

Canadian cannabis companies conquer U.S. capital markets

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Legalization of cannabis for adult use in Canada was a watershed event of 2018. But a select few Canadian cannabis companies also celebrated a different milestone by breaking their way into the U.S. capital markets. The New York Stock Exchange (NYSE) and Nasdaq have embraced and now welcome listings from Canadian cannabis growers, creating new opportunities for Canadian cannabis companies to participate in the U.S. capital markets, and for U.S. investors to gain exposure to Canada's exploding cannabis industry.

A few short years ago, the idea of successfully listing a cannabis company on a U.S. stock exchange seemed next to impossible. Cannabis is, after all, still prohibited as an illegal narcotic under the *Controlled Substances Act*; a U.S. federal statute. This statute declares cannabis illegal along with other drugs, like heroin, that are considered to have a high potential for abuse and no accepted medical use. While adult use of cannabis for recreational purposes is now legal in 10 U.S. states, and medical use of cannabis is now legal in 33 U.S. states, the sale, cultivation and use of cannabis is still a U.S. federal crime, even in the states where it is legal. This divide between U.S. state and U.S. federal law has created a difficult environment for the multi-billion dollar U.S. cannabis industry, which remains trapped in limbo. U.S. banks, securities dealers, investors, law firms and other capital markets participants – including the major U.S. stock exchanges – have been understandably wary of any interaction with U.S. cannabis growers that could raise questions about their own compliance with U.S. federal law. These market participants quite legitimately continue to have concerns about aiding and abetting violations of the *Controlled Substances Act*, and concerns about money laundering through receipt of the proceeds of criminal activity, and a host of concerns about other potential sources of derivative liability.

So how did four Canadian cannabis companies manage to get listed on major U.S. stock exchanges this year? The key to understanding that, and the opportunities that exist for other Canadian cannabis companies eager to access the U.S. capital markets, is that the *Controlled Substances Act* only prohibits the manufacture, possession, use and distribution of prohibited substances *in the United States*, but not in other countries such as Canada, if those activities are conducted legally under all applicable Canadian or other federal, provincial or state laws. If the company does not manufacture, possess, use or distribute cannabis in the United States, then there is no violation of the *Controlled Substances Act* by the company. Nor is there a violation of any other U.S. federal law so long as the company is in compliance with the laws of Canada and every other country in which it operates. Without any violation of U.S. federal law by the company itself, there should be no reason for concern about aiding and abetting violations, or money laundering, or other potential derivative liability for U.S. capital markets participants who deal with or invest in the company or facilitate trading in its securities – including the NYSE and Nasdaq.

In July 2018, Tilray Inc. completed the first-ever IPO of a cannabis company in the United States, listing its shares on Nasdaq. Although Tilray is technically a U.S. corporation, it only handles cannabis in Canada and other countries where it is fully legal. This made it eligible to

join the ranks of Nasdaq-listed companies. The initial public offering, led by Cowen in the United States and BMO Capital Markets in Canada, was widely regarded as a huge success story and vindication of the cannabis industry's rightful place in the U.S. capital markets. The IPO offering price of US\$17 per share soared to a high of US\$300 in September 2018 amid investor frenzy, before settling back to a respectable trading price of around US\$100 per share by mid-November. Osler participated in the IPO as U.S. and Canadian legal counsel to the dealers involved, as well as in a subsequent US\$475-million convertible debenture offering by Tilray.

Three other Canadian cannabis companies that were already public and listed in Canada also joined the ranks of U.S. stock exchange-listed companies this year: Cronos Group, Canopy Growth and Aurora Cannabis. All three of these companies took advantage of the Canada/U.S. Multijurisdictional Disclosure System (MJDS) to register their common shares under the U.S. *Securities Exchange Act of 1934* (the Exchange Act), which is a necessary step in listing on a U.S. stock exchange. For any Canadian company with at least a one-year Canadian reporting history and at least a US\$75-million public float, MJDS will allow registration under the Exchange Act by filing a Form 40-F registration statement, containing past Canadian continuous disclosure documents, without the same type of review by the U.S. Securities and Exchange Commission as would normally be conducted in an IPO or other type of Exchange Act registration.

Cronos Group became the first cannabis company listed on Nasdaq in February 2018, although it has not yet conducted a registered public offering in the United States. Canopy Growth became the first cannabis company listed on NYSE in May 2018. While it has also not yet conducted a U.S. registered public offering, shortly after its listing on the NYSE Canopy Growth completed a C\$600-million convertible debenture offering also led by Cowen and BMO Capital Markets, in which Osler represented the initial purchasers as both U.S. and Canadian legal counsel. Aurora Cannabis became the second cannabis company listed on the NYSE (and the fourth listed on a major U.S. stock exchange) in October 2018. Aurora Cannabis also has not yet completed a registered public offering in the United States, leaving Tilray as the first and only U.S. cannabis IPO and concurrent U.S. stock exchange listing so far.

As the growth of the cannabis industry continues in Canada, we will almost certainly see many more Canadian cannabis companies take advantage of the U.S. capital markets. U.S. investors have a keen demand for opportunities to gain exposure to the cannabis industry that do not give rise to concerns about the potential consequences of investing in a company contravening the *Controlled Substances Act* or other U.S. federal laws. Those cannabis companies that follow suit in 2019 and beyond will owe a debt of gratitude to the Canadian trail-blazers who conquered the U.S. capital markets this year.

For more information, read our Osler Update entitled "[New cannabis licence regime and transition of existing cannabis licences](#)" on osler.com.