TOPICS

WINTER 2015

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BC Legal Management Association

Informed Opinions on Legal Management

Risk Management Revisited

by Michael Litchfield, Managing Director, Thinklab Consulting Inc. Originally published on slaw.com, October 20, 2014.

I wrote a column on the value of risk management for law firms and put forward the proposition that "despite the considerable grounding in working with risk and counseling clients on methods to minimize and avoid risk, seemingly very few law firms in Canada actually engage in any sort of structured or coordinated risk management activities for their own organizations."

I was recently contacted by a reporter for a legal industry publication to discuss risk management for law firms and thus had the opportunity to reflect on my original statement. When asked about the growth of risk management in recent years and the adoption of risk management programs by law firms, I was reluctantly forced to report that while risk management programs have increased in popularity and use amongst organizations in Canada, in general their adoption in the legal services sector has remained rare.

In an attempt to continue to spark interest in the legal sector in the field of risk management (and in recognition of recent shakeups such as the failure of a significant national law firm), I thought it was time to revisit the topic of risk management for law firms and set out some examples of practical steps that law firms can take in regards to risk. As a starting point for the discussion, it can be generally observed that organizations fall on a spectrum of awareness regarding risk management. At one end of the spectrum is a reactive organization that has no formalized risk management practices and is applying an ad hoc approach to dealing with unexpected

...continued on page 3

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TOPICS in this issue

Who We Are
The BCLMA, founded in 1972, is a non-profit organization with 140 Representatives and 270 Affiliates across BC. It is the BCLMA's goal to provide educational and networking opportunities, to enhance skills as legal administrators and managers, and to provide professional and personal benefits to its registrants.

Member Services
The BCLMA provides opportunities to network with other law firm administrators and managers at annual Spring and Winter socials, and monthly subsection meetings. We host an annual Managing Partners Event, and a large conference every other year.

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Topics is a public newsletter. Contact the Editorial Committee to provide comments on articles, to offer suggestions for articles in future issues, or to augment the circulation list. We welcome your feedback! Please send comments to membership@bclma.org.

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If you have an article or story idea you would like to submit, please email Heather Ritzer at hritzer@lawsonlundell.com. Please note that our prescribed article length is 1000 words. All submissions will be subject to review by the editorial board.

Risk Management... continued from page 1

events. In the middle of the spectrum is an organization that is aware of risk management and perhaps integrates some level of risk management practice into their everyday business decisions. At the far end of the spectrum is an organization that is addressing risk in a strategic manner through the adoption of a comprehensive risk management program that is addressed in its annual strategic planning process and is integrated into the everyday functioning of the firm.

While there are many different approaches to risk management, a common approach is to follow a step-by-step procedure that begins with establishing the context for the risk management program and ends with the application of what is known as risk treatment. The beginning of any risk management program should entail a consideration of various foundational considerations including establishing baseline definitions of risk for the organization and making clear the goals of the program. The next step in the process is a risk assessment that entails the identification and description of potential risks as well as their evaluation. This is perhaps the most important and time-consuming step. The final step in a basic risk management process includes the development of a plan for the treatment of the priority risks that have been identified. Common treatments include transferring the risk (for example through insurance), treating the risk (by engaging in risk reduction activity) or terminating the risk (by ceasing the risk generating activity altogether). While the steps above are a considerable simplification of the risk management process, they nonetheless capture the common baseline approach to the subject.

In order to make the above discussion less abstract, it is useful to examine a few of the main categories of risk that may be applicable to an average law firm in Canada and that would be considered in the risk assessment steps set out above. A sampling of four of these categories is as follows:

- **Economic risks** are those that arise due to changing economic conditions. An example of an economic risk that had a significant effect on law firms throughout Canada was the crash in the global economy that occurred in 2009
- **Regulatory risks** are those that are associated with new or changing laws and regulations. An example of

...continued on page 4

WELCOME & KUDOS

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Risk Management... continued from page 3

regulatory risk was the closing of the tax loophole regarding income trusts that occurred in 2006 that significantly altered many lawyers practices who focused in this area

- **Environmental risks** are those that are faced due to uncommon, adverse or extreme environmental conditions. An example of an environmental risk that negatively impacted the operations of many law firms in Canada was the ice storm of 1998 in Quebec and Ontario
- **Human Resources risks** are those that arise from the management of human resource functions within an organization. The most pressing example of a human resource risk in the legal marketplace today is the failure of many law firms to adequately plan for succession

As I stated in my column "risk management has grown to become a multi faceted management discipline that is an important component of the strategic management activities of organizations both big and small." Unfortunately, in my experience, while lawyers play the role of risk managers for their clients, the legal services industry itself has been slow to adopt formal risk management processes. While the brief comments above only scratch the surface of this complex discipline, it is my hope that they spur some readers on to research the issue further and consider the application of risk management activities to their law firms.

Michael Litchfield is the Managing Director of Thinklab Consulting and the Director of the Business Law Clinic at the University of Victoria.

Correction Notice

In the Autumn 2014 newsletter of Topics, BMC Networks' ad contained the incorrect street address. Their address is:

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Zen and the Art of Law Firm Maintenance

by Heather Gray-Grant, Business Strategist, Marketing Planner, and Certified Executive Coach

Years back, a friend was shocked when he found out that I ignored the oil change calendar in my new car. "Aside from your house, this is the most expensive thing you own" he explained. "Why wouldn't you protect your investment by doing something so simple to ensure the engine lasts forever?"

Lawyers do this all of the time with something far more important than their cars. Their careers — and for sole practitioners, the success of their firms — is likely the most important financial vehicle of their lives. Yet very few have a long-term strategic plan, short-term business objectives, or a personal business development plan. In the absence of such plans, these lawyers are effectively leaving their futures up to chance.

This isn't the case with virtually all other types of businesses. In fact, professional services are the last bastion of planning reluctance in the business world. Most of your firm's clients have detailed long-term and annual plans in place. Banks require them before lending money. Executives study them before agreeing to join an organization. So what makes law firms immune to this requirement followed by the rest of the business world?

I believe this stems from three core beliefs of most lawyers:

- I will intuitively know how to do the right thing in the moment;
- Years of such moments will result in my business success;
- I can (and should) trust those around me to also do the right thing.

Firms comprised of lawyers with these beliefs feel that planning is too formal and dogmatic, and that the documentation and the inevitable accountability of such processes will work against the collegial culture of their firm. For years, lawyers have made good money despite following these beliefs. I say "despite" because these behaviours were never conducive to business productivity. Lawyers thrived due to marketplace conditions being in their favour, a situation which has been dramatically shifting over the past 25 years. The old way of doing things is no longer valid, or safe.

Some firms intuitively understand this and have attempted to conduct planning processes on their...*continued on page 6*

Zen and the Art... continued from page 5

own, with mixed success. This can be the result of a bad consultant hire, a watered down process by the partnership, or weak implementation. The last point is key: it is rare for a firm to have on its payroll an individual who is both an excellent strategist, and sufficiently objective to view the firm with fresh eyes – qualities required in anyone seeking to take a firm through strategic planning. But it can also be damaging to engage in a planning process that under-delivers or that is insufficiently supported in subsequent implementation. Indeed, many firms eschew planning processes due to bad past experiences. But there's too much at stake for this to be an emotional issue.

Firms without a sound planning process are losing ground against those who take planning seriously. Strong marketing campaigns can gain legal talent and clients over firms with a weaker market presence. Firms with a business vision and processes in place to achieve it are consistently outperforming those whose lawyers simply show up for work each day. This doesn't minimize the quality of legal work being provided at such firms. But as one lawyer told me "I feel like I'm driving down the highway in a BMW, but everyone is passing me in Porsches". Legal excellence is no longer enough.

Plans have a multitude of benefits for law firms, regardless of the size of the firm:

- Long-term plans create a target that all practitioners and practice areas in a firm can aim toward, creating tremendous focus and momentum
- Declared annual business objectives for the firm as a whole provide direction in the short-term, making it much easier for practice areas and individuals to then create their own corresponding business development plans
- Marketing plans focus activities on those items that will most quickly lead toward intended business successes, while simultaneously making it much easier to understand which "opportunities" will actually be a waste of time and money
- Shared marketing plans enable teams to truly work together. This includes sharing marketing duties, benefiting from each other's marketplace reputation, and collectively improving the group's knowledge base
- Planning enables improved cross-selling of existing clients, and better pursuit of new clients
- Planning (and subsequent reporting) results in higher accountability, which (thanks to the lawyer type A personality) results in greater accomplishment

If the value proposition for planning isn't there yet, consider the risk of not planning. Quite apart from the potential erosion of your client base to more active planners in the marketplace, there's also evidence to suggest that strong planning will make it easier to attract and hold onto legal talent. Lawyer attrition is continuing at an alarming rate. It's been suggested that most of the firms that closed their doors in the past few years (such as Heenan Blaikie, Goodman & Carr, Howrey LLP and Brobeck Phleger & Harrison) did so due to the loss of critical lawyers a year prior. I'm increasingly hearing of senior associates asking to see a firm's business plan before considering whether to apply for Partnership. Your most promising and productive lawyers want to know they are in an environment supporting the productivity of all of its lawyers....*continued on page 7*

Zen and the Art... continued from page 6

The existence of strategic plans, annual business plans, practice group and personal plans all provide such evidence.

More importantly, the culture of a firm that is planning-based is visibly different from one that does not do planning. Lawyers in planning firms act more like team members. They interact with each other more frequently and meaningfully. They help each other to market and win clients. They support each other in marketing and reputation enhancement. Increased interdependence improves loyalty, productivity and career satisfaction. What kind of environment would you prefer to work in?

"Planning" is not a dirty word or a waste of time; it is a critical and valuable business process. Done well, it can be the most powerful business management tool your firm will engage in within the next five years. At the very least, it will keep the engines running longer than without it.

Heather Gray-Grant is a business strategist, marketing expert and executive coach specializing in small to medium-sized law firms. Learn more at www.heathergraygrant.com

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Is Your Law Firm Website at Risk?

4 Essential Steps to Cyber Security

by Robert Foley, Co-Founder and Chief Digital Officer at fSquared Marketing

Is the management of your law firm website ultimately your responsibility? Are you being held hostage by your web vendor? Do you even know? If things go wrong, who is left to figure out and manage getting it fixed? Do you know what changes are being made to your website, when and what the contingency is if things go wrong? Who has access to your Content Management System (CMS) and who has direct access to your database files on your server (FTP) and what rights do they have to both? How do you share login credentials? Do people email user IDs and passwords? Do you even know who hosts your site?

If you are in an administration function or have responsibility for marketing or IT at your firm then you probably face some of these issues. You may even find yourself in a position where you are considered the internal resource who should manage all these aspects of your website. "The website is marketing and it has nothing to do with us", is often an opinion expressed by other functions or departments.

Most law firms outsource the development and technical maintenance of their website to a vendor which makes sense and is very practical on a lot of levels. However, every law firm I have worked with lately seems to have very loose controls around how they manage the architecture and security aspects of that site. This usually means that they have given the "keys to the kingdom" to an outside source and are left scrambling when things go wrong. Typically they find themselves locked into a particular website vendor as they are on a proprietary CMS or control has been relinquished to them and they make everything seem somewhat mysterious. The old analogy "knowledge is power" is practiced by many agencies to keep you locked-in and held hostage as a client, and in most cases their clients don't even know that they are essentially victims of a type of "Stockholm Syndrome".

Maybe it's because of my experience at JPMorganChase, building Online Banking, that I know security is paramount. Apart from the obvious issue of bad guys getting access to bank accounts, if our security was compromised all the hard work to convert customers online could be destroyed in one stroke and our brand badly bruised.

So what should you be doing to mitigate this situation and your firm's risk?

STEP 1: PERFORM A TECHNICAL AUDIT OF YOUR LAW FIRM WEBSITE

Well, first let's deal with knowing what platforms and services support your site. In conjunction with your IT department, you should do an inventory to determine the following:

- What company do you use to manage your domain registration and is your company profile up-to-date so they know who to contact when it is going to expire.
- Do you have a monitoring service to let you know when your site goes down and help you protect or clean the website from malware and hacking attacks?

...continued on page 10

Cyber Security... continued from page 9

- Who is your hosting company and do they recognize you as their client?
- What CMS are you on and do you know all the users and their roles?
- Is that CMS open-source or proprietary?
- Are the CMS, and any plugins, running the latest version?
- Do you have Google Analytics and Google Webmaster accounts?
- Do you have firm social media accounts and who has access?
- To what other services do you subscribe in order to support your website?
- While determining what accounts you have, you should also inventory who has access to them or is authorized to speak to an outside vendor, e.g. your host.

STEP 2: TRANSFER TECHNICAL MANAGEMENT OF THE WEBSITE TO YOUR IT DEPARTMENT

Once this audit is complete your IT Department should either ensure that existing IT Policies are applied to the administration of your website or come up with new ones.

Typically, on an ongoing basis, I recommend the marketing department, or those holding this function, should only be responsible for adding new content to your website. All other technical support needs should be managed by your IT department. They can do this either directly or by ensuring they have active service level agreements and policies in place with your various vendors and act as the focal point to manage any changes, issues or updates.

In some cases, this assignment of roles may be resisted by your IT Department as their experience is more than likely focused on supporting a LAN/WAN/database environment. However, being "techies", with a little training it won't take much for them to get up to speed and they might even enjoy developing a stronger relationship with the website.

STEP 3: HAVE AN ID AND PASSWORD MANAGEMENT POLICY

There is plenty of advice out there on how to construct "Strong" user ID's and passwords so I'm not going to repeat that advice here. However, what I don't often see is advice on how to share or administer those ID's and passwords. I can't tell you how many times I have been emailed the ID and password to...*continued on page 11*

Cyber Security... continued from page 10

a law firm's CMS or the FTP login credentials. If your email is compromised, or the person you sent credentials to have their email compromised, then bad guys will have the "keys to your kingdom". You only have to look to the recent hacking of Sony for an example of the impact this can have. In the Sony case, IDs and passwords were stored, unencrypted in word documents by employees of the company. This made it very easy for the hackers to gain deeper access into the company's systems and files, making off with 40GB of data and causing significant damage to internal computer systems.

The best approach from a security standpoint is to share these credential in an offline manner, e.g. face-to-face or over the phone. If you must share the information electronically then split up the ID and password and send them via two different methods, e.g. the ID via email and the password via SMS text message or voice mail. This way the two credentials are divided and it would be harder to discover or recombine them as a hacker. Never store them unencrypted, on paper in your desk drawer or on post-it note under your keyboard!

In addition, if you have to give an ID and password to an outside vendor, or to someone who only needs temporary access to make an update or fix a problem, once they are finished that password should be changed, locking them out of the system. If they need access again, just give them the new password and repeat the process. It's not unheard of for a disgruntled employee to mess with a website and by allowing vendors to have unfettered access you just increase this risk by adding their employee's to the mix.

STEP 4: MANAGE YOUR SITE UPDATES AND PERFORM REGULAR BACKUPS

Before any technical changes or updates are made to your website your IT department should be involved in understanding and documenting what these updates entail, when they will be performed (I prefer weekends), and what the contingency plan is if things go pear-shaped.

This last point leads us to ensuring that your site is backed up. Not just before you make a major change (and also just after) but also on a regular basis. If you don't have a daily automatic backup system, you don't have a backup.

If you follow these basic steps then your firm website will be well on its way to being more secure. You will be more empowered in the overall management of the site and less dependent on outside vendors. If the responsibility is shared internally within your firm, those fulfilling the marketing function will be able to focus more on what they do best and might even gain an ally in the IT department when looking to obtain a budget to improve your law firm website.

Start the New Year by putting your technical house in order, keeping security top of mind. If you need someone to take a look at your website and perform a technical or client usability audit, feel free to contact me at robertfoley@fsquaredmarketing.com or checkout our other website & digital services.

Robert Foley is Co-Founder and Chief Digital Officer at fSquared Marketing a consulting and outsourcing firm serving law firms specializing in Strategic Planning, Business Development and Marketing. He has over 15 years of experience building websites and other digital solutions. For more information, please visit fsquaredmarketing.com.

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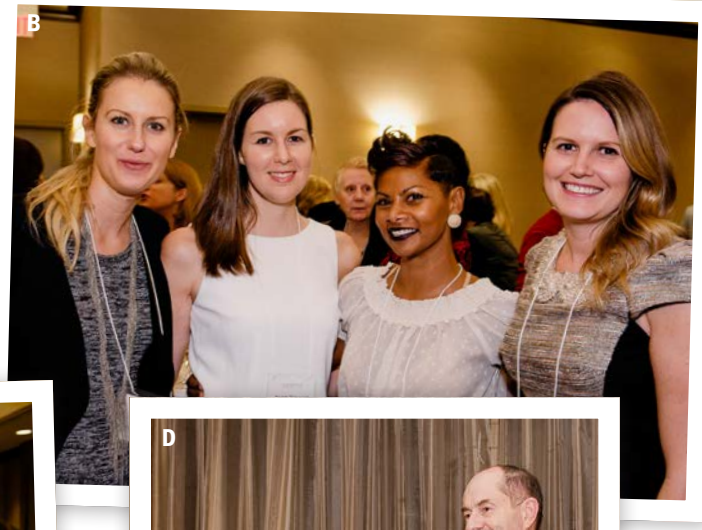

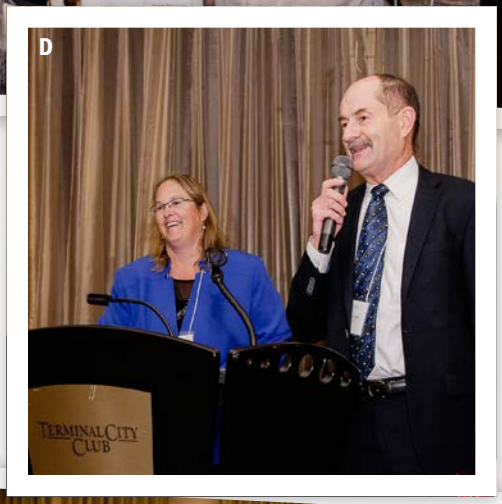

A) Representing the small firm members were Sophie Gourdine (Hamiliton Howell Bain & Gould) Lifen Lee (Hastings Labour Law) Natalie Foley (Miller Titerle) Rubyna Jinnah (Hamiliton Howell Bain & Gould)

B) Avril Tysoe (Boughton Law) Sarah Richmond (AHBL) Priscilla Martindale (AHBL) and Caitlin Turner (Boughton Law) enjoy some holiday festivities.

C) Litigation Support Subsection members: Lisa Rennie (Blakes) Monique Sever (Blakes) Cindy Brandes (Miller Thomson) Lisa Evenson (Harper Grey) take some time to catch up.

D) Leslie Morgan presents Ernie Gauvreau, long time BCLMA Board member with a parting gift. Ernie makes a comic rebuttal.

E) Technology men unite: Rob Walls, (Boughton Law) Technology Co-Chair + Ken Brennan, (Gowlings), Technology Chair, Josh Gardner and Rohan Hare of Harper Grey.

F) The guests, including new BCLMA members David and Enzo, network, mix and mingle. David Smith (Bull Housser), Katie Stowe (Bull Housser), Stella Nillas (Miller Thomson) Lisa Ezaki (Miller Thomson) Enzo Carotenuto (Bull Housser)

BCLMA WINTER SOCIAL

G) Greg Christensen, Erin Bird, Sonia Kenward of Fasken Martineau strike a pose.

H) Lin Kinshore and new member Naomi Anderson of Clark Wilson enjoy the holiday tree.

I) The president's club. Anita Parke (Thorsteinssons) BCLMA 2013 President, Cindy Hildebrand (Richards Buell Sutton) BCLMA 2012 President, Leslie Morgan (Harper Grey) Current BCLMA President.

J) Jacquie Wintrup, Janice McAuley, Shauna Sigurdson (Litigation Support Co-Chair) all from Lawson Lundell.

K) Judie Boroevich, Charmaine Hall, Andrea Russell of BLG with Parm Ahuja-Robertson of R.JOHNSON are getting festive.

L) Jodi Hunt (Blakes) and Christina Hughes (Klein Lyons, also the Facilities Co-Chair) look forward to a happy holiday.

Loose Lips Sink Settlements

by Preston Parsons, Associate Lawyer at Overholt Law

It is common for employers to offer departing employees severance of some amount in exchange for a release of claims the employees may have against the company. Confidentiality clauses are usually a key element of the release as they ensure that former employees do not tell others what they received upon leaving the company, and potentially, do not disclose particulars of events leading up to the termination of employment.

What happens though if the employee breaches the confidentiality provision? Will the clause have any teeth?

Consider the following example. Your firm decides to terminate the employment of a senior paralegal named Leslie and puts together a generous severance package for her worth $60,000.00. Leslie agrees to sign a release including a confidentiality clause to obtain the severance package. The confidentiality clause states that the existence of the severance package and release, along with the terms therein, are to be treated as confidential and are not to be disclosed except to immediate family and professional legal and financial advisors, and only after such persons have been advised of the confidentiality of the agreement.

Three months later, you are at home after a long day at the firm and notice on your Facebook wall that the former employee is in Mexico. To your shock, her Facebook status says:

> While I was bummed out for the last 3 months about being let go by my firm, I now realize it was the best thing that could have happened to me! $60,000.00 buys a LOT of margaritas down here in Puerto Vallarta! #suckers #glassmorethanhalffull #gladtheydiditbeforeIquit #paralegalsgonewild

You are the executive director of the law firm and handle human resources matters. What can you do?

Recent decisions from Ontario have commented on precisely this issue.

In *Tremblay v 1168531 Ontario Inc., 2012 HRTO 1939* ("Tremblay"), the Ontario Human Rights Tribunal ruled that a former employee of a fast food franchise in Cornwall, Ontario breached the confidentiality clause of a settlement agreement she had entered into with her former employer by posting three comments on Facebook:

> "Sitting in court now and _____ [blank in original posting] is feeding them a bunch of B.S. [original not reproduced here]. I'm not leaving here without my money... lol."
> "Well court is done didn't get what I wanted but I still walked away with some..."
> "Well my mother always said something is better than nothing..."

The employer was alerted to these comments the day after the settlement agreement was signed and refused to pay any of the settlement funds. The employer took the position that Ms. Tremblay's breach of the settlement agreement rendered the agreement null and void and extinguished its obligation to pay the settlement funds. Ms. Tremblay argued in defence that she had not mentioned the employer by name in the posts and that Facebook was private. She also argued the employer's refusal to pay was a breach of the agreement.

The Tribunal noted that a breach of the confidentiality clause of a settlement agreement is a serious matter and found that Ms. Tremblay had breached the confidentiality clause. The Tribunal also found that the employer's reaction in refusing to pay the

...continued on page 15

Loose Lips... continued from page 14
settlement funds was "understandable" but constituted a breach of the settlement agreement. In the circumstances of this case, the Tribunal found the employer was entitled to a $1,000.00 reduction in the settlement funds as a result of Ms. Tremblay's breach, and Ms. Tremblay was entitled to pre-judgment interest from the date of the settlement.

Other cases since Tremblay have continued a pattern of awards in the range of $500.00 to $1,000.00 for breaches of confidentiality clauses in settlement agreements. However, in the case *Globe and Mail (The) v. CEP, Local 87-M, Re, 2013 CarswellOnt 9956* ("Globe and Mail") a much stronger remedy was available to the employer.

In Globe and Mail, the settlement agreement and release contained a confidentiality clause and also contained a built-in remedy clause for repayment in the event of a breach:

> Should the Grievor breach the obligations set out... Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor...

In May 2012, the Grievor published a book, which caused the Globe to initiate proceedings to recover under the terms of the agreement. The Arbitrator found that 4 specific statements amounted to a breach of the agreement and upheld the repayment clause, forcing the employee to return the settlement funds. Of importance were the facts that both parties were experienced and sophisticated, the negotiations over the agreement were lengthy, both sides were represented by counsel, and both sides understood the terms of the agreement.

Placed side-by-side, these decisions make it clear that confidentiality terms in settlement agreements will be enforced in appropriate circumstances and can lead to the payment of monetary damages, particularly where well drafted repayment clauses are included and the departing employee receives time to review the agreement and seek independent legal advice.

With respect to my earlier example with Leslie, given that she disclosed the actual amount of the settlement funds, there is a good argument to be made that she should be penalized by more than a nominal amount, even without the repayment clause from Globe and Mail. The firm would need to bring an action to recover; however, it is an opportunity for an articling student or junior associate to get court time!

Knowing this, the better proposition is to prevent the problem. Emphasize the confidentiality provision at the time of settlement, include a repayment clause, and give Leslie some time to review it. I guarantee she will think twice before saying the same thing on Facebook.

Note: My thanks to our paralegal practicum student Laura for her edits to this article, her excellent judgment on social media, and for never threatening to randomly leave for Mexico when we need her.

Preston Parsons is an associate lawyer at Overholt Law, practicing in the areas of employment and labour relations, human rights and privacy law. Overholt Law is a boutique employment and labour relations firm located in downtown Vancouver, British Columbia. For more information regarding Overholt Law, please visit www.overholtlawyers.com.
These tips are provided for general informational purposes only and do not constitute legal advice.

Are You Next? Responding to a Privacy Breach

by Bailey Jung, Owner/Founder of Silver Bullet Shredding

Turn on the Six O' Clock News or open up a newspaper and chances are that somewhere another privacy breach incident has occurred. No organization, regardless of size or whether it is in the public sector or the private sector is immune from the threat of a privacy breach. Law firms, with the highly confidential and sensitive nature of information they handle need to be well prepared if the unthinkable happens. This article takes you through a hypothetical scenario and the basic steps you need to take in the event of a privacy breach incident.

SCENARIO

You send your Administrative Assistant to the public storage facility where your client files are stored to retrieve a half dozen boxes. On the way back to the office, she stops for a quick coffee at the local Starbucks. When she returns to her car 10 minutes later, she discovers that the back window has been smashed and 2 of the 6 boxes are missing. What do you do?

STEP 1: CONTAIN THE BREACH

- Immediately contain the breach by securing the remaining four boxes so that they are safe and cannot be accessed by anyone. In this case, you may lock the boxes in the trunk until they can be safely transferred to another vehicle.
- Next, immediately contact your Privacy Officer or the person responsible for privacy and security in your organization.
- Develop an immediate plan to safely transport the remaining boxes to the office so that you can determine how serious the breach is and what kind of information has been stolen.
- Notify the Office of the Information and Privacy Commissioner's office if the breach is potentially quite serious.
- Notify the police if the breach involves theft or other criminal activity.

STEP 2: RISK ASSESSMENT

There is no one-size-fits-all response to a privacy breach. The level of intervention will depend largely on a number of factors. Some personal information is more sensitive than others and presents a higher degree of risk. For example, health information, government-issued pieces of identification such as social insurance numbers, driver's license, and health care numbers comes to mind. Financial information are also highly sensitive and require a different response than say, a client list with names, addresses, and telephone numbers.

Important questions to determine the seriousness of the breach include the following:

- What possible use is there for the personal information?
- Can the information be used for fraudulent or otherwise harmful purposes?
- Is the cause of the breach known?
- How did it happen?
- Was the information lost or stolen?
- If stolen, was the information targeted or not?
- Has the information been recovered or is it still missing?
- Was this an isolated incident or was the breach part of a much bigger problem?
- How many individuals are affected by the breach?
- What harm to the individuals could result from the breach?
- Are there any immediate steps that can be taken to minimize potential harm?

STEP 3: NOTIFICATION

The outcome of your risk assessment will determine whether notification of affected

...continued on page 18

Are You Next?... continued from page 17

individuals is appropriate. A key consideration is whether notification is necessary in order to avoid or mitigate harm to an individual whose personal information has been inappropriately collected, used, or disclosed.

Some factors to consider include the following:

- Does current legislation require notification in the circumstances?
- Are there any contractual obligations that require notification?
- Is there a risk of identity theft or fraud?
- Is there a risk of physical harm? (will the loss put an individual at risk of stalking or harassment)
- Is there a risk of hurt, humiliation or damage to one's reputation? (for example when the information lost includes medical or disciplinary records)
- If notification is necessary, it should occur as soon as possible following the breach.

The preferred method of notification is by phone, letter or in person unless it is impractical or cost prohibitive to do so directly. Using multiple methods of notification in certain cases may be the best approach. For example, a combination of direct notification as well as indirect notification such as through your website, posted notices, and through the media.

When notifying an individual who has been affected by a breach, it is important to be transparent and provide as much information as possible. Include the date of the breach, a description of the breach, the type of information that may be compromised, the risk(s) to the individual caused by the breach, the steps taken so far to manage or reduce the harm, steps the individual can take to further mitigate or reduce the harm, and a contact person within the organization who can answer questions and provide further information.

Apart from notifying affected individuals, an organization will also need to determine if other authorities or organizations need to be informed of the breach.

For example, professional or other regulatory bodies may need to be notified. In some cases, insurers if required by contractual obligations will also need to be notified.

STEP 4: PREVENTION

The final step in dealing with a privacy breach is to put in place proper procedures and safeguards to ensure further breaches do not occur again. For example, in the hypothetical scenario described in this article, it may mean developing a policy that requires all important documents and files to be locked in a truck and not in plain view when being transported from the storage facility to the office. If the breach was the result of a much larger problem, then developing and implementing proper procedures and protocols along with a more comprehensive security audit may be necessary. Policies should be reviewed and updated periodically, say annually to ensure best practices are adopted. Finally, an organization's plan should be tested perhaps with a "dry-run" to see how an organization would actually fare in a real breach incident. By simulating an actual crisis breach, you will be able to identify gaps that needs to be addressed before an actual breach occurs.

Bailey Jung is the owner/founder of Silver Bullet Shredding, a Burnaby-based document shredding firm. Contact him at bailey@silverbulletshredding.com or 604.708.4200

BCLMA Managing Partners' Speaker Event

BCLMA held its annual Managing Partners' Speaker event on Wednesday, November 5, 2014 at the Four Seasons Hotel.

The presentation 'Trends Reshaping the Legal Industry: Social Media, the Generations and Your Firm – Ready or Not? was delivered by innovation and trends expert Max Valiquette.

Max's engaging presentation emphasised that to keep clients in today's climate and to attract new ones depends more and more on legal providers' understanding of technology trends, demographics, the internet and social media.

92 Representatives and Managing Partners attended the event. Leslie Morgan, BCLMA president, opened the event and thanked our 2014 Premier Sponsors Corporate Couriers Logistics, Dye & Durham Corporation and Hub International.

Researching Expert Witnesses

by Patti Wotherspoon, Assistant Manager of InfoAction, and Alyssa Green, Manager of InfoAction

Expert evidence is an important part of the litigation process. An expert witness has the power to greatly influence a judge or jury's opinion of a case by evaluating evidence of a technical or complicated nature and presenting their opinions in an understandable manner.

In recent years, however, there have been challenges to the use of expert witnesses in Canada and elsewhere. Accusations of impartiality of the expert to the case at hand or lack of competence in the particular subject matter can seriously undermine the usefulness of their evidence to the Court. Further, the Court may hold the witness elector responsible if the expert witness proves unreliable or gives false testimony.

Researching the background of your expert witness in order to establish their reputation, professionalism, and relevant qualifications is an important first step before enlisting expert evidence.

MINIMUM REQUIREMENTS FOR BACKGROUND REPORT

Prior to providing testimony the expert must be qualified by the Court. A 2013 study commissioned for the Canadian Institute of Chartered Business Valuators indicates that, at a minimum, expert witnesses in Canada are required to have:

- A background report of their qualifications, including indication of their employment and educational experience in their area of expertise
- A rationale based on fact and experience that led to the forming of their opinion
- An indication of any data that is outside their realm of expertise

While these requirements meet baseline expectations, many Canadian judges expect that a witness presented to them will have been thoroughly researched above and beyond the minimum requirements. They want to be able to easily verify that the witness possesses the requisite credentials and expertise to act in an expert capacity.

GENERAL GUIDE TO EXPERT WITNESS RESEARCH

When evaluating an expert's qualifications, the assessment may be based in large part on information in the expert's curriculum vitae. Though this is a logical starting point for the research process, it is also important to look outside of the witness's self-published documentation to ensure the individual has not exaggerated or falsified qualifications. While a basic Internet search may locate some information, a biographic profile of the ideal expert witness should be compiled from a range of trusted sources.

KEY RESOURCES

The following resources, while not comprehensive, do provide a brief overview of some key tools for locating and vetting expert witnesses. Your local public library can also be a resource for additional databases and directories.

FINDING EXPERTS

Expert directories are a good starting point for sourcing potential experts or locating an expert's "marketing profile". These specialized directories often include short biographies, contact information, and links to each expert.

FREE DIRECTORIES

- National Expert Witness Academy Directory [Canadian]
- Jurispro Expert Witness Directory [US]

SUBSCRIPTION-BASED DIRECTORIES

- WestlawNext Canada Litigator Expert Witness Directory
  Profiles of experts from across Canada and the United States for a broad range of medical, technical, scientific, business, and family law issues

University websites can help locate faculty who perform research in a specific area who may be a potential expert. Some universities include faculty CV's, publications, professional affiliations and more on their website.

UNIVERSITY WEBSITES

- UBC Experts Guide
- SFU Experts Guide

...continued on page 21

Researching... continued from page 20

Professional associations can be useful for finding experts in a specific or obscure field.

- Associations Canada Directory. Provides contact information for thousands of associations. Available online through a number of public libraries with a valid library card.
- British Columbia Business Associations Directory.

VETTING EXPERTS

Educational & Professional Credentials including degrees, professional licenses and association memberships should be verified, with special attention paid to past disciplinary actions brought against the witness that could discredit his or her testimony.

- Associations or professional regulatory bodies usually provide information on membership and disciplinary history if you contact them directly. Some publish membership details on their website.
- Academic qualifications checks are increasingly outsourced to online services that allow you to verify whether a stated degree has actually been obtained: Subscription-based sources for degree verifications include:
  - Auradata [Canada]
  - National Student Clearinghouse [US]
  - HEDD [UK]

Publications by the witness should be reviewed to confirm they have not falsified their expertise nor published an opinion that is contradictory to the opinion to which they are testifying.

Confirm articles, books, and other publications using:

- Free periodical databases: Google Scholar; Medline/PubMed.
- Fee-based sources: Academic Search; Elsevier; Web of Science
- Library catalogues: Library of Congress; AMICUS

Prior Experience as an expert must also be verified. Any previous testimony by the witness should be reviewed in order to ascertain experience.

- Daubert Tracker Case Reports: summarize opinions addressing the admissibility of expert witness testimony [Subscription-based]
- Case law databases: Canlii.org [free]; Quicklaw; LexisNexis. Use to locate summaries or transcripts of the expert's past courtroom appearances

...continued on page 22

SAVE THE DATE

BCLMA Educational Event
Generations Exposed! Unexpected Insights Into The People You Work With Guest Speaker: Merge Gupta-Sunderji
Wednesday, March 25, 2015 from 11:45 am - 2:00 pm
Hyatt Hotel, Vancouver

BCLMA Annual General Meeting
Friday, April 10, 2015 from 12:00 pm - 1:30 pm
Gowlings LLP

For more information, visit www.bclma.org

Researching... continued from page 21

Public Statements made outside litigation can be damaging to your expert's reputation. Search news and social media sources to uncover references in articles, interviews, opinion pieces, blog posts and more.

- Media search: Free sources: Google News; Canadian Newswire; Business in Vancouver
- Fee-based: FP InfoMart; Factiva; LexisNexis news
- Discussion board postings & blogs: Google Groups

Public Records answer important questions your may have about your witness. Is your expert a party to pending litigation? Named as party in civil or criminal filings?

- Court filings: BC Court Services Online; US Party Case Index; Equifax Commercial Law Records [subscription-based]
- Labour arbitrations/disciplinary proceedings: Canlii.org; Quicklaw

Does your expert have a potential conflict of interest with party in question? Search for corporate affiliations, employment and investments using:

- Free: SEC Edgar; SEDI; InfoTSX Venture
- Fee-based: Canada Stockwatch

Patents may be held by some experts. Search for useful information about patent applications:

- Canadian Intellectual Property Office; US Patent & Trademark Office

No time to conduct an extensive search? Consider outsourcing your research services:

- LexisNexis Expert Research on Demand
- Thomson Reuters Expert Witness Service

Patti Wotherspoon is an information specialist with InfoAction, Vancouver Public Library's fee-for-service research division. She has over 15 years specializing in business and legal research.

Alyssa Green is the manager of InfoAction. She is an experienced business and legal researcher who specializes in small business and market research. For more information, visit www.vpl.ca/infoaction/

The Next Wave of Canada's Anti-Spam Legislation: Installation of Computer Programs and Transmission Data

by Nathan Schissel, MacPherson Leslie & Tyerman LLP. Originally published in MLT Lawyers' bulletin *Intellectual Property Advisor*.

On July 1, 2014, the first part of Canada's Anti-Spam Legislation ("CASL") came into force and created new rules for sending emails and other electronic communications. In the months leading up to July 1, most Canadian consumers were flooded with requests from businesses for their consent to receive commercial electronic messages. Since that time, many businesses have taken steps to interpret and comply with these new "anti-spam" provisions by updating email practices and developing anti-spam policies or procedures.

However, it is important to remember that CASL is more than just an "anti-spam" law.

Additional parts of CASL will come into effect on January 15, 2015, that will impose new rules and restrictions on the installation of computer programs and the alteration of transmission data. These new provisions are worded very broadly and can be challenging to interpret and apply.

NEW COMPUTER PROGRAM INSTALLATION RULES

Generally speaking, CASL prohibits anyone from installing, in the course of a commercial activity, a computer program on any person's computer system, without the express consent of the owner or authorized user of the computer system. These provisions will apply to almost all computer programs (including software and mobile apps) that are installed on computing devices (including tablets and smartphones) as part of a commercial activity.

CASL applies to anyone who installs software in Canada, and to persons inside Canada who install software on computer systems outside of Canada. In both cases the installation must be done in the course of commercial activity for CASL's software provisions to apply. It is important to note, however, that under CASL, "commercial activity" does not require an expectation of profit and, as a result, these rules will also affect free downloads.

CASL considers "computer programs" to include both software applications and updates to applications. Therefore CASL will apply where a computer program causes updates to be installed automatically without the user's knowledge and consent. If updates and upgrades to previously installed computer programs are not intentionally self-installed by the owner or authorized user of the computer system, CASL will apply and express consent will be required.

The CRTC (the federal agency responsible for enforcing CASL) has recently clarified that the CASL rules do not apply when the owner or authorized user of a computer or device intentionally installs a computer program on the computer or device.

CONSENT REQUIRED

The person who installs the computer program must obtain the express consent of the computer system's owner or authorized user. Under CASL, this express consent must be obtained before the software is installed.

CASL requires the following to be clearly and simply set out when seeking express consent to install a computer program: the reason consent is sought,the mailing address and one other piece of contact information that identifies the person seeking consent and any person on whose behalf consent is sought,a statement indicating that the person whose consent is sought can withdraw their consent

...continued on page 24

The Next Wave... continued from page 23
at any time, and the function and purpose of the computer program to be installed.

Additional disclosure is required if the computer program performs certain prescribed functions (such as interfering with control of the computer, collecting personal information or changing the computer's settings or commands).

Under CASL, a person is deemed to consent to the installation of certain kinds of computer programs (including cookies, HTML or Javascript), provided that person's conduct is such that it is reasonable to believe that the person consents to the installation.

The CRTC has confirmed that a person who seeks and obtains consent to the installation of a computer program has the burden of proving the consent.

TRANSITION PERIOD

CASL provides a three-year transition period that applies to updates and upgrades to computer programs that were installed prior to January 1, 2015. Specifically, computer programs that were installed prior to January 15, 2015, may be upgraded or updated without express consent until January 15, 2018. The owner or authorized user can withdraw his or her consent during this period, and after January 15, 2018, the owner/authorized user's express consent must be obtained to install updates and upgrades to existing computer programs.

ALTERING TRANSMISSION DATA

As of January 1, 2015, CASL will also prohibit altering transmission data in the course of a commercial activity. Specifically, CASL will prohibit altering (or causing to be altered) transmission data in an electronic message so that the message is sent to a destination other than one specified by the sender (unless the sender or the recipient is obtained and the sender provides an opt-out mechanism).

The alteration of transmission data in this fashion usually results from malware and viruses and, for the most part, these rules will have little application to legitimate businesses. Nonetheless, if an organization's IT system is hacked causing it to violate this prohibition then that organization could be liable under CASL.

PENALTIES AND ENFORCEMENT

A failure to comply with these new requirements under CASL can result in fines of up to $10,000,000 (per violation) for organizations, or $1,000,000 (per violation) for individuals. Employers can also be held liable for their employee's actions if the employee was acting within the scope of his or her employment, and directors and officers can be held personally liable for violations of the legislation.

CONCLUSION

The next wave of CASL will have implications for every business that offers software, apps or other computer programs for purchase or download. As a result, these businesses need to be aware of the application of CASL's rules, consider the implications the rules have on business activities, and implement appropriate compliance measures.

Nathan Schissel is a partner practising in the area of corporate and commercial law with a focus on technology law, outsourcing, procurement, health care law, mergers and acquisitions and corporate finance. He can be reached at nschissel@mlt.com.

BCLMA 2015 Schedule of Annual Surveys

by Bob Waterman, Chair of BCLMA Survey Committee

Surveys provide valuable data to law firm managers. The more firms that respond, the more accurate the results; we need your input. The BCLMA surveys are distributed throughout the year at a time that should work for the majority of participants. Your comments are welcome on any of the surveys, so please contact Bob Waterman, Chair of the BCLMA Survey Committee, via email: bwaterman@rbs.ca.

SURVEY	DISTRIBUTION DATE	REPLY DEADLINE	PUBLICATION DATE	SURVEY CO-ORDINATOR
Associate Salaries	March 2	March 16	April 1	Bob Waterman
Law Firm Economics	April 1	May 1	June 15-19	Sandy Delayen
Biennial Disbursement Survey	April 1/16	April 15/16	May 1/16	Chair of Facilities
Staff Ratios	May 1	May 15	May 29	Wayne Scott
Support Staff Salaries	September 1	October 1	November 2	Raf Sansalone
Billing Rates	September 1	October 1	November 2	Raf Sansalone
Management Staff Salaries	October 1	October 16	November 2	Leslie Morgan

- Note that the Biennial Disbursement Survey has been added. This survey will be done every other year with the next one scheduled for 2016.
- The Law Firm Economic Survey will be compiled by Wolrige Mahon LLP, which has conducted the survey for BCLMA for a number of years.
- The Support Staff Salary Survey will be compiled by Western Compensation & Benefits Consultants and distributed by the CBA with significant input from BCLMA.
- Benefits and Charge-out Rates are part of the Support Staff Salary Survey.

We publish the names of the law firms who participate in the surveys, however, no direct links or references to any of the results are made public, nor are they available for confidential viewing.

— BCLMA Survey Committee

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