

Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare



2016 Litigation Trends Annual Survey – Canada

Perspectives from corporate counsel



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Norton Rose
Fulbright



Introduction

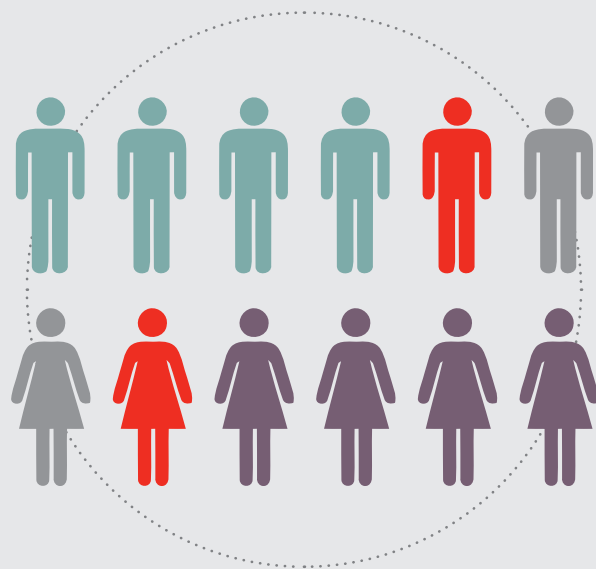
This year, over 80 individuals from Canadian companies participated in the 2016 Litigation Trends Annual Survey, providing their experiences and perspectives on litigation matters. Globally, Norton Rose Fulbright canvassed over 600 corporate counsel and executive decision makers on litigation-related issues and concerns.

The most notable trend revealed in Canada is that companies are not as proactive as their global peers in adopting measures to mitigate the risk of litigation. This at a time when organizations face continuing cost pressures from discovery, class action litigation and regulatory investigations.

In response to these findings, we provide a litigation minimization framework, which comes as a result of reviewing and collating successful measures taken by companies facing disputes around the world. This practical tool is adaptable to suit a company's specific situation, allowing in-house counsel to review their current approach and implement measures to reduce litigation risk and costs.

In addition, the report provides an outlook on how Canadian companies compare to their US and global counterparts, and offers benchmarks on litigation spending and resourcing.

Methodology and respondent profile



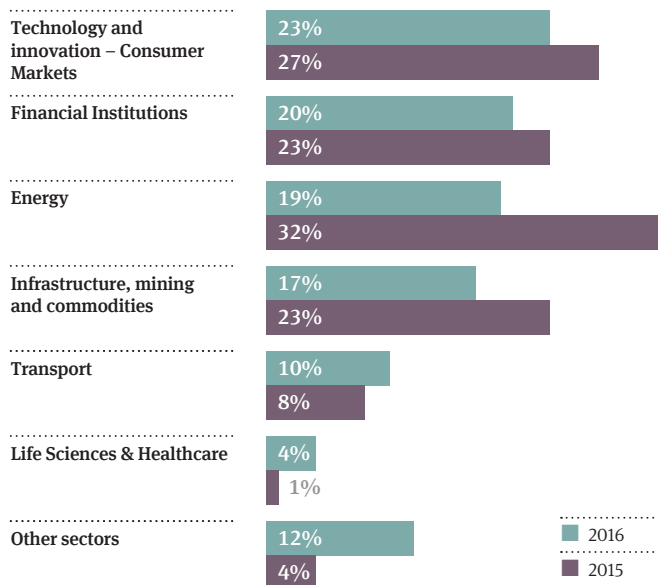
Methodology and respondent profile

Methodology and respondent profile

What are the primary industries in which your company does business?

In all, 84 individuals from Canadian companies responded to the survey. The majority of interviews were conducted by telephone and a small proportion participated in a web-based survey. Approximately one quarter of this year's respondents were from the Technology and Innovation sector, while Financial Institutions and Energy sectors represented one fifth each. Infrastructure, mining and commodities accounted for 17%, Transport 10%, and Life Sciences 4%. Approximately half (52%) of the surveyed companies have over \$1 billion in revenue; the other half were under.

Primary industry

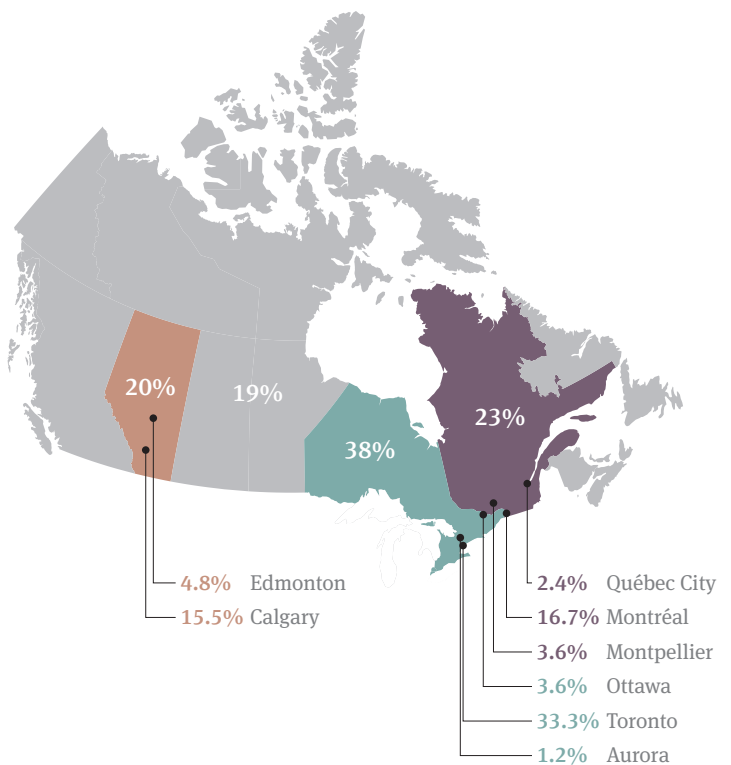


Which of the following is closest to your title?

Most respondents held senior (52%), deputy (27%) or head of litigation roles (10%) within legal departments. Business leaders such as Vice Presidents or Company Secretaries represented 7%. The remaining 4% held other roles, including heads of other business functions such as risk and compliance.

Our survey respondents came primarily from Toronto (33%), Montréal (17%), and Calgary (16%).

Location of survey respondents



Note: All currency amounts are stated in US dollars unless otherwise specified.

Survey findings



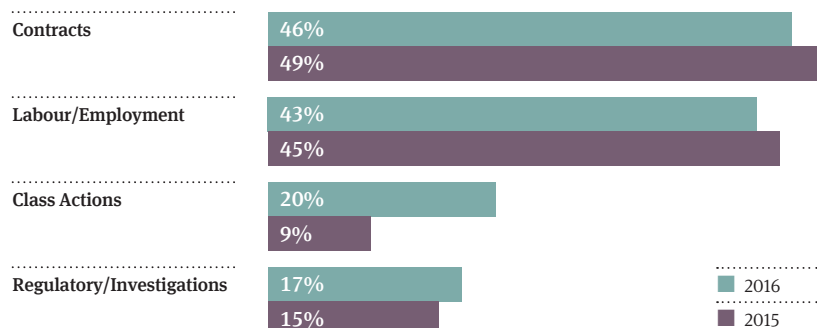
Survey findings

Most numerous types of dispute

Identify the three most numerous types of litigation matters that were pending against your company in the last 12 months.

While contracts and labour disputes remain the two most numerous types of disputes facing Canadian companies surveyed, class actions have grown to become the third most common.

Type of dispute



Relative to our global survey, a significantly lower proportion of Canadian companies cited personal injury and product liability disputes as among the most numerous disputes, while class actions accounted for a higher proportion of disputes for Canadian companies surveyed compared with the global results.

Almost half of the Canadian companies surveyed (45%) reported seeing a change in the level of intervention from regulators, with the entire 45% saying that regulators have become more interventionist in the past 12 months. This was most often attributed to political change in Canada driving new regulations and guidelines and greater enforcement and scrutiny.

For example, almost one quarter (23%) of those surveyed said they have spent more time addressing antitrust or competition issues during the last 12 months, compared to the previous 12 month period. In the next 12 months, 16% plan to spend more time addressing antitrust issues, citing the new normal and an anticipated rise in transaction reviews from a competition perspective, due to an uptick in deal activity as the oil industry recovers.

“The report echoes what we are seeing and hearing from clients: class action litigation continues to grow in Canada. What this means for clients is that they need to proactively manage risk to ensure that small issues do not become much larger if pursued on behalf of a class. Given the current landscape for class actions, it is also important for clients to think strategically and creatively in how they defend these claims ensuring a coordinated approach in Canada, and globally.”

Randy Sutton
Partner

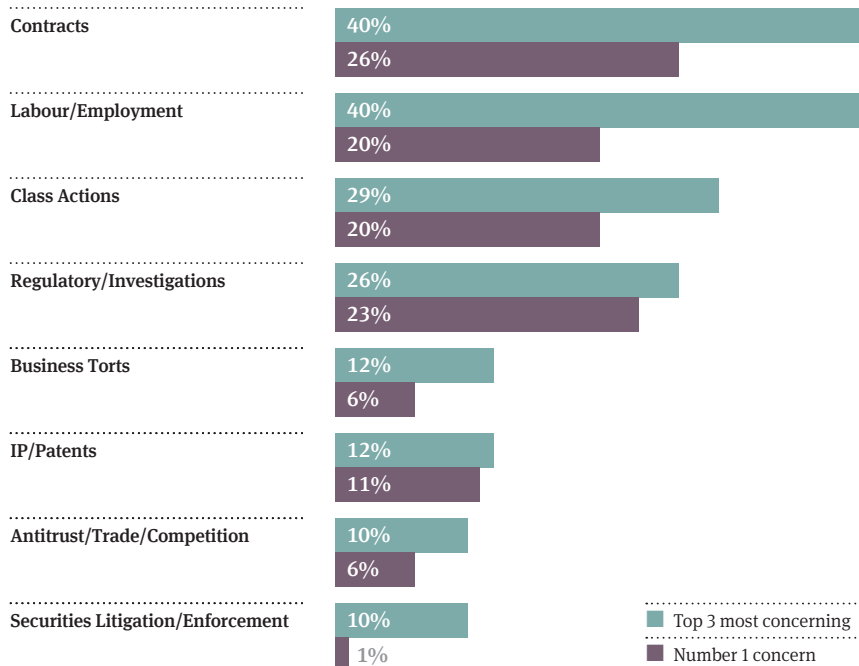
Survey findings

Most concerning types of dispute

What are the three to five types of legal disputes that most concern your company?

Of those legal disputes, which would you class as your top one or two concerns?

Type of dispute



“Keeping abreast of the regulatory expectations and requirements of securities regulators across Canada is increasingly a challenge, putting regulated entities at increased risk of enforcement action when compliance programs fail to keep pace.”

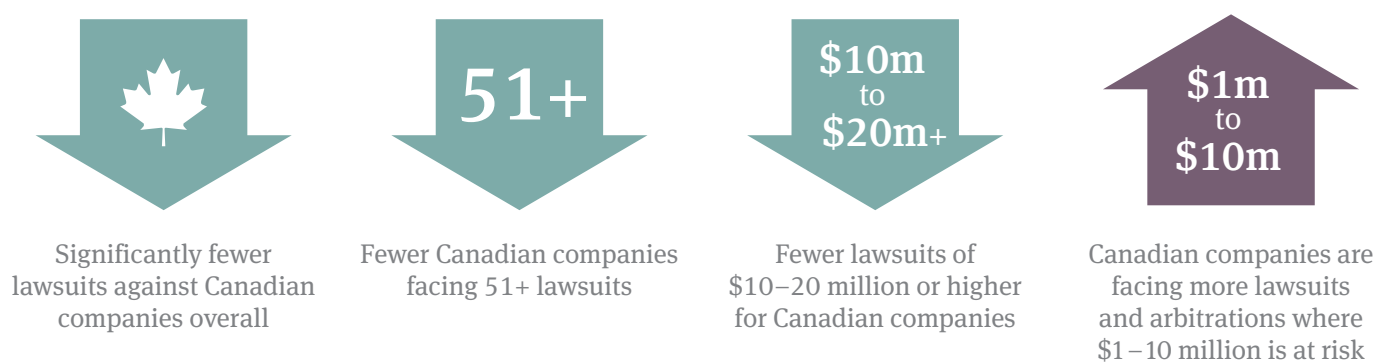
Linda Fuerst
Partner

With one notable exception, the Canadian companies surveyed are most concerned with the types of disputes they most frequently face. The one exception is regulatory/investigation matters which give rise to greater concern relative to their frequency, and have been identified as second among the most concerning types of disputes. This is not surprising given the potential impact of an investigation on an organization. However, what is of note is that even a greater percentage of non-Canadian companies surveyed ranked regulatory/investigation matters as their top concern.

Survey findings

Size and procedural nature of disputes

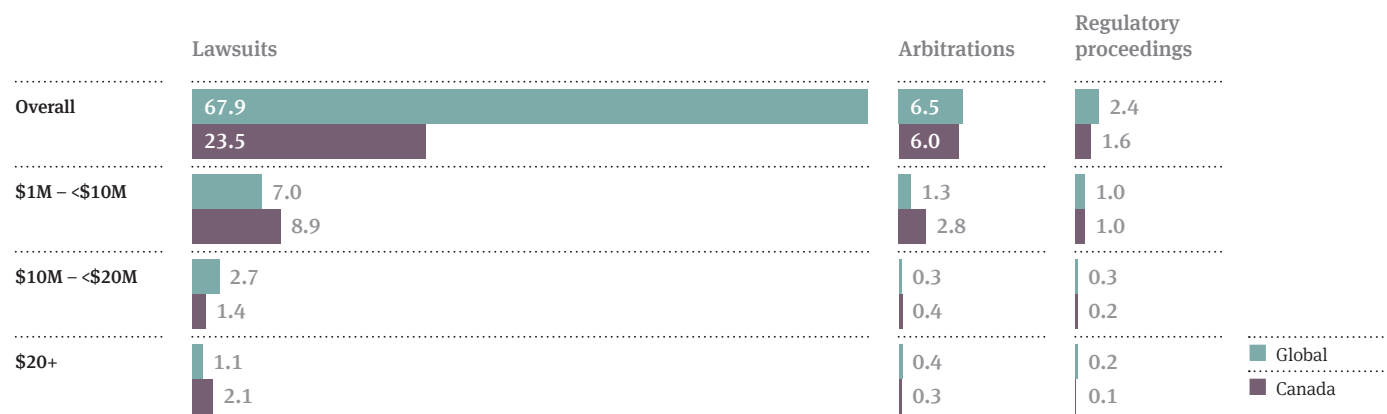
In Canada, compared to the global survey, the survey results show:



Below we show the average number of disputes brought against Canadian companies surveyed and their global counterparts in 2016 by procedural type and dollar value.

How many of the following types of legal disputes were commenced against your company in the last 12 months? For each type of dispute that your company filed or initiated, please also indicate how many had the following amounts at issue.

(Mean) average number of disputes



Survey findings

Resourcing

How does your legal department compare to the Canadian companies we surveyed?



On average, the Canadian companies surveyed had legal departments with median team sizes of 4 in-house lawyers, but with significant variance accounting for a mean of 11.3 in-house lawyers. The majority plan to keep head count static in the next year, while 12% will be adding to their teams.

US companies have the same median team size (4) as Canadian companies, but their mean team size is larger.

In the last 12 months, the majority (73%) of Canadian companies surveyed have engaged the same number of legal firms as they did in 2015, while 14% have used fewer firms and 13% have used more firms. This presents a very steady picture in contrast to the US where companies have engaged 24% more firms in the last 12 months than they did in 2015.

Survey findings

Managing documentary discovery

Our survey of Canadian companies shows that in the past 12 months:

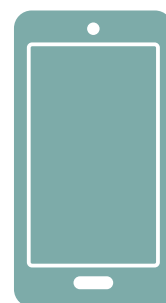
43%

have conducted cross-border discovery and, of this group, over one in four (27%) had to balance data protection regulations in one jurisdiction with discovery obligations in another jurisdiction.



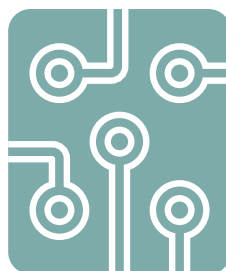
51%

have been required to preserve or collect data from a mobile device on at least one matter. This was slightly more common in the US at 60%.



82%

relied primarily upon self-preservation for at least one of their cases.



55%

used technology assisted review and, of this group, half (49%) outsourced it while others relied on in-house tools or predictive coding.

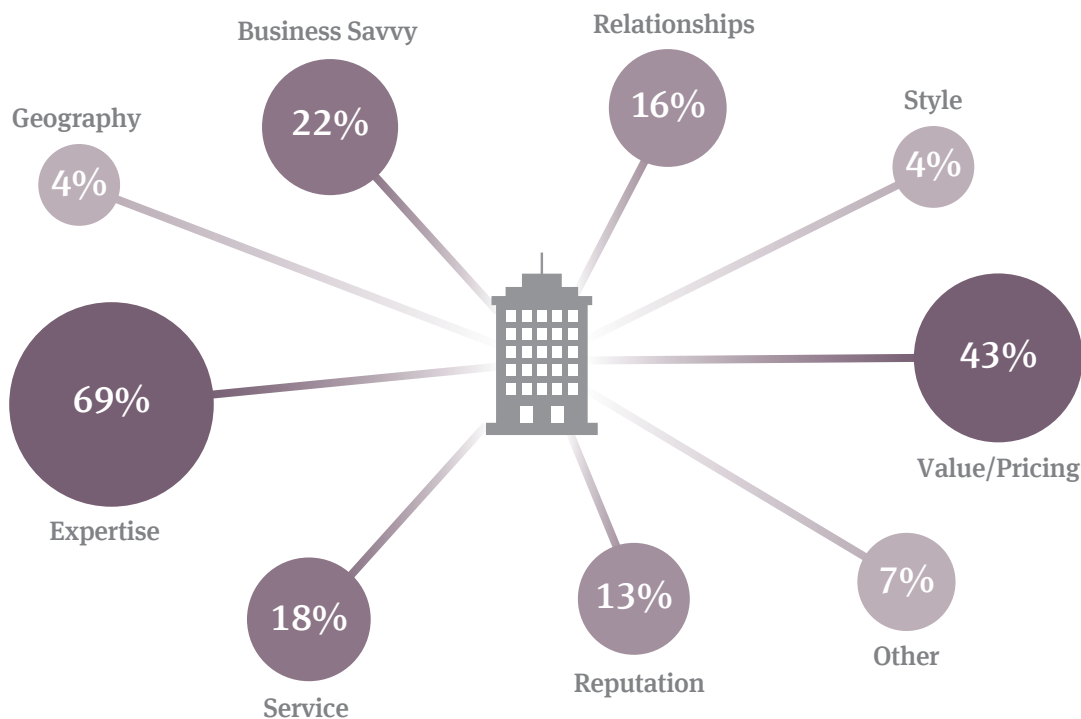
Survey findings

Selecting outside counsel

What are the most important attributes/factors you look for when choosing to retain a law firm for disputes?

Canadian companies identified the two most important factors for choosing a firm to represent them in a dispute as: (i) Expertise (especially specialist expertise) and (ii) Value/Pricing (especially cost). These were followed by Business Savvy (understanding the client’s business and needs), Service (responsiveness most important) and Relationships.

Most important factors for retaining outside counsel (multiple response)



Almost half (48%) of the Canadian companies surveyed said the criteria they use to select external counsel vary depending on the value of the claim, with almost half of that group citing pricing as the primary varying criterion. The level of expertise required also varies by value of claim.

Expertise and Value/Pricing are also a priority for US and global companies when they are deciding who to engage for a dispute.

Survey findings

Litigation spends and forecasts

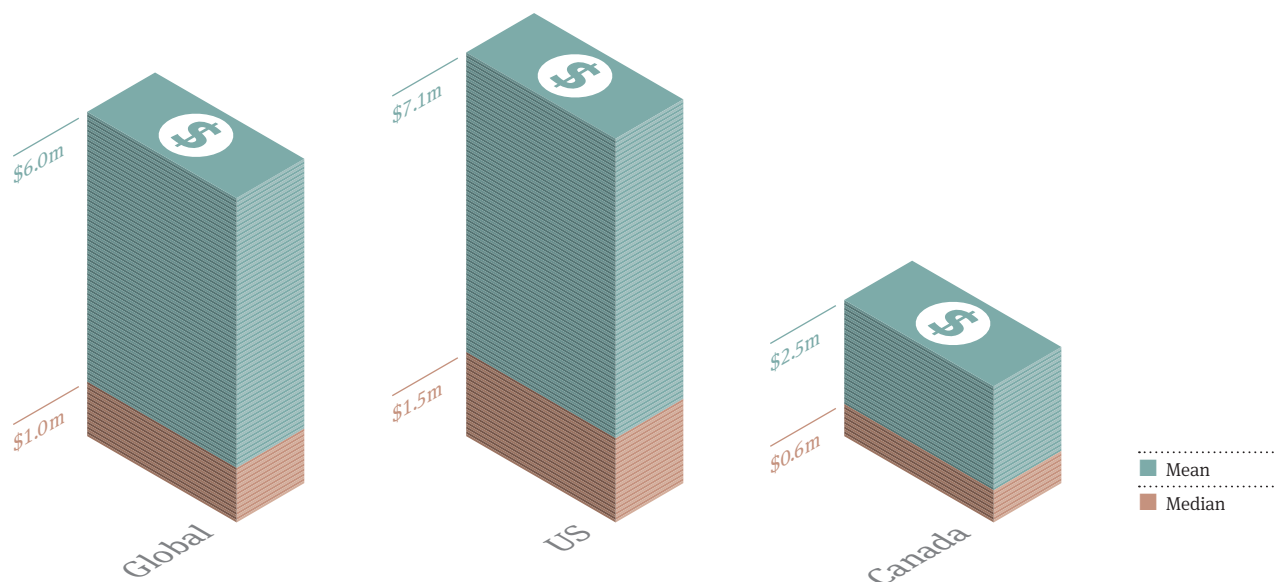
What is your annual litigation spend, excluding cost of settlement and judgments?

In 2016, the average annual litigation spend in Canada, excluding cost of settlement and judgments, was \$2.5 million – significantly lower than US or global average litigation spend.

Of the Canadian companies surveyed, over half are spending under \$1 million a year and only 7% spend over \$10 million. In the US, 20% of companies have a litigation spend of over \$10 million.

Most Canadian companies surveyed (69%) expect the number of legal disputes they face to remain constant over the next 12 months, while 20% expect increases, due primarily to economic conditions. Only 11% forecast a decline in disputes.

Annual litigation spend



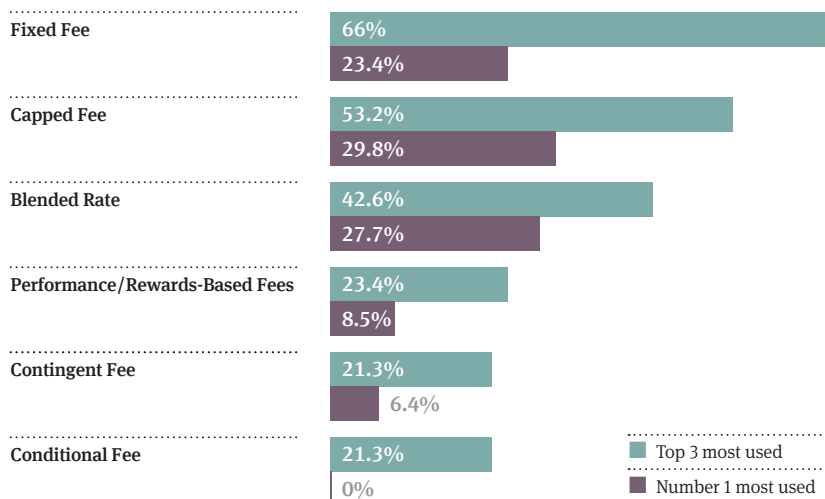
Survey findings

Alternative Fee Arrangements (AFAs)

What are the three types of Alternative Fee Arrangements you use most? (Asked in rank order)

58% of Canadian companies surveyed are using alternative fee arrangements. On average, just over one third (36%) of external spend is estimated to be billed by AFAs. The most frequently used fee arrangements are fixed fees, capped fees and blended rates. Among these, the most effective are considered to be capped, fixed and blended, in that order.

Type of AFA



Almost all (92%) of the Canadian companies surveyed have been satisfied with the quality of work provided under Alternative Fee Arrangements, and 42% expect to increase their use of AFAs in the next 12 months. This is driven by budgetary pressures and a drive for efficiency, as well as a wider availability of AFAs in the market.

“We have seen a significant increase in the number of clients looking for AFAs for their litigation needs. Flat fees and hybrid arrangements, which include a success fee component, are particularly popular. Interestingly, flat fees are no longer restricted to individual matters as more clients are looking to us to manage a portfolio of legal work, including all of their litigation, for a single annual flat fee. We are continuing to explore opportunities to disaggregate litigation work with our clients, including alternative service models for certain phases of work.”

Suzanne Wood
National Director, Legal Project Management,
Litigation

Survey findings

Select AFA types explained

Blended Rate	Fixed Fee	Contingent/ Conditional Fee	Performance/ Rewards (also called Success Fee (US))
One rate comprised of all Time Keepers individually with assigned work allocation. Additionally, blended rates can be presented by practice area, or within Time Keeper sub-classes. Good AFA for clients who prefer highly experienced attorneys at a lower rate.	<p>A set fee amount based upon an agreed scope of work.</p> <p>Fees can be set by matter, phase or time period.</p> <p>Good AFA when scope is well defined and client prefers a guaranteed spend amount.</p>	<p>Fees that are paid only if the outcome of the matter is successful or meets the agreed upon outcome.</p> <p>This is a high risk fee structure for the law firm and rates for success generally reflect that risk premium.</p>	<p>Fee amount agreed upon with an opportunity for a bonus based on the matter outcome, favorable spend or matter progression.</p> <p>Success bonus can be percentage of matter or a fixed amount.</p> <p>This AFA is very good when a high level of success is possible.</p>
Capped Fee	<p>Maximum fee amount set prior to engagement, set by phase, matter or group of matters (portfolio).</p> <p>Overages are absorbed by the firm, or fees renegotiated should the cap limit be exceeded. If the fees fall below the cap, the client only pays for the work done.</p> <p>Good AFA for clients where the scope is not very detailed and an estimate of fees is required.</p>		
	<p>A capped fee with collar stipulates a predetermined percentage above/below the cap amount (e.g. 10%):</p> <ul style="list-style-type: none">– Should the fee fall below the percentage band (i.e. collar), the firm and the client share savings.– Should the fee fall below the cap, but within the percentage band, the firm retains 100% of the savings.	<ul style="list-style-type: none">– Should the fee exceed the cap but within the percentage band, the firm absorbs the additional cost.– Should the fee exceed the cap and the percentage band, remaining work is completed at a predetermined hourly discount.	<p>AFA is good for clients who have a good relationship with the firm and are willing to share risk during the course of the matter.</p>

Survey findings

Disputes in a global legal market

89% of Canadian companies surveyed expect the number of disputes they will face to either increase or at least remain the same over the next 12 months. Overall, 83% of Canadian companies surveyed expect to face litigation in Canada, 40% expect to face litigation in the US, with 22% mentioning countries in the rest of the world including the UK, Europe, South America and Asia.

89%

of Canadian companies surveyed expect the number of disputes they will face to either increase or at least remain the same over the next 12 months.



83%

expect to face
litigation in Canada



40%

expect to face
litigation in the US



22%

expect to face
litigation in the rest
of the world

When asked: “If you had to bring a claim and had a free choice as to which jurisdiction to litigate in, which jurisdictions would you choose?” (where respondents were allowed to name more than one jurisdiction) most chose the place where their business is headquartered or where they most often do business. For example, 82% of the Canadian companies surveyed headquartered in Canada would prefer to litigate in their home jurisdiction. However, 44% of respondents also cited locations outside of Canada, with the US and UK topping the list (at 11% each).

Survey findings

Looking ahead

In your view, what is the most important issue or trend in litigation impacting your company?

Canadian respondents identified discovery, class actions, cost pressure and regulation as the most important issues in future litigation.

Discovery

is complex and time consuming, especially in multi-jurisdictional litigation. Costs are often disproportionate to the dispute and electronic discovery adds to the costs and complexity.

15%

"Documents preservation and production issues since they often impact the cost of litigation significantly."

Class actions

remain an important litigation risk to Canadian companies.

14%

"More class actions because that seems to be the activity of the current time – everything is going to be class action."

*"The incidence of class actions seems to be increasing in Canada."
"There's an ever present concern about class action lawsuits in financial services that some regulatory action will trigger."*

Cost pressures

are increasing not only in respect of the cost of the actual litigation (including the costs associated with discovery obligations) but also the increasing potential size of damage awarded.

11%

"Reducing time and cost"

"Increasing damage awards for personal injury claims."

Regulatory scrutiny

appears to be on the rise in Canada, and for those companies working on an international platform, balancing regulations in different countries is increasingly challenging.

9%

"Regulators are becoming more interventionist in competition law. It's a matter of frequent commentary in Canada in the last three or four years, with the Competition Bureau more zealous and interventionist in its enforcement policy. The recently amended and beefed up Competition Act goes hand in hand with the new enforcement focus of Canadian competition law."

Example verbatim comments

"With cost pressures comes an ever increasing focus on budgeting and project management. Using expert staff in these functions helps increase cost certainty for our clients."

Andrew Fleming, Partner

Survey findings

Adoption of risk mitigation strategies

Have you implemented any preventative measures aimed at reducing the volume of litigation in the last 12 months that you have found to be effective?

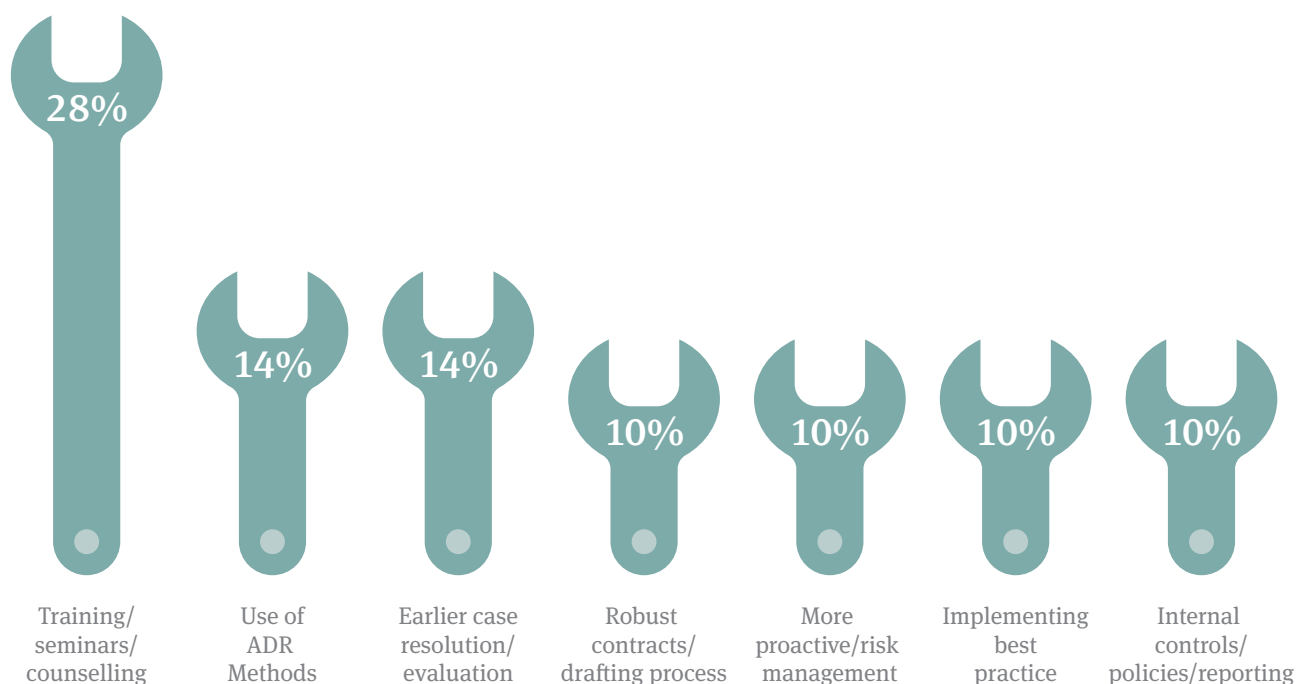
Despite the concerns identified by our Canadian respondents, only one third (34%) have implemented any concerted preventative measures aimed at reducing the risk/volume of litigation in the last 12 months. In this regard, our Canadian respondents trail their global counterparts.

The two most common preventative measures in place among the Canadian companies surveyed are employee training in an effort to avoid disputes all together (28%), and alternative dispute resolution, which includes settlement to minimize exposure in the early stages of the dispute (14%).

“Part of being risk ready is appreciating that you cannot control everything...it is critical to have a risk response team. We want to support our clients to manage risks in a way that allows them to achieve their business goals and strategies.”

Jane Caskey
Partner, Global head of risk advisory

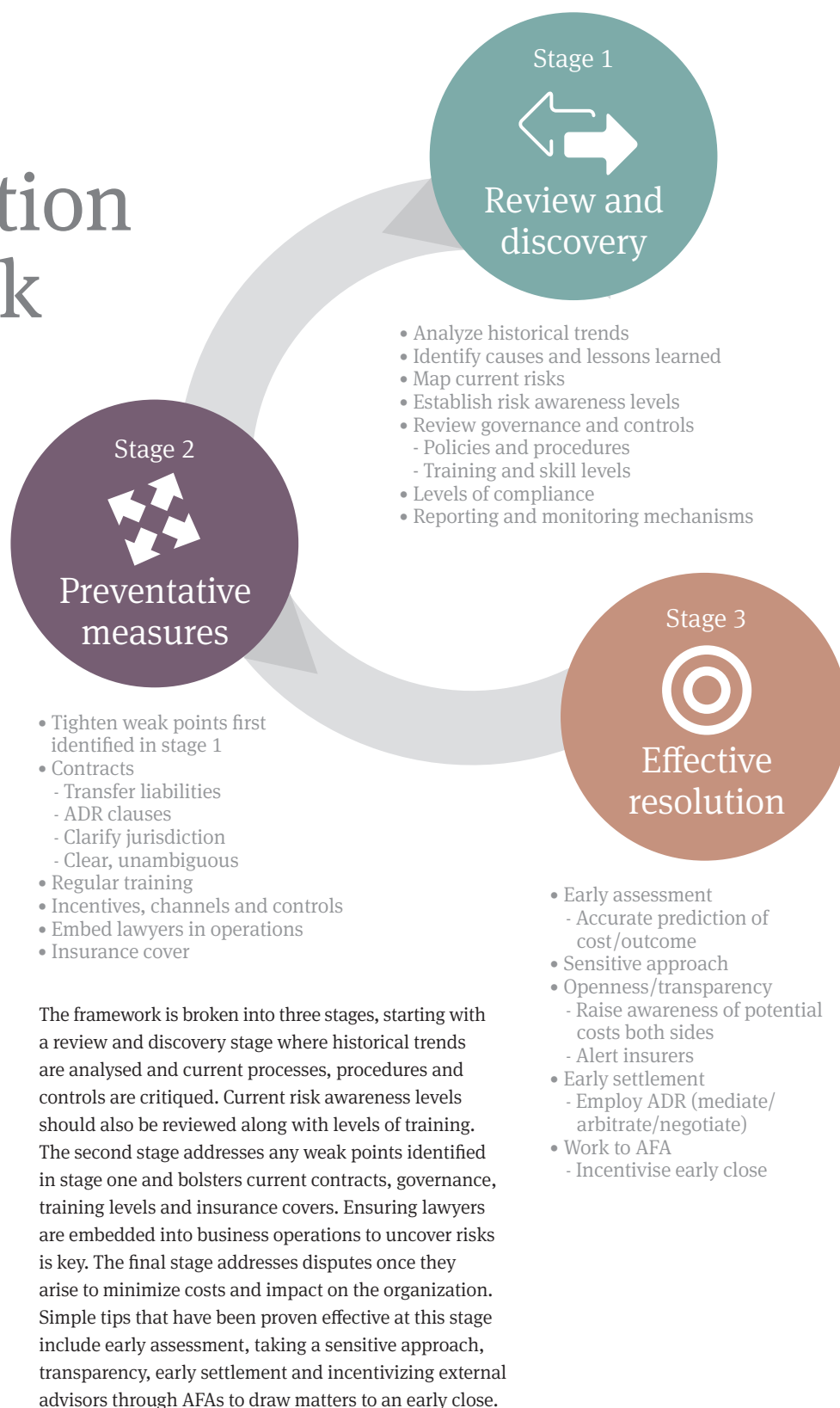
Preventive measures



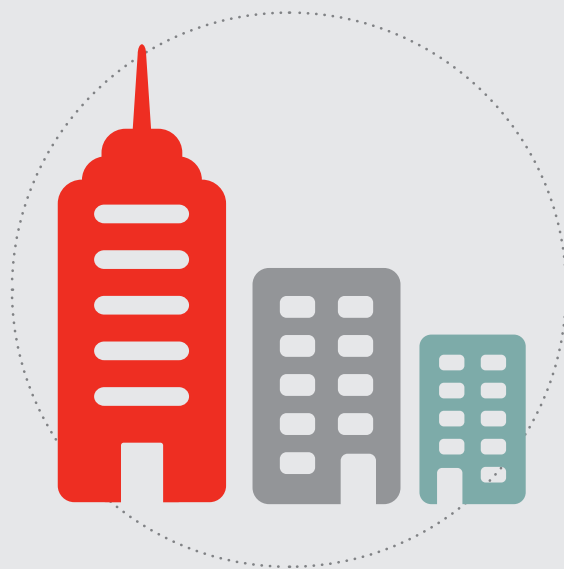
Litigation minimization framework

Have you implemented any preventative measures aimed at reducing the volume of litigation in the last 12 months that you have found to be effective? If yes, what are they?

While each individual respondent identified one or two preventative measures, the framework takes the full range of measures and places them into a three-stage process. Some of these steps may not be relevant for individual organizations or may already be in place. The framework is intended to act as a guide to proactively addressing the level of litigation facing organizations.



Norton Rose Fulbright



Canada overview

In Canada, we have 575 lawyers, patent and trade mark agents in business law, dispute resolution and litigation, intellectual property, and employment and labour based in offices in Calgary, Montréal, Ottawa, Québec, Toronto, and the newest office addition in Vancouver. We serve the interests of Canadian businesses at home and abroad, and advise international clients seeking expansion, practising Canadian law in both English and French. According to the Acritas Canadian Law Firm Brand Index 2016, Norton Rose Fulbright remains in the enviable number one position for favourability in the Canadian legal market and the number one brand position in Alberta and with elite clients (\$1b+ multinationals).

Offices

Calgary

Montréal

Ottawa

Québec

Toronto

Vancouver

*effective January 1, 2017



Practice strengths

Antitrust and competition

Asset-based lending

Banking and finance

Capital markets

Class actions

Corporate, M&A and securities

Debt finance

Dispute resolution and litigation

Employment and labour

Financial restructuring and insolvency

Intellectual property

International arbitration

Project and infrastructure finance

Regulation and investigations

Structured finance

Risk advisory

Tax

Dispute resolution and litigation

We have one of the largest global dispute resolution and litigation practices in the world, with experience of handling and resolving multi-jurisdictional mandates and international arbitration across all industry sectors. We advise many of the world's largest companies on complex, high-value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice that focuses on our clients' strategic and commercial objectives.

Lawyers

1200

'Among the top global dispute resolution practices.'

Chambers Global 2016

Our practice covers

Antitrust and competition

Appellate

Catastrophic and mass disaster disputes

Class actions

Commercial disputes

Construction and engineering

Data protection, privacy and access to information

eDiscovery and information governance

Employment and labor

Energy

Environmental

International arbitration

Life sciences and healthcare

Marine casualty, admiralty and shipping

Mass tort and toxic tort disputes

Patent litigation

Pharmaceutical medical device disputes

Product liability

Professional liability

Qui Tam/False Claims Act

Real estate

Regulatory and governmental investigations

Securities litigation, investigations and SEC enforcement

Transnational litigation

White collar crime

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Norton Rose Fulbright

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Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare.

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