



Privacy and Cybersecurity: Essentials for Corporate Counsel

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December 11, 2019

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Privacy and Cybersecurity: The Role of Corporate Counsel

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▼ The role of corporate counsel

- Advisor, translator, simplifier, liaison
- Legal is part of a larger team
- What is corporate counsel's unique value?
 - An inside view of the business
 - A closer understanding of operations and strategy
 - Focused, tailored and nimble legal and risk advice

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▼ Privacy and cybersecurity

- Privacy:
 - What do I need to know?
- Cybersecurity:
 - What if things go wrong?

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▼ Privacy

- If your business collects, uses, stores and/or transmits personal information of individual clients, customers, employees or others
- A solid grasp of privacy law fundamentals is essential

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▼ Privacy and cybersecurity

- Privacy and cybersecurity go hand-in-hand
 - Critical dependence on information technology systems to run our businesses
- IMHO:
 - Being conversant with privacy law and IT contracting (including data security requirements) should be in nearly every corporate counsel's legal toolkit

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▼ Privacy: What else do I need to know?

- Privacy laws are evolving
 - Consumer awareness of privacy rights is increasing
 - The need for consent; reasonable expectations for limits on use of personal information
- Data analytics - everybody is doing it
 - What are the privacy implications for business?
- What is coming down the privacy track?
 - Will things get easier for business? Or harder?

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▼ What if things go wrong?

- A privacy/cybersecurity breach
 - If or when?
- Think about and plan well before it happens
 - Develop a plan, rehearse the plan, refine the plan, rehearse the plan
 - Rinse and repeat
 - Simulation exercises

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▼ When things go wrong

- Who do you engage internally?
- Do you have written policies and plans to respond to major incidents?
 - Business continuity
 - Cybersecurity breaches

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▼ When things go wrong

- Who does what?
 - Do you have a team specifically designated to be pulled together and respond to these types of situations?
 - A “command centre”
 - Are roles clearly defined?
 - First responders, management, executive team, board of directors
- Who are the decision-makers?
 - Do you have a documented “chain of command”?

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▼ Legal is part of a larger team

- Internal counsel
- External counsel
- Impacted business/operational departments
- Information technology/services departments
 - IT infrastructure
 - Data and information security department
 - External service providers

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▼ Legal is part of a larger team

- Compliance department
- Enterprise risk management department
 - Business continuity plan and processes
 - Major incident response policy and plan
- Communications, media and public relations
 - What do you communicate, when and to whom?
- Your privacy/cyber-breach liability insurer/broker

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▼ When things go wrong: Legal privilege

- What is legal privilege?
- How do we maintain it?
- What do non-lawyers need to know?
- When to engage legal counsel?
 - Internal? External?

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▼ When things go wrong: Legal privilege

- Is there a magic bullet or shield?
- Should we:
 - Cc lawyers on all emails?
 - Mark everything “legally privileged”?
 - Include lawyers in all meetings?
- That would be nice, but it’s more nuanced than that
 - Privilege protects documents and records created for the purposes of seeking and obtaining legal advice

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Cybersecurity and privacy legal update

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Overview

- Current risk trends
- Lessons from the courts
- Regulatory developments

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Current risk trends

Ryuk ransomware now believed to be the work of Russian crime syndicate

TrickBot takes over as top business threat

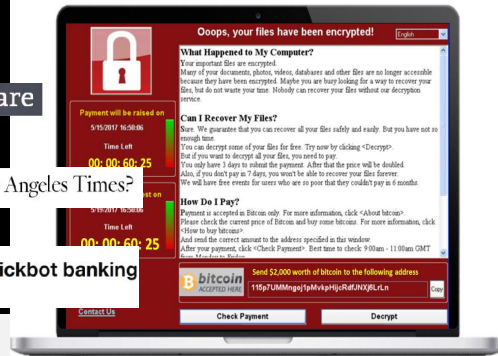
Emotet launches major new spam campaign

Emotet and Trickbot Are the Future of Malware

What is Ryuk, the malware believed to have hit the Los Angeles Times?

Advisory: Trickbot banking trojan

Under the Radar – The Future of Undetected Malware



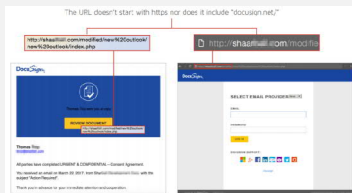
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Current risk trends

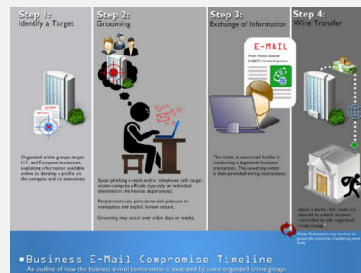
Why Multifactor Authentication Is Now a Hacker Target

SIM swaps, insecure web design, and channel-jacking are four ways attackers are circumventing MFA technology, according to the FBI.



Attackers are exploiting IMAP to bypass MFA on Office 365, G Suite accounts

Microsoft Office 365 Attacks Circumvent Multi-Factor Authentication, Lead to Account Compromise and Wire Fraud



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Lessons from the courts

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 Highlights of Data Breach Litigation and Damage Awards in Canada 2019-2020
 Also: Consumer, Class, Privacy and Cybersecurity Group, Practice

| Case | Allegation | Outcome | Status |
|--|--|---|--|
| 1. <i>Harlow v. Hudson</i> , 2019 BCCSC 1028 | Disclosure of private communications | Breach of statutory privacy law | \$10,000 for breach of privacy and defamation |
| 2. <i>LaBrosse v. National Bank</i> , 2019 QCC 1188 | Large breach 220,000 affected. Actual financial loss | Regulatory in complying "failure to offer robust monitoring, data, issue remedy" | Class certified. Settlement \$95,000 to charity, \$1,000 to each plaintiff, and class settlement process set up for benefit of all class members. No class action costs awarded. |
| 3. <i>Bonfield v. Hudson</i> , 2019 FC 581 | Private club disclosed number of visits to the complainant's employer | Breach of PIPEDA | No damages. Direct was the result of a misunderstanding. |
| 4. <i>Samuel v. Thompson</i> , 2019 FC 124 | Class members disclosed healthcare costs, report to bank | Breach of PIPEDA | \$1,000 in damages awarded (including for violation and sentence) |
| 5. <i>Cooper v. CBIC</i> , 2019 QCC 1128 | Misdirected texts with bank customer information | Class action for breach of contract, breach of a duty of care and breach of PIPEDA | Class certified. Settlement \$100,000 to charity, \$42,000 to members, and class process. See also: <i>Thompson v. BCI</i> |
| 6. <i>BCU v. Thoma</i> , 2019 FC 963 | Attachment of auditor's report to settlement of wage | Class for breach of contract, breach of statutory privacy law, and defamation, etc. | Private claim dismissed. Absolute immunity for court proceedings |
| 7. <i>Lane v. Lane</i> , 2019 QCC 28 | Use of email without consent and threat to claim insurance | Breach of statutory privacy law | Quotation of privacy. Quotient of damages, admitted to pay |
| 8. <i>Shaw v. Royal Bank</i> , 2019 FC 1079 | Law firm submitted Commissioner report as a PIPEDA complaint | Breach of PIPEDA | \$1,000 award. Reassignment controls but no class test. |
| 9. <i>Lalancette v. Royal Bank of Canada</i> , 2019 FC 887 | Disclosure to complainant's ex-employer in divorce proceeding | Breach of PIPEDA | \$4,000 in damages, concerning contributory fault and harassment |
| 10. <i>Chabot v. Fidelity Investments</i> , 2019 QCC 1008 | Facebook, employer, privacy, wrong, releasing confidential information | Compensation, invasion of privacy, breach of confidence | Class certified. Contribution due to third parties. Settlement \$75,000 and award for new privacy policy |
| 11. <i>United One Credit Services v. BCU</i> , 2019 QCC 1118 | Bank used Deep Packet Inspection (DPI) to inspect internet traffic | Declaration relief, CC, CC in damages, and remedy for reduced bandwidth services | Class certification based on finding that DPI was to change traffic, not monitor |
| 12. <i>Sharma v. Hinds</i> , 2019 QJ No. 1030/19 | Inadequate safeguards to protect customer information in release | \$200 million class action. Breach of contract and privacy, and negligence | No reported decision or settlement |



Resolving B2B Data Security Disputes: Addressing Data Breaches and Privacy Torts in Court and through Arbitration

Who is liable when a data breach occurs?

Security Firm Sued for Failing to Detect Malware That Caused a 2009 Breach

Delta Sues Chatbot Vendor Faulted for Data Breach
 Sean O'Neill, SkRr - Aug 19, 2019 12:30 pm

Banks Find Success Suing Over Data Breaches



Lessons from the courts

- Class action certification/authorization refused:
 - *Broutzas v Rouge Valley*, 2018 ONSC 6315
 - *Kaplan v Casino Rama*, 2019 ONSC 2025
 - *Bourbonnière c. Yahoo! Inc.*, 2019 QCCS 2624
 - *Li c. Equifax inc.*, 2019 QCCS 4340
- But see...
 - *Tocco v Bell Mobility Inc*, 2019 ONSC 2916
 - *Haikola v The Personal Insurance Company et al.*, 2019 ONSC 5982
 - *Ari v ICBC*, 2019 BCCA 183



Lessons from the courts

Protecting Privilege Before and After a Cyber Breach

ENSURING PRIVILEGE OF A PRE-BREACH CYBERSECURITY ASSESSMENT

Preserving the Privilege During Breach Response

The Risk in Your (Unprivileged) Risk Assessment

An Ounce of Data Breach Prevention...Address Attorney-Client Privilege in Your Breach Planning

Cyber Breach Disclosure Now Comes With Limited Privilege Waiver Protection, If You're Careful

Legal Privilege? The Role of Attorney Advice in Risk Assessments and Compliance Programs

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Lessons from the courts

- *Kaplan v. Casino Rama*, 2018 ONSC 3545
 - Proposed class action relating to data breach
 - Plaintiffs seek court order for production of:
 - all Mandiant reports and supporting documentation
 - all Casino Rama documents provided to Mandiant
 - all report(s) of security audits at Casino Rama in 2016-2017

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Lessons from the courts

- *Kaplan v. Casino Rama*, 2018 ONSC 3545

1. Description of Services

Mandiant will provide incident response services as set forth herein. The objective of this professional services engagement is to assist the Client in responding to a security incident. The a

- Investigative su
information

This is the Cross-Examination of RYDER GILLILAND, on his affidavit sworn the 6th of December, 2017, taken at the offices of Network Reporting & Mediation, One First Canadian Place, 100 King Street West, Suite 3600, Toronto, Ontario, on April 24, 2018.

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Lessons from the courts

- *Kaplan v. Casino Rama* - result:
 - Whether the reports are privileged is not decided
 - Court finds implied waiver of Mandiant opinion
 - Court orders production of “parts of the Mandiant Reports that relate to the size and scope of the Class”

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Regulatory developments

- **PIPEDA developments:**
 - Only four findings issued in 2019
 - Mandatory breach notification and guidance
 - Guidance on receiving a breach notification
 - Consultation on transborder data flows
 - Online privacy policy guidance tips
 - Cannabis transactions guidance
 - Meaningful consent guideline
 - Political parties guidance
 - Digital Charter

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Regulatory developments

- **BC – PrivacyRight! tools**
- **Alberta**
 - Phishing advisory
 - Email management guidance and tips
- **Quebec**
 - Updated surveillance guidance
 - Loss or theft of personal information guidance
- **OSFI cybersecurity guidance**

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Regulatory developments

- Ontario IPC Report PR16-40 (2019)
 - October 14:
 - 11 employees received targeted phishing email from “manager”
 - some deleted email, others opened attachment
 - attachment installed malware on workstations
 - manager reported issue to IT and others
 - no investigation was commenced

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Regulatory developments

- Ontario IPC Report PR16-40 (2019)
 - October 19
 - employee reported to IT inability to log in
 - IT finds suspicious remote log in by “IT staff”
 - IT commences investigation of workstation and logs
 - IT blocks dropbox for all, disables remote desktop, and later begins changing administrative and related passwords

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Regulatory developments

- Ontario IPC Report PR16-40 (2019)
 - October 27
 - port scan finds Russian IP attempting to connect to workstation
 - IP address is blocked
 - IP address is same as in phishing email
 - 39 systems had already been compromised

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Regulatory developments

- Ontario IPC Report PR16-40 (2019)
 - November 4
 - attacker claimed to have 154 GB of data and provides samples
 - attacker demands ransom to be paid
 - notification made to police and others and later to IPC and public

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Regulatory developments

- Ontario IPC Report PR16-40 (2019)
 - Failure to implement adequate safeguards:
 - Local administrative privileges questioned
 - Gap in phishing training noted
 - Lack of proper response to obvious case of spear phishing
 - Inadequate response to the remote connection issue

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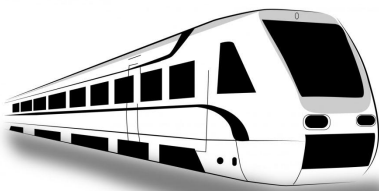
▼ What we covered

- Current risk trends
- Lessons from the courts
- Regulatory developments

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Data Protection Reform is coming down the tracks



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▼ The global influence of the General Data Protection Regulation (GDPR)

- Throne Speech Dec 2019
- “To ensure fairness for all in the new digital space, the government will review the rules currently in place.”



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▼ General trends

- New rights: data portability, delinkage, enhanced consent, local remedies, opting-out of data sharing
- New obligations: data impact assessments, privacy by design, transparency

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▼ Principles of Canada's Digital Charter, May 2019

1. Universal Access
2. Safety and Security
3. Control and Consent
4. Transparency, Portability and Interoperability
5. Open and Modern Digital Government
6. A Level Playing Field
7. Data and Digital for Good
8. Strong Democracy
9. Free from Hate and Violent Extremism
10. Strong Enforcement and Real Accountability

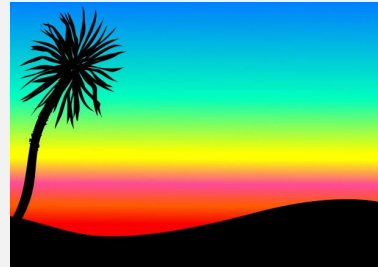
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▼ The United States

- *California Consumer Privacy Act* – Jan 2020
- Referendum for additional measures :Fall 2020 elections
- Nevada, Arizona
- Washington, New York



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▼ A copy of the GDPR in Canada?

- Obvious Canadian insufficiencies
 - onward transfer of personal information
 - treatment sensitive data
 - Data Protection Impact Assessments
 - $A=B, B=C, C \neq A$ in adequacy standards
- Issues for business
 - role of the Data Protection Officer vs Chief Privacy Officer
 - documentation burden
 - Right To Be Forgotten

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▼ Big Data Use

- Competition, data protection and human rights implications
- OECD develops Principles for AI use
- Ethical data impact assessments

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▼ A Possible Time Line for Reform

- May 25 2020 Adequacy grace period expires
- Spring 2020 Federal and Quebec legislation introduced
- 2020-2022 Discussions with EU and possible commitments to future reform
- 2022 Probable implementation dates federally and provincially
- 2022 Discuss possible changes to Alberta and B.C. legislation



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