

TOP 10  
LEGAL RISKS  
for Business  
in 2018

**BLG**

**Borden Ladner Gervais**

*It begins with service*





Cybersecurity,  
Privacy and  
Data Protection



Transforming  
Infrastructure



Market Implications  
of Legalizing  
Cannabis



Failure to Consider  
Aboriginal and  
Treaty Rights



Reforming our  
Tax System



Trade Agreements  
Cross-Border  
Commerce



Workplace  
Sexual  
Harassment



Disruption Caused  
by Technology



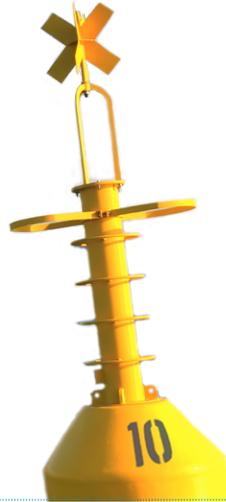
Environment and  
Climate Change



Class  
Actions

# TOP 10 LEGAL RISKS

for Business  
in 2018



Canadian business leaders and entrepreneurs are facing an economy that's increasingly complex and unpredictable. They are not only affected by the policies of Canada's federal and provincial governments, but also by international changes, such as the rise of populism and protectionism. This combination is bound to raise the level of uncertainty for businesses, and have serious impacts on our economy.

In its most recent Economic Outlook<sup>1</sup>, the Organization for Economic Co-Operation and Development (OECD) states that the World economy has strengthened in 2017 and that its annual growth should improve slightly in 2018. However, long-term challenges may prevent the economy from reaching its full potential.

On a national level, many challenges are facing Canadian business. OECD data shows the Canadian economy is bouncing back to 3 per cent growth rate this year, before slowing to 2.1 percent in 2018 and 1.9 percent in 2019 as policy stimulus dwindles down<sup>2</sup>.

In addition, the cost of doing business in Canada is constantly increasing, at a time when other jurisdictions are reforming their tax systems to become more competitive. It is necessary for us to consider a more competitive fiscal regime.

On the trade front, the coming into force of CETA in 2017 opened doors to the European Union market for Canadian businesses, but the renegotiation of NAFTA, our country's most important and successful trade agreement – and the strong stance of the President of the United States on this matter – raises serious concerns. The withdrawal of the United States from the pact would have major consequences for all three countries involved.

Our trade-enabling infrastructure is deteriorating rapidly, causing us to lose ground to regions who can respond to the demands of their clients more rapidly. In addition, the upcoming decision of the Supreme Court of Canada on the *Comeau* case may reshape the basis of inter-provincial trade.

As 2017 has set the stage, 2018 will be a year when Canadian business must navigate through uncharted territory. New challenges and opportunities are arising concurrently, making it difficult for businesses to adapt successfully. Thankfully, Canada has all of the elements to succeed in spite of all the uncertainty: a stable economy, skilled workers and a culture of innovation. These are strong assets for all organizations.

Yet, in order to succeed, companies need to be aware of the risks and have a comprehensive outlook of their consequences. BLG's *Top 10 Legal Risks for Business in 2018* provides insight into legal challenges that organizations may face in the future. The Canadian Chamber of Commerce is proud to partner with BLG to provide crucial information to business leaders and entrepreneurs to help them mitigate risks and seize growth opportunities.

## The Canadian Chamber of Commerce

1. <http://www.oecd.org/newsroom/oecd-sees-global-economy-strengthening-but-says-further-policy-action-needed-to-catalyse-the-private-sector-for-stronger-and-more-inclusive-growth.htm>

2. Ibid.

## Cybersecurity, Privacy and Data Protection

### Personal Information Security Breach Obligations

Canada's federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") will soon impose record-keeping, reporting and notification obligations on organizations that suffer a "breach of security safeguards" regarding personal information under their control. At this time, Alberta is the only Canadian jurisdiction that has personal information security breach reporting obligations. PIPEDA's security breach obligations, when in force, will require that an organization create and maintain a record of every personal information security breach, and provide those records to the Privacy Commissioner on request. In addition, if a personal information security breach creates a "real risk of significant harm to an individual", then the organization will be required to: (1) report the breach to the Privacy Commissioner; (2) give prescribed notice of the breach to all affected individuals; and (3) give notice of the breach to other organizations or government institutions that might be able to reduce the risk of harm that could result from the breach or mitigate that harm. A knowing contravention of the security breach obligations will be an offence punishable by a fine of up to \$100,000. The security breach obligations will come into force after required regulations are finalized. The federal government issued proposed regulations in September 2017. For more information, see BLG bulletin *Preparing for Compliance with Canadian Personal Information Security Breach Obligations*.<sup>3</sup>

### European Union General Data Protection Regulation

The European Union *General Data Protection Regulation* (the "GDPR"), which comes into force in May 2018, will apply to Canadian organizations that have an establishment in the European Union or that collect or process personal data of European Union residents in connection with an offering of goods or services or to monitor European Union residents' behaviour. The GDPR gives regulators the ability to impose on a non-compliant organization fines of up to the higher of €20 million or 4% of worldwide annual revenue of the organization's undertaking (corporate group) during the previous year. The GDPR is a significant evolution in personal information protection laws, and is materially different in important respects from Canadian laws. Compliance with Canadian laws will not satisfy GDPR requirements. Preparing for compliance with the GDPR may require significant effort, time and expense, and may involve changes to business models and corporate structures. For more information, see BLG bulletin *The European Union General Data Protection Regulation – A Primer for Canadian Organizations*.<sup>4</sup>

### Rethinking Consent and Enforcement

In September 2017, the Office of the Privacy Commissioner of Canada published a Report on Consent to provide detailed comments and guidance regarding meaningful consent in the digital environment, and recommend amendments to relevant parts of PIPEDA. The Report also recommends PIPEDA amendments to give the Privacy Commission order-making powers and the authority to impose administrative monetary penalties on organizations that violate PIPEDA. For more information, see BLG bulletin *The OPC Publishes its Report on Consent*.<sup>5</sup>

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Black Market:  
value of data  
**US\$1** credit card  
number  
up to  
**US\$10** health  
information<sup>6</sup>



Canada loses  
**\$3.12 Billion**  
annually to  
cybercrime<sup>7</sup>

3. [http://blg.com/en/News-And-Publications/Publication\\_5133](http://blg.com/en/News-And-Publications/Publication_5133)

4. [http://blg.com/en/News-And-Publications/Publication\\_5105](http://blg.com/en/News-And-Publications/Publication_5105)

5. [http://blg.com/en/News-And-Publications/Publication\\_5074](http://blg.com/en/News-And-Publications/Publication_5074)

6. The Canadian Chamber of Commerce. (2017). *Cyber Security in Canada: Practical Solutions to a Growing Problem*. Ottawa, ON: The Canadian Chamber of Commerce

7. Ibid

## Transforming Our Infrastructure

As the public and private infrastructure sectors continue to evolve, changes or clarity brought to one area create potential questions or challenges in others.

With the 2017 federal budget, additional clarity was provided for the funding of public sector infrastructure projects in Canada. The federal government has renewed its commitment to such spending, with planned investments of over \$180 billion over the next 12 years, on both new and existing programs, focused primarily in the areas of public transit, green infrastructure, community culture and recreation, and rural and northern communities. However, concern has arisen over perceived delays by the federal government in providing funding, and its failure to spend all funds announced, for certain projects. For example, some observers point to the recent federal decision to delay expenditures of some \$2 billion of the approximately \$5 billion in funding budgeted for 2017 to later years as demonstrating problems with the implementation and delivery of federal infrastructure programs. Others contend, though, that any such delay is simply the result of different-than-expected project cash flows or other factors outside of the control of the federal government.

Clarity was also recently provided for the Canada Infrastructure Bank, through the enactment of its legislative framework in June 2017. The relevant legislation provides that the Bank's purposes include investing, and seeking to attract investment from both private sector and institutional investors, in revenue-generating infrastructure projects located wholly or partly in Canada that are in the public interest. Among other concerns, some critics have suggested that the revenue generation element of the Bank's purpose may be viewed as ultimately necessitating or encouraging the imposition of user or other fees on public infrastructure, or resulting in privatization in some form.

This increase in public infrastructure spending and planning, while potentially transformative for Canada, should be considered against the backdrop of rising public opposition to certain private sector infrastructure projects. The liquefied natural gas and oil industries have recently experienced opposition to a number of their project development proposals, causing unforeseen obstacles and delays in start-up work. Social opposition to these controversial projects has become more organized and effective, with public stakeholders using both legal and non-legal means of challenging projects. The recent cancellation of certain high-profile projects may serve as notice to project proponents and participants that social and political concerns must be addressed from the outset in planning such initiatives. Consultation and collaboration by governments, as well as public and private stakeholders, is now necessary to ensure the successful undertaking and completion of any major infrastructure project in Canada, whether public or private.

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Canada's Infrastructure deficit compared to its needs is estimated to grow as much as **\$200-300 Billion** by 2025<sup>8</sup>



**+250 P3 Projects** under construction or operational across Canada<sup>9</sup>

Government of Canada will invest in the next 10 years<sup>10</sup>:



**\$10.1 Billion**  
Trade and Transportation  
Projects



**\$21.9 Billion**  
Green Infrastructure



**\$21.9 Billion**  
Support Social Infrastructure

8. <https://www.theglobeandmail.com/report-on-business/rob-commentary/you-can-guide-the-future-of-canadian-infrastructure/article36439075/>

9. <http://markets.businessinsider.com/news/stocks/Government-of-Canada-announces-wind-down-of-PPP-Canada-Crown-Corporation-1006747330>

10. <https://www.budget.gc.ca/2017/docs/plan/toc-tdm-en.html>

## Market Implications of Legalizing Cannabis

The *Cannabis Act* is expected to come into force by July 1, 2018. As the Canadian cannabis industry expands from exclusively servicing a medical market to including an adult-use market, a variety of changes will be introduced. The changes will be highly disruptive, expanding the opportunities and challenges available to established businesses and new entrants – storefronts, product diversification, micro production (cultivation or processing), nurseries, research and development licences, clarity around advertising and packaging restrictions, natural health products, cosmetics and extraction from industrial hemp flowers. These changes will support the industry's mandate to outcompete the illicit cannabis industry. By doing so, the industry will provide Canadians with greater choice in medical solutions, health maintenance and legal psychoactive products alongside caffeine, alcohol and tobacco.

As the number of ways to participate in the cannabis industry increases, competitive pressure may marginalize licensed producers lacking a focused plan with effective execution. Growing competitive pressure will also fuel industry consolidation, as well-financed major producers turn to acquisitions to expand production capacity and fuel an insatiable market demand. Industry maturation will also bring commoditization. Coupled with new categories and form factors for destination products – notably infused foods and beverages, concentrates, and pre-rolls – commoditization will elevate the importance of a deliberate approach to branding, technology and well-timed execution on financings.

Canada's move towards a regulated commercial cannabis industry brings a shifting variety of paths to success. Predicting, managing and adapting to a rapidly-changing regulatory landscape requires an a reliable and focused approach to navigating Canada's international first – a G20 country with a federally regulated commercial cannabis industry servicing medical and adult-use markets.

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Legalized Recreational Cannabis could be a **\$22.6 Billion** industry annually<sup>11</sup>



In 2018, an estimated **4.6 Million** Canadians aged 15 and over will use cannabis at least once<sup>12</sup>



**\$2.1 to \$2.3 Billion** projected retail sales in Ontario<sup>13</sup>

11. <http://www.cbc.ca/news/canada/toronto/marijuana-ontario-price-market-sales-1.4298311>

12. [http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2016/Legalized%20Cannabis/Legalized%20Cannabis%20Fiscal%20Considerations\\_EN.pdf](http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2016/Legalized%20Cannabis/Legalized%20Cannabis%20Fiscal%20Considerations_EN.pdf)

13. <http://www.cbc.ca/news/canada/toronto/marijuana-ontario-price-market-sales-1.4298311>

## Failure to Consider Aboriginal and Treaty Rights

Despite the immense potential for emerging sources of renewable energy and the incessantly growing business opportunities afforded by more traditional energy and resource sectors across Canada, navigating through the complex regulatory and consultation processes continues to make advancing new projects a challenge. Where land and resources are subject to Aboriginal and treaty rights – which is the case of nearly the entire landmass of Canada – engaging with indigenous communities is often a major consideration.

In the eve of the 10<sup>th</sup> anniversary of the *UN Declaration on the Rights of Indigenous Peoples*, the Liberal government recently voiced its support for Bill C-262, which sets forth potentially game-changing principles, such as the requirement for the free, prior and informed consent of indigenous communities to development projects on their traditional territories and their right to self-government with respect to lands and resources.

The governments' duty to consult, accommodate and, in certain circumstances, obtain the consent of First Nations with respect to project proposals that could adversely impact their lands and rights is not new. However, given the uncertain state of the law regarding what constitutes proper consultation and accommodation in specific circumstances, it is increasingly in the project proponents' interest to engage directly with affected indigenous groups and negotiate business agreements with them, in an effort to avoid the significant risks, delays and costs associated with potential legal challenges to the projects.

While lands that are subject to historical or modern treaties are often considered as providing more certainty for development initiatives, recent cases show that such lands could be encumbered with further treaty rights (e.g. reserve creation on treaty territories) or with Aboriginal rights of other indigenous groups, such as the Métis, who are not a party to the existing treaties.

Furthermore, courts in Québec and British Columbia have recently opened the door for indigenous groups to sue private companies directly for past or ongoing environmental harm caused to lands and resources on which they claim an interest, even where the interest in question is asserted, but not yet proven. The Supreme Court of Canada has made it clear that third parties wishing to develop a project on land over which Aboriginal title or other Aboriginal rights are asserted could have an obligation to seek the affected groups' prior consent.

Partnership opportunities with First Nations, ranging from resource exploitation on their traditional territories to more recent cases of medical cannabis production on reserve lands also merit serious consideration by both parties.

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More Than  
**1.67 Million**  
people in Canada  
identify themselves as  
an Aboriginal person<sup>14</sup>



2006 to 2016 Aboriginal  
population change:

**+ 42.5%**<sup>15</sup>

### Principles for Building Relationships:<sup>16</sup>

Be Respectful

Engage Early

Be Open and Transparent

Act with Honour

Listen

Adaptability

14. <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/abo-aut/Table.cfm?Lang=Eng&T=101&S=99&O=A>

15. <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/abo-aut/Table.cfm?Lang=Eng&T=101&SR=1&S=99&O=A&RPP=25&PR=0&D1=8&D2=1&D3=1&TABID=2>

16. [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/building\\_relationships\\_with\\_first\\_nations\\_english.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/building_relationships_with_first_nations_english.pdf)

## Reforming our Tax System

Since 2010, 7 of 10 Canadian governments have raised tax rates on high-income earners. Additionally federal corporate tax rates have increased on investment income earned by Canadian-controlled private corporations, with certain provincial governments increasing general corporate tax rates.

Increases to marginal income tax rates place Canadian businesses at a competitive disadvantage for attracting skilled labour, investment and entrepreneurs. 42 U.S. jurisdictions have combined top tax rates that are lower than those of all Canadian provinces. Internationally, Canada has the 13<sup>th</sup> highest combined top tax rates for individuals (of 34 countries).

Recent tax proposals by the Department of Finance will adversely affect the after-tax financial results for Canadian private enterprises, as well as the retention of after-tax corporate income to address cash flow, reinvestment, retirement savings and other cash requirements of private enterprises.

U.S. tax reform is underway, with proposed changes to the taxation of high income earners and corporations. Such reform could result in significantly lower corporate tax rates as well as tax rate cuts for individuals.

A less competitive Canadian tax regime, combined with difficult regulatory and political constraints, is expected to reduce the amount of inbound investment, placing yet another barrier on attracting funds for the development and expansion of Canadian businesses, including the natural resource sector.

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Effective January, 2018, the Federal Government intends to **LOWER** the small business tax rate on active business income to **10%**<sup>17</sup>



U.S. President Trump is pushing the biggest overhaul of the U.S. tax code since the 1980's.<sup>18</sup>

17. <http://www.fin.gc.ca/n17/17-097-eng.asp>

18. <https://www.reuters.com/article/us-usa-tax/republicans-push-ahead-with-tax-bill-as-democrats-sharpen-attacks-idUSKBN1D6180>

## Trade Agreements and Cross-Border Commerce

2018 promises to be a year of both significant uncertainty and profound change for Canadians in the areas of international and internal trade. While a number of ongoing trade disputes, such as the softwood lumber standoff, will continue to plod along during 2018, it is in the area of trade negotiations where the most important developments will occur.

U.S. President Trump triggered a renegotiation of the North American Free Trade Agreement (NAFTA) during 2017, in a stated effort to improve the terms of trade between the U.S. and its NAFTA partners. The partners are aiming to conclude negotiations by March 2018. The U.S. has tabled a number of controversial proposals that Canada and Mexico have largely dismissed as non-starters. The negotiations are now entering a crucial phase, where President Trump's attachment to these proposals, and NAFTA generally, will be tested. U.S. withdrawal from NAFTA sometime during 2018 remains a distinct possibility, which could have major economic effects throughout the NAFTA area. No "successful" conclusion to the negotiations for Canada is likely to occur without at least some major changes to the current Agreement, with concomitant economic impacts.

President Trump, shortly after taking office, also gave notice that the U.S. was withdrawing from the Trans-Pacific Partnership (TPP). Undaunted, a number of the remaining TPP parties continued to push to bring the Agreement into effect without the U.S. These efforts appear to be meeting with success and it is likely that a somewhat amended TPP will be concluded and opened for ratification during 2018.

After years of negotiation and subsequent difficulties related to implementation, the Canada-E.U. Comprehensive Economic and Trade Agreement (CETA) entered into provisional effect in September 2017. While not yet definitively in force, the Agreement's provisional application means that much of the Agreement is now applicable, creating significant new export opportunities for Canadian exporters and increased competition within Canada from E.U. imports.

Not satisfied with NAFTA, CETA and the TPP, the federal government is now in preliminary discussions on a possible free trade agreement with China, with formal negotiations likely to commence in 2018. The entry into force of CETA and TPP will present very considerable export opportunities for Canadian businesses during 2018. The successful conclusion of a trade agreement with China would further and substantially supplement those opportunities. This collection of trade agreements, coupled with our preferential access to the U.S. market under NAFTA, will markedly improve Canada as a destination for foreign investment. These agreements could also serve as potential economic safety nets, in the event that NAFTA cannot be successfully renegotiated, at least while President Trump remains in office.

On the domestic trade front, the Canadian Free Trade Agreement (CFTA) was successfully negotiated and entered into force on July 1, 2017. While the CFTA does not provide for complete internal free trade, it notably improves on the scope and coverage of internal trade. The CFTA also provides for continuing negotiations in a number of areas, such as regulatory reconciliation and trade in alcoholic products. In a related development, the Supreme Court of Canada will soon hear oral arguments in the case of *R v. Gerard Comeau*. An essential issue in the *Comeau* case is the proper interpretation of section 121 of the *Constitution Act, 1867*, which has application to inter-provincial trade. The Court is expected to release its decision sometime later in 2018. The case has potentially major implications for internal trade within Canada, particularly in those sectors currently subject to governmental measures that limit inter-provincial movement of certain goods, including alcoholic beverages, dairy products, and poultry.



National trade represents about **\$385 Billion** of Canada's annual GDP<sup>19</sup>



CETA could Increase Bilateral Trade by **20%**<sup>20</sup>



Cross-border online retail could reach **US\$900 Billion** by 2020<sup>21</sup>

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19. [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/provincial\\_ON\\_eng.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/provincial_ON_eng.pdf)

20. <https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-general-backgroundunder.pdf>

21. [http://www.dhl.com/content/dam/Campaigns/Express\\_Campaigns/Local\\_Campaigns/apem/express\\_campaign\\_spice\\_trade\\_apem\\_en.pdf](http://www.dhl.com/content/dam/Campaigns/Express_Campaigns/Local_Campaigns/apem/express_campaign_spice_trade_apem_en.pdf)

## Challenges Relating to Sexual Harassment in the Workplace

The latter half of 2017 demonstrated that the uproar over high profile cases of sexual harassment in the workplace has not ceased. We expect 2018 to bring renewed emphasis on how employers address concerns of sexual harassment in the workplace.

With this in mind, how should Canadian businesses react to a renewed emphasis on proper workplace conduct? What actions can be taken by employers to remain vigilant against acts of sexual harassment in the workplace?

First, employers should undertake a thorough review of their harassment-related policies and procedures and confirm that these meet the applicable legal obligations of the jurisdictions in which they operate. Beyond meeting these obligations, employers should focus on whether the harassment policies they have in place actively encourage victims of sexual harassment to step forward and report misconduct in a timely manner.

Second, businesses should examine whether they have the appropriate resources devoted to investigating and resolving sexual harassment complaints. This includes, in particular, implementing employee hotlines, designating company representatives who can promptly respond to and investigate harassment claims, as well as providing managerial guidance for handling the time commitments entailed in conducting harassment investigations (whether for the investigators, witnesses, alleged harassers or the complainant). Also, proper legal guidance should be obtained to assist harassment investigators in recognizing prohibited harassment versus other milder forms of office conflict or inappropriate behaviour.

Third, employers must be proactive in identifying to what degree they remain at risk for harassment-related claims. This includes promoting the existence of harassment policies, clarifying the company's expectations as regards workplace conduct, as well as implementing regular training sessions that make workplace standards of conduct clear for all personnel. Particular attention should be paid to management staff that are asked to implement harassment policies.

Liability for sexual harassment claims across Canadian jurisdictions will likely increase as this issue becomes even more socially unacceptable. Sexual harassment claims that involve allegations of employer negligence or complacency may aggravate damages claimed by and awarded to employee complainants. Steps should be taken by employers to address these concerns and limit their liability.

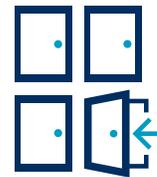
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**94%**

of those who reported experiencing sexual harassment were women<sup>22</sup>



**75%**

of those who experienced sexual harassment faced obstacles trying to resolve the issues<sup>23</sup>



**50%**

of respondents experienced harassment or violent behaviour from an individual with authority over them<sup>24</sup>

22. <https://www.canada.ca/en/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence.html>

23. Ibid.

24. Ibid.

## Disruption Caused by Technology

We are witnessing sweeping changes in numerous industries, driven by new technologies. Cryptocurrencies, blockchains and autonomous vehicles, for example, are among the developments disrupting the core of the financial and the automotive industries, with far-reaching repercussions.

Cryptocurrencies, whether “securities” tokens or utility tokens, are poised to become a new and potentially critical asset class for Canadian and global investors. In 2018, securities regulators will continue grappling to achieve an appropriate balance between protecting investors and fostering this new financing vehicle. Many remaining questions will hopefully be answered in 2018: whether markets generally will accept cryptocurrency as a medium of exchange, whether governments will enter the space with fiat-backed cryptocurrency in core jurisdictions, whether transaction processing can be improved to make cryptocurrency more viable for daily use as “money”, and if cryptocurrency will remain a speculative investment with expected future value or transform into a more broadly accepted medium of exchange.

As highly reliable distributed ledger systems, blockchains can address a broad variety of problems, ranging from supply chain verification, to reduction of counterfeiting, to maintenance and proof of ownership records, to logistics management, and streamlining regulatory compliance in the financial services sector. 2018 will see a broadening and deepening of blockchain technologies, in applications outside and apart from cryptocurrencies. While they will not remedy all the world’s ills, blockchains provide great opportunity for commerce, data management and transparent, automated contracting. 2018 will see ever greater use of blockchains, moving from theoretical to real market applications and increasing real market value. They will also pose a challenge to regulators.

Autonomous vehicle technology is attracting billions of dollars in investment. In a number of cities around the world, small samples of self-driving cars and trucks are now being tested on city streets. All this development, however, raises the question: how will autonomous vehicles impact the potential liability of vehicle owners, drivers, retailers, and manufacturers? The answer to that question is not clear. Further cause for concern arises in the context of data security and privacy protection. Autonomous vehicles rely on their ability to communicate with GPS satellites, software providers, and other devices. Consequently, this high-value data needs to be secure, especially given the rise of cybercrime and privacy breaches.

Because autonomous vehicles bring with them increased emphasis on product liability, manufacturers and suppliers will have a greater need for product liability insurance. This may also lead to risk slicing between drivers and manufacturers, depending on whether a vehicle is being operated by the driver or in autonomous mode. While there are certainly technological, safety, and regulatory hurdles to be surmounted before autonomous vehicles are commercially available for the average consumer, it is clear that autonomous vehicle technology is here to stay. Thus, the legal and regulatory frameworks on which business and our society are based will have to anticipate the magnitude of this particular change, prepare for it, and adjust accordingly.

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Bitcoin’s price has soared more than **1,600%** in 2017<sup>25</sup>



Canada could reap **\$65 Billion** in potential benefits from Autonomous Vehicle Developments<sup>26</sup>



Ontario launched an **\$80 Million** Autonomous Vehicle Innovation Network (AVIN)<sup>27</sup>

25. <https://www.cbsnews.com/news/cryptocurrency-buyers-warned-by-sec/>

26. <https://www.theglobeandmail.com/report-on-business/canada-a-contender-in-self-driving-car-race/article36158049/>

27. <https://news.ontario.ca/opo/en/2017/11/ontario-creating-opportunity-with-cars-of-the-future.html>

## Environment and Climate Change

International commitments and domestic legislation are set to transform the energy sector in Canada and abroad. The Paris Agreement under the *United Nations Framework Convention on Climate Change*, for example, has initiated a global plan to phase out fossil fuels in an attempt to reduce energy-related carbon emissions. In an effort to achieve this goal, we can expect to see an increase in the rate of carbon taxes, and larger decreases on the limit of allowable carbon pollution in cap-and-trade systems. This will impact Canada's energy sector, among others, influencing changes to fossil fuel companies, power utilities, car manufacturers, and other players in Canada's hydrocarbon-heavy economy. The implications will extend as far as the Canadian housing market and consumer credit.

The rise of clean and renewable energy technologies, from batteries to electric vehicles, are quickly filling the void left by the decreasing reliance on fossil fuel energy. These technological advancements, alongside the risks from climate change, are becoming increasingly hard to ignore. This means that investors, auditors and regulators must react to rapidly evolving requirements – and public expectations – on how they respond to climate change. There has been a rise in the number of international investment disputes that address environmental regulatory obligations, and this trend is expected to continue. A further key issue to watch in 2018 will be the impact on reclamation of oil and gas interests addressed in the *Redwater* dispute, to be heard by the Supreme Court of Canada.

As we continue to search for viable solutions to address climate change, it is clear that Canada will feel the impact. Whether or not one believes that carbon emission targets are going to be successfully met, businesses must begin to acknowledge the risks and opportunities linked to the resulting transformation of the global energy sector.

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2017 storms caused nearly  
**US\$370 Billion**  
in damages worldwide

**US\$202 Billion**  
in the United States<sup>28</sup>



Canada aims for a  
**30% Reduction**  
in greenhouse gas  
emissions from 2005  
levels by 2030<sup>29</sup>



In 2017, B.C. experienced  
the worst wildfire season  
since 1958<sup>30</sup>

28. [https://www.upi.com/Top\\_News/US/2017/11/30/As-hurricane-season-ends-2017-settles-firmly-into-record-book/7711511317614/](https://www.upi.com/Top_News/US/2017/11/30/As-hurricane-season-ends-2017-settles-firmly-into-record-book/7711511317614/)

29. <http://climateactiontracker.org/countries/canada.html>

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## Class Actions

All signs indicate that 2018 will continue the trend of class actions becoming more common and broader in scope.

With large-scale data breaches dominating headlines on both sides of the border, expect to see plenty of litigation around privacy and cybersecurity. We expect a dramatic increase in claims once the repeatedly-postponed private right of action, envisaged by Canada's Anti-Spam Legislation (CASL), comes into force. Among other effects, this will expose companies to lawsuits over unsolicited or allegedly misleading emails.

By the same token, a spate of publicly-announced product recalls across various industries will likely give rise to more product liability class actions. Other "trendy" areas that will generate claims include competition and securities law, financial services, and labour and employment (especially overtime claims).

Expect Québec to solidify its status as the "jurisdiction of choice" for class counsel, with a recent Court of Appeal decision arguably further lowering the bar for authorization (certification). By contrast, judges in Ontario have been more willing to dismiss class actions at certification, which may cause plaintiffs' counsel to choose other provinces (especially B.C. and Québec) as lead jurisdictions for national proceedings.

While the Supreme Court of Canada has recently cleared the way for judges from different provinces to sit together on settlement approval hearings, there will continue to be disputes about how competing class actions in different provinces should interact, especially with different class counsel competing for lucrative retainers in an increasingly aggressive fashion.

To complicate matters further, the Ontario Court of Appeal has recently confirmed the validity of global opt-out classes. In other words, in certain cases it is possible to bring an action in Ontario on behalf of every person with a potential claim (located anywhere in the world) who does not take an active step to indicate that they do not want to benefit from, or be bound by, the outcome. As a result, Canadian-based multinational corporations can expect claims in Ontario relating to their foreign supply chains and their interactions with customers in other countries.

Finally, the Law Commission of Ontario is currently involved in a consultation process to assist it in preparing a report with recommendations for reforming class actions legislation in Ontario. Stakeholders will be following this process attentively to see what changes will result.

Overall, expect 2018 to be a busy year for class actions in courts across Canada.

Canada suspended the coming into force of CASL's private right of action<sup>31</sup>



Class Action spending reached **US\$2.17 Billion** in 2016 or **11.2%** of all litigation spending in the U.S.<sup>32</sup>

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32. <https://www.bticonsulting.com/6-trends-shaping-litigation>

# TOP 10 LEGAL RISKS

for Business  
in 2018

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Cybersecurity,  
Privacy and  
Data Protection



Transforming  
Infrastructure



Market Implications  
of Legalizing  
Cannabis



Failure to Consider  
Aboriginal and  
Treaty Rights



Reforming our  
Tax System



Trade Agreements  
Cross-Border  
Commerce



Workplace  
Sexual  
Harassment



Disruption Caused  
by Technology



Environment and  
Climate Change



Class  
Actions

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