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2012 01 G 4305 CP
SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN: TAMMY RUTH TAYLOR

PLAINTIFF

AND: EASTERN REGIONAL HEALTH AUTHORITY

DEFENDANT

BROUGHT 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 Plaintiff for an Order for certification of the action
as a class proceeding;

UPON HEARING Bob Buckingham on behalf of the Plaintiff and Daniel Boone,
Q.C. on behalf of the Defendant in Case Management;

UPON HEARING that the Parties have consented to Certification of this action
as a Class Action;

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 is Representative Plaintiff who can fairly represent the Class, has produced a workable Litigation Plan and has no interest 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 on behalf of a class consisting of a class of natural persons who were contacted by the Defendant, Eastern Health between July 16, 2012 and August 11, 2012 and advised that their electronic health record was inappropriately accessed by an employee.
2. **THIS COURT ORDERS** that Tammy Ruth Taylor c/o Bob Buckingham, Bob Buckingham Law, 81 Bond Street, St. John's, Newfoundland A1C 1T2, be appointed as the Representative Plaintiff of the Class.
3. **THIS 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 as alleged in the Statement of Claim seek monetary damages and declaratory relief are as set out in the Statement of Claim except for and excluding the claims and relief set out in paragraphs 24, 25, 26, 40, 41, 42, 43, and 47(f) of the Statement of Claim.
5. **THIS COURT DECLARES** that the common issues in the action are:

Negligence

- (1) Did Defendant Eastern Health owe a duty of care to the Class Members?
- (2) If so, what is the standard of care required of the Defendant Eastern Health?
- (3) If so, did the Defendant Eastern 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, do the actions of the employee of the Defendant Eastern Health constitute the tort of intrusion upon seclusion?
- (6) If so, what defences are available to the employee of Eastern Health?
- (7) If so, can the Defendant Eastern Health be held vicariously liable for the conduct of an employee which constitutes the tort of intrusion upon seclusion and in what circumstances?
- (8) If so, what defences are available to the Defendant Eastern Health against whom vicarious liability for intrusion upon seclusion is alleged?
- (9) Is the Defendant Eastern Health vicariously liable for such intrusion upon seclusion in the circumstances of this case?

Statutory Tort under the *Privacy Act*

- (10) Did the Defendant Eastern Health willfully and without claim of right violate the privacy of the Class members?
- (11) Did the employee of the Defendant Eastern Health willfully and without claim of right violate the privacy of the Class members?
- (12) If so, can the Defendant Eastern 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, then what defences are available to the Defendant Eastern Health against whom vicarious liability for the statutory tort of breach of privacy is alleged?
- (14) Is the Defendant Eastern 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 Eastern 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 the Defendant Eastern Health by that implied term?
- (18) Are the obligations imposed by that term met by the adoption of reasonable policies and safeguards for the protection of privacy?
- (19) If so, did the Defendant Eastern Health breach the contractual agreement?

Aggregate Damages

- (20) In the event that the Plaintiff succeeds 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 Plaintiff succeeds 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) Mailed to each Class Member by the Defendant;



- (b) posted by Class Counsel on their websites:
<https://buckinghamlaw.ca>; and
- (c) provided by Class Counsel to any person who requests it.

7. **THIS COURT ORDERS** that the cost of the mail-out 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 DECLARES** 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 an Opt-Out Form, attached as Schedule 'C', signed by the class member, to counsel for the Plaintiff to the Defendant Eastern Health on or before the deadline stipulated in the Opt-Out Form. The Opt-Out Form shall be returned to either Eastern Health c/o Russell Bungay, Regional Director, Information Security & Privacy Office, Eastern Health, 760 Topsail Road, St. John's, NL or to the Plaintiff care of Bob Buckingham, Bob Buckingham Law, 81 Bond Street, St. John's, Newfoundland A1C 1T2.
11. **THIS COURT ORDERS** that there shall be document production on all the common issues.
12. **THIS COURT ORDERS** that the Defendant shall deliver its Statement of Defence no later than 30 days following the issuance of this Order.

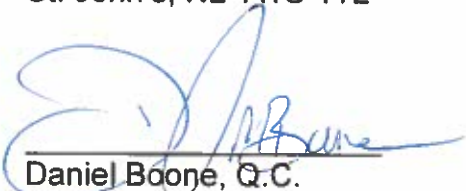


ORDERED ACCORDINGLY at St. John's, Newfoundland and Labrador, this
_____ day of September, 2017.

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



SCHEDULE 'A'

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

To: Natural persons who were contacted by the **Eastern Regional Integrated Health Authority** between July 16, 2012 and August 11, 2012 and advised that their electronic health record was inappropriately accessed by an employee.

Notice Of Certification:

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

Class Counsel Compensation:

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

Who is Included?

All living persons who were contacted by the **Eastern Regional Integrated Health Authority** between July 16, 2012 and August 11, 2012 and advised that their electronic health record was inappropriately accessed by an employee

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 contact Class Counsel at the address below:

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.

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

Representative of the Class

What Option do Class Members have?

Class Members may opt-out of the class action by sending an "Opt-Out Form," signed by the Class Member, to counsel for the Plaintiff or to Eastern Health/NLHS c/o Alissa Setliff, Chief Privacy Officer, NL Health Services, 70 O'Leary Avenue, St. John's, NL A1B 2C7 **on or before the deadline stipulated in the Opt-Out Form.** At the end of the Notice period, Class Counsel will be provided with a list of names of all Class Members who have not opted out.

Tammy Ruth Taylor
c/o Bob Buckingham
Bob Buckingham Law
81 Bond Street
St. John' A1C1T2

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

SCHEDULE "B"

PLAINTIFF'S 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 Plaintiff ("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) the Defendant mailing the Notice to each member of the Class;
 - (b) posted by the Class Counsel on their website <https://buckinghamlaw.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.
5. The Plaintiff proposes that the Court should specify that class members may opt out of this class action by sending a written election by mail to Eastern Health before a date to be fixed by the Court. The Plaintiff proposes 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 Plaintiff understands that there may be a number of non-residents of this province who may constitute a sub-class. The Plaintiff proposes to provide notice of class certification to such non-resident persons as detailed above and in the same manner as detailed above following the certification of this action. If any of these non-resident Class members then choose to opt-in to the certified class, the Plaintiff proposes 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 Certificate Order is filed.

PRODUCTION OF DOCUMENTS

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

EXAMINATIONS FOR DISCOVERY

9. The Plaintiff will seek to discover Representatives of the Defendant.
10. The Parties agree the Defendant has leave to discover Class Members other than the Representative Plaintiff. The Parties have leave to develop the method of selecting Class Members for discovery of the Class Members by the Defendant.
11. The Plaintiff 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 Plaintiff 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 Plaintiff 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 Plaintiff, the Plaintiff proposes 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 Plaintiff proposes 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 Plaintiff does 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 Plaintiff proposes 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 Plaintiff is working to gather information about the various types of injuries reported by Class members, and this is an ongoing process. The Plaintiff anticipates 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 Plaintiff proposes 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 Plaintiff suggests there are ways to streamline the process of individual damage claims based on estimated quantum.
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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 Plaintiff proposes utilizing a stream-lined process as highlighted above.

COUNSEL FEES

25. Class Counsel has entered into agreements with the Representative Plaintiff with respect to legal fees and disbursements. Legal fees will 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 Plaintiff does 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 6 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 14 to 17 of the Litigation Plan; and

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

The Plaintiff is not aware of any counterclaims or third party proceedings and proposes that if a counterclaim 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

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

