

LERNERS



LAWYERS

The Legal Liability Risks Arising from the Use of Digital
Technology in Municipal Infrastructure and Operations

Presented by Jennifer Hunter

Overview of Presentation

1. Legislation and organizations governing municipal organizations in their use of technology
2. Form and frequency of legal claims against municipal organizations arising from the misuse of digital technology
3. Possible legal claims arising from the misuse of digital technology
4. Development of legal liability risks in the future as digital technologies evolve

- In 2015, the global cost of cybercrime was US\$375-575 billion
- Expert consensus is that cyberspace will be a less secure place over the next 5-10 years
- Cyber criminals often target organizations that have a strong incentive to pay a ransom so they can resume operations
- Canadians spend more time online than people in any other country in the world

Cybercrimes are only one type of the legal liability risks that could arise from the use of digital technology...

- ***MFIPPA*** – *Municipal Freedom of Information and Protection of Privacy Act*
 - No reporting requirements
 - Also can apply to school boards
- ***IPC*** – *Information and Privacy Commission of Ontario*
 - Handles complaints of information misuse and conducts investigations

- ***PIPEDA – Personal Information Protection and Electronic Documents Act***
 - Can apply to municipalities if they are engaged in a “non-core” commercial activity:
[\(https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/ro p/02_05_d_25/\)](https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/ro p/02_05_d_25/)
 - Mandatory reporting requirements to the Privacy Commissioner of Canada

- ***PHIPA – Personal Health Information Protection Act***
 - Only applies to personal health information which is collected, use, or disclosed by health information custodians
 - Mandatory reporting requirements

- ***The Education Act***

- The confidentiality provisions of *MFIPPA* prevail over the provisions under the *Education Act*

A note about class actions...

- Most common form of legal proceeding against municipalities for misuse of digital technologies
- Can be long, costly, and high risk for the defendants
- Must be certified by a judge after the claim is brought

Three risks from the use of digital technology

- Intentional breaches
- Human error
- Privacy litigation

All three could result in legal claims against municipalities!

2. Form and frequency of legal claims against municipal organizations arising from the misuse of digital technology

Intentional breaches
(no litigation yet – but
only a matter of time?)



Cyber attack that cost Stratford city hall \$75K ransom should be wake-up call: Expert

An update published on the city's website stated Stratford paid out more than \$75,000 in Bitcoins as ransom following the ransomware cyber attack on April 14.

GALEN SIMMONS & JANE SIMS, THE LONDON FREE PRESS Updated: September 20, 2019



And the hits keep coming...

Nunavut ransomware attack impacting 'all government services'



No estimate of when services will be back online, government says

[John Last](#) · CBC News · Posted: Nov 03, 2019 10:35 AM CT | Last Updated: November 3



TECH

City of London IT taking steps to protect municipal software amid spate of Ontario cyberattacks

Insurance BUSINESS CANADA

Three municipalities in southwestern Ontario have each reported cyberattack incidents that targeted key functions within their respective communities.

August 2019

Saskatoon Falls Victim to \$1 Million Cyber Attack

2019-08-26 2:52:36 PM

London

City of Woodstock hit by a cyber attack



Access to email and most city files has been blocked

CBC News · Posted: Sep 24, 2019 1:42 PM ET | Last Updated: September 24

Intentional breaches

CANADA

Father says daughter, other students had info hacked at Markham school

BY MICHELLE MCQUIGGE - THE CANADIAN PRESS

Posted December 6, 2018 3:53 pm

Updated December 6, 2018 5:43 pm



— When Kirk Tobias' daughter logged onto her school's student portal one morning last month, she was greeted by an ominous note. . *THE CANADIAN PRESS/Jonathan Hayward*

Human error

Calgary

\$93M class-action lawsuit filed against City of Calgary for privacy breach



Lawsuit alleges personal info of 3,700 city staffers sent to an employee of another Alberta municipality

[Meghan Grant](#) · CBC News · Posted: Oct 03, 2017 3:37 PM MT | Last Updated: October 3, 2017



Lawsuit claims thousands of city employees are now at a higher risk of identity theft, financial fraud, financial losses and psychological injury, including humiliation. (Monty Kruger/CBC)

Privacy litigation

Toronto

Canadian Civil Liberties Association files lawsuit over Sidewalk Labs project



Toronto project sets a 'terrible precedent' for the country, executive director says

The Canadian Press · Posted: Apr 16, 2019 1:16 PM ET | Last Updated: April 16



The site of Toronto's proposed 'Quayside' smart city designed by Alphabet, Google's parent company. (Sidewalk Labs)

What can legally be claimed against municipalities for the misuse of digital technology?

Negligence

To find negligence:

1. The defendant owed the plaintiff a duty of care (2 step *Anns-Cooper* analysis);
2. The defendant breached the standard of care;
3. This breach caused, legally and factually, the plaintiff's injury; and
4. The plaintiff suffered compensable harm from the injury.

Negligence in misuse of technology

- Whether a duty is owed may depend on an independent contractual relationship
- Individuals need to plead only that they suffered some damage arising from the breach
- The duty and standard of care may depend on the sensitivity of information that is breached

3. Possible legal claims arising from the misuse of digital technology

Negligence: *Condon v Canada*

Canada

Federal agency loses data on 583,000 Canadians



CBC News · Posted: Jan 11, 2013 6:00 PM ET | Last Updated: January 12, 2013



Intrusion upon seclusion

To find the tort of intrusion upon seclusion:

1. The defendant's conduct must be intentional or reckless;
2. The defendant must have unlawfully invaded the plaintiff's private affairs or concerns; and
3. A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Intrusion upon seclusion in misuse of technology

- The loss of information must amount to a significant invasion of personal privacy
- Employers can be held liable for intrusion upon seclusion from an employee's breach of personal information
- If an organization was sufficiently reckless, it may be liable even for external cyber breaches

3. Possible legal claims arising from the misuse of digital technology

Intrusion upon seclusion: *Evans v Bank of Nova Scotia*



The screenshot shows a web page from PrivateTech. The header includes the PrivateTech logo and a navigation menu with links for HOME, ABOUT, SERVICES, RESOURCES, PRODUCTS, BLOG, and CONTACT. The breadcrumb trail reads: PRIVATETECH > Blog > Breaches > Canadian Bank Proposes to Settle Privacy Class Action. The main heading is 'CANADIAN BANK PROPOSES TO SETTLE PRIVACY CLASS ACTION'. Below the heading, the post is dated May 29, 2016, has 1124 views, 3 likes, and is categorized under Breaches and Court Decisions. The author is listed as privadmin. At the bottom, there are social sharing buttons for Tweet, Facebook Share, and LinkedIn Share, along with icons for email and print.

PRIVATETECH

HOME ABOUT + SERVICES + RESOURCES + PRODUCTS + BLOG CONTACT

PRIVATETECH > Blog > Breaches > Canadian Bank Proposes to Settle Privacy Class Action

CANADIAN BANK PROPOSES TO SETTLE PRIVACY CLASS ACTION

🕒 May 29, 2016 👁️ (1124) ❤️ 3 📁 Breaches, Court Decisions 👤 privadmin

🐦 Tweet 📘 Share 🔗 Share ✉️ 🖨️

Breach of confidence

To establish breach of confidence:

1. The information must be confidential;
2. The information was imparted obligating confidence; and
3. There was an unauthorized use of that information.

Breach of confidence: *Canada v John Doe*

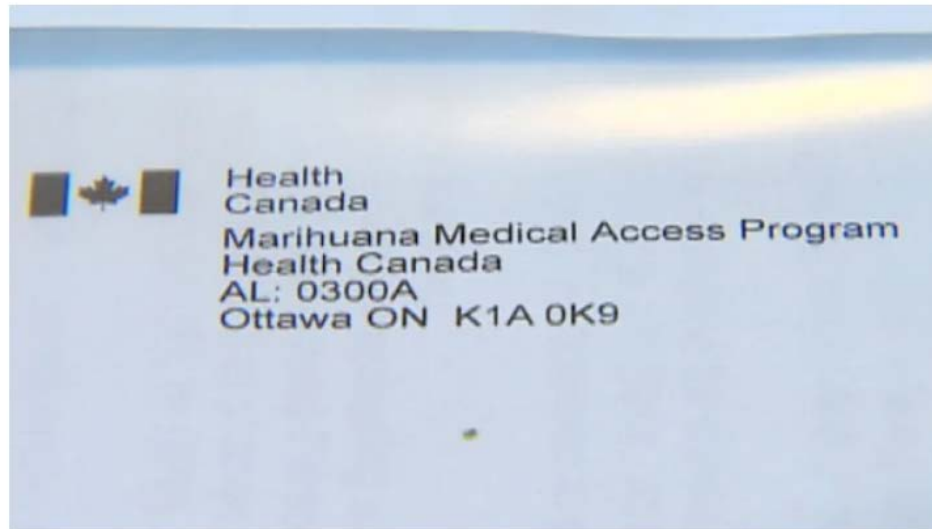
Nova Scotia

Medical marijuana class action against Health Canada certified by Federal Court



40,000 people received envelope marked with medical marijuana access program's name

CBC News - Posted: Jul 29, 2015 8:19 AM AT | Last Updated: July 29, 2015



Breach of contract

- The terms and conditions of a service will be a relevant consideration if individuals bring a claim for breach of contract following a data breach

3. Possible legal claims arising from the misuse of digital technology

Breach of contract: *Tucci v Peoples Trust*

Company

Class-action suit alleges Vancouver trust company exposed customers to risk of identity theft

KEITH FRASER Updated: August 31, 2017



Phishing is the act of soliciting money or information from people by individuals pretending to be from real company. *SUNMEDIA*

Publicity given to private life?

- While not yet a recognized tort in Canada, courts may soon recognize the tort of publicity given to private life

To establish this:

1. The matter publicized must be highly offensive to a reasonable person; and
2. Is not of legitimate concern to the public.

Breach of *Charter* privacy rights?

- Canadian jurisprudence has not yet considered if and how privacy rights under the *Charter of Rights and Freedoms* may be engaged in digital technology misuse

3. Possible legal claims arising from the misuse of digital technology

Summary of cases

| | Internal | External |
|--------------------|----------|----------|
| Intentional breach | 3 | 2 |
| Human error | 2 | 0 |

Legal claims can arise from any type of misuse of digital technology!

4. Development of legal liability risks in the future as digital technologies evolve

- New legal claims which may emerge in the future
- New risks to consider in “Smart Technology” and “Smart Cities”
- New regulations and oversight around use of digital technologies

- Develop a framework around digital use and information protection
- Continue to upgrade digital technology which can best reduce risks and liability
- Employee training and monitoring
- Prepare a breach response plan – it's a matter of when, not if