



CYBER Security Matters

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Cybersecurity attacks – what
are the numbers in Canada?

Cybercrime and Canadian Businesses, 2017

Businesses spent
\$14 billion
to prevent, detect
and recover from
cyber security incidents.



\$8 billion on salaries for employees, consultants and contractors
\$4 billion on cyber security software and related hardware
\$2 billion on other cyber security measures



Reasons businesses invested in cyber security

68% for protection of personal information
41% for prevention of fraud and theft
31% for prevention of loss of business operations



Cyber security incidents impacted **21%** of all businesses and led to **23 hours of downtime** on average.

Business size	Businesses impacted	Downtime
Large (250 or more employees)	41%	29 hours
Medium (50 to 249 employees)	28%	24 hours
Small (10 to 49 employees)	19%	22 hours



Businesses experienced attempts by cyber criminals

to steal money or demand ransom payment	38%
to gain access to unauthorized areas	26%
to steal personal or financial information	23%
to disrupt or deface the business or web presence	22%

Businesses impacted



Source: Canadian Survey of Cyber Security and Cybercrime, 2017.

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Source: StatsCan Canadian Survey of Cybersecurity and Cybercrime, 2017 (released Oct. 2018)

Scalar Security Study 2019:

- 100% of surveyed organizations had experienced a cyber security attack over the past 12 months.
- 58% had data exfiltrated.
- Overall number of attacks declined from 455 (2018) to 440 per organization.
- Cost per organization of responding to and recovering from cybersecurity incidents increased from \$3.7 million to over \$4.8 million – this is primarily tied to the length of detection and response time.
- The security strategy of the Canadian organizations is shifting from protection to detection and response.

Recent high profile Cyberattacks in Canada:

- Equifax – personal information of approx. 19,000 Canadians was accessed.
- Bell Canada – hackers gained unauthorized access to personal information of 100,000 customers.
- Ransomware attacks on municipalities – Midland and Wasaga Beach, Ontario.
- Saint John Parking Commission



What is at risk from a Cyberattack?

CYBER Risk = Risk

- Business disruption.
- Loss of confidential business information, including financial and IP information.
- Loss of employee or customer personal information, including credit card information.
- Reputation.
- Regulatory infractions/prosecutions.
- Privacy complaints.
- Litigation.



What are Canadian organizations
doing about Cybersecurity?

StatsCan Canadian Survey of Cybersecurity and Cybercrime:

- 95% of Canadian businesses employ some form of cybersecurity to protect themselves, their customers and their partners in 2017.
- Approximately one-third (29%) of businesses were required to implement cybersecurity measures by their suppliers, customers, partners or regulators.
- Almost one-quarter (24%) of large businesses indicated that they had cyber liability insurance to protect against cybersecurity risks and threats, compared with 14% of medium-sized businesses and 7% of small businesses.

CIRA/Strategic Council Cybersecurity Report 2018:

- 59% said they stored personal information from customers, but only 38% said they were familiar with PIPEDA.
- 34% mostly relied on vendors to handle their cybersecurity needs, 33% felt they had an equal mix of insourced and outsourced resources, while 27% reported internal resources only.



What is the law on Cybersecurity?

Legislative Framework:

PIPEDA

- Privacy Designate
- Policies and Practices
- Appropriate security safeguards
- Breach reporting and Notification requirements
- Breach documentation requirements

Legislative Framework:

Legislation protecting personal health information

- Provincial legislation existing in all jurisdictions.
- Contains limitations on the collection, use, and disclosure of personal health information by custodians, as well as requirements for security safeguards and mandatory breach reporting.

Legislative Framework:

Provincial access to information legislation

- Provincial legislation existing in all jurisdictions – applies to government departments, municipalities, universities.
- Contains limitations on the collection, use, and disclosure of personal information, as well as requirements for security safeguards and mandatory breach reporting.

Legislative Framework:

Criminal Code - Cyber criminal offences include:

- Using a device willfully to intercept a private communication without the express or implied consent of the originators or intended recipient (s. 184); and
- Intercepting fraudulently any function of a computer system (s. 342.1).

Legislative Framework:

Statutory Torts for invasion of privacy:

- British Columbia
- Manitoba
- Newfoundland and Labrador
- Saskatchewan

Legislative Framework:

Canadian Anti-Spam Law (“CASL”)

- Prohibits installation of computer programs on another person's computer system without the express consent of the owner or an authorized user of that system.
- Prohibits causing computer program to communicate with other electronic devices without consent.
- Applicable if installer or target computer system are in Canada.

Legislative Framework:

General Data Protection Regulation (“GDPR”)

- Has application to some Canadian organizations.
- 72 hour breach notification requirement

Legislative Framework:

- Sector specific statutes, e.g. *Bank Act*
- Bill C-59 – if passed, will create the *Communications Security Establishment Act*, and grant new powers to defend critical Canadian infrastructure (telecommunications, nuclear plants) from attacks, and launch cyberattacks.
- There is also sector specific regulatory guidance, including from Sector specific regulatory guidance, including from IIROC, Canadian Securities Administrators and MFDA.

Legislative Framework:

- Liability of an organization can arise from breaches of these statutes that result in litigation and/or complaints being filed against the organization.



What type of litigation?

Claims for Breaches of Statute

- There is no independent cause of action for breach of statute (*R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205).
- Legislation may inform negligence analysis.

Civil Causes of Action

- Breach of Contract: arising from failure to satisfy contractual obligation to protect information.
- Negligence: arising from failure to employ sufficient safeguards.
- Intentional Torts: generally arising from employee snooping or harvesting of data for sales.

The Common Law Tort: Intrusion upon Seclusion

- (a) Intentional conduct (includes reckless conduct);
- (b) An invasion of a person's private affairs or concerns without lawful justification;
- (c) That a reasonable person would regard as highly offensive, causing distress, humiliation or anguish.

Jones v Tsige, 2012 ONCA 32

Statutory Torts

- Statutory torts exist in British Columbia, Manitoba, Saskatchewan and NL
- Elements:
 - (a) A violation of an individual's privacy;
 - (b) That is done willfully; and,
 - (c) Without a claim of right.

Class Proceedings

- Requirements for Class Proceedings:
 - (a) Pleadings disclose a cause of action;
 - (b) There is an identifiable class of 2 or more persons;
 - (c) The claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
 - (d) A class action is the preferable procedure to resolve the common issues of the class; and,
 - (e) There is an adequate representative plaintiff.

Types of Class Actions

- Lost or misplaced information (I.E. *Condon*)
- Employee snooping (I.E. *Hemeon*)
- Employee stealing information for 3rd parties (*Evans v BNS*)
- Third party hacking (*Home Depot*)

Exposure impacted by:

- Breach response & mitigating efforts.
- Type of information at issue.
- Risk of misuse/harm.
- Number of people impacted.

Vicarious Liability for Cybersecurity Matters

- VL imposed when act is authorized or the act is so connected with authorized acts that they are regarded as a mode of doing an unauthorized act (*Bazley v Curry*, 1999 CarswellBC 1264 (SCC)).
- The problem of the “Rogue Employee”.

Various Claimants v WM Morrisons Supermarket PLC

- Senior IT internal auditor had access to employee data.
- Stole data, including salary and bank details of nearly 100,000 staff and posted it online.
- Anonymously reported data breach to newspapers.
- *Morrisons* was vicariously liable:
 - (a) Thread linking work to disclosure.
 - (b) Employee was entrusted with data.
 - (c) Unauthorized disclosure closely related to job of receiving, storing and disclosing data.
- Decision is under appeal.

Other Sources of Civil Liability

- Claims by Financial Institutions
- Claims by Shareholders



What is effective Cybersecurity
governance?

- Increased cost of Cybersecurity attacks is resulting from detection and response times being too slow.
- Deficiencies in planning for incident response leaves organizations vulnerable if there is a breach.
- Directors of Canadian companies, consistent with their fiduciary duty and duty of care, need to exercise oversight over Cybersecurity risk.

- Liability can arise not from a cybersecurity breach itself, but from a failure to demonstrate that the board properly assessed and considered the risk.
- The bottom line is – the development of appropriate policies and procedures to manage and address Cybersecurity risk can demonstrate board care and diligence.

Development of a Cybersecurity plan:

Audit of assets and risks:

- Identify types and location of assets/information;
- What is the most valuable and the most vulnerable?
- compliance requirements
- industry standards (i.e, encryption, multi-factor authentication)?

Development of a Cybersecurity plan:

Audit of assets and risks:

- IT and other systems infrastructure
- Current processes and procedures
- Use of third party suppliers/vendors
- Employees
- Collection/retention policies.

Components of a Cybersecurity plan:



Source: IIROC
Cybersecurity Best
Practices Guide

Components of a Cybersecurity plan:

- Security safeguards/Defensive plan
- Breach detection/monitoring
- Breach Response
 - Response team (GC, IT/forensics, communications, Board representative)
 - Preservation of evidence/records
 - Documentation of breach

Components of a Cybersecurity plan:

- Breach Response (cont'd):
 - Identifying threshold for notification;
 - Notification procedures.
- Breach Recovery

Organization and Board Buy-in:

- Responsibility
- Budget
- Education
- Training
- Regular reporting to the Board.

Regular Review:

- # of incidents and response;
- Security safeguards, technical infrastructure (updates, patches);
- Breach response plan;
- Testing of breach response plan;
- Third party and supplier risks;
- Risks associated with employee conduct;
- Scope of cyber insurance.



Cyber Security Insurance

Cyber security insurance

- Policies for losses resulting from cyber security incidents.
- Very little standardization.
- What is not typically covered:
 - Social engineering losses
 - *The Brick Warehouse LP v Chubb Insurance Company of Canada*, 2017 CarswellAlta 1208 (ABQB)
 - New hardware

Continued..

- Software upgrades
- Third-party errors
- Third party contract claims
 - *P.F. Chang's China Bistro Inc v Federal Insurance Company*, 2016 WL 3055111
- Intellectual property theft and reputation damage

So what is covered?

- First party coverage
 - Notification costs
 - Forensic investigation costs
 - Crisis management costs
 - Cyber Extortion costs
- Third party coverage
 - Network security costs
 - Privacy liability



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