Cybersecurity and Data Breach:
Head in the Clouds or Feet firmly Planted?

For: Canadian Bar Association

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Cybersecurity and Data Breach: The Agenda

- **Cyber risk – relevance to lawyers and firms:**
  - **a) external threats to law firms;**
  - **b) internal threats to law firms;**
  - **c) law firms as threats to clients;**
  - **d) evolving expectations for solicitors; and**
  - **e) litigation, evolving claims, evolving strategies.**
- **An overview of legal obligations and expectations for management, response and remediation.**
- **Cybersecurity - emerging frontiers from procurement to class actions – the legal landscape**

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It used to be so easy to spot the Cyber-risks!

From: <ts@setauketcomputer.com>
Date: May 1, 2015 at 4:58:17 PM PDT
To: Undisclosed recipients:;
Subject: HI
Reply-To: <andbail00911@gmail.com>

My name is Andrew Bailey (www.bankofengland.co.uk.)
I have 25Million proposal for you, email me at andbaile@yandex.com with your details

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External Threats to Lawyers and Firms

- **Theft or physical loss of equipment:** What would you do if your phone, laptop or USB was stolen? What confidential client information is stored on each device? Could it be used to access your data servers, or accounts at your bank? Is your device password/bio protected? How strong is your password? Is the data encrypted? What if all the computers in your office were stolen? Would you be able to recover that information? Could you wipe it clean? Would anyone be able to access it?
- **External hackers:** How can you prevent unauthorized access to your office systems over the internet? Do you understand the risks of using public computers or public Wi-Fi connections? Do you know how to harden your own wireless and Bluetooth connections?

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Internal Threats:
What risks lurk one click away?

- **Internal breaches – conduct whether inadvertent or deliberate presents a daily threat to law office security. There are a multiplicity of potential threats. Email whether from a new 'client' or phishing or from an imposter posing as an 'old friend' is the most common way that external hackers deliver malicious programs and fraudsters gain access to your accounts. Emails may come with links to harmful sites or contain infected attachments. USB's used at home or elsewhere are only as strong as the weakest link.**

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Now Imagine Your Office in the Cloud

- **Pros: Hosted, Secure, Reliable, Encrypted, Available 24/7, Supported, Global, cost effective outsourcing …**
- **Cons: Reliant on Internet connectivity, possibly multi-jurisdictional data storage, access and retrieval issues, reliant on service provider's controls for availability, capacity, response time, support, cryptography, logging and monitoring, security verification, vulnerability management, and retrieval of data on termination**
- **Realities: Cloud Service Providers are probably great, but not a panacea for all cyber risks.**

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Cyber Threats: The Evolving Risk Landscape for Lawyers, Firms & Clients

- **Cryptolocker ransomware alert**

The Law Society is warning of a computer virus called Cryptolocker ransomware after two BC law firms were infected. The virus is installed on a computer by opening an infected email attachment, watching an infected video file or plugging an infected USB flash drive into a computer. - See more at: https://www.lawsociety.bc.ca/page.cfm?cid=3848&t=E-Brief:-December-2013#sthash.CUvN6JQc.dpuf

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Spectrum of Risks for lawyers and firms

- Loss of Data: Malicious Destruction
- Theft of Data: Breach of Privacy, Breach of Confidentiality, Misuse for Material Gain
- Extortion for Data Access
- Access to Firm or Personal Banking/Brokerage
- Spoofing and Imposters redirecting data and funds
- Hacktivism and Vexatious Litigants
- Traditional “new client scams” – counterfeit cheques
- Placement of virus in firm as parasitic host
- Reputational harm and loss

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Law firms as threats to clients

- What lurks in the attachment you sent to your client?
- What if you cannot access your files moments before a closing or as you head to court?
- Who bears the loss when you wire funds as per your "client's" new account instruction?
- What happens if your client's personal information or business information becomes public domain or is unlawfully used for material gain?
- What do you do when your cloud service provider suffers a hack, goes bankrupt or goes off-line?

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Solicitor's New Contractual Paradigm:
Data is the raw material, the means of production, the capital and the goodwill supporting reputation

- Identifying and drafting for data security and Cyber risks
- Explanation of data security, extra-territorial data hosting, jurisdictional concerns and implications to clients
- Responsibility for theft and misuse of data
- Third parties and expectations for audit rights and standards
- Banking terms and conditions and risk allocation
- Insurance

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Solicitor's New Contractual Paradigm: You need to know the risk to assign it

- **Client contracts should consider and assign responsibilities for personal and confidential data and cyber risks applicable to client needs, regulatory audits and production requirements**
- **Consider use of resource checklists and guidelines to identify applicable risks and draft t&c to address:**
  (LSBC. Practice Resource: Cloud computing checklist https://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf.):or
  Office of the Superintendent of Financial Institutions Canada ("OSFI") – "Cyber Security Self-Assessment Guidance"

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Solicitor's New Contractual Paradigm: You need to know the risk to assign it

- Disaster Planning: contracts only matter when things go wrong. T&C must consider situational risks.
- Notification Requirements: Regulators, Police, Third party service providers, clients, banking relationships, credit bureaus, insurance, etc.
- Remediation Requirements: prevention and technical support to investigate and prevent further breach
- Mitigation Requirements: requirements to prevent misuse of lost data, liability for loss, indemnities, insurance, etc.

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Data Breach for Litigators:
From the mundane to new class claims

- Breach of personal privacy
- Intrusion upon seclusion
- Injunctive relief and a revival for Marevas, Anton Pillers and Norwich Pharma orders for copyright breach, theft of industrial secrets and piracy
- Compliance Regimes and Regulatory Sanctions
- Coaching and coordinating the data breach team through disclosures, mitigation, and public relations
- Defense in mass data breach class action claims

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No common law tort of breach of privacy in British Columbia

- In Ladas v. Apple Inc., 2014 BCSC 1821, the court confirmed there is no common law tort of breach of privacy in British Columbia. (See also: Hung v. Gardiner, 2002 BCSC 1234 at para. 110, aff'd 2003 BCCA 257; Albayate v. Bank of Montreal 2015 BCSC 695)
- But….B.C. is not the only jurisdiction and breach of privacy is not the only claim…
- Consider primary claims exposure and potential for third party liability, vicarious liability and contractual indemnities that may be triggered

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Breach of Privacy: B.C.

Privacy Act, R.S.B.C.1996, c. 373 provides:

1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

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Intrusion upon seclusion:

- **One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.**
- **A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy.**

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The Tort of Breach of Privacy

- **Four common law provinces currently have a statutorily created tort of invasion of privacy: British Columbia, Privacy Act, R.S.B.C. 1996 c. 373; Manitoba, Privacy Act, R.S.M. 1987 c.P125; Saskatchewan, Privacy Act, R.S.S. 1978, c. P-24; and Newfoundland, Privacy Act, R.S.N. 1990, c.P-22.**
- **All four Privacy Acts are similar. They establish a limited right of action, whereby liability will only be found if the defendant acts wilfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances". Jones v. Tsige, 2012 ONCA 32**

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Data Breaches, Infrastructure Attacks, and Breach of Privacy Obligations

- For major attacks, (involving more than 10,000 records) estimated cost to deal with reporting and remediation for each lost or stolen record was $145/record. (Ponemon, 2014: Quantifying the Cost of Data Breach)
- For individualized breaches of privacy without demonstrated actual pecuniary damages, court awards range from $2,000 to $20,000 (See: Albayate v. Bank of Montreal 2015 BCSC 695; Jones v. Tsige 2012 ONCA 32)
- The worry: Major Attack + Class Action + application of individualized damage range = Massive Loss

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Factors for Calculation of Damages for Breach of Privacy

1. The nature, incidence and occasion of the defendant's wrongful act;
2. The effect of the wrong on the plaintiff's health, welfare, social, business or financial position;
3. Any relationship, whether domestic or otherwise, between the parties;
4. Any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
5. The conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

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Front Lines for Data Breach Class Actions:
Evans v. The Bank of Nova Scotia:

Bank employee intentionally compromised and sold client info.

Post discovery bank notified clients promptly, compensated, but...

Class action certified (but not yet decided on):

a) Vicarious liability of the Bank for employee's tort of intrusion upon seclusion or his breach of duty of good faith;

b) Negligence of the Bank in failing to adequately supervise employee;

c) Breach of contract by the Bank;

d) Liability of Bank on the basis of waiver of tort; and

e) Liability of the Bank for damages for emotional stress, hardship and inconvenience for any of the alleged causes of action, 2014 ONSC 2135 .

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Data Breach: Disaster Response Team

- **Plan Ahead for Contingencies – Don't simply wait to plan on the fly**
- **Identify Goals: Prevent further breach, mitigate losses to parties compromised, preserve reputation and goodwill, and remediate weaknesses.**
- **Anticipate: regulatory investigation, police investigation, client complaints, privacy complaints, litigation and class actions.**

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Data Breach: Disaster Response Team
Pre-assemble the Team before the event

- **Multi-disciplinary Team Requirements:**
  - **a) Chief Privacy Officer plus key Executives;**
  - **b) internal PLUS external IT consultants;**
  - **c) risk officer;**
  - **d) public relations;**
  - **e) internal communications (call centre, mail);**
  - **f) general counsel;**
  - **g) external legal counsel – litigation, privacy.**

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Data Breach: Disaster Response Team
The Plan – Day 1 - Discovery

- Understand the Facts as First Known
- Develop and Pursue Situational Investigation Plan
- Assign Responsibilities and Timing
- Prevent Further Loss
- Implement document generation and retention protocols in anticipation of litigation
- Notifications – Public Relations
- Mitigation: Data Recovery – Injunctions
- Financial Relations and Reporting
- Anticipate

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THE INVESTIGATION TO DO LIST:

1. Ensure that you have an information technology policy that stipulates that the hardware and all information thereupon belong to the employer and can be accessed and verified at all times.

2. Ensure that the policy is known and enforced.

3. Before doing a thorough search of an employee's computer, ensure that there are serious reasons (supported by evidence) to do so.

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THE INVESTIGATION TO DO LIST:

4. Police authorities need a warrant to access such information, even if the employer is entitled to it.

5. Verify with counsel before searching an employee's computer, regardless of the circumstances.
R. v. Cole 2012 SCC 53

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Investigation Through Alternative Processes:

- Consider confrontation if Employee: Authorization for Production of Records, negotiation or litigation
- Norwich Order – Equitable bill of discovery to obtain third party documents by court order to assist in investigation (establishes evidence for tracing and identification of parties).
- Mareva Order to Freeze Assets.
- Anton Piller Order to search and seize specified evidence or items.

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Cyber Threats: Persistent, Pervasive and Permanent

From: The Canadian Bar Association [mailto:info@cba.org]
Sent: May-02-15 5:59 AM
Subject: How are you all.....

Hello

Please view the document I uploaded for you using Google docs.

Click Here just sign in with your email to view the document it's very important.

Thank You

The Canadian Bar Association

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Yes, real email, real time, real threat, real life...
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Thank You

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