



# How to Brand a Cannabis Product

by John McKeown

## Choosing a Brand Name

Now that Canada is closing in on legalizing the sale of cannabis products, how can an entrant to this rapidly developing market find an effective brand name? The starting point is to understand the ground rules. Like other controlled substances, the government plans to heavily restrict how marijuana is marketed and promoted.

Finding the right brand name is a difficult exercise since the brand name must work with the business plan and appeal to consumers. Although different people have different lists and factors, some of the key conventional characteristics of a successful brand name include:

- a. Brevity – A brand name should be simple and easy to understand.
- b. Easily remembered – Consumers have limited time and energy to devote to brand names so it is best to choose a brand name that is memorable and distinctive.
- c. Easily readable and pronounceable.
- d. Be meaningful – A brand name should communicate positive product attributes.
- e. Be suggestive of the product class.

- f. Work with a symbol or slogan.
- g. Be legally available and protectable under the *Trade-marks Act*.

It is important to understand the legal framework that will apply to this marketplace. Because of control and regulation, branding a cannabis product is a complicated task.

## Regulation and Control – The Objectives

The Summary of the *Cannabis Act* confirms the government's intention to provide legal access to cannabis and to control and regulate its production, distribution, and sale. The objectives of the Act are to prevent young persons from accessing cannabis, to protect public health and public safety by establishing strict product safety and product quality requirements, and to deter criminal activity by imposing serious criminal penalties for those operating outside the legal framework.

The Act has been passed by Parliament and sent to the Senate. However, the Senate has made 46 amendments to the Act that must go back to Parliament. The government has indicated it will reject 13 of the amendments.

The government has said that it intends to bring the Act into force by July 2018, but it may be more difficult to do this because of the Senate amendments.

To meet this commitment, the final regulations must be published in the Canada Gazette soon. Health Canada has consulted and sought comments from interested parties to expedite the development of the regulations. Draft regulations have been prepared and released to the public for comment. This process continues. Due to the current situation, Health Canada has said that it will not pre-publish the regulations before they appear in the Canada Gazette.

## The Statutory Restrictions

The Act refers to a “brand element,” which includes a brand name, trademark, tradename, distinguishing guise, logo, graphic arrangement, design, or slogan that is reasonably associated with or evokes cannabis or a brand of cannabis. This definition is similar to the definition used relating to the control of tobacco products and the government appears to approach both products in a similar manner.

## Promotional Restrictions

Detailed requirements prohibit any promotion, packaging, and labelling of cannabis that could be appealing to young persons or encourage its consumption. Yet the requirements also specify that consumers must be given access to information with which they can make informed decisions about the consumption of cannabis.

It is prohibited to promote cannabis in the following ways:

- a. by communicating information about its price or distribution;
- b. by doing so in a manner that on reasonable grounds could be believed to be appealing to young persons;
- c. by means of a testimonial or endorsement, however displayed or communicated;
- d. by means of the depiction of a person, character, or animal, whether real or fictional, or
- e. by presenting it or any of its brand elements in a manner that associates it or the 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.

There are limited exceptions to these restrictions. First, a person authorized to produce, sell, or distribute cannabis may promote cannabis by means of informational promotion or brand preference promotion if the promotion is:

- a. in a communication addressed and sent to an individual 18 years of age or older and is identified by name;
- b. in a place where young persons are not permitted by law; or
- c. communicated by means of a telecommunication, where the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person.

Second, a person authorized to sell cannabis may promote it at the point of sale if the promotion indicates only its availability, its price, or its availability and price.

Third, a person may promote cannabis by displaying a brand element of cannabis on a thing that is not cannabis or a cannabis accessory, other than:

- a. a thing that is associated with young persons;
- b. a thing that on reasonable grounds could be believed to be appealing to young persons; or
- c. a thing that is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk, or daring.

It seems that the Senate wants to remove this exception but Parliament has rejected the change.

## Sponsorships

Sponsorships and the naming of specified facilities that suggests a connection with a cannabis supplier is prohibited. It is prohibited to display, refer to, or otherwise use any of the following, directly or indirectly, in a promotion that is used in the sponsorship of a person, entity, event, activity, or facility:

- a. a brand element of cannabis, and
- b. the name of a person that produces, sells, or distributes cannabis.

It is also prohibited to display on a facility, as part of the name of the facility or otherwise, if the facility is used for a sports or cultural event or activity:

- a. a brand element of cannabis, or
- b. the name of a person that produces, sells, or distributes cannabis.

## Packaging and Labelling

Finally, the Act contains prohibitions relating to packaging and labelling. It is prohibited for a person authorized to sell cannabis to sell it in a package or with a label:

- a. if there are reasonable grounds to believe that the package or label could be appealing to young persons;
- b. that sets out a testimonial or endorsement, however displayed or communicated;
- c. that sets out a depiction of a person, character, or animal, whether real or fictional;
- d. that associates the cannabis or one of its brand elements 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; or
- e. that contains any information that is false, misleading or deceptive or that is likely to create an erroneous impression about the characteristics,

value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects, or health risks of the cannabis.

The draft regulations add additional controls concerning packaging and labelling, including these detailed requirements:

- a. a standardized cannabis symbol that would need to appear on every label, including specific requirements regarding its size, placement, and appearance;
- b. mandatory health warning messages that would need to appear on every label, including specific requirements regarding their size, placement, and appearance. A warning (consisting of a primary and secondary message) would need to appear on every label, and the different warnings would need to be rotated on package labels; and
- c. information regarding the THC and CBD content, and other information required on each label, including specific requirements regarding the size, placement, and appearance of this information.

The proposed regulations also implement a recommendation to require plain packaging of cannabis products and set out strict requirements related to the use of branding, logos, and colours. Specifically, the following restrictions are included:

- a. only one other brand element (besides the brand name) could be displayed. This element could include, for example, a slogan or a logo. If it is a text element, the font must be no larger than the font of the health warning message, and must be a single, uniform colour. If the brand element is a graphic, image, or logo, it would have to be no larger than the standardized cannabis symbol;
- b. it would be prohibited to display any other image or graphic;
- c. label and package backgrounds would to be a single, uniform colour (inside and outside);
- d. it would be prohibited to use any fluorescent or metallic colours;
- e. colours must contrast with the colours of the standardized cannabis symbol and the background of the health warning messages;
- f. labels and packaging could not have any coating (e.g., could not be glossy),

embossing (raised or recessed relief images), texture, foil, cut-outs, or peel-away labels;

- g. any overwrap must be clear; and
- h. it would be prohibited to include any insert in a package.

### The Impact of the Restrictions

Based on the current statutory restrictions, any proposed brand name cannot:

- a. appeal to young persons;
- b. consist of a testimonial or endorsement;
- c. depict a person, character, or animal, whether real or fictional;
- d. associate the cannabis or one of its brand elements with, or evoke 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; or
- e. contain any information that is false, misleading, or deceptive or that is likely to create an erroneous impression about the characteristics, value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects, or health risks of the cannabis.

In addition, because of the proposed plain packaging constraints, the proposed brand name must work when presented in a relatively small font-size and in a single uniform colour. While a brand element may consist of a graphic, image, or logo, careful consideration should be given to the size constraints that might make it difficult to bring this type of brand name to the attention of potential consumers.

### Conclusion

When consideration is given to the traditional desirable brand name characteristics it should be possible to choose a brand name that is simple and easy to understand, memorable, easily readable and pronounceable, and suggestive of the product class.

It may be more difficult to find an acceptable brand name that communicates positive product attributes, but it is still possible if the brand name does not create an erroneous impression about such attributes or evoke a way of life such as one that includes glamour, recreation, excitement, vitality, risk, or daring.

The plain packaging constraints will make it more difficult to develop the distinctiveness of the brand name but it does not preclude the ability to do so.

The final desirable characteristic is that the brand name be legally available and protectable under the *Trade-marks Act*. This hurdle can be overcome by carrying out trademark searches before using the brand name, working with a trademark lawyer who understands the statutory constraints, and filing a trademark application.

### Author Bio

**John McKeown** is a counsel at Goldman Sloan Nash & Haber LLP. With more than 25 years of experience providing advocacy and advice concerning intellectual property and related marketing matters, he is certified by the Law Society of Upper Canada as a specialist in Intellectual Property Law (Trade Marks/Copyright).

John is the author of [Brand Management in Canadian Law, 4th Edition](#). This book is the only publication in Canada that brings together the legal and business issues that you need to understand when helping clients reach their business objectives through branding. He's also the author of [Fox on Canadian Law of Copyright and Industrial Design, 4th Edition](#), a work which has been extensively referred to by both the Supreme Court of Canada and the Federal Court of Appeal as an authoritative source.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer

*\* Since the submission of this article the Government has prevailed in its dispute with the Senate but has announced the Act will be brought into force on October 17, 2018.*

