Aon Risk Solutions
Financial Services Group

At-a-Glance

Issue 71 September 2018

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Transmission of malware leads to CASL fine for two companies

In a novel enforcement step, the Canadian Radio-television and Telecommunications Commission (CRTC) levied administrative monetary penalties (AMPs) totaling $250,000 against two companies for aiding in the installation of malware via online advertising. The penalties, and associated notices of violation, were issued under Canada's Anti-Spam Legislation (CASL) on 11 July 2018. This marks the first time that CASL has been used by the CRTC to penalize malware installation.

Sunlight Media Network Inc. (Sunlight) and Datablocks, Inc. (Datablocks) provide networks to online third-party advertisers, allowing them to distribute their advertisements on various legitimate websites. However, these advertisers installed malicious programs on the devices of users who viewed the advertisements. The malware allowed the same third-party clients who initially created the advertisements to lock user's systems, steal their data, or use their computer resources for financial gain. In so doing, these unnamed clients violated CASL, with the CRTC alleging that Sunlight and Datablocks aided the contraventions. Specifically, the CRTC alleged that Sunlight accepted anonymous and unverified clients who used its services to distribute the malware, and Datablocks provided the necessary software for Sunlight's clients to carry this out. After investigation, the CRTC found that both companies could have prevented the distribution of malware, but omitted to implement the necessary safeguards to that effect, thus violating CASL. Datablocks faced a fine of $100,000, while a $150,000 fine was levied against Sunlife.

Companies and their management would be wise to remember that the compliance regime created by CASL is not limited to practices surrounding the distribution of commercial electronic messages. Rather, CASL's application extends to the installation of programs on another's computing device as well. Moreover, as illustrated by these AMPs, online intermediaries, such as organizations that provide infrastructure or advertising networks, may also be targeted by the CRTC for CASL enforcement action. As a compliment to fulsome internal compliance mechanisms, cyber liability insurance can help organizations looking to transfer some of the risk that can arise should malicious code be unwittingly transferred to third parties. The policy will cover defence costs, judgments and settlements where the organization is involved in third-party litigation or a regulatory proceeding. If the cyber liability insurance your company procures contains robust wording, you may also have the ability to argue that non-criminal fines and penalties, such as some of the AMPs imposed under CASL, are insurable and thus covered under the policy.

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Property owner liable for $1.8M in damages for environmental contamination

In what may prove to be an unsettling decision for property owners and business operators, the Ontario Court of Appeal recently held a property owner liable for adverse environmental effects resulting from actions that occurred between 1960 and 1974. The defendant, Fraser Hillary's Limited (Fraser), operated a dry-cleaning business beginning in 1960. Fraser disposed of solvents by adhering to best practices at the time, which was to simply dump them out onto the ground. In 1974, new equipment was purchased which eliminated the solvent discharge. In 2003, an environmental assessment was conducted on the plaintiff's property, which was located adjacent to Fraser's property. It was discovered that the plaintiff's property was contaminated, which precipitated a lawsuit against Fraser for both the common law tort of nuisance and compensatory damages under the Ontario Environmental Protection Act (EPA). The court of first instance initially found in favour of the plaintiff, and ordered Fraser to pay damages of over $1.8M. Fraser appealed, arguing that the relevant section of the EPA should not apply retroactively, and that the common law claim of nuisance required foreseeability of harm to succeed, which the defendant claimed did not exist in this case.

The Court of Appeal upheld the decision, finding that even though the applicable part of the EPA didn't come into force until 1985, it imposed a duty on everyone that had previously owned or controlled a pollutant at the time it was spilled to attempt remediation of the contamination, irrespective of whether the pollution continued. By failing to do this, Fraser could be held liable. As the court stated, "Time does not freeze in 1974 for the purposes of liability under s.99(2)...In short, while the spills may have occurred before Part X of the EPA was enacted, Fraser's obligations under that part of the legislation are ongoing". Regarding the common law claim, the court clarified that the tort of nuisance does not require foreseeability of harm to succeed. As such, even though Fraser disposed of the solvents in accordance with best practices in place at the time, and the contamination to the plaintiff's property was not foreseeable during the period in which the solvents were being disposed, the defendant could be held liable in nuisance so long as the plaintiff's property was substantially and unreasonably interfered with as a result of the contamination.

For certain offences under the EPA, including those related to discharge of contaminants as was the case here, liability can be imposed upon directors and officers whether or not the corporation itself has been prosecuted or convicted. It's also possible for individual board members or executives to be named in lawsuits alleging common law tort violations pertaining to adverse environmental effects. Ongoing developments to directors' and officers' (D&O) liability insurance policies have broadened coverage such that the primary policy may now respond, in certain instances under specific circumstances, to indemnify individual insureds should they be named in environmental contamination lawsuits. In some cases, D&O policies will also respond in the event the insured individual is responsible for costs flowing from a clean-up or remediation order issued by the Minister of the Environment. However, the extent of coverage varies widely in the marketplace and will not be available in all circumstances. An environmental liability insurance policy is still recommended as the preferable risk transfer option for environmental matters.

Alberta employee wins wrongful termination lawsuit

A safety manager in Alberta recently won $28,000 in damages against his former employer in a wrongful dismissal lawsuit. The employee had worked at the company for 3.5 years and had a flawless work record at the time he received an email from his manager stating, "Don't bother coming in either I'll look after all this k that your two weeks. Thanks for your services have good day" [sic]. The employee subsequently alleged wrongful termination, whereas the employer argued that the employee had quit, or, alternatively, that the employer had just cause for termination.

The Provincial Court of Alberta rejected the employer's arguments, finding that the email from the manager amounted to termination. The court also found that the employer did not have just cause for dismissal, as the employee hadn't failed to complete a task assigned to him, namely, adding certain safety procedures to the employer's safety manual. Moreover, the court also found that the employee telling his manager to "f__ off" on a telephone call did not meet the just cause threshold, as there was no scene made in public or in front of other employees. The employee was ultimately awarded 4 months of pay in lieu of notice, amounting to approximately $28,000 in damages.

Employment Practices Liability (EPL) insurance provides coverage for employment related claims made against an organization and its directors, officers and employees. If the policy contains robust wording, some coverage may be available on private company forms for pay-in-lieu of notice damages. However, there continues to be a disparity as to the extent of coverage provided. While some carriers will cover the wages ultimately awarded by a court that are over and above what is required by legislation, most others will cover only wages awarded by a court that are over and above the amount offered at the time of termination by the employer in a contract or settlement offer. This coverage is, for the most part, not yet available for public companies with standalone EPL insurance.

Items of Note

- Only a couple months prior to the 17 October 2018 legalization date for recreational cannabis in Canada, Ontario Premier Doug Ford appears set to shift provincial policy on the matter, looking to the private sector to sell cannabis in retail locations. It appears likely that the Ontario government will retain control of online cannabis sales for the time being. This shift in policy could have drastic implications for businesses looking to gain market share in this emerging industry. Aon will continue to monitor these developments as they unfold.
- According to a recent report from Cornerstone Research, securities class action lawsuits in the U.S. were filed at "near record levels" in the first half of 2018. There were 204 such lawsuits filed in the first six months of the year. Comparatively, this represents an approximate 8% increase from the number of similar lawsuits filed in the latter half of 2017. More strikingly, however, is that the 1997-2017 annual average number of filings was 203- one less than the previous 6 months. If the rate of filings continues at such a rapid rate through the end of 2018, the projected year end filings would see a 101% increase over the annual average number of filings from the previous 10 years.
- The Canadian Securities Administrators (CSA) have decided to maintain the status quo in determining director and audit committee independence, retaining the current "bright-line" disqualification categories articulated in National Instrument 52-110 Audit Committees. The decision comes after the CSA re-evaluated the criteria for director and audit committee member independence, consulting with market participants in the process. Further details can be found in CSA Staff Notice 52-330, *Update on CSA Consultation Paper 52-404 Approach to Director and Audit Committee Member Independence*, published on 26 July 2018.

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