

Legal update

Cannabis: learning from the *Tobacco Act*

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Food and agribusiness

As we have reported [here](#) and [here](#), the Canadian government is getting set to legalize recreational cannabis through the introduction of the proposed *Cannabis Act* later this year.

In anticipation of legalization, industry players are starting to make plans for advertising. Not surprisingly given that one key objective of the *Cannabis Act* is to protect Canadians from enticements to use cannabis, the *Cannabis Act* contains prohibitions on promoting cannabis. Many of these mirror prohibitions found in the federal *Tobacco Act*.

What's prohibited

At a high level, the proposed *Cannabis Act* adopts the same approach to restricting promotion as the *Tobacco Act*, banning *all* promotion of cannabis and cannabis accessories except as specifically authorized. This means that all promotion is prohibited unless it falls within a category that is specifically authorized in the *Cannabis Act*.

Both statutes include essentially the same broad definition of “promotion” and both contain similar authorizations.

For greater certainty, both statutes also set out, non-exhaustively, specific types of promotion that are prohibited. For example, both statutes prohibit testimonials or depicting any person, character or animal, real or fictional, in advertising.

Both Acts also prohibit promotion that could be appealing to young persons and what the *Tobacco Act* calls “lifestyle advertising,” meaning presenting a product or its brand elements “in a manner that associates it or its 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.”

These provisions have been interpreted in the context of the *Tobacco Act*, most notably by the Supreme Court of Canada in a 2007 judgment.

The Supreme Court of Canada read down the prohibition against advertising that is “appealing to young persons,” construing it as applying only to advertising that “could be *particularly* attractive and of interest to young persons, as *distinguished from the general population*” (emphasis added). Therefore, an advertisement is not prohibited merely because it is of general interest, appealing to young people just as it appeals to older people. The prohibition targets advertising that is particularly attractive to, i.e., intended to be appealing to, young persons as opposed to the general population.

With regard to lifestyle advertising, the Supreme Court attempted to strike a balance between the prohibited advertising and “true information and brand-preference advertising,” which is permitted. The court considered that the prohibition is

intended to prevent the use of emotions and images that may induce people to start to use or increase their use of tobacco. According to the Supreme Court, “even advertising that does not appear on its face to connect a lifestyle with a tobacco product is prohibited if it subliminally connects a tobacco product with a lifestyle.”

What’s permitted

In terms of what’s allowed, the *Cannabis Act*, like the *Tobacco Act*, authorizes only very limited promotion. The most significant authorization is for “informational promotion” and “brand-preference promotion,” both narrowly defined in the *Cannabis Act*. However, even such promotion is allowed only in communications addressed and sent to adults identified by name, or in places where young persons are not permitted by law, or when communicated by means of a telecommunication where reasonable means have been taken to ensure it cannot be accessed by young persons. These rules may be further refined by future regulations.

The rules on promotion are complex and open to significant interpretation. We expect the innovative cannabis producers will likely test the boundaries on what is authorized promotion under the *Cannabis Act* and that Health Canada, and eventually our courts, will have to grapple with interpreting and applying these prohibitions. Although it is reasonable to assume the interpretations of the *Tobacco Act* will also apply to the *Cannabis Act* given the strong similarity between the two, the products present different risks and have different social histories. It will be interesting to see whether this leads to a divergence in the approach to interpreting and applying them. In the interim, while the industry and public wait for Health Canada and eventually the courts to provide guidance on what is allowed and what is not, it will not be surprising if we find some producers aggressively promoting their products in the hope of establishing effective brand awareness and public profiles before the regulator steps in.

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