

Exceptional Corporate, Director, and Officer Liability under the Federal *Cannabis Act*

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The legalization of cannabis in Canada is right around the corner with the *Cannabis Act* receiving royal assent in June 2018 and coming into force in October 2018. The Act will create an entirely new regulated industry which offers both significant opportunities and significant risks for businesses selling cannabis, cannabis accessories, or related services, and their directors and officers.

The Act creates exceptional liability risks for corporations and their directors and officers. For example, directors and officers can be personally liable for offences (punishments for indictable offences can be a fine of up to \$5,000,000 or imprisonment for up to three years or both) and violations (administrative monetary penalties for violations can be up to an extraordinary \$1,000,000). In the case of administrative monetary penalties, the Act expressly removes the defence of due diligence or mistake of fact, creating a strict liability offence.

As the cannabis industry explodes, corporations, directors and officers need to be aware of and manage the distinctive liability risks created by the Act. Corporations, directors, and officers should also be aware of different ways to defend against criminal prosecutions and resolve violations and administrative monetary penalties.

This article reviews the different offences and violations under the Act that corporations, directors, and officers can be liable for; punishments for offences and administrative monetary penalties for violations; and potential defences and defence strategies.

Offences and violations under the Act

Offences and violations under the Act include:

- Contraventions of provisions prohibiting, among other things:
 - promotion, packaging, and labeling in a way that appeals to youths or evokes glamour, recreation, excitement, vitality, risk or daring;
 - promotion, packaging and labeling through sponsorship, testimonials, or endorsements, or depictions of persons, celebrities, characters, or animals;
 - false, misleading or deceptive promotion, packaging, and labeling of cannabis likely to create an erroneous impression about its characteristics, value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects or health risks;
 - false, misleading or deceptive promotion of and packaging and labelling of cannabis accessories likely to create an erroneous impression about their design, construction, performance, intended use, characteristics, value, composition, merit, safety, health effects or health risks;

- promotion using foreign media;
 - displaying a brand element on a sports or cultural events facility;
 - providing or offering to provide cannabis or cannabis accessories for free or in exchange for the purchase of a thing or service or the provision of a service;
 - providing or offering to provide a service or any thing that is not cannabis or a cannabis accessory if it is an inducement to purchase cannabis or a cannabis accessory;
 - sale or distribution of cannabis subject to a recall order;
 - sale or distribution of cannabis or cannabis accessory by self-service display or a dispensing device,
 - obstructing an inspector, and
 - making, or participating in, assenting to or acquiescing in the making of, a false or misleading statement in any record required to be prepared, retained or provided under the statute.
- Contraventions of provisions regarding:
 - compliance with license conditions;
 - cessation of activities related to the suspension of a license; and
 - making available to the public information about cannabis.
 - Contraventions of regulations or orders to provide the Minister information, recall, conduct tests, or take measures.

Liability under the Act

The Act provides for both criminal prosecution for offences and administrative monetary penalties for violations. If proceedings against a person for an act or omission are initiated under the administrative monetary penalty scheme, a criminal prosecution could not also be commenced for the same act or omission.

Punishment for offences under the Act

The punishment for an indictable offence is a fine of up to \$5,000,000 or imprisonment for up to three years, or both. The punishment for a summary conviction offence is up to \$250,000 or imprisonment for up to six months, or both, for the first offence and a fine of up to \$500,000 or imprisonment for up to 18 months, or both, for any subsequent offence. Notably, if an offence continues for more than a day, it constitutes a separate offence for each day it is committed.

Administrative monetary penalties for violations under the Act

The administrative monetary penalty for a violation is up to \$1,000,000 or a maximum amount fixed by the regulations if the violation is classified as minor, serious or very serious. Regulations regarding penalties below \$1,000,000 for classified violations have yet to be published. Notably, a violation that continues for more than a day constitutes a separate violation for each day it is committed.

Director and officer liability

Directors and officers may be personally liable for contraventions of the Act committed by the corporation. Directors and officers of a corporation who direct, authorize, assent to, acquiesce in or participate in the commission of a corporation's offence under the Act are deemed parties to the offence and liable on conviction to the punishment provided for by the Act, even if the corporation is not prosecuted for the offence.

Similarly, directors and officers of a corporation who direct, authorize, assent to, acquiesce in or participate in the commission of a corporation's violation under the Act are deemed parties to the violation and liable for it.

Defences

Corporations, directors, and officers can rely on several defences appropriate to their circumstances in a criminal prosecution or when facing an administrative monetary penalty.

Limitations defence in the context of criminal prosecutions

Regarding summary conviction offences, no proceedings may be commenced a year after the subject-matter of the proceeding arose.

Defences of due diligence, mistake of fact

Persons facing criminal prosecution under the Act may rely on defences of due diligence and mistake of fact. The defence of due diligence requires that the person took all reasonable care to avoid the breach of the Act. This involves consideration of what a reasonable person would have done in the circumstances. The defence of mistake of fact is available where the person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.

Of particular interest to directors, officers, and their insurers is that these defences are not available in relation to the administrative monetary penalty scheme. The Act does, however, provide that "every rule and principle of the common law that excuses a violation continues to apply, so long as it is not inconsistent with this Act." Common law defences include defences that impair volition, such as duress, coercion and necessity.

While the express elimination of the due diligence and mistake of fact defences is not unique (there are several other statutes in Canada that expressly remove these defences), the Act provides for a \$1,000,000 maximum administrative monetary penalty which exceeds every other comparable statute. In other statutes where these defences are expressly removed, the statutes typically carry a maximum administrative monetary penalty of \$25,000 for individuals and \$100,000 for other persons (i.e., corporations).

Resolving violations and administrative monetary penalties

A person facing an administrative penalty may (a) enter into a compliance agreement where the amount of the penalty is \$5,000 or more; (b) request a review by the Minister of the acts that constitute the alleged violation or of the amount of the penalty; or, (c) challenge the Minister on the basis of the six-month limitation period applicable to administrative monetary penalties. A person may elect to enter into a compliance agreement or request a review, but they cannot do both.

- Compliance Agreements

A compliance agreement may be proposed by corporations, directors, or officers and include a provision for the deposit of reasonable security to guarantee compliance. It may set out terms to remedy the effect of the violation and to ensure steps are taken to ensure the violation does not occur again. A compliance agreement will reduce in whole or in part the penalty.

Persons negotiating a compliance agreement will need to consider carefully the deemed presumption under the Act which provides that persons who enter into compliance agreements are deemed to have committed the violation. The Act does not expressly remove the possibility of negotiating a compliance agreement without this presumption.

- Request for Reviews

Corporations, directors, or officers may request a review of the facts and/or penalty (whether the amount of the penalty was established in accordance with the Act). On a request for review, the Act only permits the Minister to consider written evidence and written submissions.

With respect to a review of the facts, the Minister must determine whether the person requesting the review actually committed the violation. Directors or officers may provide evidence that they did not direct, authorize, assent to, acquiesce or participate in the commission of the violation. If the Minister determines persons did not commit the violation, the proceedings against them will end.

With respect to a review of the penalty, the Act requires the penalty to promote compliance with the Act. As such, there is a proportionality consideration as to the amount of the penalty and what is required to promote compliance. Further, the Minister is required to determine the amount of the penalty with reference to the following factors:

- the person's history of compliance or non-compliance with the Act and regulations;
- the nature and scope of the violation;
- whether the person made reasonable efforts to mitigate or reverse the effects of the violation;
- whether the person derived any competitive or economic benefit from the violation;
- and, any other prescribed criteria - presumably indicating regulations will add further relevant factors for consideration.

For significant administrative penalties, a negotiated compliance agreement may be preferable since it would provide certainty and control over the outcome.

The Act does not currently provide for an appeal procedure for the Minister's determinations. Corporations, directors, and officers may also consider applying for judicial review of the Minister's determinations.

- Limitation defence

Corporations, directors, and officers may also challenge the Minister's timeliness in issuing a notice of violation. No proceedings in respect of a violation may be commenced six months after the Minister became aware of the acts or commissions that constituted the violation.

This is fact dependent and will require prompt action to seek disclosure of documents and information relevant to determining when the Minister became aware of the alleged acts or commissions constituting the violation.

Conclusion

Under the Act, corporations that sell cannabis, cannabis accessories, or related services and their directors and officers are subject to numerous restrictions, including on how they promote, package, and label their products and services. The potential severity of punishments for offences and administrative monetary penalties for violations require careful consideration of an appropriate defence.

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