

CANNABIS: REGULATORY AND IP LANDSCAPE FOR FOOD AND AGRIBUSINESS IN CANADA—A LEGAL PERSPECTIVE

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I. INTRODUCTION

The anticipated legalization of recreational cannabis in Canada will likely create opportunities and challenges for many areas, but especially the food and agribusiness sectors. Legalization will increase innovation, including the development of new plant genetics, cultivation methods, agricultural inputs, processing techniques, and food products.

This Essay highlights the key regulatory issues to cannabis legalization in Canada from a food and agribusiness perspective, and contrasts the intellectual property landscape in Canada with the United States.¹ Key methods of protecting

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1. This Essay is a general discussion of certain Canadian legal issues and related Canadian developments and should not be relied upon as legal advice. If you require Canadian legal advice, the authors would be pleased to discuss the issues in this Essay with you, in the

cannabis-related innovations in Canada are considered, including patents, plant breeders' rights, industrial design, and trademarks.

II. REGULATORY LANDSCAPE IN CANADA

A. Recreational Use

In April 2017, the Government of Canada introduced draft legislation to legalize the production, distribution, and sale of cannabis for recreational use within Canada.² Coined the Cannabis Act, the targeted enactment date is July 1, 2018, with regulation of edibles to follow one year later.³ If enacted, this will make Canada the first G7 country to legalize cannabis for recreational use nationwide.⁴

A proposed regulatory framework for the Cannabis Act was released for public consultation on November 21, 2017.⁵ However, the regulations themselves have not yet been published and the Cannabis Act may be subject to further amendment—regulatory uncertainty remains. Until the Cannabis Act comes into force, recreational use of cannabis remains illegal in Canada.⁶

B. Medical Use

Medical marijuana is currently regulated in Canada under the Access to Cannabis for Medical Purposes Regulations (ACMPR).⁷ ACMPR provides legal access to fresh and dried cannabis and cannabis oil for consumers with a document from their health care provider.⁸ Medical marijuana may only be produced by a Licensed

context of your particular circumstances. The authors are not U.S. attorneys and cannot provide advice on U.S. law.

2. *Cannabis Legalization*, ONTARIO, <https://perma.cc/M37N-M4ST> (last updated Apr. 20, 2018).

3. Recent updates from the federal government suggest legalization may not occur by July 1, 2018, but will occur in the summer of 2019. *Trudeau Seems to Back Away from July 1 Deadline for Legal Cannabis*, MONTREAL GAZETTE (Dec. 20, 2017, 7:53 AM), <https://perma.cc/R5VT-ZYRN>; see also Patrick Cain, *Marijuana Edibles Won't Be Sold until July 2019*, GLOBAL NEWS (Oct. 4, 2017, 4:03 PM), <https://perma.cc/6BV4-AR33>.

4. Ashifa Kassam, *Canada Introduces Long-Awaited Legislation to Fully Legalise Marijuana*, GUARDIAN (Apr. 13, 2017, 6:13 PM), <https://perma.cc/HCS3-CH6P>.

5. Press Release, Gov't of Can., Health Canada Launches Public Consultation on Proposed Approach to the Regulation of Cannabis (Nov. 21, 2017), <https://perma.cc/FF69-FEZR>.

6. Eileen McMahon et al., *Breaking Ground: Canada's Cannabis Framework*, TORYS (Apr. 19, 2017), <https://perma.cc/X92S-KCVW> [hereinafter McMahon et al., *Breaking Ground*].

7. Gov't of Can., *Understanding the New Access to Cannabis for Medical Purposes Regulations*, HEALTH CAN. (Aug. 2016), <https://perma.cc/Q9TM-9C97>.

8. *Id.*

Producer (LP), which has received a license from the Canadian government, or may be grown in specific quantities by an authorized individual (i.e., the medical consumer) or their designate.⁹

In view of the expected demand relating to recreational use, in addition to medical use, there is a race to ramp up production by July 1, 2018, with shortages expected.¹⁰ There are currently 91 LPs in Canada,¹¹ with many more in the queue, including approximately 200 cannabis companies in the late stages of the approval process.¹² Many with existing licenses are expanding their facilities in anticipation of increased demand.¹³

Once the Cannabis Act is in place, cannabis for medical use will continue to be regulated under ACMPR, and LPs under ACMPR will continue to have the right to produce, distribute, and sell cannabis for medical purposes. Additionally, these LPs will also have “rights to produce, distribute and sell cannabis for recreational purposes,” giving them a significant first mover advantage.¹⁴

III. INTELLECTUAL PROPERTY LANDSCAPE IN CANADA

With the anticipated growth in the cannabis market, increased research and development into new cannabis strains and methods of production, as well as ancillary products and agricultural inputs, are anticipated. Also expected is an increased focus on brand differentiation¹⁵ as players jockey for market share, in addition to an increased consolidation of players¹⁶ and an increased focus on governance.¹⁷

In this section, we compare the intellectual property landscape for cannabis

9. *Id.*

10. See Daniel Lablanc, *Ottawa to More Than Triple Cannabis to Boost Production*, GLOBE & MAIL (Dec. 19, 2017), <https://perma.cc/K9Z3-PNBC>.

11. Gov't of Can., *Authorized Licensed Producers of Cannabis for Medical Purpose*, LICENSED PRODUCERS, <https://perma.cc/YF36-YWF2> (last modified Mar. 16, 2018).

12. Lablanc, *supra* note 10.

13. See Lift Staff, *Expansion Roundup: How Canada's LPs Keep Growing*, LIFT NEWS (May 23, 2017), <https://perma.cc/US44-XET4>.

14. McMahan et al., *Breaking Ground*, *supra* note 6.

15. Matt Lamers, *Canada's Top Medical Cannabis Brand Tries Fashionable Marketing Idea*, MARIJUANA BUS. DAILY (Mar. 5, 2018), <https://perma.cc/9ET7-JZ96>.

16. Peter Armstrong, *Merger Madness: Canada's Marijuana Industry Enters Consolidation Phase*, CBC NEWS (Nov. 27, 2017, 5:00 AM), <https://perma.cc/Z3Z3-6DG8>; David Hodges, *87% of Canadian Cannabis Producers Say Industry Consolidation is Inevitable: Survey*, BNN (Nov. 20, 2017), <https://perma.cc/N3TT-CX84>.

17. Cheryl V. Reicin & Shane Thomas, *Time to Grow Up: Corporate Governance for the Cannabis Sector*, LIFT NEWS (Nov. 30, 2017), <https://perma.cc/HKX8-YUKA>.

in Canada with the U.S.¹⁸ For convenience, the following table provides the corresponding Canadian legislation for utility patents, plant patents, plant variety protection, design patents, and trademarks in the U.S., which are described in turn below.

TABLE 1.

United States (Type of protection)	Canada (Corresponding Legislation)
Utility patents	<i>Patent Act</i>
Plant patents	N/A
Plant variety protection	<i>Plant Breeders' Rights Act</i>
Design patents	<i>Industrial Design Act</i>
Trademarks	<i>Trade-marks Act</i>

A. Patents

In Canada, patents may be obtained for inventions which are new, useful, non-obvious, and which meet certain other criteria.¹⁹ A patent gives the owner the right to stop others from making, using, or selling the invention for a period of twenty years from the filing date of the application.²⁰ A patent in Canada is similar to a utility patent in the U.S.²¹

Canada is seeing a general increase in cannabis-related patent filings, although the trend is more pronounced in the U.S. For example, figure 1 illustrates the increase in published U.S. and Canadian patent applications with the keyword cannabis or cannabaceae in the claims.

18. Comments regarding the U.S. intellectual property landscape are made only for the purpose of describing the Canadian intellectual property landscape to a U.S. audience. The authors are not U.S. lawyers and cannot give U.S. legal advice.

19. Patent Act, R.S.C. 1985, c. P-4, s. 2, 28(3) (Can.).

20. Patent Act, R.S.C. 1985, c. P-4, s. 44 (Can.).

21. See 35 U.S.C. § 101 (2012).

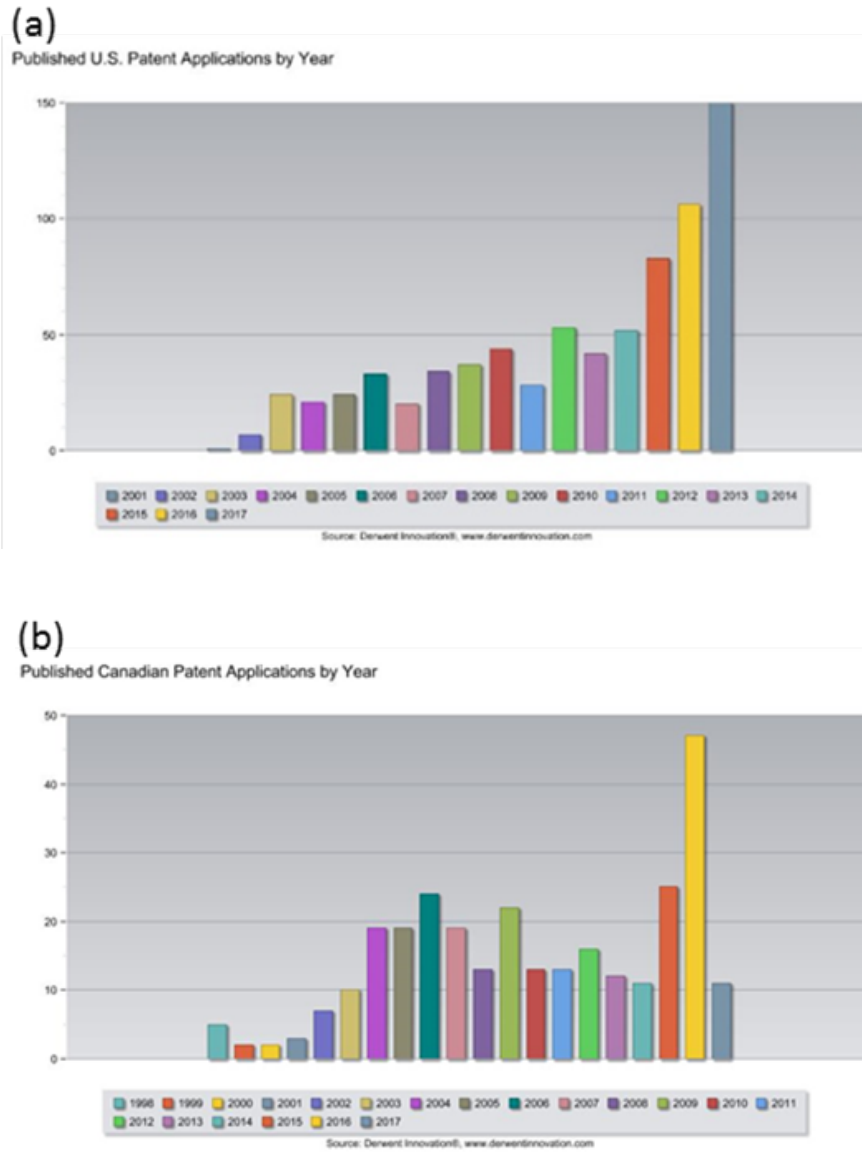


FIGURE 1. Patent publishing trends

22. Derwent Innovation, *Patent Research, Intelligence and Services*, CLARIVATE ANALYTICS, <https://perma.cc/2RG8-K3BC> (archived Apr. 26, 2018) (search “claims”; then

Although most cannabis patents and patent applications are in the pharmaceutical sector,²³ likely due to the broader legality of medical marijuana, there is a small but growing number in the agricultural sector.²⁴ While this is still a nascent industry, we expect to see increased innovation and patent protection as companies stake their position in this emerging market. The United States Patent and Trademark Office (USPTO) has granted utility patents for cannabis-related agricultural inventions including methods of growing cannabis, inputs such as fertilizers and fungicides, processing methods, and cannabis-infused edible products, despite the illegality of marijuana at the federal level.²⁵

Similar inventions may be patented in Canada, with some nuances. For example, it is currently not possible to patent higher life forms, such as plants and seeds, in Canada.²⁶ It is possible, however, to claim the cells and genes of a plant.²⁷ The Supreme Court of Canada has signaled that patents to the cells and genes of a plant will be enforced in a similar manner to patents for the plant itself. In *Monsanto Canada, Inc. v. Schmeiser*, the Court found that Mr. Schmeiser had infringed Monsanto's patent, which claimed cells and genes,²⁸ by growing plants.²⁹ The majority stated:

Provided the patented invention is a significant aspect of the defendant's activity, the defendant will be held to have "used" the invention and violated the patent. If Mr. Schmeiser's activities with Roundup Ready Canola plants amounted to use interfering with Monsanto's full enjoyment of their monopoly on the gene and cell, those activities infringed the patent. Infringement does not require use of the gene or cell in isolation.³⁰

search "cannabis"). Figure 1 includes two figures; figure 1(a) denotes published U.S. patent applications by year, and figure 1(b) denotes published Canadian patent applications by year. Each figure excludes applications filed July 2016 to present due to the eighteen-month confidentiality period.

23. Pharmaceutical patents include cannabis compositions, drug formulations, methods of preparation, and methods of treating diseases.

24. See Craig Nard, *Viewpoint: Marijuana Patents Could Plant the Seeds of Future Lawsuits*, BOS. BUS. J. (July 5, 2017, 7:15 AM), <https://perma.cc/6UE5-MY3X>.

25. Tyler Koslow, *U.S. Patent Office Continues Issuing Cannabis Patents Despite Federal Law*, MERRY JANE (July 24, 2017), <https://perma.cc/ZVW9-966Q>; Lisa Shuchman, *Roll Another Pot Patent (For the Road)*, CORP. COUNS. (Apr. 1, 2015, 3:13 PM), <https://perma.cc/RH5A-FAG6>.

26. *Harvard Coll. v. Canada*, [2002] 4 S.C.R. 45 (Can.).

27. See *Monsanto Can., Inc. v. Schmeiser* [2004] 1 S.C.R. 902 (Can.); *Glyphosate-Resistant Plants*, Can. Patent No. 1,313,830 (filed Aug. 6, 1986).

28. '830 Patent.

29. See generally *Schmeiser*, [2004] 1 S.C.R. 902.

30. *Id.*

Accordingly, many applicants are protecting their elite crop genetics by pursuing claims to plant cells and genes.³¹ On the pharmaceutical side, while the Canadian Patent Office is not currently accepting claims to methods of medical treatment, it will accept use claims.³² Accordingly, it is possible to obtain similar patent protection in Canada by amending the claims of U.S. patents.

B. Plant Patents

Cannabis may be reproduced by either sexual or asexual reproduction.³³ In the U.S., cannabis may be protected under either the plant patent regime, which covers asexually propagated plants (excluding tubers)³⁴ or the Plant Variety Protection Act (PVP), which covers sexually propagated plants and tubers.³⁵ The first plant patent for cannabis was issued by the USPTO on December 20, 2016 for PP27,475, entitled “Cannabis plant named *Ecuadorian Sativa*.”³⁶

Canada does not have an equivalent to the U.S. plant patent. In Canada, all species of plants—excluding algae, fungi, and bacteria—would be covered under the Plant Breeders’ Rights Act (PBRA), assuming they otherwise satisfied the necessary criteria for protection.³⁷ Accordingly, Canada has two options for protecting cannabis varieties, the Patent Act and the PBRA, while the U.S. potentially has three options, utility patents, plant patents, and plant variety protection.

C. Plant Breeders’ Rights

In Canada, it is possible to protect cannabis plant varieties under PBRA, which is similar to the U.S. PVP. To obtain Plant Breeders’ Rights (PBR) in Canada, the applicant must demonstrate that the variety is new, distinct, uniform, and stable.³⁸

The exclusive rights afforded by a registered PBR include: (i) producing and reproducing the protected plant variety; (ii) selling the propagating material of the

31. Stephanie Curcio, *Protecting Cannabis Strains in Canada: A Growing Concern*, LEXOLOGY (Oct. 26, 2017), <https://perma.cc/76J7-HNMS>.

32. Suzanne Sjovold, *Examination of Methods of Medical Use Claims at the Canadian Intellectual Property Office*, PARLEE MCLAWS (Apr. 2015), <https://perma.cc/G4L3-247T>.

33. *Cannabis Breeding and Sexual Reproduction*, GREEN CULTURED, <https://perma.cc/7RY7-Y5SX> (archived Mar. 25, 2018).

34. 35 U.S.C. § 161 (2012).

35. 7 U.S.C. § 2401 (2012).

36. Nicole Grimm et al., *Biotech Institute’s Growing Patent Portfolio—U.S. Patent No. 9,095,554 and the Path Forward*, PATENT DOCS (Nov. 16, 2017), <https://perma.cc/GBT6-573H>.

37. CAN. FOOD INSPECTION AGENCY, *Guide to Plant Breeders’ Rights in Canada*, PLANT BREEDERS’ RIGHTS, <https://perma.cc/K327-T7GM> (last modified July 13, 2015).

38. *Id.*

variety; and (iii) exporting or importing propagating material of the plant variety.³⁹ The term of protection is twenty years for most plant species, such as cannabis, calculated from the day on which the certificate of PBR is issued.⁴⁰ Since there are a number of exceptions to the rights afforded by the PBRA,⁴¹ the scope of protection is considered less robust than protection under the Canadian Patent Act (i.e., utility patents).⁴²

There is currently one pending PBRA application for marijuana in Canada.⁴³ There are also issued and pending PBRA certificates for hemp.⁴⁴ No PVP certificates have been issued for new cannabis strains in the U.S.⁴⁵

D. Industrial Design

Under the Canadian Industrial Design Act, it is possible to protect original visual features of an object (i.e., shape, configuration, pattern or ornament, or any combination of these features, applied to a finished article).⁴⁶ The term of protection for an industrial design is ten years from issue.⁴⁷ Industrial designs in Canada are similar to design patents in the U.S.; both may be used to protect the visual appearance of ancillary products in the agricultural sector, such as grow light apparatuses, hydroponic systems, or planting trays.⁴⁸

Our search uncovered only one registered industrial design patent in the U.S. that uses the keyword “cannabis” in the title field: patent D798,739, entitled “Can-

39. *Id.*

40. *Id.*

41. Plant Breeders’ Rights Act, S.C. 1990, c. 20 s. 5.3(1-2) (Can.). In Canada, the rights of the holder do not apply to any act performed for private and non-commercial purposes, experimental purposes, or plant breeding. In addition, the PBRA now officially recognizes a limited “farmer’s privilege” (i.e., a farmer’s right to harvest material of a plant variety grown by the farmer, on the farmer’s holdings, and use the material on those holdings for the sole purpose of propagation of the plant variety).

42. For a comparison of enforcement of U.S. utility patents, plant patents, and plant variety protection certificates, see Caitlin M. Andersen, *A Blessing and a Curse: Plant Variety Protection Act Enforcement*, MCKEE, VOORHEES & SEASE, PLC (Mar. 30, 2017), <https://perma.cc/V4WD-HH6A>.

43. Curcio, *supra* note 31.

44. *Id.*

45. Brian J. Amos & Charles R. Macedo, *Protecting Your Cannabis Plant IP*, CANNABIS INDUSTRIAL J. (Nov. 29, 2017), <https://perma.cc/EP74-7Q5F>.

46. Industrial Design Act, R.S.C. 1985, c. I-9 s. 2 (Can.).

47. Industrial Design Act, R.S.C. 1985, c. I-9 s. 10(1) (Can.).

48. 35 U.S.C. §101 (2012); Industrial Design Act, R.S.C. 1985, c. I-9 s. 2 (Can.).

nabis Storing Container with Individual Tear Off Lids,” which was issued on October 3, 2017.⁴⁹ However, there are numerous registered industrial designs that may be related to the cannabis industry, such as grow lights and hydroponic systems.⁵⁰

There are no industrial designs on the Canadian Industrial Designs Database with the term “cannabis” in the title or product description fields;⁵¹ however, there are several designs which may be cannabis-related, such as grow light apparatuses, hydroponic systems, or planting trays.⁵²

E. Trademarks

Trademarks are used to distinguish the goods or services of one person or organization from those of others and may include word marks and logos.⁵³ The USPTO does not currently allow the registration of federal trademarks with respect to cannabis.⁵⁴ Industry players have attempted other means to protect their trademarks, such as obtaining federal trademark protection for products which are not related to marijuana, using state registration of trademarks, or relying upon the more limited protection of common law trademarks.⁵⁵

The situation is much different in Canada, where federal trademarks can be obtained in relation to cannabis, cannabis accessories, and cannabis services.⁵⁶ There has been a dramatic increase in cannabis-related trademark filings as Canada

49. U.S. Patent No. D798,739 (filed Apr. 7, 2016).

50. See U.S. Patent No. D809,702 (filed May 31, 2016) (issued Feb. 6, 2018); U.S. Patent No. 9,848,545 (filed Oct. 7, 2016) (issued Dec. 26, 2017).

51. Gov't of Can., *Search Results*, INTELL. PROP. DATABASES, <https://perma.cc/PN5N-K4NF> (last updated Mar. 22, 2018).

52. *Id.*

53. U.S. Patent & Trademark Office, *Trademark, Patent, or Copyright?*, TRADEMARK BASICS, <https://perma.cc/6R2Z-UZE3> (archived Mar. 25, 2018).

54. See Nicholas J. Krob, *TTAB Reiterates Refusal to Register Marks for Marijuana Products*, MCKEE, VOORHEES & SEASE, PLC (Nov. 4, 2016), <https://perma.cc/NXV9-KX3M>.

55. Shuchman, *supra* note 25.

56. See Rowand Intellectual Prop. Grp., *The Trademark “Green Rush” is on in Canada*, OUR BLOG (Mar. 15, 2017), <https://perma.cc/HE7T-YVD3/>.

moves towards legalization of the recreational market.⁵⁷ Numerous cannabis-related trademarks have already been registered.⁵⁸ It is expected there will be an increased focus on brand differentiation as industry players jockey for a position in this emerging market.

However, the proposed Cannabis Act will introduce a number of tobacco-like restrictions on the marketing of cannabis.⁵⁹ As currently drafted, the Cannabis Act prohibits the promotion of cannabis or cannabis accessories if the package or label: (a) could be appealing to a young person; (b) sets out a testimonial or endorsement; (c) depicts a person, character or animal, whether real or fictional; (d) evokes certain lifestyles such as glamour; or (e) is misleading or deceptive.⁶⁰

The proposed regulatory framework for the Cannabis Act suggests the use of color, graphics, and font size on the package and label will be strictly regulated.⁶¹ It also instructs that text and graphics in brand elements cannot be appealing to youth.⁶² In March of 2018, Health Canada released a summary of comments received during the public consultation period for the proposed regulatory framework, which included additional information regarding the proposed packaging and labeling requirements.⁶³

57. See *id.* “There are nearly 2000 trademarks listed on the Canadian trademarks register with goods or services containing the word ‘cannabis’ or ‘marijuana,’” compared to less than 100 trademarks five years ago—an increase of 1900%. See Michelle Nelles et al., *A Flower By Any Other Name: Cannabis Trademarks and Branding*, TORYS (Mar. 29, 2018), <https://perma.cc/8LT4-NW5Z>.

58. U.S. Patent & Trademark Office, *Trademark Electronic Search System (TESS)*, TRADEMARKS, <https://perma.cc/87VZ-8QC6> (archived Mar. 25, 2018) (follow “Basic Word Mark Search” hyperlink; then search “Cannabis”; then follow “Submit Query” hyperlink).

59. LIBRARY OF PARLIAMENT, LEGISLATIVE SUMMARY: BILL C-45: AN ACT RESPECTING CANNABIS AND TO AMEND THE CONTROLLED DRUGS AND SUBSTANCES ACT, THE CRIMINAL CODE AND OTHER ACTS 13 (2017), <https://lop.parl.ca/Content/LOP/LegislativeSummaries/42/1/c45-e.pdf>.

60. *Id.*

61. HEALTH CAN., PROPOSED APPROACH TO THE REGULATION OF CANNABIS 50 (Nov. 2017), <https://canada.ca/content/dam/hc-sc/documents/programs/consultation-proposed-approach-regulation-cannabis/proposed-approach-regulation-cannabis.pdf>.

62. *Id.*

63. Gov’t of Can., *Proposed Approach to the Regulation of Cannabis: Summary of Comments Received During the Public Consultation*, PUBLICATIONS (Mar. 19, 2018), <https://perma.cc/592C-XN6T>. For a detailed discussion, see Eileen M. McMahon et al., *The Regulatory Haze Around Cannabis Lingers On . . . But Greater Visibility for Packaging and Labelling Emerges*, TORYS (Mar. 21, 2018), <https://perma.cc/3XAZ-3E6F>.

Although the Cannabis Act is not in force and may be subject to further amendment, it would be wise for both domestic and international growers to consider the potential impact of the Cannabis Act when choosing a trademark for use in Canada.

IV. CONCLUSION

There are many opportunities for innovation in the expanding cannabis market. While there has been an increase in intellectual property filings, it is still a nascent industry. Food and agribusiness companies who consider their intellectual property position early will have a competitive advantage as the market unfolds.