

Health Canada Announces the Independent Review of the Cannabis Act – Considerations for the Promotion Provisions

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On September 22, 2022, Health Canada issued a press release announcing the review of the federal *Cannabis Act* (the Act) by an independent expert panel chaired by Morris Rosenberg (the Panel). The review has been initiated nearly four years after the passage of the Act, which legalized the production, distribution, sale, and possession of cannabis for adult-use. The review is mandated by the Act and must include a review of the impact of the Act on young persons, particularly their health and consumption habits, and Indigenous communities, and the impact of growing cannabis plants in private residences. (Under the Act, up to four mature plants per residence are permitted.) According to the press release, “the review will help ensure that the Act adapts to the current situation and continues to meet Canadians needs and expectations.” The first step in the review is online engagement: Canadians are invited to complete a questionnaire or otherwise provide feedback by November 21, 2022. A report must be produced no later than 18 months after the review begins, including any recommendations for changes to the Act.

One of the many aspects of the Act expected to undergo review are the sections on the promotion and advertising of cannabis. The 2016 Task Force on Cannabis Legalization and Regulation (the Task Force) had recommended comprehensive restrictions, similar to those placed on the promotion of tobacco products, and indeed the Act follows those recommendations. The Act broadly prohibits the promotion of cannabis with some limited exceptions for licensed producers who are permitted to conduct “brand preference promotions” and “informational promotions,” which are defined as promotions that convey brand characteristics and factual information about cannabis, respectively. To be compliant, these promotions must be distributed through prescribed age-gated channels, including age-gated websites (“communication by telecommunication”), direct mail/email addressed by name to individuals confirmed to be legal age for consumption, and in places where young persons are “legally” prohibited, such as cannabis stores where budtenders have taken on a key role in educating consumers about cannabis products. Additionally, licensed producers are permitted to merchandise. Specifically, producers can display a “brand element” on a “thing” provided the “thing” is not appealing to young persons or associated with young persons or a way of life, such as one that includes glamour, recreation, excitement, vitality, risk, or daring.

Labelling is similarly restricted under the Act with near-plain packaging. A label is only permitted to have two brand elements, one of which must be the name of the licensed producer. Neither brand element can be larger than the mandatory THC symbol. Beyond that, the elements of the label and package are prescribed, including the matte finish, the factual information that must be disclosed and the text, size, and colour of the health risk warning statements inside a prominent yellow box. The result is that there is very little difference

or variation between the look and feel of cannabis products available for sale in Canada.

Since the passage of the Act, there has been no liberalization of the promotion and labelling provisions. However, “farmgate” licenses are now available to federally licensed producers and processors in certain provinces. Once granted, licensed producers are permitted to sell their cannabis products directly to consumers from their own growing facilities. There are provincial differences regarding availability and logistics of these licenses, but generally these retail licenses for “farmgate stores” give licensed producers the opportunity to interact with consumers at their growing facilities and educate them about their products and their brands before purchase without the budtender intermediary. Although a novel development, the rural location of most growing facilities may well limit accessibility to most consumers and few - if any - large, licensed producers have lodged an application to open such retail locations given the stringency of the rules surrounding retail operations generally.

Once the Panel commences its review, it will focus on whether the present provisions meet the stated purposes of the Act, which include protecting public health and safety, providing for the legal production of cannabis to reduce illegal activities relating to cannabis, and providing access to a quality-controlled supply of cannabis that “will help identify priority areas for improving the functioning of the legislation.”

It is important for the Panel to revisit whether branding can play a role in achieving the Act’s stated public health and safety purposes, by enabling producers to better educate consumers about cannabis and the products they are purchasing and consuming beyond the limited and compulsory information imposed by the Act. Twenty months following legalization, the Brightfield Group surveyed 3000 Canadian cannabis users about recognition of cannabis brands. According to the report, no brand had more than 41% recognition among current cannabis users, while the vast majority had between 1% to 15% recognition. The report stated that “when product options increase and brand awareness remains low, consumers get confused. They get decision fatigue when they do not see a product that aligns with their complex repurchasing decisions. This has led to a significant gap between consumers aware of Canadian brands and those that report purchasing them.” If the study were conducted today the numbers for brand recognition may well be higher but not high enough given that cannabis has an individualistic effect on consumers and predictability is desired. Without brand recognition, consumers then adopt potentially adverse behaviours by relying on price or THC concentrations (active ingredient content) instead of other attributes of the product. The repurchasing decision can be critical to health and safety and brand recognition may play an important part.

The restriction on the marketing and promotion of cannabis products has equally disadvantaged legal producers to the benefit of the black market, which is still estimated to account for approximately 50% of the cannabis market. The Panel will need to recommend ways to reduce the breadth and depth of the illegal market. The illegal market does not operate within the confines of the Act: not in its quality controls (seized products have had contaminants that would not be permitted under the Act), its requisite child-proof packaging, its constraints on promotion, or the Act’s overarching prohibition on any activity that may be

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appealing to young persons. Ironically, the illegal market may have had better success in building brand awareness than legal brands, in no small part due to its illegal use of well-known third-party food brands. In December 2021, Health Canada issued an advisory regarding the sale of illegal cannabis that was packaged to look like popular brands of candies and snack foods. These illegal cannabis products are typically sold through websites whose ownership is privacy shielded and which can be taken down and re-constituted under different domains within minutes making enforcement by law enforcement and brand owners difficult and expensive. Why do consumers continue to visit these sites? Cost may be an obvious answer. Beyond price, consumers recognize the brands and may not even be aware that the sites and the products sold on them are illegal.

There was a recent victory for brand owners of food products in the fight against illegal cannabis brands in Canada. In May 2021, Mars Canada Inc. commenced an action against John Doe c.o.b. as King Tuts Cannabis, West Coast Supply, Shrooms Online, Flash Buds, and Sure Buds regarding the use of its registered trademark SKITTLES and lookalike packaging in association with cannabis. Mars Canada subsequently brought a motion for default judgement after seeking and obtaining an order for substituted service by email against three of the defendants, West Coast Supply, Shrooms Online, and Flash Buds, effective September 17, 2021. The order was obtained based on evidence that Mars Canada's investigator had successfully communicated with these defendants at the email addresses authorized for substituted service, and the statement of claim had been sent in May 2021 to each defendant using the same email addresses.

On August 12, 2022, the Federal Court of Canada (the FCC) granted a motion for default judgement against these three defendants for trademark infringement, depreciation of goodwill, and passing off likely to cause confusion between their goods and Mars Canada's SKITTLES trademark and ordered each defendant to pay \$15,000 in damages and \$3,200 in costs. The FCC also awarded \$30,000 in punitive damages citing the harm to Mars Canada and the public given the SKITTLES appeal to children. The Court commented that "advertising and offering for sale of a potentially dangerous product using appropriated trademarks that are evidently and obviously attractive to children represents a marked departure from ordinary standards of decent behaviour that deserves to be denounced and deterred." These defendants were also ordered to destroy all infringing product and provide Mars Canada with the source of the infringing product. (Regarding the two other defendants, in the case of Sure Buds, the FCC held that the evidence was not sufficient to establish default at the email address relied on for service, and in the case of King Tuts Cannabis, Mars Canada had acknowledged there is insufficient evidence in the motion record to support default judgment.)

While this recent success is noteworthy, the onus should not be placed on brand owners to enforce against the illegal market, nor is it practical for Health Canada whose resources may be limited. If the stated purposes of the Act are to be achieved, particularly in respect of black-market goods, cannabis brand owners need to have some latitude to deploy their brands in a manner that will allow them to acquire goodwill and distinctiveness in the eyes of consumers. This could mean that more than one brand element may need to appear on packaging, or its prominence may need to be increased, or there may need to be

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more latitude in the color, look, and feel or trade dress of packaging so that products can be distinguished and recognizable to a purchaser. Without the potential to acquire such distinctiveness, it will be difficult for any licensed producer to secure a judgement like Mars Canada for any infringing products. If considered from a consumer safety lens, brand preference may prove to be a powerful tool in helping quell and deter black market participants. Until this occurs, the illegal market can be expected to continue to thrive.

Cassels wishes to acknowledge and thank the article's co-author, Christelle Gideon, Chief Legal Officer at Canopy Growth Corporation.

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