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# FIRST NATIONS JURISDICTION OVER CANNABIS PRODUCTION AND SALE

BC FIRST NATIONS CANNABIS FORUM

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## Introduction



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### + 3 CAVEATS:

- + This is not specific legal advice and should not be relied upon as such. This presentation provides a high level overview of the issues in relation to First Nations jurisdiction over cannabis production and sale only. For specific advice in relation to your community or business, hire a good lawyer (like me).
- + I don't make the law, I just explain it; my explanations are not endorsements.
- + Boring legal stuff coming your way.

### + Topics:

- + Who we are
- + Context of jurisdictional issues
- + Jurisdiction over cannabis production and sale
- + Issues for First Nations
- + Asserting First Nations jurisdiction



## Who We Are: Miller Titerle + Company



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- + We regularly advise Indigenous leadership (both councils and business groups) on economic development, governance, and partnerships in various industries including the cannabis industry
  - + We can provide legal advice to First Nations in the following areas:
    - + Drafting bylaws and laws in relation to cannabis
    - + Developing relationships with cannabis producers
    - + Structuring corporate entities
    - + Negotiating and drafting corporate/ commercial agreements
    - + Financing
    - + Leasing and land development
    - + Licensing and compliance
    - + Governance and community engagement
    - + Employment and training matters



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- + We also advise companies that are committed to positive business relationships with Indigenous peoples, that further Reconciliation. We advise on the following matters:
    - + Aboriginal law and jurisdiction issues
    - + Reserve land leasing and development
    - + Governance
    - + Corporate structuring
    - + Financing
    - + Licensing and compliance
    - + Employment and training



## Who We Are: Me



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- + Yvan Guy Larocque
    - + Indigenous business lawyer at Miller Titerle Law Corporation in Vancouver, BC
    - + Visit our booth (or come find me) for more information
    - + [www.millertiterle.com](http://www.millertiterle.com)



# **CONTEXT OF JURISDICTIONAL ISSUES**



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- + Sections 91 and 92 of the *Constitution Act, 1867*, divide up law making authority and responsibility between the federal and provincial governments (respectively)
  - + Under section 91, the federal government has exclusive jurisdiction over matters of national interest, including:
    - + Regulation of Trade/Commerce
    - + Direct/Indirect Taxation
    - + Criminal Law
    - + “Indians, and Lands Reserved for the Indians”...



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- + Under section 92, the provincial governments have exclusive jurisdiction over provincial matters, including:
    - + Direct taxation in the province
    - + “Shop, Saloon, Tavern, Auctioneer, and other Licences in order for the raising of a Revenue for Provincial, Local, or Municipal Purpose”
    - + Property and civil rights in the province
    - + Administration of justice in the province
    - + Generally all matter of a local or private nature in the province
  - + Some matters aren’t named in either, and have been interpreted as being federal jurisdiction (e.g., nuclear power) or shared between the federal and provincial governments (e.g., agriculture)





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- + The *Indian Act* is an federal law pursuant to section 91(24) of the *Constitution Act, 1867* (“Indians, and Lands Reserved for the Indians”)
  - + Pursuant to section 81 *Indian Act*, bands “may make bylaws not inconsistent with [the] Act or with any regulation made by the Governor in Council or the Minister”, including in relation to:
    - + Health of members on reserve
    - + The prevention of disorderly conduct and nuisances
  - + Section 83 provides bylaw making powers relating to:
    - + Taxation for local purposes of land or interests in land, including rights to occupy, possess or use the land in the reserve (subject to Ministerial approval)
    - + Licensing of businesses
  - + Section 85 provides bylaw making powers relating to “prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve” PROVIDED however that such bylaws are consent to by a majority of the electors of the band voting at a special meeting called for the purpose of considering the bylaw



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- + The *First Nations Land Management Act* provides powers for First Nations under a Land Code to enact laws in relation to:
    - + the development, conservation, protection, management, use and possession of reserve lands
  - + First Nations under the FNLMA and Land Code continue to be subject to the *Indian Act*, and continue to have bylaw making powers under that law
  - + Various comprehensive land claim, modern treaties, and self-government agreements may provide bylaw making powers, and are subject to the particular agreement



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- + A full analysis of the jurisprudence around section 35 and Aboriginal rights would require much more time than we have...
  - + Section 35 of the *Constitution Act, 1982* provides that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
    - + What rights?
    - + The “Empty Box” vs. the “Full Box”
    - + The content and nature of Aboriginal rights
      - + Developed through court cases (fishing rights, hunting rights, rights to land [Aboriginal title], etc.) or by negotiation in treaties and other agreements
      - + Continue to be subject to proof and evidence of specific/distinctive pre-contact practices (for the time being)
      - + Subject to infringement and justification tests (under current law)



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- + Aboriginal rights to self-government
    - + Aboriginal rights to self-government are “inherent” rights, that arise from the fact that Aboriginal nations were historically self-regulating political bodies, controlling their own collective lives and lands.
    - + Although Canada claims that they have recognized Aboriginal peoples’ rights to self-government, they have consistently fought communities who have sought to assert their inherent jurisdiction and rights to self-government *outside* of the confines of Canadian law (ie. the *Indian Act*, common law, treaties, etc.)
    - + Canada’s idea of “self-government” is closer to a right to self-determination and decision making within and under the sovereignty of Canada and its laws.
    - + In *Mitchell v. M.N.R.*, the Supreme Court of Canada held that Aboriginal self-government rights that conflict with Crown sovereignty did not survive the assertion of Crown sovereignty over the lands that now form Canada (e.g. the right to raise an army).





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- + The United Nations Permanent Forum on Indigenous Issues adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) in 2007.
  - + Under the Declaration, Indigenous peoples have the right to:
    - + “self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”
    - + “autonomy or self-government in matter relating to their internal or local affairs...”
    - + “maintain and strengthen their distinct political, legal, economic, social and cultural institutions...”
    - + “be involved in developing and determining health, housing and other economic and social programs affecting them...”
  - + Canada signed the Declaration in May 2016, and promised to unconditionally incorporate this international document into Canadian law (to give it full legal effect)
  - + BC has also stated that it will fully implement the Declaration



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- + Romeo Saganash introduced Bill C-262 *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* in 2016 (the latest version can be read here: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading#enSH96>)
  - + The Bill would require Canada, in consultation and cooperation with indigenous peoples in Canada, to “take all measured necessary to ensure that the laws of Canada are consistent with” the Declaration and “develop and implement a national action plan to achieve the objectives of” the Declaration
  - + The Bill in its second reading in the Senate (the last sitting and discussion occurred on March 3<sup>rd</sup>, 2019 and can be read here: <https://sencanada.ca/en/content/sen/chamber/421/debates/271db/2019-03-19-e?language=e#68>)



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- + Generally speaking:
    - + Anything that happens on reserve or concerns Indigenous peoples in Canada is under federal jurisdiction and laws (including the *Indian Act*, but other laws as well including the *Cannabis Act and Regulations*)
    - + Section 88 of the *Indian Act* provides that provincial laws of “general application” (e.g. traffic laws, *Cannabis Control and Licensing Act*) apply to reserves and “Indians”, unless they are inconsistent with any federal laws or regulations or bylaws under them (including the *Indian Act*).
    - + A provincial law won’t apply to reserve land if (a) it singles out “Indians” or “Lands Reserved for the Indians”, (b) it conflicts with a federal law (including the *Indian Act*), (c) it unjustifiably infringes a section 35 Aboriginal or treaty right, (d) it impairs the core of the federal jurisdiction under section 91(24)...



## Law Making Powers: Conflicting Laws



- + Conflicts with federal laws and regulations:
  - + The doctrine of federal paramountcy provides that if:
    - + there is an inconsistency between a provincial law and federal law, the federal law applies, or,
    - + If the provincial law frustrates the purpose of federal jurisdiction, it will not apply.
  - + IF THERE IS NO FEDERAL LAW, OR REGULATION OR BYLAW UNDER A FEDERAL LAW, THAT COVERS THE SUBJECT MATTER, THE PROVINCIAL LAW WILL APPLY IF IT DOES NOT FRUSTRATE THE FEDERAL JURISDICTION (or infringe an Aboriginal right)





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- + Laws that infringe Aboriginal rights:
    - + Federal and provincial governments have jurisdiction to pass laws that infringe Aboriginal and treaty rights (but only if the infringement is justifiable).
    - + Two part test:
      - + Has there been an infringement of a right?
        - + Does the law have an effect of interfering with an existing right?
        - + Is the limitation unreasonable?
        - + Does the limitation impose undue hardship?
        - + Does the regulation deny the holders of the right their preferred means of exercising that right?



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- + Two part test:
    - + Can the infringement be justified?
      - + Is there a valid legislative objective?
      - + Has the honour of the Crown been upheld?
      - + Has there been minimal infringement?
      - + Is the law/regulation an appropriate priority?
      - + Has the Aboriginal group been consulted?
  - + WHAT RIGHT IS BEING CLAIMED?
    - + A right to self-government and law making powers under section 35?
    - + Or a right to grow or sell cannabis?
    - + The first one is likely the best characterization for a successful argument



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- + Interjurisdictional immunity:
    - + If the provincial law doesn't conflict with a federal law or regulation, and there's no infringement of an Aboriginal right, the doctrine of interjurisdictional immunity provides that if the law affects the "core" of the federal jurisdiction (in this case, section 91(24)) then it will be invalid or read down (partially invalid)
    - + What is the core of the federal jurisdiction under 91(24)?
      - + Simple answer: (other than "Indians") interests in, and uses of, reserve lands (eg. in the absence of an *Indian Act* bylaw or Land Code law, the *Residential Tenancy Act* would not apply on reserve in respect of provisions that deal with interests, use and possession of land but may apply with regard to matters in relation to other matters)

# JURISDICTION OVER CANNABIS PRODUCTION AND SALE







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- + Canada
    - + Cannabis has been legal in Canada for many years for medicinal purposes, and became legal for recreational use on October 17, 2018 (in case you missed it!)
    - + The *Cannabis Act* and *Cannabis Regulation* (and the other acts and regulations they amend) are the feds' laws on recreational cannabis
    - + The *Cannabis Act* and regs deal with:
      - + Cultivation, production, and selling to distributors
      - + Packaging and labelling
      - + Marketing
      - + Licensing cultivators and producers
      - + Cannabis tracking system



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- + Provinces have legislative jurisdiction over the sale to consumers (retail sales), distribution to retail locations, personal possession and growing, public use and age requirements, among other things.
  - + In BC, there are two acts that govern recreational cannabis:
    - + *Cannabis Distribution Act*
    - + *Cannabis Control and Licensing Act*
  - + The *Cannabis Distribution Act* creates a monopoly for the province (through the newly named BC Liquor and Cannabis Regulation Branch) to distribute recreational cannabis to licensed retailers throughout the province
  - + Without a provincial licence, dispensaries will not be able to purchase cannabis for sale (except from non-licensed growers, probably)



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- + The *Cannabis Control and Licensing Act* provides for licensing of retail sales locations (either provincially or privately owned).
    - + Section 33 provides that Indigenous nations be consulted prior to a licence being issued for a location on their reserve lands
    - + Section 35 provides that an Indigenous nation may by bylaw or law impose fees on an applicant to cover costs of assessing their application
    - + Section 119 provides that the Lieutenant Governor in Council may enter into agreement with an Indigenous nation “with respect to cannabis”
      - + If the agreement relate to the sale of cannabis, the agreement must be between the nation, the Minister responsible for the *Cannabis Distribution Act*, and the Minister of Finance
      - + The agreement will be subject to requirements including only selling cannabis purchased from a federally licenced producer, no sales to minors, record keeping, etc.
  - + We don’t know of any agreements thus far and know of a client that received a letter from the province earlier this month stating that they will not be entering into any agreements for the time being



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- + Bylaws in relation to cannabis production on reserve
    - + under section 81 (health, nuisances) [prohibition?]
    - + under section 83 (licensing of businesses)
  - + Bylaws in relation to cannabis sales on reserve
    - + under section 81 (health, nuisances) [prohibition?]
    - + under section 83 (licensing of businesses)
    - + under section 85 (intoxicants) [needs to be approved by members]
  - + Laws passed under Land Code:
    - + In relation to the use of reserve lands and business licensing
  - + Laws passed under self-government or treaties:
    - + Fact specific





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- + From most defensible to least defensible (in my opinion):
    - + Laws passed pursuant to inherent rights to self-government under section 35 and (potentially) and the Declaration (cannabis production and/or sale)
    - + Laws passed pursuant to economic rights to regulate cannabis production and/or sales pursuant to section 35 (not necessarily the strongest argument) and (potentially) the Declaration
    - + Engaging in cannabis production or sales pursuant to a claimed Aboriginal right to produce and/or sell cannabis (not a great argument unless the First Nation can show that they historically produced and/or sold/traded in cannabis as a traditional medicine or otherwise) pursuant to section 35 and (potentially) the Declaration



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- + Jurisdictional issues:
    - + Do federal and provincial cannabis laws apply on reserve?
      - + Yes
    - + Will *Indian Act*, Land Code, or Self-government/Treaty Agreement passed laws replace federal and provincial laws on reserve?
      - + It depends!
      - + What does the bylaw or law try to do?
        - + More difficult consideration for production (because of the federal government's powers under section 91(24))
        - + Bylaws that prohibit sales are most likely replace provincial law
        - + Bylaws that allow sales without provincial licensing will face scrutiny and may not replace provincial laws



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- + Jurisdictional issues:
    - + Laws passed pursuant to inherent rights to self-government will be subject to the analysis of whether the federal or provincial laws that are inconsistent with these Indigenous laws unjustifiably infringe the Aboriginal right of self-government relied on to pass the cannabis law (production or sales)
    - + Engaging in cannabis production or sales, relying on a claimed right to produce and/or sell cannabis will likely be justifiably infringed by federal and provincial laws
    - + The question for both is:
      - + Are the federal and/or provincial governments willing to enforce their laws on reserve?
      - + Are Indigenous leaders willing to go to court to fight for these rights?





# ISSUES FOR FIRST NATIONS



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- + Canada and provinces failed to adequately consult and accommodate Aboriginal peoples in Canada prior to enacting these laws and regulations
  - + Taxation and sharing of tax revenues
  - + Operating risks for “unlicensed” production and/or sales on reserve
    - + Proper structuring for liability protection
    - + Insurance risks
    - + Banking risks
    - + Supply risks
  - + Balancing opportunities and assertion of rights against potential risks
  - + Community engagement and consultation (“social license”)
  - + Partner risks (who are you doing business with?)
  - + Section 119 of the *Cannabis Licensing and Control Act*



# ASSERTING FIRST NATIONS JURISDICTION







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- + Carefully and well drafted bylaws and laws
    - + Cover everything that the provincial or federal laws covers (to some extent)
    - + Build in processes and institutions for implementation
  - + Communication with the province and feds (or not)
    - + Asserting jurisdiction and law-making authority (inhering rights to self-government)
    - + Requesting meetings regarding the lack of consultation and accommodation, taxation issues, etc.
    - + Some communities may consider attempting to “fly under the radar”
  - + Enforce your own laws
  - + Prepare for the risks and protect your communities assets through proper corporate structuring
  - + Prepare for potential litigation

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