

大成 DENTONS

3rd annual Data Summit

High anxiety: Top 6 issues in privacy right now

Wednesday, September 29, 2021

12:10-12:45 p.m.

Our Team

Moderator



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Bill 64 and privacy in Québec

Chantal Bernier, Counsel

Bill 64 – Why it matters and how to prepare

Why it matters:

- It sets a precedent for privacy legislation in Canada
- The CAI is likely to apply it to all companies collecting PI from Québec

How to prepare:

- Implement a robust privacy program
 - To ensure internal compliance
 - To guide performance of Privacy Impact Assessments (PIAs)
 - To respect new individual rights
 - To comply in breach response
- Adopt guidelines to assist staff in implementation
- Review and update privacy policies and consent mechanisms
- Upgrade technology to meet new legal requirements

Ransomware, ransom demands, and determining whether to pay

Karl Schober, Senior Associate

Key takeaways

1. Involve your cybersecurity insurance provider right away.
2. Prepare factors that could guide your business in determining whether to pay, or not pay the ransom demand.



Payments, open banking, and opening up data

Tracy Molino, Counsel

Open banking

- Pre-election release of the final report from the advisory committee on open banking provides additional detail on a proposed Canadian roadmap
- Open banking continues to evolve
- As an immediate first step, the appointment of an open bank lead to spearhead the initiative with the industry
- Phase 1 – Operational by January 2023
 - Should include data that is currently available to consumers and small business through online banking; and
 - Consumer data held by the third party service providers
- Foundational elements of an open banking system:
 - Common rules;
 - An accreditation framework for third party service providers; and
 - Technical specifications

The RPAA

- The *Retail Payment Activities Act* received Royal Assent in June (not yet in effect)
- Creates the first regulatory framework that applies to “payment service providers” that perform a broad category of payment functions
 - Payment accounts, transmitting funds, clearing and settlement services, maintaining payment accounts
 - Introduces the Bank of Canada as regulator
 - Will require that PSPs adopt operational risk management frameworks
- Interaction with PayMod initiative driven by Payments Canada

Opening up data

- Privacy considerations for new payment systems
 - Payments are getting more data-rich
 - Payment system privacy is more important than ever before
 - Will require that PSPs adopt operational risk management frameworks
- *Consumer Privacy Protection Act* – part of legislation tabled in November 2020
 - New rights of control:
 - Portability, Erasure and AI
- Implications for open banking and FinTech

Bad news: Privacy litigation is increasing

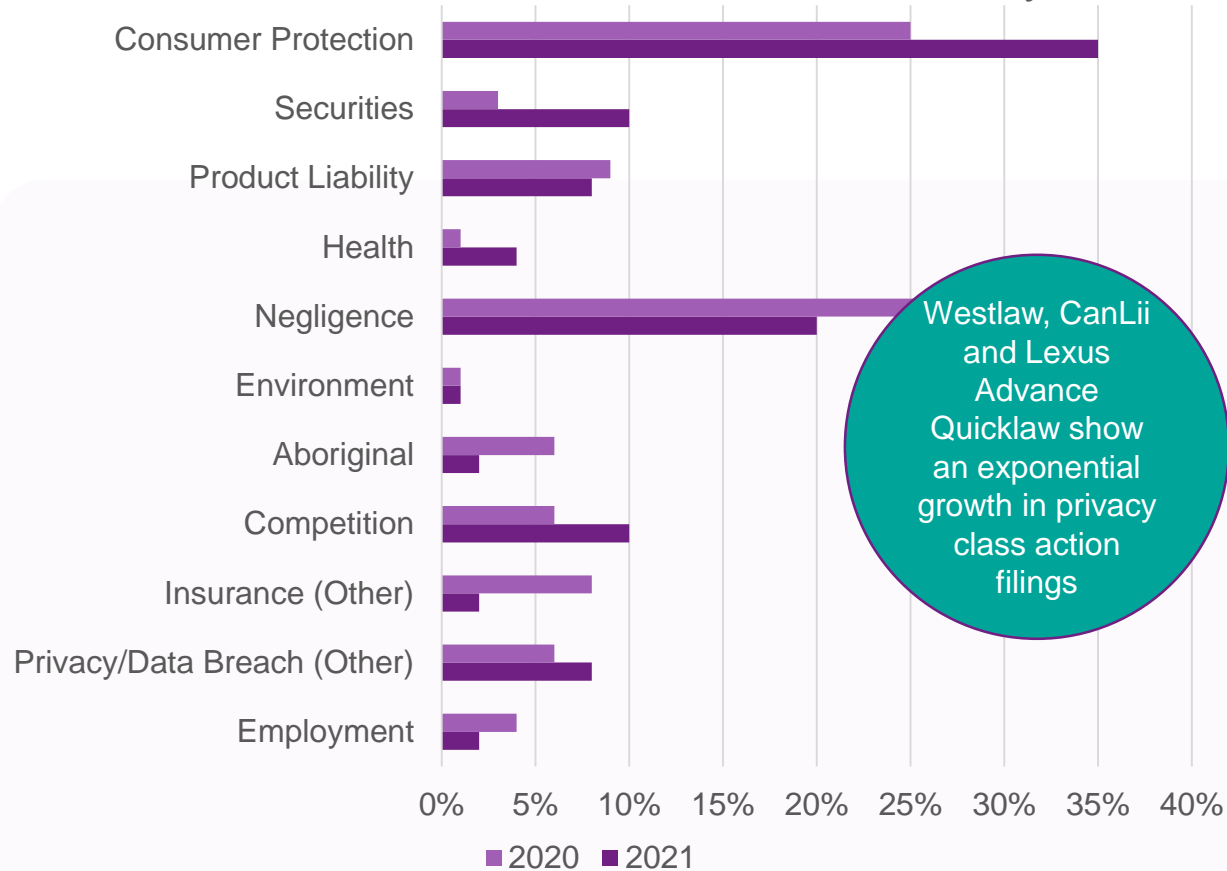
Good news: It's getting harder for plaintiffs to win

Chloe Snider, Partner

1. Privacy litigation is increasing

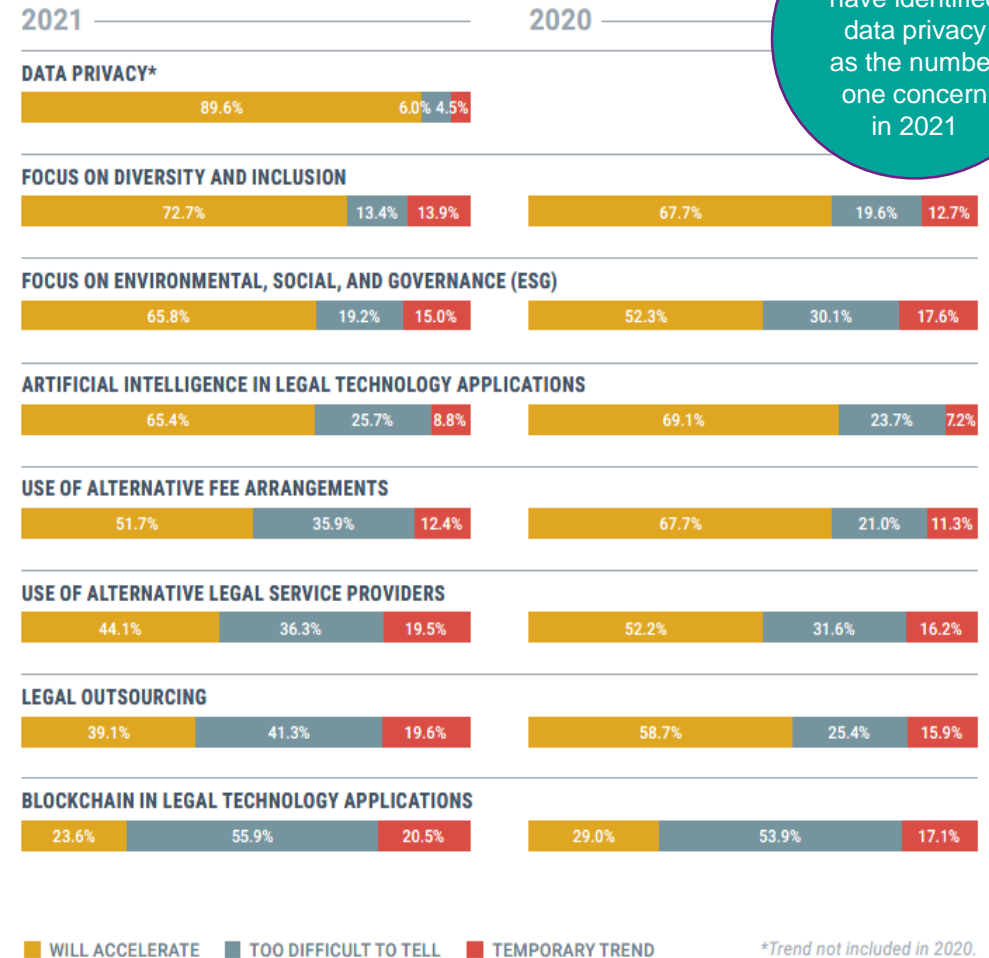
90% of CLOs have identified data privacy as the number one concern in 2021

National Class Action 2020 vs. 2021 by Area



Data is from the CBA National Class Actions database

** Please note that the database does not provide a comprehensive listing of all class action lawsuits, since it's a voluntary initiative.



Source: 2021 Association of Corporate Counsel CLO survey

2. Intrusion upon seclusion case law is becoming more defendant friendly

- *Owsianik v. Equifax Canada Co.*

Intrusion by the defendant "is the central element of the tort"

- *Del Giudice v Thompson*

Failure to prevent an intrusion does not constitute intrusion

3. Damages are required

- *Lamoureux c. Investment Industry Regulatory Organization of Canada (IIROC)*

Plaintiff did not demonstrate sufficiently serious non-pecuniary damages that would entitle him to compensation

- *Setoguchi*

There must be some evidence or basis in fact of real, compensable harm or loss leading to a claim that is at least arguable

4. So is proof of compromise

- *Simpson v Facebook*

Plaintiff's failure to provide any evidence that Canadian users' personal data was shared with a third party was enough to deny certification

5. Plaintiff's conduct is being criticized

- *Del Giudice v. Thompson*

Court awarded costs of \$125,000, in favor of the defendant, holding that “Plaintiffs’ Counsel engaged in reprehensible, scandalous and outrageous conduct”

- *Del Giudice v Thompson*

Court critical of counsel, stating that “the prose is prolix, tedious, whiningly-polemic, conceited, pompously preachy, wanting in objectivity, and grossly overstated”

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COVID Recovery: Managing testing,
vaccinations and passports going forward

Wednesday, September 29, 2021

12:45-1:30 p.m.

Our Team

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Vaccines and vaccine passports/certificates: update on the law and regulatory environment

Kelly Osaka, Partner

	Alberta	British Columbia	Ontario	Federal
Public Health Order	<ul style="list-style-type: none"> Mandatory masks in indoor public spaces Restriction Exemption Program (proof of vaccination or restrictions on businesses) 	<ul style="list-style-type: none"> Mandatory masks in indoor public spaces BC Vaccine Card Program (proof of vaccination required for accessing events, services and businesses) 	<ul style="list-style-type: none"> Mandatory mask requirement O /Reg 645/21 (proof of vaccine requirement for indoor spaces) 	<ul style="list-style-type: none"> A standardized proof of vaccination is being developed for international travel
Occupational Health & Safety	<ul style="list-style-type: none"> Employers must review and update their hazard assessment in regards to changes related to COVID-19 conditions 	<ul style="list-style-type: none"> No mandate for employee proof of vaccination but employers can implement such policies on their own responsibility 	<ul style="list-style-type: none"> Employers are required to screen employees at start of their shifts even if employees are vaccinated 	<ul style="list-style-type: none"> Requirement for federal departments and regulated sector employees to be vaccinated
Privacy Commissioner	<ul style="list-style-type: none"> Information collected cannot be used for any other purpose 	<ul style="list-style-type: none"> Vaccine passport to meet highest level of privacy protection 	<ul style="list-style-type: none"> Joint Statement by Federal and Provincial and Territorial Privacy Commissioners 	<ul style="list-style-type: none"> Joint Statement by Federal and Provincial and Territorial Privacy Commissioners

Looking forward: managing vaccination information in workplaces and businesses

Karl Schober, Senior Associate

Managing vaccine information under privacy laws

- Limit your collection of vaccine information and be prepared to justify the collection and use
- Review safeguarding and retention policies and procedures for vaccine information
- Mandatory vaccine policies and use of vaccine information must be regularly reviewed and updated against privacy laws and industry standards

Managing refusals – what are the options?

Eleni Kassaris, Partner

Key takeaways – Managing Refusals

- Be ready to address complaints – some people can be convinced to comply with policy
- Understand the scope of the duty to accommodate and consider accommodations that may include an exemption from policy or a modification that suits the needs of the particular individual
 - Remember, you have to accommodate legitimate reasons (e.g. medical) someone can't get vaccinated, not their preference not to be vaccinated
- Be ready to both articulate and follow through with consequences of non-compliance
 - Leave of absence to provide time to get vaccinated
 - Continued work from home if available
 - Termination without cause / for cause (get specific advice - there is no one size fits all)
- Understand that you will face some formal complaints or litigation – prepare for the fight; document all your communications and keep track of efforts made with employees to bring them into compliance with the policy

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Technology and privacy

Wednesday, September 29, 2021

1:30-2:15 p.m.

Our Team

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AI - Proposal for a Regulation on a European Approach for Artificial Intelligence and implications for Canada

Antonis Patrikios, Partner
Luca Lucarini, Associate

Biometrics – Tips on avoiding landmines when dealing with biometric information

Peter Stockburger, Partner
Kirsten Thompson, Partner

Additional resources

- [Federal Government 'Responsible Use of Artificial Intelligence'](#)
- [Federal Directive on Automated Decision Making](#)
- [Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things](#)
- [Dentons Insight on Bill 64](#)

Read some of our posts on AI and the EU proposed regulation:

- <https://www.privacyandcybersecuritylaw.com/stretching-the-boundaries-through-artificial-intelligence-the-european-proposal-for-a-dedicated-regulation-a-risk-based-perspective/>
- <https://www.dentons.com/en/insights/articles/2021/june/28/regulating-artificial-intelligence-in-the-eu-top-10-issues-for-businesses-to-consider>
- <https://www.businessgoing.digital/regulating-artificial-intelligence-in-the-eu-what-do-high-risk-ai-systems-mean-for-future-technological-advancement/>
- <https://www.privacyandcybersecuritylaw.com/stretching-the-boundaries-through-artificial-intelligence-the-european-proposal-for-a-dedicated-regulation-the-protection-of-personal-data/>
- <https://www.privacyandcybersecuritylaw.com/ico-guidance-on-artificial-intelligence/>
- <https://www.businessgoing.digital/artificial-intelligence-the-next-evolution-of-digital-transformation/>

Additional resources (continued)

We recently ran an AI survey with clients. Click [here](#) to learn more and access the survey.

- [UK AI strategy](#) (September 2021):
- [The UK Information Commissioner's pages on AI](#)
- [The EU Proposed AI Regulation](#) (April 2021)