TOP 10
LEGAL RISKS FOR BUSINESS
IN 2017

Borden Ladner Gervais
It begins with service

CANADA'S NATURAL RESOURCES

MANAGEMENT OF INFRASTRUCTURE

CONDUCT RISK

CYBERSECURITY & DATA PRIVACY

INNOVATION DISRUPTION FINTECH

MEDICAL CANNABIS

EMPLOYMENT AGREEMENTS

GLOBAL TRADING

SHAREHOLDER ACTIVISM

SECURITIES REGULATION

TOP 10 LEGAL RISKS FOR BUSINESS IN 2017

Today's business leaders are facing unprecedented volatility and uncertainty. World markets are pressured by a unique combination: weaker growth from a sluggish global economy and rising political risk from a surge in populist governments that are determined to topple the status quo.

Rich countries are stuck in a "slow-growth trap" according to The Organization for Economic Co-Operation and Development (OECD), because aging societies and diminished productivity gains have kept growth stubbornly in the 1-2 per cent range. At the same time, technology is producing incredible new opportunities for highly skilled, highly paid workers, while automation is reducing demand and wages for low-skilled workers. This has produced popular anger – incorrectly blaming trade and immigration – that has given us Brexit, the election of President-elect Trump, and populists surging at the polls throughout Europe.

For Canada, we have our own unique challenges. Consumers are highly indebted and our housing market is bubbly in certain areas. Business investment has fallen six quarters in a row as reduced capital expenditure in the natural resource sector is swamping gains in manufactured goods and services. The government is providing stimulus, but exports are weak. These are difficult times for the Canadian economy.

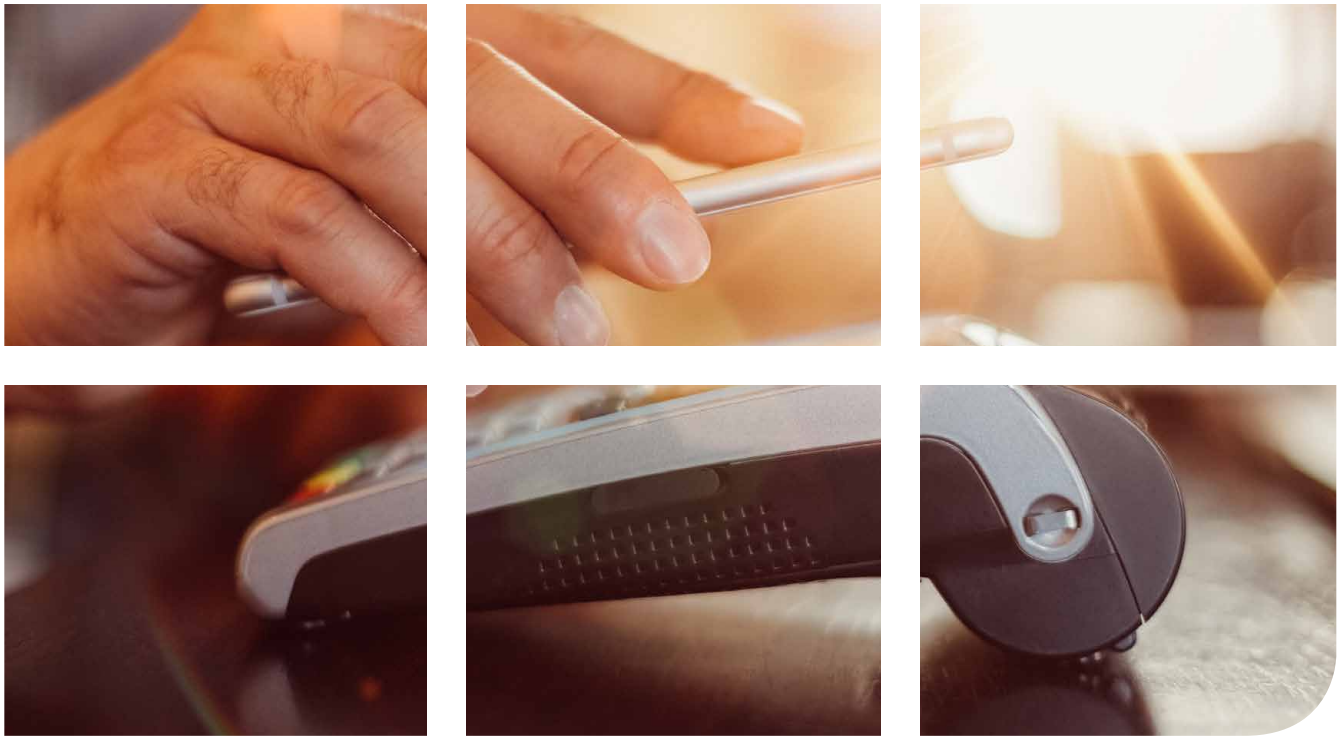
Still, there are incredible opportunities out there. Canadian business is innovative and we have the most skilled workers in the world. Canada is uniquely positioned with a Federal Government that is opposing the populist nationalisms, by remaining strongly pro-trade and pro-immigration. And we soon should have access to the 600 million people in the European Union thanks to CETA.

Warren Buffet's advice – to be fearful when others are greedy and to be greedy when others are fearful – has never been more relevant. In a tough environment, Canadian businesses can gain first-mover advantages by taking action when others are worried about uncertainty. But you have to be aware of the risks and be able to manage them. That's why we are very excited to be part of BLG's *Top 10 Legal Risks for Business*; all of these issues are critical for business success.

Hendrik Brakel
Senior Director, Economic, Financial and Tax Policy
The Canadian Chamber of Commerce

All dollar amounts referenced in this document are in Canadian dollars unless otherwise indicated.

1 TECHNOLOGY TRANSFORMATIONS



Innovation, Disruption and the Regulation of Fintech

We are witness to sweeping changes taking place in Canada and the world in the delivery and operation of financial products, services and technologies.

"Fintech", or financial technology, is the term that is now commonly used to refer to innovation – some would say disruption – in financial services. Of course, mention the word "financial" in the same breath as "innovation" or "disruption", and invariably regulators will think of another word: "risk". Prudentially and sensibly regulating the financial sector to manage risk, not to mention market conduct, consumer protection, money laundering and market integrity, among other important areas, is the collective job of our various Canadian regulators. However, the Canadian regulatory framework is an uneven, fragmented, divergent and overlapping patchwork when it comes to fintech. The identity of the regulator and the nature, scope and degree of any applicable regulation depends on the entity and the type of product or service involved.

Federal financial institutions are regulated primarily (and quite extensively, including capital requirements and risk exposure) at the federal level, with the possible overlay of provincial and territorial consumer protection, privacy and insurance laws. Meanwhile, fintech companies are only lightly regulated under provincial privacy and consumer protection laws and to some degree under federal privacy, anti-spam, anti-money laundering and competition laws. It is only in the area of securities regulation, which is still an area of predominant provincial jurisdiction, that there is some degree of equality between broker-dealer incumbents and fintech companies. Provincial securities laws apply to fintech activities such as raising the capital required for funding online lending and registration requirements for robo-advisor portfolio management. That said, progressive securities regulators are looking to potentially tailor their regulatory model to better fit this quickly changing financial landscape. Still, outside of securities laws, for the most part, particularly at the federal level, the regulatory rules of the game are determined by who the player is, rather than the game they are playing.

Operating in a newly developing sector, this leaves independent fintech companies with much more flexibility than their more established and more regulated financial institution competitors. The incumbents and traditional financial institutions in Canada are, of course, not standing still in the face of this onslaught of change. They are actively examining their businesses and operations and taking steps to address these changes and to determine how to face this unregulated competition.

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Canadian fintech investments saw an INCREASE of 51% in 2014 with an investment of US$6.8 BILLION.[1]

The global investment in fintech for 2015 US$19.1 BILLION 36% over 2014.[2]

Canadian Financial Sector IT spending is expected to INCREASE to US$14.8 BILLION by 2018.[1]

Adoption of fintech products set to TRIPLE in one year.[3]

1 https://www.marsdd.com/wp-content/uploads/2015/02/Ten-Surprising-Facts-about-Fintech-in-Canada.pdf

2 https://home.kpmg.com/content/dam/kpmg/pdf/2016/06/pulse-of-fintech-2015-review.pdf

3 http://business.financialpost.com/news/fp-street/canadian-adoption-of-fintech-products-set-to-triple-in-a-year-report

Cybersecurity and Data Privacy

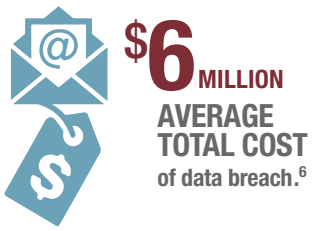
The *Annual Privacy Governance Report 2016*[4] recently published by Ernst & Young and the International Association of Privacy Professionals states that privacy is now a board-level issue for 73 per cent of all organizations. Specifically, 14 per cent of Canadian privacy professionals are reaching the C-Suite and more than 50 per cent of privacy leaders are within two rungs of the CEO position.

Upon security breaches taking place, privacy commissioners will often take the opportunity to provide guidance as to what types of measures are adequate under applicable data protection laws. In recent months, many regulators have provided guidance on the development and implementation of adequate cybersecurity measures and protocols. Businesses therefore have to stay up to date on the data privacy and security legal guidance which is quickly evolving. With the new *Personal Information Protection and Electronic Documents Act* (PIPEDA) breach notification and recordkeeping requirements coming into force in the near future, providing that it will be a criminal offence for an organization to knowingly fail to report breaches, punishable by significant fines, many businesses are preparing by investing in breach incident management response plans, adopting relevant breach response and recordkeeping policies, and training their staff on how to report and adequately respond to security breaches.

Following the Ashley Madison security breach, which exposed the personal information of some 32 million users of the online dating website, the Office of the Privacy Commissioner of Canada released an important report which raised a number of key elements and recommendations for all organizations subject to the federal PIPEDA. The report sheds light on several issues, such as the need to implement safeguards supported by an adequate information security governance framework; the risks associated with charging a fee for the deletion of user profile information; the issues pertaining to the long-term retention of information contained in inactive or deactivated customer profiles; the importance of email verification (when collecting email addresses); and the impact of false or misleading security seals or icons.

In last year's report, we discussed the growing trend towards privacy class actions being filed following a security breach or a business practice breaching applicable data protection laws. We note that there are currently 33 privacy breach class actions pending in Canada. While cases like Ashley Madison get most of the attention, there are more internal privacy breach cases than external ones: 79 per cent of pending privacy breach class actions are employee-generated. In 2016, settlements were reached in two privacy class actions cases, which may provide incentive for additional claims being filed in the future, if they are not being litigated.

New technologies are also presenting additional privacy and data security challenges. Wearable technologies and related apps and services, which can use sensors to collect environmental, behavioural, and social data from consumers or employees are gaining in popularity. With the Internet of Things, seemingly mundane everyday devices are fitted with microchips, sensors, and wireless communication capabilities. These recent innovations may trigger additional privacy and data security challenges that have to be considered when a business is assessing its legal risk exposure.



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4 https://iapp.org/media/pdf/resource_center/IAPP%202016%20GOVERNANCE%20SURVEY-FINAL3.pdf

5 http://www.pwc.com/ca/en/media/release/2016-1-13-cyber-security-in-canada.html

6 http://globalnews.ca/news/2793414/average-cost-of-data-breach-in-canada-is-6-03m-study/

7 http://www.theglobeandmail.com/report-on-business/cyber-attacks-have-hit-36-per-cent-of-canadian-businesses-study-says/article20096066/

2 MARKET CONCERNS

Shareholder Activism Gets Ugly

Compared to the record setting year of 2015, shareholder activism in Canada in 2016 returned back to historic levels, with the mining and energy sectors being most frequently targeted by activists. Interestingly, Canadian issuers generally prevailed in proxy contests against shareholder activists in 2016. This contrasts with the general success that activists experienced in prior years in Canada and continue to experience in the United States. Overall, these results suggest that corporate Canada has become more prepared in responding to activists, particularly through the adoption of advance notice bylaws and policies.

So, should Canadian boards and management rest easy when it comes to shareholder activism in 2017? Probably not.

First, there may be an influx of more-sophisticated activists into the Canadian landscape. Well-financed U.S. activist funds are turning their attention to Canadian and European issuers, as the number of activist-susceptible targets in the U.S. which can generate positive returns for these funds begin to dwindle. Additionally, short seller funds, which have become increasingly active in the Canadian market, have begun adopting activist strategies. Even private equity firms, which previously focused on distressed and undervalued situations, have begun to adopt activist tactics, as seen from Catalyst Capital Group's opposing Corus' acquisition of Shaw Media.

Secondly, activists have continued to be successful in Canada with specific strategies. For example, activists seeking to elect minority, rather than majority, slates were highly successful in 2016. Similarly, where a former founder, CEO or director of a corporation engaged in activism, it also tended to be successful.

Third, activists have been employing "scorched earth" tactics with greater frequency, which increases the time, expense and distraction for target issuers. In Raging River's unsuccessful proxy fight against Taseko Mines Limited, for example, the activists: alleged that the target was about to undertake a dilutive equity financing and that its directors and officers had engaged in insider trading; launched an oppression action; threatened defamation litigation; and misrepresented the nature of their investment in the target.

Finally, new takeover bid rules adopted in May 2016, which extend the minimum deposit period under a bid from 35 days to 105 days and introduce a mandatory 50 per cent minimum tender condition, may push potentially hostile strategic investors towards the use of proxy fights over takeover bids.

Lessons that issuers can take away from Taseko Mines Limited's successful defence against activism include: (i) respond to activism by adopting beneficial corporate governance changes; (ii) push back and ensure that the activist is providing complete and accurate disclosure; (iii) directly respond to each activist allegation with facts; and (iv) communicate frequently with major shareholders and proxy advisory firms.

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The number of board seats sought by activists has almost doubled from **23** TO **43** BETWEEN 2010 - 2015.[8]

A sharp increase in activist activity in the past 5 years, with **300** companies worldwide subjected to public demands in the first half of **2015.**[8]

FOR **OVER 50%** OF FUNDS SURVEYED **the most cited non-U.S. jurisdictions being considered for activist investments were Canada and the U.K.**[8]

US$169 BILLION GLOBAL TOTAL ASSETS managed by funds or investors with a primary focus on activist investing.[8]

8 http://www.fticonsulting.com/~/media/Files/us-files/insights/reports/shareholder-activism-parti.pdf

Conduct Risk is an Increasing Threat

All corporations should be concerned with conduct risk in 2017. The threat of loss, both financial and reputational, due to the actions of one, or many, managers or employees is greater than it has ever been.

Every business today is faced with heightened media scrutiny and public expectations. In a world of instantaneous and unrestricted communications, the ability of individual customers, users, observers or even competitors, to spread information about grievances (real or imagined) and to seek action, is unparalleled in business history.

We see conduct risk as an increasing threat in 2017, as a number of factors converge:

- The pressure to meet high performance targets in a low-growth world is likely to lead to more frequent incidences of unethical or illegal conduct.
- The increasing regulatory burden in many industries is putting an added strain on already constrained corporate resources, both in operational and compliance functions.
- Social media is amplifying public scrutiny and expectations regarding corporate behaviour are changing accordingly.
- The public's level of trust in business people and tolerance for their missteps is quite low.

All of this is likely to translate into a greater focus on business conduct, corporate culture and ethics.

On the regulatory side, we can expect continued debate and discussion regarding the adequacy of disclosure requirements. Corporate social responsibility and compensation disclosure are already on the agendas of market participants and governance observers. Reputational risk disclosure will be added to that mix.

On the business side, expect additional pressure on senior management to review the effectiveness of corporate policies, adopt robust alternative reporting structures for whistleblowers, shore up employee education programs, increase the accountability of executives, establish a suitable ethical tone-at-the-top, and align financial incentives with longer-term and strategic objectives.

Boards of directors are increasingly being held accountable for the reputational and financial damage caused by conduct risk. They will demand action from management and it behooves directors and executives alike to take steps to proactively address conduct risk across the enterprise.

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In a 2016 global study,

36%

of employees at multinational companies said they personally observed misconduct in the last 12 MONTHS.[9]

UNETHICAL BEHAVIOUR
is more likely to be accepted in the workplace if the unethical employee is a high performer.[10]

9 https://higherlogicdownload.s3.amazonaws.com/THEECOA/11f760b1-56e0-43c6-85da-03df2ce2b5ac/UploadedImages/research/GBESFinal.pdf

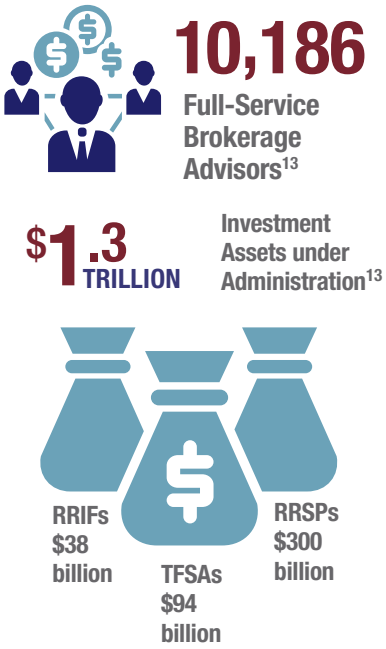
10 http://phys.org/news/2016-04-supervisors-coworkers-tolerate-unethical-behavior.html

Securities Regulators

During 2016, the Canadian Securities Administrators (CSA) embarked on an ambitious consultation[11] regarding proposed regulatory changes that would touch virtually every aspect of the retail investment industry that is carried on in Canada by registered dealers and advisers and their representatives. Proposed changes include extensive enhancements on the way in which conflicts of interest are managed and avoided and on fundamental concepts such as know your client, know your product and suitability obligations. Proposals to ban payments of any incentives by fund managers to distributors are also being considered. Much attention has been given to the proposal that firms and representatives be held to a "regulatory" best interest standard when working with non-discretionary clients. This standard would be added to the existing standard of registrants dealing fairly, honestly and in good faith with their clients and would require firms and representatives also to "act in his or her clients' best interest". The conduct required arising out of this standard is explained as being one of a "prudent and unbiased" firm or representative "acting reasonably", although it is not certain that these latter words and concepts would form part of the enumerated new standard.

The CSA states that it does not intend to establish a statutory fiduciary duty for all registrants, and that the proposed best interest standard does not necessarily imply that registrants would be held to a fiduciary duty. Notably not all CSA members consider that a best interest standard is a necessary addition to the Canadian securities regime.

Concerns raised by commentators, including BLG[12], are that these proposals, and in particular the best interest standard, are setting impossible standards for registrants, without regard to the actual services being provided, the varying business relationships between clients and firms and investor expectations. We recognize that the CSA has stipulated that the proposed "best interest" standard of care is not intended to interfere with registration categories, guarantee that clients' securities investments will never lose value, result in the best or highest returns for the client or in the lowest risk to the client, or interfere with the courts' ability to apply common law principles. However, we strongly believe that it will inevitably have all of these unfortunate consequences.



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11 http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20160428_33-404_proposals-enhance-obligations-advisers-dealers-representatives.pdf

12 http://www.osc.gov.on.ca/documents/en/Securities-Category3-Comments/com_20160930_33-404_borden-ladner-gervais.pdf

13 http://iiac.ca/wp-content/uploads/Canadas-Securities-Industry-Infographic.pdf

3 PUBLIC DEBATES






Canada's Natural Resources – Under Pressure and Transformation

In 2017, Canada's energy sector faces continued uncertainty and inertia. From taxes to transportation, Canada's natural resource industries – and their benefits to the national economy – are under threat from a dramatically changing legal, regulatory and political landscape. Foremost among those challenges are infrastructure development, carbon pricing, and waning investor confidence.

Notwithstanding recent approvals, the future for pipelines reaching tidewater – a polarizing issue in Canada – remains uncertain. The inability to transport oil and gas to market impacts the national economy, including government revenues and Canadians who rely on the sector for their jobs. Chief concerns in 2017 include regulatory process uncertainties and the necessity for a "social licence" to operate, over and above meeting legal requirements. Then there are battered commodity prices, now entering their third year.

Climate change and carbon pricing regimes are also transforming Canada's natural resource industries. The Government of Canada's clear message is that economy-wide carbon pricing will reduce greenhouse gas emissions. British Columbia, Alberta, Ontario and Québec have already introduced carbon pricing, with uncertain implementation, divergences in approach – carbon tax versus cap and trade - and heightened the risk of patchwork climate architecture among provinces and the federal government.

As we enter into 2017, federal climate policy may have negative impacts on emissions-heavy and trade-sensitive industries' ability to be competitive. There is also uncertainty as to how the federal government's leadership on climate change will address Canadian pipeline development, energy market access, and foster innovation.

What is clear is that Canada's natural resources – fundamental to its standard of living – are facing unprecedented challenges in 2017. This is not lost on investors, for whom patience is waning and capital is fluid, particularly into the United States and other lower cost jurisdictions. With optimism - and leadership - in short supply on the energy front, 2017 will be a turning point for not only the sector, but also as to whether the country can reach its full potential for nation building and positive economic transformation.

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$81 BILLION

Value of Canadian crude oil and natural gas exports in 2014 – most of which was transported by pipeline.[14]

4,200 RAIL CARS

needed to transport the 3 MILLION barrels of crude oil transported each day by pipeline in Canada — the equivalent of MORE THAN 200 Olympic sized swimming pools.[14]

MORE THAN 2/3

of Canada's energy demand is met by natural gas or products made from crude oil.[14]

97%

of Canadian natural gas and crude oil transported by transmission pipelines.[14]

14 https://www.eiseverywhere.com/file_uploads/2e1d12eb201f496a16b2319fa7004cb8_April282.30pmCulturalLeadership.pdf

Medical Cannabis

The *Access to Cannabis for Medical Purposes Regulations* (ACMPR) provide Canada's framework for individuals to purchase or produce small amounts of cannabis for their personal medical use. Under the ACMPR, a health care provider gives a patient a medical document. Based on the medical document, the individual can purchase cannabis from a federally licensed producer (LP). The ACMPR allow individuals registered with an LP to purchase dried or fresh "marihuana" (cannabis flowers) or cannabis oil. Alternatively, individuals can send their medical documents to Health Canada for authorization to grow a limited amount of cannabis for their own medical purposes, or designate someone to produce it for them.

Health Canada has stated that the ACMPR are not permanent regulations. Stakeholders should keep up to date with coming changes. Changes in medical cannabis regulations present new opportunities and challenges in health care, labour and employment, and capital markets.

From a health care perspective, the ACMPR complement the *Narcotic Control Regulations* in setting out rules for the possession, sale, use and administration of medical cannabis in a healthcare facility. The ACMPR are permissive, not mandatory. It is up to each facility to determine whether, and if so within what parameters, it will permit the provision, sale or administration of medical cannabis to patients or residents who have an ACMPR medical document, prescription or a written order providing access to medical cannabis. Given increasing social acceptance of medical cannabis, more accessible products (e.g. cannabis oils and capsules) and the outcome of some *Canadian Charter of Rights and Freedoms* challenges, we may see a push towards greater acceptance of medical cannabis in the health care setting.

From an employment law perspective, employers have a duty to accommodate employees with disabilities under human rights legislation. If an employee provides written communications from a physician or other evidence indicating that, in order to attend work, he or she must be permitted to smoke or ingest cannabis for medical purposes, an employer will have to consider this request. Whether the duty to accommodate requires an employer to permit an employee to consume medical cannabis at work or not, will depend on a number of factors, including the nature of the employee's work and the impact on productivity caused by the ingestion of cannabis. Employers also have a corresponding duty under provincial occupational health and safety legislation to maintain a safe workplace. Employees in safety-sensitive positions might not be entitled to smoke or ingest medical cannabis at work while or before performing their duties.

From a capital markets perspective, the ACMPR and the loosening legal framework surrounding medical cannabis is fueling fast growth in a relatively nascent market sector. As of the date of this publication, 37 licenses to produce medical cannabis have been issued under the ACMPR or its predecessor legislation, the *Marihuana for Medical Purposes Regulations* (Canada), and there are approximately 416 license applications awaiting review by Health Canada, with approximately 20 new applications being received every month. LPs are scrambling to grab their share of a burgeoning Canadian medical cannabis market, which is forecast to peak at $1.1 billion by 2020 (without full legalization for recreational use). With these sky-high opportunities, LPs are accessing the capital markets at a feverish pace to finance increased growing capacity and complete complementary acquisitions of other LPs or production facilities. Since the 2015 federal election in Canada, publicly-listed LPs have raised more than $563 million in equity. The Canadian market for cannabis could get even hotter if the federal Liberals make good on their election promise to fully legalize cannabis for recreational use, which is widely anticipated.

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Dried marijuana sold to clients has INCREASED
1,170%
between April 1, 2014 and Sept. 30, 2016.[15]

Registered users have INCREASED
1,244%
between April 1, 2014 and Sept. 30, 2016. [15]

There are
37 LICENSED PRODUCERS
for medical purposes… 22 of those in Ontario. [15]

Cannabis oil sold to clients has INCREASED
414.4%
between Jan 1, 2016 to Sept. 30 2016. [15]

15 http://www.hc-sc.gc.ca/dhp-mps/marihuana/info/market-marche-eng.php

Global Trading System

In 2016, the backlash against globalization interrupted a three decade long trend towards increased predictability in international trade and investment. The backlash is exemplified by Brexit, the hurdles that were encountered by Canada and the European Union during the EU signing and ratification process for the Comprehensive Economic and Trade Agreement (CETA) and the anti-trade rhetoric in the United States' presidential election.

The risks associated with the United Kingdom and the EU are highly intertwined. Brexit will result in the loss of one of the major EU economies, undermining confidence in the economic union. Confidence has been further undermined by the Wallonia region of Belgium first blocking the ratification of CETA, then consenting subject to certain conditions, including allowing individual EU member states to opt out of the investor-state dispute settlement procedures under the agreement. Consequently, the scope of application of CETA within the EU will only be known once all of the EU member states complete the ratification process for the agreement.

Given the U.K.'s role as the entry point for a large part of Canada's trade and investment with the EU, its exit creates uncertainty for Canadian trade and investment in both the U.K. and the EU. Assuming that, post-Brexit, CETA continues in force with respect to the U.K. and the twenty-seven EU member states, the apportionment of certain market access rights between the EU and U.K., and therefore the clarification of Canada's market access rights and obligations under CETA, will only be known once the U.K.-EU relationship is settled and the treaty succession process is completed. This will not be accomplished in 2017, and therefore uncertainty and risk will prevail.

In the U.S., the election of Donald Trump as president creates considerable uncertainty and risk in the Canada-U.S. trade and investment relationship. Although election promises do not generally equate to post-election action, given the conviction of his promises and the anti-trade perspective of many of those who elected him, it can be expected that President Trump will take action to further his international trade and investment promises. Specific areas of uncertainty include the North American Free Trade Agreement (NAFTA) (will it be renegotiated?), the Trans-Pacific Partnership (TPP) (will it be ratified?) and the U.S.-EU trade and investment negotiations (will they be completed?). If a U.S.-EU trade and investment agreement cannot be negotiated, CETA will put Canada and its exporters and investors at a competitive advantage *vis-à-vis* their U.S. competitors for trade and investment with the EU. Beyond trade agreements, there is considerable uncertainty as to how President Trump will address bilateral trade issues with Canada, in particular softwood lumber, livestock (cattle and hogs) and dairy products.

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CANADA IMPORTS
US$223.2 BILLION
from the U.S. equaling a
+ US$90.4 Billion trade balance.[16]

TOP 5 CANADIAN GLOBAL IMPORTS:[16]

Vehicles
US$66.8 Billion

Machinery
US$63.3 Billion

Electrical and electronic equipment
US$41.3 Billion

Mineral fuels and oil
US$29.5 Billion

Plastics
US$14.9 Billion

TOP 3 CANADIAN EXPORT MARKETS FOR GOODS IN 2015:[16]

USA
US$313.6 BILLION

China
US$15.8 BILLION

U.K.
US$12.5 BILLION

16 https://comtrade.un.org/labs/BIS-trade-in-goods/?reporter=124&partner=0&year=2015&flow=2

Government's Evolving Management of Infrastructure

Federal, provincial and municipal budgets and program announcements signaling increased investment in, and focus on, Canada's public infrastructure are welcome news in light of recent reports on Canada's "infrastructure gap".

Through its 2016 budget, the federal government set out its plan to invest over $120 billion in public infrastructure over a ten-year period, including approximately $60 billion in new infrastructure funding, focused on public transit systems, social infrastructure and water, wastewater and green infrastructure.

Since that time, it has been progressively releasing further details on how it intends to implement that plan. Phase 1 of the federal plan proposed to provide $11.9 billion over up to five years for immediate investment, with Phase 2 seeing the implementation of longer-term elements of the federal plan, such as the anticipated creation of an infrastructure bank, capitalized with both federal and private sector funds.

A number of Canadian provinces have also outlined ambitious funding programs for new and existing public infrastructure through recent budgets, including Ontario investing more than $137 billion over the next 10 years; Québec providing close to $89 billion over 10 years; Alberta confirming nearly $35 billion over five years; and British Columbia allocating $12 billion over three years.

Investment in public infrastructure provides significant social, economic and financial opportunities and rewards for stakeholders. However, there are a number of challenges currently faced by the infrastructure sector (government and private sector) including:

- Uncertainty from the changing and competing policy priorities as an influence on project selection and uncertainty over shared or allocated jurisdictional responsibilities amongst the participating governmental authorities.
- Uncertainty associated with changing infrastructure priorities, programs, conditions and the timing for accessing public/private funding.
- Uncertain allocation of decision-making control over project selection, prioritization, procurement and project implementation oversight.
- Uncertainty regarding the project pipeline – which projects, why, when and how.
- Evolving views as between jurisdictions regarding the selection of the optimum project delivery models on a project-by-project basis (P3s and other).

Continued strong participation in, and support of, public infrastructure projects will depend, in part, on the governmental authorities successfully addressing these and other related matters.

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Approximately **30%** of municipal infrastructure ranked **"FAIR"** to **"VERY POOR"**[17]

REPLACEMENT COST OF THESE ASSETS TOTALS $905 BILLION nationally.[17]

ROADS
$330 BILLION

WASTEWATER
$234 BILLION

DRINKING WATER
$207 BILLION

STORM WATER
$134 BILLION

17 http://www.acec.ca/files/advocacy/background_infrastructureinvestment_oct2014.pdf

Employment Agreements

Employment standards legislation in several provinces, including Ontario, renders void any provision of an employment agreement which seeks to waive or contract out of any right conferred under the statute. In 1992, the Supreme Court of Canada acknowledged that an employment agreement specifying the employee's rights when employment was terminated *could* displace the implied common law term requirement that "reasonable" notice (or pay in lieu thereof) be given to an employee dismissed without cause. The court found, however, that a termination clause in an Ontario employment agreement which was inconsistent with the minimum statutory standard was void, and that the common law requirement for "reasonable" notice filled that void. This has given rise to much litigation.

Having an enforceable termination clause in the employer's standard employment agreement is of great benefit. Even if the rights conferred exceed statutory minimums, the termination provisions provide certainty and avoid the transaction costs associated with litigation or threatened litigation. The jurisprudence is clear that a termination clause which seeks to take away statutory rights is void in most provinces. There has been a grey zone with respect to termination clauses which do not take away statutory rights, but which address some rights (*e.g.* notice/pay in lieu) without being explicit about associated categories of statutory rights (*e.g.* benefit continuation during the statutory notice period/severance pay). Our courts have consistently upheld these types of clauses as enforceable, but that is of limited value to the employers who must invest in significant legal fees and associated risks to achieve this result. Another grey zone arises when an employment agreement is potentially off-side the statutory requirements at some hypothetical future date, and this question remains unresolved in the jurisprudence.

Employers are well advised to review their standard employment agreements on a regular basis, in order to ensure that termination clauses avoid any of these grey zones. Employers can then be confident that there is little risk associated with threatened litigation and therefore avoid transaction and settlement costs.

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