

Legal Trends Update

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Kelly Friedman, Davis LLP
kfriedman@davis.ca

Key Legal Developments - Agenda

- Lawsuits and 3rd parties
- Contract renewals
- Arbitration
- Privacy
- Data Breach

Lawsuits and 3rd parties

Hey you! Help me pay this!

- Think another party should help pay the damage award against you?
 - *Limitations Act*
 - “claims by one alleged wrongdoer against another for contribution and indemnity”
 - Can you wait to see if you are found liable?
 - NO. Must claim against other person within 2 years of being sued or enter a tolling agreement



Canaccord Capital Corporation v. Roscoe, 2013 ONCA 378

Stop bothering him, you're bothering me!

- Stricter rules for suing someone who has, by improperly engaging a 3rd party, interfered with your business:
 - “Unlawful/ intentional interference with contractual/ economic relations”
 - Defendant (*B*) must have intended to cause you (*A*) economic harm when dealing with the other (*C*)
 - You (*A*) can only sue defendant (*B*) if the defendant (*B*) was in breach of legal obligation to 3rd party (*C*)



A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12

Contract renewals

I don't want to renew the contract, so I won't!

- No implied duty of good faith when renewing contract
- Duty of good faith, even in employment contracts, is very narrow (harsh or demeaning termination)
- Courts will only imply contractual terms in narrow circumstances (obvious or to make it work)



Bhasin v. Hrynew, 2013 ABCA 98

Arbitration

Think arbitration is final? Think again.

- If the arbitration agreement is silent, court can review decision on a question of law with leave (*Arbitration Act*)
- When choosing arbitration, must take special steps to immunize the arbitrator's decision from court review
- Example: Finder's fee payable in shares
 - Dispute first arbitrated in 2008, appealed to court, then twice to BCCA, now awaiting SCC decision!

Creston Moly Corp. v. Sattva Capital Corp., 2012 BCCA 329;
SCC heard appeal on Dec 12, 2013

To appeal, or not to appeal?

- Appealing might result in you paying more in damages!
- Example: Lighting business sued truck company for dust damage. Court found truck company liable for damages based on time spent by staff to address dust problems. Truck company appealed. Appeal judge: YES, you are liable, but I'm sending the case back for a new trial on damages ["a real wrong, which caused a real loss"]



TMS Lighting Ltd. v. KJS Transport Inc., 2014 ONCA 1

Privacy



Developments in the realm of privacy

- Two years ago, the OCA found “intrusion upon seclusion”

Jones v Tsige, 2012 ONCA 32

- “Intrusion upon seclusion” is gaining traction

Developments in the realm of privacy

- Company can be dragged into class action for employee's snooping, even if company covers all monetary losses

Evans v Bank of Nova Scotia, 2014 ONSC 2135

- Protection for “intrusion upon the seclusion” might be a broadly available right in Ontario

Hopkins v. Kay, 2014 ONSC 321

Data Breach



Minimizing Data Breach Risk

1. Comply with standards
2. Use encryption and other advanced technologies
3. Accept that cybersecurity technologies are not foolproof
4. Train employees about data breach risks and best practices
5. Negotiate key contract terms with 3rd party service providers
6. Explore cyber-liability insurance

Data Breach Response Checklist

1. Bring together your data breach response team
2. Do not power down your systems!
3. Understand what you consider to be sensitive data and where it resides
4. Interview those who discovered breach, and/or bring in forensics
5. Determine legal notification obligations

Data Breach Response Checklist

6. Consider whether you want to notify others (customers, law enforcement, privacy regulators, etc.)
7. Consider whether to offer free credit monitoring/identity theft insurance
8. Document key learnings
9. Address any longer term security vulnerabilities
10. Prepare a data breach response plan for next time

Late-breaking news?

Thank you

Questions? Comments? Complaints?

Kelly Friedman

Partner

Davis LLP

416.369.5263

kfriedman@davis.ca

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