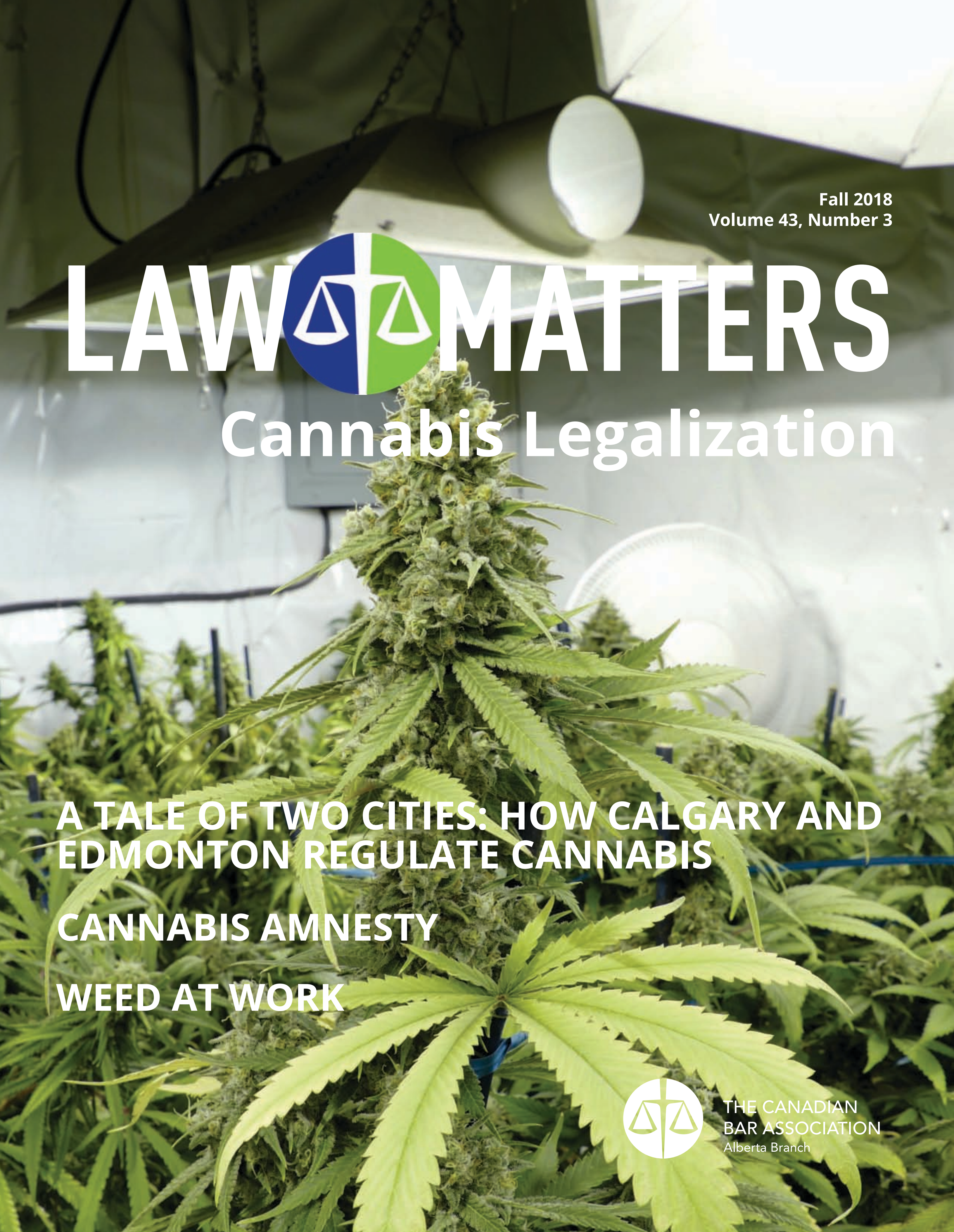
Fall 2018
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LAW MATTERS
Cannabis Legalization
A TALE OF TWO CITIES: HOW CALGARY AND EDMONTON REGULATE CANNABIS
CANNABIS AMNESTY
WEED AT WORK
THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITOR'S NOTE

BY JOSHUA SEALY-HARRINGTON

On October 17, 2018 the Federal Government will legalize cannabis, a decision that presents consumers, governments, and businesses with opportunities as well as challenges.

Some welcome the legalization of cannabis. They say that criminalization is a paternalistic and unnecessary infringement of liberty, whereas legalization will stimulate the economy, destigmatize recreational cannabis use in a manner that promotes more progressive discourse around addiction, and undermine black markets that fuel truly harmful criminal activity. Others oppose cannabis legalization. They raise concerns such as impaired driving (which is harder to police in the context of marijuana), health effects, and youth access.

Ultimately, the validity of these alleged benefits and concerns will turn on empirical questions. Will legalization increase or decrease cannabis consumption? Will legalization make it easier or harder for youth to access cannabis? Will legalization increase or decrease the use of other drugs, including alcohol? And, depending on the answers to these questions, a further inquiry arises: do many of the arguments supporting cannabis legalization extend to other drugs as well, and conversely, do arguments opposing cannabis legalization extend to alcohol?

We are thrilled with the fantastic and varied contributions in this edition. We begin with a piece from Kristen Merryweather describing the newly-minted Alberta Gaming Liquor and Cannabis (a creative means of maintaining the AGLC's established acronym!). Annamaria Enenajor discusses the pressing need for cannabis amnesty in light of legalization. And Christin Elawny outlines the complex employer-perspective on cannabis regulation. These, and many other pieces, do an outstanding job of exploring the nuanced and contested terrain of cannabis legalization.

We hope you enjoy these outstanding contributions, and join us — and our contributors — in this critical conversation regarding Canada's evolving relationship with cannabis.

JOSHUA SEALY-HARRINGTON B.Sc. (UBC), J.D. (Calgary). Joshua is an LL.M. candidate at Columbia Law School, where he is a Fulbright Student and Law Society Viscount Bennett Scholar. He is a former Law Clerk at the Supreme Court of Canada and the Federal Court."

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In This Issue

President's Report....3
What's Happening....4
Aberta Gaming Liquor & Cannabis....5
Cannabis and the American Border....6
A Tale of Two Cities....8
Weed at Work....10
The Case for Cannabis Amnesty....12
CBA News....13
Barristers Brief....14
Alberta Law Reform Institute....18
Judicial Appointments....18
Unsung Hero....19
Front and Centre....20
From the Practice Advisors....22
Classified et cetera....23
Non-Profit Announcements....23

Contributing Authors

Elizabeth Aspinall
Barry Chung
Frank Friesacher
Christin Elawny
Annamaria Enenajor
Jeremy Ellergodt
Kristjana Kellgren
Ola Malik
Kristen Merryweather
Michael O'Brien
Joshua Sealy-Harrington
Matt Zabolski
Kevin Zemp

PRESIDENT'S REPORT

BY FRANK FRIESACHER

Fall in Alberta is a blink which transforms into winter so quickly we often forget that September, October and November are full of action here at the CBA. We welcome back all our members who are returning to their sections at the Calgary and Edmonton offices as well as our members from across the province joining in via webcast.

Members are reminded that the deadline to renew your national CBA membership has now passed. If you have not already renewed your national membership, please go to www.cba.org/Membership/Join-Renew to do so. At the same time, you can also review the Portfolio and Portfolio Plus options available to you to enhance your CBA membership. These options give members benefits such as CBA education credits, rebates on approved CBA purchases, and free materials-level memberships to up to three Sections of your choice.

Section registration is also still open for all CBA Alberta members. Section membership provides you with regularly scheduled professional development, as well as opportunities to participate in fun and relaxing networking events with your colleagues. To register for your Sections, visit www.cba-alberta.com/Section-Reg.

At the end of September, we held Alberta's first Access to Justice week running September 30 -October 5. This year, the virtual soft-launch consisted of a week of blogging. The Access to Justice blog, ran for five days, and had twelve posts dedicated to specific initiatives throughout the province which help improve access to justice. Participating organizations included: Association des juristes d'expression française de l'Alberta, Calgary Legal Guidance, the Canadian Research Institute on Law and the Family, the Central Alberta Community Legal Clinic, the Centre for Public Legal Education Alberta, the Edmonton Community Legal Centre, Legal Aid Alberta, Lethbridge Legal Guidance, Pro Bono Law Alberta, the University of Alberta - Faculty of Law, and the University of Calgary - Faculty of Law - ABLAWG. Planning is already underway for Alberta's Access to Justice Week 2019, which will be held from September 29 – October 5 and will hopefully include keynote lectures, fundraisers, professional development offerings report launches, townhalls and more. If you'd like to get involved, please email us at communications@cba-alberta.org

Edmonton has successfully hosted an Inns of Court program since 1996 and in October, we held our inaugural Inns of Court reception for our South CBA Young Lawyers. This is the Alberta's version of a program based on the English tradition of dining with senior practitioners and judges. An evening of informal discussion on topics of interest to junior barristers led by four distinguished members of the bench and bar. We would like to sincerely thank all who have participated over the years, judges and senior practitioners. We look forward to hosting both these events again in the spring.

Each year we have a welcome reception and mentor mixer for our mentors/mentorees to meet up for the first time. With the advancement of using the Mentorcity platform this year we have been able to match up 300 senior lawyers and law students. We look forward to seeing these relationships spark new paths and help continue to grow the legal community's values even further.

Also, in October we kicked-off this year's Savvy Lawyer series with a session which was open to both CBA members as well as non-members to discuss the topic of Lawyers in Political Office - the numbers and the implications. This was just the start of the conversations that will be happening this coming year with the election. Our Agenda for Justice committee has been working hard to update information to arm our members with great collateral to discuss with potential candidates. Look for more information on your opportunity to get involved in coming months.

I am excited to let you know that advanced pricing, early bird registration is now open to CBA West, a conference presented in partnership with the CBA BC Branch. This year, being held in Penticton BC, April 26-29, we know the conference will sell out quickly. The organizing committee is putting together an amazing roster of speakers. For more information on the conference, including registration details, discount codes for flights with Air Canada and WestJet, and a full conference schedule visit, https://www.cba-west.org
I look forward to seeing you there!

Another priority for the upcoming year is the transition to the new governance model which was approved in principle by the Branch Council in May. Aside from the drafting of new bylaws which will be circulated for review and feedback and voted on at a general meeting of the membership, we are setting up various transactional working groups to develop member engagement within the new model. We believe the new model will be more streamlined and simpler to understand and will separate the governance functions clearly amongst the executive committee, the board of directors, and the CBA Alberta membership. We will be nimbler, more responsive to existing and emerging challenges, and more accountable. Alan Wilson Watts, a British philosopher, said "The only way to make sense out of change is to plunge into it, move with it, and join the dance." We invite all members to read more about the proposed changes when the bylaw information is made available later this year, and plan to join the dance!

NOVEMBER

6: The Canadian Bar Association presents **WHEN CRA AND YOUR REAL ESTATE TRANSACTION COLLIDE** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_nanov118

7: The Canadian Bar Association presents **INTRODUCTION TO INSOLVENCY LAW** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_nanov218

8: The Canadian Bar Association presents **UPDATE ON KEY CIVIL LITIGATION CASES ACROSS CANADA** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_nanov318

8: The Canadian Bar Association presents **CBA LAW FIRM LEADERSHIP CONFERENCE** Toronto, ON. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_lfl15

9: The Canadian Bar Association presents **CBA NEERLS & DEPARTMENT OF JUSTICE MEETING** Ottawa, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_doj16

16-17: The Canadian Bar Association presents **CBA ADMINISTRATIVE LAW, LABOUR AND EMPLOYMENT LAW CONFERENCE** Ottawa, ON. For more information, visit https://www.cbapd.org/details_en.aspx?id=na_adm17

20: The Canadian Bar Association presents **TIPS FOR EFFECTIVE ADVOCACY IN MEDIATIONS** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_nanov518

21: The Canadian Bar Association presents **HIV NON-DISCLOSURE: THE LAW VS THE SCIENCE** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=na_nasep318

22: The Association of Women Lawyers presents the **2018 WILL AWARDS** Hotel Macdonald, Edmonton, AB. For more information, visit www.willawards.ca

DECEMBER

6: The Canadian Bar Association presents **KEY ISSUES TO CONSIDER WHEN FINDING AND RETAINING EXPERT WITNESSES, PART 1** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=NB_WITNESS118

13: The Canadian Bar Association presents **KEY ISSUES TO CONSIDER WHEN FINDING AND RETAINING EXPERT WITNESSES, PART 2** Online. For more information visit, https://www.cbapd.org/details_en.aspx?id=NB_WITNESS218

FEBRUARY

5: The Canadian Bar Association presents **THE DISTINGUISHED SERVICE AWARDS** Edmonton, AB. Location TBD at 11:30 a.m. For more information visit, https://www.cba-alberta.org/Who-We-Are/About-us/Awards-and-Recognition/Distinguished-Service-Awards

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ALBERTA GAMING **LIQUOR & CANNABIS**

BY **KRISTEN MERRYWEATHER**

On October 17, 2018, the Alberta we know will change. Some harken back to the fear mongering of Y2K at the turn of the millennium. Others are set to embrace it with the same fervor as the repeal of prohibition in 1923. Whatever your point of view, things will change. Besides its new name, Alberta Gaming, Liquor and Cannabis (still AGLC), has been working to make this change as seamless as possible for over a year.

AGLC has been tasked with both retailing and regulating cannabis in the province. While the federal government (under Bill C-45, the soon to be proclaimed *Cannabis Act*) maintains authority over cannabis production, distribution and certain aspects of its sale, AGLC will be making cannabis sales happen in Alberta.

The *Gaming, Liquor and Cannabis Act* and its regulation set out provisions similar to those for liquor. Come October 17, cannabis will be sold by provincially-licensed retailers out of closely regulated store fronts throughout Alberta communities. Business licences remain the purview of municipalities.

AGLC anticipates having 250 licensed retailers in the first year and has restricted any one retailer to no more than 37 stores within the province (the regulation prohibits any one retailer from holding more than 15% of total licences). Licence applicants have run the gambit from individuals to large TSX-traded corporations. All applicants are put through a due diligence review which includes a criminal record check and source of funds determination. AGLC is conscious of its role in ensuring that its licensed retailers are acting with honesty, integrity and in the public interest.

All cannabis sold in Alberta must be purchased from AGLC (there are exceptions for cannabis used for medical purposes). This allows Albertans two options: purchase from a licensed retailer who stock their businesses with AGLC product or purchase directly from AGLC online through its eCommerce site, albertacannabis.org. All of AGLC's cannabis is purchased from Canadian licensed producers. On October 17, cannabis sales will be restricted to fresh or dried cannabis and cannabis oil. Edibles will be legalized in the future.

The advent of its eCommerce site means a new area of business for AGLC. Albertacannabis.org will be the only legal provider of online cannabis sales in the province. The intention of this online service is not to compete with other Alberta businesses but to offer Albertan's another choice. Age verification is an integral part of these online sales; from viewing product online to the point of delivery. Additionally, as with liquor, socially responsible cannabis use will be part of AGLC's message. If you represent a cannabis supplier (a licensed producer) or a cannabis retailer in this new frontier it's important to remember that all three levels of government play a role in the process, adding a level of complexity. AGLC is always available to assist in answering questions you may have. For further information, check out aglc.ca or albertacannabis.org.

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CANNABIS AND THE AMERICAN BORDER: **MORE LOWS THAN HIGHS?**

BY **KEVIN ZEMP**

It appears that as long as the employment activity is restricted to Canada, there will "generally" not be an immediate finding of inadmissibility. The use of the term "generally" likely means that much of the article's discussion on the various risks still applies. However, the statement is quite clear that if the trip to the US is related to the marijuana industry, the person may be inadmissible. As there is no formal definition as to what is included in activities that may be "related to the marijuana industry", a person should be very cautious going to the U.S. for any business purposes in any way related to the industry. Attending conferences, performing brand promotion, raising investment funds and other similar activities may well qualify as being sufficiently related to the marijuana industry and result in the person being found inadmissible to the U.S.

The legalization of cannabis has been a matter of some controversy in Canada. Some have worried about the social and health risks, while others have looked forward to it as an opportunity for new business ventures. Whatever perspective someone may have on the legalization of marijuana, it certainly will create a wide range of investment opportunities. This includes everything from service industries, production facilities and distribution networks. It has also led to the establishment of publicly-traded companies, whose share prices have reached dizzying heights.

Overlooked in all of the frenzy of business ventures and investment opportunities has been the US government's view, and in particular, that of US Customs and Border Protection and US Citizenship and Immigration Services. News reports show people being barred from the United States due to their involvement in the marijuana industry. One publicized incident involved employees of an agricultural equipment maker whose products could be used in marijuana cultivation. Several of the company's employees received life-time bans as they were found to be "drug traffickers." Recent government statements cause additional concern. Todd Owen, the Executive Assistant Commissioner for the Office of Field Operations, was recently quoted in Politico as suggesting that not only would people who use marijuana be inadmissible to enter the United States, but also all those who work and even invest in the industry. He stated,

> Facilitating the proliferation of the legal marijuana industry in U.S. states where it is deemed legal or Canada may affect an individual's admissibility to the U.S.

Predictably, this comment has created considerable panic. Further compounding the confusion is the absence of formal direction or guidance from the US government as to how the law should be applied to individuals who use marijuana or who work or invest in the industry. US officers are consequently left to their own devices in interpreting the legislation and how it should apply.

The general provisions for determining who is inadmissible to the United States are outlined in Section 212 of the U.S. Immigration and Nationality Act of 1952 (INA). Several provisions may be applicable. First, INA §212(a)(2)(A)(i)(II), provides that individuals who have been convicted of, or who admit to having committed the essential elements of, a controlled substance offense are inadmissible. If one is found described under this section, that individual can be permanently barred from entering the United States. A conviction is not required under this provision, merely an admission of having committed the elements of the offense. Generally, this provision requires that the admitted conduct is illegal where it occurred. Admitting to marijuana use in Canada prior to October 17, 2018 may result in a bar while post October 17, 2018 use should not. However, given the wide latitude given to immigration officers, such a distinction may not be enough to preserve a person's ability to enter the United States if the officer interprets the provision strictly.

In addition, even medical or legal recreational use may result in a bar to the United States if an officer applies INA §212(a)(1)(A)(iii). This provision makes a person inadmissible if they are determined to be a drug user or addict. Presumably, the use of medical marijuana would not make one a "drug user or addict," while recreational use could.

Another area of potential concern arises from INA §212(a)(2)(C). This provision makes an individual inadmissible if an immigration officer has "reason to believe" that they are or have been an illicit trafficker in a controlled substance (a knowing assister, abettor, conspirator, or colluder). Individuals working or investing in the industry may find themselves described under this provision. Presumably, it would not apply to activities strictly located in Canada. Unfortunately, the lack of clear guidance on this point gives rise to a concern that it could be found to apply even to activities limited geographically to Canada. Certainly, Owen's comments suggest this is a possible interpretation. More likely, it will apply to employees or investors in a Canadian company that also has activities in the United States.

Another provision that may give rise to concern is INA §212(a)(1)(A)(iii). Under this provision, a person is inadmissible if they are determined to have a physical or mental disorder and a history of behaviour associated with the disorder that may pose (or has posed) a threat to the property, safety or welfare of themselves or others. This provision is often used to deny entry to individuals who struggle with alcoholism. Indeed, a conviction or two for impaired driving can give rise to this presumption. This provision could apply if some type of harmful behaviour is associated with marijuana use, such as operating a vehicle while under the influence of marijuana.

In short, a US officer may use a range of provisions to deny entry to a Canadian who uses marijuana or who is involved in the cannabis industry. In the absence of specific guidance to the contrary, anyone who is either a user of marijuana or who is involved in the cannabis industry runs a risk of encountering issues at the US border. That risk can, depending upon the circumstances, include a life-time ban from entering the United States. Until further guidance or direction is received, prudence and caution are the recommended courses of action.

As this article was going to publication, US Customs and Border Protection issued a Statement on Canada's Legalization of Marijuana and Border Crossing. In short, the key component of the statement is as follows:

> Generally, any arriving alien who is determined to be a drug abuser or addict, or who is convicted of, admits having committed, or admits committing, acts which constitute the essential elements of a violation of (or an attempt or conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, is inadmissible to the United States.

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S.; however, if a traveler is found to be coming to the U.S. for reason related to the marijuana industry, they may be deemed inadmissible.

KEVIN ZEMP is the founder of Zemp Law Group. He is licensed to practise immigration and citizenship law in both Canada and the United States. He previously served as Chair of the Alberta South section of the Canadian Bar Association and is a former Chair of the National Immigratio section of the CBA.

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A TALE OF TWO CITIES: HOW CALGARY AND EDMONTON REGULATE CANNABIS

BY MATT ZABLOSKI & OLA MALIK

As we approach October 17th, 2018, the legalization date for cannabis in Canada, it has become clear that hardly anyone can agree on anything. Across this country, each Province and Territory seem to have taken different public policy and legislative approaches to the Federal Government's decision to legalize recreational cannabis, not to mention the innumerably different schemes which have been enacted by hundreds of municipalities and municipal districts. Like a great big patchwork quilt covering this vast country, our new cannabis laws represent the great hodge-podge of fears, hopes, anxieties and myths which cannabis inspires and reflect the uncertain impact which legalization will have on our laws, our culture, and our ways of life.

Alberta was the first province to finalize its response to federal legalization. The Alberta Cannabis Framework which effectively required legislative changes to provincial laws, was first announced in the fall of 2017, and was completed with a further round of legislative changes in the spring of 2018. Interestingly, Calgary and Edmonton are taking different approaches with respect to two central issues which municipalities have had to grapple with: (1) how cannabis retail outlets are zoned and licensed; and (2) where public consumption or smoking of cannabis will be allowed.

Zoning and Licensing of Cannabis Stores in Calgary and Edmonton

Alberta municipalities are required to operate under the province's framework of privatized non-medical cannabis sales which is operated by the Alberta Gaming, Liquor and Cannabis Commission ("AGLC") and as is further set out in the Gaming, Liquor and Cannabis Act, R.S.A. 2000, c. G-1 ("GLA"). While the AGLC is responsible for regulating the distribution of cannabis and licensing of retail locations, municipalities are responsible for the land use and zoning rules which apply to the licensed retail outlets.

Municipalities are required to maintain certain minimum separation distances between cannabis retail stores and certain uses. The Province legislated that cannabis stores must be located a minimum of 100 meters from both provincial healthcare facilities and schools. Municipalities will then be free to set further requirements above this minimum threshold. In the case of schools, both Calgary and Edmonton have increased the required separation distance to address concerns about young people accessing, or being influenced by, cannabis sales. Calgary and Edmonton also decided to require minimum separation distances between cannabis stores themselves to prevent a 'clustering' of retail outlets in any one area of the city.

Calgary and Edmonton have not imposed the same separation distances for cannabis stores, an outcome of different local conditions. Calgary requires that a cannabis retail outlet is placed at a distance of at least 150 meters from schools, 30 meters from places of worship, pawn shops and payday loan stores and 10 meters from child care facilities. Further, cannabis stores must be separated by a distance of at least 300 meters from one another. Edmonton has imposed more stringent separation distances with respect to cannabis stores, including 200 meters from libraries and schools, 100 meters from parks and community recreation facilities and 200 meters from one another. Separation distances, although found in every jurisdiction with legal cannabis stores, vary broadly depending on the specific concerns prioritized in that community.

An example of each city's unique approach to zoning can be seen in regulations which pertain to cannabis and liquor stores. A Federal Task Force's report on cannabis legalization strongly recommended that cannabis stores should not be located close to liquor stores to discourage co-use. Calgary adopted these recommendations. However, Edmonton has not followed suit because finding sufficient commercial space for cannabis retail outlets and liquor stores with the requisite amount of separation was identified as a challenge.

Another difference between the Calgary and Edmonton's approaches is with the application intake. Calgary created a new online system capable of accepting applications for business licenses, building permits, and development permits in a single application. This application system (which is a nationwide first) has allowed Calgary to accept and process numerous applications quickly. When it opened the system for public applications on April 24th, 2018, Calgary received nearly 200 cannabis store applications in less than 15 minutes. With its accessible application system, Calgary took a 'first-come, first-to-decision' approach with respect to the issuance of development permits for cannabis retail outlets which gave early entrants with a specific retail location in mind a huge advantage over competitors, given the 300-meter separation distance between cannabis outlets.

Edmonton took a significantly different approach and at first, adopted a lottery system as a way of not only providing transparency but also to level the playing field for applicants. After processing the initial crush of applications Edmonton has now reverted to a 'first-come, first-to-decision' approach, similar to Calgary. Edmonton also sought to mitigate appeals to the Subdivision Development Appeal Board by defining cannabis retail stores as a permitted, rather than as a discretionary, use. This means that proposed cannabis retail outlets which meet the applicable regulations are guaranteed approval and cannot be appealed to the Subdivision Appeal Board by residents who are unhappy that a retail cannabis outlet will be located in their neighborhood. In Calgary, cannabis stores were made a discretionary use, which opens the door for opposition by affected neighbors and increases the discretion of land use authorities to decline an application. At the time of writing, Edmonton had received approximately 240 development permit applications for retail stores while Calgary had received 371. In both cities, large numbers of applications were cancelled or withdrawn shortly after they were submitted.

It's difficult to conclude which of Calgary and Edmonton has chosen a better model. Because of Calgary's decision to designate cannabis retail outlets as a discretionary use, Calgary has seen numerous appeals going the Subdivision Appeal Board, many of which will have to be heard and determined in 2019. However, Edmonton is not without its own challenges as the first three applicants chosen in its lottery system saw their applications refused for not meeting Edmonton's zoning criteria.

Public Consumption

Calgary and Edmonton have taken different approaches to regulate the public consumption of cannabis. Prior to the legalization of cannabis, the Alberta Tobacco and Smoking Reduction Act ("Smoking Act") generally prohibited the smoking of tobacco indoors in public places but allowed smoking of tobacco by adults in any outdoor public place subject to municipalities requiring minimum separation distances from buildings.

With legalization, the Province amended the Gaming, Liquor and Cannabis Act ("GLA") which now: (1) maintains a prohibition on the smoking or vaping of cannabis in those indoor areas where smoking was already prohibited by the Smoking Act; (2) expands the list of public places, such as hospitals, schools, and child care facilities in which the smoking or vaping of cannabis is not allowed; and (3) requires a minimum separation distance of 5 meters between the smoking and vaping of cannabis and outdoor public places where children are typically present, such as playgrounds, pools, splash parks, zoos and recreational facilities. It is important to note that both the Smoking Act and the GLA impose minimum prohibitions with respect to the smoking or vaping of tobacco or cannabis in public, but expressly allow for municipalities to add stricter requirements (so long as the provincial and municipal schemes aren't in direct conflict with one another).

Edmonton has adopted the Provincial scheme which allows for the smoking and vaping of cannabis in most outdoor public places although Edmonton has increased the separation distance from doorways, open windows and air intakes from 5 to 10 meters, and, with respect to playground and other child sensitive usage areas, those distances have been increased from 5 to 30 meters. Because Edmonton did not impose an absolute prohibition on the consumption, smoking or vaping of cannabis in public places, no separate rules were required to deal with the issue of the public consumption of medical cannabis. Edmonton's public consumption regulations were drafted with consideration of the fact that with the Province's refusal to license cafes or lounges in which cannabis can be smoked or vaped, there may not otherwise be a public place for someone to publicly consume recreational cannabis.

In Calgary, city council took a more restrictive approach and, following an extensive public engagement process, chose to prohibit the smoking, vaping or consumption of cannabis in any public place. This has created some issues. Those who rent or live in a condo where smoking of any kind is not allowed have no public place to go smoke or vape cannabis. Further, since the imposition of a blanket prohibition on the smoking of cannabis in any public place would likely have led to a successful Charter challenge where, for medical reasons, someone has a license to consume medical cannabis, Calgary created an exemption, allowing medical cannabis to be consumed, smoked and vaped wherever it is legal to smoke tobacco.

MATT ZABLOSKI is the Municipal Project Lead for the Legalization of Cannabis for The City of Calgary. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of The City of Calgary.

OLA MALIK is a lawyer in the Law and Legislative Services Department of The City of Calgary. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of The City of Calgary.

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CANNABIS

WEED AT WORK: CONSIDERATIONS FOR EMPLOYERS

As of October 17, 2018, the possession and use of recreational cannabis will be legal in Canada for adults. Many employers are scrambling to prepare and to understand if and how they can regulate cannabis in the workplace.

The general rule is that employers are free to regulate cannabis in the workplace as they see fit. Employers are entitled to ensure that employees are fit for work at the start of and throughout their time in the workplace. This may include prohibiting the use of cannabis before, during and at work. However, like most general rules, there are exceptions or limitations that employers must keep in mind. There are essentially two main exceptions: an employee who is dependent or addicted to cannabis and an employee who is medically authorized to use cannabis.

As with alcohol and other drugs, it is possible for an employee to become dependent on or addicted to cannabis. A dependency or addiction is considered a disability under human rights legislation.

Accordingly, employees with disabilities must be accommodated to the point of undue hardship. In most cases, the employer will obtain medical information from the employee's medical providers or will arrange for an employee to be evaluated by a Substance Abuse Expert. In either case, the employer will want to obtain an assessment of whether or not there is a dependency or addiction, as well as the development of a treatment plan. Where the treatment plan requires an employee to undergo specific treatment for the addiction or dependency, accommodation may include allowing the employee to remain off of work for all or part of the time they are involved in treatment.

An employer may also be prevented from imposing discipline on an employee with a dependency or addiction where they violate a rule or expectation contained in a policy. It is important to ensure that every situation is evaluated based on its own specific circumstances.

The second exception arises in regard to medicinal cannabis. An employee may be authorized to use medicinal cannabis under the Access to Cannabis for Medical Purposes Regulation ("ACMPR"). Where an employee has such an authorization, the employer is required to accommodate that employee as they would any employee who is using a prescribed or over-the-counter medication that may affect the employee's ability to safely or productively perform his or her job duties. The employer has obligations to ensure a safe work environment and to accommodate the employee to the point of undue hardship.

What should employers do?

With all of this in mind, what should employers do to ensure they are prepared for situations that may arise involving recreational or medicinal cannabis use by employees?

1. Review and update their drug and alcohol and/or fit for work policy and ensure that it covers the following:

• Cannabis as a legal recreational substance that may cause impairment (similar to alcohol);
• Cannabis as an authorized medication. It is important to note that medicinal cannabis is not provided through a prescription as it does not have a drug identification number (DIN). This means that if only the language of a prescription is used it will not cover medicinal cannabis. This should include, but is not limited to, the following:

  ◦ That the employee is required to report the use of a prescription, authorization or over-the-counter medication that may affect their ability to safely or productively perform their duties before they start taking the medication or before they start work while taking the medication;

  ◦ A requirement for the employee to provide medical information regarding the authorization, including the authorization itself and the details around its use, including the timing of use; and

  ◦ A requirement that the employee cooperate in allowing the employer to obtain other information from the authorizing physician related to the employee's duties, responsibilities and workplace.

• In a safety-sensitive workplace, a requirement for the employee to disclose, before a violation of the policy occurs, that he or she has or suspects she has an addiction or dependency and a specific statement that an employee who so discloses will not be subject to discipline;

• Include information about when drug and/or alcohol testing may be conducted, the consequences of testing positive, and the consequences of refusing to be tested

2. Ensure their employees are provided with a copy of their policy, or access to a copy of their policies and are notified when changes to policies have been made.

3. Provide training to their employees on the policy including:

• Training supervisors and managers to recognize the signs of potential impairment and their obligations under the policy;
• Training supervisors and managers on the process to be followed in order to be able to have employees tested for alcohol and/or drugs; and
• Training all employees on their obligations under the policy and the consequences of violation.

4. Follow the policy consistently! It will not be helpful for an employer to draft a great policy and then fail to follow it or to enforce it inconsistently.

It is important for employers to keep in mind that the goal is not to catch employees violating the policy; the goal is to maintain a safe and productive workplace. The fact that there is currently no test for impairment when it comes to cannabis is a complicating factor. At this point, the best employers can do is ensure they are being diligent in dealing with situations involving cannabis use by employees. Having a great policy in place, and providing thorough training to employees, will go a long way in helping employers to be consistent in such situations and to ensure the exceptions to the general rule are considered when appropriate.

CHRISTIN ELAWNY is a labour and employment lawyer helping both non-unionized and unionized employers with complex claims, planning and other employment-related needs.

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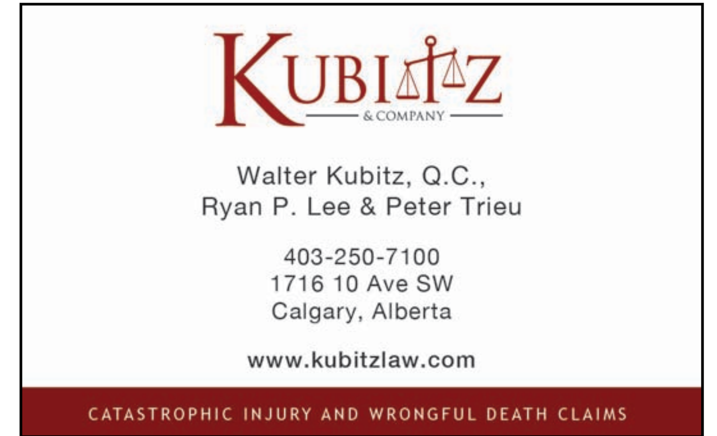
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Bryan Ryley – *Rocking Chair*
Mixed Media on paper, 7" x 7"
Provenance: Jarvis Hall Gallery

THE CASE FOR CANNABIS AMNESTY

BY ANNAMARIA ENENAJOR

The legalization of cannabis is a turning point for Canada. Legalization sends a positive message to Canadians and the rest of the world that it's time to move away from the ineffective and harmful war on drugs and adopt a pragmatic approach to the regulation of illicit substances that focuses on harm reduction rather than relying on antiquated stereotypes about cannabis consumers.

In spite of this great leap forward, many Canadians will remain left behind. Decades of cannabis prohibition have saddled hundreds of thousands of Canadians with criminal convictions for non-violent, minor cannabis offences. Indeed, one of the driving factors for cannabis legalization is to reduce the burden that the prosecution of these offences has had on our criminal justice system. These numbers are staggering:

• In the past 15 years, Canadian police agencies reported more than 800,000 cannabis possession "incidents" to Statistics Canada.

• In just four years, between 2008/2009 and 2011/2012, cannabis possession accounted for approximately 59,000 adult and 14,000 youth cases in Canadian courts and 25,000 adults and almost 6,000 youth convictions.

• An estimated 500,000 Canadians currently have a criminal record for cannabis possession.

Moreover, decades of unfair and unequal enforcement of cannabis laws has meant that marginalized and racialized Canadians have been disproportionately burdened by cannabis convictions. Despite similar rates of use across racial groups, racialized Canadians are disproportionately arrested for simple cannabis possession. The following is a description of racial disparities in cannabis possession arrests across Canadian cities for the year 2015.

• In Vancouver Indigenous people were nearly seven times more likely than White people to be arrested for cannabis possession.

• In Calgary Indigenous and Black people roughly three times more likely to be arrested than White people.

• In Regina Indigenous and Black people were arrested seven and five times more than often than White people.

• In Ottawa, Indigenous and Black people were four and five times more likely to be arrested than White, respectively.

• In Halifax Black people were over four times more likely to be arrested for than White people.

These convictions prevent people from travelling to the United States, volunteering, and finding meaningful employment. Under the Cannabis Act, past convictions may also prevent many Canadians from participating in the country's growing legal cannabis economy. In short, many people's lives will continue to be torn apart because of these minor offences.

No Canadian should be burdened with a criminal record for a minor, non-harmful act that will no longer be a crime. A poll conducted in May 2017 by Nanos Research and the Globe and Mail indicated that 62% of Canadians either support or somewhat support pardons for people with criminal records for marijuana possession.

Cannabis legalization is only the beginning of the story. We need to help the over half million Canadians who have been affected by cannabis prohibition to get their lives back on track. If the government is moving forward, Canadians deserve a right to as well.

ANNAMARIA ENEANJOR is a partner at Ruby Shiller Enenajor DiGiuseppe, Barristers, where she practices criminal defence, regulatory and constitutional law.

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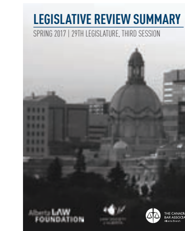
2018-19 MEMBERSHIP RENEWAL

Your 2018-19 CBA National membership renewal was due on August 31. If you have not already done so, you can renew your membership online at www.cba.org/Membership/Join-Renew. Please note that CBA Alberta Section memberships are contingent upon your CBA National membership dues being paid, and should you not renew your national membership, your Section registrations will be terminated.

Still available to CBA members are the Portfolio and Portfolio Plus enhancements to your membership. These packages provide members with CBA education credits, which can be used towards Section registrations, CBA professional development opportunities, conferences and more. Portfolio and Portfolio Plus packages also offer members up to three free materials-level Section memberships with the CBA Alberta and rebate rewards on approved CBA purchases (which will be taken off future years' membership fees). More information on these packages is available at www.cba.org/Membership/Membership-Information/Branch-Offerings/Alberta.

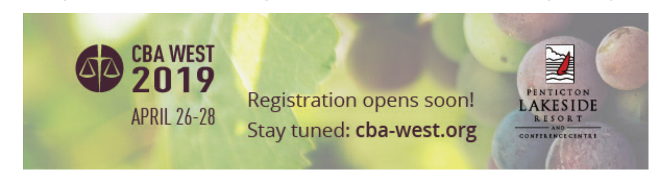
SPRING 2018 LEGISLATIVE SUMMARY



The Legislative Summary for the spring 2018 sitting of the Legislature is now available on the CBA Alberta website at www.cba-alberta.org/Publications-Resources/Legislative-Summary. Limited printed editions are also available. If you would like to receive a printed copy in the future, please email communications@cba-alberta.org.

CBA WEST

CBA West is now open for advanced pricing registration! Join colleagues from the CBA Alberta and BC Branches in beautiful Penticton, BC, April 26-28 for three days of professional development, networking, and the famous BC hospitality!



Advance pricing on now, register at www.cba-west.org
For registration details, and information on flight savings from Air Canada and WestJet.

2018-19 SECTION REGISTRATION

Section registration is still open for all CBA Alberta members. With recent changes made by the Law Society of Alberta to the CPD Program, it is more important than ever to participate in professional development delivered by your Section of choice.

This year, we have expanded our webcast offerings to include 38 Sections in Calgary and Edmonton. We have also opened up webcasting to make it available to those members who practice in Calgary and Edmonton, so whether you practice outside of the downtown core, or have trouble leaving your office for an hour at lunch, you can now participate in your Sections of choice remotely. Please note that webcast members who wish to drop in and attend a meeting in-person will be required to pay a drop-in fee.

Effective October 31, the grace period for Section registrations has ended. This means that any member who has not renewed their 2016-17 Section memberships for the 2017-18 year will no longer receive Section communications or notices, and will be required to pay a $25 drop-in fee should they wish to attend any meeting.

If you have not already done so, you can still complete your Section registration online at www.cba-alberta.org/Section-Reg. If you have any questions about your Section registration, please contact Linda Chapman (South) at 403-263-3707 or sections@cba-alberta.org, or Heather Walsh (North) at 780-428-1230 or edmonton@cba-alberta.org.

2019 DISTINGUISHED SERVICE AWARDS

The Canadian Bar Association - Alberta Branch and the Law Society of Alberta are jointly presenting the 2019 Distinguished Service Awards on Tuesday, Feburary 5 in Edmonton. Join us as we recognize outstanding legal professionals in our province in the areas of Service to the Profession, Service to the Community, Pro Bono Legal Service, and Legal Scholarship. More information is available on our website at www.cba-alberta.org/Distinguished-Service-Awards.

CBA ALBERTA VOLUNTEER OPPORTUNITIES

We are now recruiting CBA members to participate in volunteer opportunities during the 2018-19 membership year. Much of the work that the CBA does throughout the year is only possible with the assistance of a group of dedicated volunteers, and we encourage all members to find ways in which they can get involved.

There are a variety of committees that are always looking for new volunteer members, including Access to Justice, Editorial (Law Matters), Agenda for Justice & Advocacy, Equality, Law Day, Legislation & Law Reform, and Membership & Member Services. There are also opportunities to participate in Sections, either through Section leadership or as a speaker at one of our many Section meetings.

To indicate your interest in CBA Alberta volunteer opportunities, please visit www.cba-alberta.org/Volunteer.

CALL FOR CONTRIBUTORS TO CBA NATIONAL

Do you want to make a name for yourself in the legal blogosphere? Join our roster of stellar contributors and get your analysis/opinion out there! Our CBA members have a wealth of knowledge and expertise that's worth sharing with the wider world. Find out how you can get involved by contacting Yves Faguy at yvesf@cba.org.

NOT LETTING SLEEPING DOGS LIE - **THE DANGERS OF LITIGATION DELAY**

BY **MICHAEL O'BRIEN**

Since the release of the Alberta Court of Appeal's decision in *Humphreys v Trebilcock* ("*Humphreys*") 2017 ABCA 116, Alberta courts have approached delay in the civil litigation process with renewed vigor. In the short period of time since it was issued, *Humphreys* has been cited in 35 decisions in Alberta alone. An analysis of those decisions reveals a stark trend - plaintiffs who fail to advance their actions do so at their own peril. Alberta courts have not been shy in utilizing the procedural tools at their disposal to vanquish lingering lawsuits. In particular, through the *Humphreys* decision and the cases that follow it, Alberta Courts have breathed new life into Rule 4.31 (dealing with "inordinate delay") and Rule 4.33 (the "drop-dead" Rule).

The court's condemnation of litigation delay is consistent with a broader policy position recently adopted by Canadian courts, including the Supreme Court of Canada. Delay in the prosecution of court actions has been rising steadily. The 2016 *R v Jordan* decision of the Supreme Court of Canada is referred to in *Humphreys* and, though it deals with criminal rather than civil prosecutions, echoes similar themes. Three recent decisions from the Court of Appeal for Ontario have had a similar effect on the interpretation of the civil procedure rules against delay in that province.

Overall, the trend towards the dismissal of stagnant claims is a much welcomed development for litigants, practitioners and our overburdened courts. By cracking down on chronic delay, the courts are promoting, rather than hindering, much needed access to justice for civil litigants.

Humphreys

Humphreys is perhaps the most comprehensive consideration to date of whether delay in the prosecution of a plaintiff's case warrants dismissal of an action. The court reversed the lower court's decision and dismissed the action, finding that the delay was inordinate, unjustified and that the chambers justice had committed no less than four reversible errors.

The claim in *Humphreys*, commenced in December 2006, concerned a transfer and sale of assets by the defendants, which the plaintiffs claimed were fraudulent and in breach of the defendants' fiduciary duties as directors of the corporate sellers. The plaintiffs alleged that the defendants had engaged in oppressive conduct intended to cause harm and that the "egregious and high handed" behaviour was deserving of sanction and punitive costs.

The plaintiffs claimed against multiple defendants and by the time each defendant moved for the action to be dismissed in June 2016, the questioning process — a preliminary step in civil litigation — was not yet complete. At that point it had been almost 10 years since the action was first filed.

The defendants gave evidence that the delay not only resulted in litigation prejudice — depletion of memories of the events at issue and even the death of several key witnesses — but also created non-litigation prejudice which impacted their ability to conduct business and carry on their daily lives free from the stress and limitations that come from being involved in a lawsuit.

The lower court was not persuaded by the defendants' evidence and did not consider the plaintiffs' delay to be inordinate or inexcusable. The defendants appealed.

The Six "Essential Questions"

The Court of Appeal in *Humphreys* allowed the appeal and set out guiding principles for parties involved in civil litigation to pursue claims expeditiously. Failure to adhere to these guidelines may result in significant penalties and ultimately an action being dismissed.

Rule 4.31 of the Alberta *Rules of Court* (Rules) authorizes a court to dismiss a lawsuit if a party has prosecuted it at such a slow pace that delay has occurred and the delay has resulted in significant prejudice to the other party. If the party seeking relief proves inexcusable delay, this is considered proof of significant prejudice.

In *Humphreys*, the Court of Appeal articulated the following six "essential" questions in assessing a Rule 4.31 application:

1. Has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?

2. Is the shortfall or differential of such a magnitude to qualify as inordinate?

3. If the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?

4. If the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?

5. If the moving party relies on the presumption of significant prejudice created by Rule 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?

6. If the moving party has met the criteria for granting relief under Rule 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action?

The Court of Appeal found that "significant prejudice" in the context of delay will result if the time lapse causes serious impairment to a party's ability to produce evidence. This is litigation prejudice and is a non-controversial principle. Significant prejudice can also arise where the lawsuit threatens important or legitimate non-litigation interests of a party.

Non-litigation prejudice has been recognized and applied in other jurisdictions, but the *Humphreys* decision is the first instance of its adoption in Alberta. The decision is therefore a serious warning to litigants to consider not only the legal ramifications of the timing and execution of their actions, but also the commercial and personal consequences of delay to the opposing party.

Crackdown on Delay

The *Humphreys* decision, and the cases that follow it, stand as a warning to litigants in Alberta that there are real consequences to parties who employ stall tactics, are deleterious in their approach or who simply fail to pursue their legal claims with speed and efficiency. While the facts in *Humphreys* involved delays of many years, hopefully litigants will take heed of this decision and the court will be more willing to impose sufficient remedies for delay, particularly given the significant backlog of cases in Alberta.

MICHAEL O'BRIEN is a partner in the Litigation group at Blake, Cassels & Graydon LLP. His practice involves complex, high-profile corporate/commercial litigation and domestic arbitration. In addition, Michael is an instructor at the University of Calgary Law School and is a frequent speaker on new litigation developments.

BARRISTER'S **BRIEF**

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BARRISTER'S **BRIEF**

SUMMARY JUDGEMENT IN ALBERTA - **COMPETING LINES OF AUTHORITY FROM ALBERTA COURT OF APPEAL**

BY **JEREMY ELLERGODT**

Since 2010 summary judgment has undergone a transformation in Alberta, and across Canada. The Supreme Court of Canada ignited a "cultural shift" in the seminal case *Hryniak v Mauldin* 2014 SCC 7 (*"Hryniak"*) and solidified the approach courts should take when applying summary procedure rules. The impetus for the change was a concerted effort by the legal profession, and the courts to find ways to resolve disputes quicker and more cost effectively.

In *Windsor v Canadian Pacific Railway Ltd* 2014 ABCA 108 (*"Windsor"*) the Alberta Court of Appeal adopted Hyrniak, applying it to Alberta's summary judgment rule (at para 14):

New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules.

Six months after *Windsor*, the Court of Appeal considered summary judgment again in *Access Mortgage Corporation (2004) Limited v Arres Capital Inc.*, 2014 ABCA 280 (*"Access"*). In Access, the Court expanded on *Windsor* and defined what it means for a case to be without "merit", quoting from *Beier v Proper Cat Construction* 2013 ABQB 351 ("Beier") (a pre-Hryniak decision). Beier states (at para 61):

A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.

This passage from Beier was also quoted in two subsequent Court of Appeal decisions, *Can v. Calgary (Police Service)*, 2014 ABCA 322 and *WP v. Alberta*, 2014 ABCA 404, which were released shortly after *Access*.

The requirement that the applicant's case be "unassailable" remained the law in Alberta and was followed by Queen's Bench Courts regularly when deciding summary judgment applications.

The legal test for summary judgement applications was further modified by the Court of Appeal with its decision of *Stefanyk v. Stevens,* 2018 ABCA 125. In the lower court, the judge applied the case law flowing from *Access* and found that the applicant's case was not "so compelling that the likelihood of success is so high that it should be determined summarily." As a result, the application was dismissed. On appeal, the Court of Appeal departed from *Access* and *WP* and held (at paragraph 11):

A threshold issue is whether this case is suitable for summary dismissal, a form of summary disposition under R. 7.3. It would be unfortunate if our civil procedure was unable to resolve a simple dispute like this, where the facts are not seriously in dispute, without a full trial.

At paragraph 14 the Court held that "'[u]nassailable' and 'very high likelihood' are not recognized standards of proof". At paragraph 17 the Court held:

Therefore, in this appeal the issue is not whether the appellant's position is "unassailable". The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries....In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries.

Curiously, the Court does not mention either *Access* or *WP* in its Stefanyk decision but rather refers to *Hryniak* and *Windsor.*

Things start to get interesting very shortly after the release of *Stefanyk.* Despite the panel's intention in *Stefanyk* to chart a course away from the case law developed by *Access* and *WP* and towards a world where summary judgment applications can be determined without the burden of establishing an "unassailable" case, certain Appellate Justices had other designs.

While *Stefanyk* was still hot-off-the-press, two further Court of Appeal decisions were released: *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, and *Whissell Contracting Ltd. v. Calgary (City)*, 2018 ABCA 204. Justices Wakeling and O'Ferrall were on the panel for Rotzang and Whissell, and Wakeling JA had also been on the panel in *Access* and *Can*.

In *Rotzang* and *Whissell* the Court of Appeal refers to the "unassailable" test and applies it as though the decision in *Stefanyk* did not exist.

In *Whissel,* Justice Schutz (who was on the panel in *Stefanyk*) wrote a short concurring decision but in her separate reasons she stated:

I find myself unable to endorse, however, the dicta concerning the correct test for summary judgment, or the standard of proof required to be established for the moving party to succeed on an application for summary judgment... In my view, the proper test will have to be set when it is necessary to resolve the issue.

These decisions left the Justices in Queen's Bench without firm direction on the standard to apply in summary judgment applications. In *Nelson v. Grande Prairie (City),* 2018 ABQB 537 the Court examined both lines of authority, and attempted to find a middle ground between them. In obiter the Court commented that the higher standard was not a different standard of proof, but rather a higher standard for "what the Court thinks of the record, or the quality of the evidence at this stage of the proceedings."

Other courts have determined that the two positions are irreconcilable. In *330626 Alberta Ltd v. Ho & Laviolette Engineering Ltd*, 2018 ABQB 478 the Court stated (at paragraph 41): "It would be helpful if the Court of Appeal could definitively resolve this issue with a five person panel in the near future".

Sage that advice may seem, it was not immediately acted upon. *Angus Partnership Inc. v Salvation Army (Governing Council)*, 2018 ABCA 206 was released on June 1, 2018. The Court referenced and applied the law as set out in *Stefanyk*, and did not reference *Rotzang* or *Whissell.*

The tug-of-war continued. *898294 Alberta Ltd. v. Riverside Quays Limited Partnership,* 2018 ABCA 281, was released on September 4, 2018. The Court applied the "unassailable" test. Like the cases on the other side of the proverbial rope, it also failed to reference *Stefanyk* or *Angus*. The panel in *898294* was comprised of Justices Berger, O'Ferrall, and Wakeling. One may recall that Justices O'Ferrall and Wakeling also sat in *Rotzang* and *Whissell.* These two lines of authority appear to be developing like two ships passing in the night.

Litigation is difficult to predict even at the best of times when the parties know and agree on the legal test to apply in any given situation, but it is impossible to predict when a litigant is unsure of the law to be applied before even entering into the courtroom. The current state of summary judgment in Alberta further clouds the crystal ball that counsel are often expected to consult when advising a client.

Fortunately, clearer skies appear to be on the horizon. In *Sobeys Capital Incorporated v. Whitecourt Shopping Centre (GP) Ltd,* 2018 ABQB 517 the Court (at paragraph 54) states that a five person panel of the Court of Appeal is scheduled to sit in September, 2018. The Court of Appeal's online schedule indicated that a five member panel of the Court of Appeal heard two summary judgment appeals on September 7, 2018, those being *Brookfield Residential (Alberta) LP v. Imperial Oil Limited*, and *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.* Hopefully a clear precedent is set by the Court on the correct test. After all, the whole point of summary judgment was to simplify litigation.

JEREMY ELLERGODT practices in general insurance law with a focus on commercial litigation at Whitelaw Twining.

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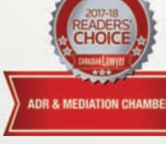

ADR CHAMBERS

IN COLLABORATIVE LAW REFORM

BY BARRY CHUNG

Here at the Alberta Law Reform Institute [ALRI], we're wrapping up our 50th year of operation on a high note. In our anniversary year we've issued several reports including Final Report 112, Property Division for Common-law Couples and Adult Interdependent Partners. These reports have garnered widespread engagement from the media, legal community, and general public. It has been a busy time for us, but as we wrap up our 50th year, we would be remiss if we didn't reflect on how we got here today and acknowledge the many exemplary individuals and groups that have supported our work throughout the decades.

The seeds of the Institute were planted in 1964 when the Law Society of Alberta informally established the Law Reform Committee. Fourteen members were selected from the judiciary, legal profession, and law faculty at the University of Alberta. The Committee had no full-time members, no staff, and no funding.

The Committee made its first set of recommendations in connection with the limitation of actions in tort. These recommendations went on to be enacted in 1966 but it was soon concluded that the Committee could not function effectively in its current structure. A formal and permanent research body was proposed by the Law Society and welcomed by the Alberta government and University of Alberta. Founding members, W. Bowker Q.C., W. H. Hurlburt Q.C., and H.G. Field signed the agreement that officially created the Institute of Legal Research and Reform, known today as the Alberta Law Reform Institute.

It's been 50 years since that day and to date we've published 112 Final Reports with 83 legislative implementations stemming from our work. We've made recommendations that have helped family and estate law keep pace with the ever-changing needs of everyday Albertans. We've helped Alberta businesses with our work in commercial law and the Alberta Business Corporations Act, and we've also worked to improve the administration of justice and the rules of court.

The variety and depth of our work has meant that many people have been involved with the Institute over the last 50 years. A quick look at our historical list of staff, summer students, volunteers, consultants, and Board reveals leaders in the legal community who have contributed to ALRI at some point in their career. Our founders were the ones to begin the work, but it was continually advanced by many exemplary individuals including former Chief Justice Neil Wittman, Peter Lown Q.C., and Margaret Shone Q.C., our longest serving Chair, Director, and Counsel respectively. Many of these individuals remain active in the legal and volunteer communities at large.

Much has changed over the last 50 years but the need for independent law reform endures. Challenges are on the horizon that will require us to respond with new processes that include expanding consultation methods, collaboration with experts and other specialized organizations, and innovative ways to facilitate engagement with our work.

By updating our processes, ALRI will continue to serve Albertans in keeping with our vision of just and effective laws. We will accomplish this by committing to our mission of improving the laws of Alberta and the objectives set by our founding parties:

- The consideration of matters of law reform with a view to proposing to the appropriate authority the means by which laws of Alberta may be made more useful and effective; and
- The preparation of proposals for law reform in Alberta, with respect to both the substantive law and the administration of justice.

Thank you to all CBA members who have contributed to our work over the past 50 years.

Website: www.alri.ualberta.ca
Email: reform@alri.ualberta.ca
Twitter: @ablawreform

BARRY CHUNG currently serves as Communications Associate for the Alberta Law Reform Institute and is responsible for ALRI's communications strategy and project support. He previously held various communications and administrative support roles since joining the University of Alberta in 2010.

JUDICIAL UPDATES

COURT OF APPEAL OF ALBERTA
The Honourable Mr. Justice J.D.B McDonald (Calgary) has elected to become a supernumerary judge effective August 31, 2018

COURT OF QUEEN'S BENCH
Michael Kraus has been appointed a judge of the Court of Queen's Bench of Alberta in Edmonton.

PROVINCIAL COURT OF ALBERTA
Honourable Judge Bart D. Rosborough (Wetaskiwin) has been appointed as a part-time judge, effective October 23, 2018.

SUSANNE THOMPSON

BY KRISTJANA KELLGREN

The Editorial Committee is pleased to introduce you to this issue's Unsung Hero: Susanne Thompson. Many of the articles featured in this edition of Law Matters are focused on the impending (as of the date of writing this article) legalization of cannabis in Canada on October 17, 2018. The evolving legal landscape at all levels of government in advance of this change has been considerable, including changes to the provincial traffic safety laws to comply with the federal amendments on drug-impaired driving (an issue which Susanne has been extensively involved with in her role as a Crown Prosecutor). Her specialization is with respect to criminal driving, but she also prosecutes in the areas of commercial robbery and personal violence, along with advising police and training new Crown prosecutors. She has been extensively involved in considering and consulting on new driving-related offences and sits on a province-wide task force in relation to the new legislation.

SUSANNE THOMPSON

On the issue of cannabis legalization, Susanne thinks this makes for an interesting time to be a criminal lawyer. She notes that on top of the legalization of cannabis, there has been a full-scale revamping of the transportation offences in the criminal code, and that more changes to other sections of the code are in the works (along with the expectation of forthcoming constitutional challenges to some of those provisions). While Susanne explains that her office already deals with people who drive while impaired by drugs, she anticipates some new and creative litigation on the issue of impairment and the new provisions that include regulated limits for cannabis.

Law is Susanne's second career. She has a bachelor of music and a Master of Arts in music from the University of Alberta, and is a classical bassoon player (she may also hold the distinction of knowing more about Duke Ellington than any other member of the Alberta bar, he having been the focus of her masters). Her first career was working in the music industry running the business side of music organizations and festivals. While it was a career she found rewarding, it wasn't always compatible with the organized and very logical thinker that she is. Susanne admits that those in the industry didn't tend to be very organized or very logical thinkers; "which is not a bad thing. It's just not my thing!" Thankfully, these are traits that ultimately led her to law school and then a career working for the Crown.

Susanne started law school at 35, and was quite certain at that time that criminal law was not going to be her focus. Her first criminal law class, however, convinced her otherwise. After graduating from the University of Alberta law school in 2009, Susanne practiced for a brief period of time with a criminal defence firm and then joined the Edmonton General Prosecutions office in February, 2011. Accordingly to Susanne, she hasn't looked back since! Susanne takes a great deal of satisfaction from her career as a trial crown and happily talks about her role as allowing her to do the right thing every time by focusing on a just outcome for the public and for the accused. Her strengths in that role include her ability to focus on what is a fair and just outcome in the circumstances, whether that be negotiating a rehabilitative sentence for an offender so that he or she can get help to overcome the difficulties that led him or her to the criminal justice system, helping a grieving family understand the prosecution, or running a difficult trial and dealing with the challenging evidence and arguments that need to be addressed.

Susanne was born and raised in Edmonton, and is the first and only lawyer in her family. She manages her busy practice while being a mom to 2 children who she describes as being confident, capable and outstanding members of their communities (to which the reader must ask themselves, how could they not be, with a mom like Susanne?) Susanne's husband (a successful jazz pianist and instructor at MacEwan University) and her children share a love of music and travel. She continues to play classical bassoon with the Edmonton Winds, and has been a member of the executive for the past 3 years. While she hasn't played the bassoon in Court (yet), she had the pleasure of performing for other lawyers in a "klezmer" band as part of the Players de Novo production in 2017.

We are privileged to count Susanne as a member of the bar in Alberta. Thanks Susanne for all the work that you do!

Kristjana Kellgren is in-house counsel with the Alberta Utilities Commission. In addition to her practice, Kristjana is a member of the CBA Alberta Editorial Committee and will be co-teaching an administrative law class at the University of Alberta this fall.

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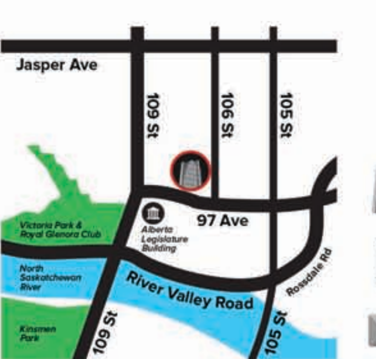

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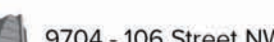
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EXCEPTIONAL COMMUNICATIONS: **THE ETHICS OF EX PARTE COMMUNICATIONS**

BY **ELIZABETH ASPINALL**

"This is a court of law, young man, not a court of justice" - Oliver Wendell Holmes, Jr.

The scales of justice symbolize the court's consideration of each side of every case. Fairness and public faith in the judicial system require that balance. If courts are perceived as hearing only one side of a dispute, a reasonable apprehension of bias may arise. At best, that may result in a decision being set aside or appealed; at worst, it undermines public confidence.

The rule for all communications with the court is that notice must be provided to the opposing party unless a valid exception applies. The Alberta Court of Appeal recently stated in *Secure Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 that "Applications without notice (formerly *ex* parte applications) are extraordinary since it is a fundamental principle that parties have a right to be heard before their rights are negatively affected" (at para 41). The Supreme Court of Canada noted that "The circumstances in which a court will accept submissions ex parte are exceptional and limited to those situations in which the delay in notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given" (*Ruby v Canada*, 2002 SCC 75 at para 25).

Extraordinary. Exceptional. Limited. These are the words which the courts use to describe applications without notice.

And yet. Calls to practice advisors about applications made without notice are rising. Many of those calls are prompted by opposing lawyers writing to judges. Those communications may constitute *ex parte* appearances as seeking a remedy without notice in correspondence may have the same effect as an *ex parte* hearing: an application without notice is not limited to a courtroom hearing.

The problem is not new. Former Practice Advisor, Barry Vogel, Q.C., advised the profession in 1997 that it is "improper to contact a judge ... even to arrange an appointment [or] write a letter ... no matter what the subject".

The Code of Conduct unequivocally states:

> A lawyer must not communicate with a tribunal respecting a matter unless the other parties to the matter, or their counsel, are present or have had a reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the court. (Rule 5.1-1, Commentary para 6)

Note that the Code of Conduct refers to "tribunal" not "court". "Tribunal" includes courts, administrative bodies, mediators and arbitrators. The same principles apply to these decision-makers (see *Hunt v The Owners, Strata Plan LMS 2556*, 2018 BCCA 159).

If your situation does not justify an ex parte application or communication, but you need to communicate with a court or other decision-maker, it is unethical simply to send a letter. You must give the opposing party or their lawyer a reasonable opportunity to review, comment on and respond to the communication. Send a draft to the other side (preferably after having a colleague review it if it is a contentious matter), indicate a reasonable deadline by which you require their comments, and indicate that you will be sending the correspondence "as is" unless you receive their response by that reasonable deadline. What is reasonable will depend on the circumstances. Advise the court that you have provided your correspondence in draft to the other side. If the opposing side has reasonable comments, you may choose to include them, or if the comments are lengthy or objectionable, you may indicate to that party that they should send their own correspondence (to be reviewed by you in advance, of course). Even better, particularly if the matter is contentious, consider whether correspondence is the appropriate way to proceed. Consider whether you should proceed in court on notice where a transcript of the proceeding is prepared, both parties can make submissions, and the court can be assured its own questions are answered.

Remembering that communications may be ex parte appearances and allowing the opposing party to provide input in the communication ensures fairness. It ensures that the court has heard from both sides and can make a decision which takes all relevant interests into account. Lawyers who follow their ethical obligations when communicating with tribunals ensure that courts of law are also courts of justice.

ELIZABETH ASPINALL is a Practice Advisor and the Equity Ombudsperson at the Law Society of Alberta. Prior to joining the Law Society, she practiced at JSS Barristers in Calgary. Elizabeth is a member of the CBA Alberta Editorial and Equality, Diversity & Inclusion Committees.

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NORTHERN OFFICE
1501 Scotia Place, Tower 2, 10060 Jasper Avenue NW, Edmonton, AB T5J 3R8
Phone: 780-428-1230 | Fax: 780-426-6803 | edmonton@cba-alberta.org

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