
Cannabis: One Year Later

LAWYERS ARE ADAPTING
TO THE UNKNOWNNS
FOR THEIR CLIENTS
BY LEXPERT

As legalized recreational cannabis comes to its first-year anniversary, with further products and markets opening soon, *Lexpert* checked in with busy lawyers in the sector. From deals to litigation, insurance, employment, and regulation, there is much going on. Perhaps the overarching theme is that it is difficult to answer what comes next. Lawyers are not waiting idly by.

Sherri M. Altshuler, an Aird & Berlis LLP partner, is co-Practice Group Leader of the firm's Capital Markets Group and a member of the Corporate/Commercial, Mining, Capital Pool Company, Startups and Cannabis Groups. She describes this point in time: "The sector is ripe for activity and we expect to see continued consolidation and contraction in the market. The focus of M&A activity continues to be on cultivation and retail; however, we are seeing a significant uptick in the number of infused product and extract deals, as well as an increase in technology deals. Technology is critical as companies continue to mature."







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Altshuler connects the recreational cannabis sector with the medical one that preceded it and sees that the world is taking notice and potentially following Canada’s lead. “We have had legislation for medical cannabis since 2001 and were the first G7 nation to legalize cannabis for adult recreational use in 2018. Other countries are following our lead, and there is a global move to remove prohibition and to permit access to cannabis for medical purposes. Canadian licensed producers recognize that Canada has a population of 36 million and there are limits on potential growth looking to the Canadian market alone. We expect to see a continued bullish trend on international markets, particularly in Europe.

“This has created a lot of opportunities from a legal perspective. We have been working with clients on debt and equity investments, public listings, supply agreements, licensing agreements, IP portfolios, international corporate and tax structuring, mergers and acquisitions, joint ventures and other commercial arrangements. Without having gone through the process, some companies do not appreciate the complexities with going international, particularly when it involves emerging markets. From a regulatory perspective, there is a lot of nuance and it is fragmented.”

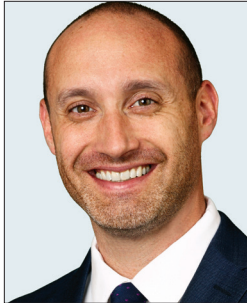
Bennett Jones LLP partner Aaron Sonshine practises corporate and securities law with particular emphasis on corporate finance, M&A, private equity and corporate governance matters. He breaks down the current wave of consolidation in the cannabis industries: “There will be a growing divide between ‘haves’ and the ‘have-nots’ as access to capital continues to tighten. We’re likely to see more distressed M&A and opportunistic buying by the larger and better capitalized players. We will also continue to see large and mid-market companies making acquisitions to fill gaps in their operations — by adding production facilities, extraction capability, supply chain expertise and, perhaps above all, human talent.”

Opportunities in the U.S. are on many investors’ minds. According to Sonshine, “All eyes have been on the U.S. in the past 12 months, and this trend will continue. We see more and more U.S. companies, absent viable listing options in the U.S., accessing the public markets by listing on the CSE. We’re also seeing U.S. family offices and, increasingly, U.S. institutional funds, gaining exposure to the sector by investing in Canadian LPs. Canadian LPs are looking to gain a toehold in the U.S. cannabis market, too, most recently by acquiring or partnering with U.S. hemp CBD producers.”

The production side of cannabis is becoming more and more commoditized, Sonshine says. “Products such as edibles and vapes will bring substantial new opportunities to the industry. There are vape pens coming to market that contain a few dollars’ worth of hardware and cannabis oil and retail for \$75. Next-generation products have given rise to ancillary products and services companies and attracted traditional consumer packaged goods firms looking to penetrate the sector. As Mark Twain once said, the gold rush was a great time to be in the pick-and-shovel business.”

Blakes’ lawyer Chris Nyberg is co-chair of Blakes’ Cannabis Group and his practice focuses exclusively on regulatory, commercial and financing matters under the federal Cannabis Act and the various provincial and territorial adult-use regimes.

For clients in the emerging edibles-re-



Matt Maurer

TORKIN MANES LLP

“The initial lottery in Ontario was a roller coaster. Our clients were gearing up for an open application system only to have the provincial government switch to a lottery system at the 11th hour due to national product shortages. Once the lottery results were posted, it was a whirlwind. The timelines were very compressed and we were (fortunately) dealing with a lot of lottery clients all at once.”

lated businesses, he sees the “pressure for vertical integration on commercial transactions. We’re starting to see people get very specialized in what they do; they’re saying, let’s partner with others who do what they do well.”

Torkin Manes LLP partner Matt Maurer looked back on the year that was: “The initial lottery in Ontario was a roller coaster. Our clients were gearing up for an open-application system only to have the provincial government switch to a lottery system at the 11th hour due to national product shortages. Once the lottery results were posted, it was a whirlwind. The timelines were very compressed and we were (fortunately) dealing with a lot of lottery clients all at once. Additionally, my phone, email and text were literally non-stop for two weeks from companies who were seeking to partner with the winners. In addition to the challenge of balancing the time requirements, we also had to try to navigate the regulatory waters, which were challenging.

“The Alcohol and Gaming Commission were figuring things out as we went along, and there was no established playbook to

go by. Figuring out what was acceptable to the regulator was a challenge, and one wrong step could result in the winner being disqualified, which added additional stress.”

Still, Maurer is just one example of the opportunity this sector presented for lawyers. And it was an opportunity where the distinction between litigator and solicitor wasn’t quite so rigid, especially on regulatory matters. “After many years of practicing exclusively civil litigation, I determined that cannabis was going to be a major industry and a regulated one at that,” says Maurer. “I told myself that I would learn everything I could about the law and the industry and give myself a year to see if it panned out.

“There were numerous times that I questioned what I was doing along the way, venturing so far from civil litigation,” he says. “However, I told myself that just because I had been trained as a civil litigator did not mean that I could not learn new skills. Indeed, law school taught me how to learn in general as opposed to teaching me a specific practice area. Years later, it has all panned out far better than I ever could have hoped, and it became apparent that you really can learn to do anything you want if you set your mind to it and persevere.”

On the insurance defence side, there was a great deal to anticipate and to do. Jennifer Huneault, a partner at Zuber & Company LLP, explains the proactive advice that was helpful to clients: “In advance of recreational use becoming legal, we actively met with our clients, and spoke with underwriters, risk managers, and claims managers in the insurance industry at large; offering our input on both changes that we foresaw that needed to be made to their policy offering wording, and to the policy application process. While claims will be inevitable, we recognized that a proactive approach for our clients, and the industry, in identifying new potential areas of claim and possible policy coverage issues, was an essential frontline strategy in their ability to respond to litigation that may result from recreational cannabis legalization.”

As for the emerging types of litigation, Huneault says, “The immediate area of concern for insurers was predicted to be in-

creased claims rates in the auto and homeowner insurance spheres. But there does not appear to be any sound evidence to date that claims in these areas have increased due to recreational cannabis being legalized. Based on my review of occurrences in the cannabis manufacturing and processing sectors to date, I predict that we will begin to see claims, and inevitably litigation, involving licensed producers for coverage for costs relating to product recall caused by product mislabeling, mould, and undisclosed pesticide use; and resultant product liability class actions brought by consumers alleging personal injury caused by consumption of those affected products. I think the incidence of product recall and liability claims may only increase with the legalization of edibles in October 2019.”

Insurance companies need to be ready. “The legalization of edibles brings with it a new area of unknown claims and litigation potential,” says Huneault. “The edibles industry is impressively entrepreneurial and I’ve seen everything from traditional THC-infused chocolate, candies, and cookies to THC-infused pancake mix and even individual servings of TH- infused salt and sugar packets, which would allow any meal to become an ‘enhanced’ experience. The ease with which THC may be potentially added to any edible offering by consumers understandably results in inherent risk. This is compounded by the fact that there is no standard predictability in terms of how an individual will react to THC once it’s in their system. One of the potential areas for litigation arising from the legalization of edible products will be social host liability in the event that personal injury that can be linked back to the serving of an edible to one’s guests.”

Clearly, the unknowns on the insurance side are as numerous as on the commercial side. As Nyberg says, “The biggest issue is everyone’s still learning, including the regulators, and so it is not easy to get an answer, especially federally. Clients are trying to develop on the commercial side. We’re trying to get an idea of what someone wants to do and help them to do it. We have to figure out something novel.”



Meanwhile, as Sonshine points out, “Right now there’s a much greater emphasis on operating results and financial performance. An increasingly sophisticated investor base, including strategics from the tobacco, liquor and pharma sectors, are simply demanding it. We are witnessing a handover to a second generation of management, often with greater experience managing supply chains and bringing highly regulated products to market. It remains to be seen whether these new leadership teams will remain nimble enough to respond to ever-changing regulations and market forces.”

Altshuler concludes, “Canada has taken a public policy approach to reform cannabis legislation domestically. Other countries are following our lead by adopting legitimate regulated systems. They are also watching closely to see and judge our successes and failures. As the industry matures, we will continue to see an increased emphasis on governance practices and risk management.”