

# **Privacy laws in Canada; Where we are at, where we are headed**

**Wednesday, November 3, 2021**

# **Updates to privacy laws in Canada; Where we are at, where we are headed, and things corporate counsel need to think about**

# Bill 64 – Quebec's privacy law modernization

## **1 year after date of assent (September 22, 2022)**

- Appointment of Privacy Officer
- Mandatory cyber security incident reporting
- Exception to consent for the purpose of a commercial transaction
- Exception to consent for the purpose of study, research or statistics

# Bill 64 – Quebec's privacy law modernization

## 2 years after date of assent (September 22, 2023)

Most provisions of the Bill come into force, including:

- Implementation of policies and practices
- Mandatory privacy impact assessments in certain circumstances
- Privacy by Design and by Default
- Right to be Forgotten
- Transparency requirements, including
  - Plain language privacy policy
  - Determination of all collect and uses, and transfers to third parties
  - Information with respect to location and profile technology
  - Information with respect to automated decision making
- Consent requirements and basis for collection
- Anonymization policies and practices

# Bill 64 –Quebec's privacy law modernization

**3 years after date of assent (September 22, 2024)**

- The right to data portability

# Bill C-11 – The Digital Charter Implementation Act

- What is its status?
- What can we expect will remain in the new Bill?
- What can we expect will change in the new Bill?

# Bill 22 – Amending British Columbia’s Freedom of Information and Protection of Privacy Act

- Repeal of data localization provisions
- Privacy breach notifications

**Don’t forget about Ontario and BC FPIPA!**

# Breaches, ransomware and their costs

## Breaches

- What does your breach response playbook / crisis management plan say?
- Insurance provider?
- Will you require assistance from a third party?

## Ransomware

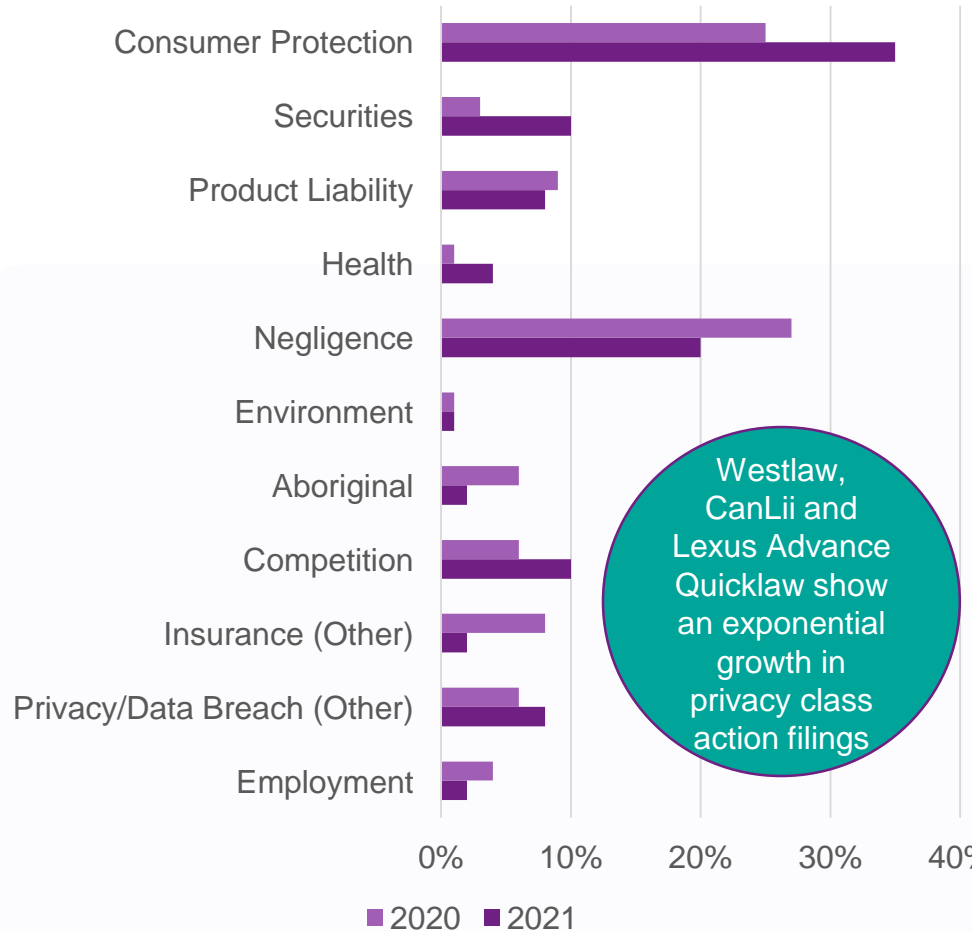
- What is it?
- What are we seeing in Canada?
- Should you, or should you not, pay the ransom demand?



**Developments in privacy litigation;  
More litigation, higher penalties...  
but (just maybe) fewer certified  
class actions**

# Privacy litigation is increasing

## National Class Action 2020 vs. 2021 by Area

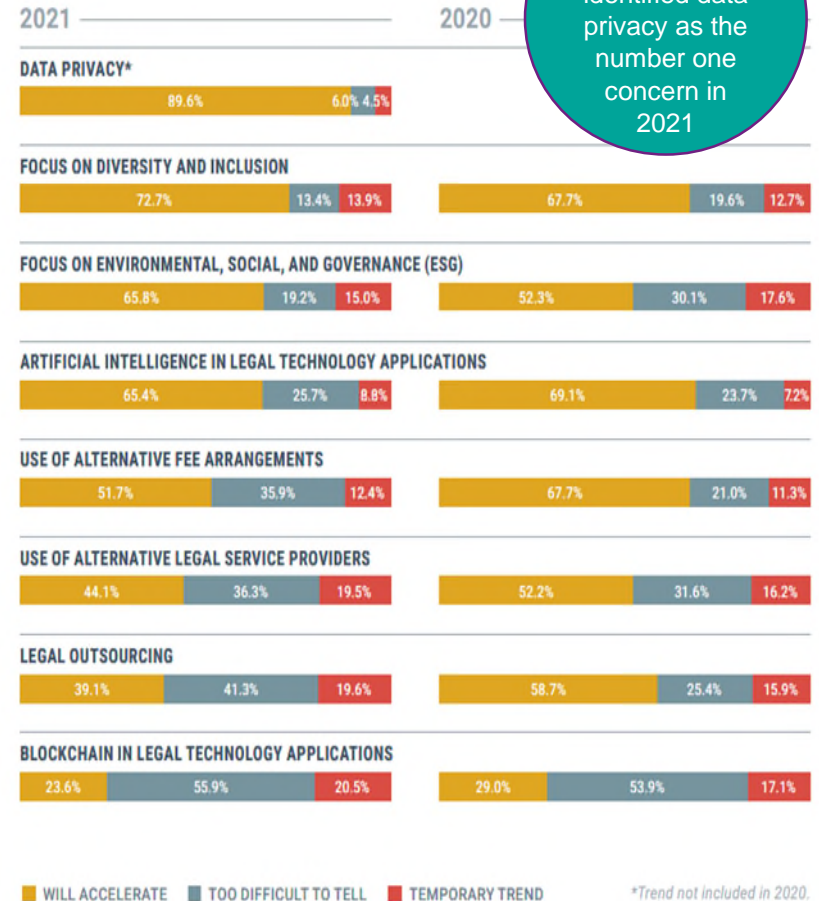


Westlaw, CanLii and Lexus Advance Quicklaw show an exponential growth in privacy class action filings

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.

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

Source: 2021 Association of Corporate Counsel CLO survey

# Intrusion upon seclusion case law becoming more defendant friendly

## ***Tucci v. Peoples Trust Company***

- Frequently cited case certifying privacy class action on the basis that liability for intrusion upon seclusion can result from misconduct of third party hacker

## ***Owsianik***

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

## ***Del Giudice v. Thompson***

- Failure to prevent an intrusion does not constitute intrusion

# Nature of the Information

## ***Broutzas v. Rouge Valley Health System***

- Even if taking personal contact information is an intrusion, it is not one that a reasonable person would regard as offensive

## ***Setoguchi***

- Names, phone numbers and emails are not private

## ***Kaplan v. Casino Rama***

- Uniformity of information required at certification

# Damages are required

## ***Lamoureux c. Investment Industry Regulatory Organization of Canada***

- 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

# So is proof of compromise

## ***Simpson***

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

# Settlements

- Settlements reflect “very modest *per capita* recoveries for class members” including “cents on the dollar” in some cases
- Significant range in counsel fees: as low as \$50,000 and as high as \$5.25 million – with a cluster in the range of \$120,000-\$330,000
- Many settlements include *cy pres* distributions to non-profit organizations
- Defendants’ breach response relevant

# 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”



# Bill C-11 – A pending resurrection?

## Penalties

- Up to the greater \$10,000,000 and 3% of the organization's gross global revenue, and where organizations knowingly commit certain offences, up to the greater of \$25,000,000 and 5% of the organization's gross global revenue

## Private right of action

- The CPPA would have provided that where the OPC or Tribunal has made a finding that the organization contravened the CPPA, individuals affected by the acts or omissions of an organization (not necessarily the complainants) may sue the organization for damages for loss or injury

# Costs

## IBM Security study

- Average cost of data breach rose from \$3.86 million USD to \$4.24 million USD
  - In Canada, the average cost rose from \$4.5 million USD to \$5.4 million USD
- Costs *lower* for organizations with more mature security infrastructure and *higher* for those who lagged

## Litigation costs

- In addition to these post-breach costs

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## Q&A?

**Chloe A. Snider**

Partner, Toronto

Dentons

D +1 416 863 4674

chloe.snider@dentons.com

**Karl Schober**

Senior Associate, Toronto

Dentons

D +1 416 863 4483

karl.schober@dentons.com

**Maria Zeldis**

Associate General Counsel

ONNI GROUP

D: (604) 484-0389

C: (604) 649-4407

mzeldis@onni.com

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**ACC Ontario Chapter**

[www.acc.com](http://www.acc.com)