

2012 04 G 0180 CP
2012 04 G 0190 CP

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN: BARBARA HYNES AND VALERIE DYKE

PLAINTIFFS

AND: WESTERN REGIONAL HEALTH AUTHORITY

DEFENDANT

PROCEEDING UNDER THE *CLASS ACTION ACT*, c.C-18.1

Consent Order Certifying the within action as a Class Actions pursuant to
ss. 3, 5, 6, 7, 8, 9 of the *Class Actions Act*, SNL 2001 c. C-18-1

BEFORE THE HONOURABLE JUSTICE WILLIAM GOODRIDGE

THIS MOTION is made by the Plaintiffs for an Order for certification of the action
as a class proceeding and heard on February 6 and 7, 2014;

UPON READING the Consolidated Amended Statement of Claim of the
Plaintiffs, dated July 31, 2013; the Plaintiff's Preliminary Certification Brief; the
Defendant's Certification Brief; the Plaintiffs' Reply Submissions; and the Affidavit
of Barbara Hynes;

UPON HEARING Bob Buckingham and Andrew May on behalf of the Plaintiffs
and Daniel Boone, Q.C. and Janet Carpenter on behalf of the Defendant;

AND UPON IT APPEARING that it is appropriate to certify the proceeding as a
class proceeding in that:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;



- (c) the claims raise common issues;
- (d) a class proceeding is the preferable procedure; and
- (e) there are Representative Plaintiffs who can fairly represent the Class, have produced a workable Litigation Plan and have no interests in conflict with the interests of other Class Members.

1. **THIS COURT ORDERS** that the action be and is hereby certified as a class proceeding, consisting of a class of 1043 persons identified in an internal audit of the Defendant who had their personal health information accessed without a valid reason by an employee of Western Regional Health Authority. If an out-of-province subclass of members is identified the Plaintiff has leave to file an application to amend the Statement of Claim seeking an Order to appoint a Representative Plaintiff for the non-resident class.
2. **THIS COURT ORDERS** that Barbara Hynes and Valerie Dyke c/o Bob Buckingham, Bob Buckingham Law, 81 Bond Street, St. John's, Newfoundland A1C 1T2 and Andrew May, Brothers & Associates PLC Inc. 89 West Valley Road Corner Brook, Newfoundland A2H 2X4, respectively, be appointed as the Representative Plaintiffs of the Class.
3. **THE COURT ORDERS** that a Representative Plaintiff for a non-resident sub-class may not be required.
4. **THIS COURT ORDERS** that the claims to be determined and the relief sought are as stated in the decision of the Honourable Mr. Justice Goodridge dated November 14, 2014. The Plaintiffs seek monetary damages and declaratory relief.
5. **THIS COURT DECLARES** that the common issues in the action are:



Negligence

- (1) Did Defendant Western Health owe a duty of care to the Class Members?
- (2) If so, what is the standard of care required of the Defendant Western Health?
- (3) If so, did the Defendant Western Health breach the standard of care as pleaded by the Class Members in the Statement of Claim?

Intrusion upon Seclusion

- (4) Is the tort of intrusion upon seclusion recognized in Newfoundland and Labrador as creating a tort separate from the statutory tort created by the *Privacy Act*?
- (5) If so, did the actions of the employee of the Defendant Western Health constitute the tort of intrusion upon seclusion?
- (6) If so, what defences are available to the employee of the Defendant Western Health?
- (7) If so, can the Defendant Western Health be held vicariously liable for the conduct of the employee which constitutes the tort of intrusion upon seclusion in the circumstances?
- (8) If so, what defences are available to the Defendant Western Health against whom vicarious liability for intrusion upon seclusion is alleged?
- (9) If so, then is the Defendant Western Health vicariously liable for such intrusion upon seclusion in the circumstances of this case?

Statutory Tort under the *Privacy Act*

- (10) Did the Defendant Western Health willfully and without claim of right violate the privacy of the Class Members?
- (11) Did the employee of the Defendant Western Health willfully and without claim of right violate the privacy of the Class members?
- (12) If so, can the Defendant Western Health be held vicariously liable for the conduct of the employee which constitutes the statutory tort created under the *Privacy Act* in the circumstances?



(13) If so, what defences are available to the Defendant Western Health against whom vicarious liability for the statutory tort of breach of privacy is alleged?

(14) If so, then is the Defendant Western Health vicariously liable for the statutory tort of breach of privacy in the circumstances of this case?

Breach of Contract

(15) Was a contract created between the Defendant Western Health and the Class Members?

(16) Was there an implied term to safeguard the personal information of the Class Members?

(17) If so, then what are the specific obligations imposed on Western Health by that implied term?

(18) If so, then are the obligations imposed by that term met by the adoption of reasonable policies and safeguard for the protection of privacy?

(19) If so, did the Defendant Western Health breach the contractual agreement?

Aggregate Damages

(20) In the event that the Plaintiffs succeed on any of the certified causes of action, is the remedy of aggregate damages available in the circumstances of this case?

(21) If the remedy of aggregate damages is available, then should that remedy be awarded in the circumstances of this case?

Punitive, Exemplary and Aggravated Damages

(22) In the event that the Plaintiffs succeed on any of the certified causes of action is the remedy of punitive, exemplary and aggravated damages available in the circumstances of this case?

(23) If the remedy of punitive, exemplary and aggravated damages is available, then should that remedy be awarded in the circumstances of this case?



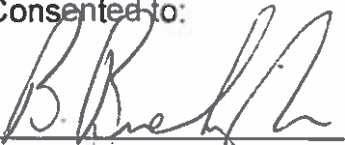
6. **THIS COURT ORDERS** that the Class Members shall be given notice of the certification of this action as a class action, in accordance with the form of the Notice of Certification, attached as Schedule 'A', in the following manner:
- (a) posted in an ad in the Western Star;
 - (b) posted by Class Counsel on their respective websites: <https://buckinghamlaw.ca/> and <http://www.brothersandburden.com/>; and
 - (c) provided by Class Counsel to any person who requests it, and
 - (d) by registered mail to a single individual class member resident outside of the province on August 1, 2012.
7. **THIS COURT DECLARES** that the cost of the Western Star ad shall be borne by the Defendant.
8. **THIS COURT DECLARES** that the Notice and its distribution satisfy the requirements of ss. 19 and 20 of the *Class Actions Act*.
9. **THIS COURT ORDERS** that the Litigation Plan attached as Schedule 'B' is a workable method of advancing the action subject to clarification and amendment if required.
10. **THIS COURT ORDERS** that a Class Member may opt out of the class action by sending written notice signed by the class member, to counsel for the Plaintiffs or to Western Health on or before the deadline stipulated in the Notice. The written notice shall be returned to either Western Health care of Ms. Donna Hicks, Information and Quality, Western Health, P.O. Box 2005, Corner Brook, NL A2H 6J7 or to the Plaintiffs care of Mr. Andrew May, Brothers and Associates PLC Inc. at 89 West Valley Road, Corner Brook, NL A2H 2X4.




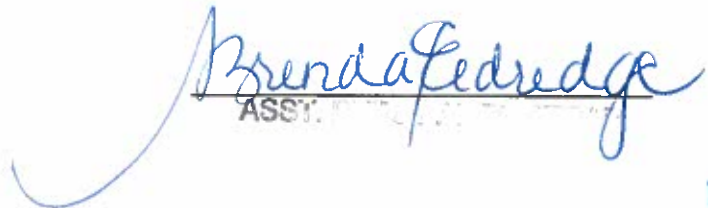
11. **THIS COURT ORDERS** that the non-resident Class Member may opt in to the class action by sending an Opt-In Form, attached as Schedule 'C', signed by the class member, to counsel for the Plaintiffs or to Western Health on or before the deadline stipulated in the Opt-In Form. The Opt-In Form shall be returned to either Western Health care of Ms. Donna Hicks, Information and Quality, Western Health, P.O. Box 2005, Corner Brook, NL A2H 6J7 or to the Plaintiffs care of Mr. Andrew May, Brothers and Associates PLC Inc. at 89 West Valley Road, Corner Brook, NL A2H 2X4.
12. **THIS COURT ORDERS** that there shall be document production on all the common issues.
13. **THIS COURT ORDERS** that the Defendant shall deliver its statement of defence no later than 30 days following the issuance of this Order.


ORDERED ACCORDINGLY at Corner Brook, Newfoundland and Labrador, this 7 day of Feb. 2014

Consented to:


Bob Buckingham
Bob Buckingham Law
81 Bond Street
St. John's, NL A1C 1T2


Daniel Boone, Q.C.
Stewart McKelvey
11th Floor, Cabot Place
100 New Gower Street
St. John's, NL A1C 5V3


ASSISTANT JUDGE


Andrew May
Brothers & Associates PLC Inc.
89 West Valley Road
Corner Brook, NL A2H 2X4



SCHEDULE 'A'

**NOTICE OF CERTIFICATION OF THE
WESTERN REGIONAL INTEGRATED HEALTH AUTHORITY PRIVACY
BREACH CLASS ACTION**

To: Recipients of correspondence from the Western Regional Integrated Health Authority advising that their personal health information may have been improperly accessed by an employee.

Notice Of Certification:

Class Members be advised of a certification of a class action lawsuit regarding the Western Regional Integrated Health Authority Privacy Breach Class Action.

Who is Included?

All living persons who were sent letters from the Western Regional Integrated Health Authority advising them that their personal information had been inappropriately accessed by an employee.

What is the Nature of the Claim?

Compensation and/or damages for breach of privacy under the Privacy Act and the common law, breach of contract and negligence. A judgment on the common issues for the Class will bind all Class Members who do not opt out.

What Option do Class Members have?

Class Members may opt out of the class action by sending written notice signed by the Class Member, to counsel for the Plaintiffs or to Western Health c/o Donna Hicks, Information and Quality, Western Health, P.O. Box 2005 Corner Brook, NL, A2H 6J7 on or before the deadline of [DD/MM/YY 90 days after publish].

This summary notice has been approved by the Supreme Court of Newfoundland and Labrador. Do not contact the Court about this Certification.

Class Counsel Compensation:

The Representative Plaintiffs have entered into a Contingency Fee Agreement. Should any settlement or judgment be awarded in favour of the Class, the Plaintiffs' counsel will receive a percentage of the net award, subject to Court approval.

Where can Class Members get more information?

You may participate in the common issues trial by contacting Class Counsel.

For more information , or to access Opt-Out forms, visit <https://buckinghamlaw.ca/> or <http://www.brotherslaw.ca/> or contact Class Counsel at the addresses below:

Bob Buckingham
Bob Buckingham Law
81 Bond Street
St. John' A1C1T2
Office: 709-739-6688
Fax: 709-739-6686

Andrew May
Brothers & Associates
89 West Valley Road
Corner Brook, NL A2H 2X4
Office: 709-639-6400
Fax: 709-639-3410

Representatives of the Class

Barbara Hynes
c/o Bob Buckingham
Bob Buckingham Law
81 Bond Street
St. John' A1C1T2

Valerie Dyke
c/o Andrew May
Brothers & Associates
89 West Valley Road
Corner Brook, NL A2H 2X4

SCHEDULE "B"

PLAINTIFFS' LITIGATION PLAN

OVERVIEW

1. The Class Actions Act ("CAA") requires a workable plan to be put into place as part of the certification process. In particular, section 5(1)(e)(ii) of the CAA requires production of "plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action". The solicitors for the Plaintiffs ("Class Counsel") propose that the final plan involve input by the solicitors for the Defendant and this Honourable Court.

NOTIFICATION OF CERTIFICATION AND OPT-OUT PROCEDURE

2. The Court should settle the form and content for notification of the certification of the action as a class proceeding (the "Notice Programme"). The notice should be generally in accordance with the form attached hereto as Exhibit "A" (the "Notice of Certification").
3. The Notice of the Opt-Out process should be:
 - (a) posted in an ad in the Western Star which said ad will be paid for by the Defendant;
 - (b) posted by the Class Counsel on their respective websites: <https://buckinghamlaw.ca> and <http://www.brotherslaw.ca>; and,
 - (c) provided by Class Counsel to any person who requests it.
4. From time to time, Class Counsel will post frequently asked questions and answers and other documentation relating to the class action on the Class Counsels' class action websites for the information of Class members at www.buckinghamlaw.ca and www.brotherslaw.ca.
5. The Plaintiffs propose that the Court should specify that class members may opt out of this class action by sending a written notice by mail to the Plaintiff or to Western Health before a date to be fixed by the Court. The Plaintiffs propose that the deadline for class members to opt out should be ninety (90) days following the first publication of the notice.

NON-RESIDENT CLASS MEMBERS

6. The Plaintiffs understand that there may be a number of non-residents of



this province who may constitute a sub-class. If any of these non-resident Class members choose to opt in to the certified class, the Plaintiffs propose to seek formal appointment by the Court of one of these Class members to serve as a Representative Plaintiff to represent this non-resident subclass. If no such non-resident persons choose to opt in to the proceeding by the deadline for opting in, then the creation of a non-resident subclass and the appointment of the Representative Plaintiff for this non-resident subclass is unnecessary as no persons will have opted in to this subclass.

LITIGATION STEPS PRIOR TO THE TRIAL ON COMMON ISSUES

PLEADINGS

7. If not provided in advance of certification, the Defendant shall provide a Defence no later than thirty (30) days following the date in which the Court renders a decision with respect to the certification hearing.

PRODUCTION OF DOCUMENTS

8. The Plaintiffs will ask the Court to fix a date for the delivery of Lists of Documents.

EXAMINATIONS FOR DISCOVERY

9. The Plaintiffs will seek to discover Representatives of the Defendant.
10. The Parties agree the Defendant has leave to discover Class Members other than the Representative Plaintiffs. The Parties have leave to develop the method of selecting Class Members for discovery of the Class Members by the Defendant.
11. The Plaintiffs may ask the Court to consider additional safeguards to ensure the privacy of all Class members is maintained throughout the process of discovery.

EXCHANGE OF EXPERT OPINIONS/CASE MANAGEMENT

12. The Plaintiffs will ask the Court to fix a date for the delivery of expert reports.

ADDITIONAL COMMON ISSUES CONFIRMED OR REFINED BY STATEMENT OF DEFENCE OR DISCOVERIES

13. The Defendant has not yet delivered its Defence. It may be, upon delivery of its Defence, that a number of common legal and factual defences that it



intends to assert against Class members will be confirmed. As well, matters may arise following the examinations for discovery of the Defendant, which may reveal further or more refined common issues. If necessary, the Plaintiffs may attend before the Court to seek amendment of the certification order to include these additional or further refined common issues as revealed by the Defendant.

CASE MANAGEMENT CONFERENCES/ INTERLOCUTORY APPLICATIONS

14. There will be a case management conference before the appointed judge at least every three (3) months, unless the parties and the court agree that such hearings are not required.
15. Unless a particular application is a matter of urgency, all interlocutory motions will be heard at these regular case management hearings.
16. Any party bringing an interlocutory application will file supporting material at least fourteen (14) days prior to the case management conference. The respondents will file any responding affidavit material seven (7) days prior to the conference. The moving party will file its factum five (5) days prior to the conference. The responding party will file its factum three (3) days prior to the hearing. The court will determine whether any additional oral argument is required, and advise the parties accordingly.

ASSUMING THE COMMON ISSUES ARE DETERMINED IN FAVOUR OF THE CLASS MEMBERS, THE FOLLOWING SHOULD TAKE PLACE

NOTICE OF RESOLUTION OF COMMON ISSUES

17. The Court should settle the particulars of a Notice Programme giving Class Members' notice of resolution of the common issues.

VALUATION AND DISTRIBUTION OF DAMAGES

18. If any or all of the common issues are resolved in favour of the Class and judgment is pronounced for the Plaintiffs, the Plaintiffs propose that a case management hearing be held as soon as possible following judgment. At that hearing, both parties will be at liberty to make submissions regarding the methodology for resolving the remaining issues. Potential methods include aggregate damage calculations pursuant to section 29 to 34 of the Class Actions Act, mini-trials, mediation, arbitration or other means approved by the Court.



19. The Plaintiffs propose that at this case management meeting both parties will be at liberty to make submissions regarding the methodology for resolving any remaining individual issues pursuant to section 27 of the CAA. At this time the Plaintiffs do not foresee the existence of many individual issues and any individual issues that do exist would likely relate to determination of damages. If this becomes an issue, there may be ways to streamline the process of individual damages claims, such as grouping individual claims of Class members by the quantum of their individual damage claims.
20. The Plaintiffs propose that there may be a number of ways to categorize the individual claims of Class members. This may be done first by grouping the individual claims of Class members by the quantum of their individual damage claims, and second, by the nature of those claims. It is likely that any individual claims, the extent of which is presently unknown, could be divided into two groups by quantum. First would be those Class members who wish to assert claims that exceed the jurisdiction of small claims court, and second would be those that fall within that jurisdiction.
21. With respect to the nature of the claims of Class members, the Plaintiffs are working to gather information about the various types of injuries reported by Class members, and this is an ongoing process. The Plaintiffs anticipate that these injuries may ultimately lend themselves to rough categorization into a number of groups based on the particular claims made by each member.
22. While individual issues may remain following the common issues trial, such individual issues may be capable of some standardization to speed their resolution.

PERSONAL INJURY

23. The Plaintiffs propose that the Class members will be entitled to personal injury damages. It is within this heading that individual entitlement to particular damages may become an issue. As stated above, the Plaintiffs suggest there are ways to streamline the process of individual damage claims based on estimated quantum.



PUNITIVE DAMAGES

24. It is proposed that the issue of the entitlement and quantum of any punitive damage award may be decided for the Class as a whole. If individualized damage trials are required, the Plaintiffs propose utilizing a stream-lined process as highlighted above.

COUNSEL FEES

25. Class Counsels have entered into agreements with the Representative Plaintiffs with respect to legal fees and disbursements. Legal fees would be paid on a contingency fee basis. This agreement will be reviewed and approved by the Case Management Judge.

RULE 7A.07

26. Rule 7A.07 of the *Rules of the Supreme Court of Newfoundland and Labrador, 1986*, as amended, specifies the content of the litigation plan as follows:

- (a) a statement of issues of fact and law involved in this proceeding:

The details of the claims made are contained in the Statement of Claim;

- (b) a statement of any legal difficulties or complications the proceeding may encounter:

The Plaintiffs do not foresee any unusual complications in these proceedings, no more than is commonly present in contentious class actions across Canada;

- (c) a statement of the methods of discovery and of obtaining other information relevant to the proceeding:

See paragraphs 10 to 13 of the Litigation Plan;

- (d) a statement of the potential difficulties and complications in resolving individual claims once common issues have been decided:

See paragraphs 19 to 27 of the Litigation Plan;

- (e) the method of notifying members of the class or sub-class of the proceeding:

See paragraphs 2 to 9 of the Litigation Plan;

- (f) how funds that may result from the proceeding will be able to be distributed:

See paragraphs 20 to 27 of the Litigation Plan;

- (g) a statement of the proposed timing of the various stages of the proceeding:

The action will proceed in accordance with a timetable set pursuant to this Honourable Court's on-going case management,

See paragraphs 15 to 18 of the Litigation Plan; and

- (h) a proposal as to how any counterclaims and third party proceedings are to be dealt with

The Plaintiffs are not aware of any counterclaims or third party proceedings and propose that if a counter or third party claim does arise a case management meeting will be held to discuss how to deal with such claims.

REVIEW OF THE PLAN

29. This Plan may be reconsidered and revised as necessary, under the continuing case management authority of this Honourable Court.



SCHEDULE "C"
[See following page.]

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SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN: BARBARA HYNES AND VALERIE DYKE

PLAINTIFFS

AND: WESTERN REGIONAL HEALTH AUTHORITY

DEFENDANT

NOTICE TO OPT-IN

to the Western Regional Integrated Health Authority Privacy Class Breach Class Action

I, _____, of _____ (Address), in the
_____ (City/Town/Community) in the Province of
_____ (Province), Canada hereby acknowledge I have been
advised of the Class Action commenced by Barbara Hynes and Valerie Dyke, the
Plaintiffs, against the Western Regional Health Authority, Defendant, alleging a
breach of privacy by the Western Regional Health Authority and seeking
compensation and/or damages for breach of privacy under the Privacy Act and
the common law, breach of contract, negligence.

I understand I am considered to be a non-resident member of the Class Action in
that I was not a resident of Newfoundland and Labrador when the Western
Regional Health Authority sent out notice to potential class members that their
privacy was breached.

I understand that as a non-resident in order for me to be considered a class
member I must opt-in to the class action.

I hereby give notice that I wish to opt-in to the class action.

Dated at _____ (City/Town) in the Province of _____
this ____ day of _____.

Witness

Signature

