

High Time for Change: Combatting the Black Market for Cannabis in Canada

N I C K N O O N A N *

I. INTRODUCTION

On October 17, 2018, Canada legalized the recreational possession and use of cannabis federally under the *Cannabis Act*.¹ The *Cannabis Act* states goals of protecting young people from cannabis, reducing and deterring illicit activities in relation to cannabis, and providing the public with access to a supply of legal, quality-controlled cannabis.² Despite this, the black market for cannabis has remained strong and persistent, with research indicating that the black market accounted for approximately 71-86% of cannabis sales in the first year of legalization.³ This paper will explore how and why Canada's criminal black market for cannabis continues to function after legalization, and what measures can be taken to counteract it.

Canada's illicit black market for cannabis continues to function as the by-product of a reprobate stew of mail-order and traditional cannabis dealers, who operate in a difficult-to-enforce periphery of the *Cannabis Act*.

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¹ *Cannabis Act*, SC 2018, c 16 [CA].

² *Ibid.*

³ David George-Cosh "Cannabis 'gold rush' falling short amid cheap black market: analysts", *BNN Bloomberg* (9 October 2019), online: <www.bnnbloomberg.ca/cannabis-gold-rush-falling-short-amid-lure-of-cheaper-black-market-pot-say-analysts-1.1329064> [perma.cc/PY88-2PGW]; Sean Williams "Canada's Black Market to Control 71% of Marijuana Sales in 2019", *Motley Fool* (9 February 2019), online: <www.fool.com/investing/2019/02/09/canadas-black-market-to-control-71-of-marijuana-sa.aspx> [perma.cc/SQB4-98CX].

They continue to flourish by offering cheaper, higher quality, and more available cannabis, functioning as a better-run business outside of the stringent regulatory requirements of the licit market, particularly in packaging and marketing requirements.

This paper will recommend that licit retailers and the government must take several decisive steps to combat this. First, amend the *Canada Post Corporation Act*. Second, be a better business generally by offering lower cost, higher quality cannabis that is consistently available in stores. Third, introduce affordable cannabis options to directly address price-sensitive consumers. Fourth, engage in consumer education. Fifth, loosen marketing restrictions on legal cannabis retailers. Sixth, pass legislation to better utilize the banking and financial sector to trace and flag bank accounts associated with illegal cannabis sales.

II. A PROFILE OF THE BLACK MARKET POST-LEGALIZATION

A law is only effective insofar as it achieves the aims it set out to accomplish, and avoids bringing about concomitant drawbacks.⁴ Thus, a persistent black market for cannabis after one of the *Cannabis Act*'s goals was to reduce and deter this criminality, would represent legislative failure.⁵ This is particularly the case in light of the additional goals of the *Cannabis Act*.⁶ Alas, in the first year after legalization, somewhere between 71% and 86% of cannabis sales occurred on the black market. In a world of federally legal cannabis in Canada, how is the black market not only surviving, but thriving? First, this paper will explore how the black market for cannabis is operating and functioning at present – that is, what is the source of all of this illicit cannabis, who is selling it, and how are their businesses run?

⁴ Antony Allott, “The Effectiveness of Law” (1981) 15:2 Valparaiso UL Rev 229 at 233.

⁵ CA, *supra* note 1.

⁶ Bruce Cheadle “Legal pot taxes could add \$5B a year to government coffers, CIBC says”, *CBC News* (28 January 2016), online: <www.ctvnews.ca/business/government-revenues-from-legal-pot-could-reach-5b-a-year-bank-economist-1.2755755> [perma.cc/3VDU-P4CS].

A. Sources, Realities, and Challenges

There are two main sources for which Canadians are spurning legal, government cannabis: traditional street drug dealers and online mail-order cannabis sites.

1. *Traditional Street Drug Dealers*

In a 2018 town hall, Prime Minister Trudeau explained the criminal element of the cannabis industry as dealers selling in stairways linked to organized crime gangs.⁷ This is the picture frequently painted of those involved in the sale of illegal cannabis: small-time street dealers, Canadians turning to “their guy” for a product they can trust. However, in reality these individuals are minor players in the cannabis industry, and their link to organized crime is exaggerated. Criminal gangs do not focus on cannabis, preferring moving harder drugs like cocaine and opioids to the “high-risk, low-reward” movement of cannabis.⁸ Academic research generally does not support the idea that these dealers are part of a web of highly organized criminals controlled by gangs.⁹ Though it is possible this was the case at some time in the past, it now appears to be largely composed of a multitude of independent growers, with no ties to gangs.¹⁰ The market appears to be a pyramid, with low-level street dealers who sell small quantities (usually between 1 and 28 grams) at the bottom, buying from mid-level dealers who purchase cannabis by the pound from the growers at the top of the pyramid.¹¹

Though, for obvious reasons, we do not have a breakdown of black market cannabis sales between street-level dealers and mail-order business, it seems a reasonable inference that this pyramid is not from whence the majority of black market cannabis is being sold. For one, they lack the

⁷ Kevin A Molina, *The New El Chapo? Understanding the Implications of the Legalization of Marijuana for the Drug Seller and the Hidden Drug Economy* (Master of Arts, University of Manitoba, 2019) [unpublished] at 34.

⁸ Mack Lamoureux “How Will Legalization Affect the Hells Angels?”, *Vice* (17 October 2018), online: <www.vice.com/en_ca/article/d3q93x/how-will-legalization-affect-the-hells-angels> [perma.cc/L5AC-ZSDA].

⁹ Matthew Taylor & Gary Potter, “From ‘Social Supply’ to ‘Real Dealing’: Drift, Friendship, and Trust in Drug-Dealing Careers” (2013) 43:4 *J Drug Issues* 392 at 399.

¹⁰ Molina, *supra* note 7 at 56.

¹¹ *Ibid* at 57.

motivation or means to sell at a significant scale. One Canadian dealer put it quite stereotypically, saying:

I would love to grow my business, but I'm too lazy. Is it really worth the extra dollar to run around and kill yourself that much more? ... For dealers like me and most of my friends – if we make a buck today then great. It's just supplementing our income. I have a day job, I do this for the extras, so I can take my wife out to an expensive dinner. I don't look at it as business: it's a cultural thing. If I can make a dollar off it I will – if not, I'm still going to smoke. I mean, a person who smokes pot is pretty chill to begin with.¹²

Though this dealer does not speak for all, he is largely representative of the attitude and scope of most street-level cannabis dealers.¹³ This is compounded by the fact that consumer loyalty to these street dealers has eroded. Another cannabis dealer explains that, “In the old days you had a drug dealer and you held on to him. He's like your doctor or mechanic: once you got a good one you held on to him. The loyalty thing is dead now,” with consumers instead purchasing based primarily on price competition. This has pushed many dealers out of business, or to curtail operations, as they cannot compete with illicit mail-order prices.¹⁴

The facts are clear: street cannabis dealers are not who the government needs to fear. They are generally small-time operators, who are largely not linked to organized crime, growing and selling a few plants in their basement, or operating as part of a pyramid of relationally affiliated dealers.¹⁵ In the wake of legalization and increasing price competition, many of them have left the business or scaled back their sales efforts.¹⁶ How, then, does one reconcile this with the fact that a significant majority of Canadian cannabis is purchased on the black market? It's as if Canadians reported drinking more ‘Slurpees’ than ever, yet 7-11 reported falling sales. There

¹² Chris Frey “‘I deliver to your house’: pot dealers on why legalization won’t kill the black market”, *The Guardian* (7 June 2018), online: <www.theguardian.com/world/2018/jun/06/canada-will-cannabis-legalization-affect-black-market> [perma.cc/TGV8-NS3S].

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Molina, *supra* note 7.

¹⁶ *Ibid.*; Manisha Krishnan “How Canada’s Black Market Survived One Year of Legal Weed”, *Vice* (17 October 2019), online: <www.vice.com/en_ca/article/wjwb8y/how-canadas-black-market-survived-one-year-of-legal-weed> [perma.cc/5Z9J-GB76] [Krishnan, “How Canada’s Black Market Survived”].

must be a hidden white whale in the industry, siphoning a majority of the profits without attracting nearly as much headline ink. That whale is what the government desperately needs to address to achieve its goals for legalization: Canada's mail-order cannabis industry.

2. *Mail Order Cannabis*

When asked specifically whether Ottawa knows how many illegal online cannabis dispensaries are operating in Canada, Minister of Border Security and Organized Crime Reduction Bill Blair said the government is “aware of the existence of several.”¹⁷ This appears to be a gross understatement. Alas, a Google search for the purposes of researching “mail-order cannabis Canada” yields few academic or news reports on the industry; rather, the first 14 pages of search results are exclusively filled with websites—such as the aptly named “mailorder-marijuana.ca”, “ganjaexpress.ca”, and “buybudnow.ca”—offering users the opportunity to buy cannabis online and have it shipped to their door. These sales are not occurring on the dark net using encrypted browsers, but rather are made on the traditional internet, using a person's real name, real address, and in many cases, real credit card.¹⁸ These businesses (“MOMs,” standing for “mail-order marijuana”) represent the most significant threat to the Canadian government's legalization goals: they are plentiful in number, require little-to-no identity verification, and are cheaper and often more convenient than legal cannabis, yet, the government has only recently begun to pursue measures to address the problem.¹⁹

i. *Operational Logistics*

Generally, criminal enterprises do not advertise the logistics of their operations. However, MOMs represent an exception to this idea, as many

¹⁷ Solomon Israel “Marijuana minister confident police will address illegal online cannabis dispensaries”, *Winnipeg Free Press* (26 April 2019), online: <www.winnipegfreepress.com/arts-and-life/life/cannabis/marijuana-minister-confident-police-will-address-illegal-online-cannabis-dispensaries-509124452.html> [perma.cc/P2KF-AXDD].

¹⁸ Alois Afilipoaie & Patrick Shorti, “From Dealer to Doorstep - How Drugs Are Sold On the Dark Net” (June 2015), online (pdf): *Global Drug Policy Observatory* <www.swansea.ac.uk/media/From-Dealer-to-Doorstep-%C3%A2%C2%80%C2%93-How-Drugs-Are-Sold-On-the-Dark-Net.pdf> [perma.cc/DZT2-X6VV].

¹⁹ Israel, *supra* note 17.

mail-order cannabis sites disclose detailed guides on how to order from them and what to expect.²⁰ Essentially, mail-order cannabis sites function similarly to any other order placed online – go to the website, point, click, pay, and it arrives at your doorstep in a few days.²¹ For instance, the very first website resulting from a Google search—mailorder-marijuana.ca—lists the steps as follows. First, order: select your products and provide proof of your age. Second, pay: send payment via Interac E-Transfer (a type of user-to-user direct money transfer supported by most financial institutions) to an email address listed on the website. On e-transfers, the site makes a dubious promise of “the best security,” and never sharing “any of your information, guaranteed.” The legitimacy of this promise is a matter beyond the scope of this paper, but it remains best practice to be skeptical of criminal enterprises promising consumer security. Third, packing: your selected cannabis products are vacuum-sealed and placed in discreet packaging, which generally involves writing some other type of product name on the shipping label, such as a shipment of “video games” from “Mark’s Video Game Warehouse.” Fourth, shipping: express shipping is supported across Canada, using Canada Post, and taking only 1-3 days. It seems counterintuitive for a criminal enterprise to be sharing its internal logistics online for all to see, yet that is precisely how brash Canada’s mail-order marijuana criminals have become. To reiterate, this is at the very bottom of the very first website resulting from a simple Google search.

The question, then, is who are consumers interacting with on the other end of that e-transfer? For obvious reasons, the individuals perpetrating criminal acts do not identify themselves or their businesses clearly. However, a small amount of cyber-sleuthing yields some distinct commonalities. Nearly all of these sites identify themselves as being from British Columbia, and either sourcing their cannabis from “BC craft growers” or being craft

²⁰ For instance, scroll to the bottom of mailorder-marijuana.com to reach their “How to order your Marijuana & Weed Concentrate Online” section.

²¹ Lexi Freehill “Mail order marijuana: How buyers are accessing cannabis without legal consequence”, *The Calgary Journal* (4 October 2018), online: calgaryjournal.ca/2018/04/10/mail-order-marijuana-how-buyers-are-accessing-cannabis-without-legal-consequence/ [perma.cc/CU39-2FYA].

growers themselves.²² Some of the sites go as far as to identify their location²³ or the names of their founders.²⁴ Ultimately, very little other information is available on these retailers. This should raise a red flag both for consumers and the government. These MOM services are moving far more product than the aforementioned street level dealers, and we have little to no information about who is behind them.²⁵ Though the sites claim to be largely individual or groups of ‘craft growers,’ it could just as easily be a form of organized crime.

ii. *Legality and Challenges*

If this all sounds too shady to be legal, that is because it isn’t legal at all. Both buying and selling cannabis using these sites is illegal. Under the *Cannabis Act* and its related provincial legislation, the only legal way to purchase cannabis online is through the government’s licensed retailers.²⁶ It is illegal for anyone other than these licensed retailers to sell cannabis.²⁷

Thus, the sales on these mail-order sites are strictly illegal, though false claims of legality on the site may serve to confuse consumers.²⁸ The confusion is compounded by the fact that many of these sites have an ostensible age requirement, either operating on an obviously flawed honour system (for instance, a pop-up asking the user if they are over 18) or requiring a scanned copy of the user’s ID be submitted to verify their age and identity.²⁹ Consumers are likely to be further confused by the fact that many of these sites ask the user to confirm they have a medical marijuana

²² “Mail Order Marijuana in Canada” (2021), online: *Canada Mail Order Marijuana* <www.mailorder-marijuana.com/> [perma.cc/JW57-MZTL].

²³ *Ibid.*

²⁴ “Get Kush in Canada” (2021), online: *Get Kush* <getkush.io/about/> [perma.cc/9Y9U-M2MT].

²⁵ Mike Hager “Police struggle to stamp out online cannabis shops”, *The Globe and Mail* (21 August 2019), online: <www.theglobeandmail.com/cannabis/article-police-struggle-to-stamp-out-online-cannabis-shops/> [perma.cc/R3F6-YDPZ].

²⁶ CA, *supra* note 1.

²⁷ “Buying Cannabis in Manitoba” (accessed 26 July 2021), online: *Liquor, Gaming & Cannabis Authority of Manitoba* <lgcamb.ca/cannabis/store-list/> [perma.cc/RP65-3QSH].

²⁸ Freehill, *supra* note 21.

²⁹ *Ibid.*

prescription by checking a box saying so, without actually asking for proof of its existence. Other sites will provide the customer with the opportunity to ‘skype’ someone (generally a ‘medical professional’ employed by the company) who is highly willing to write the ‘patient’ a prescription for as much cannabis as they desire.³⁰

Selling cannabis as MOMs do is illegal under the *Cannabis Act*, and is punishable by a fine, as well as the possibility of up to 14 years in jail, depending on the amount being sold.³¹ Purchasing cannabis from a MOM is also illegal under the *Cannabis Act*, and is punishable by a fine of “\$200 plus a victim surcharge and any applicable administrative fees.”³² However, since the *Cannabis Act* is federal criminal legislation, the standard of proof is beyond a reasonable doubt. Therein lies the problem – what this paper will refer to as “the mail problem.”

iii. Canada’s Most Prolific Dealer: Canada Post and the Mail Problem

Though buying cannabis from a MOM—and the underlying sale—is illegal under the *Cannabis Act*, this illegality is only effective insofar as it is enforceable.³³ Unfortunately, the surrounding realities paint a bleak picture of the enforceability of the *Cannabis Act* against MOMs, due in part to the intricacies of Canada Post and Canada’s mail system.

First, cannabis shipments from MOMs are difficult for authorities to identify. As discussed previously, the shipments are advertised as being sent in double vacuum-sealed, smell-proof bags inside discreet packaging.³⁴ These shipments are sent via Canada Post, and since the police have essentially no authority to search Canada Post packages, the responsibility to identify and flag potentially illegal packages falls to the employees of Canada Post.³⁵

³⁰ Ryan Mac “I Got A Marijuana Prescription and Pot In Minutes Without Leaving My Couch”, *Forbes* (30 June 2015), online: <www.forbes.com/sites/ryanmac/2015/06/30/eaze-doctor-online-prescription-marijuana-pizza-couch/#7e4d105489ba> [perma.cc/9AQ5-TSR7].

³¹ CA, *supra* note 1, ss 10(1)–(5).

³² *Ibid*, s 51(4)(a).

³³ *Ibid*; Frank D Day, “Criminal Law Enforcement and a Free Society” (1963) 54:3 J Crim L & Criminology 360.

³⁴ Freehill, *supra* note 21.

³⁵ Claire Brownell “For fentanyl importers, Canada Post is the shipping method of choice”, *Maclean’s* (7 March 2019), online: <www.macleans.ca/news/canada/fentanyl-

These employees are trained in mail sorting, delivery, and customer service – they generally have little training in identifying suspicious packages the way that international border security agencies do. This is further complicated by the fact that once cannabis has been vacuum sealed, humans have minimal ability to detect it via their olfactory senses, and even sniffer dogs are unreliable.³⁶ This means that a highly trained individual is unlikely to be able to detect vacuum-sealed cannabis in the mail – rendering a Canada Post employee incredibly unlikely to successfully identify a discreetly packaged, vacuum-sealed shipment in the mail.³⁷

Second, if a package is flagged as potentially illegal, the police have little authority to open it.³⁸ Criminals sending drugs by Canada Post “exploit an antiquated legal quirk that bars police from searching packages sent through Canada Post, a limitation that doesn’t exist for private courier services such as FedEx and UPS.”³⁹ This problem stems from the *Canada Post Corporation Act*, written in a context where mail was innocently used for a majority of communications, and where police interference with private individuals’ mail would have been an unthinkable privacy violation.⁴⁰ Generally, to engage in a search, police require a warrant.⁴¹ Warrants relating to suspicious mail are rarely granted, with the rare cases relating to national security risks.⁴² Further problematic is the fact that, when it comes to Canada Post packages, “nothing in the course of post is liable to demand, seizure, detention or retention,” even if the officer has reasonable grounds to suspect criminal activity.⁴³ The phrase “in the course of post” has been construed broadly, and includes all packages in a mailbox, on private

mail/> [perma.cc/978H-QLTQ].

³⁶ Avery N Gilbert & Joseph A DiVerdi, “Human olfactory detection of packaged cannabis” (2020) 60:2 *Science & Justice* 169; Amber Marks, “Drug Detection Dogs and the Growth of Olfactory Surveillance: Beyond the Rule of Law?” (2007) 4:3 *Surveillance & Crim Justice* 258.

³⁷ *Ibid.*

³⁸ Brownell, *supra* note 35.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Hunter v Southam Inc*, [1984] 2 SCR 145 at 160 [*Hunter*].

⁴² Freehill, *supra* note 21.

⁴³ CA, *supra* note 1, s 40(3).

property, or in a Canada Post location.⁴⁴ Police instead rely on Canada Post employees to flag packages on a case-by-case-basis—which is problematic for the reasons discussed above—and only then, if the employee deems the package to be “non-mailable,” may the package be opened and handed over to police.⁴⁵ These arcane provisions do not apply to the Canada Border Services Agency, who has broader authority, or to private couriers, such as UPS and FedEx.⁴⁶ In sum, the structure of the *Canada Post Corporation Act* places heavy restrictions on the ability of police to combat the use of Canada Post as perhaps our country’s largest drug distribution network. The irony of this is that Canada Post, a government-owned Crown corporation, is the very drug distribution network dismantling the efficacy of the government’s legalization of marijuana.

Third, the aforementioned enforcement challenges are further compounded by the fact that even if a package is determined to be cannabis, it is in fact legal to send cannabis by mail.⁴⁷ Canadians are legally allowed to share up to 30 grams of cannabis with other adults, as long as the package meets minimum packaging requirements specified by Canada Post.⁴⁸ This engenders multiple problems. First, while Canada Post specifies requirements—such as mandatory age verification process and a signature—for receiving cannabis in the mail from a government-licensed seller, there are no such requirements when receiving it from a private individual.⁴⁹ In those cases, all that is specified is that “a signature may be required, if the sender opted for this feature.”⁵⁰ This is clearly problematic, as the exact type of criminal action the government wishes to prevent has the least strict standard applied to it upon package receipt at Canada Post. Second, the fact that it is legal to send cannabis inside the country makes it far more difficult to track down and prevent illicit sales, since there is generally going to be

⁴⁴ Brownell, *supra* note 35.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ “Sending and Receiving Cannabis” (accessed 26 July 2021), online: *Canada Post* <www.canadapost.ca/cpc/en/personal/sending/parcels/restrictions/cannabis.page> [perma.cc/47PB-SPCZ].

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

little obvious difference between legal and illegal packages.⁵¹ This challenge, the “plastic bag problem,” refers to the idea that in an era of legalized cannabis, the difference between licit and illicit cannabis is very minor – once the cannabis is transferred from its dispensary-purchased container into a plastic bag, or a vacuum-sealed one for mailing purposes, illicit and licit cannabis are nearly identical, rendering enforcement difficult.⁵²

Fourth, these challenges are further worsened by the difficulty inherent in differentiating between a gift of cannabis by mail and a sale of cannabis by mail. For the purposes of mail, a package of a few grams of cannabis from your friend “Ben” in Vancouver to you, and a package from an illicit Vancouver MOM will look essentially identical. The only means by which law enforcement will be able to find a difference is in the element of a “sale” versus a “gift”; that is, it is legal for “Ben” to send you up to 30 grams of cannabis by mail, but it is illegal for anyone—“Ben” or otherwise—to be paid in exchange for this. In the event of a payment, it becomes a sale of cannabis, which, *per* the *Cannabis Act*, can only be done by government licensed retailers.⁵³ However, distinguishing between a sale and a gift represents a difficult challenge. Legally, a gift is the voluntary transfer of property from one person to another without valuable consideration, while a sale is the transfer of property in exchange for consideration.⁵⁴ Thus, determining whether cannabis sent by mail is a legal gift or transfer, or is an illegal sale of cannabis, requires a concrete determination that consideration—money, in most cases—was sent by the recipient to the sender.

Since in the case of MOMs, the payment is sent by e-transfer, the issue of enforcement thus becomes an issue of bank secrecy.⁵⁵ Generally, in Canada, banks owe their customers a common-law duty not to disclose the customer’s data to third parties except under specified circumstances.⁵⁶ One

⁵¹ Anis Heydari “Legal pot puts 14 RCMP sniffer dogs out of work”, *CBC News* (24 June 2018), online: <www.cbc.ca/news/canada/calgary/dogs-rcmp-marijuana-retrain-retire-1.4759428> [perma.cc/G2CY-BRPG].

⁵² William J. Meadows, “Cannabis Legalization: Dealing with the Black Market” (2019) No 13 Ohio State U Drug Enforcement & Policy Center, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3454635> [perma.cc/3TB9-PLPT].

⁵³ CA, *supra* note 1.

⁵⁴ *Horsley v Phillips Fine Art Auctioneers Pty Ltd*, [1995] NSWSC 78, 7 BPR 97557 [*Horsley*].

⁵⁵ Freehill, *supra* note 21.

⁵⁶ Shawn Smith & Wesley R Ng, “Bank Secrecy Laws (Canada)” (16 May 2019), online:

such circumstance is being compelled by law, often under court order or legislation.⁵⁷ As a result, it seems feasible that law enforcement could compel the bank to disclose certain information, such as payments and deposits by individual accounts, though this may require a disproportionate amount of work to simply punish an individual purchaser.⁵⁸ From there, law enforcement's next challenge is determining what bank account belongs to the recipient of the package—which will show a payment—and which bank account belongs to the seller of the package – which will show a receipt of this payment. This may be further complicated by the use of multiple bank accounts by the recipient, the potential use of cryptocurrency, and the fact that the e-transfers are generally (though not always – remember `payment@mailorder-marijuana.ca?`) sent to non-descript email addresses.⁵⁹ As such, it may be difficult for law enforcement to comb through a bank account to determine which e-transfer was sent for legitimate reasons—to friends, family, etc.—and which was sent as payment for the package.⁶⁰ This would likely be an undue amount of work for law enforcement to undergo for any individual purchaser; however, working with banks to shut down the accounts of MOMs and other illegal drug sellers may represent a means by which the government can make strides to crack down on the illegal cannabis market in Canada. This potential remedy will be discussed at greater length later in this paper. It is also worth noting that some provinces, such as Manitoba, have requirements that cannabis can only be legally possessed in its initial packaging.

Stikeman Elliott <www.stikeman.com/en-ca/kh/canadian-technology-ip-law/Bank-Secrecy-Laws-Canada> [perma.cc/789Q-6VKB]; *Tournier v National Provincial and Union Bank of England*, [1924]1 KB 461 (CA) [*Tournier*].

⁵⁷ Smith & Ng, *supra* note 56; *Park v Bank of Montreal*, [1997] BCJ 787 (BCSC), 1997 CanLII 3128 (BC SC) [*Park*].

⁵⁸ Bruce Zigaris & Sheila M Castilla, “Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy” (1993) 19 *Brook J Intl L* 871.

⁵⁹ Tatiana Tropinka, “Do Digital Technologies Facilitate Illicit Financial Flows?” (2016) World Bank Working Paper No 102953.

⁶⁰ *Ibid.*

B. Black Market Cannabis in Canada at Present

The present state of the Canadian cannabis market overwhelmingly indicates that, despite legalization and government sale, a majority of Canadians continue to purchase cannabis illegally. Whether purchasing from their local street dealer, or more likely, from an online mail-order cannabis seller, this reality clearly frustrates the government's intentions behind the legalization of cannabis in the first place. Illegal sellers fly in the face of the law, and are able to continue operating either because they are too common and often small-time to catch, or because—as is the case with mail-order sellers—they have found room to operate in a flawed legislative framework for cannabis legalization, exacerbated by enforcement difficulties resulting from the *Canada Post Corporation Act*.⁶¹ However, having gained an understanding of just *how* these sellers are able to (illegally) operate, the question remains: why have so many Canadians spurned legal cannabis for its illegal, illicit counterpart?

III. WHY THE BLACK MARKET FOR CANNABIS IS SUCCEEDING

Generally, consumer behaviour illustrates that when making a purchase decision, consumers consider multiple relevant criteria in making their final decision.⁶² According to rational choice theory, consumers will perform an explicit or implicit risk-reward or cost-benefit analysis when making a purchase decision.⁶³ In the case of the choice between black market illicit cannabis and legal, government-sold cannabis, a cost-benefit analysis often leads consumers to the purchase of black market cannabis.

In general, due to the notable inability of law enforcement to police the sale of black market cannabis—meaning that consumers often bypass concerns about the legality of their purchase—consumers are more likely to view licit and illicit cannabis as in direct competition with each other.⁶⁴ Thus, they often engage in this rational analysis based on traditional

⁶¹ *Canada Post Corporation Act*, RSC 1985, c C-10 [CPCA].

⁶² Frank Kardes, Maria Cronley & Thomas Cline, *Consumer Behavior* (Mason, OH: South-Western Cengage, 2011) at 9.

⁶³ Meadows, *supra* note 52.

⁶⁴ *Ibid.*

consumer purchase decision-making factors, an analysis which licit cannabis generally loses.⁶⁵ These decision-making factors include cost, availability, quality, and general product and marketing issues, as well as issues related to enforcement.

A. Competition on Price

1. Introduction

One major reason consumers choose the black market is cost.⁶⁶ A poll taken of Canadian cannabis users prior to legalization indicated they were only open to purchasing their cannabis legally if it was affordable and competitive with black market prices.⁶⁷ This is consistent with the findings that consumers are generally highly price-sensitive when making a cannabis purchase decision.⁶⁸ Black market cannabis is significantly cheaper than its legal counterpart, despite promises to the contrary by the government during the planning of legalization.⁶⁹ The government realized—and stated multiple times—that they would need to undercut the black market on price in order to stamp it out, yet have failed to do so. Though this is for multiple reasons, one major reason appears to have been an overestimation of the black market’s cannabis cost. Multiple times, prior to and in the early stages of legalization, the Canadian government stated that the black market charges approximately \$10 per gram for cannabis, and that they would come in at a price below this.⁷⁰ However, the price of black market cannabis was

⁶⁵ *Ibid.*

⁶⁶ Jason Lemon “Marijuana Black Market ‘Business Has Never Been Better’ in Canada Despite Legalization, Cannabis CEO Warns”, *Newsweek* (20 March 2019), online: <[newsweek.com/marijuana-black-market-canada-legalization-cannabis-1370423](https://www.newsweek.com/marijuana-black-market-canada-legalization-cannabis-1370423)> [perma.cc/U9TM-HDLU].

⁶⁷ *Ibid.*

⁶⁸ ER Aston, J Metrik & J MacKillop, “Further validation of a marijuana purchase task” (2015) 152 *Drug & Alcohol Dependence* 32.

⁶⁹ Ian Brown “Marijuana is finally legal. What happens next is anyone’s guess”, *The Globe and Mail* (16 October 2018), online: <www.theglobeandmail.com/cannabis/article-canadas-long-path-to-marijuana-legalization/> [perma.cc/586M-FKQH].

⁷⁰ Michael Boudreau “Feds have room to move on fully eradicating the cannabis black market”, *The Hill Times* (30 October 2019), online: <www.hilltimes.com/2019/10/30/feds-have-room-to-move-on-fully-eradicating-the-cannabis-black-market/221310> [perma.cc/S7CL-2HBUI].

actually approximately \$5 per gram at the time of legalization, not to mention that legal cannabis came in slightly above \$10.⁷¹

The government likely knew that a price difference would persist, at least for some time. However, it stood to reason that most Canadians would prefer to pay slightly more for a legal product, rather than pay slightly less and risk being reprimanded for committing a crime. The stark reality, however, is that it is not the price difference that is slight, but the risk of being reprimanded. As of the last quarter of 2019, Statistics Canada reported that legally sourced cannabis was priced on average at approximately \$10.30 per gram, while the black market—composed of both street dealers and MOMs—offered it at around \$5.73 per gram.⁷² This is a substantial price difference, and compounded with the enforcement difficulties discussed above, and which will be discussed further, may drive a rational consumer to choose to purchase illicit cannabis, rather than its legal counterpart.

2. Where does this price come from?

Though the determination of Canada's prices for legal cannabis is somewhat of a black box, it is clear that it costs more than illicit cannabis for multiple reasons.⁷³ First, the legal market is forced to pay compliance and licensing fees, as well as associated costs, which the black market does not.⁷⁴ This same logic applies to any procedural government requirements for cannabis production and sale, which contribute to raising the price of licit cannabis above the illicit market. Second, the legal market is subject to a "sin tax," and all transactions are subject to traditional taxes (e.g. goods and services tax, provincial sales tax, etc.). The 'excise tax' or sin tax is imposed to generate tax revenue for the government.⁷⁵ Generally, sin taxes can be effective insofar as they are not so large as to discourage rational

⁷¹ Krishnan, "How Canada's Black Market Survived", *supra* note 16.

⁷² The Canadian Press "Affordable legal cannabis should be priority as illegal pot prices drop, experts say", *CBC Business* (24 January 2020), online: <www.cbc.ca/news/business/cannabis-price-gap-illegal-legal-1.5438899> [perma.cc/4F3T-ESXD].

⁷³ Meadows, *supra* note 52.

⁷⁴ *Ibid.*

⁷⁵ Tim Edgar, Arthur Cockfield & Martha O'Brien, *Materials on Canadian Income Tax*, 15th ed (Toronto: Thomson Reuters, 2015).

consumers from purchasing the product at all, as may be the case here.⁷⁶ As well, all transactions on the black market are not subject to any value-added taxes such as goods and services tax (GST), harmonized sales tax (HST), or any provincial sales taxes (PST). In their totality, these taxes generally range from 5% to 15%, depending on the province, and thus represent a not insubstantial increase in the price of legal cannabis over its illicit counterpart, which is tax-free. Third, legal cannabis is subject to onerous packaging requirements, involving substantial labelling, as well as large quantities of single-use plastics, which its illicit counterpart is not.⁷⁷ This packaging process and additional costs contribute to causing the price of legal cannabis to be higher than the black market.⁷⁸ Fourth, legal cannabis stores have to pay overhead to ‘keep the lights on’ at their brick-and-mortar locations, while street dealers do not, and MOMs are free to take advantage of the ‘Amazon-style’ cost-savings present in a non-brick and mortar, strictly mail-order sales model. Finally, legal cannabis stores do not offer their customers bulk discounts, unlike black market cannabis sellers. In sum, though the full and plain details of legal cannabis pricing in Canada remain unknown, it is clear that multiple factors contribute to raising its price above its black-market competition.

3. Conclusion: The State Must Compete on Price

The facts are clear: consumers of products like cannabis are highly price-sensitive.⁷⁹ When the price of a product on the black market is substantially lower than its legal counterpart, particularly when the enforcement measures in place to combat the black market are known to be ineffective, consumers are likely to show a distinct price-based preference for the illicit product – or at least an indifference between illicit and licit, with price competition pushing them toward the illicit product.⁸⁰ This much is clear

⁷⁶ *Ibid.*

⁷⁷ Health Canada, “Summary: Packaging and labelling guide for cannabis products” (11 July 2019), online: *Government of Canada* <www.canada.ca/en/health-canada/services/cannabis-regulations-licensed-producers/packaging-labelling-guide-cannabis-products.html> [perma.cc/Y3EX-2ZX8].

⁷⁸ The Canadian Press, *supra* note 72.

⁷⁹ Jason Childs & Jason Stevens, “The state must compete: Optimal pricing of legal cannabis” (2019) 62:4 *Can Public Administration* 656.

⁸⁰ *Ibid.*

from the Canadian tobacco market, where increases in the price of tobacco—through a sin tax—were directly and naturally linked to increases in the size of the market for contraband tobacco. In this sense, the availability of a cheaper, illicit substitute limits the effectiveness of the legal alternative, a fact that is applicable to Canada’s cannabis legalization.

Behavioural economics research on the price elasticity of demand for illegal versus legal cannabis indicates that consumers will have a general preference for legal cannabis, relative to the black market, if the costs are relatively similar.⁸¹ At present, they are not similar, with the price of legal cannabis being nearly double that of its black market competition, at the aforementioned \$5 and \$10 figures, respectively. For the range of policy objectives and circumstances present in Canada, the socially optimal pricing strategy is for the legal market price-point to be significantly lower than the price in the illicit market, which is contrary to the approach being implemented across the country.⁸² Unless drastic measures are implemented by both federal and provincial governments to take seriously price competition with the black market when determining pricing of legal cannabis, the black market will continue to thrive and undermine the intent of legalization.⁸³

B. Enforcement Challenges

As discussed above, another reason customers are willing to purchase their cannabis on the black market is because their risk of being caught doing so is very low.⁸⁴ Though the *Cannabis Act* makes the purchase and sale of illicit cannabis illegal, there are significant logistical constraints discussed already—such as what this paper has dubbed “the mail problem”, “the plastic bag problem,” as well as banking secrecy issues—which renders the enforceability of this law challenging.⁸⁵ The problem is made worse by the fact that, for years, laws against the illegal possession of cannabis have been enforced in a lax manner for small amounts, continuing into early Canadian

⁸¹ M Amlung et al, “Price elasticity of illegal versus legal cannabis: a behavioral economic substitutability analysis” (2019) 114:1 *Addiction* 112.

⁸² Childs & Stevens, *supra* note 79 at 656.

⁸³ *Ibid* at 672.

⁸⁴ Meadows, *supra* note 52.

⁸⁵ *Ibid*.

legalization.⁸⁶ Though this factor alone does not necessarily drive consumers toward black market cannabis, it influences their decision-making by removing the disincentive role the law plays in encouraging citizens to follow it. That is, instead of having to choose between “Buy A at \$10” and “Buy B at \$5 with the possibility of a fine or prison time,” the rational analysis may become a comparison of “Buy A at \$10” versus “Buy B at \$5, and though it’s technically illegal, there is virtually no chance of punishment.” In sum, due to the challenges regarding enforceability, Canadians are more likely to turn to the black market’s cheaper, more available, and higher-quality cannabis – for the reasons mentioned throughout this paper.

C. The Issue of Availability

Beginning after legalization in late 2017 and continuing into 2020, Canadian cannabis stores have experienced extreme supply and availability shortages.⁸⁷ These shortages led to long lines, backlogs, and empty shelves in legal cannabis stores.⁸⁸ Consumer research studies indicate that customers become frustrated when they make the decision to go to a store to make a purchase, but are greeted with empty shelves.⁸⁹ This phenomena, known as insufficient on-shelf availability, directly impacts the retailer’s sales and subsequent profitability, and generally causes customers to purchase a similar substitute product from a competitor, as well as to be less likely to purchase from the out-of-stock retailer again.⁹⁰

⁸⁶ *Ibid.*

⁸⁷ Mack Lamoureux “Canada Is Already Experiencing Cannabis Shortages”, *Vice* (18 October 2018), online: <www.vice.com/en_ca/article/evw99z/canada-is-already-experiencing-cannabis-shortages> [perma.cc/4YPJ-75PT] [Lamoureux, “Cannabis Shortages”]; Bill Alpert “The Great Marijuana Shortage Shows No Signs of Letting Up”, *Barron’s* (25 March 2019), online: <www.barrons.com/articles/marijuana-supply-running-short-in-canada-51553528232> [perma.cc/4YPJ-75PF].

⁸⁸ Trevor Howlett “Why Alberta continues to lose money on legal cannabis”, *CBC News Edmonton* (5 March 2020), online: <www.cbc.ca/news/canada/edmonton/alberta-cannabis-lose-money-1.5484830> [perma.cc/X2DE-VF5G].

⁸⁹ University of Alberta, “Sold-out Products Influence Consumer Choice”, *ScienceDaily* (29 September 2009), online: <www.sciencedaily.com/releases/2009/09/090929133252.htm> [perma.cc/X2DE-VF56].

⁹⁰ Alexander Tautrimis et al, “Optimizing On-Shelf Availability for Customer Service and

In the ordinary case, a customer who desires a pair of headphones from Best Buy will, upon seeing Best Buy is sold out, become mildly frustrated with Best Buy and less likely to purchase from them in the future; then, they will turn to a competitor, such as The Source, for the product. Since the companies are independent from each other, with their own separate supply chains and inventory, it is likely the customer will be able to find the headphones in stock at a competitor and purchase from them. The result of this scenario is that Best Buy—due to unavailability of a given product—lost a customer and the revenue that the customer would have provided, as well as created some ill-will in the eyes of the customer, who is less likely to buy from Best Buy in the future.⁹¹ The competitor, The Source, gained a customer and the revenue that the customer provided with their purchase, and created some goodwill by having the product in stock.⁹² Regardless, the entire transaction occurred in the legal consumer electronics sector of the economy. If the product was, for some reason, sold out in all consumer electronics stores, the customer would have two possible choices available to them.⁹³ First, they could decide not to purchase the product at all. Second, they could turn to a possible secondary or black market for the product. If the customer decides not to purchase the product at all, the entire consumer electronics sector of the economy suffers this loss of sales, if the scope is large enough. If the customer turned to a secondary or black market for a product—such as scalpers or second-hand markets like Facebook Marketplace, Kijiji, or Craigslist—the consumer electronics sector loses out on the revenue, has control over neither the quality of the product nor who is buying it, and the government does not collect any tax revenue on the transaction.⁹⁴

The above consumer purchase decision example illustrates the negative impact sold-out products have on consumer choice. In the Canadian cannabis market, since the legal retailers are all supplied by the same pool of government ‘licensed producers’ (LPs), the shortages cascade across the

Profit” (2011) 30:2 J Bus Logistics 231.

⁹¹ Howlett, *supra* note 88.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

entire legal market.⁹⁵ To take a Manitoba example, this means that not only would Delta 9 Cannabis be sold out, Meta Cannabis, Garden Variety, and Tokyo Smoke would be as well. A customer who makes the decision to purchase from Delta 9 would arrive at a store to find that it is completely sold out of cannabis. Growing mildly frustrated with Delta 9, the customer—if desperate enough, which customers who have made a purchase decision often are—would then drive to each of the other legal cannabis stores, only to find that they are similarly sold out. The customer’s frustration would rise with each additional instance, leading to the customer becoming frustrated with every legal cannabis store in the province, rendering them less likely to buy from any of them in the future. Additionally, the customer may become frustrated with the legal cannabis sector as a whole.⁹⁶ In the event of completely or near-completely sold-out products, the cannabis customer, much like the headphone purchaser, would have two options. First, the customer could decide not to purchase cannabis at all. Second, the customer could turn to the black market for cannabis. In this scenario, a customer deciding not to purchase cannabis at all is the best remaining outcome for the Canadian government and the cannabis sector, though it will result in the cannabis sector losing out on sales revenue and the government losing out on tax revenue. However, the latter option seems far more likely, especially in light of the passionate and often habitual use of cannabis by many.⁹⁷

When customers, frustrated by sold-out stores, empty shelves, and long lines, turn to the black market for cannabis, it represents a near-total failure of the government’s strategy for legalization. As mentioned, the black market is broadly non-discriminatory about who they sell cannabis to – meaning that curbing the sale and use of cannabis by children, one of the goals of legalization, is frustrated by this fact.⁹⁸ Further, the legal cannabis sector loses out on this revenue, putting the viability of the sector in potential jeopardy, all the while benefiting the black market. As well, the cannabis sold on the black market is not regulated, monitored, or quality-controlled by the government, frustrating the government’s goal for

⁹⁵ Lamoureux, “Cannabis Shortages”, *supra* note 87.

⁹⁶ *Ibid.*

⁹⁷ Meadows, *supra* note 52.

⁹⁸ *Ibid.*

legalization of providing Canadians with safe, quality-controlled cannabis sold by licensed government retailers.⁹⁹ Though ordinarily the black market is not a perfect substitute for its legal counterpart in consumer purchase decision-making—as its use is generally somewhat curbed by illegality and the administration of law enforcement therein—the aforementioned lack of enforcement regarding the use and sale of black market cannabis renders the two types of retailers to be near perfect substitutes for consumers.

D. Product Quality

Another reason customers may be choosing the black market for cannabis over its legal counterpart is the often superior quality offered on the black market. Since legalization, legal cannabis has been lambasted by media and users alike for its poor-to-mediocre product quality.¹⁰⁰ Notably, this poor quality has included dry, old cannabis – past its ‘best before date’, packaged months earlier – low in tetrahydrocannabinol (THC), the psychoactive ingredient which gives the plant its intoxicative effect, and fraught with mold and mildew.¹⁰¹ This was confirmed by consumers interviewed by Vice, who reported that the cannabis “buds are really dry... crumbl(ing) between my fingers,” “was packaged a month ago,” and “did not do anything for me.”¹⁰² These quality issues are not merely aesthetic, according to cannabis consultants; rather, they impact the actual use and effect of the product in the same way rottenness impacts fruit.¹⁰³

⁹⁹ CA, *supra* note 1.

¹⁰⁰ David George-Cosh “The good, the bad, and the ugly from Canada’s first year of legal pot”, *BNN Bloomberg* (11 October 2019), online: <www.bnnbloomberg.ca/the-good-the-bad-and-the-ugly-from-canada-s-first-year-of-legal-pot-1.1330342> [perma.cc/M2F3-3AYM].

¹⁰¹ Vanmala Subramaniam “A year in the weeds: why the cannabis industry didn’t take off the way everyone planned”, *Financial Post* (15 October 2019), online: <business.financialpost.com/cannabis/cannabis-news/cannabis-legalization/a-year-in-the-weeds-why-the-cannabis-industry-didnt-take-off-the-way-everyone-planned> [perma.cc/ZGA5-9N3Y].

¹⁰² Manisha Krishnan “Canadians Are Reviewing Their Legal Weed on This Subreddit”, *Vice* (22 October 2018), online: <www.vice.com/en_us/article/9k777d/canadians-are-reviewing-their-legal-weed-on-this-subreddit> [perma.cc/E5YG-NMXG].

¹⁰³ “Low-quality cannabis driving consumers back into black market: industry consultant”, *BNN Bloomberg* (26 March 2019), online (video): <www.bnnbloomberg.ca/marijuana/video/low-quality-cannabis-driving-consumers-back-into-black-market-industry-consultant~1644640> [perma.cc/E6YK-NKGX].

On the other hand, the black market for cannabis has maintained continuously high product quality offerings, such that some consumers are trying both legal and black market cannabis, and returning to the black market since the legal market “does not meet their quality standards.”¹⁰⁴ This means that low-quality legal cannabis is driving consumers to the black market because the quality from legal retailers is simply insufficient.¹⁰⁵

In short, quality issues are being caused by the transition to the new, legal cannabis market on the part of growers. Most of the growers who now grow for Health Canada are either inexperienced or only had prior experience growing for black market cannabis operations. In both cases, the growers are not accustomed to producing cannabis in the large quantities that Health Canada and the legal retailers are demanding it to be grown.¹⁰⁶ In this sense, the legal cannabis market’s quality issues are an issue of scaling – a problem caused when the growers have to adjust to new market realities with greater quantities of product demanded at a given time.¹⁰⁷ At the same time, the black market is able to flourish as it has for decades: with small-to-medium scale, experienced craft growers who have not had to adjust their business or growing practices at all.

The good news for legal cannabis retailers is that these quality control problems are hopefully not systemic, and instead relate to the transitional period in the early days of cannabis legalization.¹⁰⁸ Thus, it seems reasonable to infer that they will improve over time, as licensed growers and providers of legal cannabis gain experience growing at the magnitudes they are being asked to deliver. However, the quality concerns have persisted through the first 2 years of legalization, and are presently still causing retailers problems. As a result, it remains to be seen if, and when, they will improve.

[“Industry Consultant”].

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ “Quality control at scale still a challenge for Canadian cannabis industry, says prof”, *CBC News* (7 January 2020), online: <www.cbc.ca/news/canada/windsor/cannabis-quality-control-niagara-college-1.5417336> [perma.cc/2RP6-SV9M].

¹⁰⁷ “Industry Consultant”, *supra* note 103.

¹⁰⁸ *Ibid.*

E. Marketing Inabilities

In implementing its regime for legal cannabis in October 2017, the Canadian government—motivated by its policy objectives—placed significant prohibitions on the marketing that legal cannabis retailers can engage in, which limits their ability to compete against the black market.¹⁰⁹

Specifically, the regime prohibits the promotion of cannabis or ancillary products by (a) communicating information about price or distribution (not including displaying price at point of sale); (b) doing so in a way that may appeal to young persons; (c) through endorsements or testimonies; (d) with the use of a person, character, or animal; or (e) in a way that associates the product or brand with emotions about a way of life including glamour, recreation, excitement, vitality, risk, or daring.¹¹⁰ For the purposes of this section, promotion is construed in a broad sense, including any representation of the product which may “influence and shape attitudes, beliefs, and behaviours.”¹¹¹ These prohibitions apply to all sellers, producers, and providers of cannabis-related products and services.¹¹²

Retailers are further restricted by the mandating of plain packaging for all cannabis products, which render brands largely indistinguishable from each other.¹¹³ This creates difficulties in differentiating your brand from others in the eyes of consumers, as they may not even know from which brand they are purchasing. Further complicating the effective sale of cannabis products is the prohibition on the sensory consumer experiencing of cannabis products. That is, most provinces require cannabis products to be sealed and stored behind a locked display case, with only a small number of jars available for customers to smell and see the products.¹¹⁴ As a result, customers are largely unable to sensorially experience—via sight, touch, and

¹⁰⁹ CA, *supra* note 1, s 17.

¹¹⁰ *Ibid*, s 17(1)(a – e); Beverly Cheung, “Marketing an Unmarketable Product” (28 February 2019) at 4, online (pdf): *Canadian Bar Association – Business Law Section Resources* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3406119> [perma.cc/F5ZW-PDY3].

¹¹¹ CA, *supra* note 1, s 2(1).

¹¹² *Ibid*, s 16; Cheung, *supra* note 110 at 4.

¹¹³ Cheung, *supra* note 110 at 5.

¹¹⁴ Alberta, *Alberta Gaming, Liquor and Cannabis, Retail Cannabis Store Handbook*, (Alberta: 2018), s 3.3.5 [AGLC Handbook].

smell—the cannabis before they make their purchase decision, rendering them less likely to purchase the product.

These marketing restrictions have and will limit the ability of Canada’s legalization of cannabis to meet its outlined policy objectives, as they make it more likely for consumers to turn to the black market. As stated by Beverly Cheung, “licensed producers must compete against experienced and aggressive illicit competitors, all the while being unduly constrained and prohibited from adopting marketing strategies that are essential to the growth of an infant industry.”¹¹⁵ These marketing restrictions hamper the informational flow between a business and its consumers, causing consumers to be less educated about the products they are buying, which according to social science research, makes them more likely to purchase from brands and sources they are familiar with.¹¹⁶ For instance, shortly after legalization, greater than 95% of cannabis purchasers said they “were unaware of which brand they had purchased.”¹¹⁷ In the case of the legal cannabis market, this means that consumers are more likely to turn back to what they have done in the past – the black market. Further, by impairing the ability of consumers to form educated opinions about a brand based on the differentiating factors that are traditionally represented in advertising, these significant restrictions on advertising render consumers even more likely to return to the ‘tried and true’ black market.

For instance, consider a consumer who has decided to purchase 1 gram of cannabis. If the consumer was considering purchasing the cannabis from a legal retailer, they would have no awareness of whether or not the product is on sale, nor would they have received any promotional materials advertising the store itself or its products.¹¹⁸ Since promotional materials generally influence a consumer’s perceptions about a store or brand, this means that the consumer would be less likely to attend the store to find out. Even if the consumer did attend the store, they would be greeted with products in plain packaging, small brand logos, and closed boxes. If they wanted to see or smell the cannabis, they may be able to, but only for some products, and only in a limited way – through the sensory smell jar.

¹¹⁵ Cheung, *supra* note 110 at 15.

¹¹⁶ *Ibid* at 16.

¹¹⁷ *Ibid* at 17.

¹¹⁸ *Ibid*.

On the other hand, if the consumer accessed a mail-order cannabis retailer's website, they would immediately be greeted with frequently available sales, bargains, and quantity discounts.¹¹⁹ Further, the products received from the retailer would not be subject to the strict packaging and advertising requirements, and could be packaged and advertised in a colourful, visually appealing manner.¹²⁰ This will make a customer more likely to purchase the product.¹²¹ However, mail-order cannabis retailers similarly lack the ability for the consumer to sensorially experience the product, which is a shortcoming of the business model. This puts legal retailers at a relative advantage, though this is limited by the fact that the sensory experiences available at the legal stores are small and narrow in scope. However, this is balanced out by the fact that some mail-order retailers are willing to offer free samples, and that street drug dealers are able to allow potential customers a sensory experience of the products.¹²²

At present, the marketing regulations in the *Cannabis Act* may be too restrictive to allow legal cannabis retailers to effectively compete with, and defeat, the black market for cannabis. This failure, by undercutting legal retailers' ability to draw in and sell to consumers, in turn frustrates the policy objectives underlying the framework, and the legalization of cannabis in Canada itself.

F. Excessive Packaging

Another factor which contributes both to the higher cost of legal cannabis, and which impacts the consumer purchase decision, is the excessive packaging present in a legal cannabis sale. As a result of the aforementioned marketing and safety regulations, legally purchased cannabis comes in extensive, dense, single-use packaging composed of multiple layers of paper, foil, and plastic.¹²³ There is often up to seventy

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² "Sample Pack" (accessed 2020), online: *Buy Online Weed Canada* <buyonlineweedcanada.com/product/sample-pack>. Please note that at the date of publication, buyonlineweedcanada.com is no longer an operational website.

¹²³ Shane Fowler "Shameful: Cannabis customers floored by the amount of plastic packaging on their pot", *CBC News* (22 October 2018), online: <www.cbc.ca/news/canada/new-brunswick/cannabis-packaging-excess-1.4870682>

grams of packaging for a single gram of cannabis sold, because even a single gram has to be in child-resistant packaging similar to what is used for over-the-counter pills like Tylenol.¹²⁴

In comparison, the black market is, shockingly, more environmentally conscientious, whether by design or chance. Black market cannabis retailers do not have to abide by the strict packaging requirements—such as child-proofing and multi-layered packaging—that legal retailers do. This allows them to package in the most minimalistic and cost-efficient way, which is in turn better for the environment. Further, since black market retailers are not subject to the government’s restriction on the bulk sale of cannabis, they—unlike legal retailers—are able to sell “family-sized value bags of pot-laden peanut butter cups,” where legal retailers would have to sell the cups individually packaged. This yields substantially less packaging waste on a per gram-of-cannabis basis, and, since some consumers feel better about buying a product which has a smaller environmental footprint, may influence consumers to purchase from the black market, rather than legal retailers.¹²⁵ After their first purchase of legal cannabis, many consumers complained about the environmentally wasteful nature of the packaging.¹²⁶ Since “most cannabis consumers care very much about the environment,” the excessively wasteful packaging of legal cannabis may influence the consumer purchase decision toward the black market, and away from legal retailers.¹²⁷

G. General Advantages for Black Market Dealers

In the wake of federal legalization of cannabis in Canada, one final group of reasons for the prominent position the black market still occupies

[perma.cc/46DR-NMT6].

¹²⁴ Manisha Krishnan & Randy Robinson “Weed Packaging Rules Are Wasteful Overkill”, *Vice* (2019), online: <www.vice.com/en_ca/article/panxev/weed-packaging-rules-are-overkill-and-wasteful-in-canada-and-the-us-sticky> [perma.cc/6QYM-SHER].

¹²⁵ Lois Mohr, Deborah Webb & Katherine Harris, “Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior” (2005) 35:1 *J Consumer Affairs* 45.

¹²⁶ Krishnan & Robinson, *supra* note 124.

¹²⁷ Bill Kauffman “Excessive edible cannabis packaging could be buzz kill: producers”, *Calgary Herald* (27 January 2019), online: <calgaryherald.com/cannabis/cannabis-business/excessive-edible-cannabis-packaging-could-be-buzzkill-producers/> [perma.cc/3FKF-CTPF].

in the cannabis market are the various general advantages black market dealers have over the legal market. These include a developed customer base, familiarity, and convenience.

1. Consumer Base

Since the black market for cannabis far precedes the new legal market, black market dealers have had ample time to build up a base of consumers.¹²⁸ A relationship of trust between seller and purchaser is an essential element of the sale of cannabis.¹²⁹ As a result of this trust and relationship between dealers and their clients, many of these consumers are unlikely to leave their black-market dealers.¹³⁰ This is true for both mail-order cannabis retailers and street-level dealers, as frequent customers of both will have built up a trusting relationship with the source, based on the quality, price, consistency, and safety of the product being sold.¹³¹

2. Familiarity

Similar to the idea of a base of consumers, the black market may be the more familiar option for many consumers. Since it has been around for decades and was the sole means by which to purchase cannabis, consumers will have built the aforementioned relationship with their dealer or source. Furthermore, since human beings are creatures of habit, many find it unappealing or untenable to suddenly change their cannabis purchasing habits after legalization.¹³²

3. Convenience

The convenience of a purchase is, ultimately, one of the most important factors in a purchase decision.¹³³ As illustrated by the success of online

¹²⁸ Meadows, *supra* note 52.

¹²⁹ *Ibid* at 19.

¹³⁰ Paul Gaita “Black Market Cannabis Thrives In California, Despite Legal Options”, *The Fix* (9 April 2019), online: <www.thefix.com/black-market-cannabis-thrives-california-despite-legal-options> [perma.cc/G25N-YJRN].

¹³¹ Meadows, *supra* note 52.

¹³² *Ibid*; Jason Lemon “Legal Weed: Canadian Cannabis Customers Angry About Excessive Plastic Packaging and Shipping Problems”, *Newsweek* (23 October 2018), online: <www.newsweek.com/legal-weed-canadian-cannabis-customers-angry-about-excessive-plastic-1183736> [perma.cc/9C77-M4F7].

¹³³ Jonathan Palmer, “Electronic commerce in retailing: Convenience, search costs,

retailers, such as Amazon, few things are more convenient than the product you desire showing up on your doorstep. The black market is distinctly willing and able to deliver to a consumer's house.¹³⁴ This is true both for mail-order cannabis retailers, whose business model relies on shipping products directly to customers' doorsteps, and street level dealers, who are generally willing to deliver to a customer directly.¹³⁵ Though some legal cannabis retailers offer delivery services as an option, they are generally both pricier and less reliable than the black market's option, since the legal market generally relies on fledgling start-ups like Pineapple Express, whereas the black market utilizes Canada Post exclusively.¹³⁶

H. Conclusion

The black market for cannabis has achieved continued success in spite of the federal legalization of cannabis in Canada for multiple reasons. Namely, it provides a generally better product at a lower price. Since enforcement of law against black market cannabis purchases and sales is lax at best, and non-existent at worst, consumers are likely to view the black market as a direct substitute for legal cannabis. As a result, a realistic comparison of price and quality yields a rational consumer purchase decision trend toward the black market. This is made worse in light of the stringent restrictions on the marketing of legal cannabis in Canada, which impair the legal market's ability to grow its consumer base, as well as to persuade repeat customers to return. Further problematic is the distinct dislike that the excessive packaging of legal cannabis engenders in consumers, who view it as wasteful and unnecessary, and turn to the black market instead. Additionally, further exacerbating this shortcoming in the eyes of consumers is the fact that the stores are often sold out of all, or nearly all, cannabis products, which serves to frustrate consumers and drive them away from the legal market toward the black market.

delivery and price across retail formats" (2000) 1 *Information Technology & Management* 25.

¹³⁴ Frey, *supra* note 12.

¹³⁵ *Ibid.*

¹³⁶ David George-Cosh "Pot delivery services looking to replace illicit dealers face hurdles", *BNN Bloomberg* (23 January 2020), online (video): <www.bnnbloomberg.ca/pot-delivery-services-looking-to-replace-illicit-dealers-face-hurdles-in-canada-1.1379384> [perma.cc/83VG-ZZ7].

Cannabis was legalized in Canada, in part, to protect young people from cannabis, reduce and deter illicit activities in relation to cannabis, and provide the public with access to a supply of legal, quality-controlled cannabis.¹³⁷ However, the black market is composed of multiple small, medium, and large-scale criminal enterprises who have no qualms about selling cannabis to underage young people, and whose cannabis is illegal as well as not quality- and safety-controlled by the government. As such, the continued flourishing of the black market for cannabis, as well as the failure of the legal cannabis market to win and keep customers, frustrates the intent of legalization, and requires an effective government response to remedy the issue.

IV. COMBATting THE BLACK MARKET FOR CANNABIS

To effectively combat the black market, and thereby to achieve the policy goals of legalization, several decisive actions are prudent. First, the *Canada Post Corporation Act* should be amended to afford the police greater means to combat drug trafficking by mail. Second, legal cannabis retailers should, quite simply, be a better business when it comes to price, quality, and availability. Third, and relatedly, retailers should consider introducing lower-priced cannabis options to compete with the more affordable black market. Fourth, the government and retailers should focus on consumer education. Fifth, the government should loosen the marketing restrictions on the sale of legal cannabis. Sixth, the government should better utilize the banking and financial sector as a means to target and combat the illegal cannabis trade.

A. Amend the Canada Post Corporation Act

Most Canadians interact with the largest, most prolific drug dealer in the country daily: a small piece of its enabling statute has turned Canada Post from an innocent Crown corporation into the most prolific drug distributor in Canada. The drugs being distributed in this manner range from cannabis, to methamphetamine, to fentanyl, and everything in between. A by-product of a legal quirk within the *Canada Post Corporation Act* (hereafter “the CPCA”) allows Canada Post to be veritably abused by

¹³⁷ CA, *supra* note 1.

illegal drug traffickers, and as a result, the CPCA must be amended to allow the legal market for cannabis to function as intended.

As discussed above, the CPCA is the 1981 Act of Parliament which created Canada Post as a Crown Corporation, and set out its rights, powers, and duties, as well as the rights of those it interacts with.¹³⁸ Contained within the CPCA is Section 40(3), which provides that “nothing in the course of post is liable to demand, seizure, detention or retention,” even if the officer has reasonable grounds to suspect criminal activity.¹³⁹ As mentioned, “in the course of post” has a broad construction, sufficient to include all packages in a mailbox, on private property, or at a Canada Post Location.¹⁴⁰ The only possible routes around this are if the package is flagged by a Canada Post employee—which occurs very rarely—or if the police are granted a warrant in relation to suspicious mail, which generally only happens in rare cases relating to a severe national security risk.¹⁴¹ Even with reasonable grounds to suspect criminal activity, police generally can’t get a warrant to intercept mail before it’s been delivered and taken inside and must instead ask Canada Post employees to review packages as they come in, a task at which they lack sufficient expertise, and which even experts struggle with.¹⁴²

The problem is clear. The police have essentially no concrete powers with which to search packages sent by Canada Post, and criminals are aware of this. As a result, they send packages of an illegal nature using Canada Post, knowing full well that their likelihood of being caught is on the spectrum between minimal and non-existent. This limitation on police powers resulting from the CPCA does not exist for other, private courier services like FedEx and UPS.

In 2015, the Canadian Association of Chiefs of Police called for the government to amend the CPCA to afford the police similar powers as they

¹³⁸ Joe Warmington “Post office loophole handcuffs drug cops”, *Toronto Sun* (25 September 2019), online: <torontosun.com/news/local-news/warmington-post-office-loophole-handcuffs-drug-cops> [perma.cc/5PWH-Q9F6].

¹³⁹ CPCA, *supra* note 61, s 40(3).

¹⁴⁰ Brownell, *supra* note 35.

¹⁴¹ Freehill, *supra* note 21.

¹⁴² Maclean’s Staff “Canada Post the shipping method of choice for fentanyl importer’s”, *CityNews* (7 March 2019), online: <toronto.citynews.ca/2019/03/07/canada-post-fentanyl/> [perma.cc/N58N-72PN].

have in relation to FedEx, UPS, and other private couriers. This resolution was supported by the Royal Canadian Mounted Police (RCMP), Canada Border Services Agency (CBSA), and even the Canadian Civil Liberties Association (CCLA).¹⁴³ When two groups as disparate in purpose and opinion as law enforcement agencies and the CCLA agree on something, the government should take notice and follow the recommendation. However, in 2017, the Federal government declined to act on this recommendation, instead saying that Canada Post's current collaboration with police was sufficient – in spite of resolute statements to the contrary by the police, RCMP, CBSA, and CCLA, who ought to know best.¹⁴⁴ It seems unlikely that the government would know better than the police and RCMP whether the collaboration between Canada Post and law enforcement agencies is functioning sufficiently. Ultimately, it remains unclear why this recommendation was not followed, especially in light of the abundant body of evidence that Canada Post is awash in criminal drug trafficking.

Increasing the police's capacity to enforce the law relating to Canada Post and drug trafficking will significantly hamper the black market for cannabis. Canada Post is being used heavily by all manner of drug trafficking. This includes mail-order marijuana retailers, which, as discussed *supra*, use Canada Post exclusively to deliver their products to customers.

This paper recommends the government amend the CPCA in a manner similar to that of the CCLA's recommendation. The CCLA recommends that the more significant search powers—in line with private couriers—sought by law enforcement in relation to Canada Post be granted, but only in relation to packages, not letters. This recommendation strikes the proper balance between respecting Canadian's right to privacy, and law enforcement's ability to combat criminal drug trafficking by Canada Post, by engaging in a purposive analysis of the CPCA. The CPCA's special privacy protections were originally intended to provide Canadians with requisite privacy for letters, as letters were among the most common forms of personal and professional communication in 1981, when the CPCA was passed. Now, packages make up a growing share of Canada Post's deliveries. Thus, continuing to extend this protection to letters, while not doing so for packages—which make up the vast majority of criminal activity using Canada

¹⁴³ Brownell, *supra* note 35.

¹⁴⁴ *Ibid.*

Post—respects the very purpose of the CPCA, while at the same time updating it for modern times. By doing this, the government would be creating uniform package searching standards across all couriers—whether public or private—and thus, giving criminal drug traffickers using Canada Post as a tool nowhere to hide.

B. Be A Better Business

The simplest, yet possibly the most pertinent, recommendation this paper will make is for the legal market for cannabis and its retailers to be a better business. No business can thrive offering a lower-quality product at higher prices than its competitors, while also being consistently out of stock. This is particularly true when the business is attempting to enter a new business sector with an already established dominant player. Regardless of whether all the other means taken to combat the black market for cannabis, if legal cannabis retailers continue to fail at being price competitive with the black market, at offering a similar—if not better—quality product, and at consistently stocking products, consumers will continue to turn to the black market.

There are three constituent elements of the legal cannabis sector ‘being a better business’ generally.

First, legal cannabis retailers must determine an optimal price which will allow them to be price competitive with the black market, while still generating the desired tax revenue and covering the additional licensing and packaging fees. The socially optimal pricing strategy for legal cannabis is to be priced drastically lower than the black market.¹⁴⁵ This approach is contrary to the path which has been taken in Canada since legalization, but would be in line with their rhetoric prior to legalization.¹⁴⁶ This rhetoric demonstrated a clear awareness that the price would need to undercut the black market to establish a firm foothold with consumers.¹⁴⁷ This has not occurred. As such, a return to the pricing strategies expounded by the government prior to legalization would represent a turn toward better

¹⁴⁵ Childs & Stevens, *supra* note 79.

¹⁴⁶ Manisha Krishnan “Here’s What Happens to the Black Market Now That Weed Is Legal”, *Vice* (17 October 2018), online: <www.vice.com/en_ca/article/7x3jyx/heres-what-happens-to-the-black-market-now-that-weed-is-legal> [perma.cc/N57X-EWQA] [Krishnan, “Here’s What Happens to the Black Market Now”].

¹⁴⁷ *Ibid.*

business practices – to defeat an established competitor (in this case, the black market), the newcomer must either offer a more affordable product, or a better product, or ideally both. In this case, neither is occurring.¹⁴⁸

Second, legal cannabis retailers must offer quality that is competitive with the black market. As discussed above, there has been a wave of consumers reporting that the cannabis they purchased from legal retailers was “dry,” “lacked potency,” and was “crumbling.”¹⁴⁹ Poor-quality cannabis pushes consumers toward the black market, whose quality has allegedly remained sufficient for decades.¹⁵⁰ To address this perception, the legal market can take a two-step approach. First, put in place better quality control throughout the supply chain to ensure that these quality issues become demonstrably and verifiably false. The quality of the legal market needs to be comparable, if not better, than the black market to effectively combat it. Second, legal retailers should make it clear in the eyes of consumers that their products are far superior, whether through press releases, advertising—which is heavily restricted, as was discussed above—or news interviews. As a result of this process, the product quality of the legal market will be competitive with the black market, and consumers will be educated regarding the difference between the two. The legal market needs to provide consumers with a clear “why” proposition – an answer to the question of “why should I buy my cannabis legally?” The problem of the black market in this attribute is not something to dance around; the legal market needs to address it head-on, acknowledge that there have been problems regarding product quality in the past, attribute that to start-up challenges, and make it clear that the opposite is true – the legal market is safer and higher quality.

Third, legal cannabis retailers must consistently have products in stock, so as to not push away consumers who grow frustrated by regularly empty shelves. As discussed above, consumers have grown disillusioned as a result of consistent shortages in legal cannabis retail stores, instead turning to the black market, where someone—whether your local street dealer or a mail-order cannabis dispensary—always has cannabis in stock. This is largely a problem of supply shortcomings and supply-chain inefficiencies, and is an

¹⁴⁸ Anne Coughlan & Murali Mantrala, “Dynamic competitive pricing strategies” (1992) 9:1 *Intl J Research Marketing* 91.

¹⁴⁹ Krishnan, “Here’s What Happens to the Black Market Now”, *supra* note 146.

¹⁵⁰ Meadows, *supra* note 52.

issue which will get better as time passes. The government and its legal cannabis retailers should prioritize supply-chain efficiencies and ensure they have a sufficient number of growers to consistently meet demand. Beyond that, this is a matter of patience. Time heals all wounds; over time, with effort and emphasis placed in the right places, the supply of legal cannabis will meet demand.

C. Introduce Affordable Cannabis Options

If legal cannabis retailers are unable to be consistently price-competitive with the black market on all products, offering some products at the lower price point would be a useful alternative. This would provide an initial draw for consumers who are particularly price-discriminative, and as long as the quality is comparable, they may become return customers. These products would not be particularly fancy or illustrious; rather, they would be specifically targeted at undercutting the black market on price. These have been described as the equivalent of “boxed wine used to drive bootleggers out of business.”¹⁵¹ This next step is already in the planning stages in the Canadian market. The strong competition between the legal and black market on price has led to three of the largest cannabis producers in Canada—Canopy Growth, Tilray, and Aurora—to begin planning to introduce lower-priced cannabis products.¹⁵² These products, called “Twd. 28”, “The Batch,” and “Daily Special,” respectively, are aimed directly at addressing the price-sensitive segment of the black market. In tandem with the better business practices—particularly quality and supply—already discussed, these products will serve to appeal to customers who choose the black market over its legal competitor solely on price, by offering a product for the frequent cannabis user that is verifiably safer (and more legal) than black market marijuana.

¹⁵¹ Michael Kaplan “Can a Marijuana Dispensary’s Budget Pot Put Illegal Dealers Out of Business”, *New York Post* (30 January 2019), online: <nypost.com/2019/01/30/can-a-budget-pot-dispensary-put-illegal-dealers-out-of-business/> [perma.cc/N56X-EWQA].

¹⁵² Soo Kim “Canada to offer ‘value’ marijuana brands to compete with illegal sellers market”, *Newsweek* (29 February 2020), online: <www.newsweek.com/canada-cannabis-value-brand-marijuana-weed-aurora-canopy-tilray-1489836> [perma.cc/9WLW-KCRX].

D. Consumer Education

Any solution to combatting the black market for cannabis should be paired with a focus on consumer education.¹⁵³ A clear government initiative to educate consumers about the safety measures present in the legal market, such as regulation and testing, would make significant progress in convincing consumers to leave the black market for the legal market. This consumer education would focus on providing a level of transparency—in growing, testing, product quality and safety, as well as environmental practices (if the recommendation made earlier is followed)—that the black market cannot provide.¹⁵⁴ If the legal market for cannabis follows the recommendations in this paper and becomes a better, more socially responsible business, this education can only help their reputation among consumers, and will allow it to recapture sales from the black market.

E. Loosen Marketing Restrictions on Legal Cannabis Retailers

The legal market for cannabis is subject to extremely stringent restrictions on the marketing practices it may engage in. These include the promotion of cannabis or cannabis-related products through “communicating information about price or distribution prior to the point of sale,” “endorsements or testimonies,” and “in a way that associates the product or brand with emotions about a way of life including glamour, recreation, excitement, vitality, risk, or daring.”¹⁵⁵ This paper recommends that these restrictions, which inhibit its ability to compete with the established black market, be significantly relaxed. As discussed earlier, the legal cannabis market has a great distance to go in order to fulfill its policy objectives and overcome the already established black market for cannabis. As stated by Beverly Cheung, “the elimination of the illicit market will depend on the ability of licensed incumbents to successfully compete against the black market. As it stands, the current restrictions on price, sales, and marketing inhibit the ability for the licit market to do so.”¹⁵⁶ While it may be argued that loosening these marketing restrictions would counteract the

¹⁵³ Meadows, *supra* note 52.

¹⁵⁴ *Ibid.*

¹⁵⁵ CA, *supra* note 1, s 17(1)(a - e).

¹⁵⁶ Cheung, *supra* note 110 at 20.

policy objectives of legalization by encouraging its use in a broader manner than the government desires, this may be counteracted by an effective consumer education campaign on the dangers and responsible use of cannabis. Deleting some aspects of these restrictive marketing laws will achieve similar policy objectives, without the substantial drawbacks.

Relaxing the stringent marketing restrictions on the legal market for cannabis would be a significant step toward accomplishing these policy goals and effectively combatting the black market. This paper recommends that the government eliminate the aforementioned restrictions. Though the aforementioned do not include all restrictions imposed by the government on the legal cannabis sector, they represent the aspects whose deletion would generate the most significant boost to the sales of legal cannabis.

First, allowing the promotion of cannabis by communicating about price or distribution availability is a much-needed first step for the legal market to compete with the black market. At present, it seems that these restrictions mean that legal retailers are not allowed to advertise sales, discounts, or essentially any promotional materials regarding price or availability. Yet, these two areas—price and availability—are among the biggest complaints that consumers have with the legal market, compared to the black market. If this notion has already created such ill-will in potential customers that they will not enter a legal cannabis store, and if in addition, the legal market is prevented from engaging in sufficient advertising to dispel this notion, these customers will never return to the legal market. Further, advertising about price and availability—for instance, major sales and discounts, or particularly special new products—is fundamental to good business practice in the modern age.¹⁵⁷ Consumers generally do not simply walk from store to store, hoping to find that the products they need are in stock and on sale.¹⁵⁸ Rather, businesses in the modern age must cater to the bargain-hunting consumer, who is scouring the web, mail, and e-mail for the best possible deals. If they are not receiving these advertisements from legal cannabis retailers, and are receiving them from black market retailers—who are subject to no such restrictions on marketing—they will be drawn to the black market.

¹⁵⁷ Soo-Juan Tan & Seow Hwang Chua, “While stocks last! Impact of framing on consumers’ perception of sales promotions” (2004) 21:5 J Consumer Marketing 343.

¹⁵⁸ *Ibid.*

Second, allowing the promotion of cannabis and related products through endorsement or testimonies would provide a crucial means of differentiation for the legal market from the black market. Endorsements by celebrities or notable individuals in a specific field or sphere, called ‘influencers’, are a major factor which drives sales of a product.¹⁵⁹ However, few if any legitimate celebrities or influencers are going to become involved in the promotion of the black market. Thus, deleting the restrictions on the promotion of cannabis through endorsements or testimonies, and instead utilizing these endorsements by major public figures, represents a significant advantage the legal market has over the black market – one it is not using at present. In sum, allowing celebrity endorsements and testimonials—for instance, a Cheech-and-Chong-endorsed cannabis product—would drive significant sales to the legal market, and provide it an advantage over the black market.¹⁶⁰

Third, allowing the marketing of cannabis and related products “in a way that associates the product or brand with emotions about a way of life including glamour, recreation, excitement, vitality, risk, or daring” would modernize the marketing capabilities of the legal cannabis sector. This prohibition is incredibly broad, and essentially prohibits the legal cannabis sector from engaging in effective, modern-day marketing.¹⁶¹ Marketing to the modern consumer is heavily based around ‘lifestyle marketing’; that is, associating the product with the consumer’s desired lifestyle, and showing how it can be a part of that lifestyle.¹⁶² This type of marketing is highly effective because it “segments the market on the basis of lifestyle dimensions, positioning the product in a way that appeals to the activities, interests and opinions of the targeted market and undertaking specific promotional campaigns which exploit lifestyle appeals to enhance the market value of the offered product.”¹⁶³ By allowing the legal cannabis sector to engage in a form of lifestyle marketing, the government will be making

¹⁵⁹ Anita Elberse & Jeroen Verleun, “The Economic Value of Celebrity Endorsements,” (2012) 52:2 J Advertising Research 149.

¹⁶⁰ *Ibid.*

¹⁶¹ Cheung, *supra* note 110.

¹⁶² Ronald Michman, Edward Mazze & Alan Grego, *Lifestyle Marketing: Reaching the New American Consumer* (Westport, CT: Praeger, 2003).

¹⁶³ S Satish & A Rajamohan, “Consumer Behaviour and Lifestyle Marketing” (2012) 1:10 Intl J Marketing Financial Services & Management Research 152.

significant progress towards a stronger legal market for cannabis, and curbing the sales of the black market.

Fourth, adjusting the current requirements regarding legal cannabis packaging and sampling will allow the legal market to establish greater brand recognition and grow sales. Cannabis purchasing is an experiential process, and “requires a dynamic multi-sensory environment,” which is not satisfied when “plain packaging makes every product look identical.”¹⁶⁴ The plain packaging used for all brands creates difficulty for consumers to differentiate between products. Since identifiable packaging plays a significant part in creating brand recognition, which in turn signals quality and separates products from competitors, this paper recommends that the government loosen packaging requirements to allow licensed producers and brands to better differentiate their products at the point of sale.¹⁶⁵

At present, legal cannabis is priced higher than its black market competitor, is often of lower quality, and suffers from significant supply problems. However, consumer psychology dictates that higher-priced products can succeed against arguably superior competitors—for instance, Apple Inc. products—if producers are given the ability to differentiate themselves through branding and marketing. The current regulatory landscape for legal cannabis does not afford producers and retailers this ability. This paper recommends that these restrictions be relaxed, so as to provide the legal market for cannabis yet another potential avenue to compete with, and ultimately defeat, the black market.

F. Utilize the Banking and Financial Sector

Perhaps the most novel idea this paper will suggest is the utilization of the banking and financial system to combat the black market for cannabis. As discussed earlier in this paper, the vast majority of black market cannabis purchases—particularly mail-order—are conducted via Interac e-transfer, or a similar direct-transfer mechanism. This represents a unique opportunity for the government to utilize the banking system to curb the black market. Individuals, groups of individuals, or corporations who are selling cannabis illegally, especially online, are likely to be receiving an abundance of e-transfers from a variety of e-mail addresses. If the financial institution they

¹⁶⁴ Cheung, *supra* note 110 at 29.

¹⁶⁵ *Ibid* at 30.

are using is paying attention, and is allowed to disclose this information to authorities, it will serve as an effective means of cracking down on black market cannabis sellers.

The utilization of the banking and financial sector is a question of bank secrecy. As discussed earlier, banks in Canada owe their customers a common law duty not to disclose the customer's data to third parties except under certain circumstances.¹⁶⁶ However, one of these exceptions is under compulsion of law – generally by court order or legislation.

Thus, it seems possible that legislation could be enacted providing an exception to this common-law duty for clearly suspicious accounts which are receiving a significant number of e-transfers. This would, at the very least, allow for the potential 'flagging' of accounts with e-mail addresses such as the aforementioned 'payment@mailorder-marijuana.ca'—a real e-mail address used by a real company, discussed above—which are more than likely using the bank account to harbor ill-gotten gains. However, the logistics of this sort of method would need to be carefully parsed by the enacting body, as it faces challenges to be effective, as well as privacy concerns – such as how much authorization law enforcement may receive to search an individual's banking history, and what the threshold for triggering this ought to be.

Even if granted access to an individual's bank account, it may be difficult for law enforcement to determine whether any individual or group of e-transfers were sent for legitimate reasons—the conducting of business, reimbursement by friends or family, etc.—and which were sent for illegal purposes. In this sense, truly aggressive measures – such as shutting down an account or limiting its activity – would have to be reserved for instances of clear criminality. However, a lesser level of concern—so-called 'flagging'—could be applied to any accounts which engage in the receipt of a sufficient number of e-transfers to raise questions. In these cases, the legislation could empower law enforcement to run detailed background checks on the user information attributed to the account to determine any other links to criminality or questionable activity which may engender further digging.

¹⁶⁶ *Tournier, supra* note 56.

V. CONCLUSION

Canada legalized cannabis federally with many noble objectives in mind; notably, to keep cannabis out of the hands of minors, quash the black market's role in the cannabis market, and to ensure that Canadians have access to a safe, reliable supply of quality-tested cannabis. However, the very Act that legalized cannabis, as well as the implementation thereof, has demonstrated that the government remains unsure whether its intent for legalization was harm reduction or to establish a viable federal cannabis retail sector. That is, whether they want to reduce harm by drawing in only existing, frequent cannabis users, who were previously buying from the black market, or whether they want to generate revenue by creating a high quality, appealing product that less frequent cannabis users will be drawn to try. At present, the government is walking a tightrope directly down the middle, which is in no one's best interest. The price is too high, the quality is too low, and the product is too often sold out, to attract veteran cannabis users, while the product issues are too common, and marketing and packaging are too weak, to attract new users. As a result, the black market for cannabis has continued to thrive in spite of legalization, frustrating the policy objectives underlying legalization.

At present, the black market is composed of both traditional cannabis dealers—so-called 'street dealers'—and mail-order cannabis retailers – so-called MOMs. While the presence and proliferation of both frustrates the intent of legalization, the mail-order variety are far larger and more problematic. Though exact numbers are unavailable due to the criminal nature of the businesses discussed, it is estimated that these mail-order retailers make up a far more significant portion of the large black market for cannabis than traditional retailers do. These mail-order retailers—who share a surprising amount of information about their business models on their websites—generally operate by sourcing their product from craft growers in British Columbia, receiving payment by Interac money transfer, and mailing the product directly to consumers through Canada Post. As discussed, a dated loophole in the *Canada Post Corporation Act* renders these packages nearly impossible for police to search, which has led to Canada Post being perhaps the most prolific drug distributor in Canadian history – both for cannabis and other, more dangerous drugs like methamphetamine and fentanyl.

The black market has grown, and remains, so powerful despite legalization because the government is offering an often lower-quality product for a vastly higher price, without the availability of quantity discounts, while supply shortages cause the product to be out of stock frequently. This is in addition to marketing and packaging difficulties creating issues regarding consumer awareness, education, reputation, and brand management, and is compounded by consumer distaste for the excessive and wasteful packaging legal cannabis comes in. Black market sellers also possess distinct advantages on an interpersonal level, such as an established consumer base, familiarity, and convenience.

To combat the success of the black market for cannabis, this paper recommends several decisive steps. First, follow the joint recommendations of the police, RCMP, CBSA, and Canadian Civil Liberties Association and amend the *Canada Post Corporation Act* in a manner that grants the police enhanced search powers regarding Canada Post packages, bringing them in line with those relating to private couriers. This will make it far more difficult for the black market for all drugs, particularly cannabis, to flourish by abusing Canada Post's laxity. Second, legal cannabis retailers must generally become a better business. At present, they offer a similar or often worse product for a higher price, and it is sold out frequently. No business, government-supported or otherwise, could flourish under those circumstances. In this sense, legal cannabis retailers must determine an optimal price which will compete with the black market, raise product quality in a consistent manner, and ensure that store shelves are reliably stocked so as to not frustrate customers. Third, legal retailers need to introduce a segment of affordable cannabis options specifically designed to target the price-sensitive consumer and draw them away from the black market by offering safe, reliable legal cannabis at a reasonable price. Fourth, loosen the marketing restrictions in the *Cannabis Act* which impede the legal cannabis sector's ability to grow by preventing it from advertising sales and new products, engaging in partnership and sponsorship advertising, and utilizing modern advertising techniques such as lifestyle advertising. Finally, the government needs to pass legislation to better utilize the banking and financial sector to trace and crack down on the bank accounts used to receive e-transfers for the sale of illegal cannabis.