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## Cannabis: Cultivating an IP Culture

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On April 13th, 2017, the government of Canada tabled Bill C-45, the “Cannabis Act”, effectively paving the way for the commercial sale and use of recreational cannabis in Canada. Time to take a deep breath: yes, cannabis will be “legal” for adults in Canada and everyone from your neighbor Sylvia to Pappy Tim has an opinion on if/when/how cannabis should be grown, sold and consumed.

What the public seems to forget however is that cannabis is already legally being sold to Canadians as part of a regulatory regime that provides for its production, cultivation and use for medical purposes. This program is the “green rush” that people have been hearing about, as it essentially created an industry overnight by establishing a system in which Health Canada can grant licenses to applicants allowing them to grow, cultivate and sell cannabis for medical purposes.

Many have applied to become a licensed producer, and comparatively speaking, few have thus far received Health Canada’s seal of approval. In terms of rough numbers: thousands of applications have been filed, hundreds have been rejected or withdrawn, and while there are hundreds more in queue for review, there are currently 58 licenses granted for the cultivation and/or sale of medical cannabis in Canada at the time this article was written.

With the Cannabis Act presently travelling through the different inner workings of the government before becoming actual law, and while provinces are presently debating how they will implement the various sections of the Act that circumscribes recreational cannabis, there’s a frenzy amongst stakeholders as they speculate on what the market will look like once the “green light” is given (licensed producers selling into the current medical market will be grandfathered into the recreational system). Presently, it is unknown how most provinces will regulate the retail sale of cannabis to consumers. Will it continue to be by mail order, like with the present medical system, or will it be by government controlled retail outlets like Ontario has set out to do, time will tell.

Nevertheless, whether you are already one of the chosen few with a license, or whether you’ve just applied to Health Canada, wish to do so soon, or simply wish to provide ancillary services, the challenges of course don’t start and stop with Health Canada. You also need to focus on running your business! And that’s where we have noticed a troubling trend. With all the hype and speculation surrounding the “cannabusiness”, and with all

sorts of opportunists looking to stake their claim at all levels, it is easy to get distracted by the noise and forget that this industry is much like any other and there are certain reflexes that should be top of mind: like protecting your intellectual property!

It seems obvious for an industry that is based on the sale of the same product, that protecting and enforcing one's IP would be front and center in order to differentiate your offerings from those of another. Unfortunately, this has not been the case so far and many have already fallen for some of the common pitfalls that entrap those who are too busy to get their businesses up and running that they forget to take easy precautions that could prevent headaches in the future. In other words, people are eager to build their house but often forget to put the appropriate locks on their doors.

So here is a very quick and dirty guide to some of the common mistakes we have noted in this industry, with the hope that it helps develop some very basic reflexes.

### **IP Myths, Common Mistakes and Basic Commercial Principles**

- Marketing interests and Intellectual Property interests are analogous. **False.**

Actually, Marketing interests sometimes do intellectual property a disservice. The point of marketing is to get the word out on your products and services. For some marketers, the best brand is one that communicates a message to the consumer without having to educate them as to the nature of the offering. This often ends up at odds with basic notions surrounding trademark protection, which benefit marks that are distinctive but not descriptive. When we look at some of the initial branding efforts in this industry, it seems like everyone was smoking the same stock. Many adopted commercial names and logos that evoked imagery and wording involving "the leaf" motif, as well as the words "Mari", "Canna", "Weed", the colour green, etc. Furthermore, many chose product names that were inherently descriptive or common and therefore, hard to trademark. In so doing, the industry may have already rendered these elements ubiquitous, making it easy for other "Canna" type players with similar motifs, product names, or otherwise from entering the market and creating confusion. A strong trademark is one that is distinctive, not descriptive, and it becomes hard to argue that this type of common imagery/nomenclature is exclusive to one source when many have already adopted it.

-Regulatory restrictions reduce the inherent value of Intellectual Property rights such as Trademarks. – **False.**

Ok, the Cannabis Act and the current medical regulatory scheme contain restrictions on how cannabis can be packaged, advertised and displayed to the public. Certain "brand elements" are also restricted or prohibited. Many have interpreted this as making any trademarking efforts moot (what's the point of registering a trademark if I can't use it?). This is of course false. These restrictions mirror similar restrictions already found in the alcohol, tobacco and pharmaceutical sectors. Close your eyes and think of a cigarette brand, an alcohol brand and a pharmaceutical brand. Each of the beforementioned industries are subject to branding and advertising restrictions, and yet, you were likely able to name at least one example of each. Get comfortable with the creases of your advertising

restrictions, protect your distinctive trademarks by registering them and defend your goodwill.

- Given the subject matter, there is no room for innovation in this field since cannabis has been grown, used and sold for hundreds of years, so no one can claim a monopoly to any aspect of this industry. **False.**

This alludes to how patent protection is not an available resource because of how common the techniques that are being used are. This is of course false. New and innovative technologies to grow, cultivate, track, extract and store cannabis more efficiently are front and center to the activities of many ancillary service providers and patent protection is of course very relevant in this regard. As the culture shifts from an illicit activity where participants needed to share information out of necessity, towards private enterprise, the ability to identify and protect innovations via patent registrations or otherwise (industrial designs, trade secrets), will play a key role in many successful competitive commercial strategies.

-And what if I am eventually confronted with something “new”?

Conversely, just because you are presented with something that is “new” to the field of cannabis, this does not mean it does not already exist in another application. In other words, DO YOUR DUE DILIGENCE. Like the gold rush, like the web boom, the green rush has attracted its fair share of snake oil sellers and the last thing you want is to be dragged into litigation because a device, technology, or “unique genetics” that is being offered to you as exclusive, or as “new”, didn’t really end up being what was promised. Is that novel technology that will help you grow better quality yields really new? Does that producer really own the rights to the strains (plant varieties) it is looking to license to you? Things become even more complex as you start to consider international trade in this field. Exciting, yes, but more reason to do your homework.

- You can’t protect the plant. This is both **true and false.**

While patent protection is limited to the genetics of the plant (a cell of the plant can be protected), the plant itself can’t be protected under the current Canadian patent system. Nevertheless, plant varieties are protected under a separate regime known as “Plant Breeder’s Rights” in Canada. Those believing to have developed a new and viable strain of cannabis should seek the help of an IP professional to see if the Plant Breeder’s rights program is suitable for them.

-Any use of cannabis will be legal. **False**

-Is your business model even possible?

Strangely, we have also seen a lot of effort thrown at setting up cannabis related operations that clearly violate the current regulatory regime. There are many restrictions on how cannabis can be sold, in what formats, and how it can be consumed. That new restaurant idea featuring cannabis cocktails is not going to happen under the present program. Talk to a go-to specialist and get a grasp of the regulatory restrictions before investing in any long-term plans.

- Lessons learned: Cross border relations.

There are presently no territorial restrictions applicable to who can own and operate a cannabusiness in Canada. However, that does not mean that your new international partners won't run afoul of the law in their own local jurisdictions. These issues notwithstanding, it is interesting to note that the largest resources crossing the border thus far isn't cannabis itself (you can only import or export cannabis for research or medical purposes) but the import and export of know-how, technology and brands. This of course goes back to the topic of due diligence so when engaging in such cross-border discussions for technology transfers, knowledge sharing, consulting, or any other form of licensing, always make sure it is clear who owns what from an intellectual property perspective, before moving forward. Furthermore, the topic of "exclusivity" should also be top of mind. It is great to have access to know-how, but if this same know-how is also being sold to your competitor, it may change the value of this commercial relationship, like in any other business.

## **Conclusion**

Yes, the above contained some very basic information, but the purpose of the present article was simply to create awareness to those who are curious about this industry about the role that intellectual property will play, and to help develop some reflexes. Great, your "cannabusiness" plan is setup and you're looking for financing. While many parts to this industry present new, never before seen challenges, it is a business like any other. Identify and protect your intellectual property and familiarize yourself with the following terms: trademarks, patents, industrial designs, copyrights and plant breeder's rights. Bottom line, when you're ready to delve into more detail regarding the above, talk to an IP professional that's also specialized in this field.