

Form 78.05

2012

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ALICIA HEMEON and WILLA MAGEE

Hfx. No. 398067

Court Administration

AUG 26 2013

Halifax, N.S.

PLAINTIFFS



SOUTH WEST NOVA DISTRICT HEALTH AUTHORITY,
a body corporate

DEFENDANT

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, S.N.S 2007, C. 28

Order Certifying the within action as a Class Proceeding pursuant to
ss. 4(3) and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28

BEFORE THE HONOURABLE JUSTICE ARTHUR W. D. PICKUP

THIS MOTION is made by the Plaintiffs for an Order for certification of the action as a class proceeding and heard on August 26, 27, & 28, 2013;

UPON READING the Notice of Motion dated December 17, 2012; the Plaintiff's Preliminary Certification Brief filed June 28, 2013; the Defendant's Certification Brief filed July 19, 2013; the Plaintiffs' Reply Submissions filed July 26, 2013; the Affidavit of Michael Dull sworn January 31, 2013, Affidavit of Alicia Hemeon sworn on January 30, 2013, Affidavit of Willa Magee sworn on January 30, 2013, Affidavit of Kendrick Beck sworn on January 30, 2013, Affidavit of Wanda Demings sworn on January 30, 2013 and the Affidavit of Janet Wile sworn on April 2, 2013;

ON HEARING Raymond F. Wagner, Q.C. on behalf of the Plaintiffs and Nancy Rubin, Q.C. on behalf of the Defendant;

UPON IT APPEARING that Counsel for the Defendant hereby consents to the certification of the within 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 are Representative Plaintiffs who would 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.

2. **THIS COURT ORDERS** that the Class, divided into two sub-classes, be defined as:

- (1) All living persons who were sent letters from the South West Regional Health Authority advising them that their personal health information had been inappropriately accessed by an employee.
- (2) All living persons who were sent letters from the South West Regional Health Authority advising them that their personal health information had been inappropriately accessed by an employee and who were subsequently notified by the South West Regional Health Authority that their personal health

information was not inappropriately accessed by an employee.

3. **THIS COURT ORDERS** that Alicia Hemeon and Willa Magee, c/o Wagners Law Firm, 1869 Upper Water Street, Suite PH301, Pontac House, Halifax, NS B3J 1S9, be appointed as the Representative Plaintiffs of the Class.
4. **THIS COURT ORDERS** that the claims to be determined and the relief sought is as alleged in the Statement of Claim dated and filed on the 20th day of June, 2012. The Plaintiffs seek monetary damages and declaratory relief.
5. **THIS COURT DECLARES** that the common issues in the action are:
 - a) Is the tort of intrusion upon seclusion recognized as an independent tort in Nova Scotia? If so, what are its parameters and constituent elements?
 - b) Did an employee of the Defendant, over the course of his or her employment, intentionally access the medical records of the Class Members without a valid purpose?
 - c) If the tort of intrusion upon seclusion is ultimately available in Nova Scotia and established by any of the Class Members, would the Defendant be vicariously liable for the commission of this tort by the employee?
 - d) Did the Defendant owe a duty of care to the Class Members to protect the privacy of their personal health information?
 - e) If so, did the Defendant breach the corresponding standard of care as pleaded by the Plaintiffs in the Statement of Claim?
 - f) If the tort of intrusion upon seclusion is recognized in Nova Scotia, can damages of class members be determined on an aggregate basis in the circumstances of this action?

6. **THIS COURT ORDERS** that the Class Members shall be given notice of the certification of this action as a class proceeding, in accordance with the form of the Notice of Certification, attached as Schedule "A", in the following manner:

(a) posted by Class Counsel on its website: <http://wagners.co>;

(b) direct mailed by the Defendant to the last known addresses of known Class Members as identified by a list of potential Class Members; and;

(c) provided by Class Counsel to any person who requests it.

7. **THIS COURT DECLARES** that the cost of Notice to the Class Members will be shared evenly between the Plaintiffs (50%) and the Defendant (50%).

8. **THIS COURT DECLARES** that the Notice and its distribution satisfy the requirements of s. 22(6) of the *Class Proceedings Act*.

9. **THIS COURT ORDERS** that the Litigation Plan attached as Schedule "B" is a workable method of advancing the proceedings 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 Plaintiffs on or before the deadline stipulated in the Opt-Out Form.

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 45 days following the issuance of this Order.

13. **THIS COURT ORDERS** that the costs of this motion are to be determined by the Case Management Judge.

August 26, 2013.

Jessica Renfert

Prothonotary

JESSICA RENFERT
Deputy Prothonotary

Consented to:

[Handwritten signature]

Raymond F. Wagner, Q.C.
Solicitor for the Plaintiffs
Wagners
1869 Upper Water Street
Suite PH301, Historic Properties
Halifax, NS B3J 1S9

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document,
identified by the seal of the court, is a true
copy of the original document on the file herein.

AUG 26 2013

Jessica Renfert
Deputy Prothonotary

[Handwritten signature]

Carman McCormick, Q.C. & Nancy Rubin, Q.C.
Solicitors for the Defendant
Stewart McKelvey
1959 Upper Water Street
Suite 900
Halifax, NS B3J 2X2

SCHEDULE "A"

NOTICE OF CERTIFICATION OF THE SOUTH WEST NOVA DISTRICT HEALTH AUTHORITY PRIVACY BREACH CLASS ACTION

To: Recipients of correspondence from the South West Nova District Health Authority advising that their personal health information may have been inappropriately accessed by an employee.

Notice Of Certification:

Class Members be advised of a certification of a class action lawsuit regarding the South West Nova District Health Authority Privacy Breach Class Action.

Who is included?

All living persons who were sent letters from the South West Regional Health Authority advising them that their personal health information had been inappropriately accessed by an employee, including those living persons who subsequently received letters advising that their personal health information was not inappropriately accessed.

What is the nature of the claims?

Compensation and/or damages for intrusion upon seclusion and negligence. A judgment on the common issues for the Class will bind all Class Members who do not opt-out.

What options 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 Plaintiffs on or before the deadline stipulated in the Opt-Out Form.

Class Counsel Compensation:

The Representative Plaintiffs have entered into a Contingency Fee Agreement. Should only settlement or judgment be awarded in favor 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 <http://www.wagners.co>

or contact Class Counsel at the address below:

Wagners
1869 Upper Water Street
Suite PH 301, Pontac House
Historic Properties
Halifax NS B3J 1S9
Office: 902-425-7330
Toll Free: 1-800-465-8794
Fax: 902-422-1233

Representatives of the Class:

Alicia Hemeon
Willa Magee
c/o Wagners
1869 Upper Water Street
Suite PH 301, Pontac House
Historic Properties
Halifax NS B3J 1S9
Email: seriousinjury@wagners.co

This summary notice has been approved by the Supreme Court of Nova Scotia. Do not Contact the Court about this Certification.

SCHEDULE “B”

PLAINTIFFS’ LITIGATION PLAN

OVERVIEW

1. The *Class Proceedings Act* (“the CPA”) requires a workable plan to be put into place as part of the certification process. In particular, section 7(1)(e)(ii) of the CPA requires production of a “plan for the action that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding”. The solicitors for the Plaintiffs (“Class Counsel”) propose that the final plan involve input by the solicitors for the Defendants and this Honourable Court.

CLASS COUNSEL

2. The Plaintiffs have retained Wagners Law Firm as Class Counsel to prosecute this class action. Class Counsel have the requisite knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution.

THE COMPOSITION OF THE CLASS

3. The Plaintiffs seek to represent the following Class, divided into two sub-classes:

- (1) All living persons who were sent letters from the South West Regional Health Authority advising them that their personal health information had been inappropriately accessed by an employee.
- (2) All living persons who were sent letters from the South West Regional Health Authority advising them that their personal health information had been inappropriately accessed by an employee and who were subsequently notified by the South West Regional Health Authority that their personal health information was not inappropriately accessed by an employee.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

4. Notice to the class of certification of this action shall be given pursuant to section 22 of the *CPA* as approved by the Court. Notice of certification is intended to inform Class Members of what has happened, of the effect on their individual rights, and what steps they can take and the consequences of doing so. Notice of certification therefore generally contains the following:

- (a) A description of the Class that has been certified;
- (b) A general description of the claims asserted by the Representative Plaintiffs for which the action has been certified;
- (c) An explanation of the significance of the certification of the action for Class Members;
- (d) An explanation of Class Members' right to "opt-out" or exclude themselves from the litigation, and the significance of doing so; and
- (e) Contact information for Class Counsel to allow Class Members to appropriately direct their inquiries.

5. The Plaintiffs propose that a notice of the certification of the action be circulated to advise Class Members, among other things, that:

- (a) the Court has certified the action as a class proceeding;
- (b) the claims being advanced by the Representative Plaintiffs relate to the allegations of medical record privacy breaches and the Defendant's vicarious liability for these privacy breaches;
- (c) persons falling within the definition of the Class will be bound by the determination of the common issues unless they opt-out;
- (d) a person may only opt-out of the class proceeding by sending a written election to opt-out to the recipient designated by the Court before a date fixed by the Court;
- (e) no person may opt-out of the class proceeding after the date fixed by the Court;

(f) further notice will be provided following judgment on the common issues; and

(g) if the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and prove additional facts in order to obtain compensation.

6. The Plaintiffs propose that the notice advising of certification, in a form approved by the Court, be disseminated to Class Members in the following manner:

(a) posted by Class Counsel on its website: <http://wagners.co>;

(b) direct mailed by the Defendant to the last known addresses of known Class Members as identified by a list of potential Class Members; and

(c) provided by Class Counsel to any person who requests it.

7. Once the order certifying the proceeding becomes final, Class Counsel will seek a case conference before the case management judge to finalize the terms of the certification order and of the notice of certification. Input will be solicited from the Court and the Defendant.

8. The Plaintiffs will ask the Court to order that the costs of disseminating the notice in the above manner be shared evenly between the Plaintiffs (50%) and the Defendant (50%).

9. The Plaintiffs propose that opt-out notices be directed to Class Counsel, who will report to the Court and the Defendant, the names and addresses of the persons who opt-out by the date fixed by the Court. The Defendant may make a motion at any time, seeking production of the names and addresses of all persons who have overtly contact the Plaintiffs' counsel to express an interest in this proceeding as a putative Class Member.

REPORTING AND COMMUNICATION

10. Current information on the status of the action is posted and will be updated regularly on Class Counsel's website at www.wagners.co. Copies of some of the publicly filed court documents, court decisions, notices, documentation and other information relating to the action

are and will be accessible from the website. Website updates will come within two weeks of a court proceeding. Court documents will be made accessible within two weeks of their receipt.

11. The website also provides direct dial contact information for a member of Class Counsel's staff who can provide further information should a Class Member request or require personal contact.

LITIGATION STEPS PRIOR TO THE DETERMINATION OF THE COMMON ISSUES:

PLEADINGS

12. Pursuant to subsection 4(6) of the *Class Proceedings Act*, the Defendant shall file a Statement of Defence no later than 45 days following the date on which a Certification Order is issued in respect of this proceeding.

PRODUCTION OF DOCUMENTS

13. The Defendant possesses most, if not all, of the documents relating to the common issues.

14. Two months following the delivery of the Statement of Defence, or such other date as agreed between the parties, the parties will exchange their Affidavit of Documents. The Plaintiffs may seek the agreement of the Defendant that documents be produced electronically, and failing such agreement, may seek an order requiring same.

DOCUMENT MANAGEMENT

15. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendant and all relevant documents in the Plaintiffs' possession. By agreement, the parties will attempt to negotiate a protocol for the coding of documents produced in the lawsuit, so that all parties will provide their documents in compatible electronic formats, and disclose uniform categories of information about each.

EXAMINATIONS FOR DISCOVERY

16. Six months following the exchange of the Affidavit of Documents, or such other date as agreed between the parties, the parties will complete their examinations for discovery. The Plaintiffs may require more than a designated manager and one other officer or employee of the Defendant to be examined, and may seek an order as appropriate pursuant to *Civil Procedure Rule 18*.

EXCHANGE OF EXPERT OPINIONS

17. The Plaintiffs expect to lead expert evidence at the common issues trial to establish that the Defendant's electronic record keeping systems, and its oversight into breaches of privacy, were below the standard of care.

18. 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

19. Matters may arise following the exchange of expert opinions and the completion of examinations for discovery, which may reveal further or more refined common issues. If necessary, the Parties 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 evidence.

CASE MANAGEMENT CONFERENCES / INTERLOCUTORY APPLICATIONS

20. There will be case management conferences before the appointed judge as required by the parties and the Court, and the Court will specify dates for steps in this litigation in accordance with this Litigation Plan and as necessary.

DISPUTE RESOLUTION

21. The Plaintiffs are willing to participate in mediation or non-binding alternative dispute resolution, to settle the action or narrow the issues for the common issues trial, if the Defendant is prepared to do so.

THE COMMON ISSUES TRIAL:

TRIAL OF THE COMMON ISSUES

22. Subject to the Court's scheduling availability, hearing of the common issues trial will commence within twelve months after the completion of the examinations for discovery or such other convenient time taking into account the desire for a speedy resolution of the dispute.

MANNER OF PROOF AT TRIAL

23. At trial, the Plaintiffs expect to rely on the following to prove the facts underlying their causes of action:

- (a) admissions made in the pleadings;
- (b) admissions made in discovery;
- (c) admissions made through Notices to Admit Facts;
- (d) admissions contained in documents proven through Notices to Admit Documents;
- (e) witness testimony of the privacy breaches and resulting notifications, and other witnesses;
- (f) witness testimony of the distress associated with the privacy breaches; and
- (g) expert evidence.

ISSUES TO BE RESOLVED AT THE TRIAL OF THE COMMON ISSUES

24. The Plaintiffs will ask for a judgment on the following common issues:

- (1) Is the tort of intrusion upon seclusion recognized as an independent tort in Nova Scotia? If so, what are its parameters and constituent elements?

- (2) Did an employee of the Defendant, over the course of his or her employment, intentionally access the medical records of the Class Members without a valid purpose?
- (3) If the tort of intrusion upon seclusion is ultimately available in Nova Scotia and established by any of the Class Members, would the Defendant be vicariously liable for the commission of this tort by the employee?
- (4) Did the Defendant owe a duty of care to the Class Members to protect the privacy of their personal health information?
- (5) If so, did the Defendant breach the corresponding standard of care as pleaded by the Plaintiffs in the Statement of Claim?
- (6) If the tort of intrusion upon seclusion is recognized in Nova Scotia, can damages of class members be determined on an aggregate basis in the circumstances of this action?

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

25. If the common issues are resolved in favour of the Plaintiffs, the parties will seek further directions and approval of the Court in respect of a further Litigation Plan in relation to all necessary and subsequent steps.

FURTHER ORDERS CONCERNING THIS PLAN

26. This Plan may be amended from time-to-time by directions given at case conferences or by further order of the Court.

EFFECT OF THIS PLAN

27. This Plan, as it may be revised by order of the Court from time to time, shall be binding on all Class Members whether or not they make a claim under the Plan.

SCHEDULE "C"

2012

Hfx. No. 398067

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ALICIA HEMEON and WILLA MAGEE

PLAINTIFFS

- AND -

SOUTH WEST NOVA DISTRICT HEALTH AUTHORITY,
a body corporate

DEFENDANT

PROCEEDING UNDER *THE CLASS PROCEEDINGS ACT, S.N.S 2007, C. 28*

**OPT-OUT FORM
DEADLINE – NOVEMBER 30, 2013**

I, _____, do not want to be included in the class action against the South West Nova District Health Authority with respect to the privacy breach.

I want to opt-out (be excluded from) this class action. My information is as follows:

Print Name: _____ Date of Birth: _____

Address: _____ Email Address: _____

City/Prov./Code: _____ Telephone: _____

Signature: _____ Date: _____