

Positioning Your Business For A Major Strategic Event

The Four Truths and Six Deadly Sins

Presented by: Robert Picard
September 12, 2019



Preliminary Points

- Strategic Event can mean:
 - a. Sale
 - b. Joint Venture
 - c. IPO
 - d. Other (strategic alliance or other arrangement)

Four Basic Truths

1. Some things only become important when you sell
2. Some things only emerge when you sell
3. Selling is a stress test
4. Selling is a parallel business



Six Deadly Sins

1. Presumption of Benign Preliminaries
2. Sloth (one of the oldies)
3. Assumption of Continuity
4. Assumption of Security
5. Scramble (as in don't)
6. Forget the Easter Eggs (as in don't)

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- Preliminaries include
 - Non-disclosure agreements
 - Letters of intent (LOIs)
 - Non-circumvention (standstill) agreements
- NDA
 - Assume “just talking”
 - Non circumvention \ standstill language normally provided
 - Exclusivity normally contemplated

- LOI
 - “Not binding” – really?
 - Optimal monetization imperilled
- An example: exclusivity language creates risk:
 - Certicom Corp. v. Research in Motion Ltd., 2009 CanLII 1651 (On SC)
 - Information not usable even though the standstill had expired

Sloth



“We know it’s somewhere”

(Don’t forget – or keep forgetting – the minute book)

- Business Corporations Act requires corporate records – including approval of financials and authorization of dividends
- OBCA section 139: *The corporation shall take adequate precautions, appropriate to the means used, for guarding against the risk of falsifying the information recorded; and provide means for making the information available in an accurate and intelligible form within a reasonable time to any person lawfully entitled to examine the records...*

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- What if the records are deficient?
 - Twomey v. The Queen (2012) TCC 310
 - Where sufficient evidence is provided demonstrating approval of certain corporate acts, ratification is permitted
 - Twomey vs Adam and “retroactive tax planning”
 - Also Canada (AG) vs Fairmont Hotels Inc. 2016 SCC 56

- Per McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: Both courts below erred in holding that the parties' intention of tax neutrality could support a grant of rectification. A common continuing intention does not suffice. Rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. It is limited to cases where a written instrument has incorrectly recorded the parties' antecedent agreement.

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- In other words, rectification is not available where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself.

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- Before Closing
- Tie up key employees
 - Stress-Crete Limited and King Luminaire Company Inc. v. Harrman, 2019 ONSC 2773 (Ontario Sup. Court)
 - Limits to non-competition and non-solicitation clauses
- Earn-out vulnerability
 - Crescent (1952) Limited ... v Jones et al. 2019 ONSC931
 - Success assumes continuity

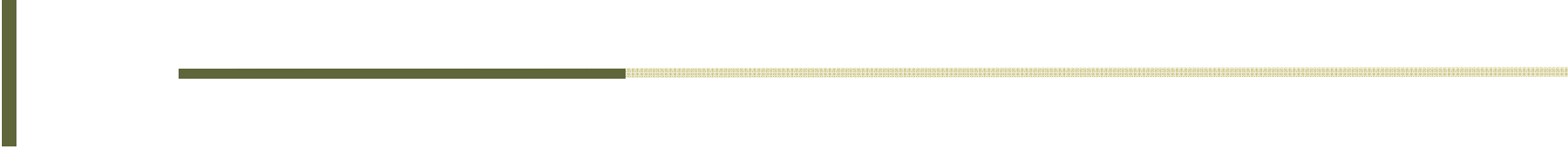
Assumption of Security



- Secure key assets
 - IP: Consultants vs. employees
- Purge non-business assets
- Avoid “life-style” integration

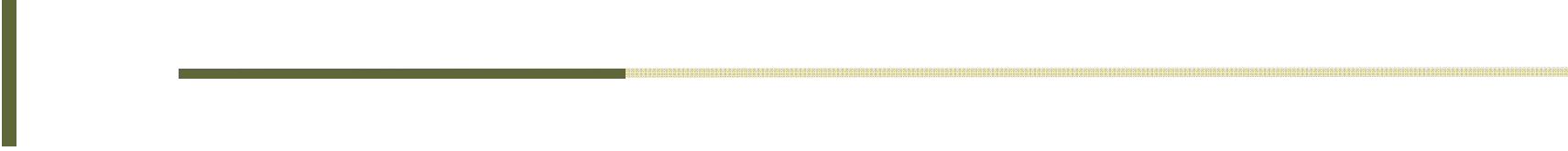
Scramble (as in don't)



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- Green File compilation
 - Nature of due diligence
 - Anticipate informational needs

Forget the Easter Eggs (as in don't)



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- Run the scenarios
 - Safe income and other pre-sale issues
 - Normalization of capital

Conclusions

- Goal: optimal monetization and clean break
- Process control is key
- Don't assume first steps are benign
- Don't assume continuity
- Get ready

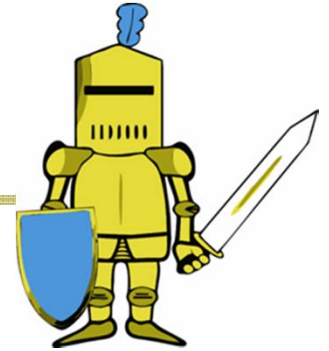
Where the Wild (IP) Things Are

Recent Intellectual Property Developments

Presented by: Bob Nakano, Partner
September 12, 2019



What is Intellectual Property (IP)?



- o Country-specific monopolies providing exclusive rights to owner.
 - o Canada, US, China, Europe (Brexit)
- o Assets that can be used, asserted, acquired, sold, licensed.

Where IP issues lurk

- Day-to-day operations
 - New products / updates
 - Market expansions (geographic, product)
 - Marketing and branding materials (websites, promotions)
 - Employment / service contracts
- Transactions
 - IPOs / Acquisitions
 - Asset Purchases / Sales / Loans
- Competitors
 - Litigation (knockoffs, theft)



Maze at Haver Castle



Types of IP



- o Each IP covers different facets, where rights may overlap and co-exist
 - Trademarks
 - Patents / Trade secrets
 - Copyrights
 - Industrial Designs

Trademarks



- Protect brands and slogans
- Traditional trademarks
 - Non-descriptive logos, names, slogans for goods and services
 - “Apple” 
 - “Apple.com” 
 -  
 - “The world’s best white phone” 



Trademarks (2019 Updates)

- New types:
 - Sounds (MGM lion roar)
 - Scents (Perfumes)
 - Tastes (KFC recipe, Coke)
 - Textures (wallpaper), colours
- 10 year term (renewable)
- Use not needed for registration
- Madrid Protocol (foreign filings)
- Nice (France) Classifications

Patents / Trade Secrets



- Patents
 - Protect new, non-obvious and useful ideas
 - Devices, software, business methods, improvements
 - 20 year non-renewable term
 - Oct 2019 Rules (time periods, representation)
- Trade secrets (common law)
 - Confidential information
 - Client lists, business plans, formulas (Coke)
 - Perpetual, but subject to reverse engineering

Copyright



- Protects “works” from copying
 - Literary, musical, dramatic works
 - Website layouts, photographs, packaging, owner’s manuals
 - Software and related works
 - Software/website code, spreadsheets, some databases
- Term – Life of author + 50 years
- Does not protect ideas (patents)

Industrial Designs



- Protect appearance of an item from copying



vs.



- 10 year term (Canada)

Summary of IP types

IP Right	Protects	Term
Trademarks	Brands/Slogans	Reg. trademarks (10 years)
Patents	Inventions	20 years
Trade Secrets	Confidential Info	Forever (?)
Copyright	Expressions / Software	Life + 50 years
Industrial Designs	Product Design features	10 years



Questions?
Thank you!



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SEPTEMBER 12, 2019

Managing Political Risk For Your Business

*Presentation to the Gardiner Roberts Toolbox Seminar by
Charles Bird, Managing Principal, Earnscliffe Strategy Group*



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What Does Political Risk Look Like?

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Trump Word Cloud

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Negatives

Unprincipled

Unpredictable

Untested

Unreasonable

Uninterested

Unethical

Unmanageable

Positives

Unafraid

Unprecedented

Unusual

Unapologetic

Unwavering

Undeniable

Undaunted

Political Risk in Canada

- Global economic and political uncertainty present challenges largely beyond the control of Canadian political leaders
- Regional and cultural factionalism at home present considerable challenges to national unity and governing consensus
- Growing economic concerns plus cynicism on the part of the Canadians create an unpredictable if not volatile electorate
- Increasing sense that political class is unwilling or unable to bring about meaningful action for the folks who need it most


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Federal Election

Current Seat Count

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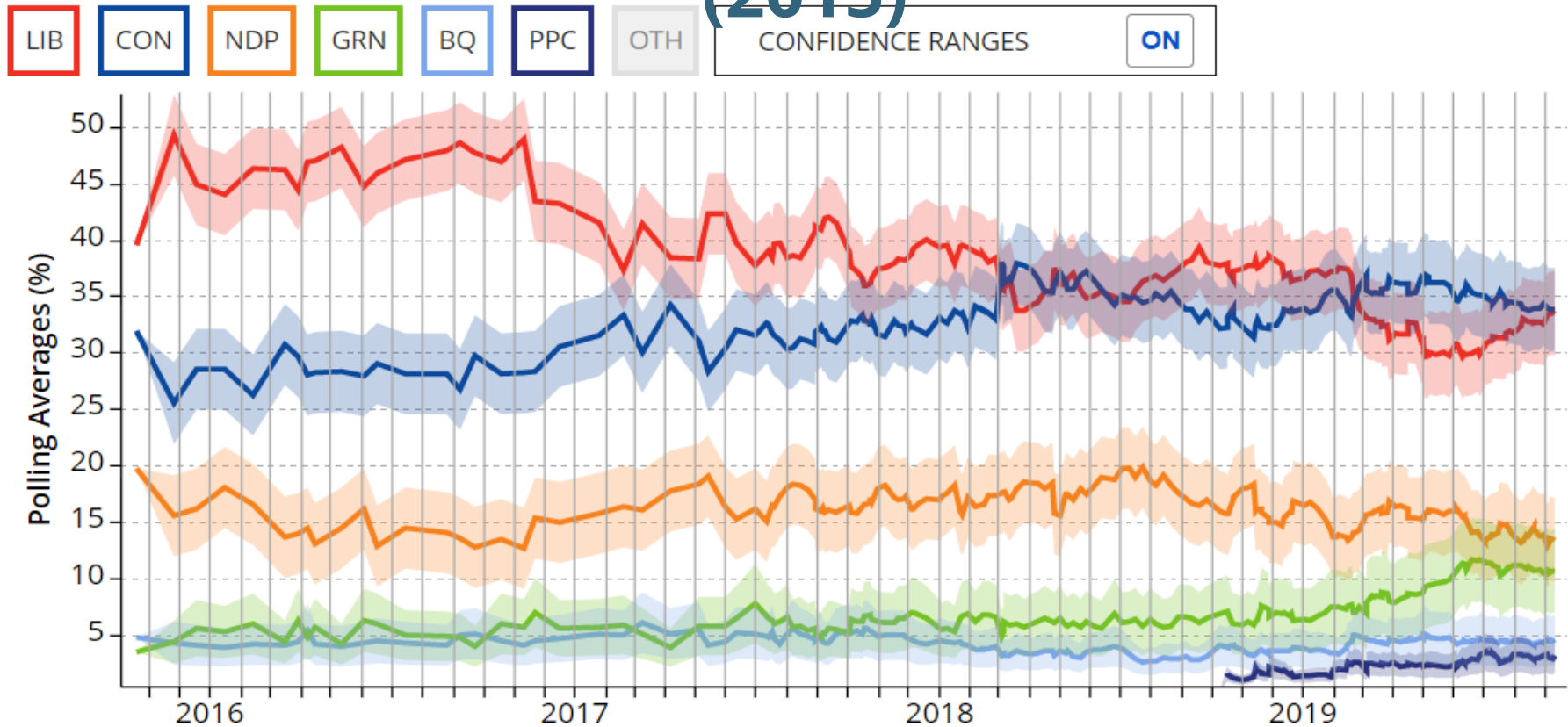
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National Seat Count – House of Commons (As of May 1, 2019)

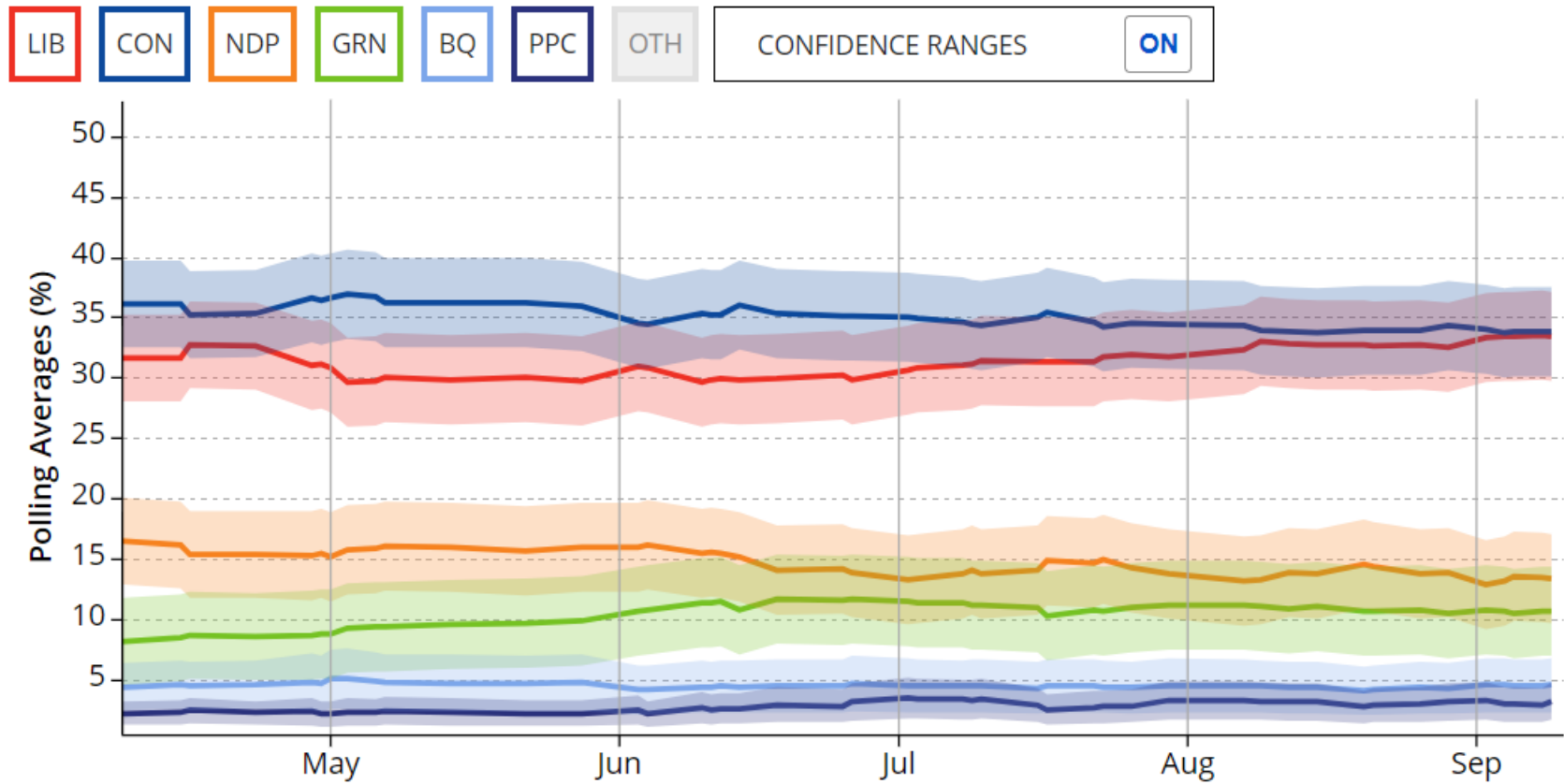
Party	Number of Seats
Liberal Party of Canada	177
Conservative Party of Canada	97
New Democratic Party of Canada	41
Bloc Quebecois	10
Green Party	1
Peoples Party of Canada	1
CCF	1
Independents	7
Vacancies*	3
Total:	338

*Vacancies in Kings-Hants (NS), Saint-Léonard—Saint-Michel (QC) and Nanaimo—Ladysmith (BC)

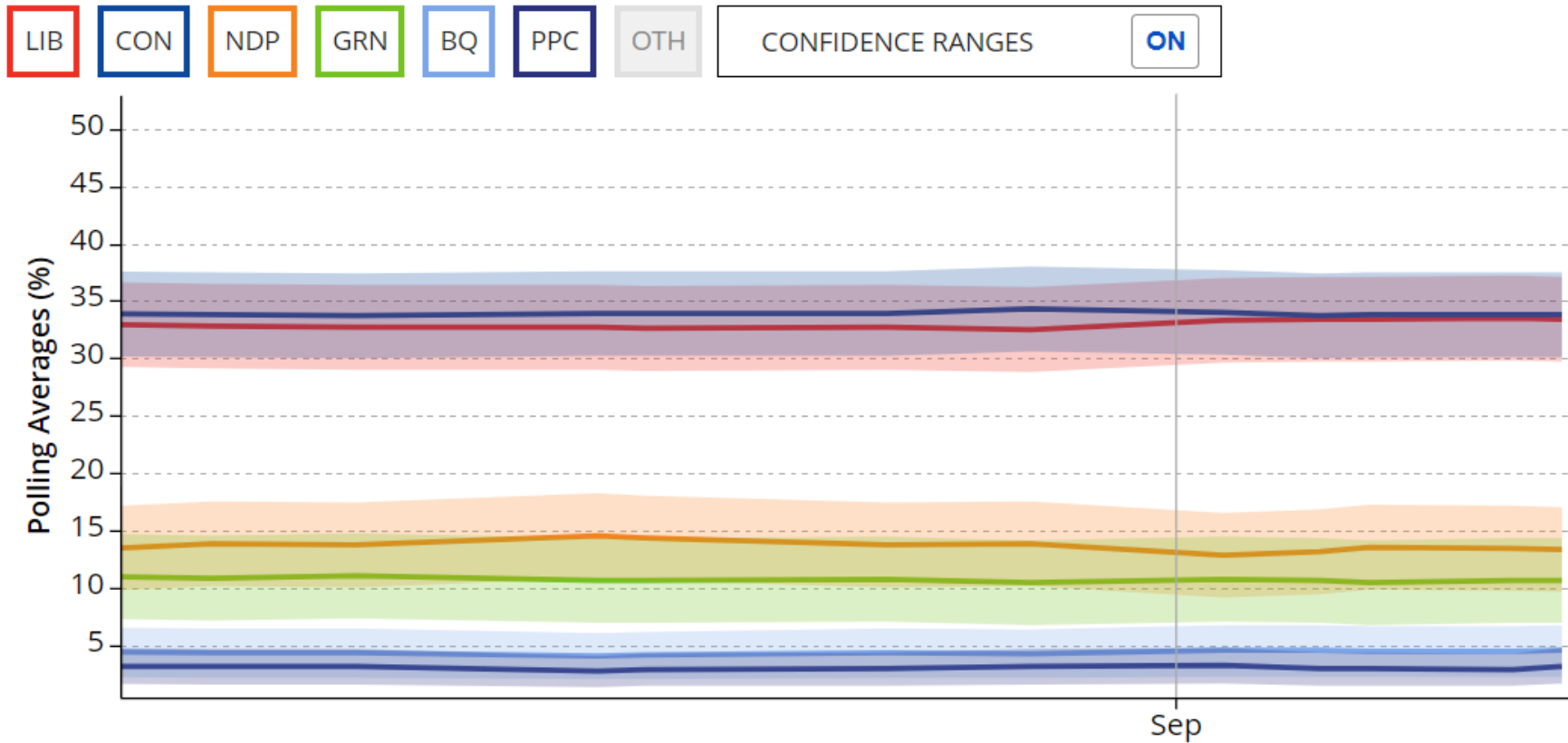
Canadian Polling Since Last Federal Election (2015)



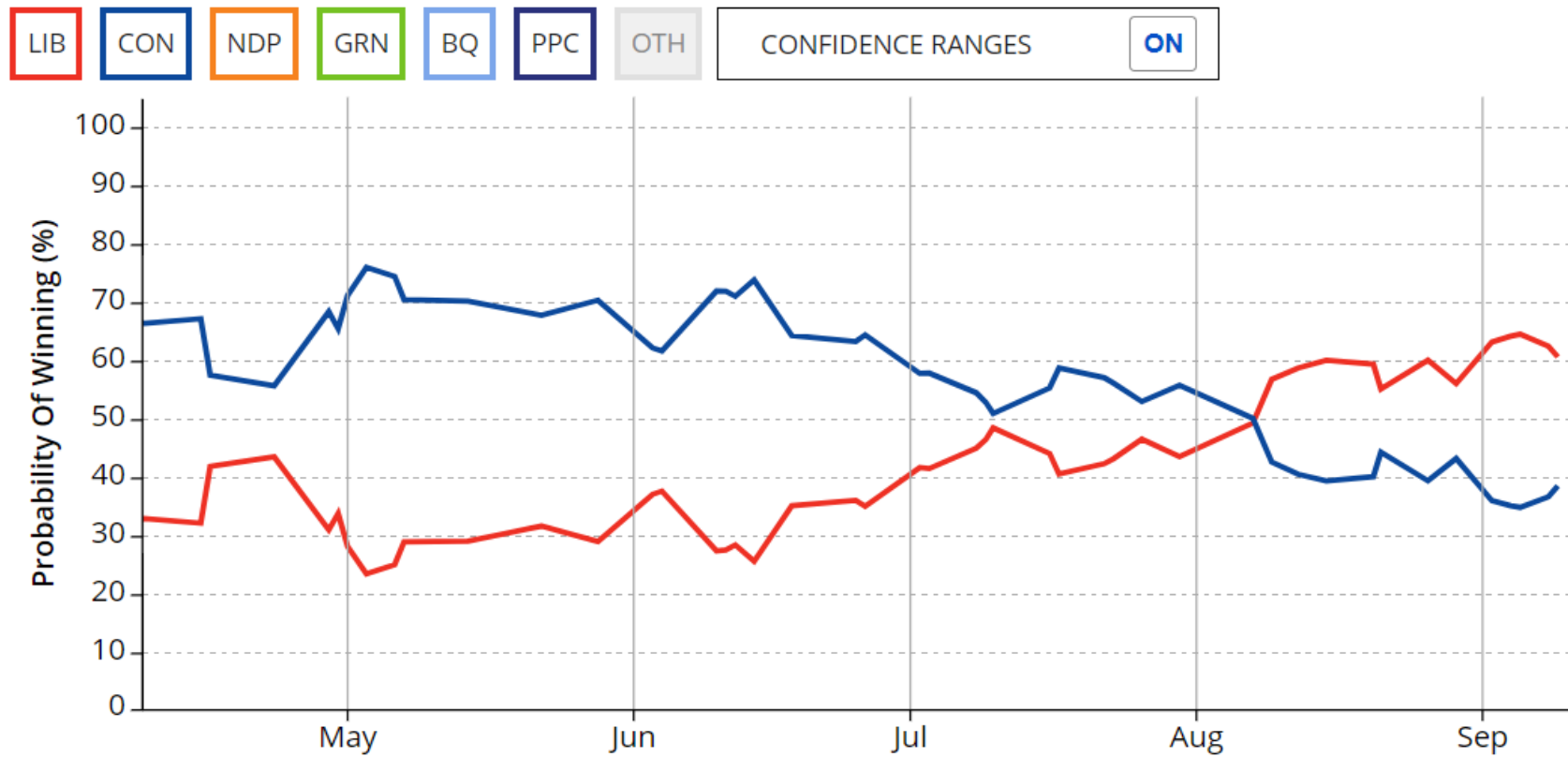
Canadian Polling Over The Last Six Months



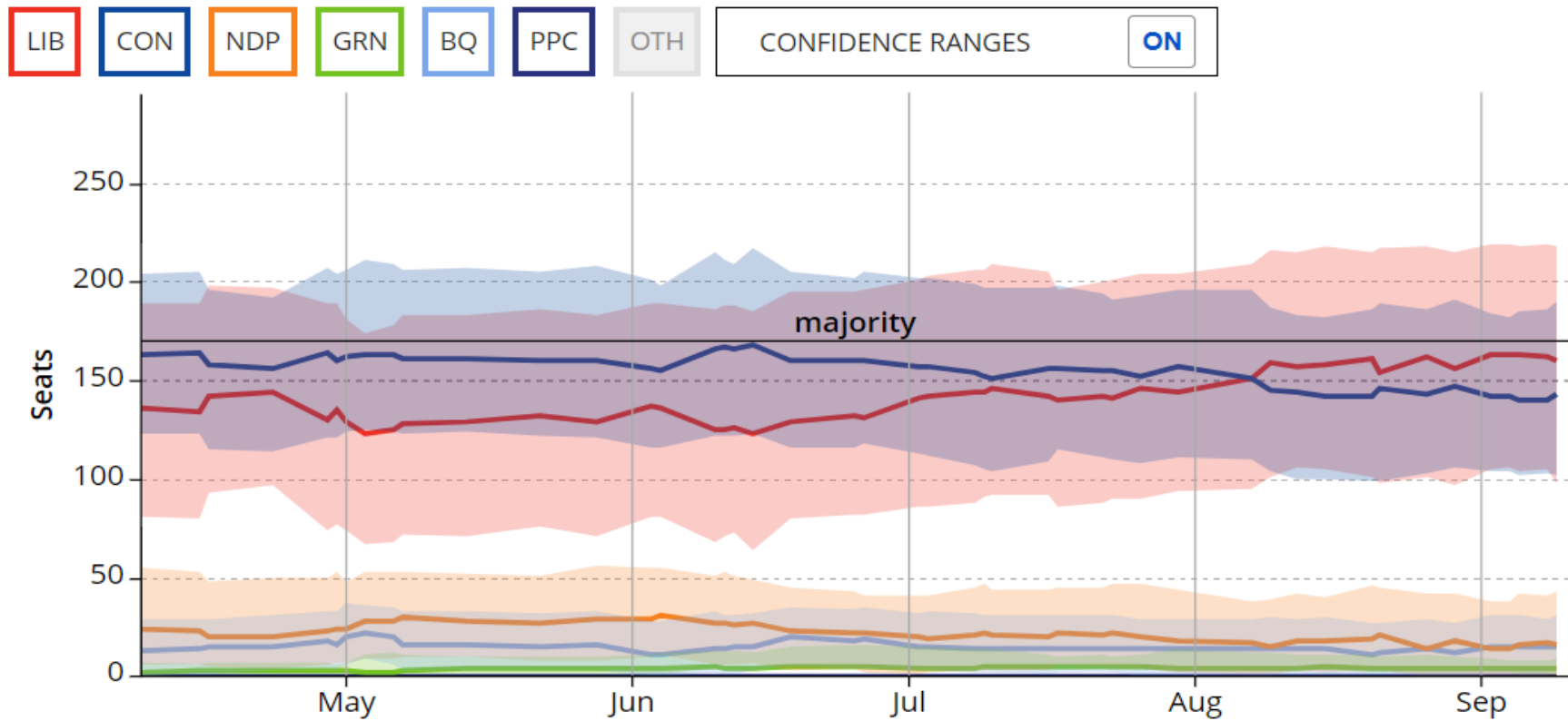
Canadian Polling Over Last Two Months



Probability of Winning



Projected Seat Count



Minority Governments


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- Harper minority governments of 2006 to 2011 were atypical, given that Harper's declared intent was to govern as if he had a majority
- Most minority governments are more often the products of ongoing compromise and deal making, often hastily arranged
- Underlying reality of minority governments is a shift in power from the unelected (senior bureaucrats and political staff) to the elected
- Conservative minority unlikely to survive, while a Liberal minority would likely be

Strategic Planning

- You must have a strategy
- Effective strategy will identify where uncertainty exists and will plan accordingly to meet various potential exigencies
- Over-all recognition of what you can control and that which you cannot, and where you can hope to have influence
- Setting of clearly defined objectives and the means to achieving them which can be adjusted in the face of changing realities
- Knowing with whom you should speak and what you can or should say


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Developing a Plan

- Identifying Strengths, Weaknesses, Opportunities, Threats
- What are the chief areas of concern to your organization's ability to do business?
- What's the issue? / What are your objectives?
 - Are you trying to "get" something or "stop" something?
 - Is the issue legislative, regulatory, policy, program or financial?
 - How does the process work?
 - Who are your allies? Who will oppose you?

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Building the Case

- Ongoing efforts to build relationships and trust with officials and stakeholders for periods when the unexpected happens
 - Policy issue
 - Media scrutiny
 - Unforeseen events
- Expectations management and risk mitigation are key elements
- Building trust speaks to longer term relationship building with transparent decision making
- Helps avoid hair on fire syndrome – instead, successful government relations provides helpful context, insight and solutions


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Transparency & Consistency

- While messaging should be tailored, the content or intent should not be different
- Protocol also important
 - Consistent lines of contact
 - Letting working level officials know when you are in contact with senior political staffers / minister
 - Sharing intelligence of use with officials
- Requires concrete follow-up on meetings
- Clarity around what you are able to share and what you are not – be up front about it and preferably offer suggestions as to why
- Consistency of message and language – many decision makers speak in narratives

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Alignment & Thought Leadership

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Alignment

- Alignment with government or stakeholder agenda:
 - Platforms, Throne Speeches, Budgets, White Papers, Green Papers and policy statements and policy announcements
 - Priorities, directions, sectoral strategies, policy preferences

Thought Leadership

- Not just responding to, but driving the agenda of innovation in agriculture
- Engaging in public discourse relating to your issue set
 - Push knowledge and understanding of issues
 - Develop op ed pieces
 - Participate in policy panels

Public Policy vs. Self-Interest

- Obvious linkage to thought leadership
- “Ask” fatigue – dilutes impact
 - Sometimes better to position “ask” within a sectoral context rather than a company or product specific context
- Part of a larger CSR approach and has potential to create access at more senior levels of government
- Also can be issue specific and delivered through a coalition approach


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Managing Political Risk

Key Strategic Elements


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- Awareness -- Do you know where your potential vulnerabilities exist and have you worked through the potential implications?
- Engagement – Are you talking to the right people within government at both the federal and provincial level?
- Messaging – Does what you are saying to a given government align with that government's agenda and its underlying ethos?
- Coordination – Do you have sense of what like minded stakeholders (as well as your opponents) and are saying to government?
- Information – Are you current with what both the news of the day and what is motivating decision-making within governments?



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Appendices

Lobbying Defined

- Communication with a public office holder in respect of:
 - The development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons
 - The introduction, passage, defeat or amendment of any Bill or resolution that is before either the House of Commons or the Senate
 - Making or amending regulations
 - Developing or amending any policy or program of the Government of Canada
 - The awarding of any contract, grant, contribution or other financial benefit by or on behalf of the federal government
 - Arranging a meeting between a public office holder and any other person

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Context

- The Lobbying Act governs the relationship between government and stakeholders at the federal level, based on the principle of reasonable transparency
 - Creates a framework for publicly-accessible registration of paid lobbyists, and requires that they publicly log contact with government officials
 - There are more than 5,000 registered lobbyists in Canada at the federal level, and the Lobbying Act explicitly states that this is a legitimate activity which is a necessary part of government-stakeholder relations
- The Harper government passed the omnibus Federal Accountability Act (2006), to “clean up” government’s relationship with lobbyists. The bill:
 - Created Conflict of Interest & Lobbying commissioners, a Parliamentary Budget Officer and give more powers for the Auditor General
 - Increased reporting requirements for contact between government and lobbyists
 - Imposed a new five-year cooling off period, prohibiting political types and senior bureaucrats from lobbying shortly after leaving their government jobs

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Types of Lobbyists

- Consultant Lobbyists
 - Represent and lobby on behalf of various clients (individuals, companies, coalitions, associations)
 - Payment on a fee for service or retainer basis
- In-House Corporation
 - Employed full time by for a company, lobby as part of job
- In-House Organization
 - Most senior officer of a non-profit: charity, association, learning institution, (i.e., college or university)


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Obligations of Lobbyists

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- Company or association officials must publicly register as lobbyists on behalf of their organization if 20% or more of their job description or duties are lobbying
 - Consultant lobbyists must publicly register as lobbyists on behalf of a client if they engage in a single “registrable activity” – i.e. any act that falls under the definition of lobbying
 - It is not, however, considered lobbying if a normally “registrable” activity is done on a voluntary basis. In other words, you have to be employed or paid to do it, for the legal definition to apply
- Registered lobbyists must log their communications with designated public office holders (DPOHs) on a monthly basis, according to an online form and registry operated by the Commissioner of Lobbying
 - Contact logs include the names of individuals involved, date of contact, nature of contact, and general subject of contact
 - Chance encounters and electronic communication do not have to be logged (however, e-mails could be released through Access to Information requests)

Designated Public Office Holders (DPOHs)

- MPs and Senators, including Ministers and Parliamentary Secretaries
- Ministerial staff and staff of the Leader of the Opposition (although there seem to be escape loopholes for most OLO staff)
- Deputy Ministers and heads of agencies
- Assistant Deputy Ministers (or equivalent-rank officials)
- Appointees of the Government of Canada
- Members and officers of any federal agency, board or commission
- Members of the Armed Forces
- Members of the Royal Canadian Mounted Police (RCMP)


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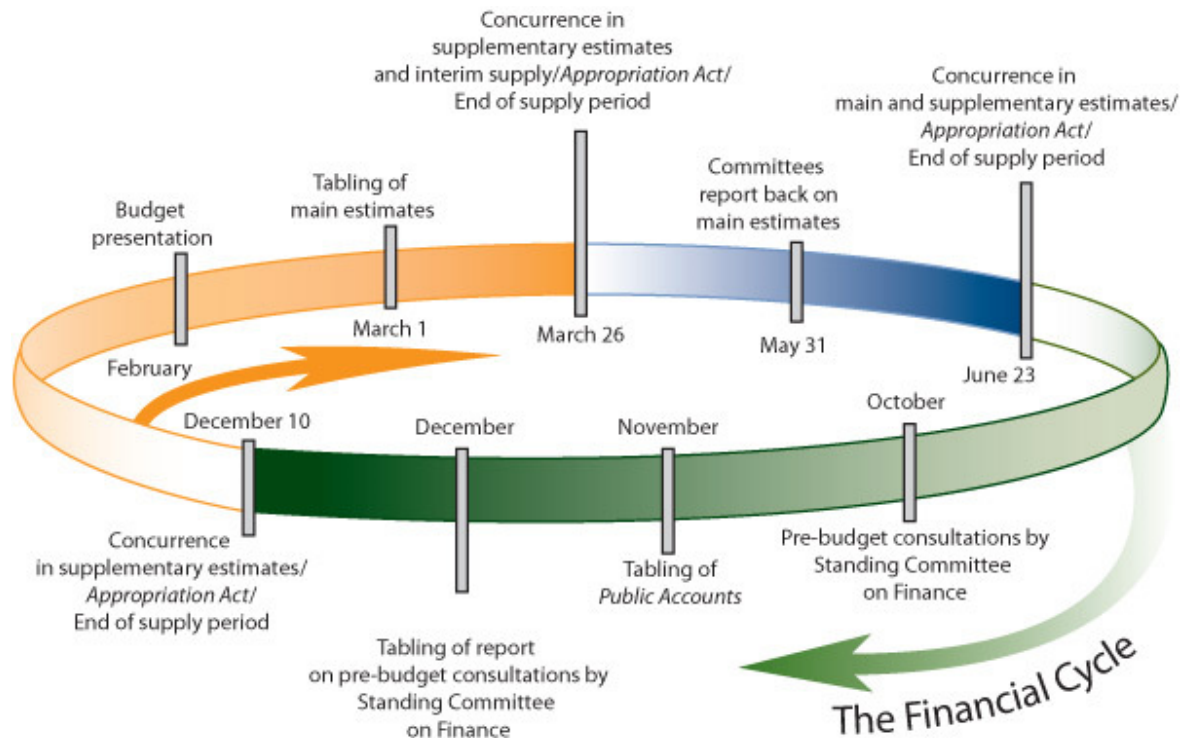
Reporting Communication with DPOHs

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- Monthly reporting:
 - “Oral and arranged communication” re: policy, programs and legislation” initiated by client
 - For financial benefits, oral or written communication initiated by either side
 - Arranging meetings
 - E-mails and “chance meetings” are exempted
- The following activities are NOT classified as lobbying:
 - Oral or written communication to a House or Senate Committee on the public record
 - Questions about enforcement, interpretation or application of laws or regulations as they pertain to your organization
 - Requests for information/assistance from a DPOH
 - Requests for publicly available information
 - Activities that are normally registrable, if conducted by non-agents / non-contractors of an organization (for example, it is not lobbying if a citizen writes to an MP to request that a law be changed; it is lobbying if a CEO does)

Budget Process: Financial Cycle



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