



Psychedelics – The New Trademark Frontier

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It has been only about 5 years since the start of Canada's green rush and already there are clear signs of the impending psychedelic surge. Psychedelics in many ways are the new cannabis, having grabbed the attention of investors in both the medical and recreational arenas. Accordingly, research into potential medical uses of psychedelics is receiving increased attention. Studies are revealing that naturally occurring and synthetic psychedelic compounds show promise in treating psychiatric and neurological conditions including depression and Post-Traumatic Stress Disorder. Current estimates predict the industry will grow at double-digit annual rates (between now and 2027). Just as was the case with the cannabis craze, trademark practitioners expect that we are nearing another blitz of trademark filings but this time in association with a variety of goods and services including medical and recreational mushrooms, psilocybin mushrooms, and psilocybin infused food and beverages: GROOVY.

Achieving Brand Success in an Emerging Market

Success in an emerging market such as psychedelics rests on many factors, including product strength, brand distinctiveness, customer loyalty, and rights to exclusive use of trademarks and trade names. Those who wish to come out ahead in this new psychedelic frontier will certainly need the best and sharpest brand protection tools; properly and timely filed trademark applications being chief among them. Early trademark filers benefit from a less crowded register, offering greater chances of securing a registration.

Historical data related to Canada's emerging cannabis market is likely to provide a glimpse into what is to come. Cannabis-related goods and services appeared in only two trademarks on the Canadian Trademark Register prior to the substance's legalization for medical use in 2001. Since then, and by the time recreational cannabis was legalized, a significant increase in trademark filings in Canada occurred.

The Road to Legalization and what it means for Trademark owners

While there is no clear timeline on the future of legal medical or recreational use of psychedelics in Canada, history shows that it is better to file an application sooner than later, particularly in view of the backlog with CIPO, which is taking approximately 34 months for first examination.

The Impending Rainbow Rush

Psychedelics-related trademark applications seem to be entering the early stages of what we expect may be an eventual "rainbow rush". Though it's still very early days, a search in the Trademarks Register for psychedelic-related terms already turns up two registered marks and over 60 applications, a clear sign that more and more investors are seeking trademark protection in Canada.



Canadian trademark registration offers applicants in the psychedelics industry several potential advantages. Chief among them – good-faith intent to use the mark is enough, even when there is no regulatory scheme in place. Meeting Canadian requirements for trademark registration and maintenance may pose different challenges, but skilled counsel with knowledge of the industry can help devise a tactful and thoughtful filing strategy to avoid objections, opposition, or an expungement proceeding in a few years' time.

Will my Application for a Psychedelic-Related Mark Pass Muster?

Hurdles encountered during the examination process are almost always a risk in trademark prosecution. In fact, regardless of the goods and services associated with the trademark, applications face technical and/or substantive objections at least 65% of the time. In the case of an application for psychedelics, objections from an examiner that are reasonably foreseeable might include:

1. Trademarks that represent the name of a product or that consist of a term commonly used in the industry are typically held to be unregistrable on the basis that they lack inherent distinctiveness i.e., they are so common that they are unable to actually identify the single source of the goods or services. Filings during the green rush were often met with a distinctiveness objection as applicants felt compelled to include common industry terms in their trademarks being considered for registration. Applicants for psychedelic-related trademarks can certainly learn from this historical example and avoid this pitfall by selecting unique, suggestive, or ideally coined terms for their psychedelic products and services.
2. As the number of filings for psychedelic-related marks increase it will inevitably become more and more difficult to originate marks that are not confusing with existing marks in use in Canada or on the register. A properly executed trademark search completed by an experienced trademark agent at the early branding stages can often help avoid confusion citations and avoid having to re-brand after launch.
3. Applicants should also be aware that there is likely to be stringent regulatory labelling requirements that will impact which trademarks can be used in Canada. While CIPO will not examine or refuse applications based on these criteria, it is prudent to check that all potential marks of interest are cleared from both a trademark perspective and on the basis of regulatory requirements.

As mentioned, trademark registration in Canada can take several years to issue. For applicants in the psychedelics field, these wait times may be a source of frustration but, on the bright side, this brings at least one important advantage. Increasing acceptance of psychedelics in society and in political circles does not guarantee a timeline for legalization. If a trademark is not used for three years since registration, it may be expunged at the end of that three-year period. The current long processing times give applicants extra breathing room to wait out the legalization debate while maintaining a priority right to their brand.

We Passed Examination! Now what?

Once an application has passed the examination and been advertised, an interested third party could oppose. During the two-month period, an opponent can select from various statutory grounds of opposition when seeking to interfere with registration in this way. A successful opposition prevents a trademark application from issuing a registration, and as such can be a very effective defensive or offensive strategy for another player in the market. There are several grounds of opposition that can be asserted. Oppositions are often costly to defend and can delay or block the registration of a trademark.

Oppositions can be avoided if a comprehensive search is conducted prior to filing. Because Canada recognizes common law rights, a search of both the Register and marketplace is highly recommended.

Avoiding a “Dead Wood” Designation

Once registration is achieved, the new-found owner may not be fully out of dodge. Section 45 of the *Trademarks Act* permits interested parties to seek cancellation of a registered trademark once it has been on the register for 3 years. These



summary cancellation proceedings require that the registered owner furnish evidence of use of the trademark in accordance with section 4 of the *Act* to be maintained. This means that an owner must prove that they have sold the goods in direct association with the trademark in the normal course of trade in Canada.

In the context of psychedelics, it could take many more than 3 years before federal legalization for medical use and conceivably more than that for recreational use. This could mean that having finally achieved registration, a trademark registered in association with psychedelic-related goods and services is vulnerable to expungement for non-use. An owner's mark could be wiped off the register before they even get a chance to use it.

Notably, registrations can survive a section 45 challenge for non-use if the owner proves that special circumstances prevented them from using the trademark. Authorities use a three-factor test to determine if this exception applies. Firstly, the difficulty of defending non-use increases with its duration. Secondly, the owner must have a serious intention to resume use. Thirdly, the reasons for non-use must have been beyond the owner's control, that is "unusual, uncommon or exceptional."^[1] Members of the psychedelics market may find this criterion difficult to satisfy. The broad prohibitions of the Controlled Substances Act apply equally across Canada^[2], have been in force for many years and are well known. To overcome such an argument, trademark owners in the past provided authorities with a consistent record of their efforts to obtain regulatory approval.^[3]

The long delays at examination may prove to be helpful for the applicants of psychedelic marks. For marks which issue for which there is no use because of delays with the legalization of psychedelics, re-filing is available and can provide an additional layer of trademark rights.

Takeaways

There are few downsides to taking early steps to conduct preclearance searches and apply to register for trademarks of interest in respect to psychedelic-related goods and services, as soon as possible, particularly since in Canada the registration process may take several years. Early filers are more likely to obtain broader protection and meet legalization with a full suite of IP enforcement tools at their disposal to fend off imitators and competitors joining the rush. Opposition and non-use cancellation remain a threat to all psychedelics-related applications and registrations, owing to the current illegality of most relevant goods and services. Retaining IP counsel when entering the fray is imperative to obtain strategic advice on how best to obtain IP protection

[1] *Bereskin & Parr v. Bartlett* (2008), 70 C.P.R. (4th) 469 (T.M.O.B.):

[2] *Gowling WLG (Canada) LLP v. Canadian Rockport Homes International Incorporated* 2019 TMOB 33

[3] *Oyen Wiggs Green & Mutala LLP v. Rath*, 2010 TMOB 034

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