# Marketing Cannabis in a Brand-New Regulatory Environment

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It may be natural to assume that making a profit in Canada's emerging cannabis industry would be simple. After all, the federal government's Parliamentary Budget Officer has conservatively estimated the annual demand for regulated cannabis products at $5.5 to $5.8 billion nationally.

But in the days since the Cannabis Act (Bill C-45) came into force, industry players have been struggling to find their footing in a new and complex regulatory environment filled with untested and subjective standards. This is especially true when it comes to the rules around cannabis promotional activity and public-facing statements.

> A central objective in regulating adult-use cannabis was protecting young Canadians from potential harms associated with it.

To compete with the illicit market, the regulated industry must rapidly expand in production capacity, product diversity and reach. Gaining market share from the illicit market will require promotional activity. This promotional activity must be balanced with concerns any promotional activity — the traditional tool for boosting market share — could encourage more young people to try cannabis

This push-pull has created a tension in the regulations that cannabis companies are forced to manage.

## The Precedent Problem

Responsible messaging about social consequences of cannabis use or changing public perception about a cannabis company or its stock is not a contravention of the Cannabis Act. In contrast, changing beliefs about cannabis products could be. A wrong move could mean hefty fines or worse if Health Canada suspends or revokes a company's licenses to cultivate, process and sell product.

> Predicting Health Canada's reaction to infractions is complicated by the absence of regulatory enforcement under the Cannabis Act.

Uncertainty about enforcement standards makes it difficult to distinguish a cannabis company and it products in the Canadian marketplace. Currently, cannabis companies can use branding elements on packaging, websites and corporate communications. Yet, at what point does branding become promotion?

When advising in relation to promotional activity, packaging and labelling, we rely on detailed discussion with clients around the purpose, intent and reasonably expected outcome of any proposed communications. Without precedent to rely on, our guidance leans on the side of caution.

## Patent Potential

As they concentrate on overcoming these considerable marketing challenges, many Canadian cannabis companies may be sitting on an untapped source of potential profit: new technology.

What is happening in the cannabis sector now is akin to what was happening in the Alberta oil sands a decade ago. For years, that industry focused on recovering a commodity and generating profits. Oil sands companies at the time were also necessarily tech companies: As they created new and better ways to extract bitumen from the ground, they developed valuable technologies and patent protection helped maintain the value of those technologies.

Cannabis companies are similar. As they grow better quality cannabis on a larger scale, they are going to innovate.

> Every step in producing a cannabis product — from planting seeds or clones through growing and harvesting, to extracting, formulating and packaging cannabis oil — can be optimized. And all those optimizations are potentially patentable.

We are educating licensed producers on how to establish standing operating procedures to help them recognize when they have created a potentially patentable process or valuable trade secret. We have done it for clients operating in oil and gas, and other industries. Now we are helping clients establish similar protocols and policies for the cannabis sector to capture and protect their intellectual property.

By

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