the Society to provide guidance and direction on the myriad of issues arising, many of which require novel solutions. In the course of your retainer to provide professional services to your clients - to the extent you follow guidance from the Society on, for example, remote commissioning of affidavits and verification of identity - we will consider those activities to be covered professional services.

We have started to assess the longer-term impact of COVID-19 on our business. The market decline has reduced the value of our investment portfolio which directly affects our surplus. Moreover, as is common with a broad market event like COVID-19, we would expect to see not just an increase in claims but also new types of claims as (when) things get back to normal.

If you have any questions, we are here to help. For general inquiries, please contact us at info@lians.ca. To report a new claim please submit an online report.

All of us at LIANS offer our thoughts for the health and safety of you, your family and your employees at this challenging time. We would also remind you that the Nova Scotia Lawyers Assistance Program is available for any wellness questions you might have.

Lawrence Rubin
Director of Insurance

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RECENT DECISIONS OF INTEREST

Though our focus is risk, practice management and loss prevention, we are regularly asked to write on substantive topics. So for this issue of LIANSwers, we thought we would do something many CPD providers do at this time of year – impactful decisions from the prior year. It is impossible to list all such decisions but what follows is a spring reading list of what are, in the writer's opinion, six interesting decisions from 2019 and one from this year:

Class Actions

Pioneer Corp. v. Godfrey, 2019 SCC 42 (CanLII) - The court permitted umbrella purchasers to join a class action against the manufacturer for price fixing. Umbrella purchasers are consumers who purchase the product from a third party non-conspirator and argue that the price fixing conspiracy created a price umbrella that permitted the third party to charge more.

Bancroft-Snell v. Visa Canada Corporation, 2019 ONCA 822 (CanLII) - if class members in a class action do not opt out of the class they will be bound by the outcome as the settlement of a class proceeding binds all class members.

Employment Contracts

Andros v. Colliers Macaulay Nicolls Inc., 2019 ONCA 679 (CanLII) - this case deals with termination clauses in employment contracts, in particular the impact of failsafe provisions. Though arising from Ontario's *Employment Standards Act*, the decision provides guidance on drafting failsafe provisions in employment contracts.

Administrative Law

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII)

Bell Canada v. Canada (Attorney General), 2019 SCC 66 (CanLII)

These decisions should be read together. *Vavilov* involved judicial review. The Court stated that that the standard of review analysis begins with a rebuttable presumption that in all cases reasonableness is the applicable standard. This presumption is rebuttable in two situations. One is when the legislature indicates that it intends a different standard to apply. The second is when the rule of law requires application of the standard of correctness. In *Bell*, the appeal was pursuant to the statutory appeal mechanism in the underlying statute and as the appellate standard of review was applicable, the Court applied the correctness standard.

Corporate Law

Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd., 2019 SCC 30 (CanLII) - a director or officer's fraud will not be attributed to the corporation when the company's wrongful acts are found to be part of a larger fraudulent scheme in which the company is also a victim. In other words, a corporation will not be liable for the wrongful conduct of a directing mind if it too was a victim.

Litigation

McCabe v. Roman Catholic Episcopal Corporation, 2019 ONCA 213 (CanLII) - a defendant who conducts litigation within the rules, even when doing so harms a vulnerable opposing party, should not be censured with punitive damages though there could be cost consequences for the behavior.

Acts of Foreign Subsidiaries

Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (CanLII) - Canadian companies can be sued and held liable in Canada for acts that take place as part of their foreign operations.

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UPDATES FROM HOMEWOOD HEALTH: A ROUND-UP OF RESOURCES

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide the following newsletters (presented in reverse chronological order), on subjects related to COVID-19 ranging from anxiety, to talking with children about the crisis, to media overload, to self-monitoring symptoms, and much more.

"COVID-19 Pandemic:Managing the Impact: **Information for Managers**" and "COVID-19 Pandemic:Managing the Impact: **Information for Employees**" (April 3rd)
"COVID-19 Virtual Workplaces - the New Norm: **Information for Managers**" and "COVID-19 Virtual Workplaces - the New Norm: **Information for Employees**" (April 1st)
"COVID-19: Managing Stress & Anxiety" (March 30th)
"COVID-19: How to Speak to Children" (March 27th)
"COVID-19: Self-Isolation and Quarantine: What you Need to Know" (March 25th)
"Quelling COVID-19 Anxiety: How Much Information is Too Much?" (March 25th)
"The COVID-19 Pandemic: Facts & General Information" (March 23rd)
"The COVID-19 Pandemic: Managing the Impact" (March 23rd)
"COVID-19 Response: Homewood i-Volve for Anxiety" and "iCBT Support Programs for Anxiety" (March 20th)
"How to Stay Productive and Motivated When Working from Home" (March 19th)

If you have wellness questions, or are looking for wellness information, visit the NSLAP website at www.nslap.ca. For more information and support with the Coronavirus, along with resources and counselling to improve your health and wellness, register with 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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WHO CAN (OR CANNOT) ENFORCE A “TIME IS OF THE ESSENCE” TERM IN A CONTRACT?

In a recent Ontario Court of Appeal decision (*Fortress Carlyle Peter St. Inc. Ricki’s Construction and Painting Inc.,* 2019 ONCA 866) dealing with a real estate transaction, the Court upheld the summary judgment holding that a “time is of the essence” term in a contract is not enforceable by a party who acts in bad faith. As stated by the motion judge, for a party to a contract to insist on “time is of the essence”, the party

“…*must have shown itself to be ready, desirous, prompt, and eager to carry out the agreement and to have not been the cause of the delay or default in performing the contract.*”

The Court of Appeal also affirmed the motion judge’s holding that if both parties were at fault, there was still no defence to the claim for specific performance. As stated by the Court of Appeal,

“…*when both contracting parties breach a contract, the contract remains alive with time no longer being of the essence. As the motions judge explained, either party may restore time of the essence by giving reasonable notice to the other party of the new date for performance. This is precisely what occurred when Ms. Lau suggested that the transaction close on August 14, 2018.*”

What constituted the bad faith may make an interesting read for some.

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