

A Tale of Two Countries: Does Canada's Legalization of Cannabis Give It the First Mover Advantage in Franchising?

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I. Introduction

Since Canada's legalization of recreational marijuana in 2018, the cannabis¹ industry has witnessed a significant number of U.S. cannabis brands moving north to Canada to capitalize on the freedom and growth potential afforded in a legalized marijuana market. Given the



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regulatory challenges facing the recreational marijuana market in the United States, this is no wonder. While a number of U.S. brands have experienced considerable financial returns within the U.S. state markets that have legalized recreational marijuana, the restrictions inherent in a country where marijuana is still illegal under federal law, but legal to varying degrees (if at all) within certain states, has placed constraints on the ability of brands to utilize tools to increase their market presence and profitability. One such restriction is the inability of U.S. cannabis brands to effectively utilize franchising to expand across state lines.

The cannabis industry nevertheless appears ripe for the utilization of franchising as an expansion model, and at least one U.S. cannabis company

1. This Article does not discuss or address industrial hemp or cannabidiol (CBD) derived from industrial hemp. It uses the terms "cannabis" and "marijuana" interchangeably, but, when using either, is referencing cannabis with a tetrahydrocannabinol (THC) content of greater than 0.3% on a dry weight basis. Additionally, this Article focuses on the retail distribution of recreational marijuana and does not discuss or address issues pertaining to medical marijuana.

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has deployed a limited cannabis brand franchise, seemingly successfully.² But without a doubt, the federally illegal nature of marijuana in the United States has created significant barriers and risks to those wishing to franchise their cannabis brands. These barriers have understandably led many to question whether brand growth prospects are more promising in Canada, a country without similar tensions and constraints.

All the while, many are currently speculating that U.S. federal legalization of marijuana is not far off. For this reason, industry players question whether the United States' future marijuana market will be eclipsed by Canada's marijuana market, which currently appears to possess a significant first mover advantage.³ Such concerns are well-founded given the current trend of Canadian investment in U.S. cannabis companies;⁴ however, Canada itself is facing significant challenges in implementing its recreational marijuana regime that may complicate or frustrate brand expansion in Canada. Thus, while Canada's marijuana market may appear to have an overwhelming leg up on the United States, this article questions whether Canada's perceived first mover advantage is secure enough to withstand the test of time and the anticipated turn toward federal legalization in the United States.

Parts II and III of this article detail the legal landscape underlying recreational marijuana in both the United States and Canada, as well as the current state of the recreational marijuana industry in both countries. Part IV discusses the benefits of brand franchising, while Part V explores the legal and economic challenges currently facing U.S. cannabis brands that wish to franchise in the United States. Part VI then discusses how federal legalization in Canada has unlocked opportunities for U.S. and Canadian brands in Canada. Finally, Part VII explores whether Canada's head start in the legalized recreational marijuana market will be enough for it to maintain a market advantage⁵ over the United States if the U.S. federal government eventually legalizes recreational marijuana.

2. For example, Denver, Colorado-based cannabis company, ONE Cannabis, has sold at least five retail outlet franchises in Colorado. Nick Thomas, *Denver Cannabis Firm with Franchise Model to List on Canadian Stock Exchange*, MARIJUANA BUSINESS DAILY (Mar. 6, 2019), <https://mjbizdaily.com/denver-cannabis-company-cse-franchise-model>; Karsten Strauss, *How Tough Can It Be to Start a Cannabis Franchise?*, FORBES (May 31, 2019), <https://www.forbes.com/sites/karstenstrauss/2019/05/31/how-tough-can-it-be-to-start-a-cannabis-franchise/#48b53ec4b1ca>.

3. Ross Gerber, *Outmoded U.S. Laws Giving Canadian Cannabis Companies a Massive Head Start*, FORBES (Mar. 27, 2019), <https://www.forbes.com/sites/greatspeculations/2019/03/27/outmoded-u-s-laws-giving-canadian-cannabis-companies-a-massive-head-start/#2ecfa86f5e15>.

4. Jon Blistein, *Canadian Weed Company Canopy Growth to Buy U.S. Firm Acreage After Legalization*, ROLLING STONE (Apr. 18, 2019), <https://www.rollingstone.com/culture/culture-news/canopy-acreage-deal-buy-canada-federal-legalization-824153>; Thomas, *supra* note 2; Kris Kane, *American Invasion: Why U.S. Cannabis Companies Are Finding a Home in Canada's Public Markets*, FORBES (July 30, 2019), <https://www.forbes.com/sites/kriskrane/2018/07/30/us-cannabis-companies-gaining-ground-on-canadians-public-markets/#1ae05d91de0c>; Gerber, *supra* note 3.

5. When speaking of a "market advantage," this Article is referring to a competitive advantage gained through access to superior products, lower prices, and large-scale distribution.

II. Overview of Cannabis Laws in the United States

A. Federal Law

The United States federal government prohibits the manufacturing, distribution, and possession of a variety of illicit substances intended for recreational use.⁶ It exercises control over such substances through a practice known as “supply reduction,” which seeks to make drugs “more difficult, expensive, and risky to obtain” through domestic drug enforcement actions.⁷ State and federal law enforcement agencies cooperate in drug enforcement to “dismantle and disrupt criminal organizations involved in domestic drug production and distribution.”⁸ The Attorney General of the United States is primarily responsible for controlling the use of illicit substances at the federal level.⁹

The federal Controlled Substances Act (CSA) is the cornerstone piece of legislation passed by Congress to define, regulate, and classify illegal substances and their manufacture, distribution, and possession. The CSA also provides the statutory framework through which the federal government regulates the “lawful production, possession, and distribution of controlled substances.”¹⁰ Under the CSA, substances are classified into one of five schedules. Schedules are determined according to “(1) how dangerous [the substances] are considered to be, (2) their potential for abuse and addiction, and (3) whether they have legitimate medical use.”¹¹ Schedule I substances are considered the most dangerous and addictive, and thus are the most regulated and restricted.¹² For example, marijuana and heroin are categorized as Schedule I substances, whereas cocaine and methamphetamine are categorized as Schedule II substances.¹³

While federal agencies, namely the Drug Enforcement Administration under the supervision of the U.S. Attorney General, enforce the provisions of the CSA, all states have their own statutory framework through which they also enforce their own drug laws. In fact, the majority of drug crimes are dealt with at the state level.¹⁴ But, while states primarily enforce drug law

6. Notable exceptions are alcohol and tobacco. Further, the federal government does permit and control the use of many intoxicants for medical purposes. LISA N. SACCO, CONGRESSIONAL RESEARCH SERVICE, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 1 (2014).

7. *Id.* at 1; DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 77, 94–95 (2005).

8. SACCO, *supra* note 6, at 1.

9. *Id.*

10. *Id.* at 6.

11. *Id.* Substances are evaluated on (1) actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect, if known; (3) current scientific knowledge of the substance; (4) history and current pattern of abuse; (5) scope, duration, and significance of abuse; (6) risk to public health; (7) psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of an already-scheduled substance. See 21 U.S.C. § 811.

12. SACCO, *supra* note 6, at 6.

13. 21 U.S.C. § 811.

14. SACCO, *supra* note 6, at 16.

violations, “the CSA places drug control under federal jurisdiction regardless of state laws.”¹⁵ In other words, federal agencies may enforce the CSA in all states and territories irrespective of state laws criminalizing or legalizing drug possession, use, and distribution. What’s more, federal, state, and local law enforcement agencies often coordinate their drug-related law enforcement efforts.¹⁶

Because the CSA classifies marijuana as a Schedule I substance, federal law prohibits manufacturing, distributing, dispensing, or possessing marijuana.¹⁷

B. State Laws

Despite the federal prohibition of marijuana, starting as early as the 1970s, municipalities and states began enacting a range of laws and policies deviating from strict federal prohibition.¹⁸ In 1973, Oregon became the first state to pass cannabis decriminalization legislation,¹⁹ and in 1996, California became the first state to legalize the use and possession of marijuana for medical purposes.²⁰

In response to an increase in states enacting laws legalizing medical marijuana, then acting U.S. Deputy Attorney General David Ogden issued a memorandum to federal prosecutors (the Ogden Memo) instructing them to avoid prosecuting users of medical marijuana, such as those with cancer or other serious illnesses, whose actions “are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana,” and to instead focus prosecution efforts on “commercial enterprises that unlawfully market and sell marijuana.”²¹ Despite this guidance, uncertainty remained high among federal prosecutors in jurisdictions where medical marijuana had been legalized, and many sought further clarification from the federal government. In 2011, in response, then acting U.S. Deputy Attorney General James Cole issued a memorandum for federal prosecutors reiterating many of the points made in the Ogden Memo and emphasizing that the Ogden Memo did not foreclose prosecution of those engaged in large-scale commercial marijuana cultivation, even when operated in compliance with state law.²²

15. *Id.*

16. *Id.* at 17.

17. *Id.* at 15.

18. Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america>.

19. See *Marijuana Law Reform Timeline*, NORML, <https://norml.org/shop/item/marijuana-law-reform-timeline> (last visited May 21, 2019); *Atlanta Is the Latest City to Decriminalize Marijuana. Here’s What It Means*, FORTUNE (Oct. 3, 2017), <http://fortune.com/2017/10/03/list-of-cities-that-decriminalized-marijuana>.

20. *Marijuana Law Reform Timeline*, *supra* note 19; Martin, *supra* note 18.

21. Memorandum from David W. Ogden, Deputy Att’y Gen., Dep’t of Justice, to Selected U.S. Att’y’s, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

22. See Memorandum from James M. Cole, Deputy Att’y Gen., Dep’t of Justice, to U.S. Att’y’s (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

Thereafter, pro-legalization sentiments continued to grow and were brought to national attention when, on November 6, 2012, citizens of Colorado and Washington passed ballot initiatives legalizing the recreational use, possession, and distribution of marijuana.²³ Retail sales of marijuana began on January 1, 2014 in Colorado and on July 8, 2014 in Washington.²⁴

Following this move toward legalization, on August 29, 2013, Deputy Attorney General James Cole released his second memorandum, colloquially referred to as the “Cole Memo.” The Cole Memo provided “guidance to federal prosecutors concerning marijuana enforcement under the [CSA]” in states that had legalized marijuana for recreational purposes.²⁵ The Cole Memo stated that the DOJ would not intervene with or challenge state laws legalizing marijuana so long as states implemented and maintained strict systems of regulation addressing threats to public safety, public health, and other law enforcement interests potentially posed by legalization.²⁶ It also provided guidance to federal prosecutors in the form of eight “enforcement priorities”²⁷ as to when prosecutorial discretion should be exercised and when prosecution may be warranted.²⁸

Following the federal government’s release of the Cole Memo, on November 4, 2014, Alaska, Oregon, and the District of Columbia legalized recreational marijuana.²⁹ Since 2014, seven additional states—Maine,

23. DRUG POLICY ALL., *SO FAR, SO GOOD: WHAT WE KNOW ABOUT MARIJUANA LEGALIZATION IN COLORADO, WASHINGTON, ALASKA, OREGON AND WASHINGTON, D.C.* 2 (2016) [hereinafter *SO FAR, SO GOOD*], available at http://www.drugpolicy.org/sites/default/files/Marijuana_Legalization_Status_Report_101316.pdf.

24. *Id.*

25. Memorandum from James M. Cole, Deputy Att’y Gen., Dep’t of Justice, to U.S. Att’y’s, Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

26. *Id.* at 3.

27. *Id.* at 2–3. These enforcement priorities include (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

28. In 2014, after issuing the Cole Memo, the U.S. Department of Justice issued a companion memo addressing the Bank Secrecy Act and other laws and regulations regarding financial crimes, commonly referred to as the “BSA Cole Memo.” Memorandum from James M. Cole, Deputy Att’y Gen., Dep’t of Justice, to U.S. Att’y’s, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014) [hereinafter *BSA Cole Memo*], available at <http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>. At the same time, the Financial Enforcement Crimes Network (FinCEN) of the U.S. Department of the Treasury issued companion guidance to the BSA Cole Memo, referred to as the “FinCEN Guidance,” that provided clarification for financial institutions wishing to provide services to marijuana-related businesses. See DEP’T OF TREAS., *BSA Expectations Regarding Marijuana-Related Businesses*, Fin-2012-G001 (Feb. 14, 2014) [hereinafter *FinCEN Guidance*], available at <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>. Both are discussed *infra*, Section V(B)(2).

29. *SO FAR, SO GOOD*, *supra* note 23, at 1.

Nevada, Vermont, California, Massachusetts, Michigan, and Illinois—have legalized marijuana for recreational purposes.³⁰

But following President Trump's election to office, Attorney General Jeff Sessions rescinded the Cole Memo in what is known as the "Sessions Memo," declaring marijuana activity to be a "serious crime."³¹ In doing so, the Sessions Memo did not go so far as to order federal prosecutors to take any specific action relating to prosecuting marijuana possession or use. Instead, it simply instructed federal prosecutors to "weigh all relevant considerations" when deciding which cases to prosecute,³² leaving industry players to closely watch any and all public statements and sentiments coming from federal prosecutors' offices throughout the country to understand their varying enforcement philosophies and priorities.³³

Regardless of the uncertainty surrounding federal marijuana policy, recreational marijuana markets in states that have legalized marijuana continue to grow, with recreational market sales achieving considerable success. In 2018, recreational sales of cannabis products in the United States were projected to reach between \$8 and \$10 billion, and this number is projected to increase to around \$20 billion by 2022.³⁴ While U.S. market sales are sizeable, certain U.S. brands have opted to target the Canadian marketplace in hopes of capitalizing on Canada's fully legalized system, spurring a flurry of recent Canadian investment in, and acquisition of, U.S. cannabis brands. But is Canada's legalized marijuana regime able to sustain the flow of U.S. cannabis brands moving north, and will brands ultimately experience the success in Canada that they now anticipate? To answer these questions, one must first understand how the cannabis industry is regulated in Canada.

III. Overview of Cannabis Laws in Canada

To understand how recreational cannabis is regulated in Canada, it is first necessary to be aware of the constitutional model of governance in the country. Under Canada's *Constitution Act*, 1867 (the Constitution), the legislative powers and responsibilities are divided among three types of government: federal, provincial/territorial, and Indigenous self-governments. The Constitution outlines the specific powers assigned to the federal and provincial governments in particular.³⁵ Section 91 of the Constitution outlines the sub-

30. Jeremy Berke & Skye Gould, *New Jersey Lawmakers Postponed a Critical Vote to Legalize Marijuana — Here Are All the States Where Pot Is Legal*, BUSINESS INSIDER (June 10, 2019), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

31. Memorandum from Jefferson B. Sessions, Deputy Att'y Gen., Dep't of Justice, to U.S. Atty's, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

32. *Id.*

33. Ben Adlin, *Here's Where US Attorneys Stand on Cannabis Enforcement*, LEAFLY (Jan. 11, 2018), <https://www.leafly.com/news/politics/heres-where-us-attorneys-stand-on-cannabis-enforcement#alaska>.

34. MARIJUANA BUSINESS DAILY, ANNUAL MARIJUANA BUSINESS FACTBOOK x (6th ed. 2018).

35. Constitution Act, 1867 (Schedule B to the Canada Act, 1982), c 11 (U.K.).

ject matters for which the federal government can enact laws, namely, those matters not assigned exclusively to the provinces, which are outlined in Section 92.³⁶ Matters regulated exclusively by the federal parliament include trade and commerce, criminal law, currency, and banking. Matters regulated exclusively by provincial legislatures include the municipal institutions, lands belonging to the province, property and civil rights in the province, administration of justice, and “all Matters of a merely local or private Nature in the Province.”³⁷ These broad provincial areas of jurisdiction give provinces “the power to enact laws regulating and controlling the development and use of land; regulating business activities through licensing; and promoting and protecting public health, safety and welfare.”³⁸

Despite this division of powers, the broad nature of the areas of jurisdiction can lead to situations wherein the laws required to regulate a particular activity do not fall squarely into one category of government. Regulating the production, distribution, use, and sale of recreational cannabis is such an activity. The regulation of recreational cannabis does not fit neatly under federal or provincial jurisdiction, as cannabis touches on numerous enumerated categories of governance. While the federal government is responsible for enacting criminal laws with respect to cannabis, provincial and territorial governments have the power to regulate the production, retail sale, and consumption of cannabis based on the comprehensive head of power of “property and civil rights” granted to provincial governments by Section 92.³⁹ Therefore, the criminal laws related to cannabis, as enacted by the federal government, apply to all Canadians, while the ways Canadians can purchase and use cannabis will vary, depending on the province in which they live.

A. *Federal*

On October 17, 2018, Canada became the second country in the world to legalize recreational cannabis.⁴⁰ In anticipation of the legalization date, the federal government of Canada passed the Cannabis Act (the Act) on June 21, 2018.⁴¹ The Act is an expansive statute with more than 200 sections and many regulations.⁴² Its mandate includes the broad goal of protecting public health and safety, as well as more specific purposes, such as protecting young

36. *Id.* at §§ 91, 92.

37. *Id.* at § 92.

38. BRUCE A. MACFARLANE, ROBERT J. FRATER & CROFT MICHAELSON, *CANNABIS LAW* 7-2 (2018).

39. *Id.*

40. *Id.* at 1-1. In 2013, Uruguay became the first country in the world to fully legalize marijuana. German Lopez, *Uruguay Was the First Country to Fully Legalize Marijuana*, *Vox* (Nov. 14, 2018), <https://www.vox.com/identities/2018/8/20/17938416/marijuana-legalization-world-uruguay-canada-netherlands>.

41. Cannabis Act, S.C. 2018, c 16 (Can.).

42. Health Canada released the federal Cannabis Regulations, SOR/2018-144 (Can.), on July 11, 2018. These Regulations govern matters such as licensing; packaging, labelling and promotion, and taxes.

persons, preventing illicit activities, reducing the burden on the criminal justice system, and ensuring a quality-controlled supply.⁴³

The Act also reflects the constitutional division of powers of Canada by setting a broad federal regime for the licensing of cannabis and the creation of criminal offences, while “carv[ing] out areas where provinces and territories can legislate for the distribution and retail sale of cannabis.”⁴⁴ Accordingly, the Act is, in some ways, limited in scope, as it is “simply one part of a larger picture that includes provincial and territorial legislation, municipal bylaws, and measures taken by Indigenous authorities.”⁴⁵ The Act does, however, provide guidance on where to find more specific regulations, such as the Criminal Code for impaired driving provisions and provincial legislation for workplace cannabis issues.⁴⁶

This integrated regulatory regime borne of the constitutional model of governance in Canada has been met with varying opinions. On the one hand, Marc Gold, a member of the Canadian Senate from the Province of Québec, stated in the Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs that this cannabis regime “respects the balance of power between the federal and provincial jurisdictions and that it properly addresses federal concerns about criminality and health. It also recognizes that the provinces, municipalities and communities, with their own particular values, have the right to have their say there, too.”⁴⁷ On the other hand, it has been noted by Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, authors of a treatise on cannabis law in Canada, that such a structure, so dependent on the cooperation of “intricate local, provincial and federal cannabis laws,” will inevitably lead to complications related to the constitutionality of federal and provincial laws.⁴⁸

B. *Provincial and Territorial*

The federal Cannabis Act grants considerable discretion and powers to the provincial and territorial governments with respect to the regulation of cannabis production, distribution, and consumption. Specifically, Section 69 of the Act outlines the following minimum legislative measures that must be enacted by provinces and territories for the distribution and retail sales of cannabis:

- Only cannabis produced by a person authorized under the Act to produce cannabis for commercial purposes may be sold;
- Cannabis may not be sold to young persons;⁴⁹

43. Cannabis Act, § 7; MACFARLANE, *supra* note 38, at 1-8.

44. MACFARLANE, *supra* note 38, at 6-2.

45. *Id.* at 1-9.

46. *Id.*

47. Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs (42nd Parl., 1st Sess. March 21, 2018). See also MACFARLANE, *supra* note 38, at 6-7.

48. MACFARLANE, *supra* note 38, at 6-7 to 6-8.

49. “Young person” is defined in Section 2(1) of the Cannabis Act as an individual who is under eighteen years of age for the purposes of Section 69.

- Appropriate records must be kept on activities with cannabis possessed for commercial purposes; and
- Adequate measures must be taken to reduce the risk that cannabis for commercial purposes would be used in an illicit market or activity.⁵⁰

Each province and territory in Canada has implemented legislation to fulfill these legislative measures in different ways. Some provinces have made amendments to existing gaming and liquor legislation to include the distribution and sale of cannabis.⁵¹ Others have created new legislation with considerable influence from liquor control laws.⁵² Further, provincial and territorial approaches to governing who is permitted to distribute/sell cannabis have ranged from government monopoly to private business owners.⁵³ At present, Québec, New Brunswick, Nova Scotia, Prince Edward Island, and the Northwest Territories distribute cannabis through publicly owned crown corporations (state-owned enterprises),⁵⁴ while Ontario, Alberta, Saskatchewan, Manitoba, Newfoundland, Yukon, and Nunavut permit retail sales by privately owned and operated brick-and-mortar retailers.⁵⁵ British Columbia operates on a hybrid model permitting the sale of cannabis through both privately and publicly owned stores.⁵⁶ In addition, the provincial distributor in every province and territory, except in Saskatchewan and Manitoba, is responsible for online sales of cannabis. In those two provinces, private retailers are permitted to sell cannabis online within the province.⁵⁷ As such, approaches to retail sales of cannabis vary widely across provinces.

But even given the inconsistent regulations with which they must contend, Canadian cannabis brands are prospering. The three biggest cannabis companies globally—Canopy Growth Corporation, Tilray Inc., and Aurora

50. Cannabis Act § 69.

51. MacFARLANE, *supra* note 38, at 6-2 to 6-3.

52. *Id.*

53. *Id.* at 6-4.

54. *Frequently Asked Questions—Legal Aspects*, SOCIÉTÉ QUÉBÉCOISE DU CANNABIS, <https://www.sqdc.ca/en-CA/about-the-sqdc/frequently-asked-questions>; *Cannabis in New Brunswick*, GOV'T OF NEW BRUNSWICK, <https://www2.gnb.ca/content/gnb/en/corporate/promo/cannabis.html>; *Nova Scotia's Cannabis Laws*, GOV'T OF NOVA SCOTIA, <https://novascotia.ca/cannabis/laws>; *Buying Cannabis in PEI*, GOV'T OF PRINCE EDWARD ISLAND, <https://www.princeedwardisland.ca/en/information/finance/buying-cannabis-on-pei>; *Cannabis in the NWT*, GOV'T OF THE NORTHWEST TERRITORIES, <https://www.eia.gov.nt.ca/en/cannabis>.

55. *Cannabis Retail Store Owners/Operators*, ALCOHOL & GAMING COMMISSION OF ONTARIO, <https://www.agco.ca/cannabis/cannabis-retail-store-ownersoperators>; *Alberta Cannabis Framework and Legislation*, GOV'T OF ALBERTA, <https://www.alberta.ca/cannabis-framework.aspx>; *Cannabis Retailers in Saskatchewan*, SASKATCHEWAN LIQUOR & GAMING AUTHORITY, <https://www.sлга.com/permits-and-licences/cannabis-permits/cannabis-retailing/cannabis-retailers-in-saskatchewan>; *Retail Cannabis in Manitoba*, GOV'T OF MANITOBA, <https://www.gov.mb.ca/cannabis/knowthefacts/retailcannabis.html>; *Purchasing Cannabis*, GOV'T OF NEWFOUNDLAND AND LABRADOR, <https://www.gov.nl.ca/cannabis/purchasing-cannabis/>; *Apply for a Cannabis Licence*, YUKON LIQUOR CORP., <http://www.ylc.yk.ca/Cannabis-licence.html>; *Cannabis*, GOV'T OF NUNAVUT, <https://www.gov.nu.ca/finance/information/cannabis>.

56. *Retailers*, BRITISH COLUMBIA LIQUOR DISTRIB. BRANCH, <https://www.bcldbccannabisupdates.com/opportunities/retailers>.

57. *See Retail Licensing*, CANNABIS COMPLIANCE, INC., (last visited June 9, 2019), <https://www.cannabiscomplianceinc.com/licensing/retail-licensing/>.

Cannabis Inc.⁵⁸—are Canadian. And unlike U.S. brands, which are facing considerable legal obstacles hindering brand growth, Canadian brands have degrees of access to growth vehicles, such as franchising within provinces, that allow for private distribution.

IV. Impact of Brand Franchising

In the United States, franchising has grown in popularity and economic significance since the early 1950s.⁵⁹ Today, franchised businesses can be found in many sectors of the economy, ranging from restaurants, gas stations, and auto dealerships, to financial service organizations and even nonprofit organizations.⁶⁰ Indeed, with an estimated 801,153 franchised businesses in the United States providing nearly 9 million jobs (or 5.6% of all private sector jobs in the United States), producing close to \$900 billion in annual output, and paying more than \$350 billion in annual payrolls,⁶¹ franchised businesses directly impact the U.S. economy in ways that are difficult to fully appreciate or comprehend.⁶²

Likewise, franchises contribute significantly to the Canadian economy across numerous industries, representing almost 5% of the Canadian economy or \$86 billion per year to the Canadian gross domestic product.⁶³ Robust franchise legislation is in place in six provinces (Alberta,⁶⁴ British Columbia,⁶⁵ Ontario,⁶⁶ New Brunswick,⁶⁷ Prince Edward Island,⁶⁸ Manitoba⁶⁹), meaning Canada offers unique franchising growth opportunities and is widely viewed as a “stable, predictable and profitable expansion landscape.”⁷⁰

58. 24/7 Wall St., *10 Largest Marijuana Companies*, MARKETWATCH (Jan. 2, 2019), <https://www.marketwatch.com/story/10-largest-marijuana-companies-2019-01-02>.

59. Byron E. Fox & Henry C. Su, *Franchise Regulation—Solutions in Search of Problems?*, 20 OKLA. CITY U. L. REV. 241, 248 (1995); Douglas C. Berry, David M. Byers & Daniel J. Oates, *State Regulation of Franchising: The Washington Experience Revisited*, 32 SEATTLE U. L. REV. 811, 812 (2009); William B. Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEX. L. REV. 1180, 1180 (1975).

60. Fox & Su, *supra* note 59, at 248–49; Berry, *supra* note 59, at 812; INT’L TRADE ADMIN., U.S. DEP’T OF COMMERCE, 2016 TOP MARKETS REPORT FRANCHISING 5 (2016) [hereinafter 2016 TOP MARKETS REPORT], available at https://www.trade.gov/topmarkets/pdf/Franchising_Top_Markets_Report.pdf.

61. PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACT OF FRANCHISED BUSINESSES: VOLUME IV, 2016 I-6 (2016) [hereinafter THE ECONOMIC IMPACT OF FRANCHISED BUSINESSES], available at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf; see also 2016 TOP MARKETS REPORT, *supra* note 60, at 7.

62. THE ECONOMIC IMPACT OF FRANCHISED BUSINESSES, *supra* note 61, at I-6.

63. Canadian Centre for Economic Analysis, *The Economic Contribution of the Canadian Franchise Industry*, CANADIAN FRANCHISE ASS’N (Jan. 2018).

64. Franchises Act, R.S.A. 2000, c F-23; Alta. Reg. 240/95 (Can.).

65. Franchises Act, S.B.C. c 35; B.C. Reg. 238/201 (Can.).

66. Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c 3; O. Reg. 581/00 (Can.).

67. Franchises Act, S.N.B. 2007, c F-23.5; N.B. Reg. 2019-92 (Can.).

68. Franchises Act, R.S.P.E.I. 1988, c F-14.1; P.E.I. Reg. EC232/06 (Can.).

69. Franchises Act, C.C.S.M. c F156; Man. Reg. 29/2012 (Can.).

70. Larry Weinberg, *A Canadian Perspective on the Independent Contractor-Employer Issue*, 34 FRANCHISE L.J. 311, 312 (2015); see also George J. Eydt & Edward (Ned) Levitt, *The Devil Is*

Because franchising can accelerate the expansion of businesses in numerous industries and markets, it theoretically should be an apt vehicle for widespread growth in the cannabis industry as well. But in the United States, a number of obstacles, rooted in both the differences and complexities of state legalized marijuana regimes, as well as the prohibitions contained in the CSA, stand between cannabis brands' ability to fully exploit the franchise model.

V. Current Obstacles Impeding Cannabis Brand Franchising in the United States

Federal prohibition of marijuana has led to a patchwork of inconsistent state laws and regulations in states that have legalized recreational marijuana. These state laws have created considerable barriers for those seeking to franchise cannabis brands, particularly across state lines. One of the primary benefits of franchising for franchisors is the franchisor's ability to enter new markets and reach new customers with less capital and time as compared to company-store growth. But in the current cannabis regulatory climate in the United States, in which each franchised unit must be customized to comply with state, municipal, and county law, many of the advantages of franchising are undermined.

A. Patchwork Nature of State Legalized Marijuana Regimes

States in which recreational marijuana has been legalized continue to implement and develop laws and regulations guiding marijuana growth, processing, and sale. Complying with these laws, which differ considerably across states, presents particular problems for those interested in franchising cannabis businesses in the United States.

For example, state laws differ in terms of what marijuana-related practices a licensed marijuana business may engage in. Colorado and Oregon allow for vertical integration—a producer of marijuana may simultaneously sell its marijuana in its own retail location, so long as the licensee holds a license for both marijuana production and retail.⁷¹ The same is true in California.⁷² But, by contrast, in Washington, a licensed marijuana producer and processor is prohibited from having any financial interest in a licensed marijuana retailer.⁷³ This means that franchised cannabis brands wishing to produce, process, and sell marijuana at retail are unable to expand into Washington's cannabis market, thus limiting their growth.

Similarly, states differ in terms of who may invest in licensed marijuana businesses. For example, California does not impose a California residency

in the Details: How Canadian and U.S. Franchise Legislation Differs, 32 FRANCHISE L.J. 237, 237 (2013).

71. See COLO. REV. STAT. § 44-12-402; OR. REV. STAT. § 475B.068.

72. See CAL. BUS. & PROF. CODE § 26053.

73. See WASH. REV. CODE § 69.50.328.

requirement on investors,⁷⁴ and Colorado⁷⁵ and Oregon⁷⁶ now permit out-of-state investment in licensees, but, in Washington, a prospective licensee must have lived in Washington for at least six months to be eligible for a license—out-of-state ownership of a licensed business of any kind is strictly prohibited.⁷⁷ This law means that in Washington, a franchisor's pool of potential franchisees is limited to those who have lived in Washington for the requisite amount of time. Further, franchisors must be careful not to provide, or to be perceived as providing, any monetary investment in Washington franchisees, or else the franchisor could be subject to regulation.⁷⁸

States likewise differ in terms of how much power municipalities are afforded in determining whether to license marijuana businesses within their borders. For example, California, Alaska, Colorado, and Washington all permit local jurisdictions to prohibit licensed marijuana businesses from operating within their territory,⁷⁹ but via state-specific mechanisms that do not universally prohibit licensing divisions from issuing licenses to those wishing to operate in jurisdictions that prohibit recreational marijuana.⁸⁰ By contrast, Oregon permits cities and counties to adopt ordinances that impose reasonable regulations on the operation of licensed marijuana businesses, but only permits local jurisdictions to prohibit marijuana retail sales if voters vote to ban such sales during a statewide general election.⁸¹ To that end,

74. Omar Sacirbey, *It's Not Easy, but Nonresident Cannabis Entrepreneurs Can Set Up Shop in California*, MARIJUANA BUSINESS DAILY (Dec. 27, 2017), <https://mjbizdaily.com/not-easy-non-resident-cannabis-entrepreneurs-can-set-shop-california/>. That being said, while California's marijuana regime does not mandate state residency, it does require business license applicants to first have a local marijuana business permit before they can apply for a state permit, and many municipalities require marijuana business operators to be residents of California or the municipality where they apply. *Id.*

75. COLO. REV. STAT. § 44-12-306.

76. OREGON LIQUOR CONTROL COMM'N, *Recreational Marijuana FAQs: Licensing-General*, OREGON.GOV (last visited May 19, 2019), <https://www.oregon.gov/olcc/marijuana/Pages/FAQs-Licensing-General.aspx>.

77. WASH. REV. CODE § 69.50.331.

78. See WASH. ADMIN. CODE § 314-55-035.

79. See, e.g., CAL. BUS. & PROF. CODE § 26200; COLO. REV. STAT. § 44-12-301; OR. REV. STAT. § 475B.968.

80. For example, while local jurisdictions in Washington can ban marijuana businesses by enacting zoning laws that place restrictions on what land may be used for, the State Liquor and Cannabis Board has the final authority over whether to grant or deny a marijuana license in Washington. See *Matter of Kittitas Cty. for a Declaratory Order*, 438 P.3d 1199, 1203 (Wash. Ct. App. 2019). A recent Washington Court of Appeals decision upheld the Liquor and Cannabis Board's authority to issue licenses over restrictions contained in local zoning laws, holding that while the Liquor and Cannabis Board may consider zoning restrictions in making licensing decisions, doing so is not required under current law. *Id.* That being said, a Washington Court of Appeals decision also recently upheld the authority of local jurisdictions to ban marijuana licensees within their territories. *Emerald Enters., LLC v. Clark Cty.*, 413 P.3d 92, 105 (Wash. Ct. App. 2018), *review denied*, 421 P.3d 445 (2018). Enforcement of such bans has recently escalated. *Uprooting Cannabis: Officials Stepping Up Enforcement of Ban on Recreational Marijuana Businesses*, SEATTLE TIMES (Apr. 12, 2019), <https://www.seattletimes.com/business/retail/uprooting-cannabis-officials-stepping-up-enforcement-of-ban-on-recreational-marijuana-businesses>. But in California, for example, licenses will not be issued to those wishing to operate in a local jurisdiction where recreational marijuana is prohibited. CAL. BUS. & PROF. CODE § 26200.

81. OR. REV. STAT. §§ 475B.486, 475B.968.

Oregon's legislation goes even farther by repealing any municipal charter amendments or local ordinances that conflict with its recreational marijuana legislation.⁸² Thus, even though a state may have legalized marijuana, a cannabis franchisor's ability to access the entirety of a state's market may be limited by what laws and regulations a given county or municipality within that state chooses to enact.

Finally, the newness of marijuana regulations, coupled with the rapid rate at which laws in even the most "established" recreational marijuana jurisdictions are changing, poses additional challenges for those wishing to establish cannabis franchises.⁸³ Cannabis franchisors must be willing and able to adapt their business model to comply with changes to laws and regulations in the jurisdictions in which they operate, and often across jurisdictions. While this risk is inherent in any franchised business, it is particularly acute in the recreational marijuana space, where laws are changing regularly.

Thus, the discrepancies in state laws with which cannabis franchisors must comply when seeking to expand their brand into new states present a significant obstacle to market expansion. Due diligence must be given at every turn to ensure that the franchised unit is legally compliant with laws that often differ considerably and change often. Of course, the differences in which states have chosen to legalize marijuana within their borders are not the only source of challenges for cannabis franchisors. Many challenges are rooted in obstacles imposed on cannabis franchisors by other federal laws.

B. Other Federal Roadblocks to Franchising in the Cannabis Industry⁸⁴

1. Inability to Register a Federal Trademark

One of the primary obstacles currently limiting cannabis franchisors in the United States is their inability to register a federal trademark. A trademark, sometimes referred to as a brand or brand name, is a "word, phrase, symbol, and/or design that identifies and distinguishes the source of goods

82. *Id.* § 475B.454.

83. For example, in 2017, Washington, which first enacted regulations governing its recreational marijuana regime in 2013, introduced legislation drastically changing many elements of those regulations. See, e.g., Polly Washburn, *Here's what just Changed in Washington State Marijuana Laws*, CANNABIST (May 23, 2017, 12:10 PM), <https://www.thecannabist.co/2017/05/23/washington-state-marijuana-laws-changes/79698>. Similarly, in 2018, Oregon and Colorado both amended their recreational marijuana regulations, enacting significant changes. Vince Sliwoski, *Oregon's New 2018 Cannabis Laws*, CANNA LAW BLOG (Mar. 11, 2018), <https://www.cannalawblog.com/oregons-new-2018-cannabis-laws>; *New Colorado Rules Increase Marijuana Product Safety and Improve Business Efficiencies*, COLORADO: MARIJUANA (Nov. 13, 2018), <https://www.colorado.gov/pacific/marijuana/news/new-colorado-rules-increase-marijuana-product-safety-and-improve-business-efficiencies>.

84. The roadblocks identified in this section are by no means exhaustive. For example, an additional and significant federal roadblock to cannabis franchising is Internal Revenue Code § 280E, prohibits marijuana businesses, as businesses engaged in "trafficking in controlled substances," from claiming business deductions or tax credits on their federal income tax returns. See 26 U.S.C. § 280E. The inability to claim such deductions reduces the net profit of cannabis businesses, meaning aspiring cannabis franchisors may be required to reduce their fees below what it could otherwise charge. See Shannon L. McCarthy & Dawn Newton, *Franchising a Marijuana Business: It's Not Quite Mission Impossible*, 35 FRANCHISE L.J. 357, 376–77 (2016).

of one party from those of others.”⁸⁵ Because a trademark is associated with a business and the goods or services it provides, companies have an interest in preventing their trademarks from being infringed, used, or appropriated by other entities. Trademark law—federal, state, and common—provides protections.

A business acquires a trademark simply by using a mark when selling or rendering goods or services.⁸⁶ When a business does so, it acquires what is known as a “common law” trademark,⁸⁷ which protects a company’s trademark within the geographic area in which the goods or services associated with that mark are used.⁸⁸ While better than nothing, common law trademark protections require those wishing to protect their trademark to first start doing business in whatever jurisdiction in which they wish to assert protections.⁸⁹ For this reason, most businesses opt to register their trademarks, which can be done at the state or federal level.⁹⁰

Both state and federal trademark registration offer owners a degree of protection. That being said, federal trademark registration provides the trademark owner with the most benefits. Unlike state registered trademarks, which can only be enforced in the state in which they are registered,⁹¹ federal trademark registration grants the mark’s owner nationwide rights to

85. *Trademark, Patent, or Copyright?*, U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright> (last visited May 19, 2019); Nicholas Herdrich, *The Great Balancing Act: Limiting Trademark Risks for Early-Stage Businesses in a Limited Capital Environment*, 97 J. PAT. & TRADEMARK OFF. SOC’Y 144, 146–47 (2015); Lanham Act, 15 U.S.C. § 1127.

86. Herdrich, *supra* note 85, at 151; Grupo Gigante SA De CV v. Dallo & Co., Inc., 391 F.3d 1088, 1093 (9th Cir. 2004) (stating that “[u]nder the principle of first in time equals first in right, priority ordinarily comes with earlier use of a mark in commerce” and that “[i]t is ‘not enough to have invented the mark first or even to have registered it first’”); Blue Bell, Inc. v. Farah Mfg. Co., 508 F.2d 1260, 1264–65 (5th Cir. 1975).

87. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (“Federal law does not create trademarks . . . Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country.”).

88. McCarthy & Newton, *supra* note 84, at 368; Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 453 (E.D. Va. 2015) (“Regardless of whether a mark is registered, the right to a particular mark grows out of its use, not its mere adoption.”).

89. McCarthy & Newton, *supra* note 84, at 368; Kiernan G. Doyle, *Trademark Strategies for Emerging Marijuana Businesses*, WESTLAW J. INTELL. PROP. 3, 5 (May 14, 2014); Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 268 (4th Cir. 2003) (quoting Armand’s Subway, Inc. v. Doctor’s Assocs., Inc. 604 F.2d 849, 849 (4th Cir. 1979)).

90. *See State Trademark Registration in the United States*, INT’L TRADEMARK ASS’N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/StateTrademarkRegistrationsUSFactSheet.aspx> (last updated July 2014).

91. *Id.*

the exclusion of all others.⁹² This means that “[b]rands are generally valued higher when federal registration is secured.”⁹³

But a trademark is only eligible for registration if its owner has used it in commerce, defined under federal law as “all commerce which may lawfully be regulated by Congress.”⁹⁴ While Congress regulates marijuana pursuant to the CSA because it is classified as a Schedule I controlled substance, it has no acceptable use under federal law.⁹⁵ Accordingly, businesses selling cannabis goods or services that touch the marijuana plant⁹⁶ are unable to register their trademark at the federal level.⁹⁷

Indeed, companies that have tried to obtain federal trademark registration have been unsuccessful.⁹⁸ And while certain cannabis companies have deployed a franchising business model, it does not appear that they have done so with federally protected marks.⁹⁹ Certain brands have sought state trademark registration in states where marijuana has been legalized, but

92. See U.S. PATENT & TRADEMARK OFFICE, Protecting Your Trademark: Enhancing Your Rights Through Federal Registration 11 (2018), available at <https://www.uspto.gov/sites/default/files/trademarks/basics/BasicFacts.pdf>; WILLIAM M. BORCHARD, A TRADEMARK IS NOT A COPYRIGHT OR A PATENT 4 (2017), available at <https://s3.amazonaws.com/documents.lexology.com/177eb83f-e157-4e42-8ba3-6453c886a984.pdf> (detailing advantages of federal trademark registration).

93. Rebecah Gan, *Protection for Marijuana Trademarks*, 32 GPSOLO 72, 72 (2015).

94. Lanham Act § 45, 15 U.S.C. § 1127.

95. 21 U.S.C. § 812(b)(1)(b).

96. Lanham Act § 45, 15 U.S.C. § 1127 see *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526 (Fed. Cir. 1987) (explaining that a valid application requires that the mark be in “lawful use in commerce”); *In re Stellar Int'l, Inc.*, 159 U.S.P.Q. (BNA) 48 (Trademark Tr. & App. Bd. July 30, 1968); *Clorox Co. v. Armour-Dial, Inc.*, 214 U.S.P.Q. (BNA) 850 (Trademark Tr. & App. Bd. June 29, 1982) (stating that the policy of the U.S. Patent and Trademark Office is that “shipment of goods in violation of federal statute . . . may not be recognized as the basis for establishing trademark rights”); *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1947–48 (T.T.A.B. 2010); *In re Midwest Tennis & Track Co.*, 29 USPQ2d 1386, 1386 n.2 (T.T.A.B. 1993); Gan, *supra* note 93, at 72; Trademark Manual of Examining Procedure § 907 (Oct. 2018) (requiring that federal trademark registration be denied whenever the mark or the goods associated with the mark violate federal law).

97. But those selling goods or services that do not touch the marijuana plant have had some success registering federal trademarks. See Christopher R. McElwain, *High Stakes: Marijuana Brands and the USPTO's “[Lawful] Use” Registration Criterion*, at 16 (2016), available at <http://www.inta.org/Academics/Documents/2016/McElwain.pdf>. Examples of such trademarks include HIGH TIMES for books about cannabis, MISTLETOKE for decorative hanging marijuana plant leaves made of silk, WONDERS OF CANNABIS for organizing and operating festivals in the field of the cannabis plant, and THE MARIJUANA COMPANY for clothing. Miriam D. Trudell, *Marijuana in the U.S.*, INTABULLETIN (Aug. 1, 2015), https://www.inta.org/intabulletin/pages/marijuana_in_the_us_7014.aspx.

98. See, e.g., *In re Pharmacann LLC*, 123 U.S.P.Q.2d 1122 (T.T.A.B. 2017); *In re Morgan Brown*, 119 U.S.P.Q.2d 1350 (T.T.A.B. 2016); *In re JJ206, LLC*, 120 U.S.P.Q.2d 1568 (T.T.A.B. 2016).

99. For example, The Green Solution, a Colorado-based cannabis company, is rumored to have successfully registered its franchise program in Washington; however, Washington's franchise agency licensee database does not indicate that the program is currently registered. See Rochelle Spandorf, *Franchising in the Cannabis Industry Begins to Light Up*, LAW 360 (May 2, 2019, 2:27 PM), <https://www.law360.com/articles/1154096/franchising-in-the-cannabis-industry-begins-to-light-up>; <https://fortress.wa.gov/dfi/webapp/dfi/EFiling/LicenseLookup/LicenseLU/Filing> (last visited May 21, 2109).

these protections will not serve to protect them beyond that state's jurisdiction. Thus, state trademark registration provides limited protections to brands hoping to expand their market reach.¹⁰⁰

2. Limited Ability to Access Financial Services and Products

Cannabis businesses wishing to franchise are also hindered by the fact that many cannabis companies still have limited access to financial services. In 2014, after issuing the Cole Memo, the U.S. Department of Justice issued a companion memo pertaining to the Bank Secrecy Act, as well as other laws and regulations regarding financial crimes (the BSA Cole Memo).¹⁰¹ The BSA Cole Memo provided that financial transactions involving proceeds generated by marijuana-related conduct could form the basis for prosecution under federal money laundering statutes and the BSA.¹⁰² That being said, the BSA Cole Memo indicated that investigations and prosecutions instigated against banks accepting funds from marijuana-related businesses should be conducted pursuant to the same enforcement priorities as those outlined in the Cole Memo.¹⁰³

At the same time, the Financial Enforcement Crimes Network (FinCEN) of the U.S. Department of the Treasury (Treasury) issued guidance as a companion to the BSA Cole Memo (the FinCEN Guidance) to clarify BSA expectations for financial institutions seeking to provide services to marijuana related businesses (MRBs).¹⁰⁴ The stated goal of the FinCEN Guidance was to “enhance the availability of financial services for . . . marijuana-related businesses.”¹⁰⁵ While the FinCEN Guidance did not change federal law, it did provide some comfort that federal law enforcement and federal banking regulators did not intend to pursue financial institutions providing at least certain banking functions to MRBs operating in compliance with state law and where federal priorities were not otherwise implicated.¹⁰⁶ But while doing so, the

100. See Spandorf, *supra* note 99.

101. BSA Cole Memo, *supra* note 28.

102. *Id.* at 2–3.

103. *Id.* (“For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers’ activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.”)

104. FinCEN Guidance, *supra* note 28. The FinCEN guidance does not define what constitutes a “marijuana related business,” but the “general consensus seems to be that [the term] applies to those businesses that deal directly with the plant in some way, such as growing or retailing.” Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA: RISK AND COMPLIANCE (Sept. 11, 2018), <https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum>.

105. FinCEN Guidance, *supra* note 28, at 1.

106. *Id.*

FinCEN Guidance reminded financial institutions that the sale of cannabis remains illegal under federal law and that accepting proceeds from marijuana-related activity continues to violate the BSA.¹⁰⁷

Among other things, the FinCEN Guidance requires financial institutions to perform enhanced due diligence on MRBs.¹⁰⁸ Additionally, because federal law prohibits the distribution and sale of marijuana, the FinCEN Guidance also requires participating financial institutions to file suspicious activity reports (SARs) on certain activities involving MRBs (including those MRBs duly licensed under state law).¹⁰⁹ Put simply, the FinCEN Guidance requires financial institutions to do more than passively receive information provided by their customers; instead, they must seek out and monitor their customers' behavior outside of their standard banking practices.

Following the issuance of the FinCEN Guidance, some financial institutions began to provide services to MRBs in accordance with the FinCEN Guidance's terms.¹¹⁰ But when the Sessions Memo's rescinded of the Cole Memo and the BSA Cole Memo in January of 2018,¹¹¹ it signaled a potential increase in risk of federal enforcement of the CSA against MRBs, even those that complied fully with state laws.¹¹² While the Sessions Memo did not rescind the FinCEN Guidance, because the FinCEN Guidance was largely built on the foundation established by the Cole Memo, the Sessions Memo created increased concerns among financial institutions providing services to MRBs and had a chilling effect on additional financial institutions expanding their services to MRBs.¹¹³ To date, FinCEN has not offered

107. *Id.* at 2; see also BSA Cole Memo, *supra* note 28, at 2 (emphasizing that marijuana-derived financial transactions “can form the basis for prosecution under the money laundering statutes”).

108. For example, the FinCEN Guidance recommends that banks (1) review each customer's state license application for operating a MRB, (2) request additional information about the customer and related parties from state licensing and enforcement authorities, (3) conduct ongoing monitoring for adverse information about the customer and related parties, (4) conduct ongoing monitoring for suspicious activity by the customer, and (5) periodically refresh the bank's information about the customer. FinCEN Guidance, *supra* note 28, at 2–3.

109. SARs are required for MRB transactions in amounts over \$5,000, individually or in the aggregate. 31 C.F.R. § 1020.320. SARs are also required for customers that provide goods and services to MRBs, such as landlords that lease space to MRBs. FinCEN Guidance, *supra* note 28, at 6.

110. See Alison Jimenez & Steven Kemmerling, *Who Is Filing Suspicious Activity Reports on the Marijuana Industry? New Data May Surprise You* (2015), http://securitiesanalytics.com/marijuana_SARs; Eli McVey, *Chart: More banks serving cannabis sector, but Cole Memo repeal threatens to slow progress*, MARIJUANA BUSINESS DAILY (Feb. 12, 2018), <https://mjbizdaily.com/chart-banks-serving-cannabis-sector-cole-memo-repeal-threatens-slow-progress>.

111. See Memorandum from Jefferson B. Sessions, Deputy Att'y Gen., Dep't of Justice, to U.S. Atty's, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

112. *Id.*

113. See Memorandum from FSC Majority Staff to Members, Committee on Financial Services, February 13, 2019, “Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses” 4–5 (Feb. 12, 2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba15-20190213-sd002_-_memo.pdf.

further guidance to financial institutions on what, if any, operational and/or compliance changes might be necessary as a result of the Sessions Memo.¹¹⁴

That being said, in 2019, two bills were introduced in the U.S. Congress that, if passed, would substantially change the landscape of banking in the marijuana sector. On the one hand, the Safe Banking Act of 2019 would, among other benefits, protect financial institutions from federal prosecution for providing financial services to cannabis-related businesses that are acting in compliance with state law.¹¹⁵ The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act of 2019, on the other hand, would go even further by amending the CSA so that its provisions no longer apply to any person acting in compliance with state or tribal laws relating to the manufacture, production, possession, or distribution of marijuana, so long as states and tribes comply with basic protections.¹¹⁶ In the banking sector, it would provide that all compliant banking transactions do not constitute trafficking and do not result in proceeds of an unlawful transaction, thus insulating banks from fear of federal prosecution or retribution for banking with marijuana industry customers.¹¹⁷ Thus, if either bill is ultimately signed into law, those involved in the cannabis industry may be able to utilize banking resources in a manner not previously available to them.

3. Inability to Move Product over State Lines

Cannabis franchisors are also hindered by the fact that they cannot move marijuana over state lines. Under the CSA, transporting a Schedule I drug via interstate commerce is prohibited, meaning marijuana plants, oils, extracts, and more grown or produced in one state cannot legally be transported across state lines to another state.¹¹⁸ This presents problems to those wishing to establish marijuana franchises because they are prohibited from moving the core product of their business—marijuana—across state lines when establishing new franchised units. Thus, for existing brands to sell outside of the state in which their marijuana products are produced, they must rely on out-of-state licensees to source marijuana plants and attempt to match their brand's formulation or strain in hopes that the product ultimately produced is the same as the original.¹¹⁹ But not all cannabis plants are the same—indeed, there are numerous strains that, although related,

114. The Department of the Treasury, however, has issued a letter clarifying that, for the time being, the SAR reporting structure set forth in the FinCEN Guidance remains in effect. Letter from Drew Maloney, Assistant Secretary for Legislative Affairs, Dep't of the Treasury, to Denny Heck, Representative, U.S. Congress (Jan. 21, 2018), available at https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18_Heck.pdf.

115. Melissa Schiller, *SAFE Banking Act Reintroduced in U.S. Senate*, CANNABIS BUSINESS TIMES (Apr. 15, 2019), <https://www.cannabisbusinesstimes.com/article/safe-banking-act-reintroduced-us-senate>.

116. Senator Elizabeth Warren & Senator Cory Gardner, *The STATES Act*, available at <https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20One%20Pager.pdf>.

117. *Id.*

118. See 21 U.S.C. § 801 *et seq.* See generally *Gonzalez v. Raich*, 545 U.S. 1 (2005).

119. McCarthy & Newton, *supra* note 84, at 376.

are far from identical and contain varying amounts of the cannabinoids that customers specifically seek to purchase.¹²⁰ Because consumers have come to expect brand and product consistency across franchised units and, as a result, many franchises uphold consistency as a core principle of their brand, this serves as an obstacle for such franchises wishing to franchise in the marijuana industry.¹²¹

Given the numerous challenges facing U.S. cannabis brands seeking to expand their market reach, it is no wonder many have opted to move north in search of the capital and the freedom that coast-to-coast legalization should bring—freedom that theoretically should enable companies to meaningfully and productively capitalize on brand expansion mechanisms, such as franchising.¹²²

VI. Cannabis Brand Franchising in Canada Post-Legalization

With Canada's turn to the legalization of recreational marijuana, the U.S. cannabis industry has set sights on Canada to capitalize on the opportunities that a legalized market provides. One such opportunity is the ability to franchise with groups like Colorado's ONE Cannabis, which has begun promoting franchise opportunities in Canada.¹²³ While the path into Canada for U.S. cannabis brands is not nearly as established as it would be for a food brand or service based system, the relative freedom in Canada to commence cannabis franchise development makes it a compelling first stop along the growth path for emerging cannabis brands.

The ability of any franchised brand to franchise successfully in a particular geographical area and industry hinges on various factors rooted in long-term stability. These factors include “the concept of a proven business formula over many years of trial and error. The all-important consistency of product, service and brand recognition that successful franchisors and their franchisees have mastered over time.”¹²⁴ In this relatively new post-

120. *Id.* at 375–76.

121. That being said, Oregon has recently introduced legislation that would enable its governor to enter into agreement with other states to move marijuana interstate between states in which it has been legalized. While the bill would not be operative until federal law permits the interstate transfer of marijuana, or the U.S. Department of Justice offers guidance allowing or tolerating it, the bill is a significant step towards addressing issues currently facing states wishing to move marijuana product over state lines. Andrew Selsky, *Oregon Lawmakers Move to Prepare for Interstate Pot Commerce*, AP News (Apr. 6, 2019), <https://www.apnews.com/df49ba79ad394d6cb76dc7edc28b37cd>. Alternatively, and depending on the goals of the franchise system in general, cannabis franchise brands may consider allowing certain levels of product differentiation within their stores, particularly if their goals focus more on rapid and geographically dispersed store development, as opposed to product consistency.

122. It is important to note that while cannabis brand intellectual property can, for example, be moved across the border into Canada, marijuana itself cannot. See 21 U.S.C. § 953.

123. See Thomas, *supra* note 2.

124. Edward (Ned) Levitt, *Key Business and Legal Considerations for Franchising Retail Cannabis Distribution*, LEXOLOGY (Dec. 17, 2018), <https://www.lexology.com/library/detail.aspx?g=377e2629-5848-42cb-8c49-237838d0d929>.

legalization cannabis world, those ever-present risk factors that are unique to franchising¹²⁵ are only exacerbated due to the uncertainty of laws and lack of proven track records.

The burgeoning retail industry of post-legalization cannabis in Canada is working out the growing pains necessary to establishing stability. This process undoubtedly has come with obstacles—obstacles that may result in Canada being unable to sustain U.S. cannabis companies moving north to capitalize on Canada’s legalization of marijuana.

VII. Looking Behind the Curtain: Is the Grass Greener on the Other Side of the Border?

Having legalized marijuana first, Canada should be at a significant advantage over the United States in the recreational marijuana market, even once the United States ultimately legalizes; the number of U.S. cannabis brands moving north since Canada’s legalization serves as an indication of Canada’s growing hold on the marijuana market. But the implementation of Canadian legalization has been far from smooth, and the brand and recreational marijuana user experience in Canada’s legalized market have not been perfect.

While many of these difficulties are likely attributable to the challenges associated with establishing any new industry, they may also indicate that cannabis brands moving north may experience complications with their immediate growth plans. While brands may have the ability to utilize certain tools for expansion to which they lack comparable access in place in the United States, such as franchising, it is possible that obstacles in place in the Canadian market—resulting from the manner in which Canada’s recreational marijuana laws are written and have been implemented—may likewise limit cannabis brands’ ability to fully reap the rewards of the franchising business model in an unfettered fashion.

A. *Obstacles to Franchising from Uncertainty in Canadian Cannabis Legislation*

Issues stemming from the differing laws and uncertainty about enforcement and interpretation across the provinces have made it difficult for the post-legalization cannabis industry to burgeon to its fullest potential. As legalization neared, the Canadian media braced itself for these complications because Canada’s cannabis regime was, in the words of one journalist, “worse than a splotchy patchwork of where one can shop for marijuana, where one can’t, where one can’t yet and where it kind-of-depends-on-a-few-things.”¹²⁶ Unfortunately, this patchwork and accompanying confusion remain, with some noting a lack of surprise:

125. Morgan Ben-David, *Managing Catastrophic Risks in Franchise Systems*, 38 *FRANCHISE L.J.* 207, 208 (2018).

126. Jason Markusoff, *A Homegrown Mess*, *MACLEAN’S* (Oct. 2018).

Such confusion may have been inevitable, given that politicians and bureaucrats face the seemingly incompatible tasks of encouraging legal enjoyment of cannabis while simultaneously shielding everyone from its harms. They've been pulled in conflicting directions by entrepreneurs, law enforcement, health experts and grumpy seniors who vote, producing contradictions in rules from jurisdiction to jurisdiction that can border on the absurd.¹²⁷

These convoluted rules across provinces include the retail sale of cannabis.

The most obvious obstacle to cannabis brands' ability to franchise in Canada post-legalization, then, is that several provinces have chosen public or government-operated sales regimes for cannabis, making franchising impossible. Québec, New Brunswick, Prince Edward Island, and Nova Scotia have all opted for government monopolies on the sale of cannabis.¹²⁸ The other six provinces (Ontario, British Columbia, Alberta, Manitoba, Saskatchewan, and Newfoundland) have adopted a private or hybrid (both private and public) distribution model, making franchising a viable option for cannabis brands entering the retail sales market in those provinces.¹²⁹

Therefore, viability of a cannabis brand franchise in Canada depends on compliance with provincial cannabis legislation. A cannabis brand would need to look within the relevant provincial legislation to ensure franchising is permitted in the areas targeted for expansion. Given the recent timing of legalization, specific difficulties highlighting cannabis brands' ability to franchise in Canada post-legalization have begun to surface in the Canadian news media as the country works through new and evolving laws and circumstances. And these difficulties may limit the growth potential of U.S. cannabis brands that are moving north to take advantage of the Canadian marketplace.

B. *Licensed Producers' Obstacles to Brand Expansion in Ontario*

Another obstacle to cannabis brands building and expanding their retail strategy has surfaced in Ontario as a direct result of the province's cannabis legislation. Ontario's cannabis framework consists mainly of the following statutes: Cannabis Control Act, 2017,¹³⁰ Ontario Cannabis Retail Corporation Act, 2017,¹³¹ and the Cannabis Licence Act, 2018.¹³² Section 4(4) of the Cannabis Licence Act, in particular, has created confusion for cannabis brands looking to expand and franchise in Ontario. The provision outlines the restrictions applicable to cannabis producers licensed under the Cannabis Act, including the restriction that the "person and its *affiliates*, as defined by the regulations, may not between them hold more than one retail store authorization."¹³³ The initial interpretation of "affiliate" seemingly created

127. *Id.*

128. *See supra* note 54.

129. *See supra* note 55.

130. Cannabis Control Act, 2017, S.O. 2017, c 26, Sched. 1 (Can.).

131. Ontario Cannabis Retail Corporation Act, 2017, S.O. 2017, c 26, Sched. 2.

132. Cannabis Licence Act, S.O. 2018, c 12, Sched. 2 (Can.).

133. *Id.* § 4(4) (emphasis added).

impediments to market monopolization by licensed producers and vertical integration by prohibiting producers and their affiliates from operating more than one retail location. Further, the regulations to the Cannabis Licence Act, O. Reg. 468/18, defines in Section 2 what an “affiliate” of a person is, the most relevant branches for licensed producers being:

- A corporation of which the person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 9.9 per cent of the voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities.¹³⁴
- A person is deemed to be an affiliate of another person if the other person, or a group of persons or entities acting jointly or in concert with the other person, has any direct or indirect influence that, if exercised, would result *in control in fact* of that person.¹³⁵

Interestingly, franchising has emerged as a potential workaround by licensed producers from this impediment created by the Ontario legislation. As large licensed producers may be barred from participating as owners of cannabis stores in Ontario pursuant to the Cannabis Licence Act and its regulations, “the only way they will be able to get their logos and brands on storefronts is to license or franchise all of these small business people to which the province wants to allow access, [. . .] [which] will create fertile ground for franchising by licensed producers.”¹³⁶ At least one Canadian franchise lawyer has noted that franchising is a viable option for getting around this limitation in the cannabis retail framework as franchising is, by its nature, a model that allows for franchisors to set up independent operators with the resources necessary to be in business for themselves.¹³⁷ So long as the licensed producer, as franchisor, exercises the appropriate level of control over the franchisee and its retail business, the level of control that comes with this independence may possibly satisfy the “control in fact” standard as articulated in Section 2(3) of the Regulations.¹³⁸

Pursuant to the Ontario Regulations, the Ontario government gave the Alcohol and Gaming Commission of Ontario (AGCO) the mandate to hold a random lottery to determine who may apply for Retail Operator Licences, the selection of which was completed on January 11, 2019.¹³⁹ At the outset,

134. Cannabis Licence Act, O. Reg. 468/18, § 2 (1)(c).

135. *Id.* § 2(3).

136. Kristine Owram, *Ontario's Pot Restrictions Have Producers Seeking Workarounds*, BLOOMBERG (Sept. 27, 2018), <https://www.bloomberg.com/news/articles/2018-09-27/ontario-s-pot-restrictions-have-producers-seeking-workarounds>.

137. Frank Robinson, *Why Franchising Could Be the Answer to Cannabis Retail in Ontario*, BNN BLOOMBERG (video at 5:50–6:55) (Nov. 22, 2018), <https://www.bnnbloomberg.ca/marijuana/video/why-franchising-could-be-the-answer-to-cannabis-retail-in-ontario~1546797>.

138. See Cannabis Licence Act, O. Reg. 468/18, § 2(3).

139. *Id.* at § 8.2; *Expression of Interest Lottery Rules*, ALCOHOL & GAMING COMMISSION OF ONTARIO, <https://www.agco.ca/cannabis/expression-of-interest-lottery-rules>.

interested parties were informed to be prepared to open a cannabis store on April 1, 2019.¹⁴⁰ As a result of supply shortages, on December 13, 2018, the government temporarily capped the issuing of licenses at twenty-five Retail Store Authorizations to allow for the supply of cannabis to stabilize.¹⁴¹ The twenty-five lottery winners, divided by geographic region, were announced at the close of the lottery and had until January 18, 2019, to submit a Retail Operator Licence Application to start the process of operating a brick-and-mortar cannabis store.¹⁴² A majority of the twenty-five lottery winners were sole proprietors,¹⁴³ many with limited to no retail experience.¹⁴⁴ Due to the numerous steps these individual lottery winners were required to complete on their own with limited resources and experience, the April 1, 2019, deadline became too aggressive. As a result, by March 29, 2019, only ten stores in Ontario had received the necessary licenses to meet the April 1st deadline.¹⁴⁵ The aggressive deadline for opening stores created an angle for cannabis brand owners and lottery winners to negotiate to enter into licensing agreements to get stores up and running.¹⁴⁶ Spiritleaf, an Alberta-based cannabis company, entered into an agreement with one of the sole proprietor lottery winners, allowing them to open a store in Kingston, Ontario.¹⁴⁷ Canopy Growth Corporation entered into agreements with two sole proprietor lottery winners to each operate a Tweed store in London and Tokyo Smoke store in Toronto, both brands owned by Canopy Growth.¹⁴⁸ Upon becoming

140. *Id.*

141. *Id.*

142. Vanmala Subramaniam, *Ontario Announces Winners of Cannabis Retail Lottery, No Known Names Emerge Victorious*, FIN. POST (Jan. 12, 2019), <https://business.financialpost.com/cannabis/ontario-announces-winners-of-cannabis-retail-lottery-no-known-names-emerge-victorious>.

143. *Express of Interest Lottery Selection Results*, ALCOHOL & GAMING COMMISSION OF ONTARIO, <https://www.agco.ca/cannabis/expression-interest-lottery-selection-results>.

144. David George-Cosh, *Ontario Pot Shop Lottery Winners Pressed for Details amid Deal-making*, BNN BLOOMBERG (Jan. 25, 2019), <https://www.bnnbloomberg.ca/ontario-pot-shop-lottery-winners-pressed-for-details-amid-dealmaking-1.1204040>.

145. Kristine Owrarn, *Ontario's First Pot Shops open Their Doors Today, but the Actual Number Ready Is Pretty Underwhelming*, BLOOMBERG NEWS (Apr. 1, 2019), <https://business.financialpost.com/cannabis/an-underwhelming-pot-shop-rollout-for-ontario-cannabis-weekly>. But as of June 9, 2019, twenty-two of the twenty-five lottery winners had received the requisite licensing. ALCOHOL & GAMING COMM'N OF ONTARIO, *Status of Current Cannabis Retail Store Applications*, AGCO.CA, <https://www.agco.ca/status-current-cannabis-retail-store-applications> (last visited June 9, 2019).

146. David George-Cosh, *'We're in Panic Mode': Ontario Pot Lottery Winners Scramble to Strike Deals*, BNN BLOOMBERG (Jan. 18, 2019), <https://www.bnnbloomberg.ca/we-re-in-panic-mode-ontario-pot-lottery-winners-scrambling-to-strike-deals-before-deadline-1.1200780>; Armina Ligaya, *Ontario's 25 Pot Licence Lottery Winners Fielding Partnership Offers*, CANADIAN PRESS (Jan. 14, 2019), <https://business.financialpost.com/pmn/commodities-business-pmn/agriculture-commodities-business-pmn/ontarios-25-pot-licence-lottery-winners-fielding-partnership-offers>.

147. *Spiritleaf Kingston Cannabis Retail Store Opening in Ontario Market on April 1*, INNER SPIRIT HOLDINGS (Mar. 29, 2019), <https://www.newswire.ca/news-releases/spiritleaf-kingston-cannabis-retail-store-opening-in-ontario-market-on-april-1-836923149.html>.

148. Jacquie Miller, *Canopy Growth Lands a Cannabis Store in Toronto Opening Under Its Tokyo Smoke Brand Name*, OTTAWA CITIZEN (Mar. 19, 2019), <https://ottawacitizen.com/news/local-news/canopy-growth-lands-a-cannabis-store-in-toronto-opening-under-its-tokyo-smoke-brand-name>.

aware of this development, the AGCO required additional information about these agreements with large retailers and producers, and Ray Kahnert, a spokesperson of the AGCO, made a statement about the lottery rules being “very clear about application requirements and that those selected in the lottery must maintain control of the business.”¹⁴⁹

As a result, franchising and licensing are continually being explored as ways for cannabis brands to enter into the Canadian cannabis market post-legalization. However, the success of this endeavor, and the true growth potential for U.S. cannabis brands that have moved north to Canada, will depend on the resolution of numerous supply issues.

C. Effects of Cannabis Supply Issues

Major cannabis supply issues have arisen across Canada since its legalization of marijuana.¹⁵⁰ Around the time of legalization, it was widely reported that the supply of legal cannabis would “only meet 30 percent to 60 percent of demand.”¹⁵¹ This has proven true as these supply shortages have been present since legalization and could last “as long as three years.”¹⁵² About fifty percent of products in five provinces were out of stock by mid-December.¹⁵³

The effects of these supply issues are far-reaching, slowing the granting of licenses and store development, and resulting in general consumer disappointment, all of which hinders cannabis brands’ ability to franchise in Canada post-legalization. The Alberta Gaming, Liquor and Cannabis, the governing body in the province, decided to temporarily suspend accepting applications and issuing any additional cannabis retail licenses until further notice as a result of the “national cannabis supply shortage.”¹⁵⁴ On December 13, 2018, the Ontario government similarly announced a temporary cap on twenty-five Retail Store Authorizations while the supply shortage stabilizes.¹⁵⁵ Together, these adjustments to the required foundations of retail cannabis (product and licenses) have necessarily slowed store development, with Québec stores having to close three days a week, Alberta halting the

149. George-Cosh, *supra* note 144.

150. Rob Gillies & Tracey Lindeman, *Supply Shortages Plague Canada’s New Cannabis Marketplace*, ASSOCIATED PRESS (Oct. 31, 2018), <https://business.financialpost.com/pmn/business-pmn/gone-to-pot-marijuana-shortages-plague-canada;PwCCanada’scannabisseries—Chapter8—Supplychainmanagement>, PwC CANADA, <https://www.pwc.com/ca/en/industries/cannabis/pwc-cannabis-series-chapter-8-supply-chain-management.html>.

151. Jacqueline Thorpe, *Canada is Facing a Shortage of Legal Weed*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/news/articles/2018-10-05/fear-not-dope-dealer-canada-s-facing-a-shortage-of-legal-weed>.

152. Kristine O’wram, *Canadian Pot Shortage Could Last Up to Three Years, Industry Executives Say*, BLOOMBERG NEWS (Jan. 8, 2019), <https://business.financialpost.com/cannabis/pot-shortage-could-last-up-to-3-years-in-canada-executives-say>.

153. *Id.*

154. *Retail Cannabis*, ALBERTA GAMING, LIQUOR & CANNABIS, <https://aglc.ca/cannabis/retail-cannabis>.

155. *Cannabis Retail Store Owners/Operators*, ALCOHOL & GAMING COMM’N OF ONTARIO, <https://www.agco.ca/cannabis/cannabis-retail-store-ownersoperators>.

opening of new stores, and Ontario limiting its initial retail store roll-out to twenty-five stores.¹⁵⁶

Despite these nation-wide shortages and subsequent complications, the province of Manitoba maintains an aggressive and ambitious plan for cannabis store development in line with an “open market.”¹⁵⁷ The government has committed to the goal that, “within two years, 90 percent of Manitobans should be able to access legal cannabis within a 30-minute drive or less.”¹⁵⁸ This highlights the divergent approaches to the retail cannabis industry post-legalization across the provinces.

A further obstacle to the ability of cannabis brands to franchise in Canada is the lack of product consistency, a necessity for franchise success, and the fact that shortages have led to certain instances of consumer disappointment in Canada. Many consumers have continued to purchase cannabis through illegal channels given the supply shortages, delays in delivery, high prices, and logistical confusion surrounding accessing legal cannabis. Statistics recently released by the Canadian government showed that the price of dried cannabis has increased by 17.3 percent post-legalization.¹⁵⁹ Meanwhile, the prices from illegal sources have decreased. Hundreds of Canadians responded that they were still purchasing their marijuana from illegal sources due to the price of legal marijuana.¹⁶⁰ In a national poll conducted by Ipsos, a global market research and consulting firm, about a month after legalization, it was reported that a third of users continued to purchase their cannabis from their regular dealers after legalization.¹⁶¹ More recently, Scotiabank analysts noted in a research note that “the black market will control 71 percent of cannabis sales in Canada in 2019.”¹⁶² This continued usage of the black market,

156. Owram, *supra* note 152.

157. Ian Froese, *100 Places to Buy Cannabis? Delta 9 CEO Expects More Manitoba Stores As Province Promises ‘Open Market,’* CBC NEWS (Dec. 3, 2018), <https://www.cbc.ca/news/canada/manitoba/100-places-cannabis-retail-free-market-delta-9-1.4920995>.

158. *Retail Cannabis in Manitoba*, GOV'T OF MANITOBA, <https://www.gov.mb.ca/cannabis/knowthefacts/retailcannabis.html>.

159. *StatsCannabis Data Availability: Crowdsourced Cannabis Prices, First Quarter 2019*, STATISTICS CANADA (Apr. 10, 2019), <https://www150.statcan.gc.ca/n1/en/daily-quotidien/190410/dq190410c-eng.pdf?st=6Xu1uqHL> [hereinafter *StatsCannabis*]. Prior to legalization, the unweighted average price per gram of dried cannabis was \$6.85 in 2018. Post-legalization, the average price per gram was \$8.04.

160. *StatsCannabis, supra* note 159; Pete Evans, *Legalization Pushed Up Price of Pot by 17%, Statscan Says*, CBC NEWS (Apr. 10, 2019), <https://www.cbc.ca/news/business/cannabis-legalization-data-1.5091788>; Dan Taekema, *Critics Say Sticker Shock at Cannabis Prices Will Push Customers Back to the Black Market*, CBC NEWS (Apr. 6, 2019), <https://www.cbc.ca/news/canada/hamilton/critics-say-sticker-shock-at-cannabis-prices-will-push-customers-back-to-the-black-market-1.5083679>.

161. Jennifer McLeod Macey, *One in Six (16%) Cannabis Users Say They've Been Shamed for Consuming in Public, but Most (59%) Users Say They've Only Consumed Cannabis in Private*, IPSOS (Nov. 19, 2018), <https://www.ipsos.com/en-ca/news-polls/one-in-six-cannabis-users-shamed-for-consuming-publicly>.

162. Emma Spears, *The Cannabis Black Market Will Control 71 Per Cent of Sales in Canada This Year, Scotiabank Says*, NAT'L POST (Feb. 13, 2019), <https://nationalpost.com/cannabis-business/black-market-is-not-going-anywhere-and-will-control-71-of-cannabis-sales-in-canada-this-year-scotiabank/wcm/44667567-ff4f-4a04-916f-0950dfd000b6>.

largely stemming from supply issues, will be a further obstacle to cannabis brands' ability to franchise and successfully grow in Canada.

VIII. Conclusion

Although many cannabis companies in the United States have entered Canadian markets with hopes of realizing large gains in the absence of extraordinary legal constraints, the reality is that the regulatory landscape varies significantly from province to province, and, in some cases, other local laws impose additional layers of complication. Ultimately, opportunities for cannabis franchising in Canada may not be as unlimited as some have foreseen. That being said, Canada still possesses great potential as a jurisdiction in which to incubate, develop, and expand a franchised network of cannabis retail locations. Cannabis brands can bank in the mainstream and obtain federal registrations for their trademarks.¹⁶³ Although federal and provincial legislation prohibits cannabis companies from influencing or “coming into contact with” minors, cannabis marketing experts continue to find ways to push the limits to insert their brands into the public mind.

For cannabis franchisors in Canada, the local franchise laws are applied the same as they are to non-cannabis companies. Thus, there is no preliminary governmental oversight of cannabis franchising activities like there would be in a registration state in the United States. For these reasons, and despite some limitations and restrictions on private enterprise distribution in some of the Canadian provinces, franchising is a viable and attractive distribution model for cannabis companies wishing to enter and expand in Canadian markets.

Closer to home, it continues to be interesting to watch the evolution of cannabis regulation. From the roots of deregulation in Oregon and later in California, to the Ogden Memo, Cole Memo, and Sessions Memo, cannabis distribution in the United States has become increasingly a part of political agendas and, more recently, the country's market economy. Canada is undoubtedly pioneering the way for widespread legalization of cannabis production and distribution in North America. But whether Canada, as a market for U.S. distributors and franchisors, will maintain its appeal if the U.S. federal government legalizes cannabis distribution in interstate commerce remains to be seen. What does appear to be clear, however, is that changes to Canada's legalized marijuana regime may be needed if Canada hopes to maintain its first mover advantage over time.

163. *Intellectual Property Protection for Cannabis*, GOV'T OF CANADA (last updated Feb. 19, 2019), http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04527.html?open&wt_src=CorpNews-2019-04-23.