

Canada's Cannabis Act: Is your IP up in smoke?

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Let's start with the Cannabis Act

- Provide regulatory framework under which product is currently being sold to end users (consumers or patients);
 - Disproportionate effect on trademarks and trade-dress versus other forms of IP
 - Evidence that patents, industrial designs are unaffected by the regulatory framework governing cannabis
 - Healthy and consistent record of filing in Canada
 - Significant emphasis on know-how and trade-secrets in the industry
 - Out of reach of the Cannabis Act

Health Canada's Approach

- Canada legalized adult-use (recreational) cannabis on October 17, 2019
- The Cannabis Act, which governs the recreational and medical cultivation, distribution and sale of cannabis also provides detailed parameters of what “is” and “is not” permissible for promotion and advertising
- First mention of marketing and promotion of cannabis products
- The restrictions seem to be based in three policy objectives:
 - Protecting youth
 - Patient safety
 - Tracking the supply of cannabis

Cannabis Act - Provisions

- If not on the product label, it is at risk of being deemed promotion
- “*Promote*” in respect of a thing or service, means to make, for the purpose of selling the thing or service, a representation — other than a representation on a package or label — about the thing or service by any means, whether directly or indirectly, that is likely to influence and shape attitudes, beliefs and behaviours about the thing or service.

Cannabis Act - Scope

- 17 (1) Unless authorized under this Act, it is prohibited to promote cannabis or a cannabis accessory or any service related to cannabis, including
 - (a) by communicating information about its price or distribution;
 - (b) by doing so in a manner that there are reasonable grounds to believe could be appealing to young persons;
 - (c) by means of a testimonial or endorsement, however displayed or communicated;
 - (d) by means of the depiction of a person, character or animal, whether real or fictional; or
 - (e) by presenting it or any of its brand elements in a manner that associates it or the brand element with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

Division 2: Subdivision A

- What is equally not permitted:
 - Brand elements on other things:
 - (a) a thing that is associated with young persons;
 - (b) a thing that there are reasonable grounds to believe could be appealing to young persons; or
 - (c) a thing that is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring

Cannabis Act - Reach

- The act of “promoting” as defined under the Cannabis Act and the restrictions set forth in sections 17 to 23 can potentially apply to anyone who may be involved in promoting cannabis, cannabis accessories and services related to cannabis including:
 - Persons who produce, sell or distribute cannabis
 - Persons who sell cannabis accessories
 - Persons who provide cannabis related services; or
 - Media organizations

Permitted Promotional and Advertising Activities

What is permitted:

- Informational promotion
- Brand-preference promotion
- Point of sale - availability and price
- Brand element on other things that are not cannabis products

Cannabis Act – Downstream Effects

- Definitions are broad to capture:
 - Websites
 - Social media and other online platforms
 - Company and user created content
 - Inserts and product information (i.e. directions for use)
 - Sponsorships
 - Implications for trademarks, brand awareness and brand campaigns

Governs Brand Element vis a vis Consumer

- Detailed product labelling requirements for all product formats include:
 - Cannabis symbol
 - Health required label information
 - Governing of brand elements, logos, words versus images
 - Required units and expressions of units for different product formats
 - Warning symbol (6 different messages)
- Significant differences in approach as compared to U.S. hemp market



Trademarks

- Over 3000 trademarks have been filed in Canada for cannabis products.



STATE OF MIND

FLYING HIGH

- These marks are legal to obtain in Canada, though some may contravene the Cannabis Act.
- Struggles:
 - Many non-compliant with Cannabis Act
 - International Jurisdictions unsettled on legality of the product
 - Trademark examiners do not understand the channels of trade or regulations limiting the sale and use of cannabis
 - High risk of oppositions from third party in unrelated lines of business
 - Morality arguments – lack of desire to be associated with the product

Predicament of trademark owners in Canada and rest of world



