



APRIL 2018

## POT WILL SOON BE LEGAL. CAN I BRING WEED BROWNIES TO THE STAFF PARTY?

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## OVAA Newsletter Publication Deadlines

If you have a submission for the newsletter, please advise the editor ASAP so space can be reserved. The actual submission content (articles, advertising changes, etc.) must then be received by the following dates:

Newsletter Issue .....	Submission Deadline
June 2018.....	May 15, 2018

**If at any time you do not receive your newsletter, please contact a member of the OVAA Executive.**

### O.V.A.A. Reservation Policy

The O.V.A.A. would like to remind its members of our booking policy for dinner meetings and events.

The O.V.A.A. is charged for each person who registers for an event, whether they are able to attend or not. It is therefore necessary for us to charge anyone who registers for an event and does not attend.

We appreciate your support and understanding in this matter.

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Insurance Group, Ottawa  
Phone: 613-692-1169  
Fax: 613-692-3381  
E-Mail: cindy.bridge@dgig.ca

**Vice-President:** [TBA](#)

**Treasurer:** [WENDY RUTHVEN, CIP](#)  
Aviva Canada  
Phone: 613-834-9615  
Fax: 613-834-0877  
E-Mail: Wendy\_Ruthven@avivacanada.com

**Secretary:** [CONAR MARCOUX, BA, CIP](#)  
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285-955 Green Valley Cres,  
Ottawa ON, K2C 3V4  
613 564 7184

**Directors:** [RYAN REISS, FCIP, CRM](#)  
Economical Insurance Company  
London  
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Ottawa  
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Fax: 613-798-1810  
Email: Jordan.legg@scm.ca

**Chapter Delegate:** [CINDY BRIDGE, CIP, CRM](#)  
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During the course of planning our year, we look to our members, associates, advertisers and friends either to provide guest speakers for our monthly meetings or to let us know what topics are of interest.

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# POT WILL SOON BE LEGAL. CAN I BRING WEED BROWNIES TO THE STAFF PARTY?

WRITTEN BY JIM ANSTEY

**As the date when cannabis becomes legal draws closer, many questions remain unanswered. Where exactly will people go to buy weed? Will residents be allowed to smoke up in their condo? And will there be enough pot to go around?**

Despite the somewhat hazy picture, the rules around cannabis in the workplace are becoming increasingly clear. The challenge for employers is ensuring their workplace policies – and approach to managing staff – match the law.

Jim Anstey, a lawyer in Nelligan O'Brien Payne LLP's employment law group, is one of the firm's experts who's been studying what this unprecedented legislation means for employers.

He recommends that businesses and organizations take certain precautions to ensure their expectations around recreational cannabis are clear ahead of legalization later this year.

## Cannabis in the workplace

The federal Cannabis Act will decriminalize the recreational use of marijuana. But it's the provinces and territories that are crafting many of the rules around the consumption of cannabis.

Ontario has drafted legislation that regulates the sale, possession, cultivation and use of the drug.

So, can you bring pot brownies to a staff party?

The answer from the province is a resounding no –

Ontario's Cannabis Act is explicit in saying "no person shall consume cannabis in a workplace."

And merely moving a worksanctioned staff party from the lunchroom to an offsite location won't skirt the rules.

In this context, the definition for a workplace is taken directly from the province's Occupational Health and Safety Act – "any land, premises, location or thing at, upon, in or near which a worker works."

As Anstey explains, it's important to understand this definition, especially in an age where people are increasingly working remotely, whether from home, a coffee shop or a co-working space.

An important item for Ontario residents to remember is that the prohibition on use doesn't solely apply to your own workplace. Ontarians cannot consume cannabis in any location where it may be anyone's place of work.

For those who work from home, this potentially raises a unique situation.

In Ontario, individuals will only be allowed to use the drug in a private residence. But when you invite others into your home to work – whether as freelancers, contractors or otherwise – it becomes their workplace.

## How to prepare

While Ontario has ultimately taken a stance to prohibit cannabis in the workplace, Anstey advises that employers should still take steps to explicitly define expectations around the drug.

Is it OK for staff to stash a joint in their desk drawer for

*Continued on page 7 >*



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guidelines and publication  
deadlines.



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# Calendar of Upcoming Events

May 2018						
S	M	T	W	T	F	S
			1	2	3	4
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June 2018						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

**May 2nd & 3rd – 2019 Out of Town Provincial Claims Conference**

**May 4 – May Summit**

**May 31 – 1st Annual Skeet Shooting Event**

**June 15 - 16 – Changeover for OIAA**



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# POT WILL SOON BE LEGAL. CAN I BRING WEED BROWNIES TO THE STAFF PARTY?

WRITTEN BY JIM ANSTEY

after work? Is it OK to have a few puffs at lunchtime?

To be defensible, organizations must clearly outline expectations around cannabis in their employment contracts and workplace policies. This means employers must be clear if they're prohibiting the use and possession of cannabis at work.

It also means employees must have the opportunity to read and agree to these restrictions. Employers cannot simply tack a cannabis section or clause on to an existing contract.

Anstey recommends the following:

- Ensure you have a policy in place;
- If you already have one, take the time to review your workplace policy and update it as needed;
- Evaluate your organization's expectations around cannabis use, especially as they pertain to consequences for ignoring the policy;
- Give employees a chance to review and sign on to the new or updated policy.

As an employment lawyer, Anstey cautions against overzealous employers trying to police their employees too heavily. While it remains to be seen how decriminalization will play out, he sees a parallel between cannabis and how employers treat alcohol and illicit substances in the workplace.

Often, Anstey finds himself advising

his clients to exercise restraint when it comes to handling suspicions of drug use at work.

"It's important to step back and look at all the facts before you go ahead and fire or insult someone" by accusing them of being drunk or stoned, explains Anstey.

Ill-thought disciplinary actions can bring trouble for employers, who can face claims of constructive dismissal and defamation. Anstey often reminds his clients that their employees have a right to privacy.



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# INSURER OBTAINS ASSIGNMENT OF LONG-TERM DISABILITY BENEFITS FOLLOWING MOTOR VEHICLE ACCIDENT TRIAL

WRITTEN BY BORDEN LADNER GERVAIS LLP



On April 5, 2018, Madame Justice Sylvia Corthorn released a post-trial ruling in *Nemchin v. Green*, 2018 ONSC 2185, awarding an insurer an assignment of future long-term disability ("LTD") benefits. The ruling also considered the applicable interest rate for non-pecuniary general damages.

Justice Corthorn's ruling provides defendants with a helpful decision while we await the outcome of two Court of Appeal cases to be heard this May and the result of a leave application to the Supreme Court of Canada. These pending cases are discussed further below.

## *Nemchin v. Green – Assignment of LTD Benefits and the Applicable Interest Rate*

The plaintiff was injured in a 2010 motor vehicle accident. The jury found the defendant driver negligent and the plaintiff 10 per cent contributorily negligent. The plaintiff was awarded \$125,000 in general damages and \$600,000 for future loss of income. With the 10 per cent reduction for contributory negligence, the plaintiff was entitled to judgment of \$112,500 in general damages and \$540,000 for future loss of income.

The plaintiff was receiving LTD benefits at the time of the trial. The defendant brought a motion after the verdict requesting an assignment of these future

LTD benefits pursuant to s. 267.8(12) of the Insurance Act. The requested assignment would continue until the plaintiff reached the age of 65 or the full amount of the damages paid towards loss of future income is exhausted. Justice Corthorn recognizes in her ruling that the purpose of s. 267.8 is to "ensure that a plaintiff in motor vehicle accident litigation does not achieve double recovery." This purpose is balanced against the concern that a plaintiff should be fully compensated for her loss.

The plaintiff argued that future LTD benefits should not be assigned as the jury questions did not permit the trial judge to carry out "temporal matching" between the damages awarded and her future LTD benefits and that, as a result, there was a risk that the plaintiff would be undercompensated. Justice Corthorn disagreed for four reasons:

- The defendant was within her right to request that the jury be given the option to answer the future income loss question as a global award. A jury is not required to provide figures upon which it relies for annualized loss of income or the number of years over which the loss occurs and is entitled to award income loss as a global award
- There is no requirement for temporal matching of LTD benefits received over time to an annualized amount for loss of future income. The Court of Appeal in *Cobb v. Long Estate* concluded that it could not import temporal requirements that were not included in the Insurance Act.
- The global damages award for loss of future income did not preclude Her Honour from deciding the collateral benefits issue. In a jury trial it is the jury that awards the plaintiff's damages and, after the jury's verdict is rendered, the

*Continued on page 10 >*

# INSURER OBTAINS ASSIGNMENT OF LONG-TERM DISABILITY BENEFITS FOLLOWING MOTOR VEHICLE ACCIDENT TRIAL

WRITTEN BY BORDEN LADNER GERVAIS LLP

judge is solely responsible to address the impact, if any, of the plaintiff's receipt of or entitlement to collateral benefits.

- The plaintiff would not be undercompensated as a result of the assignment. The defendant would only be entitled to the assignment if the defendant were to pay the plaintiff the damages owed for the future loss of income. Once the defendant completed payment, the plaintiff would then be fully compensated for the loss of future income.
- The plaintiff also argued that the length of the assignment should be until the age of 60 not 65. The jury verdict did not award the plaintiff the full amount of the income loss that she had requested and, as a result, the plaintiff argued that the jury assumed a younger retirement age than 65. Justice Corthorn rejected this submission as the plaintiff's inconsistent work history was a likely factor in the verdict.

Accordingly, the defendant met the onus to obtain the assignment. Practically speaking, the value of the assignment is \$540,000 and has the potential for the insurer to recover the income loss award paid to the plaintiff as long as the plaintiff remains in receipt of LTD benefits.

## **Interest Rate**

Justice Corthorn's ruling also addressed the appropriate pre-judgment interest rate. The Court of Appeal held in Cobb v. Long Estate and El-Khodr v. Lackie that 2015 amendments to the Insurance Act applied retrospectively (as discussed in an earlier BLG alert) and as a result it was the defendant's position that the applicable interest rate was 1.3 per

cent (not 5 per cent as would have been the case prior to the Insurance Act amendments).

The plaintiff nonetheless argued for a higher interest rate relying on section 130(2) of the Courts of Justice Act which sets out a number of factors which a trial judge can rely upon to depart from the default prejudgment interest rate. The plaintiff argued that since the amendment occurred after the claim was issued, in the interests of fairness, something other than the default rate should apply. Justice Corthorn found that none of the relevant factors entitled the plaintiff to an increased interest rate on the facts of this case and awarded prejudgment interest on the non-pecuniary damages at a rate of 1.3 per cent per year.

The defendant in Nemchin was represented by Borden Ladner Gervais partners Tom Ozere and Kim Dullet.

## **Upcoming Cases**

Throughout Justice Corthorn's reasons she acknowledges that the law with respect to assignment of benefits and interest rates in motor vehicle cases is unsettled. This is a result of two pending assignment appeals in Cadieux v. Saywall and Carroll v. McEwen which will be heard by a five member panel of the Ontario Court of Appeal in May. Counsel for the plaintiff in El-Khodr v. Lackie has also sought leave to appeal to the Supreme Court of Canada, including on the issue of whether the 2015 amendments (including interest rates) apply retrospectively.

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# JUDGE RULES INSURER IS NOT LIABLE FOR CANNABIS RESIN LAB EXPLOSION

WRITTEN BY LYLE ADRIANO

A judge in Saskatchewan has ruled that while two landlords can sue their former tenants in relation to a cannabis resin lab explosion, the landlords cannot sue their insurer for denying coverage for the event. CBC News reported that the decision was delivered on May 11 – over nine years since the explosion incident.

In 2009, an explosion rocked the property located on the 4100 block of Princess Street in Regina; later investigations found that the blast was linked to the illegal production of cannabis resin on the property. Landlords Giuseppe and Rosa Carteri had a fire policy worth \$175,000 with Saskatchewan Mutual Insurance. However, the Carteris were refused a payout due to a clause which denies coverage when

the damage is the result of illegal activities involving drugs.

After the explosion incident, the Carteris hired a Calgary engineer to inspect the damage and prepare a report. That report, which cited evidence from the findings of two local police officers, concluded that the damage originated from a main floor bathroom. Inside the bathtub, investigators found a pot which contained resin residue. Investigators also found a yellowish stain in front of the toilet – a telltale sign of a chemical burn. Canisters similar to those used to contain butane were also found in the garage.

The property has since been demolished.



# **SAVE THE DATE**



## **TOURNAMENT**



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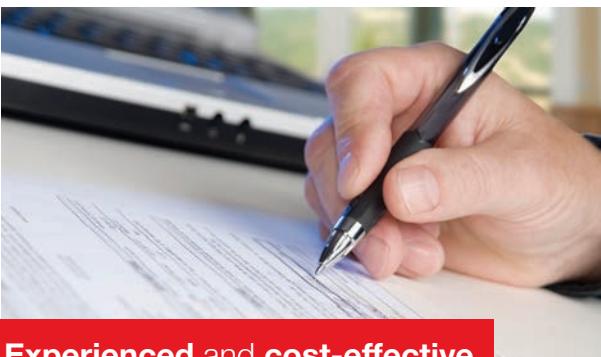
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# EXCITING NEW UPDATES AND CHANGES!!!

## UPCOMING EVENTS

### Monthly Luncheon:

Tuesday April 24, 2018 – 12PM

#### **Soot Aerodynamics: Aerosol Science & Engineering – University of Florida**

Presented by Vas Kannellos Bes; Senior Project Manager & Environmental Scientist

**Location:** Malone's , 1001 Queen Elizabeth Drive, Ottawa, ON

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### Save the Date!!

More details to follow closer to the events

Skeet Shooting: May 31, 2018

Golf Tournament: July 19, 2018

Children's Christmas Party: Nov, 2018

### OVAA CHANGES:

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# MOBILE APP FRAUD SKYROCKETING - RSA SECURITY REPORT

WRITTEN BY PAOLO TARUC

Fraudulent transactions coming from mobile apps have skyrocketed over the past three years – and Canada sits among the most targeted countries, according to a new report by RSA Security.

In 2015, just 5% of fraudulent transactions originated from mobile apps. The figure now stands at 39% this year, an increase of over 600% in just three years.

In particular, phishing accounted for nearly half (48%) of all cyberattacks. Phishing happens when fraudsters pose as authorities or banks in order to trick victims into handing over private information such as passwords.

Canada, the US, India and Brazil were the countries most targeted by phishing, RSA said, with consumer transactions and fraud continuing to grow in the

mobile channel. In the first quarter this year, more than half (55%) of transactions originated in the mobile channel and 65% of fraudulent transactions used a mobile application or browser.

As organizations look to roll out new services through the mobile channel, RSA Security said it is crucial to take care of data.

"So much attention has been focused on customer experience, perhaps to the detriment of security, allowing cybercriminals to move their activity to less protected channels," it stated. "With about two out of every three fraudulent transactions originating from a mobile browser or app, mobile fraud poses a very real threat."





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