

# LAW MATTERS

## **Alberta 2019: Budget & Justice**

**Dear Justice Minister: We Are in a Crisis. And We Are Here to Help.**

**Alberta Justice: Government to Streamline, Modernize Justice System**

**Justice Critic: Budget Cuts Give Many Reasons for Concern**



THE CANADIAN  
BAR ASSOCIATION  
Alberta Branch

BY **JESSICA ROBERTSHAW & JOSHUA SEALY-HARRINGTON**

On April 19, 2019, Jason Kenney's United Conservative Party won a majority government in the Alberta Provincial election. Campaigning on a platform of fiscal conservatism, many Albertans were unsurprised to hear that significant changes in policy and budget cuts were on the horizon. In this edition of *Law Matters*, we examine some of these changes and their ramifications on the Alberta justice system, and unavoidably, on Alberta lawyers themselves.

Our first piece by Ola Malik, Ian Savage, Jackie Halpern, Q.C., Shelagh McGregor and Jordan Stuffco is a call for unity. Representing numerous organizations which encompass nearly all lawyers in Alberta, this article recognizes that the Alberta justice system is facing tremendous challenges, while noting that drastic changes, especially without input from those most intimately connected with the system, may have dire consequences. It is also a message of hope, that not only can these issues be fixed, but that solutions can be found together.

Our second piece, by the Alberta Counsel, provides a balanced and nuanced perspective on both the positives and negatives of the 2019 budget and its impact on the Alberta justice system. The critiques include discussions of higher costs due to outsourcing of civil legal work and concerns of delays and the haunting consequences of the *Jordan* decision, juxtaposed with praise for steps towards modernizing an archaic paper-based filing system which will ultimately result in greater efficiencies and decreased costs.

Our third piece, from Danica McLellan, praises numerous aspects of the Alberta 2019 budget while opining on the merits of fiscal restraint and more judicious use of public funds.

Our fourth piece, by Matthew Block of the Alberta Crown Attorneys' Association, discusses the ongoing salary freeze with the Crown Prosecution Service including its impact on retention, morale and justice, particularly for rural Albertans and post *Jordan*.

Our fifth piece, from Wayne Barkauskas, looks at the human element of economic downturns and their effects on those seeking legal services, including a discussion of the impact of possible delays in establishing a unified family court system.

Our sixth piece, from Loraine Champion, Executive Director of Assist, provides an insightful overview of the correlation between economic downturns and lawyer mental health, while reminding the profession that Assist is here to help.

Our seventh piece, from Scott Chimuk and Amal Tharani, outlines changes to legislation meant to tackle rural crime in Alberta through Bill 27 with tougher fines and changes to civil liability for property owners.

Finally, our eighth and ninth pieces come from Alberta Justice and the Solicitor General and Kathleen Ganley, Justice Critic in response to five questions that we asked them to consider regarding the Alberta 2019 budget. These questions intentionally foster a discussion regarding the hiring of additional Crown prosecutors and funding for Drug Treatment courts, legal education, rural crime initiatives, efficiency within in the system, and Legal Aid funding.

In reading these pieces, it is clear that Alberta has had a difficult and divisive few years, economically and politically. But what is also equally clear is that both progressives and conservatives have a common concern: that our current system cannot and will not be able to meet the ever-growing demands of our province while still providing accessible, fair, and efficient services. Albertans may disagree about the best way to fix our system, but all parties agree that action is needed. At *Law Matters* we echo the comments of Ola Malik, Ian Savage, Jackie Halpern, Q.C., Shelagh McGregor and Jordan Stuffco, that we can get it done, together. 🇦🇧

**Cover Art:** Ola Malik (President, CBA Alberta), Jackie Halpern, Q.C. (Vice President, Civil Trial Lawyers Association), Ian Savage (President, Criminal Defence Lawyers Association) (l to r)

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The focus of this issue of Law Matters is on the public's ability to access timely and responsive justice through our courts system.

As your President, I wanted to take a moment to speak to you a little more about CBA Alberta's role in advocacy.

The CBA is the only national association with a mandate to protect the professional and commercial interests of the legal profession and to promote the Rule of Law. As lawyers, CBA members have an interest in ensuring the system of administration of justice is as effective as it can be. As taxpayers, we have an even bigger interest in the return on investment that is provided by an adequately funded and appropriately functioning justice system.

CBA Alberta represents over 5,300 lawyers across Alberta and the nature of our membership means that our members reflect diverse perspectives. Our members have significant experience and expertise from a variety of points of view, some of which may be oppositional. While this can make policy development more challenging as we strive to represent our membership and advocate on behalf of the justice system, in the end it makes CBA's input more valuable in terms of identifying principles that most of the legal profession would agree are important.

The President is the designated spokesperson for CBA Alberta and generally makes statements and submissions on behalf of the branch, while the Board is the directing mind of CBA Alberta and ultimately responsible for strategic directions in accordance with its mandate and values. The development of our advocacy relies on the work of the Agenda for Justice and Advocacy committee, as well as the many subject matter experts within our various Sections. Sections are encouraged to make approved submissions to a public body or statements to the media on behalf of CBA Alberta. It is important that statements and submissions reflect the will of the members, be consistent with CBA objectives and goals, and maintain accountability for content. The Agenda for Justice committee recently completed work on updating the guidelines to assist Sections in preparing statements and ensuring adequate consultation across CBA Alberta before finalizing the statements, and Section chairs and those interested in pursuing public statements and submissions should familiarize themselves with this policy.

The Agenda for Justice committee is also the guardian of the Agenda for Justice policy. The committee worked hard prior to the 2019 provincial election to refine the various issue backgrounders, such as access to justice, Truth & Reconciliation Calls to Action, resources for the justice system, family justice, drug treatment courts and judicial independence. It was

relaunched as *Justice Matters: An Agenda for Justice* and once the provincial writ dropped, we held a media event on April 2, 2019 to raise the profile of these justice issues. CBA Alberta received media coverage across the province and the media then followed up to elicit comments from major party leaders on our concerns raised over resources for the justice system. The Agenda for Justice was also provided to all parties and lawyers running in the election. We strongly believe these efforts raised our credibility as an advocate on justice issues in Alberta, acknowledged by our meeting with Minister of Justice & Solicitor General Doug Schweitzer within a week of his appointment. The full Agenda for Justice is available online at <https://cba-alberta.org/Our-Work/Agenda-For-Justice>.

Through our public policy and advocacy work, the CBA promotes lawyers' interests and protects the legal profession's core values from regulatory and legislative encroachment. By bringing lawyers' perspectives to the public debate, we strive to improve the law and the administration of justice, and to promote equality and access to justice. The ever-increasing pressure on Alberta's justice system—due to funding deficiencies, budget cuts, and lack of investment in infrastructure and technology—significantly and negatively impact the efficiency and effectiveness of the justice system in Alberta. CBA Alberta has a role in advocating for change.

Because of you and our diverse, experienced, knowledgeable and passionate membership, our voice is powerful and credible on legislative, regulatory and policy development. We invite you, through your interest and involvement as a CBA member, to continue to strengthen that voice.

If you are interested in contributing to the advocacy efforts of CBA Alberta in a meaningful way, I encourage you to get involved. This can be as simple as putting your name forward for the Agenda for Justice and Advocacy committee, or by being elected to our Board of Directors. By the time this issue lands on your desk, we will have recently held the first annual general meeting under our new governance structure – this is an excellent way to meet fellow CBA Alberta members, the Board of Directors and Executive Committee, and contribute to the conversation about the direction of your CBA Alberta. In May, we will host our first Leadership Forum, which will bring together CBA Alberta members for a day of networking and leadership development.

On April 1, nominations will open for the CBA Board and Secretary elections. All that is required to submit a nomination for these positions is that you are an active member of the CBA. More information will be available to all members shortly. In the meantime, I invite you to contact me or any other member of the Board or Executive Committee to discuss the roles and responsibilities of CBA Alberta Board members. See page 26 for more details on the upcoming elections.

As we begin this new decade, I am inspired by the work of our members to continually advocate for our profession, for access to justice, and for the Rule of Law. It is because of the efforts of our members that CBA Alberta can continue to bring value to lawyers across our province, and I thank you all for the work that you do. As always, all members of the Executive Committee welcome your calls, emails and feedback to help us make your CBA Alberta the best it can be. 🗣️

# WHAT'S HAPPENING

## FEBRUARY

**19:** The Canadian Bar Association presents **THE 2020 NATIONAL ANNUAL GENERAL MEETING**. Live hubs in Calgary and Edmonton. Register online at <http://cba.org/AGM/Home>.

**19:** The Alberta Lawyers' Assistance Society presents **NEW PARENTS PRACTICING LAW - BUILDING A HEALTHY RELATIONSHIP WHILE RAISING A FAMILY**. Bennett Jones, Calgary. For more information, visit <http://albertalawyersassist.ca/event/new-parents-practicing-law-building-a-healthy-relationship-while-raising-a-family-2/>.

**20:** The Ontario Bar Association presents **MANAGING PARTNERS ROUNDTABLE: RECOGNIZING AND MITIGATING THREATS TO LAW FIRM DATA SECURITY**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=ON\\_ON20LPM03X](https://www.cbapd.org/details_en.aspx?id=ON_ON20LPM03X).

**20:** The Canadian Bar Association presents **AN IN-HOUSE GUIDE TO PRIVACY & ACCESS LAW**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20LAW03AX](https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW03AX).

**25:** The Canadian Bar Association presents **CIVILITY AND DEALING WITH DIFFICULT LAWYERS IN THE LITIGATION CONTEXT**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS11A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS11A).

**26:** The Canadian Bar Association presents **BUSINESS FINANCE FOR LAWYERS I: RAISING SEED CAPITAL FOR A STARTUP**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS03A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS03A).

**27:** The Canadian Bar Association presents **A NEW REALITY IN REAL ESTATE: NON-RESIDENT CLIENTS, MONEY LAUNDERING AND CLIENT IDENTIFICATION REQUIREMENTS**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20LAW04A](https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW04A).

## MARCH

**6-7:** The Calgary Women Studying Law Association presents **THE LAW NEEDS FEMINISM BECAUSE NATIONAL FORUM**. University of Calgary, Calgary. Register online at <https://www.lawneedsfeminismbecause.ca/2020-national-forum>.

**9:** The Canadian Bar Association presents **WOMAN, LAWYER, VOLUNTEER BOARD MEMBER: GUIDE TO SERVING ON A NON-PROFIT BOARD**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20LAW05A](https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW05A).

**10:** The Canadian Bar Association - BC Branch presents **TRAUMA INFORMED PRACTICE: GUIDANCE FOR LAWYERS - PRACTICE & SELF-CARE**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=BC\\_BC20CAR01W](https://www.cbapd.org/details_en.aspx?id=BC_BC20CAR01W).

**12:** The Canadian Bar Association presents **MARIJUANA USE IN ASSISTED LIVING AND LONG-TERM CARE FACILITIES**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20LAW07A](https://www.cbapd.org/details_en.aspx?id=NA_NA20LAW07A).

**11:** The Canadian Bar Association presents **BUSINESS FINANCE FOR LAWYERS II: FROM VENTURE CAPITAL TO PRIVATE**

**EQUITY**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS04A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS04A).

**31:** The Canadian Bar Association presents **REPRESENTING YOUR CLIENT WHEN MULTIPLE PARTIES ARE INVOLVED**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS12A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS12A).

## APRIL

**1:** The Canadian Bar Association presents **CORPORATE IP STRATEGY: PROTECTING KNOWLEDGE ASSETS DURING THE BUSINESS LIFECYCLE**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS05A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS05A).

**7:** The Canadian Bar Association presents **VOLUMINOUS FILE MANAGEMENT: AVOIDING DEATH BY DISCOVERY**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS13A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS13A).

**15:** The Canadian Bar Association presents **WORKFORCE PLANNING: EMPLOYEE CONSIDERATIONS FOR THE BUSINESS LIFECYCLE**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS06A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS06A).

**18:** The Canadian Bar Association - Alberta Branch presents **LAW DAY 2020**. Calgary and Edmonton. For more information, visit [www.lawdayalberta.com](http://www.lawdayalberta.com).

**28:** The Canadian Bar Association presents **PSYCHOLOGY OF COMMUNICATION (WITH CLIENT, OPPOSING COUNSEL, JUDGES, WITNESSES)**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS14A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS14A).

## MAY

**5:** The Canadian Bar Association presents **PERSUASIVE OFFERS AND COUNTEROFFERS**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS15A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS15A).

**6:** The Canadian Bar Association presents **BUSINESS ACQUISITION: DEAL TACTICS AND BOARDROOM STRATEGIES**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS07A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS07A).

**13:** The Canadian Bar Association presents **CORPORATE REORGANIZATION: WHAT BUSINESS LAWYERS NEED TO KNOW**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS08A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS08A).

**19:** The Canadian Bar Association presents **TO SETTLE OR NOT TO SETTLE: STRATEGY AND TACTICS FOR LITIGATORS**. Live webinar. Register online at [https://www.cbapd.org/details\\_en.aspx?id=NA\\_NA20SLS16A](https://www.cbapd.org/details_en.aspx?id=NA_NA20SLS16A).

## SAVE THE DATE

**MAY 6, 2020:** The Canadian Bar Association - Alberta Branch presents **THE FIRST ANNUAL GOVERNANCE FORUM**. Edmonton, AB. More information will be available soon!

**SEPT 23-25, 2020:** Pro Bono Law Alberta presents **THE 8TH ANNUAL NATIONAL PRO BONO CONFERENCE**. Hotel Arts, Calgary, AB. For more information, visit <https://pbla.ca/about-us/national-pro-bono-conference/>.

## BARRISTERS' BRIEFS

BY TAMARA PRINCE AND ALLISON KUNTZ

Can you believe it has been almost a year? If you're reading this article then most likely you remember exactly where you were and what you were doing when the Alberta Court of Appeal released its summary judgment-clarifying decision in *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49.

*Weir-Jones* came to us at a time when we needed it, when Alberta's many law nerds were debating standards and burdens of proof, and when most of us were still skeptical about the summary judgment "culture shift" prescribed by the Supreme Court of Canada in *Hryniuk v. Mauldin*, 2014 SCC 7. *Weir-Jones* reminded us of the SCC's view that summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted. "The chambers judge can make findings of fact if, viewed overall, the record permits that to be done" (*Weir-Jones* at para 38), but cautions that "there are some issues of fact (such as issues of credibility, or conflicts in the evidence on material issues) that are not amenable to summary adjudication, and that are markers of genuine issues requiring a trial (*ibid*).

As of January 13, 2020, least 107 cases have considered *Weir-Jones*, and certainly some of these have grappled with how to treat a more complex hearing record and even conflicting evidence in the context of a summary judgment application. Interestingly, based on our review, the nature of the applications and decisions post *Weir-Jones* generally appear to reflect an embracing of the modern approach to summary judgment outlined in *Hryniuk*. Below are a few examples from 2019.

In *From Estate*, 2019, ABQB 988, Justice Goss granted summary judgment in an estate dispute where the key area of factual dispute was "the conclusions drawn by the experts". The Parties submitted expert evidence with differing views as to the testamentary capacity of the deceased testator. Justice Goss resolved this by preferring the evidence of lay witnesses as to capacity, and finding no real factual dispute in the volume of evidence of the Parties, determined that the record was sufficient to make a summary decision finding the testator's will invalid.

Master Mason granted summary judgment in fraud and debt in favor of the Plaintiff in *Bentley v. Hooton*, 2019 ABQB. This case included allegations that one of the Defendants forged his wife's signature to secure a loan from the Plaintiff, which loan was defaulted upon and not repaid. Considering the Defendant's allegations of duress and the death during a related legal proceeding of a co-Defendant, Master Mason found that the record was sufficient to conclude that fraud was established on a balance of probabilities.

In refusing summary judgment in *102 Street Developments Ltd. v. Derk's Formals Ltd.*, 2019 ABQB 781, Justice Neilson found that the conflicting evidence before the court precluded the awarding of summary judgment. This case involved three consolidated claims wherein the Plaintiff alleged that the Defendant Derk's Formals Ltd., with chemicals used in its dry-cleaning businesses, contaminated land purchased by the Plaintiff, and also alleged negligent misrepresentation against the Defendant Envirowest Engineering Inc. in connection with

environmental assessments reports upon which the Plaintiff purported to rely when choosing to proceed with its purchase of the land in question. Justice Neilson found that the evidence before the Court was conflicting on a number of material issues of fact, including on the issue of reliance and on the adequacy of the expert evidence adduced.

In *Scherle v. Treadz Auto Group Inc.*, 2019 ABQB 987, Justice Campbell granted summary dismissal of a proposed class action against two Defendants (while granting class certification against a third Defendant). The proposed Plaintiffs alleged that the Defendants Service Alberta and the Alberta Motor Vehicle Industry Council caused them to suffer losses as a result of a failure to administer their respective statutory responsibilities by not protecting them from the unfair business practices and fraud of the Defendant Treadz Auto Group Inc. In finding that the two public bodies did not owe a private duty of care to the proposed Plaintiffs, and that in any event the Alberta Motor Vehicle Industry Council is immune from public liability, and also in finding that there were no material facts seriously in dispute, the Court was confident that the state of the record permitted summary resolution against those two Defendants.

In *Sonny's Trucking Ltd. v. Edmonton Kenworth Ltd.*, 2019 ABQB 696 Master Schlosser declined to order summary dismissal in a case involving an alleged steering failure in a Kenworth truck. The Defendants did not submit expert evidence in support of their application, and rather focused their defence on evidence showing the existence and utilization of a manufacturing inspection process to prove that an allegedly missing cotter pin could not have been missing. Master Schlosser did not buy this view of proof, and stated that "the central problem with dealing with this case summarily is that the inferences that could be drawn from the inspection evidence are not consistent with the physical evidence", and that "given the choice between an inference and an opinion that explains the physical evidence, I feel compelled to prefer the opinion" (at para. 46).

The Plaintiffs in *Cole v. Martin-Morrison*, 2019 ABQB 311, were seeking summary judgment alleging breach of contract, negligent investment advice, and lack of ongoing due diligence and investment due diligence. In recognizing that the facts in investor liability cases are critical, Master Farrington stated that granting summary judgment would require him to ignore the Defendant's expert report entirely, which would not be appropriate, and that consideration of how to weigh the evidence of the Plaintiffs' signed acknowledgments of duties to seek legal and accounting advice "require a complete factual matrix with *vive voce* evidence" to be fairly determined. <sup>13</sup>



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## DEAR JUSTICE MINISTER: WE ARE IN A CRISIS. AND WE ARE HERE TO HELP.

BY OLA MALIK, IAN SAVAGE, JACKIE HALPERN, Q.C., SHELAGH MCGREGOR AND JORDAN STUFFCO

Dear Minister: We are in a crisis. It's not a crisis you created alone. The crisis is one that consecutive governments have contributed to over the course of decades. It's a crisis that you inherited. This crisis is on the verge of being irreversible. And we're here to help.

Inadequate funding and the failure to ensure that our administration of justice is fully supported with the infrastructure it requires to properly function undermines judicial independence and the maintenance of our judiciary as a strong, viable, third branch of government. This goes to the core of what we are as a democracy.

As former Chief Justice Beverley McLachlin stated in a speech entitled "Canada's Legal System at 150: Democracy and the Judiciary":

Maintaining the proper balance between the legislative, executive and judicial branches of governance requires constant vigilance. Tensions are inevitable, and the temptation to stymie or suppress those perceived to stand in the way is ever present. We need not look far to find current examples of countries where once independent courts have been weakened or brought to heel by the executive or legislative branches of governance. The inevitable result is to erode public confidence in the impartiality of the courts. When this happens, disrespect for the law and the rule of law cannot be far behind.

For years, funding of the infrastructure and support services that make Alberta's justice system work—court buildings, technology systems and business processes, court clerks and administrative staff, prosecutors and other government lawyers, duty counsel, Legal Aid, victim support services and judges—has (when set against Alberta's growing population) fallen steeply in decline.

This isn't surprising. Timely and effective access to legal services aren't things that often come up at election time and investing money into our legal system is wrongly perceived as enriching lawyers.

But it's not about lawyers, and it never has been. It's about something bigger.

It's about Albertans – the few lucky ones who can afford to pay a lawyer and the much larger number of self-represented litigants who can't. If you're poor, chances are you still won't qualify for Legal Aid coverage. That means that if you're charged, you're more likely to find yourself in custody while you wait for your trial. And even if you get released, you'll find yourself trying to navigate a court system that you don't understand. If you're an Alberta business owner with a civil or commercial dispute, it will take three years before you can even have your trial heard and then months before you finally get your decision. And if you're going through separation or a divorce, you'll face months of delays trying to deal with child

custody, access and support issues when you're facing the most financially and emotionally fraught time in your life.

Our courts are by necessity having to triple book trial dates so that no courtroom stands empty. But this makeshift solution results in adjournments and delays when matters finally proceed. New matters are coming in faster than they can possibly be dealt with. If you've been the victim of a serious crime, don't expect your day in court, because prosecutions take too long and because of that, often get withdrawn.

We respect this government's decision to cut spending. That's a platform this government ran on and has the mandate to deliver. We understand the difficult decisions you're being asked to make. Because making those decisions means you've got to pick winners and losers.

But making big changes is tricky business that requires careful forethought, systems-wide thinking and collaborative decision making. Because a decision made over here will affect something over there. Because you can never be certain of what's on the other side. Because someone's best intentions often have unintended consequences.

Cutting funding to core services and programs in the fall of 2019, including the \$5 million cut to Legal Aid Alberta without any prior consultation with its board of directors, has unintended consequences that will ultimately cost more than it saves. We know that every dollar spent up-front on legal aid saves more than \$6 in consequential spending later. We know that providing people with access to legal services significantly reduces the \$800 million that this government will spend a year on health care or social assistance for people whose unmet legal needs have snowballed into other, more serious, issues. We know that specialized provincial court programs, such as the Drug Treatment Court, Indigenous Court, Mental Health Court and Domestic Conflict Court provide meaningful and focused interventions for people whose unique life challenges require different approaches. These measures reduce burden on our justice and corrections systems front lines while saving governments money down the road.

Eliminating 90 Alberta Justice civil lawyers from virtually every government department who are specialized in the work they do, lawyers who are doing it better and cheaper than anyone else, may end up costing this province more in the long run. There will be no cost savings if those positions are outsourced to people to do the same work on an hourly fee basis and who don't have the same background required to fully understand their clients' needs.

The courts in this province have survived on shoestring budgets and paltry handouts for years. Successive governments have trimmed here and there, reducing the courts to bare bones operations. But the courts' caseloads are increasing. Cutting funding to our court budgets (which are for the most part comprised of personnel costs) will result in courts having to lay off essential support staff, halt creative court-initiated projects

that increase efficiencies and save money, freeze desperately needed judicial appointments including Masters, extend lead times for trials and Chambers hearings even further, and will most certainly launch us, Thelma & Louise style, over the cliff on *Jordan* applications.

We respect your decision to hire fifty new Crown prosecutors because this is a public policy decision that is within your authority and expertise and falls within your legitimate mandate. But neither your Ministry nor these new prosecutors will put a dent in rural crime if additional resources aren't also allocated to deal with the increased volume of work these prosecutors will generate throughout every aspect of our court system, including corrections and social support services.

If realized, your Ministry's proposal to eliminate the Civil Division of the Provincial Court by diverting claims under \$25,000 to an arbitration process with the remainder going to the Court of Queen's Bench is likely irreversible. A decision of this magnitude represents a fundamental shift in how civil claims are dealt with and shouldn't even be contemplated without significant consultation. Further, it will flood the Court of Queen's Bench with a new influx of civil claims. And it will place additional burdens on civil litigants who will have to come to grips with the increased cost, procedural complexities and lead times required to proceed with their lawsuit in the Court of Queen's Bench.

And this is just the beginning. While the Ministry of Justice is forecasting a spending decrease of \$3 million for 2019, we understand that there will be an additional \$96 million reduction within the next four years. But spending on the justice sector isn't a big-ticket item – currently, less than 1% of the Alberta budget is spent on the courts and provincial prosecutors. Reductions such as those your Ministry have proposed will decimate the Alberta justice system with grave and irreversible outcomes for Albertans.

We are concerned that government is making decisions that affect all Albertans' access to justice without meaningfully consulting either the legal profession or the public. Our respective organizations and others have been working hard to schedule meetings with you and with members of your government to discuss and address matters that we know are as important to you as they are to us and to all Albertans. Like you and your government, each of our organizations is committed to ensuring that Albertans have an effective, efficient, sustainable system of justice of which we can all be proud.

We are concerned when we hear, without any consultation, about major structural changes and budget cuts that will cripple how our legal system meets the most basic needs of Albertans.

We are concerned that we haven't heard from the Justice Ministry a full-throated endorsement, complete with the necessary matching financial support, of an Alberta Family Court, something that all levels of court and stakeholders in this province have agreed is the only sensible way forward. As you know, a unified family court system streamlines the family court process. It reduces the number of court filings, appearances and legal fees, while hopefully diverting cases away from court litigation, representing significant savings to taxpayers and reducing the trauma of disruptive proceedings

upon children.

We are concerned about decisions that would shuffle the bottlenecks, delays and inefficiencies from one level of court to another and within the justice system generally, without fully understanding how each of these seemingly small changes affects the big picture.

We want to help. Between the Canadian Bar Association and its various sections, the Criminal Defence Lawyers Association, the Alberta Civil Trial Lawyers Association, the Criminal Trial Lawyers' Association, and the Advocates' Society, we represent almost all lawyers in Alberta. Many of our members voted for your government. They supported, and still support, the work that you're doing. As those with the most expertise and experience, we want to be involved in helping guide the changes you're proposing. We want to be consulted. We want to be heard. Because we know we can help.

Our courts are doing their part to streamline operations, find efficiencies and cut costs. For example, the Court of Queen's Bench of Alberta through its Early Intervention Case Conference for family law matters, its suspension of the ADR rules which requires parties to seek mandatory mediation prior to setting their matters down for trial, and the hiring of retired judges to perform pre-trials in criminal matters has greatly reduced the court's workload by encouraging early resolution without having to go to trial. For its part, the Provincial Court has implemented significant criminal case and caseflow management reforms. These including the bail project that allows prosecutors based in the Calgary and Edmonton courthouses to deal with bail applications across the province through video conferencing, the civil reform project that has made it easier, cheaper and more timely to resolve civil claims through the use of simplified forms, binding arbitration and the Simplified Trial process, and the new criminal Rules of Court that will undoubtedly allow for better use of court time and resources in criminal matters. And the Court of Appeal is working hard on a multi-phase digitization project that would allow for a far more accessible filing system at the appeal level.

We can, if we join in common purpose, achieve a shared outcome. But this will require us to come together, develop shared intentions, and, no matter how hard the road gets, work together. Because working together through collaboration, real consultation, and thoughtful engagement allows us to better understand the pressures your Ministry is facing, allows lawyers to better advise and serve their clients, and allows you, and us, to craft outcomes that properly address the problems we're trying to solve.

Dear Minister, name the place and time, and we'll be there. We'll come to you with our best intentions and we'll share the heavy lifting. We promise that we'll listen, do the work and come back to you with ideas. And if those ideas don't work, we'll come back with more, until we figure it out. Until we get this done. Together. 🇨🇦

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## CUTTING THE BUDGET: A NECESSARY EXERCISE IN FISCAL RESTRAINT OR ANOTHER EXAMPLE OF MISPLACED PRIORITIES?

BY ALBERTA COUNSEL

### A critique of the UCP's budget

For progressives, it is difficult to discuss the impacts of Alberta's recent budget on the justice file without also examining its impacts on social services and the economy. Through this lens, the budget demonstrates a serious case of misplaced priorities.

While progressives understand that protection of life and property relies in part on the deterrent of being incarcerated, they see the focus on punishment common in conservative circles as not only wrong-headed but counter productive. Instead, focus should be turned to rehabilitation and addressing the social determinants of criminal behaviour, including systemic and institutional factors.

Prison populations have substantially higher rates of mental illness than the general population. A disproportionate number have been involved with the child welfare system and/or are Indigenous. Many Albertans with privileged backgrounds have social networks and resources available to help them recover from poor decisions, while others do not. For many in our jails, the overwhelming power of racism, poverty, mental illness, and abuse heavily sabotaged their odds of a good life. For the vulnerable, government services can mean the difference

between life and death, health or homelessness, a job or a life of crime. In other words, investments in social services and jobs today means less demand on the justice system tomorrow. Cuts are the last thing we need.

Budget 2019 reduces government expenses by 2.8% over the next four years, along with 7.7% of public sector jobs. This, to help pay for a corporate tax cut to 8% from 12% by 2022, even though Alberta already has the lowest taxes, and at a cost somewhere between \$2.3 and \$4.7 billion, with no guarantee of a single job created. According to the Parkland Institute, after accounting for population growth and inflation, this amounts to an 18% reduction in spending by 2022-23. Even ministries saved from absolute cuts will hurt. A 1.3% increase in health expenditure between 2018 and 2022 will feel more like a 17% reduction in spending. Early childhood intervention spending will decrease 30.5%. A reduction in expenditures for the Ministry of Justice and Solicitor General of 6.5% (almost \$94 million) will feel more like 25%.

The UCP will eliminate 764 government positions this year, including 198 (almost 3%) in the Ministry of Justice and Solicitor General, and more in outer years. Many of these cuts will be achieved through attrition and privatization.

Not filling vacant front-line positions in areas like children services and justice will impair the ability of remaining workers to do their jobs. Privatization can have detrimental effects on vulnerable populations. Private providers often increase profits by hiring less experienced staff, paying lower wages, deferring maintenance on government-owned assets, charging new fees or simply gaming the system by not providing comparable services.

Most public servants are smart, passionate and often over-worked. Caseloads in children's services, income support, and criminal prosecutions are intolerable, and many staff quit due to burn-out.

Alberta's court systems are already stretched to their limits. Proceedings have been delayed because court clerks were unavailable to open courtrooms, despite every other relevant person being on hand. Charges have been dropped because of delays, pursuant to the *Jordan* decision.

Courtroom services funding will fall \$42 million by 2022-23, a 20% reduction before population growth and inflation. Although the minister has promised a new e-court initiative will increase efficiencies and reduce costs, only a few million of the \$27 million promised has been budgeted for 2019, and in the context of an overall decreasing budget it's unclear where the remainder will come from and when.

By 2022-23, legal services expenditures will decrease over \$17 million or 31.8%. Last month we learned that up to 90 civil lawyer positions could be outsourced. This decision may need reconsidering given that some legal experts have predicted

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that outside counsel will, in fact, cost more. Of course, in-house counsel also brings other intangible benefits such as accessibility, institutional knowledge, ability to leverage relationships in government, and an ethical commitment to the public good. Their work is critical to preventing costly legal mistakes worth hundreds of millions. When asked about the decision, the minister suggested any laid-off civil lawyers should apply for vacant Crown prosecution positions.

Only time will tell if the government's decision to sacrifice current services while it waits for its risky shotgun approach to tax cuts will work. Meanwhile, cuts to services relied on by vulnerable populations will surely increase demands on justice services, taking away resources for existing caseload and serious criminality. These increased demands could wipe out any gains made by new investments in the justice system, when and if those ever happen.

### In defence of the UCP's budget

The recent budget proposal by Alberta's UCP government included substantial cuts to a number of ministries, including Justice and Solicitor General. The budget proposals also included a number of increased line items, including funding for 50 new Crown Prosecutors, more mental health and addictions services, and community and social services that target human trafficking and sexual exploitation. The justice budget, like every decision of governing, is an example of balancing competing demands.

Even though the ministry is receiving a small increase over last year's budget in 2019-2020, some departments are seeing real cuts, and the ministry will see funding fall behind based on the rate of population growth and inflation over the next four years. For example, very fair criticism comes from the ranks of court services personnel who will bear the brunt of overall cuts and have continued to see frozen budgets for several years. The unfortunate reality is that the cuts must come from somewhere, and the government is targeting an area ripe for change. It is rare that any department faces cuts and finds no fault in the decision. The evidence, however, supports moving to an electronic-based, as opposed to human resources-based, court administration system.

While no part of society is immune to the rapid digitization and automation of our era, it is no secret that the courts are last adopters of, well, everything. Legal systems generally abhor any new way of doing things, and Alberta is afflicted worse than most. Almost all US jurisdictions have moved to fully electronic court records management systems. British Columbia even has an online tribunal for small civil claims. Australia and Turkey have almost every aspect of their judicial systems online, with studies documenting their transition from analog to digital. One study from the US in 2010 suggests that a full transition to an electronic court system could eliminate up to 60% of court clerical work. Alberta's court administrators are fortunate the cuts are not harsher – even though they very likely will be in the next decade.


While the cuts in the Alberta budget are harsh and affect real people with real families, the public sector is not immunized from the economic realities of the day. When revenues are not exceeding expenses, leadership has to find ways to make ends meet, whether it's a private business or the provincial government. And a long-term solution cannot be to just whip

out of reliable AMEX. Alberta spent over two billion dollars on interest charges last year, and those costs will only continue to increase unless some cuts are made now. No one wants to see people out of work, but the bubble only continues to grow without decisive action – and the sooner the better.

Failing to act now by making cuts like this will absolutely, without a doubt, destroy our ability to fund the basics of our government, like schools, hospitals, and transportation infrastructure. The financially responsible thing to do is identify areas where we can trim through small cuts, where the effects will be felt but will not devastate the department. Albertans elected the UCP with a strong mandate to look at the books in exactly this manner, but to also increase spending in other areas, like the hiring of 50 new Crown Prosecutors. It may seem counterintuitive to increase the caseload capacity of the Crown Prosecution Service, and also cut the capacity of the courts to administer those same cases. But that is not actually what is happening. The government is ensuring that crimes that are currently not prosecuted will be – and is simultaneously working to reduce per case costs for the courts with new technology and better processes. Would it be better to have sustained funding for court administrators while the transition is happening? Absolutely. But it would also be better to not have had countless successive governments increasing spending year after year without considering what Albertans in 2020 might think about it.

Another criticism of the budget is that it moves legal work from in-house lawyers to external counsel. The crux of this criticism is that the hourly rates are much higher for external counsel than for in-house government lawyers. Government should be looking to best practices in industry on decisions like this, and the best practice is absolutely using external counsel. Cost implications such as overhead, padding pensions, and variable workloads corresponding to market competitive rates form the basis for major private sector entities like banks, insurance companies, and utility providers to extensively use outside counsel. Of course, there are some things the government cannot outsource, such as its core services like prosecuting crimes. In the wake of the *Jordan* decision, which has (to put it simply) tremendously increased the strain on prosecution timelines, this government has decided to respond aggressively with its funding of 50 new Crown Prosecutor FTEs, fulfilling one of the UCP's main campaign promises.

Strong decisions need to be made to get the books balanced and experiments like digitization of the court administration system should be pursued. The government very well could be creating an access to justice nightmare where cases will be backlogged worse than they already are – but we don't think so. We will see our courts transition to the 21st century like other common law jurisdictions have already. Cases will continue to be resolved in an increasingly more efficient manner and modest savings will be incurred by the taxpayer. Cuts need to be made somewhere, and our analog courts system is a good place to start. ☎



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## SPENDING RESTRAINT IN THE 2019 ALBERTA BUDGET

BY DANICA P. MCLELLAN

The Alberta UCP government's first budget, tabled on October 24, 2019, made no bones about taking action to deal with the province's dire financial situation. The government hasn't shied away from defending it either.

And that's exactly what the majority of Alberta voters voted for on April 16, 2019.

The UCP made a number of key commitments to voters in its election platform: repealing the provincial carbon tax, lowering the business tax rate to attract investors and their capital back to Alberta, reigning in government spending, and maintaining or increasing spending on healthcare and education, among a long list of others.

With lowered government revenues projected as a result of axing the carbon tax and decreasing the business tax rate, accomplished in Bills 1 and 3 of the legislature's spring session, the budget was the government's first real opportunity to prove they had the stomach to tackle bloated government spending and put Alberta on a path towards balanced budgets.

Supporters of the last NDP government (or just naysayers of the current UCP one) like to frequently proclaim that Alberta had forty years of conservative governments, and that those conservatives were the ones who got us into this mess. While there's no disputing a messy financial situation, there's much dispute as to whether it's a result of small "c" conservative governance. Alberta has not had a fiscally conservative steward of taxpayer dollars in office in the better part of two decades.

Successive post-Klein PC governments blew through Albertans' hard-earned money like a kid at the taxpayer-funded candy store. The result is entrenched government spending that is head and shoulders above other Canadian provinces. While it was easy for a government to justify avoiding labour disputes by doling out big public sector pay increases during the boom years, it takes much more discipline to restrain costs when times are hard. The UCP government is the first one to take that challenge seriously since the Ralph Klein hospital demolition derbies of the 1990s.

Despite what you may have heard from opposition voices and the narrative being pushed by the press gallery, the UCP's spending restraint is nowhere near the radical action from the Klein days. No one is blowing up hospitals. On the contrary, the UCP increased healthcare spending by \$200M, or 1%, in its inaugural budget. It's true that there have been ample news stories about possibly impending layoffs, contracting out of hospital services like laundry and lab services, eliminating doctor compensation perks that don't exist elsewhere in Canada, and other cost-saving measures. But, the government has committed to re-invest all these savings directly back into the healthcare system to decrease surgical wait times, increase mental health care options, and expand palliative and long-term care provided at non-hospital facilities which are more appropriate for many patients' needs and costs the healthcare system exponentially less.

Government-wide, the UCP budget proposed a modest 2.8% cut

in operating expenses over four years. That's despite around \$270 million dollars in increases to healthcare spending, a 15% increase in social services spending, and holding the line on education spending. Per student, Alberta's education system spends \$11,121 per student, compared to British Columbia which spends \$9,68. Having been educated primarily in British Columbia's system as a child, I can confirm it is excellent. Don't just take my word for it, though. In 2014, the Conference Board of Canada ranked B.C. as the country's best education system. That, despite spending significantly less per student than Alberta. Since the 2004-2005 fiscal year, Alberta's operational funding for education has seen an 80% increase, significantly outpacing both inflation and enrollment levels. That, despite a global economic downturn and plunging oil prices which have historically funded so much of Alberta's prosperity and public institutions.

The Education Minister, Adrianna LaGrange, has been insistent that school boards across the province look for ways to reduce their administrative overhead and any bloat within their boards. In Calgary, for example, the Minister has been embroiled in a very public battle with the city's largest school board over questions about their fiscal prudence. One notable example was the Board's years old decision to enter into a lease for their headquarters at a shiny new building on prime downtown real estate. Reports suggest that this lease cost significantly more than outright buying the building. They entered into a 25-year lease that included a built-in escalation rate of 2.5% per year at the time when Calgary's real estate values were at their peak. Today, in the wake of tumbling oil prices and a challenging local economy, some 25% of office space in Calgary is vacant, while the Board is stuck paying 2.5% more every year to lease their space.

This year, after initially threatening to lay off hundreds of teachers to cope with budgetary pressures, the Board ultimately backed down and are now using money reallocated from elsewhere in their budget to cover the teacher salaries. All this to say, all parties involved in the spending of taxpayer dollars have an obligation to do so judiciously. While the government isn't increasing spending to school boards, they are asking that folks at these boards exercise their common sense and discretion to keep costs down."

While the Health, Education and Community and Social Services departments saw either budget increases or budget freezes, other departments have been asked to bear the brunt of the government's 2.8% spending reduction.

Alberta Justice was not immune to spending restraint. While this upcoming year will see a modest operating expense budget decrease of 0.2%, the government is targeting a 6.6% decrease over the four years of the government's mandate. Some of this decrease will come as a result of automating and digitizing an overwhelmingly manually performed, paper-based system. The proposed modernization of the province's court records system will be music to the ears of anyone in Alberta who has struggled to get basic records from courthouses around the province, or wanted to pay various kinds of tickets online. Other provinces, like British Columbia and Ontario, have been

light years ahead of Alberta in this regard. The budget also hints at the possibility of modernizing courtroom operations and “innovative ways to address citizen’s legal disputes” as cost-saving measures, but little has been announced to date in that regard.

As part of the Ministry of Justice’s budget, and despite the relatively flat spending this year, the government also included new funding for a number of high-profile campaign promises. This includes funding for 50 new Crown prosecutors (on top of the approximately 30 vacant prosecutor positions that will also be filled); doubling the number of articling students hired by the Crown; expanding drug treatment courts, doubling the program’s capacity to 80 participants per year; and providing additional funding to the Alberta Law Enforcement Response Teams (ALERT) that tackle enforcement of serious criminality such as child exploitation, illegal firearms, and drug houses.

The government’s budget indicates savings will be found across the Justice department, and the Minister of Justice and Solicitor General, Doug Schweitzer, has stated that much of these savings will come from careful spending and reducing the total number of full-time equivalents (FTEs) through attrition and by realigning how the department provides services. This has included the elimination of positions in the department’s legal services division, though it’s not clear how many positions were filled or what role attrition will play in the downsizing. Other big measures announced by the government have included requiring small municipalities to begin paying for a portion of their policing costs, and requiring municipal police agencies

to begin paying for forensic DNA lab work to support police investigations.

While the Justice department saw the elimination of some positions that provided legal services to the government, the Ministry of Labour received funding for a new program included in the UCP’s election platform to provide legal assistance to workers affected by applications before the Labour Relations Board. Under the Employee Labour Relations Support Program, employees are entitled to one hour of legal advice to learn about their rights and receive assistance with respect to various labour relations matters and applications.

On the whole, the Alberta 2019-2020 provincial budget protects funding for healthcare and education, while respecting the Alberta electorate’s decision to vote in a government committed to getting government spending under control. The budget lays out a path to balanced budgets by 2022-2023, and begins fulfilling dozens of the UCP’s election commitments. Albertans are already spending \$5 million every single day in interest payments to banks. A responsible government would get Alberta’s debt under control so that money can be used to help Albertans instead. 🇦🇧



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## ONGOING SALARY FREEZE HARMING PROSECUTOR RETENTION

BY **MATTHEW BLOCK**

As one of the few departments to see an increase in the 2019 provincial budget, the Alberta Crown Prosecution Service will have funding for 50 new prosecutors over the next three years. This is a needed investment in a justice system that has gradually slipped into critical underfunding. However, with the government rejecting the recommendation of their own Blue Ribbon Panel to eliminate the long-standing salary freeze, the prospects for hiring and retaining these prosecutors are dim.

The Alberta Crown Attorneys' Association, as the voluntary organization that represents prosecutors in Alberta, has raised two interrelated issues consistently with the government: resourcing and retention. Resourcing is simply having an adequate number of prosecutors to deliver the justice system that Albertans expect and deserve. Retention is the ability to attract and retain those prosecutors in a fluid legal market.



The complexity of criminal prosecutions continues to rise. The landmark Supreme Court of Canada decision *R. v. Jordan* in 2016 compressed the time for all prosecutions, thereby increasing the file load in any given time. Positive changes to how the system operates, such as the rise of body worn cameras for police, have resulted in significant increases in disclosure for prosecutors to review. The number and complexity of applications under the *Charter of Rights and Freedoms* also continues to increase. The combined effect of these and other issues has strained the prosecution service over the last five or more years. While many governments across Canada responded with significant hiring of prosecutors in response to *Jordan*, Alberta added no new positions. Instead, we saw the creation of the "vacancy discount" – prosecutors that exist on paper, but not in reality.

Budget 2019 does represent a potential departure from this slow decline of the Prosecution Service. The removal of the vacancy discount and the hiring of 50 new prosecutors could go a long way to address resourcing. However, the continued failure of the government to address the diminished ability of the Prosecution Service to attract and retain prosecutors makes those new prosecutors again only prosecutors on paper.

The salaries of prosecutors in Alberta have been frozen since April 1, 2016, with other previous freezes covering most of the past decade. While the salary for a new prosecutor in Alberta may initially be competitive, the reality of staying at the exact same salary for four years has resulted in the loss of many talented young prosecutors. Other prosecution services, such as the Public Prosecution Service of Canada, have a normal pay structure that sees small increases on a regular basis. The PPSC recently received an 8% increase over the next four

years. This has made them a destination for many prosecutors that Albertans paid to train. Additionally, we have seen many prosecutors leave to private practice in recent years for purely financial reasons. The

increased workload and frozen salary of the prosecution service have eclipsed any competitive advantage offered by a government position. While the financial situation that Alberta finds itself in is cause for concern for all Albertans, the fluid nature of the legal professional in Canada can mean that lawyers just go elsewhere.

Morale in the prosecution service has also taken a hit. The freeze has created a bizarre situation where new prosecutors are being paid more than current prosecutors of the same experience level. A new prosecutor is hired at the salary level associated to their experience level. A prosecutor of the same experience level who has been working faithfully for many years, however, has had their salary frozen at a lower level. The prosecutors who find themselves in this situation understandably feel unappreciated and undervalued for their service. Despite many requests, the government refuses to do anything other than repeatedly study this issue.

The Blue Ribbon Panel, commissioned by the current government and chaired by Janice MacKinnon, examined the long-standing salary freeze that affects the prosecution service. The panel, in its final report, noted that the freeze has led to problems in attraction, retention, and morale. Recommendation 11 was to end the freeze. The failure to do so makes the plan to hire 50 additional prosecutors a half-measure that cannot succeed.

As it seems to be with all issues of justice in Alberta, the rural areas are hit the hardest. Hiring in some rural offices was difficult when the prosecution service had competitive compensation. With that disappearing, some positions in rural offices have become unfillable. By not addressing the freeze, the result will be more unfilled positions, and less justice for rural Albertans.

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## ACCESSING FAMILY JUSTICE IN AN ECONOMIC DOWNTURN

BY WAYNE A. BARKAUSKAS

The downturn in Alberta's economy has impacted both clients and lawyers managing family law issues in many different ways. Not only have the practical issues changed, including more bankruptcies and challenges in finding ways to address significant debt loads in the midst of asset bases that have eroded, but also in addressing barriers to dispute resolution that are even more significant for families with reduced financial resources.

I was recently asked to do an interview (<https://calgary.ctvnews.ca/divorce-during-the-downturn-families-struggle-after-splitting-up-navigating-system-1.4729588>) for the evening news. The story related to the dramatic toll the economy is having on people dealing with issues related to their separation or divorce. It stemmed from stories of support payors committing suicide after experiencing difficulties changing child and spousal support payments following financial setbacks.

After a one-hour interview, the journalist told me that they would have to completely redo their news story because they had no idea that the justice issues behind the problem were so large, complex, and relatively unknown to those outside family law. She was stunned that such a significant social issue was so hidden from public view and open discussion.

Having practiced family law in Alberta for more than 25 years, I have now had the chance to see how financial cycles impact both a lawyer's practice and the families we serve. There have been many changes over that time, both positive and negative.

The positive changes include the rise of alternative dispute resolution (ADR) processes which give clients greater control over results, and the increased knowledge, understanding and application of psychological and sociological principles by lawyers and judges in finding solutions for families. These positive changes, however, almost exclusively benefit the families that have the resources to bring them into play.

For those with fewer financial resources, cuts to legal aid for family law issues (rather dramatic over this period) mean that many people have almost no detailed guidance concerning the law, strategy, processes, nor any objective analysis of their legal issues. Providing "case managers", "duty counsel" and other forms of "drive-by" assistance does little to solve this inherent problem. The result is that judges are left with unrepresented parties, neither of whom knows the law, the Rules of Court or the various alternative methods available to solve the issues they face, who have little ability to objectively evaluate whether their issues should even be before a judge. Judges may also have little family law experience, given current selection criteria and the organization of our court, at least at the Queen's Bench level. They do not have the benefit of counsel guiding them to the proper case law and rules, and are left largely on their own to do this leg work. All of this, not surprisingly, leads to dramatic delays at court as judges try to provide basic procedural guidance to parties, but without giving them legal advice, and cases become drawn out wars of attrition as clients fumble their way toward final hearings.

For lawyers, this means that delays in the court system have grown to the point that clients are shocked when advised, for example, that it will usually take months to get into court to change a support order if there are any significant disagreements to be resolved. If a trial of moderate length is required for parenting issues, the wait will often be years until the next trial date is available. The delays in getting to court end up costing the clients even more money because interim legal issues arise the entire time parties wait for a trial. Unresolved underlying issues create even more conflict, not only costing parties more money and making files harder to manage, but perpetuating and increasing the trauma felt by the whole family, especially children.

As a consequence, in many parts of Alberta, especially Calgary, clients are guided by counsel into mediation, arbitration, collaborative law and parenting coordination. For many practitioners, court has become the "alternative" dispute resolution process. While some form of some of these ADR processes are available through the courts for those who cannot afford private services, people enter them with no legal representative with whom they have built a trusted relationship to advise them of the advantages and disadvantages of these alternatives, nor do they have the benefit of independent legal advice to guide them in negotiations.

All of these problems existed before the economic crisis hit Alberta, but the impact of the current economy has only exacerbated the problem. Obviously, fewer people can afford legal representation, which leaves them among the most negatively impacted group. Even those who can afford counsel may have reduced cash flow, which means that they may need to instruct counsel to slow processes even further to bear their ongoing legal fees.

Many of the urgent crises people now face involve financial difficulties. The lack of access to legal advice regarding the appropriate method of resolving the issue (going to court rather than negotiating with MEP for example), along with inherent court delays, leave people feeling helpless. This can lead to people taking extreme actions. It would be rare for a family lawyer not to have had one or more files in the last 5 years impacted by a suicide. Domestic violence incidents have increased during the economic crisis as well, with Alberta having one of the worst provincial rates of domestic violence. While the Calgary Police Service reported a slight reduction in 2019 over 2018, the current rate is still considerably higher than the five-year average for the province. It was also recently reported that more than half of the murders in Calgary in 2019 (54%) were related to domestic violence.

I would be remiss if I did not also mention the financial impact upon lawyers. Although lawyers are loath to ever discuss weaknesses, including downturns in their business, two things are obvious. Firstly, fewer people can afford legal representation and so there is less work to go around. Secondly, other areas of practice have seen even greater reductions in business, resulting in more lawyers trying to take on family law matters.

The impact on both clients and lawyers is, in fairness, partially offset by more lawyers offering "limited scope retainers" to

clients. This creates a middle ground where a client can get some independent advice and guidance, but at a lower cost relative to the lawyer handling their entire file. It still leaves the client more exposed than with full representation, but as reported through the research by the Canadian Research Institute for Law and the Family (<https://prism.ucalgary.ca/handle/1880/107805>), they are most certainly better off than with no legal guidance at all.

The profession continues to respond to challenges with innovations such as creative ADR processes designed to assist clients dealing with court delays and limited scope retainers to help reduce the cost of legal assistance. The court continues to try to respond by providing some limited ADR options in-house and providing limited procedural guidance. The crisis in the courts with respect to family law matters, however, is not likely to be addressed in any meaningful sense as long as governments refuse to acknowledge that there is a crisis and allocate the funds that are necessary to address it.

Early independent legal advice is a critical part of the filter that courts rely upon to ensure only appropriate matters end up in front of a judge. A restoration of legal aid services to address this gap would have a huge impact.

In addition, there are many ADR professionals who would be open to providing ADR through a legal aid certificate, thereby taking additional pressure off the courts, but the legal aid system currently has nothing in place that would allow for such a service. In fact, legal aid generally is constructed around the concept that the primary method of resolving family disputes is in court. While that might have been the case 30 years ago,

it is now the last method that many practitioners consider employing to resolve family law disputes.

Finally, implementation of unified family courts in Alberta, a concept already deployed in several other provinces, has been delayed year after year, despite the near universal support of the concept by the bar and bench. In a unified family court system, clients could receive all family law-related court services in one court with specialized judges, rather than in several courts with generalist judges as is now often the case. The federal government announced funding for this type of court in Alberta approximately four years ago, yet the court still has not been established and the new provincial government has not indicated whether it intends to take the necessary steps and incur the costs needed to complete implementation, let alone whether this is indeed a priority for government.

In summary, while significant advances have been made in family law over the last 30 years, there has also been notable deterioration in certain areas, and the downturn in the economy has dramatically increased the impact of these systemic problems. Despite the severity of the problem, clients who are impacted lament in private because they wish their private lives to remain so. The result is that the problem remains largely hidden from view, except for those involved in the family justice system on a day to day basis. ☞



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## ECONOMIC DOWNTURNS AND LAWYER MENTAL HEALTH

BY LORAIN CHAMPION

The Alberta economy has been in the doldrums for several years now. We have seen mass layoffs at oil and gas companies, and the Alberta government budget released in the fall of 2019 was austerity-based.

Alberta Justice Minister Doug Schweizer recently announced that 90 government lawyers' positions will be cut in early 2020. We do not have data about how many other lawyers have lost their jobs during this sustained downturn or have had the economic viability of their practices erased.

This begs the question of how this sustained economic downturn is affecting Alberta lawyers and articling students. Intuitively, we all likely believe that uncertainty and hardship cause stress and perhaps even depression but is there data that supports this belief?

### Lawyer Well-Being

Lawyers as a population are frequent subjects of study. We suffer from depression and addiction much more frequently than the general population (almost 4 times the rate for depression and more than double the rate for addictions). When students enter law school, they have typical rates of depression but, by the end of first year, their rates of depression increase more than three-fold.

As well, law students' motivation tends to shift from internal goals, such as helping people or improving the justice system, to attaining external benchmarks like top grades and landing jobs with high-paying firms.

Advanced education generally rewards students with an optimistic learning style, but law school is different. Students with an optimistic explanatory style have a much higher rate of dropping out or flunking out because law rewards pessimistic thinking, the ability to anticipate negative outcomes that could occur, which we translate into the characteristic of "prudence." Pessimism in this context is not our colloquial definition (people who see the glass as half-empty rather than half-full) but rather the pessimistic explanatory style, the belief that the causes of negative outcomes are internal, stable and global (i.e. your fault, permanent and unchanging).

Not surprisingly, practicing law has been found to be among the most stressful professions and there is a wealth of research regarding causation of lawyer distress.

According to a recent *Canadian Lawyer* article by Jim Middlemiss,

Part of the problem is that law is a high-pressure, competitive and adversarial environment where you are trained to be a pessimist. Not only do you fight competitors for business, but competition within law firms for recognition can also be intense.<sup>1</sup>

People in occupations with low decision latitude (the belief that you have limited options to choose from) and high pressure have higher rates of depression, as well as coronary disease. Junior lawyers frequently fall into this category, but the combination of making high stakes choices from limited

options can occur in many legal roles.

### A Word About Finances

According to a recent study, law school graduates in Ontario incur debt of more than \$80,000 to pay for their education.<sup>2</sup>

In an earlier Ontario study, students indicated that "mental health, stress, and academic success are all impacted by their debt burden and financial constraints, and that their career objectives have been skewed by the cost of legal education."<sup>3</sup>

While tuition at some Ontario law schools is higher than tuition at the two Alberta law schools, many Alberta articling students and practicing lawyers have significant student debt. Servicing this debt load requires steady, well-paying remuneration. Interruptions in employment makes debt-servicing even more stressful.

Many lawyers incur practice debt as well, either to buy into a partnership or to establish their own firms. When legal work dries up or collections become difficult due to prevailing economic conditions, this debt load can be daunting.

And we all know—or have been—lawyers whose lifestyles consume whatever they earn or who become highly leveraged to support a lifestyle they can almost afford in the hope that good times will continue to roll indefinitely. Unfortunately, the good times stopped rolling in Alberta around 2014 and many lawyers face the challenge of high debt servicing costs on lower incomes.

### Impact of Economic Downturn on Lawyers

The specific impacts of economic downturns on lawyer mental health does not appear to have been studied. This may be due to fact that the link between job loss and distress is logical and well-known. Psychologist Dr. Heather Fiske, in "Guidelines for Legal Practitioners with Suicidal Colleagues," identifies job loss and financial reversals as stressful circumstances that can be linked to suicidal behaviour in lawyers. Perceived failure, which can include the loss of status associated with a prestigious position, can also be a factor.<sup>4</sup>

### Financial Downturns Generally

If we look at studies of financial crises on mental health outcomes of large populations, though, there appears to be a correlation between recessions and poor mental well-being. A 2016 literature review of 101 academic papers across Europe, North America, South America, Asia and Australia concluded that factors like unemployment, decreased income and high debt levels can be associated with mental disorders, substance issues and suicide.<sup>5</sup>

### Assist's Data

Assist's data about usage of our programs by Alberta lawyers can also shed light on the impact of a prolonged recession on lawyers.

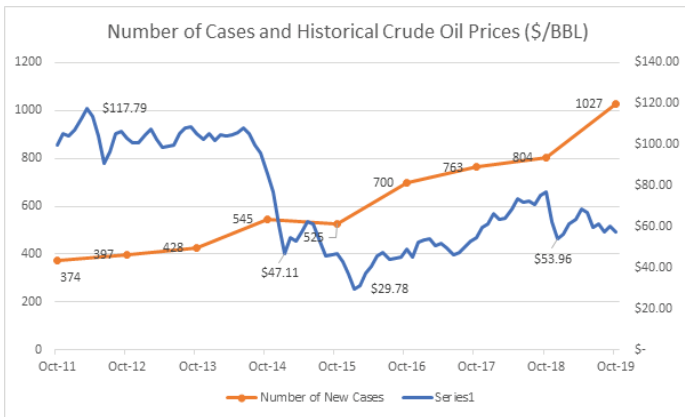
Assist provides 4 free professional counselling sessions per



person per issue per year to all Alberta lawyers, articling students, law students and dependent members of their families. Services are confidential, delivered by registered psychologists and are available throughout the province.

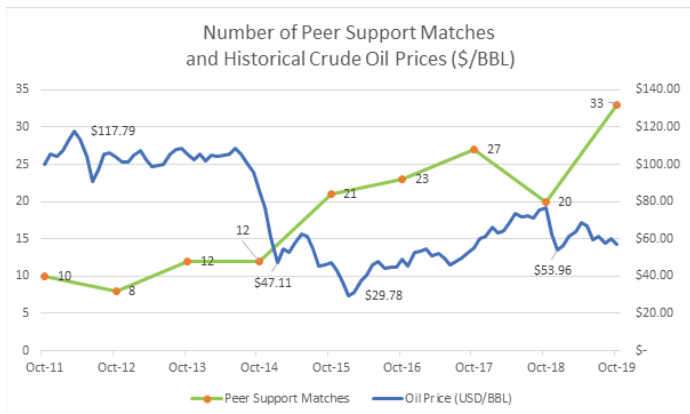
Usage of Assist's professional counselling services has continued to grow since 2014, when the price of oil collapsed. It is difficult to isolate the impact of economic turmoil but there are some key correlations:

- Usage in 2014, the year when the oil price crashed, increased by 27% over 2013.
- Usage in 2016 increased by 33% over 2015.
- Usage in 2019 increased by 27% over 2018. Since a picture is worth a thousand words, we charted the increase in program usage against WCS oil price:<sup>6</sup>



Assist also operates a peer support program where we connect an Alberta lawyer or law student with a trained peer support volunteer with experience with, or insight into, an issue of concern.

Assist's peer counselling program was introduced in 2011. Usage rates mirror the increases in professional counselling in 2014 and 2019.



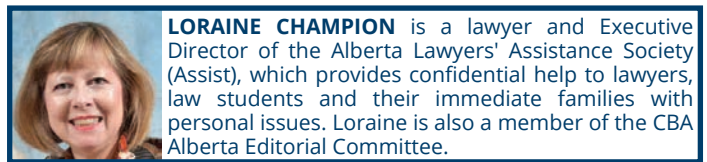
Career transition and job loss were dominant themes in peer support matches during 2019.

Assist's data should not be interpreted as meaning that economic downturns negatively impact lawyer well-being. However, it is reasonable to conclude that the economic downturn, as measured by oil pricing, certainly seems to correlate with increased use of professional counselling and peer support by Alberta lawyers.

The fact that lawyers and students are reaching out for assistance more frequently is important from the point of view of battling stigma. In studies, lawyers have reported that they do not ask for help because they fear that others will find out and that they will be perceived as vulnerable.

Do you know someone who is struggling with job loss or a change in practice viability? Please urge them to call Assist. We can connect them with counsellors who will help them process the emotions that accompany these challenges and find hope, the first step in moving forward. ☺

- <https://www.canadianlawyermag.com/news/opinion/mental-healths-toll/276099>
- <https://s3.amazonaws.com/tld-documents.llnassets.com/0010000/10102/law%20students'%20society%20of%20ontario%20-%20just%20or%20bust%20report.pdf>
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- <http://www.myassistplan.com/Content/LSUC/Articles/GuidelinesforLegalPractitionerswithSuicidalColleagues.pdf>
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## AMENDMENTS TO THE OCCUPIER'S LIABILITY ACT

BY **SCOTT CHIMUK** AND **AMAL THARANI**

The *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act* ("Bill 27") reflects the current Provincial Government's efforts to tackle rural crime in Alberta, a growing concern for Alberta's rural population. In the past year, Alberta and Saskatchewan have both seen two high profile cases involving trespassers to rural property. These cases call attention to the need for clarity with respect to a property owners' ability to protect and defend themselves, their property, and most importantly their families.

Bill 27 sets out a series of amendments to Provincial trespassing laws aimed at improving protections for law-abiding property owners. These amendments, which will apply retroactive to January 1, 2018, include an increase to maximum fines and penalties for trespassing. Fines are now \$10,000 for a first offence, up to \$25,000 for any subsequent offences and can include up to a maximum of six months of jail time. Corporations that assist trespassers can now also face fines of up to \$200,000, a change which has been touted as a novel development in Canadian legislation. Further, the maximum amount a court may order for loss or damage to property has been raised significantly from \$25,000 to \$100,000.

Most notably, are the amendments to the legislation regarding the civil liability of property owners. Subject to willful or reckless conduct a property owner is not liable for death or injury caused to a trespasser if they have reasonable grounds to believe a trespasser is committing, or about to commit, a criminal offence. Furthermore, if a trespasser wishes to sue a property owner for injury, damage, or death they must now prove that the property owner acted willfully and grossly disproportionate and that the property owner's actions resulted in a conviction under the *Criminal Code (Canada)*. Of

note, is that the amendments to the legislation do not change a property owner's legal duty to trespassers who are not committing, or are about to commit, a criminal offence.

Proponents of the legislation highlight the strong deterrence factor of the amendments noting that property-owners are not being given a free-rein to injure or harm trespassers, rather trespassers will face appropriate consequences for criminal actions. Furthermore, property owners will rightfully be able to take steps to protect their homes and families from intruders in order to feel safer in communities otherwise plagued by high rates of rural crime.

As a result of this legislation law abiding citizens, such as our client Edouard Maurice, will hopefully no longer have to fear being sued by criminally convicted trespassers. It is our further hope that victims will not have to be revictimized in a civil lawsuit by convicted criminals seeking to profit by their criminal conduct and that the legislation will enable victims to have these frivolous and vexatious claims summarily dismissed. ☪



**SCOTT CHIMUK** is a partner at Burstall LLP and is head of their commercial litigation practice group. The core of Scott's practice is solving sophisticated commercial problems, and his practice also has a significant regulatory element.



**AMAL THARANI** is an articling student at Burstall LLP. She received her Juris Doctor from the University of Calgary. During her time in law school, Amal worked with Student Legal Assistance and with Pro Bono Students Canada.

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Winter Sun Trap, 1993  
Jack Shadbold  
Stone Colour Lithograph on Wove Paper

# ALBERTA JUSTICE: GOVERNMENT TO STREAMLINE, MODERNIZE JUSTICE SYSTEM

BY ALBERTA JUSTICE & SOLICITOR GENERAL

*In these next two articles, Law Matters provided Alberta Justice and Solicitor General and the Justice Critic the same 5 questions to consider in a discussion regarding the Alberta 2019 budget and the justice system.*

**The Alberta Justice Ministry's operating budget has called for a nearly seven percent decrease in spending, but saw the hiring of 50 additional Crown Prosecutors and increased funding for drug treatment courts. What will that mean for Albertans and what changes do you think we can expect to see as a result?**

Albertans deserve a better justice system that protects them, their loved ones, and their property. Hiring additional Crown Prosecutors and support staff will give the Prosecution Service capacity to ensure all viable matters can be prosecuted rather than stayed and will eliminate the NDP's system of "triaging" crimes to be prosecuted. The additional funding will give the Crown the tools and resources they need to protect law-abiding Albertans and help create a faster, fairer, and more responsive justice system.

Expanding Alberta's drug treatment courts will break the cycle of crime for more Albertans, by helping more individuals with addictions and their families get their lives back on track. On October 31, 2019, the Government of Alberta announced it is investing up to \$20-million over four years to expand drug treatment courts. Edmonton and Calgary drug treatment court programs will double their combined total capacity from about 40 participants per year to 80. Further expanding these courts to locations outside of Calgary and Edmonton will help keep more Albertans safe by breaking the cycle of addiction-related crime. This initiative will protect communities while assisting individuals to achieve recovery. Our government strongly supports a firm criminal justice system to protect Alberta's communities from drug-related crime, but we also believe that alternatives to incarceration for non-violent offenders can break the cycle of drug abuse, crime, imprisonment, and repeat offences. The \$20 million investment in drug treatment courts will protect public safety by supporting recovery and access to treatment and mental health care to prevent future criminal activity. This initiative is strongly supported by the Edmonton Police Service and Calgary Police Service as well as support groups such as Poundmaker's Lodge, the Adeara Recovery Centre for Women, and the John Howard Society.

**The RAPID Force has been welcomed by many rural property owners in Alberta while some, particularly in Alberta's Indigenous communities, are hesitant. The Government has advised they will work with Indigenous communities to determine the best way to move forward. What will that look like?**

The *Occupier's Liability Act* and provincial trespass laws are laws of general application that protect the security of all property owners and occupiers from trespassers. The details of the implementation of the changes to the laws are still being finalized, but at this point, laws of general application will continue to apply on reserves. The details that need to be worked out are the fact that there are trespass provisions in federal legislation regarding reserves and where there is a

conflict between provincial and federal law, the federal law takes precedence.

The government has a strong relationship with Indigenous Albertans and works to consider support from Indigenous communities for projects that affect them. That is why Minister Schweitzer met with Chief Saddleback and the band councils of the four First Nations at Maskwa's prior to the introduction of the RAPID Force and additional initiatives to combat rural crime. He also met with the Blood Tribe Police and discussed the potential long-term expansion of their training program at Lethbridge College. While some Indigenous Albertans may be hesitant, like all law-abiding Albertans, many Indigenous Albertans welcome the government's initiatives to stand with them and try keeping them safe in their communities against those who wish to do them harm.

Regarding RAPID Force, rural Albertans, including those in Indigenous communities, have been victimized for too long. And we want to ensure they know that we are going to do everything we can as a provincial government to help them feel safe in their communities.

In rural areas and on reserves, police can be stretched across long distances, which may lead to longer response times. To put more first responders in more rural areas, the RAPID Force grants additional roles and authorities to the Alberta Sheriffs, the Fish and Wildlife Enforcement Branch, and Commercial Vehicle Enforcement Branch.

This will provide an additional 400 "boots on the ground" to assist the RCMP and other police services to ensure security is deployed in response to 911 calls as effectively as possible.

**What are your comments regarding criticisms of cuts to Legal Aid Funding in Alberta, particularly the fears that cuts will create increased costs due to an increase in self-represented litigants and delay?**

Legal Aid is a vital part of a fair and accessible Alberta justice system. Alberta's funding for Legal Aid supports a five-year Governance Agreement, signed in October 2018, with Legal Aid Alberta and the Law Society of Alberta. This funding sustains and enhances Legal Aid Alberta's day-to-day operations and service delivery to Albertans.

The provincial government and Legal Aid Alberta are working to strengthen Albertans' access to core legal aid services in adult and youth criminal law and family law, ensuring people in need have continual and enhanced access to Alberta's legal aid and justice systems. Legal Aid Alberta's ongoing redesign of its service delivery model, focused on high priority areas in Alberta's family and criminal law justice systems, is providing more Albertans with legal services, decreasing legal aid costs. This is strengthening access to legal aid for more people in need of services and reducing the numbers of

self-represented litigants appearing in Alberta's courts without essential legal help. More broadly, Alberta has set a path for a sustainable future with a balanced budget by 2023, protecting and strengthening delivery of core services, including legal aid, and targeting cost-effectiveness and administrative efficiencies in ensuring Albertans have access to important programs and services.

**Many post-secondary students and particularly those seeking professional degrees such as law degrees are concerned about cuts to post-secondary education, particularly the removal/decrease of certain financial aides and tuition freezes. For those looking to enter the legal profession in light of those changes, what do you want them to know?**

As part of our commitment to give the justice system the tools and resources it needs, we are strengthening the justice system by immediately doubling the number of articling students hired by the government from eight to sixteen and will increase that number to 20 in 2021 – giving the Crown the largest cadre of articling students in the province. We will ensure that we are the highest employer of articling students in Alberta so our law students do not leave for other provinces. We want to ensure Alberta's legal talent stays in Alberta and that skilled Albertans have the opportunities to live, work, and raise families here. This increase will also ensure Albertans are better served by the justice system by also placing some of the new students in centres which serve locations other than Edmonton and Calgary. More articling students and more incentives for them will ultimately help grow the ranks of the Alberta Crown Prosecution Service, to help make our justice system faster and more efficient. We want to ensure Alberta's legal talent stays in Alberta and that skilled Albertans have the opportunities to live, work, and raise families here.

**Many of the deep cuts to Alberta's budget and the Justice Ministry's budget in particular has been based on the premise that Alberta typically spends more than other provinces in a less efficient manner and that many of these cuts are about more targeted spending. What sort of inefficiencies are you looking to eliminate?**

The Government of Alberta's Budget 2019 is a balanced plan to




create jobs, grow the economy and protect vital services. Our government is committed to responsible fiscal management and taking a balanced approach to address long-term overspending. We will bring government spending more in line with spending in other provinces, while continuing to strive for better service and outcomes for Albertans.

This budget charts a path back to targeted reductions – and thoughtful reallocations away from inefficient and unnecessary spending. This year's budget targets for the Ministry of Justice and Solicitor General (JSG) for the coming years shows over a 6 per cent reduction in four years with an estimate for 2019-20 at \$1.454 billion.

While one of our goals is to reduce expenditures and be more efficient, we will continue to provide core programs and services and streamline processes in order to better serve Albertans. Some ways to reduce expenditures and be more efficient is through modernizing services, especially interconnected and complicated services like those in the justice system. Modernizing court services by investing in digitizing business practices and services so that they are more user focused, responsive and convenient, whether online or in person, makes the courts more accessible for those who need to access services and improves efficiencies in the system.

We have dedicated \$27M in capital funding to create an "E-Court" System to support the digital transformation for court – such as improving the ability to address traffic tickets online, enabling access to justice digitally in areas such as court filings and scheduling, and modernizing court processes. This is key to streamlining operations, increasing efficiency and reducing overall costs while improving services for Albertans.

The goal is to make the courts more accessible for those who need to access services and to improve efficiencies in the system – by introducing technology to deliver more user friendly and convenient services online.

Ongoing planning in general is underway across the department, with more to be done, for implementing these improvements in the coming years. 

"Edmonton Skyline": Freemages.com/Brad Harrison

## JUSTICE CRITIC: BUDGET CUTS GIVE MANY REASONS FOR CONCERN

BY KATHLEEN GANLEY

In this year's provincial budget, the UCP government has made big announcements regarding 50 additional prosecutors and the 300 additional officers and 200 civilian staff they are forcing municipalities to pay for.

However, hidden in the budget was the fact that resources in Legal Aid Alberta, the courts, and corrections will be reduced - in some cases significantly. In the next three years, Resolution and Court Administration Services (RCAS) - which includes judges, clerks, and all the supports surrounding the Courts - will have been cut by over 20 per cent (the budget for 18/19 was about \$207 million and for 22/23 is \$158 million). In the absence of a significant change in the way we do business - the completion of E-File will not be nearly significant enough - it will have long-term negative consequences that will lead to an increasing number of matters being stayed.

The UCP government has failed to recognize that the justice system is exactly that - a system. That doesn't sound like a revelation, but if we don't treat it that way, any changes will create problems. A change in one part of the system has a huge impact on other parts. If you add or remove resources in one place, you need to properly compensate in other places or the system is out of balance and cannot operate effectively.

The Supreme Court of Canada's 2016 *Jordan* decision continues to be a relevant factor. At the time, it represented a significant change in the law and had a huge impact on the operations of the entire system. Previously, adding front end resources such as police without supporting resources later in the system resulted in a slower system, longer wait times, and increased stress on everyone. This slowing had occurred over decades due to increased complexity of matters, a growing population, and political pressure on budgets. Once *Jordan* was decided, adding more resources at the front end means there may be more charges laid, but without supporting resources, it simply results in more matters being stayed because they cannot be brought to trial in a timely manner.

There are ways to try and deal with the pressures on the system - the triage policy, which primarily focused on early case resolution was one way. There are certainly more that could be implemented, but most require significantly more capital investment than is currently outlined in budget. Even then, they would not be sufficient to provide the savings outlined. In fact, many administrative efficiencies have been implemented by many hard-working employees in our courts, but those have only kept pace with growth.

There is also a lot of room to generate savings in terms of the way police operate. Ensuring more people are placed in affordable housing instead of jail, and identifying and solving the root causes of criminality in other systems would have a huge impact. There are many matters in the criminal

justice system that ought to be dealt with by other means. For example, I believe the increase in funding to the Drug Treatment Court is the right thing to do; and while it will help, it is simply not enough. Especially in light of other cuts - cuts to per capita health spending, and a refusal to even provide operating funding to affordable housing buildings being completed, let alone build more units.

To make matters worse, the Minister continues to claim that the current system is "catch and release," and that we need to be "tougher on crime" by throwing more people in jail. It seems obvious he has no intention of looking at these alternatives to improve the backlog.

To be clear, the addition of resources is necessary. However, simply adding more officers and prosecutors while cutting court resources will only put more people into the justice system with nowhere for them to go. Without support to the courts and Legal Aid, more matters will be stayed.

This worries me. I worry about how it will be framed. I worry that when an increasing number of matters are stayed, the government will try to turn that anger on the courts and the legal profession generally. I believe we must acknowledge that the present system has challenges which we must work to address - but cuts to courts, Legal Aid, affordable housing, and other social supports will take us in the wrong direction.

It often seems that the Minister is more concerned with scoring political points that may cause the system to grind to a halt. Instead, we need to work together to find real solutions that keep the system balanced.

I acknowledge that this brief article by no means deals with all the issues the budget creates. For instance, unless the Minister intends to reverse his "tough on crime" stance, there is no way to achieve the savings intended for corrections. Factor in the cuts to Legal Aid, and the layoff of one third of the civil lawyers in the government, and there are many reasons for concern.

The Minister has taken the position that he is "not responsible" for answering for the budget in the out years. I disagree completely - one of a Minister's most important responsibilities is determining how to operate within Treasury Board's guidelines. The four year outlook can be found on page 110 of the Ministry fiscal plans. The documents are available online; I would encourage you to take a look, compare the numbers to past years, and draw your own conclusions. 📄



**KATHLEEN GANLEY** is the Justice Critic for the Alberta NDP. She was previously the Minister of Justice and Solicitor General from 2015 to 2019. Prior to being elected to the Legislative Assembly of Alberta, Kathleen practiced in labour, employment and human rights law.

"Alberta Legislature stock photo": iStockPhoto.com/jewhyte

## ETHICAL AND EFFECTIVE ADVERTISING

BY **NANCY CARRUTHERS**

Legal advertising has an obvious purpose. The best advertising is memorable and informative, and assists members of the public to find lawyers who can assist them with their legal problems. Effective advertising generates business and increases profits.

Lawyers are required to maintain high standards of professionalism and are subject to rules that protect the public from irresponsible and misleading advertising. When clients choose a lawyer, they are making an important decision, and are trusting their lawyers with their well-being and resources. Clients are potentially vulnerable, as many are not able to verify the accuracy of statements about the quality or cost of a lawyer's service. Many potential clients may take lawyers' advertising at face value, often at a time when they are facing significant stress and may not know where to turn.

### Overview

The Law Society of Alberta implemented a new Code of Conduct in 2011. Alberta adopted the Federation of Law Societies' Model Code advertising rules, with some modifications. Overall, the introduction of new rules did not significantly change the regulation of lawyer advertising in Alberta.

Lawyer advertising rules do not purport to regulate or define "good taste", but they do prohibit misleading, confusing or deceptive advertising. Advertising must not bring the profession or administration of justice into disrepute, and marketing must be in the best interests of the public and consistent with high standards of professionalism.<sup>1</sup>

The rules apply to all forms of communication in which lawyers offer or market their legal services. Print ads are no longer the primary focus, as lawyers advertise on online platforms, social media, television, radio, and at sport stadiums, to name a few. Few disciplinary hearings arise from violations of advertising rules, in Alberta or in other provinces. In Alberta, lawyers usually modify their advertising on a voluntary basis when the Law Society raises concerns. The Law Society of Ontario has, however, amended its rules to deal more specifically with lawyers' advertising practices, and Ontario lawyers have recently been disciplined for misleading advertising. Law societies may be prompted to revisit their approach to advertising in light of the increasing number of venues in which lawyers promote their services.

### Protecting the Public Interest

The Alberta Code of Conduct requires that advertising must:

- not be false, misleading, confusing or deceptive, or likely to mislead, confuse or deceive;
- be demonstrably true, accurate and verifiable;
- not suggest qualitative superiority to other lawyers;
- not raise expectations unjustifiably;
- not take advantage of a vulnerable person or someone who has suffered a traumatic experience;
- not amount to coercion, duress, or harassment;

- be in the best interests of the public and consistent with a high standard of professionalism;
- not bring the profession or the administration of justice into disrepute;
- not suggest or imply a lawyer is aggressive;
- not disparage or demean other persons, groups, organizations or institutions;
- not use testimonials or endorsements that contain emotional appeals;
- not refer to the lawyer's degree of success in past cases, unless such statements are accompanied by the qualification that outcomes will vary according to the facts in individual cases;
- not advertise that they are specialists or experts in Alberta. This means lawyers should avoid the use of derivative words such as "specialize" or "expertise", though they can advertise preferred practice areas;
- not advertise that the firm makes loans to clients;
- ensure information about fees, disbursements, "other charges" and taxes is accurate;
- not disclose confidential client information without client consent.

Some examples of advertising practices that breach the Code of Conduct include:


- statements that a lawyer has obtained the largest settlements in the province or country: Settlements are not reported, and are typically confidential, making their amounts impossible to verify. Promises of large settlements create unreasonable client expectations. Advertising about potential outcomes should always be qualified to ensure clients understand their cases must be decided on their own merits.
- stating the lawyer or firm is the "leading" lawyer or firm or is "the best" or most experienced in the city, or in a certain practice area: These statements suggest qualitative superiority. Firms will sometimes claim to be the best or top choice, or purport to rely on third party rating services that state they have been ranked in that manner. The use of third party ratings may be misleading when they refer to awards, rankings or third party endorsements that are not bona fide or are likely to be misleading, confusing or deceptive. Advertising that relies on a third party ranking may be misleading when it does not genuinely reflect the performance of the lawyer and the quality of the services provided by the lawyer, is not the result of a reasonable evaluative process, or is conferred as the result of a payment rather than as the result of a legitimate evaluation of the quality of the lawyer's service. In contrast, references to awards or honours that genuinely reflect a lawyer's professional or civic service do not contravene the rules.
- including "& Company", "Group" or "& Associates" in the firm name of a solo practitioner: This language is

- misleading about the extent of the firm's resources.
- derogatory references to the billing practices, ethics or skills of other lawyers and law firms: In an example from Ontario, a lawyer was sanctioned for suggesting that his firm obtained high settlements for clients, often after clients contacted the firm for a second opinion or he had salvaged files other lawyers had bungled.
- a reference to numbers or types of successful outcomes: Statements about past successes can potentially be misleading. Is the success due to the lawyer's skill or the strength of the case, the fact pattern, etc? And what does it mean to have been "successful"?
- suggestions that a lawyer or firm is aggressive, through images of aggression, like dogs or dragons, or references to being "tough": This contravenes the Code by suggesting the lawyer is aggressive. For example, some lawyers refer on their websites to newspaper articles describing their aggressive cross-examination of witnesses. These advertising practices are attempts to do indirectly what lawyers are not able to do directly, and amount to touting of superiority or aggressiveness.
- manipulating online ratings or creating false online reviews or testimonials.

pay for reasonable advertising costs, including flat fees for lawyer referral services.

The rules do not prevent lawyers from engaging in promotional activities or making reasonable expenditures on promotional items or marketing activities that may result in the referral of clients. Lawyers are allowed to take clients for meals, to provide tickets to sporting or other events, or to sponsor client functions.

Canadian lawyers are creative in how they advertise their legal services. Many use online platforms and social media to provide relevant legal information to a target audience of potential clients. In addition to complying with advertising rules, lawyers should develop advertising that is consistent with their firm's vision and goals. The tone of a lawyer's advertising is often reflected in the clients that the firm attracts.

Ultimately, lawyers should be aware of how clients search for firms and what type of information they are seeking. Referral and ranking services might not be the most frequently used tools and firms may be better served by ensuring they have an informative website. Clients are best served when they can access information about the firm's range of experience, and the types of cases the firm handles. Above all, clients need to have a clear understanding of what to expect when they hire a lawyer. 

Referral services are another form of lawyer advertising. A lawyer must not split fees with, or pay referral fees to, any non-lawyer who refers clients to the lawyer. Lawyers are also prohibited from giving other financial or non-monetary rewards to non-lawyers for the referral of clients. Compensation cannot be directly related to a specific client matter, whether based on a fee per file or a percentage of billings. Lawyers may, however,

<sup>1</sup> Code of Conduct, Rules 4.1-2 and 4.2-1



**NANCY CARRUTHERS** is the Manager of Policy and Practice Advisor at the Law Society of Alberta. She services on the Federation of Law Societies of Canada's Standing Committee on the Model Code. Prior to joining the Law Society, she practiced insurance defence litigation for 15 years.

## JUDICIAL UPDATES

### COURT OF QUEEN'S BENCH

**Brian W. Summers** (Edmonton) has been appointed as a full-time Master in Chambers, effective October 10, 2019.

**The Honourable Mr. Justice D.J. Manderscheid** (Edmonton) has elected to become a supernumerary judge, effective November 30, 2019.

**The Honourable Mr. Justice V.O. Ouellette** (Edmonton) has elected to become a supernumerary judge, effective January 3, 2020.

**The Honourable Mr. Justice J.T. McCarthy** (Calgary) has elected to become a supernumerary judge, effective January 6, 2020.

### PROVINCIAL COURT OF ALBERTA

**The Honourable Judge Bart D. Rosborough** (Wetaskiwin) retired as a part-time judge, effective October 23, 2019.

**The Honourable Judge Daniel R. Pahl** (Calgary) has been appointed as a supernumerary judge, effective October 24, 2019.

**The Honourable Judge Anne J. Brown** (Calgary) has been appointed as a part-time judge, effective November 2, 2019.

**The Honourable Judge Evan D. Riemer** (Red Deer) has been appointed as a supernumerary judge, effective November 22, 2019.

**The Honourable Judge Kathleen D. Williams** (St. Paul) has been appointed as a part-time judge, effective January 1, 2020.

**The Honourable Judge Lloyd E. Malin** (Edmonton) has been appointed as a supernumerary judge, effective January 24, 2020.

## ALBERTA'S NEW FAMILY PROPERTY ACT

BY **BARRY CHUNG**



On January 1, 2020, Alberta's new *Family Property Act* replaced the *Matrimonial Property Act*. The *Family Property Act* extends clear property division rules to common-law couples experiencing relationship breakdown. The new legislation brings Alberta in line with several other Canadian provinces including BC, Saskatchewan

and Manitoba, all of which have extended formal property division rules to common-law couples. Previously, the property division rules set out by *Alberta's Matrimonial Property Act* only applied to married couples. Common-law partners could only rely on costly and time consuming litigation based on unjust enrichment. The CBA Alberta Branch had advocated for change in this area in its Agenda for Justice.

According to the Statistics Canada 2016 Census, approximately 1 in 10 adult Albertans live in a common-law relationship. Under the new Family Property Act, common-law couples that meet the legal definition of adult interdependent partners will have the same legal rights and obligations as married couples, leading to more predictability when couples are dividing their assets. To be considered adult interdependent partners, a couple must have lived together in a relationship of interdependence for at least 3 years, or for a shorter time if they have a child together.

Adult interdependent partners can enter a formal agreement to opt out of the property division rules in the *Family Property Act*. Such an agreement must be based on independent legal advice and provide clear proof of each partner's intent and how they want to deal with their joint and individual property. Under the previous law, opting out of the *Matrimonial Property Act* by not getting married was not always a mutual decision, nor one based on property ownership. Further, opting out by not getting married meant most partners opted into property division based on unjust enrichment which may not have reflected their intent either.

The new provisions are based on the recommendations set out by the Alberta Law Reform Institute in its project on property division for common-law couples. The Institute found that, without legislated rules for property division, it was difficult for common-law couples to settle disputes. They were often pushed towards litigation. Furthermore, litigation for unjust enrichment claims lasted several days and relied on copious detailed evidence at great cost to both partners. A 2016 survey showed that the range of legal fees for a 3-5 day family law trial in the western provinces was \$27,050 to \$73,737. Considering that in 2016, the median net worth of Alberta family units was \$290,500, a trial could consume considerable assets of a family at or below the median. Adding to the hardship,

partners with little income or money, such as in relationships where one partner worked while the other ran the home and raised their children, could find the costs of housing and basic needs during the long process unbearable. Property division rules within Alberta's *Family Property Act* seek to ease these burdens adult interdependent partners may face when their relationship breaks down.

ALRI's recommendations were informed by extensive consultation with lawyers and the general public. The consultation included:

- A phone survey that allowed us to hear from more than 1,200 Albertans;
- Three online surveys with approximately 200 respondents. Respondents included lawyers, other people working in family justice, people living in common-law relationships, and other interested Albertans;
- Four roundtable discussions with lawyers who practise in family law, wills and estates, or related areas;
- Six presentations to CBA sections, reaching upwards of 200 lawyers.

We also had informal meetings with several other stakeholders, and received comments in writing or by phone.

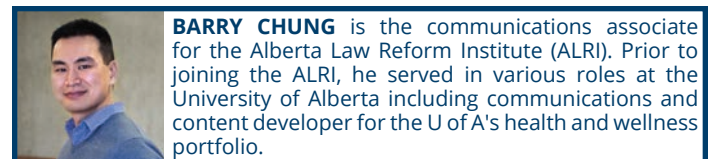
The Alberta Law Reform Institute's full recommendations and Final Report were submitted to the Alberta government in June 2018. Bill 28, which included many of the Institute's recommendations, had its first reading in November 2018. It received positive reception from both sides of the legislature and received royal assent on December 11, 2018.

Learn more about ALRI's project on property division rules for common-law couples at [www.alri.ualberta.ca](http://www.alri.ualberta.ca). 

**Website:** [www.alri.ualberta.ca](http://www.alri.ualberta.ca)

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## SPOTLIGHT ON THE ANNUAL GENERAL MEETING



Start off the new decade by joining with your CBA counterparts and participating in the 2020 Annual General Meeting.

CBA members can go to Ottawa or join from hubs spread out across the country. In Alberta, hubs are available in Calgary and Edmonton. Individuals participating via hub locations will have all the opportunities to influence events as those participating in the nation's capital.

Can't make it to Ottawa or your nearest hub? New this year is the opportunity for members to participate from their own computers. No matter where you participate from, all eligible members can vote. All you need is a mobile phone to register your votes.

More information is available online at <http://cba.org/AGM>.

## CBA STUDENT ESSAY CONTESTS



The CBA's essay contests can help students build their profile within the legal community, connect with senior members of the bar, and hone their research and writing skills. What's more, the CBA awards \$500 - \$2,500 in cash prizes for the best submissions.

Awards include:

- Administrative Law - Paul Smith Memorial Award
- Air and Space Law Section Student Essay Contest
- Alternative Dispute Resolution - James L. Thistle, Q.C. Memorial Award
- Business Law - The Langlois Prize
- Charities and Not-for-Profit Law Student Essay Contest
- Competition Law - James H. Bocking Memorial Award
- Construction and Infrastructure Law - The Atrium Law Student Essay Contest
- Environmental, Energy and Resources Law - Gowling WLG-David Estrin Prize

- Health Law Student Essay Contest
- Intellectual Property Section Law Student Essay Contest
- Labour & Employment Law Section Student Essay Contest
- Municipal Law Section Student Essay Contest
- Privacy and Access Law Section Student Essay Contest
- Women Lawyers Forum - Writing Her In Essay Contest

The deadline for these contests is March 31, 2020. More information, including award requirements, is available online at <http://cba.org/Sections/About-Sections/Essay-Contests>.

## THE EVERY LAWYER: CLAWBIE WINNER FOR BEST PODCAST



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The Every Lawyer is available wherever you get your podcasts. More information is available at <http://cba.org/Publications-Resources/Podcasts>.

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## CBA ALBERTA 2020-21 SECRETARY AND BOARD NOMINATIONS



From April 1 to April 24, the nomination period will be open for the position of Branch Secretary, and four positions on the CBA Alberta Board of Directors.

### Branch Secretary

The Branch Secretary is a member of the Executive Committee, and progresses each year to become, in turn, Treasurer, Vice President, President and Past President. Candidates must be active members of the CBA Alberta Branch, and in this year's election, the candidate must reside in South Alberta.

### Board of Directors

Four of the eight current Board of Directors positions will be open for nominations for the 2020-21 membership year, including one young lawyer position from Calgary, two positions from Edmonton, and one position from North Alberta (excluding Edmonton). Candidates must be active members of the CBA Alberta Branch.

More information about the elections will be available prior to April 1. In the meantime, we invite our members to consider submitting a nomination for one of the open positions on the Board of Directors and Executive Committee, and contribute to the governance of your Alberta Branch. Details about our governance structure, as well as a list of current Board members, is available on our website at <https://cba-alberta.org/Who-We-Are/Governance/Board>.

Please contact Maureen Armitage, CBA Alberta Executive Director at [executivedirector@cba-alberta.org](mailto:executivedirector@cba-alberta.org) if you have any questions about Board roles and responsibilities or the nomination process.

## FALL 2019 LEGISLATIVE REVIEW SUMMARY



The fall 2019 edition of the Legislative Review Summary is now available online at <https://cba-alberta.org/Publications-Resources/Legislative-Summary>.

This edition addresses recent legislature including the *Alberta Indigenous Opportunities Corporation Act*, the *Justice Statutes Amendment Act*, the *Opioid Damages and Health Care Costs Recovery Act*, and the *Trespass Statutes (Protecting Law-abiding Property Owners) Amendment Act* and other bills passed in the fall sitting of the Legislature.

We thank the Alberta Law Foundation for their ongoing support of the work of the CBA Alberta Legislation & Law Reform committees in Calgary and Edmonton, as well as committee

chairs Omolara Oladipo (North) and Bernard Roth (South) and all of the committee members.

For more information on the work of the Legislation & Law Reform committees, visit <https://cba-alberta.org/Sections/Alberta-Branch-Committees/Legislation-and-Law-Reform>.

## 2020 DISTINGUISHED SERVICE AWARD WINNERS

Join us in congratulating the 2020 Distinguished Service Award winners:

- Service to the Profession: Steve Raby, Q.C.
- Service to the Community: Meenu Ahluwalia
- Pro Bono Legal Service: Robert W. Calvert, Q.C. (posthumous)
- Legal Scholarship: Professor Jennifer Koshan



The winners were recognized at the Distinguished Service Awards luncheon on February 5, 2020 in Calgary. Thank you to those that came and helped us celebrate these outstanding members of the legal community.

## LAW DAY 2020



Law Day provides an opportunity for members of the public to learn about the law, the legal profession and the legal institutions that form the cornerstones of Canadian democracy. Law Day events are taking place across Alberta this spring, and allow the legal profession to educate

the public about the vital role lawyers and the judiciary serve in guaranteeing an open, independent and unbiased judicial system.

Calgary and Edmonton will both host their Law Day events on Saturday, April 18, with further events taking place around the province in April and May.

Activities include mock trials, courthouse tours, citizenship ceremonies and legal advice clinics.

If you are interested in volunteering to assist with any Law Day event across the province, please contact Lee-Anne Wright at [communications@cba-alberta.org](mailto:communications@cba-alberta.org), or visit [www.lawdayalberta.com](http://www.lawdayalberta.com) and click on the "Volunteer" tab.

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**WILL SEARCH.** The Public Trustee of Alberta is seeking the will of Tom Giloas also known as Athanasios Giolas. Please contact direct: 403-297-7082 or mail 900, 444 - 7 Ave SW, Calgary, AB T2P 0X8.

**WILL SEARCH.** The Public Trustee of Alberta is seeking the will of Pascal Alfredo Lagamson. Please contact direct: 403-297-7082 or mail 900, 444 - 7 Ave SW, Calgary, AB T2P 0X8.

**THOMPSON WOODRUFF INTELLECTUAL PROPERTY LAW.** Registered Patent Agents. Practice restricted to Patents, Trademarks, Designs, Copyright and related causes. 200, 10328 - 81 Ave., Edmonton, AB, Canada T6E 1X2. P: 780-448-0600; F: 780-448-7314.

**WILL SEARCH.** The Public Trustee of Alberta is seeking the will of Alan Clayton Pennylegion. Please contact direct: 403-297-7082 or mail 900, 444 - 7 Ave SW, Calgary, AB T2P 0X8

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**SEARCH FOR WILL FOR "EDWARD GARY JOHN SWAY".** Please contact The Estate House by Gorman & Koski LLP, Attn: Douglas Gorman, at 780-451-7557.

**GOOGLE REVIEWS.** Get more (and better) Google reviews with this system. Former lawyer helping lawyers since 2007. See [lawyer-reviews.ca](http://lawyer-reviews.ca). Keith Perkins (250) 215-7194.

**WILL NOTICE RE: ESTATE OF RONALD GRANT STEWART.** Anyone having knowledge of a Will of the late Ronald Grant Stewart, age 68, of Calgary, AB, who died on January 9, 2020 is requested to contact **Roksana Pawlowski, Barrister and Solicitor** at 403-960-0647 or [rpawlowski@gplawyers.ca](mailto:rpawlowski@gplawyers.ca) with any information.

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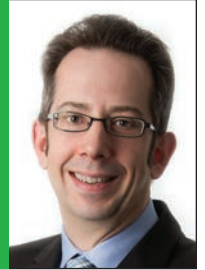
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