EMPLOYERS, ENTREPRENEURS...GET READY! CANNABIS WILL BE LEGAL IN CANADA

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On June 19, 2018, the Canadian Senate passed Bill C-45, *The Cannabis Act*, which establishes the framework for the production, sale, distribution and possession of non-medical access to cannabis in Canada. Bill C-45 comes with a provisional buffer period to give the provinces and territories – and employers and entrepreneurs – time to prepare. Non-medical access to cannabis will be legal as of October 17, 2018.

Therefore, time is of the essence for employers and entrepreneurs. To assist in the process of prioritizing efforts to make the most of this buffer period, this bulletin summarizes the most pressing issues to consider.

5 Tips for Employers

For many employers, the impact of the legalization of non-medical cannabis on their workplaces is a big concern. Workplace safety, impairment, and accommodation are consistently flagged as employers' top concerns with legalization. Although the laws related to non-medical cannabis are new and developing, employers can assuage their concerns by getting informed and taking preparatory actions during the buffer period.

1. Continue Enforcing Existing Workplace Policies

Non-medical cannabis is not legal yet. Until October 17, 2018, possession, production and trafficking of cannabis are prohibited under the *Controlled Drugs and Substances Act*, except where authorized by exemptions or regulations, such as those for medical cannabis. Employers should continue to enforce their current workplace policies during the buffer period.

2. Stay Abreast of Legal Developments and Provincial/Territorial Differences

Like employers, the provincial and territorial governments are using the interim period to finalize the laws pertaining to non-medical cannabis in their respective jurisdictions. The laws will vary between jurisdictions. Employers should ensure they understand the laws that apply in each of the jurisdictions in which they operate. Employers can and should rely on local laws and incorporate them into their workplace policies and procedures post-legalization. For example, Ontario intends to ban the consumption of non-medical cannabis in

public spaces and workplaces; Quebec intends to have a zero-tolerance policy for driving under the influence of any drug; and Prince Edward Island intends to restrict cannabis use to private residences.

3. Prepare New Post-Legalization Policies

Post-legalization, employers continue to have the right to establish rules for the non-medical use of cannabis in the workplace in much the same way that employers currently set rules for the use of alcohol or tobacco products. In particular, employers may prohibit the use of cannabis at work or during working hours and may also prohibit employees from attending work while impaired. Employer should use the buffer period to review and revise their current policies and prepare new policies to address non-medical cannabis in the workplace. Employers should consider rolling out a suite of policies including drug and alcohol policies, smoke free workplace policies, and scent free workplace policies. Employers should ensure that employees are provided with adequate notice of the new policies so all parties understand the expectations in the workplace as of October 17, 2018.

4. Conduct Employee Training

In tandem with the introduction of new policies directed at non-medical cannabis in the workplace, employers should use the buffer period to train employees on the new policies and the post-legalization workplace expectations. Prudent employers, especially those with safety-sensitive workplaces, will also use the interim period to train supervisors and managers on issues including signs of impairment and workplace protocols when an employee is suspected or determined to be impaired in the workplace by any substance, including non-medical cannabis.

5. Understand the Duty to Accommodate

Employers do not have a duty to accommodate non-medical cannabis use. Post-legalization non-medical cannabis use can continue to be treated in substantially the same way as alcohol under an employer's workplace policies. Violation of these policies can result in progressive discipline and, in appropriate cases, termination of the employment relationship. Employers continue to have an obligation to accommodate medical cannabis use when it is prescribed by a doctor as treatment for a disability covered by applicable human rights law. The line between recreational and medical cannabis use is not hazy from a legal perspective. Employers should use the interim period to gain clarity as to when their obligations under applicable human rights law is engaged and what their obligations are once it is engaged.

5 Tips for Entrepreneurs

For many entrepreneurs, the protection of intellectual property (IP) is dismissed as a costly afterthought. However, many learn all too soon that such an approach can be fatal to your business' short and long term

viability. For one, many financial institutions refuse to invest in companies whose critical (but intangible) IP assets have been left unprotected or where title cannot be definitively determined. Importantly, in most instances obtaining IP rights is a priority game. Therefore, if you are not the first to register, you risk losing your ability to gain exclusionary rights. To make matters more complicated, depending on the type of IP you are interested in protecting, the process can be painfully slow and the full spectrum of rights are only triggered once registration has occurred. Thus while entrepreneurs interested in capitalizing on the new cannabis market might believe there is an abundance of time to get their budding business' IP affairs in order, in reality you probably should have been thinking about your IP yesterday. The following are 5 tips that should get you going down the right path:

1. ID Your IP and Get It Registered ASAP

In the cannabis space, the IP an entrepreneur ought to protect will very much depend on the nature of the business. The following hypotheticals are meant to illustrate how there can be IP issues that you might not anticipate:

- Consumer protection is a linchpin of the government's message that legalization will promote safer cannabis consumption. You therefore might have the bright idea of developing a seed to sale software to address concerns of supply chain management. If so, you should ensure you have the appropriate Non Disclosure Agreements, licenses and/or software copyright assignment and waiver of moral rights in place in the event you hire an independent software developer, who is likely also working for other people in the space. Otherwise, your investment could go up in smoke.
- Cannabis Sativa has excellent phenotypic plasticity – that means the plant's genotypes demonstrate an excellent ability to alter their growth and development in response to changes in environmental factors. With this knowledge, perhaps you have cultivated a variety of cannabis and are looking to protect it and turn a profit through royalties from seeds. If you can show that the variety is new, distinct, uniform, and stable, you might qualify for protection under the *Plant Breeders' Rights Act*.[1] However, it is critical to realize that your developed variety can only be sold in Canada for a maximum of 1 year before you lose your ability to obtain Plant Breeders' Rights (PBR), which, in the case of cannabis, would provide you with up to 20 years of protection. Currently, there are only two pending PBR applications for cannabis varieties and six pending and registrations for hemp varieties. Perhaps opportunities abound?
  These are just a few examples of some of the hurdles entrepreneurs can face when turning an idea into a protectable asset. From the offset, it is worth taking the time to speak with a lawyer to help identify, navigate, and commercialize your business' IP.

2. Branding and Advertising Blues

As previously reported in our bulletin, Bud Branders Beware, the proposed advertising regulations are very restrictive when it comes to the branding and advertising of cannabis products, largely mimicking those found in the tobacco industry. While the large private actors have been vocal in criticizing the proposed regulatory regime as paralyzing, the Government's goal of restricting access to youth may well mean that we will not see the regulations relax for the next few years. These restrictions must be kept in mind when entrepreneurs are selecting their branding approach, and especially when choosing their trademark. Matters will not be helped by the approximately 2300 trademarks applications and registrations for goods and services in the cannabis space that have been filed in the past few years. Bearing in mind that Canadian law does now allow for two confusing marks to coexist on the Trademarks Register, it is important to choose wisely and consult the proposed regulations when selecting a trademark. For instance, while you may be able to get a registration for a smiling green leaf, your ability to use the mark would be hindered by the regulations prohibiting the use of designs that appeal to youth.

3. Don't Let them Get You Down, Get Creative

There is no time like the present to think of unique ways of branding your product. Notably, in the spring of 2019, Canada will be allowing smells and textures to be trademarked. Given the pungency of the terpene-rich resin found in Cannabis Sativa, there may be potential to trademark a unique smelling product, or to come up with a texture in your packaging as your source indicator. This could allow you to set yourself apart in a market that will quickly be saturated with products, all the while not running afoul of what we know about the proposed advertising regulations

4. Know How to Monetize Your IP

Whether you are an entrepreneur in the medical or recreational space, or interested in the related paraphernalia, there will always be underlying IP. Be it obtaining royalty payment from PBRs, licensing your patented technology for cold-pressing CBD oil extraction, or selling your medical cannabis delivery phone app, a lot of businesses ought to identify their critical and ancillary intellectual property to turn their hard work not only into an essential tool for their businesses, but also a revenue generating asset.

5. Protect Data

While not IP per se, consumer data and its analysis is going to be a hot commodity in our nascent legalized cannabis world, as uncertainty abounds as to what demographics and geographic areas will be the heaviest consumers. Given the limited published research on the effects of cannabis consumption, industry players will be eager to get their hands on data related to the effects, trends and purchasing habits. However, it is important that entrepreneurs in this space not run afoul of fundamental privacy obligations they owe to clients and to people with whom they interact. Prudent entrepreneurs should use this buffer period to gain clarity on

applicable privacy laws and ensure the appropriate safeguards are in place. Also, bear in mind that while there is no copyright in data, the selection or arrangement of data can benefit from copyright protection.

There is a lot to wrap your head around when starting a new business, but don't let your IP sit on the backburner. There's no silver medal when you're second to file®.

McMillan's Cannabis Practice Group is made up of lawyers who understand the laws, regulations and business landscape in Canada. Our professionals provide valuable legal solutions for financing, accessing public markets, mergers and acquisitions, licensing and regulation, employment law, workplace issues, and intellectual property to help businesses succeed in this new and evolving industry. For more information about labour and employment or intellectual property including branding and advertising, please contact the authors.

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[1] Plant Breeders' Rights Act, S.C. 1990, c.20.[ps2id id='1' target=''/]

A Cautionary Note