

The background of the entire page is a photograph of a city street. In the foreground, a crosswalk with white stripes is visible on a dark asphalt road. Several people are walking across the street, some in motion blur. In the background, there are several tall, modern buildings with many windows. The sky is a clear, light blue.

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Business as Unusual: New Realities, New Possibilities

A Roadmap for Business Leaders

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This article is for general information only and is not intended to provide legal advice. For further information, please speak to one of our contacts.



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Introduction

The novel coronavirus began as a public health crisis but has quickly become an unprecedented socio-economic crisis, affecting our way of life and business across all industries and all sectors of the economy.

Looking ahead, we expect the economic impact of the COVID-19 emergency to unfold in three distinct phases, each of which will present distinct challenges and potential opportunities:



During the **Great Lockdown** we have seen a vast and sudden freeze take hold of the economy. The government has tried to quickly put money in peoples' and businesses' hands quickly. We have seen serious supply chain disruption with the global stalling of production. The service sector has been hit particularly hard. Global healthcare systems are being tested.



While provinces cautiously ease restrictions in the **Post-Shutdown, Pre-Vaccine** period, the federal government's role in the economy will evolve, as it works to support and re-invigorate critical sectors. We may even see a vacillation between the Great Lockdown and Post-Shutdown, Pre-Vaccine phases if the coronavirus outbreaks resurge as restrictions are being lifted.



Finally, **after a vaccine or an effective treatment** are developed (assuming that a vaccine or treatment is successfully deployed), Canadian businesses will continue to feel the lingering effects of the crisis in the new economic landscape. Post-pandemic reflections will amplify weaknesses of the pre-pandemic world.

In Canada, the first priority in dealing with this crisis has and will be making people feel safe. Safe to go back to work, participate in their communities, and safe to return to the activities they enjoyed before the lockdown. We are very fortunate to be living in a country with strong social programs and a relatively robust healthcare system.

Even as the safety of Canadians is being prioritized, stabilizing the economy remains the other top priority of policy-makers, as they consider what measures they can take in the immediate term to address or mitigate the effect of the pandemic.

As we encounter each of the three phases of the pandemic's economic impact, businesses will look to adapt their policies, operations and perhaps even their business models. People are going to work differently and use spaces differently. Business travel will need to be re-thought, but globalization might even accelerate with the adaptation of new technologies. Technological innovation and migrating more aspects of our lives online will be accelerated, out of necessity.

In this paper we highlight key issues in this new economic landscape. As your trusted legal advisors, McCarthy Tétrault is here to guide you through the complexities and challenges.

Phase One: “The Great Lockdown”

As COVID-19 has spread rapidly, “The Great Lockdown” aptly describes the state of the economy in Canada and across the globe.¹ We have been following strict quarantine guidelines to try to control the spread of the virus. Once the dangers of COVID-19 became clear, governments across Canada acted quickly to implement the shutdown and preserve the economy through rapid cash transfers and emergency programs. Limited essential services, such as grocery stores, pharmacies and critical infrastructure projects, have remained open. As 2020 progresses, we are seeing a tentative expansion of businesses that are permitted to open in certain provinces (in some cases, with onerous restrictions) while many have remained closed or otherwise operating in a very limited fashion.

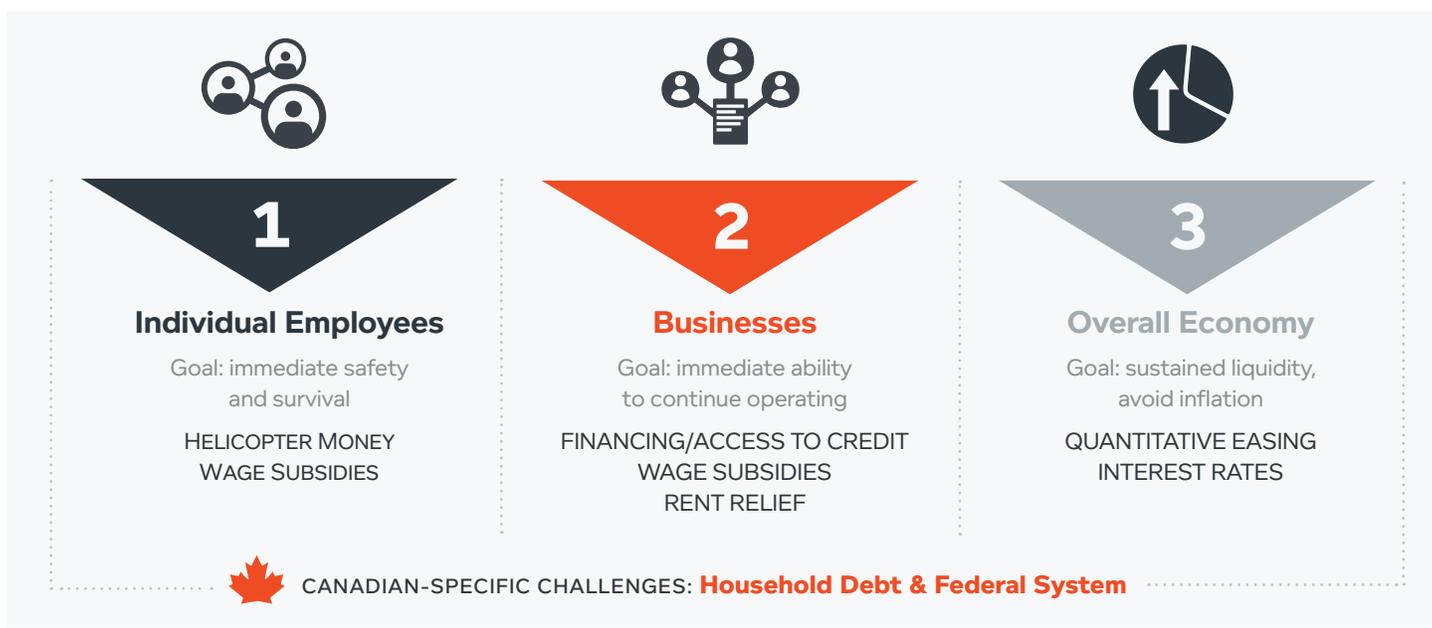
BUREAUCRACY AND SPEED

“ Governments are not designed to work rapidly and that’s quite deliberate and actually it’s a good thing. Why? They make wide-ranging decisions that have long-term consequences on our lives. Therefore we want governments to be deliberate, to think through the consequences, to measure, to consult. But in this case, everyone pretty much agrees that speed is more important than bureaucracy and there is an acceptance that governments may make decisions and put forward programs, make mistakes, have to change them along the way which is actually what has happened because of the urgency and the importance of reaching people and helping them in a moment of crisis. ”

– Jean Charest, *Partner, McCarthy Tétrault, former Premier of Québec*



Types of Emergency Relief Programs





“ The idea was the emergency response benefits had to grow first, because we have 5.7 million out of the 19 million workers in Canada not actually attached to employers. ”²

– Bill Morneau, *Minister of Finance*

Emergency relief programs have been and continue to be put forward, and are designed for the sole purpose of keeping businesses afloat and people alive. Their economic objective is preservation to mitigate the more-difficult task of rebuilding later. We anticipate that industry-targeted measures will follow, as seen with rent relief measures through the Canada Emergency Commercial Rent Assistance program.³ See up-to-date relief measures as they are announced through our [Economic Relief Measures Tracker](#).

TOP 5 TIPS FOR SEEKING ECONOMIC RELIEF

- 1. Eligibility Criteria:** Program eligibility can be tricky. It is essential to pay special attention to each program’s eligibility criteria to avoid being misled by inconsistencies. For example, the term “small and medium-sized businesses” varies by government and by program. You may also be surprised that some programs are available to your business where you assumed you weren’t eligible.
- 2. Program Availability:** All good things must come to an end, right? Pay close attention to program availability and deadlines. While some deadlines have been extended, others have closed. And with news releases being published prior to program applications opening, a lot of information quickly becomes either outdated or inaccurate.
- 3. Trusted Sources:** Government pages for programs are the most frequently updated sources. Also, the McCarthy Tétrault [COVID-19 Recovery Hub](#) contains relevant, detailed and accessible information about specific programs.
- 4. Mitigating Risk:** Significant government financial assistance rarely comes without strings attached. Make sure you fully understand the obligations you are committing to and set up systems to comply with them to the letter. This will avoid potential regulatory actions, including fines and claw-backs, down the road.
- 5. Corporate Reputation:** Businesses should be aware of how stakeholders, including employees and the general public, will view their actions when accessing these programs. Stress testing is required to analyze what these resources will be used for and how this will benefit both key stakeholders and Canadian society overall as well as meet the stated aims of the program. This will help avoid negative reputational impacts and potential litigation going forward.

We have been proactively monitoring relief programs, eligibility criteria and what it takes for organizations to be compliant. Our internal tools help us efficiently identify the programs most appropriate for your organization

and any applicable restrictions. Our Strategic Advisors also have comprehensive experience with navigating the challenges in effectively accessing and implementing these types of assistance and government interactions. If you are uncertain of which programs are available to you, or want to find more detailed information on each program and whom to call, please refer to our [Economic Relief Measures Tracker](#).

1. PROGRAMS FOR INDIVIDUAL CANADIANS

The federal Government has and will continue to inject “**Helicopter money**” – a term used to describe large sums of new money to stimulate the economy, generally distributed directly to individuals. The Canada Revenue Agency has processed over 8 million claims from unique applicants for the Canada Emergency Relief Benefit (“CERB”),⁴ the income support program that provides eligible Canadians with \$2000/month.⁵ The high need for this program demonstrates the crisis’ enormous shock to the economy and impact on peoples’ lives.



CONSIDER...

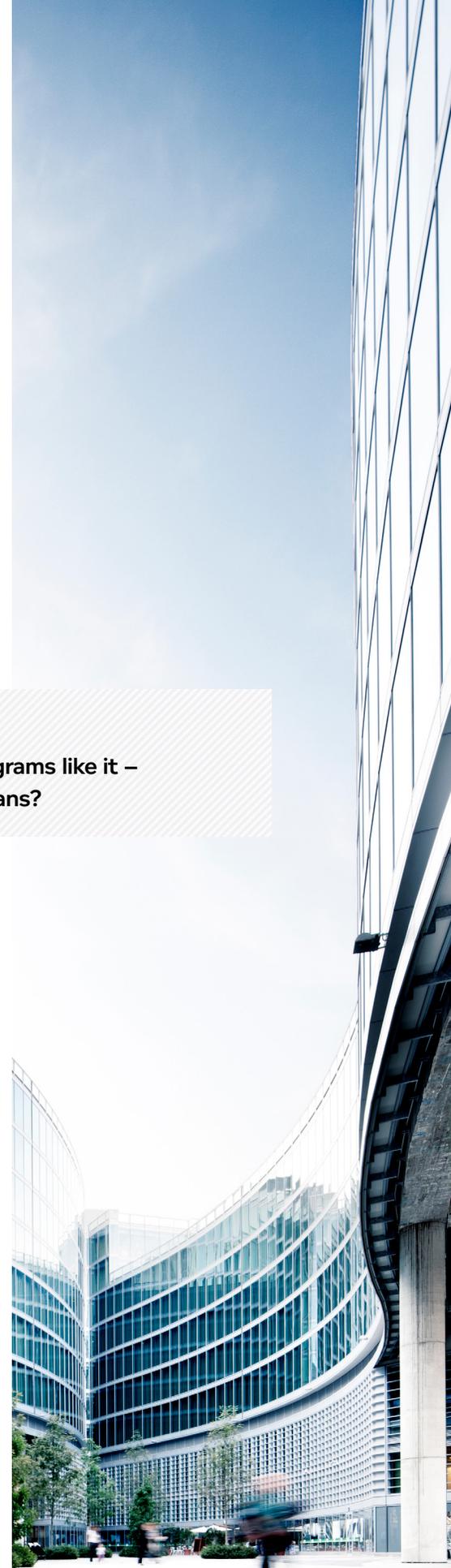
Will CERB truly be temporary? Or will it – and emergency programs like it – create a basis to discuss minimum basic income for all Canadians?

2. PROGRAMS FOR BUSINESSES

Governments of all levels are trying to keep **Canadian businesses afloat** by back-stopping and providing loans. The diversity of businesses affected creates an immense challenge for governments creating assistance packages. Programs available to help businesses access credit include:⁶

- > [Canada Emergency Wage Subsidy](#)
- > [Business Credit Availability Program](#)
- > [Canada Emergency Business Account](#)
- > [Large Employer Emergency Financing Facility](#)
- > [Canada Emergency Commercial Rent Assistance](#)
- > [Regional Relief and Recovery Fund⁷](#)

You can find more information about all of these programs on our COVID-19 Hub – see [Economic relief measures announced to date](#).





Key consideration: These funds come with “strings attached”

While the federal government’s focus has been distributing cash quickly, it has been clear that significant financial assistance will have strict conditions.⁸ For example, **funds for large businesses will include conditions** to discourage significant share buybacks and excessive executive compensation. In addition, the employer recipients of wage subsidies can be made public. Recipient companies for some of the programs will be **required to publish climate-related disclosure**, including how future operations will support environmental sustainability. As a corporate leader and decision-maker, you need to be very, very careful and conscious of accountability regarding the use of the funds received. You should ensure that any funds received through these emergency programs are diligently tracked, and that you are in fact eligible for the funds so they do not get clawed back later.

3. MEASURES FOR THE OVERALL ECONOMY

Modern monetary theory has been driving monetary policy at central banks around the world, including in Canada. To support government spending, the Bank of Canada has responded to the crisis with unprecedented levels of quantitative easing, buying \$5 billion in government bonds per week.⁹ In April, the Bank of Canada announced it will also begin buying corporate bonds, to a maximum of \$10 billion in senior secured and unsecured bonds.¹⁰ This unprecedented move, coupled with high government spending, could lead to a “day of reckoning” down the road.

MODERN MONEY THEORY

“ If you’re a sovereign country with your own central bank, you can borrow as much money as you want as long as you have enough money to service the debt. And if you have enough money to pay the interest on the debt on an annual basis, you’re okay (in theory). ”

– Jean Charest

Canadian-Specific Challenges

Two important points of backdrop will pose challenges to Canada’s recovery:

1. Canadian household debt levels are at record highs

Our household debt levels are among the highest in the world.¹¹ Following the crisis in 2008, Americans and UK residents deleveraged, while Canadians instead invested in their mortgages, especially in overheated real estate markets like Toronto and Vancouver.¹² This leaves little financial maneuvering room in a period of crisis: a missed pay-cheque or business closure could mean an inability to make mortgage payments. This made immediate government relief a necessity, and set aside the discretionary consumer spending needed to inject money back into the economy.

Interest rates are at historical lows, so many Canadian corporations are highly leveraged.¹³ This sends a strong message from the Bank of Canada to the marketplace: the banks are going to do what they have to do to keep the markets moving and put liquidity back into the market.





2. The federal government’s role is to coordinate and fund provincial and territorial efforts

While the federal government has been coordinating many emergency benefit programs and transferring money, provincial governments are the day-to-day showrunners in the Canadian economy. The provinces are responsible for health care systems, long term care facilities, schools, roads, public security and most other public infrastructure. Provincial officials – particularly public health officials – have been tasked with deciding when and how the economy re-opens. Coming out of the crisis, provincial governments will continue to bear the burden of funding large payrolls in schools and hospitals.

“ To further illustrate this, a substantial percentage of a provincial budget is for salaries (doctors, nurses, healthcare workers, teachers, workers for the Ministry of Transport), whereas in the federal budget, only a small portion is spent on salaries. ”

– Jean Charest

Opportunities through Challenges

Enterprise level assessment and mitigation has never been more important as economic and behavioural shifts impact business in new irreversible ways

 Business Continuity	 Stakeholder Opportunities
<ul style="list-style-type: none"> Supply chain stabilization Contract relief Structuring and assessing growth Access to credit Technology & cybersecurity 	<ul style="list-style-type: none"> Government support Economic relief Employee health and safety

Businesses have faced unique and unprecedented challenges, but also opportunities to assess their current operations and evaluate whether they can operate more efficiently, stabilize their operations for long-term sustainability in light of global changes, and even grow:

- **Supply Chain Stabilization:** The crisis has posed serious challenges to the **supply chain** of almost all industries. Cross-border businesses have experienced critical delays at borders. While this poses immediate challenges, it is also an opportunity to work with your trusted legal advisors to **holistically review and assess your entire supply chain**, identify potential areas of weakness, and develop a plan for long term stability.

“ You have to look behind those projects now and ask whether they will be ready to go; are those subcontractors going to be able to gear up or are they gone? ”

– Wayne Wouters, *Strategic and Policy Advisor, McCarthy Tétrault and former Clerk of the Privy Council of Canada*

- **Contract Relief and Liability:** Complex and difficult-to-resolve disputes are emerging over “force majeure” clauses in commercial contracts and entitlement to insurance. This includes COVID-related business interruption losses that impact both business continuity and economic survival of affected businesses. [A thorough understanding of your rights, liabilities and practical business solutions is critical.](#)
- **Structuring and Assessing Growth:** In reviewing market trends and in speaking with clients, we expect increased distressed investment activity. You might find yourself dealing with a challenging **distressed transaction** scenario, from considerations around restructuring your own business to avoid takeovers as well as assessing investment opportunities in the distressed space. Working with experienced counsel will help you [successfully navigate the nuanced challenges of distressed reorganizations and transactions.](#)
- **Access to Credit:** Accessing government programs to increase credit available to your business, which has allowed businesses to survive and adapt to changes to their business model and the consumer climate during this volatile time. Check out our up-to-date [Emergency Measures](#) tracker.
- **Technology & Cybersecurity:** During the Great Lockdown, we’ve seen how critical technology has become. We’ve already seen tremendous growth in companies who operate digitally or those who support the digital economy (thinking about companies like Zoom, whose subscribership

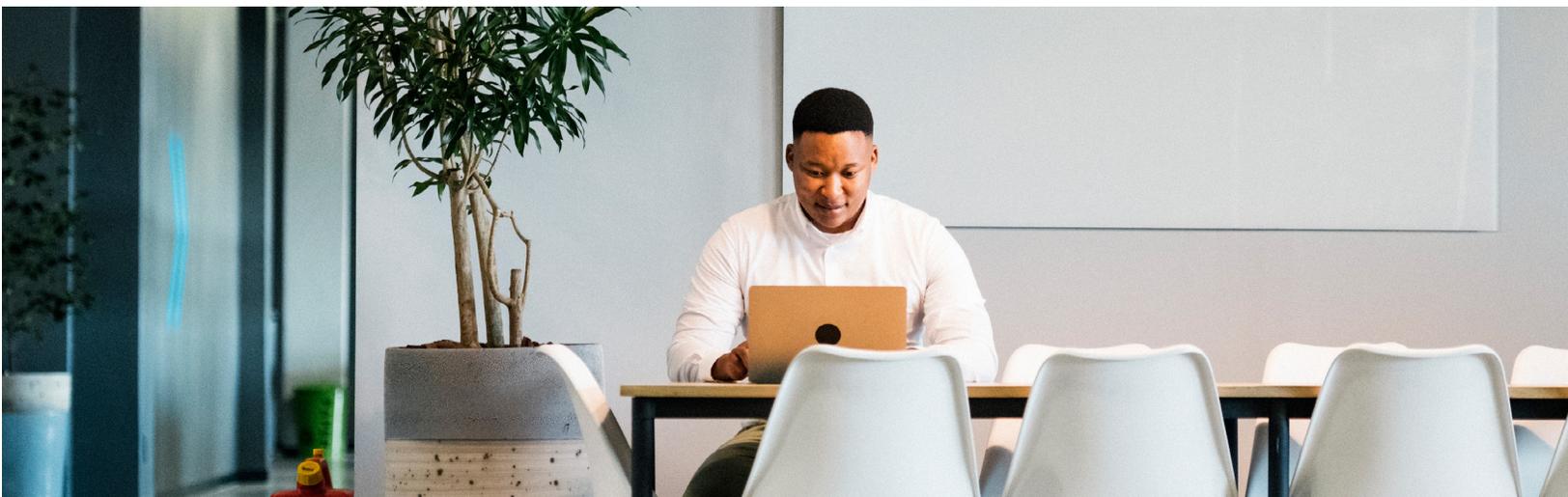
has grown immensely, the skyrocketing popularity of grocery store delivery, and companies pre-positioned in this space, such as Amazon). Businesses, in particular, should consider implementing long-term measures to mitigate cybersecurity risks, as their operations will likely have greater dependency on technology, virtual employment and services following the pandemic.



CYBERSECURITY CONCERNS AMPLIFIED

We are now working virtually on a scale that we thought wouldn't happen for many years, which creates changes for increased attacks and vulnerability. It is critical that all businesses with remote workers and online presence are equipped with adequate safeguards for these new risks.

Knowing what information you have, who is using it, where it is stored and what security protocols are in place is key to both protect information and contain any potential incidents. **Advanced AI systems like Relativity** enable the efficient identification and categorization of information to support a robust Information Governance program. [Find out more information about Relativity here.](#)

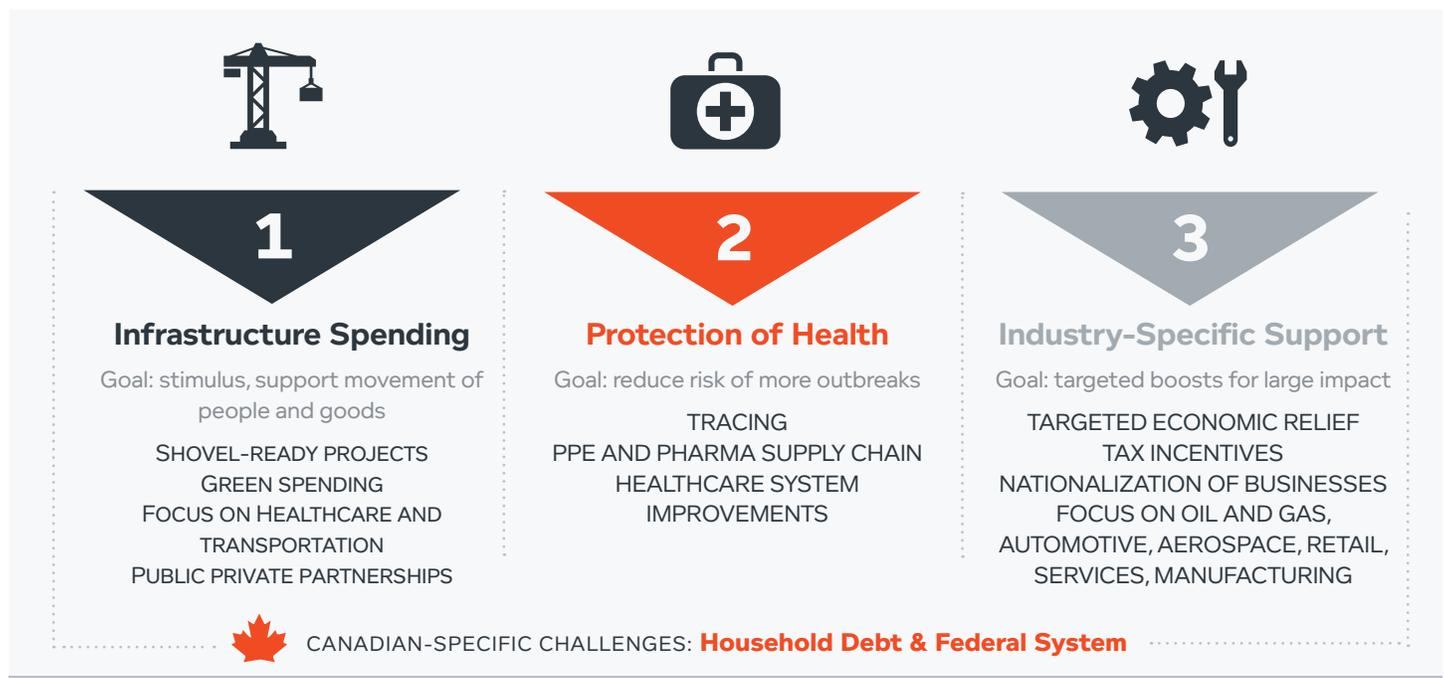




Phase Two: “Post-Lockdown, Pre-Vaccine” – Entering the Empty Chair Economy

Survival to Stimulus: As some provinces begin to loosen restrictions on activity, the Canadian economy is transitioning to this second Phase. With the pressure to rejuvenate the economy, governments are reopening even though there is no vaccine or treatment available. This puts even greater pressure on businesses to have their own houses in order to protect employees and customers, and increases the risk of another shutdown or series of shut downs of the economy.

Phase 2 Survival to Stimulus



Government Response in Phase 2 - Some Key Questions

As government programs transition from survival to stimulus, where will future investment be focused? Will these programs also be able to boost consumer confidence and spending?

It is expected that many industry-specific investments will be made. We’ve highlighted a few areas where spending will likely be focussed below.

INFRASTRUCTURE SPENDING WITH A FOCUS ON SUSTAINABILITY

The federal government will invest in infrastructure projects across the country, with up to \$180 billion in unspent infrastructure funds that were approved before the crisis. The federal government has indicated it is looking to invest in “shovel-ready projects” and “shovel-worthy projects” which can create jobs quickly.¹⁴ This is a unique opportunity for governments and businesses to focus on green spending, accelerating the transition to a more sustainable economy. It is, however, questionable as to how quickly governments of any level will be able to meaningfully spend infrastructure funds, given the long lead time to bring an infrastructure project from the conceptual and design stage to having shovels in the ground.

Taking into account the fiscal pressures of the crisis, they may be more willing to undertake alternative and creative infrastructure development initiatives in partnership with the private sector, such as those falling within the existing mandate of the Canada Infrastructure Bank, public-private partnerships, and public asset monetization. Governments may also be more receptive to allowing user fees and tolls to pay for the cost of developing, maintaining and operating public infrastructure. Legal counsel with experience in

these types of transactions will be invaluable to both the public and private sectors in order to successfully guide projects from their inception to implementation phases.

Universities and other educational institutions will be one particular example of infrastructure investment. Alternative virtual education options must be considered, while re-planning spaces to ensure student safety and maintain their value proposition.

Existing infrastructure assets may become more attractive to investors who are interested in relatively safe and stable long-term returns.

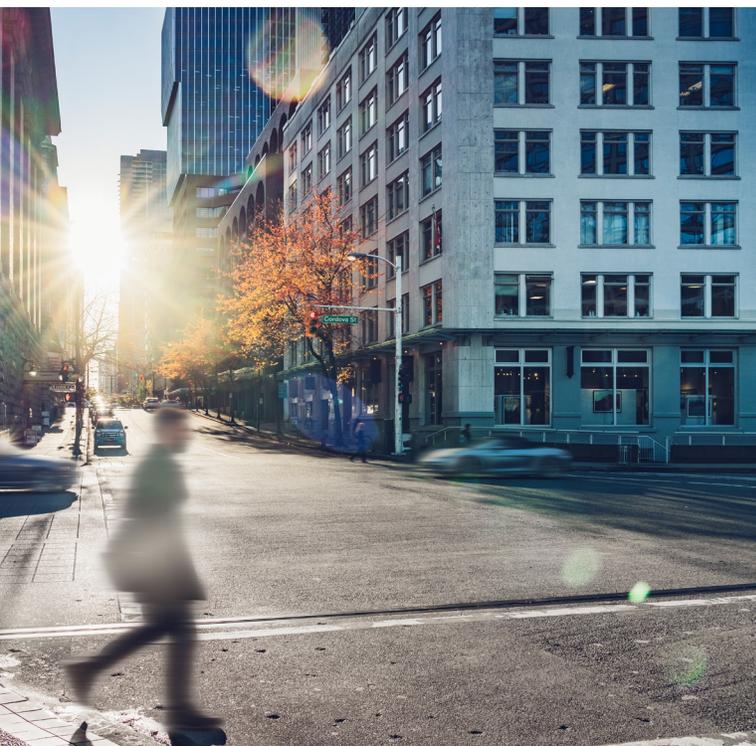
“ A lot of people are talking about shortening the supply chain for medical equipment, for drugs. Should we be looking at those kinds of opportunities in Canada? ”

– Wayne Wouters

PROTECTION OF HEALTH WITH A CLOSE EXAMINATION OF DEFICIENCIES IN THE SYSTEM

How did our hospitals and long term care facilities perform during the crisis? How did people react to the disruption? Did we have enough workers? Are they paid well enough? Are they trained for this kind of emergency? And, the recurring supply question: **how did the supply of personal protective equipment hold up?**

We should expect the government to audit how the healthcare system performed and look at a sustained and guaranteed supply of protective and medical equipment and supplies for future emergencies. Health products will be an important area of investment. Long term care facilities have been at the epicentre of the crisis – the high number of deaths at these facilities, combined with the government calling in the military to assist, laid bare the operational challenges that lie ahead. There will be an appetite to reform these facilities and consider innovative delivery and financing models for them.





Government Response to Supply Chain Shortcomings

- The pandemic has shed a new light on the weakness of global supply chains.
- Concerns arise when we are too dependent on single suppliers, or too dependent on a single country like China. We have to consider steps to ensure a security of that supply chain, especially if you operate in areas like the automotive or aerospace industries: two very important sectors for Canada.
- Our government will want companies to address redundancy, proximity, safety and security of their supplies.
- A **holistic review of your supply chain strategy** to address these concerns can also provide opportunities, reducing cost and increasing reliability.



WHAT CAN WE EXPECT FOR QUANTITIES OF GOVERNMENT SPENDING?

Sector-Specific Government Support and Stimulus

For the first time ever, we are facing a **recession that began in the service sector**. Major transformations in the government's role in the economy will characterize this Phase of the recovery.

Job loss in the service industry is disproportionately impacting women.¹⁵

The incidental benefit of the lockdown, however, may be that working from home and flexible work arrangements could become de-stigmatized, which may also enable more flexible career options for those whose life situations benefit from flexibility, such as parents of young children. The normalization of working from home continues to have a gender dynamic.

Businesses deemed "essential" have been less affected financially than those "non-essential" businesses – some are actually having challenges keeping up with the high demand during the crisis. This is also true for

businesses that are able to be nimble and move services or products to a digital platform or other alternative delivery method. **Tech startups with creative solutions** to problems arising from the crisis are another example.

It is unlikely consumer spending will return to pre-crisis levels in the near future. Highly leveraged consumers are not going to spend as freely as they did pre-COVID. In China, early signs indicate that consumers are unwilling to part with discretionary income.¹⁶ Canadian consumers will likely adopt similar spending behaviours. However, **certain types of consumers seem willing to spend during the crisis**. Luxury retailers have seen positive market valuations.¹⁷

As a result of these uncertainties, businesses in the services sector and other affected sectors may continue to require government assistance. In some industries, governments might take equity stakes in the businesses, rather than provide straight cash transfers. The government will need to make key decisions in terms of how these sectors are structured and financed. This Phase will see governments moving more slowly as they look for ways to stimulate the economy until a vaccine is developed.

- The service sector is very diverse – consider the vast variety of stores in a shopping centre. How can the government help everyone?



- It will be difficult for governments to stimulate all businesses – some businesses **will be lost**, while others will just have adapted their business model and **shifted their revenue stream**.
 - The only way the government can help these smaller retailers with truly lost revenue is through direct funding and by allowing them to return to their businesses. Larger, more established businesses will have higher chances of surviving because of access to credit lines and to banking facilities and services.

Lost vs Shifted Revenue: Think about a missed haircut – the customer will make the purchase after re-opening, but the missed haircut will just remain lost revenue. Other purchases get truly shifted, such as delaying the purchase of a new vehicle for a few months.

- Larger, more established businesses will have greater access to credit lines and to banking facilities and services.
- Economic uncertainty will also likely result in consumers paying down debt rather than increasing their spending habits, and government pay-outs to individuals may not result in increased spending to stimulate the economy.

HOW CAN WE EXPECT THE GOVERNMENT TO SUPPORT OTHER LARGER SECTORS?

Government initiatives will provide longer term support and protection

The gap between businesses with liquidity and those without will create an uptick in takeover opportunities.¹⁸ While buying opportunities will exist, the federal government will monitor foreign investment, especially

in businesses related to public health or involved in the supply of critical goods and services to guard against outsized foreign influence.¹⁹ The federal government has also indicated that enhanced scrutiny will apply to investment made by foreign state-owned enterprises or investors working under the influence or direction of a foreign government.²⁰ This is a trend emerging globally. The European Union, for example, has moved to protect European businesses from becoming controlled by foreign state-owned enterprises or sovereign wealth funds after news emerged that Saudi Arabia's fund had gained stakes in four major European oil companies.²¹ Many developed countries have decided to tighten foreign investment rules to avoid losing national champions that are strategic to their country's economy.

CANADA'S PENSION FUNDS – REVERSE SIDE OF THE COIN

Canada's 10 largest pension funds are among the most important infrastructure investors in the world. They will be well-positioned to take advantage of new buying opportunities, though they may face added scrutiny from foreign governments given tightened foreign investment restrictions abroad.

We see an example of important national corporations in the airline industry, with governments around the world bailing out their major airlines. A bail-out might be in the form of equity (nationalization of a number of companies and sectors) to get the companies back on their feet long enough to privatize them, as was the case with General Motors in the 2008-2009 recession. How and whether this happens in Canada has yet to be seen.

For the **oil & gas industry**, the immediate challenge is liquidity. With the COVID-19 onset and lockdown of global economies, demand for oil & gas dropped off dramatically at the time when these commodities were already facing an oversupply challenge. This has resulted in massive drops in commodity prices, cuts to capital expenditures and shutting in production, putting further pressure on the borrowing capacity and debt facilities that are available to the industry.

In recent weeks, we have seen a small recovery in commodity prices due to a larger supply cut that has been supported by the OPEC+ group of nations and lowered supply from other nations as a result of shuts in production. The recovery for oil & gas is expected to be slow and steady but there are several variables at play that make this very difficult to predict, such as a second wave of COVID-19 infections, the rate of demand recovery, the continued support for supply cuts by OPEC+ and global economic recovery. There will certainly be buying opportunities for those that can access capital and continued consolidation within the industry as we continue down the path of recovery.

Phase 2 Brings a Slow Re-opening of the Economy

Governments are creating and modifying plans to re-open the economy safely and effectively to return to some normalcy. **What can we expect to see?**

- Plans to re-open the economy will be full of caveats; it is not as simple as businesses simply re-opening their doors.
- With re-openings come risks, particularly with respect to health and safety as government and business work to reduce the risk of a community-spread “second wave” within workplaces.
- Among other critical health and safety considerations, physical distancing will be critical to effective reopening. There is no consistent theory about what is required for effective physical distancing, and businesses and their employees will face many challenges. Workplace reconfigurations? PPE? Elevator spacing? Sanitization and cleaning protocols? Staggered workdays? Consulting with a medical experts prior to re-opening?

THE ROLE OF BANKS DURING COVID-19

Canada’s financial institutions are playing a central role in supporting the economy in the face of the health and financial crisis caused by COVID-19.

“ **As with all sectors, the banking sector will likely have no choice but to adapt to a new normal once COVID-19 is behind us. Virtual collaboration will continue to accelerate through the use of innovative technologies which are proving to be extremely effective during this difficult time, potentially resulting in a sharp shift in the way bank staff have traditionally fulfilled their work duties. The new technologies have allowed for better and easier connectivity across organizations and ecosystems, opening the door to efficiencies, productivity gains and costs savings, potentially allowing for reductions in real estate footprint and travel. These innovations may also increase appetites for experimentation and accelerate partnerships between traditional institutions and fintech.** ”

- Lucie Tedesco, *Senior Counsel, McCarthy Tétrault, and former Commissioner of the Financial Consumer Agency of Canada (“FCAC”)*

The FCAC has introduced a new oversight framework and new enforcement team, increased its oversight bench strength, received new enforcement powers and will be administering a more comprehensive set of market conduct rules to which financial institutions will be required to adhere.²²

For further insights from Lucie on recent financial regulation changes, see:

[How the FCAC responds to COVID-19, the FSRA issues new guidance for mortgage-based investments disrupted by COVID-19, and the Federal Financial Consumer Protection Framework Article Series and Related Insights](#)



QUESTIONS YOU SHOULD ASK BEFORE RE-OPENING

What is your legal responsibility vis-à-vis your employees and third parties on your business premises? How does this differ among the jurisdictions in which you have employees or customers?

1. Is now the right time to bring people back into the workplace?
2. How will you ensure the safety of your workers and other stakeholders and how will you assure your team of these steps?
3. How can you reconfigure and rethink the work environment to enhance health and safety?
4. What new protocols, policy changes, training and communication initiatives are required to ensure safety-centric compliance by and for the benefit of all stakeholders?
5. What personal protective equipment will you need to procure and how will you do that? What technology options might be open to you?
6. How will you accommodate employees who require either medical or family-related accommodations in this new working world?

“ You can assume that this working at home and digital economy and digital working environment is going to probably be with us in a way that we had not experienced before. ”

– Jean Charest

See our [comprehensive list of return to work considerations](#).

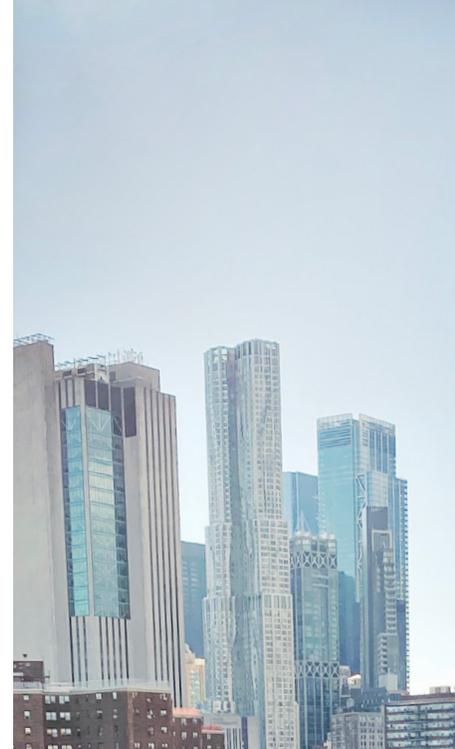
- Whether it's enabling working from home, online retail, or connecting with family and friends, we are now required to use technology in new ways and more often. The greater use of technology has brought forth a wave of malicious cybercriminal activity, including phishing campaigns, ransomware attacks and attacks on critical information technology infrastructure. Businesses and individuals both need to be aware of potential cyber threats and the cybersecurity controls that they can use to mitigate the increased cyber risks, which will continue throughout all phases of the pandemic recovery and beyond.



Consider how you should properly protect your workplace from these threats, when the workplace now includes the home. [We discuss these cybersecurity considerations here.](#)

- Phase Two will not likely mark a return to normal across Canada until a vaccine or an effective treatment is found. As a result, many businesses may experience Canada as an “**empty chair economy**”.²³ They will need to consider whether, when and how to transition their workforces back into the office.
 - **More Hybrid/Work from Home Models?** Some organizations might choose to revisit their pre-crisis telework policies to accommodate employees who continue to have domestic care obligations or who simply prefer to work from home. More workplaces might adapt a rotating work from home/“hoteling” at the office model.
 - **Reduced or Reimagined Offices?** It is possible some companies might never again occupy their full office space. Building on a pre-COVID trend, organizations may have come to the conclusion that they can significantly reduce their office footprint. We may also see traditional office spaces reimagined, used more creatively, repurposed, and redeveloped.

- **Lower Density Workspaces Desired?** Counterbalancing this is the expected concern returning employees will have in sitting at a desk or work station recently occupied by someone else. In addition, a desire to maintain some level of social distancing will result in a reversion of the trend to increased office densities. Even in a work from home economy, video-conferencing fatigue will lead to a desire to return to in person meetings both internally and with external parties. This will require larger conference and meeting facilities. All to say that the decreased demand in office space is by no means certain.
- During Phase Two, **experienced real property counsel** will be essential to commercial property owners, developers, landlords, tenants, lenders and equity providers to ensure they know their rights and obligations in these circumstances, and to help them prevent and mitigate potential losses and come up with creative solutions to challenges if and as they arise.



TOP 6 QUESTIONS BOARDS SHOULD CONSIDER:

1. How can our business continue to operate in light of government restrictions and changing legal environment?
2. What is our financial position and where do we turn for support?
3. How can we best protect the health and safety of returning employees, customers and others?
4. What are our main business continuity risks and how secure is our supply chain?
5. What have we done well in the face of this crisis and where can we improve?
6. How can we adapt our business model to take advantage of technology and online infrastructure?

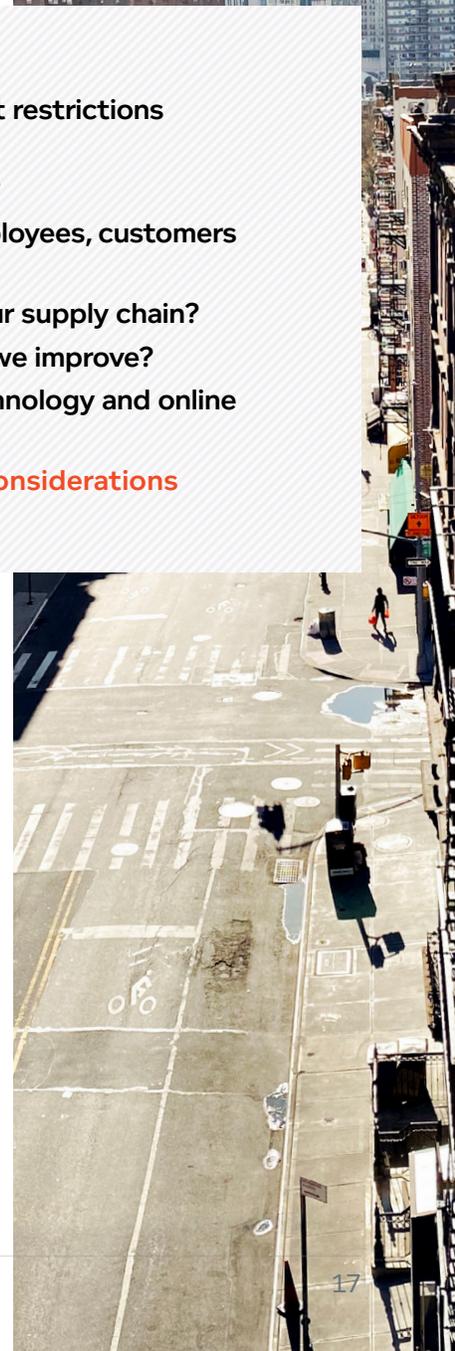
A detailed discussion of important director responsibilities and considerations can be found here.

BALANCING TESTING AND TRACING WITH PRIVACY CONSIDERATIONS

As provinces look to reopen economies, **testing capabilities** will constrain their decisions. "In Canada, in early May, there were about 20,000 tests done every day to determine whether someone had COVID 19 or not. Most experts think we need a minimum of 60,000 a day."²⁴

Question: What screening protocol can employers put in place before employees and third parties are permitted to enter the workplace? Can employers require testing? Temperature screening? Screening questionnaires? Contact tracing? What if employees refuse?

Contact Tracing is a tool that some governments are currently using to limit the spread of COVID-19. Contact tracing involves tracking individuals who have tested positive for COVID-19, and those with whom they have been in contact



to chart the path of contagion and impose controls to contain the spread of the virus. Some governments are requiring mandatory contact tracing applications for all citizens while in Canada the government is looking at voluntary apps. It is important to note that contact tracing apps are but a piece of a full COVID-19 containment solution. For maximum efficiency and for uptake in the most marginalized and vulnerable populations, wearable technologies and AI must be incorporated into a viable platform. Moreover, privacy concerns should be of paramount importance.

We explore the privacy implications of contact tracing applications and what it means for your data in Episode 14 and 15 of McCarthy Tétrault's podcast [Law in the Time of COVID-19](#).

Question: Should employers use tracing methods to protect their employees, given privacy considerations, and if so, what tracing methods are best?

- The province of Alberta has developed the [ABTraceTogether App](#), a voluntary application Albertans can download that will use Bluetooth technology to generate a log of app users they've been in close contact with.
- The federal government has not yet committed to a specific technology, although it is expected they will soon endorse one particular contact tracing technology across Canada. Apple and Google are collaborating on one Exposure Notification System and are they committed to preserving privacy through this collaboration.²⁵
- You can [listen to our podcast episodes on contact tracing](#) from an employment and privacy standpoint here.
- Find out [more information about cybersecurity and privacy issues here](#).

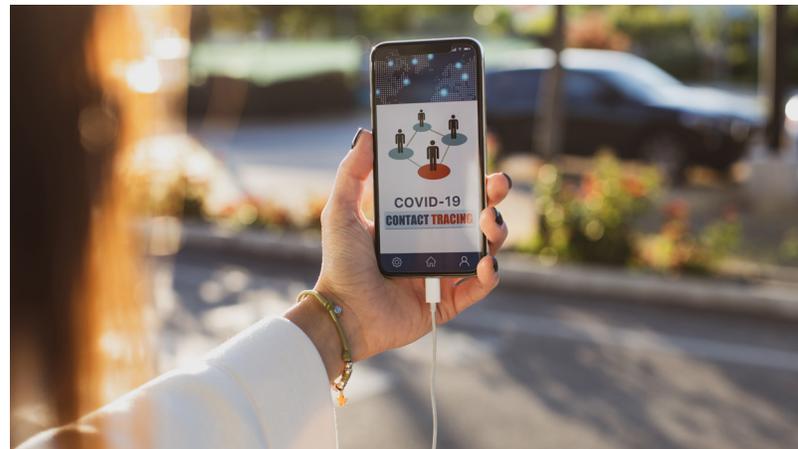
Privacy concerns may arise from the use of technologies that test for and track COVID-19. Companies that plan to use such technologies should be aware of the potential privacy risks.

Reopening the economy will require a multi-faceted COVID-19 containment plan which should include a contact tracing app, wearables, AI and an adoption

strategy. This will mitigate the spread of virus as well as predict and forecast future COVID-19 outbreaks. When considering a technical solution, one must balance privacy rights with health and safety obligations and educate users and the general public about their protections.

Consider...

Companies planning to adopt technology to fight COVID-19 should consider balancing privacy and health and safety considerations when adopting such technologies.



MT>Ventures

A DIVISION OF MCCARTHY TÉTRAULT

“ Startups are going to play a critical role in re-invigorating our economy through the pandemic. Our future depends on the work we do now. ”

- Aliya Ramji, co-founder of MT>Ventures, a division of McCarthy Tétrault

MT>Ventures was launched amidst the COVID-19 pandemic, a time when many businesses are struggling – but we are seeing increased collaboration and innovation within the startup community and gig economy that is rallying to meet the emerging needs of the Canadian marketplace and serve the greater good.

[Find out more about MT>Ventures here.](#)

The Oscillation Between Phase 2 and Phase 1

As eager as everyone has become to re-open and begin the re-stimulation of the economy, governments will be balancing the economic cost of keeping strict lockdown measures in place with the health risk of people contracting the virus. However, one thing is clear: we will not be out of the woods until a vaccine or effective treatment has been developed. Despite current global efforts to develop such vaccine or treatment, timelines are still unclear. In the meantime, the economy will re-open, people will be expected back at work, and government program spending will start to decrease.



Phase 2: Opportunities through Challenges

Businesses will have to re-imagine their operations in the new normal. As governments transition spending from emergency to stimulus programs, incentives for new technology and innovation are high.

 Government-Influenced Changes	 Stakeholder Opportunities
<ul style="list-style-type: none">Infrastructure spendingRe-evaluating our healthcare systemsSupply chain review	<ul style="list-style-type: none">New infrastructure investment: green, social, transitReturn to workEmployee health and safety

- **Infrastructure spending:** The federal government has announced that its priorities for investment are public transit, trade transportation, green infrastructure, social infrastructure (including affordable housing) and enhanced broadband infrastructure. Companies with a supply chain ready to support these projects may be presented with opportunities. [See key considerations for project stakeholders here.](#)
- **Re-evaluating our healthcare systems:** The pandemic has strained our healthcare systems, which has highlighted weaknesses. Provincial governments will be making investments in this space to ensure the system is robust. Suppliers of PPE and pharmaceuticals might find advantages in sourcing locally, which will create opportunities for Canadian companies in these industries.
- **Supply chain review:** Supply chain issues have been a serious concern across countless industries. Governments may create guidelines so future pandemics (or similar crises) don't have such a burdensome effect on certain supply chains. This creates an excellent opportunity for businesses to proactively evaluate and recalibrate their supply chains.
- **Assessing the workplace:** Although not without certain challenges, employers who take the time to develop proper policies and procedures will find that continuing to allow flexible work arrangements can be beneficial:
 - Increased productivity – no commuting or office distractions may actually help employees work more efficiently²⁶;
 - Employees value and have become more comfortable with the flexibility and more time with family²⁷; and
 - Decreased infrastructure costs for businesses.



Phase Three: “Post-Vaccine Era”

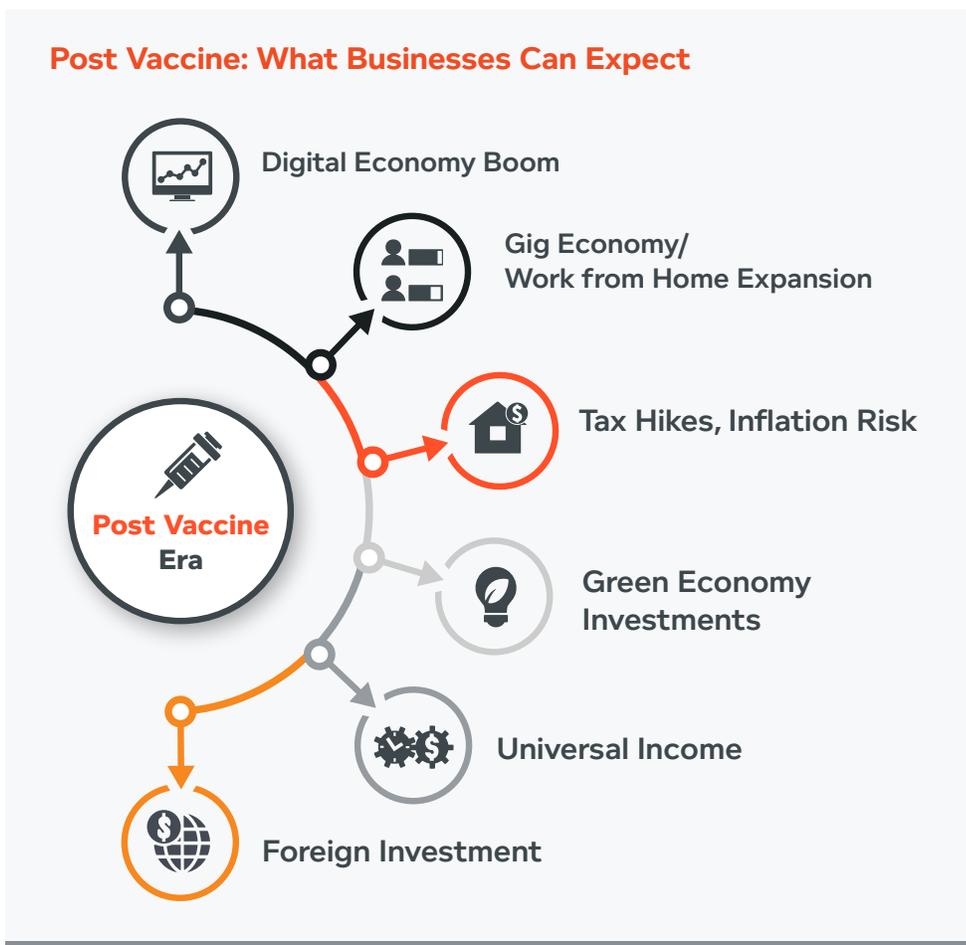
The final Phase occurs when a successful vaccine or effective treatment is developed and produced in sufficient quantities for worldwide inoculation. Until then, governments will be cautious in fully lifting the restrictions that have changed the way we live. Despite all of the efforts underway, if a vaccine does not become available, or is developed much later than expected, then we might remain in some form of Phase 2 and Phase 3 hybrid between **cautious re-opening and recovery**. Once the crisis subsides with the availability of a vaccine or effective treatment, some semblance of normalcy can return, but in truth, we will return to a very different normal.

The Debt Story

- We will face increased debt resulting from government survival spending programs.
- Governments will want to show a return to growth, albeit nominal, resulting from the implementation of economic measures.
- Further increases in annual program spending then accelerate such growth, causing a virtuous circle by which the debt can be reduced.
- However, this alone likely isn't enough – further options will likely be considered, including:
 - **Tax increases** – some blend of increased income tax, sales taxes,

wealth tax and a death tax could be in our future. Taxation of online services will be a priority, as will international tax structures.

- **Austerity measures** – cuts to non essential services.
 - **Harsher audit and assessment practices** – the Government will aggressively chase each dollar.
- Crises tend to accelerate economic trends, meaning that pre-crisis emerging trends will be amplified. In the long term, the governments will continue to be embedded in certain industries affected by the



crisis. The government's choices will dictate the crisis' winners and losers. Businesses can expect:

- Expansion of high speed broadband internet will be important to facilitate the growth of the digital economy and e-commerce industry, which will continue to boom.
 - For example, online grocery services existed before, but did not see wide-spread adoption. Those who adopted it in response to the pandemic have adjusted to this being a part of their everyday life.
- Transportation will be a more significant focus for businesses as they shift their attention to supply chain issues.
- The gig economy and last-mile transport industry will continue to grow.
- Governments will see the post-pandemic period as an opportunity to transition to a greener and digital economy.
- There will be an emphasis on public infrastructure development, especially in healthcare, long-term care, broadband, transportation, affordable housing, water, wastewater and clean energy assets and for indigenous communities.

EVALUATING ECONOMIC DISPARITY

Vulnerable populations are falling even further behind financially, in housing, healthcare, education and digitally, which will impact recovery.

The recent protests globally and here in Canada have shed light on the systemic and entrenched racism in our society that targets and disenfranchises black, indigenous and other racialized communities. Parallel to pandemic recovery, these barriers need to be dismantled.

There will undoubtedly be some revision to social programs after this pandemic.²⁸ Governments may look to redesign our social programs to make them more resilient as we tackle this pandemic and prepare for the next pandemic, or climate change event, or future global disruption.

Opportunities Through Challenges – Forecasting Business & Legal Trends

Returning to the new normal after there is a vaccination means certain trends from during the pandemic will fade, while others will become part of the future landscape for businesses.



Business and Legal Trends

- Interest in foreign investment
- Service sector recovery
- Privacy concerns
- Evolving business models



Stakeholder Opportunities

- Strength of Canada's pension fund investments, and domestic investors looking at Canadian companies
- Adjusting to consumers' new preferences, new service delivery methods and increased comfort in buying online and through social media
- Increase knowledge of privacy by design
- Rethink how we work

INTEREST IN AND SCRUTINY OF FOREIGN INVESTMENT

- **Foreign investment:** Businesses with cash on hand will have the opportunity to make significant acquisitions. State-owned enterprises will be primed to take advantage of the opportunities across the world. In most developed countries, decisions and announcements have been made to tighten foreign direct investment rules and make them more stringent.²⁹ Governments are increasingly concerned about losing national champions to foreign investors. Canada is no exception. It was announced on April 18, 2020 that **certain foreign investments will receive careful attention**.³⁰ Foreign investors looking for opportunities in Canada should know that Canada has always been and will remain a welcoming environment for foreign capital. Canada, like all countries, will be vigilant about adversely impacted strategic industries being acquired opportunistically. Our strategic advisors are very well placed to assist acquirers to navigate these sensitivities.



Opportunities may emerge for domestic investors to take a closer look at opportunities within the country if there are increased foreign direct investment rules.

- **Canadian funds investing abroad:** Conversely, Canadians will look around the globe for investment opportunities. Canada's big pension plans are some

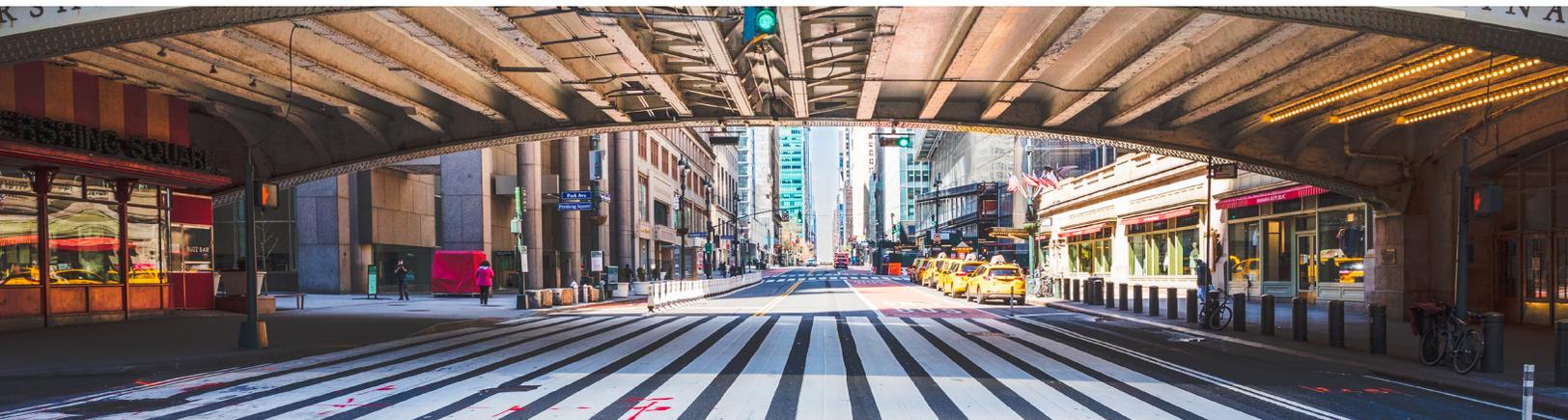
of the world's most important investors.³¹ While their investments may face more scrutiny than in the pre-COVID era, these funds have become part of Canada's brand and may have an advantage over sovereign funds of other countries.

- Smaller businesses will find the recovery particularly difficult. Larger businesses, which typically have access to cash, credit lines and banking facilities will be much more likely to weather the storm. This mismatch will inevitably result in an **increase in takeover activity**.

SERVICE SECTOR RECOVERY

Different elements of the service industry face unique challenges – for example, compare the circumstances of a manufacturer of washing machines (or similar large-ticket items) with a restaurant expecting a steady flow of customers. Through the crisis, consumers who would have otherwise purchased a washing machine likely put off such a purchase but ultimately will make the same purchase a few months later. In recovery, that demand will still exist. All those people still need a washing machine. Compare this to a restaurant that missed out on months of business. Although customers may be returning to restaurants, all the revenue that was missed in the interim is just gone.

Consumer spending will change. We will likely see increased saving rates coming out of the crisis as the uncertainty and the devastating economic effects causes people to rethink discretionary spending. There will continue to be opportunities for businesses that are creative in finding new ways of getting their products in front of consumers.





Since the pandemic began, we have seen a shift towards buying more online and through social media, online service offerings, to curbside pick-up and other new modes of delivering products and services. These new delivery methods might become permanent and might even further increase in popularity.

We will also see an increase in digital services and technology, as consumers have adapted through the crisis and are now comfortable receiving services online that were previously provided face-to-face.

PRIVACY CONCERNS

- The **increased use of technology** in all aspects of our lives will likely carry forward, increasing the focus on privacy laws.
- **Governments will have a stronger presence** in our lives, but it will likely be on very precise matters. For example, contact tracing applications are being designed to collect as little information as possible in order to achieve the goal of privacy. This is creating “privacy by design” expertise that may carry forward into other government initiatives.
- **Opportunities:** companies that are able to navigate the privacy issues while protecting health of employees will have a key differentiator to attract top talent.

EVOLVING BUSINESS MODELS

With all of these changes brought about by the pandemic – to the places we work, working from home, online retail expansion, re-thinking our supply chains – there is a great opportunity to rethink how work is done, and re-evaluate your existing business model. Some of the exciting opportunities to consider:

- Using new types of technology to re-imagine how your employees work together and how you interact with customers;
- Exploring automation to reduce costs; and
- Considering off-shoring options: based on new regulatory frameworks that might arise out of this pandemic, off-shoring may be more or less cost effective.

With all of these changes, it is key to remember the employment, cyber-security and tax implications of making these alterations. Robust risk planning should be considered to take into account for future pandemic or health-related crisis, and to learn from what worked in the current environment.



POST-CRISIS LITIGATION

The pandemic is forcing many courts to embrace virtual hearings, and counsel are quickly adapting litigating in the “new normal”, including convening virtual examinations for discovery and cross-examinations. Toronto’s Commercial List, for example, has adapted quickly and serves as the model for courts around the country. Still, the pandemic could occasion a litigation backlog, as postponed trials will have a cascading effect on the Court’s docket. What is more, the pandemic itself will give rise to new and novel litigation in all areas of the law: privacy, insolvency, contracts (force majeure, MAC clauses, frustration), supply chain, employment, negligence, and securities. Some of this litigation is time sensitive. We expect governments of all levels will be a litigation target as the scope and length of the emergency powers is tested, especially if there are second and third waves.



Strategies to Mitigate Litigation Risk for Your Business

- 1.** Demonstrate (and cultivate an image) that you are a responsible business that is doing its best and genuinely cares for the interests of your employees and business partners.
- 2.** Educate yourself regarding your legal obligations – statutory/contractual obligations, government guidelines and directives, evolving industry standards.
- 3.** Seek out, rely on, and document expert advice (e.g., industry experts, health and safety, infectious diseases experts).
- 4.** Don’t ignore early warning signs.
- 5.** Think about potential litigation and how you will respond before it occurs.
- 6.** Assemble a multidisciplinary team in advance to ensure a consistent and coordinated response (e.g., management, operations, public relations, government relations, internal and external legal counsel, medical/occupational health and safety expert, insurance).
- 7.** Think about insurance: where are your policies, what do they cover/not cover, what needs to be done to preserve coverage, are the existing limits sufficient to protect company and directors/officers, is the broker up to date regarding your evolving business and operations, and carefully consider renewals and potential policy changes.





Sources of Litigation Risk

- Occupational health and safety claims from possible COVID-19 exposure (e.g., work refusals, grievances, statutory complaints)
- Employment disputes (e.g., constructive dismissal, grievances, human rights disputes)
- Personal injury claims arising from COVID-19 infection (e.g., employees, consumers, customers)
- Contractual disputes with business partners (e.g., inability to meet supply obligations)
- Claims against business, officers and directors



Responding to Litigation or Litigation Precipitating

- Engage internal (and external) counsel immediately
- Protect privilege
- Control email communications
- Preserve documents and data
- Identify key documents and witnesses
- Consider retaining an expert
- Ensure a coordinated and consistent response
- Consider alternative compensation procedures
- Protect insurance coverage

LITIGATION CONSIDERATIONS AND PROACTIVE MEASURES

- Justice in the public court system will be slow and cumbersome as courts attempt to keep up with the backlog. **Private dispute resolution** providers, such as mediators and arbitrators, are more nimble and able to incorporate technological solutions to get disputes resolved quickly and more cost-effectively.
- There is an important distinction between **self-help remedies that can have immediate effect** but will be deemed right or wrong at some future date (e.g., non-compliance with obligations in reliance on a force majeure clause), and **remedies that require third party intervention** and thus will not provide assistance now when it is needed, even if there is legitimate entitlement (e.g., a legal claim against an insurer for business interruption loss that can take 2-6 years to prosecute).
- Many companies also do not currently have the cash flow (or existential certainty) required to pursue legal remedies. Failing to take steps to protect rights now may compromise the ability to make claims later (e.g., failure to provide timely notice to an insurer; failure to commence a legal claim within the limitation/prescription period when they resume running). **It is important that businesses not ignore these issues.** There are strategies to protect rights in a cost effective way, and good counsel will find ways to work creatively around funding (e.g., alternative fee arrangements).



Our national team is available to help you **identify the COVID-19 related risks** facing your business, and **develop practical risk mitigation strategies**. Our multi-disciplinary approach draws on industry-leading expertise across relevant practice areas, and our expertise in health law and class actions is particularly valuable to businesses faced with COVID-19 related risk.

New Challenges, Future Opportunities

We hope this has provided valuable insights and considerations for you and your business.

We have highlighted within trends, risks and key considerations for Canadian businesses. We have also asked a number of questions – many for which we do not know the answers yet. Because the virus is novel, so are the business and economic challenges we are facing.

However, what we know from working with organizations across all sectors critical to the Canadian economy, through economic booms and busts and through industry-changing events, is that every

challenge comes with opportunity. It is important to take a holistic view and scenario plan on different potential outcomes, with the above potential business and legal challenges and opportunities in mind to enable a nimble response.

Opportunity may not look the way we thought it would, but it will be there, and we would like to help you through it.

If you have any questions or would like to discuss any of these issues, please reach out to any one of our team members.

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FOOTNOTES:

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