

Oh Cannabis!

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On October 17, 2018 Canada legalized recreational cannabis, offering opportunities and challenges for businesses in this emerging field.

Even before legalization, there was a notable increase in Canadian trademark filings covering cannabis products, services and related accessories. Unfortunately, many of these mark may never be legally used in Canada due to restrictions on brand use, display and advertising in the *Cannabis Act* and *Regulations*. Non-compliance with these regulations could result in serious punishments and penalties.

The stated focus of restrictions on cannabis brand use is the protection of young persons and public awareness of health risks. These concerns are reflected in both limitations on brand selection for cannabis products and accessories and the imposition of brand limitations on packaging and labels.

In particular, the *Cannabis Act* prohibits promotions and labels for cannabis, and cannabis accessories and services if:

- there are reasonable grounds to believe they would be appealing to young persons (anyone under 18 years old);
- they include an endorsement or testimonial or depict a real or fictitious person, character or animal (while not clear, presumably, a “depiction” is visual); or
- they associate cannabis or a cannabis brand with a positive or negative emotion about a way of life, “such as” glamour, recreation, excitement, vitality, risk or daring. It remains to be seen how “appealing to young persons” or “evoking a way of life will be interpreted as there appears to

be much room for ambiguity.

The *Regulations* also very strictly control how many and the manner in which branding elements may be displayed on “cannabis products”. Branding elements or images — including trademarks, distinguishing guises and logos — may only be displayed on a “label” applied to cannabis products. They may not appear on the interior or exterior surface of any container or covering that is not otherwise “a label”. Further, only the brand name and one branding element may be displayed, and can only appear once on the principal label.

There are also strict rules on the size and colour of the brand elements and the background of the packaging. For example, fluorescent colours are not allowed, and brand elements must be both smaller than, and in contrasting colours to, the required cannabis symbol and health warnings.

Use of cannabis brands on “things” is also regulated - with the same concerns regarding appeal to youth and evoking emotions, including glamour, excitement or daring. What will this mean in practice? Can a cannabis company or licensee sell t-shirts and caps marked with the cannabis brand, or put a cannabis brand on a skateboard? Probably not — as these items are commonly associated with, and appealing to, young persons and a “way of life”.

Despite the numerous restrictions, there are many reasons to register a trademark for cannabis goods and services in Canada. A registration provides exclusive rights to use the mark across Canada for the registered goods and services, and may become a valuable business asset. Once filed, a claim to rights appears on the searchable Register, possibly deterring encroachment from others, and potentially affecting examination of other applications.

Marks that are otherwise registrable under the *Trademarks Act* might not comply with *Cannabis Act* brand restrictions. In anticipation of a huge demand for cannabis products, thousands of trademark applications have been filed for cannabis goods/services, including many that would seem to offend cannabis branding restrictions. However, the Canadian Intellectual Property Office (CIPO) has informally announced that it does not intend to examine applications for compliance with the *Cannabis Act*, with the result that many marks can never be legally used, cannot be enforced, and may also be vulnerable to challenge during an opposition.

Brand restrictions will impact the development of brand reputation, which in turn affects consumer decision-making, as well as the scope of protection for and enforcement of cannabis marks. Particularly in this early stage of legalization, strict branding rules impede the ability of new companies to easily distinguish themselves from their competitors. To help marketers and companies be compliant and effective, the Canadian Marketing Association has released a Guide on Permitted Cannabis Marketing Activities. However, this document is an industry guideline — not a government publication — and there remains uncertainty as to whether conduct might be “offside” the government rules. Many companies are already pressing the Government for more guidance, and leniency, on brand usage. Until then, cannabis companies should exercise caution, and seek legal guidance on brand use and promotion.