

'It's risky to do any promotion whatsoever'

# Companies need to be aware of advertising restrictions

BY DALE SMITH  
For Law Times

The rules around advertising and promotion of cannabis are restrictive; however, lawyers say there is room within federal regulations to be creative if their clients are willing to assume a little risk.

The Cannabis Act states that it is prohibited to promote cannabis, a cannabis accessory or any service related to cannabis, with a list of exceptions. Among the prohibitions are using any brand elements that evoke a positive or negative association with a "way of life," such as glamour, recreation, risk, excitement or vitality.

Sara Zborovski, a partner at Norton Rose Fulbright Canada LLP in Toronto, says it's very difficult to interpret what the "way of life" prohibition is supposed to mean.

"What if someone wants to put their cannabis brand element on a skateboard or a basketball or a yoyo?" asks Zborovski. "There is a slippery slope. Where do you go from being safe to being not safe?"

Zborovski says the cannabis industry is in its infancy and lawyers have a situation where there are consumers who know nothing about the cannabis brands and brand owners who have invested significantly in getting licensed and producing good, safe, quality products.

"How do you play within the super restrictive promotion guidelines and educate consumers about your safe, quality, amazing product and everything that you offer?" asks Zborovski.

"That's why this is important to lawyers."

Lawyers need to pay attention to the prohibitions because the penalties associated with im-

proper advertising can be levied against non-cannabis companies, says Matt Maurer, a partner and vice chairman of the cannabis law group at Torkin Manes LLP in Toronto.

"The way [the act] is worded, it is possible that if you're a television company or a media company and you run something that's improper, you could end up paying for it," says Maurer. "Lawyers should have an awareness [of the prohibitions], because there could be an issue."

Maurer says any cannabis promotion that is geared for business-to-business purposes is exempt from all of the restrictions in the act and that cannabis-related businesses can also send certain advertising by direct mail as long as it's directly addressed to a person that is over the legal age in that province. He says cannabis-related businesses can also use company websites to market products, as long as the site is properly designed to ensure that minors are not accessing it.

Health Canada put out a letter on March 8 to licenced producers that expressed concerns that the steps taken to restrict access to websites can easily be circumvented by youth.

Alice Tseng, a partner at Smart & Biggar in Toronto, says that the one provision of note amid the default prohibition on all advertising in s. 17 of the act is the brand element exception.

This exception states that a brand element can be displayed to promote cannabis, accessories or services and that informational advertising and brand preference promotion can happen in environments where minors are barred.

"The provision says that you can put a brand element on a 'thing' and the thing can't be



Alice Tseng says that while there are clear prohibitions against sponsorship of events in the Cannabis Act, there could be room for certain kinds of co-operation with event promoters.

something that is appealing to kids or associated with children," says Tseng.

"The intention is you can clearly put a brand element on a T-shirt or a cap. You clearly cannot put it on a child's T-shirt."

Tseng says the provision is strangely worded if the intent is to keep the "thing" to just merchandise that can be sold.

She says the word "thing" is not defined in the [Cannabis] Act or the regulations, and the use of "thing" is fairly broad and can include contest entries in certain provisions.

"That's where I think the biggest wiggle room is," says Tseng.

She says that while there are clear prohibitions against sponsorship of events in the act, there could be room for certain kinds of co-operation with event promoters, but she cautions that there are prohibitions in the legislation about promoting the "lifestyle" of cannabis.

Zborovski says there is uncertainty in terms of how the advertising prohibitions in the act are being enforced. Tseng adds that Health Canada has not been helpful in providing guidance because it will only repeat

what's in the legislation without explaining it.

Zborovski says it's incredibly difficult for lawyers to advise industry because they don't know Health Canada's limits at this point.

"We don't have great insight into where Health Canada is coming down hard," says Zborovski.

James Wishart, a partner at Dentons Canada LLP in Ottawa, says that Health Canada hasn't prosecuted anyone yet for contravening the advertising prohibitions in the act and hasn't aggressively stepped up against any particular advertising or sponsorship, with the exception of sporting and rock concert events.

"When we're trying to interpret the Cannabis Act, we go back to the Tobacco Act, from which many of the provisions were taken, close to word for word," says Wishart. "That was as a result of a very hard line being taken by Health Canada against tobacco companies over a number of years. We haven't seen the court cases or aggressive push against cannabis companies yet."

Wishart adds that while Health Canada has used webinars to give direction to industry, the feedback has been that everything is all about context.

"The context is that you can't put a billboard in an airport because that's general public advertising," says Wishart. "Within the scope of advertising that's not to the general public, you have the classic bathroom advertisements in bars and those are being used."

Zborovski says the best thing lawyers can do for industry at this stage is to be aware of the prohibitions contained in the act and to look to see what other cannabis businesses are doing and asking clients to do the same.

"This is all about risk management right now," says Zborovski.

"It's risky to do any promotion whatsoever, full stop, so let's find out where the client is comfortable on the risk continuum, and as a lawyer, I help inform that decision based on what I see in the industry based on what other players are doing."

Maurer says that if a company is making a representation that is not likely to influence behaviour — such as putting a brand out there without any statement — it gets the name out there but is not selling a product. This can include things such as a safe driving campaign.

"It is heavily restricted," says Maurer.

"Smart companies are finding ways to play within the grey area. If you're utilizing a safe driving campaign, it makes it hard for the government to crack down on that."

Even though the rules in Ontario prohibit licenced producers from operating retail locations, Maurer notes that there is a proposed Tweed-branded store planning to open up in London, Ont., thanks to a licensing arrangement.

Wishart says that this kind of licensing is expensive, but if it's one of the only ways for cannabis companies to promote their brand, then they will be willing to spend the money.

"There's nothing prohibiting [licenced producers] from partnering with retailers to promote their brands inside the store," Maurer says.

"In theory, once you're inside the store, the rules are even more relaxed because a cannabis store in Ontario is not allowed to have minors inside, so under the federal legislation, it triggers one of the exceptions." **LT**