

A Lost USB Device: A Cautionary Tale

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In December 2009, a nurse employed by the Durham Regional Health Department lost a digital memory flash-drive or USB key. This contained *unencrypted*, personal, and confidential information about more than 83,000 people who had received a flu shot at a clinic in Durham Region.

There was "minimal information" stored on the USB, being the name, address, telephone number, gender, date of birth, and Ontario heath card information (number, expiry date, name of a primary physician), and some additional personal health information. Drivers' licences were swiped in some instances, but would not include the licence number itself.

In April 2010, a class-action lawsuit was started by one of the affected individuals, John Rowlands, against the Health Department and the Regional Municipality of Durham, with a class certification granted a year later. The claim was in negligence for damages arising out of the loss of the information, and the prospect that the confidential information about the class members might be used to facilitate identity theft or be otherwise misused.

A former RCMP expert retained by the plaintiff noted that more information was usually required to commit fraud, which was obtained from the individuals themselves by identity thieves using trickery and small bits of existing information. Moreover, the usefulness of the USB information for identity thieves would diminish as time passed. Dr. Norman Archer, an expert who gave evidence for the defendant, testified that the information on the USB would not be particularly useful in identity theft. Over the course of the action, anxiety about the abuse of private information gave way to the realization that it was "probable" that no one had actually found the missing USB key, based on the fact that no class member had claimed that the information stored on the key had been used to financially damage his or her interests.

The parties now moved for approval of a proposed settlement agreement under s. 29(2) of the *Class Proceedings Act*, 1992, S.O. 1992 c. 6 (CPA). The agreement provided for a claim period by class members up to and including August 1, 2016. A class member whose personal information was lost and who consequently suffered and showed economic harm could make a claim. Durham Region would take steps to mitigate any economic harm that a class member claimant suffered because of the loss of his or her personal information, and if the claimant was not satisfied with these mitigating steps, he or she could pursue the claim before a claims administrator, who could order Durham Region to pay compensation. Last, the agreement provided for the payment of costs to class counsel in the amount of $500,000, inclusive of taxes and disbursements, plus 25 per cent of actual claims paid by the defendant in the future. There was no up-front payment to the claimants in the settlement.

A number of class members filed objections: some to the lack of immediate cash payments, some to the limited period for claims (2016), and some to the legal fees being paid, especially given that the class members had no immediate payouts.

The Ontario Superior Court of Justice approved the settlement, pointing out that "[t]his case, it bears emphasizing, would look far different if information from the lost USB key had been abused by a wrongdoer." The proposed settlement was fair and reasonable in the circumstances. As a matter of law, the plaintiffs' chances of success, in the circumstances as they had unfolded since the USB key was lost, were "quite low." There was minimal information on the USB key (for example, no credit card data), its value in identity theft was uncertain, and there were no substantiated cases of its abuse. The settlement came within a reasonable range of outcomes, given the merits and the risks, and was, in the court's view, "the best that the class can accomplish at this moment in time, given the developments in the case. The ongoing risks to members of the class appear to be negligible. I do not frankly see the further pursuit of this lawsuit being in the interests of the class or as being cost effective." Moreover, Durham Region had made it clear that it intended to bring a motion for summary judgment if the settlement agreement was not approved.

The court also added that "the behaviour modification goal of class actions has been accomplished in this case[;] the pressure of this lawsuit has signalled to public authorities like Durham Region that adequate security to protect privacy is critical in our society."

The case is *Rowlands v. Durham Region Health*, 2012 ONSC 3948 (Ont. S.C.J. July 04, 2012), available at http://canlii.ca/t/fs0hz. ML

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