Risky Business: BLG Sees Cyber Risks Underlining Challenges To Canadian Businesses

Borden Ladner Gervais Outlines 2015’s Top 10 Business Risks

Toronto (December 16, 2014) — Cyber risks will be a dominant issue for Canadian businesses in 2015, according to Borden Ladner Gervais LLP (BLG) in its 2015 Top 10 Business Risks report. Following a Statistics Canada report that 14 per cent of large enterprises experienced an Internet security breach in 2013, BLG predicts Canadian companies will continue to face legal fall-out from data breaches, employee misconduct and reputation risk on social media.

“This is the fifth year we have looked at the risks that challenge our clients and are part of larger trends, and regardless of the industry or workplace everyone has to address cyber risks. Although data breaches and social media issues have made the list before, the increase in data breaches and recent cases of employee breaches of privacy indicate a growing challenge for all sectors,” stated Sean Weir, national managing partner and CEO, BLG. “2015 will be a time for businesses to prepare to deal with legal challenges ranging all the way from the municipal level to international levels. In addition, last year saw landmark court decisions and regulatory changes that require careful consideration to avoid impacting business operations.”

The following outlines BLG’s 2015 Top 10 Business Risks:

Digital Resilience: From Data Breaches to Social Media Fall-out

All organizations in all industries have digital risk. As criminal capabilities intensify and the public voice grows louder via social networks, organizations have too much at stake to ignore the risks. And, the potential for risk has increased exponentially. The risks of regulatory actions, class actions, and the preservation of the organization’s reputation – and, in some cases the organization’s very existence – depend on the steps taken in the first few hours, not days, to contain the situation, mitigate the damage that has been done, fix the problem and get the organization up and running again. These issues cannot be seen as just a problem for the IT department. Management of the issue includes every facet of the organization and the following points are critical to consider:

- **Are You Ready?** In spite of robust systems, it is likely that an organization could experience a data breach at some point whether from outside hackers or from persons within the organization. This is why organizations need to be prepared to react quickly to protect their customers and employees confidential information and trade secrets, uphold confidence in their brand and maintain their bottom line. Organizations should ensure they follow the latest cyber best practices, which include assessing the risk, being aware of the regulatory requirements and privacy laws, and having a data breach plan to be able to react quickly when it happens.

- **The Myth of Being Cyber Secure** Cyber security has become a growing concern for both public and private sector organizations, with the majority of information created today being stored electronically. The disclosure of confidential data, breaches of privacy and infringement of intellectual property rights can have devastating consequences. Even as organizations invest millions to protect their data, the question is unfortunately when and not if it will
happen. Today’s cyber criminals have goals that go well beyond mischief to include corporate fraud, espionage, piracy and terrorism.

- **Social Slander** In the early days many business leaders wanted to distance themselves and their companies from the phenomenon of social media. Now customers are using it, detractors are using it, and employees cannot be stopped from using it, so looking the other way is not an option. While many of the same laws that govern published statements apply to social media, the environment comprises a whole new set of risks ranging from HR practices and defamation, to avoidance of copyright laws and electronic discovery that make organizations vulnerable to attack and legal consequences as a result of their own actions.

**Aboriginal Title Granted in British Columbia: Impact will be Far Reaching**

In the precedent setting case, *Tsilhqot’in Nation v. British Columbia*, the Supreme Court of Canada made a concrete finding of First Nations title for the first time in Canadian history. This decision is likely to have significant and far reaching impact for the development of natural resources throughout most of British Columbia, and those areas of Atlantic Canada, Québec, and the North where aboriginal title has not been extinguished by historic treaties or defined by modern land claims agreements. Courts could potentially suspend or even force companies to cease operations altogether unless Aboriginal consent is obtained.

**Anti-Corruption & Foreign Corrupt Practices: Internal Investigations and Compliance Reviews**

It is becoming a fact of life for companies, both public and private, that many directors, officers or senior executives could be involved in a white collar investigation and/or prosecution during the course of their professional career. Some proceedings will be anticipated; others will come as a surprise. With the report from the Charbonneau Inquiry into corruption due to be released in April 2015 and the significant increase in investigations into foreign corruption by Canadian corporations, every sign points towards escalating enforcement activity in the coming year at home and abroad. Board members and senior management who remain unprepared will be particularly ill-equipped to explain real or perceived shortcomings to increasingly aggressive law enforcement authorities.

**Thirty Years of Untested Infrastructure Deals**

The refurbishment of aging infrastructure and the development of high profile infrastructure projects have awakened public interest and become a focus of many governments, not only to address the infrastructure deficit, but also as a means to bolster the economy.

However, the pace and complexity of infrastructure renewal is giving rise to new and innovative approaches and methodologies that haven’t been tested over the long term. For both governmental authorities and private organizations, there is a need to anticipate the high risk elements of these deals by looking at granular details that may cause future issues.

**EU Agreement Presents New Era of Trade Agreements**

In September 2014, Canada and the EU signed the Comprehensive Economic and Trade Agreement (CETA). The agreement represents the first of a new era of trade agreements signed by Canada and will have a greater economic impact on the competitive landscape within Canada than any free trade agreement signed since NAFTA. It reaches beyond federal jurisdiction unlike any other trade agreement, requiring an unprecedented level of participation by provincial governments during the negotiations.

The CETA will affect Canadian and EU participants in the Canadian market as well as participants from third countries that compete in the Canadian market against Canadian and
EU participants. All stakeholders are or should be considering the impact of the CETA on their commercial activities in Canada.

The CETA will immediately eliminate customs duties on approximately 98 per cent of the EU goods imported into Canada. The combination of the duty reductions and the rules of origin could create interesting opportunities for suppliers of input materials to the EU from third countries. For example, on the date of entry into force of the CETA, duties on textile and clothing products from the EU will go to zero from approximately 18 per cent. This is a substantial reduction. It is expected that this will increase the EU’s garment exports to Canada by more than 91 per cent.

Mental Health in the Workplace: It’s no longer don’t ask, don’t tell

Despite research indicating that almost one in five Canadian adults will experience a mental health issue in any given year, the stigma attached to mental health means many employees are afraid to disclose their issue to management. Likewise, many employers avoid addressing issues with employees due to the uncomfortable nature of broaching the subject. These questions continue to preoccupy employers. This is especially top of mind in jurisdictions like Ontario which have adopted policies that impose an obligation on the employer to inquire as to an employee’s mental health.

Product Recall

Since the implementation of the Canada Consumer Product Safety Act (CCPSA) in June 2011, product recalls have appeared to be on the rise and so have the risks to the bottom line of consumer product and manufacturing companies. The most high profile risk to these businesses is a class action suit but Canadian companies face challenges even in addressing product recalls. At the onset of the recall, the leadership team is taken off day-to-day operations to find solutions. This has a cost to business operations, as does the cost of publicizing the recall, creating incentives for customers to respond and implementing processes to receive the recalled product and provide an alternate. During this time, operations are halted and the business process may have to be changed, for example the manufacturing line might have to design and implement new moulds. There also has to be a quarantine of the recalled product. In addition, there is the risk to the brand and long term revenue. A company dealing with a recall often loses the public’s trust in the brand and current market share and it could take years to return to the pre-recall status.

Prolonged Hostilities: Hostile Takeovers will become Marathons not Sprints

With the stated objective of rebalancing the current dynamic between hostile bidders and target boards, the proposed extension of the minimum bid period to 120 days from the current 35 is set to make hostile takeovers lengthy affairs in Canada. Hostile bids will undoubtedly become materially more challenging to win, with target boards afforded more time to respond, seek alternatives and implement defensive measures. However, one of the net results of the new regime may be that securities regulators will be unlikely to allow a poison pill to remain in place past the 120 day period. Canadian directors may find that art still trumps science when fending off hostile bidders and will need to be carefully prepared for long and drawn-out battles which consume substantial management and board time, effort and resources.

Gaining Social License and Implications for Energy Development

In 2012, the federal government introduced environmental assessment (EA) reform intended to aid in timely permitting and development of energy and other projects. These changes have impacted projects and resource development across the county but not necessarily in the manner intended. More certain (and shorter) EA process milestones have helped provide some procedural certainty around permitting of resource development. Historically EA has also played an important part in the obtaining of social license or community buy-in.
This year there has been a significant amount of federal energy regulatory reform aimed largely at Canada’s pipeline industry. The common thread which weaves its way throughout the reforms appears to be a move away from the previous self-regulating model, into a much more prescriptive regulatory regime. While this regulatory shift may have been prompted largely by government’s intention to silence those critics who suggested that regulatory oversight of the industry was lacking, the reforms were also intended to assist industry in gaining the required social license to develop Alberta’s vast natural resources. While arguably these federal reforms serve to assist industry in this regard, effectively gaining social license for energy and other developments remains a challenge and one of the major risks facing investors, government, and Canadians.

These recent changes to federal EA process have been scrutinized by those from whom social license is being sought. The result has been a fair bit of criticism of the changes that has been reflected in public and other demonstrations by those who are critical of the proposed development. As such, social license will continue to be a significant factor for Canadian resource projects. The Northern Gateway, Keystone, and the Kinder Morgan pipeline in British Columbia are prime examples of projects that have seen delays and rising costs in the face of continuing opposition. In order to minimize risk and build necessary energy infrastructure, companies need to obtain regulatory approval as well as social license from the affected communities. However, competing interests and the lack of clarity around what constitutes social license makes securing it very challenging. And without social license, companies will continue to face increasingly organized campaigns aimed at terminating their efforts.

**Unsettling Revisions for Investors**

Numerous international tax rules and investment structures in place for decades are being revised in ways that aren’t yet settled, creating risks for businesses and investors. With Canada’s proposed anti-treaty shopping rule from the 2014 federal budget and the OECD’s BEPS (Base Erosion and Profit Shifting) initiatives being prime examples, both Canadians investing outside of Canada and non-residents investing in Canada (including collective investment vehicles) will need to deal with the resulting uncertainty as to what constitutes acceptable tax planning as well as new compliance and financial reporting obligations.

“Providing clients with the best legal advice means you have to look at all possible outcomes, which is why BLG believes it is important to identify and assess key risks and map out a strategy to either avoid them altogether or address them when they occur,” stated Weir. “By addressing the possible risks, we can help clients to keep focused on their core business goals.”

**About Borden Ladner Gervais LLP**

Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. BLG is the country’s largest law firm with more than 750 lawyers, intellectual property agents and other professionals in five cities across Canada. We assist clients with their legal needs, from major litigation to financing and patent registration.

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