Cannabis Tool Kit

BC Assembly of First Nations





BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

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Welcome

Dear First Nations Chiefs, Councillors, and Economic Development and Business Leaders,

The BC Assembly of First Nations (BCAFN) is pleased to present our BCAFN Cannabis Toolkit. This toolkit provides information and resources regarding the legalization and economic development aspects of cannabis from a First Nations perspective.

The Cannabis Toolkit is composed of four parts. First, a discussion paper on First Nations Stories of Economic Development and Cannabis explores a number of cases studies from First Nations people and Nations and provides a high-level view of the landscape. Next, an in depth-legal memo introduces a more nuanced understanding of the legal and economic challenges and opportunities First Nations are faced with. Finally, two draft template pieces are put forward for discussion and as a potential jumping off point for Nations who are exploring how they may wish to regulate, make agreements, or make laws with respect to cannabis in their territories.

The opportunity to continue the dialogue, collaborate, and gain strength through the sharing of our stories and expertise is an exciting one, as First Nations press to participate in and occupy the emergent cannabis sector. We look forward to supporting First Nations as they determine their path forward on cannabis governance and economic development.

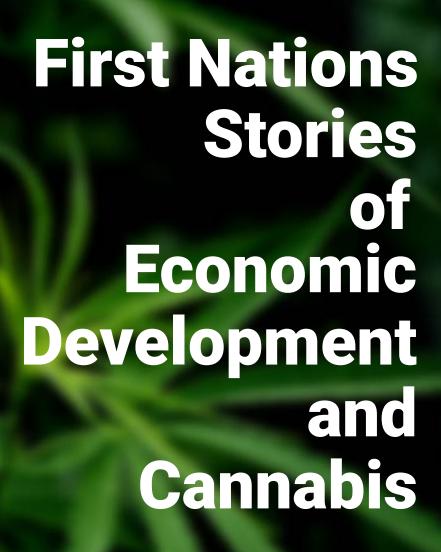
This is an exciting time to be taking these steps, and it's an honor to present these to you.

Respectfully,

Regional Chief Terry Teegee

Acknowledgements

A special thank you to Yvan Laroque of Miller Titerle + Company for support in developing	ງ these
resources, and to all those who contributed their stories to be featured in the discussion	paper.



BC Assembly of First Nations



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Cannabis Tool Kit





Introduction

The British Columbia Assembly of First Nations (BC AFN) Regional Chief Terry Teegee, has been implementing a Sustainable Economic Development and Fiscal Strategy that provides tools and advocacy for the inescapable economic component of Aboriginal title. The BC AFN is pleased to develop a series of policy papers in support of Indigenous economic development in British Columbia. This paper focuses on the challenges and opportunities related to economic development in the cannabis sector by highlighting case studies.

As the Chair of the AFN Chiefs Committee on Cannabis, the Regional Chief is leading work to develop a First Nations cannabis jurisdiction option for federal legislation.

Working together with the Union of BC Indian Chiefs and the First Nations Summit as the First Nations Leadership Council, the BC AFN also participates in a Working Group with the BC Cannabis Legalization and Regulation Secretariat in the Ministry of Public Safety & Solicitor General (PSSG). This is an important forum for advocacy on issues of economic development, jurisdiction, Section 119 agreements, revenue sharing, licensing processes, data and monitoring, public education and awareness, health considerations and impacts, and community safety.

A number of resolutions in support of First Nations jurisdiction, economic development,

and health in relation to cannabis have been passed by leadership at the assemblies of the Assembly of First Nations, BC Assembly of First Nations, the Union of BC Indian Chiefs, and the First Nations Summit.

This paper aims to provide Chiefs, leadership and community members with a preliminary resource to support their understanding of recent developments in law, policy and practice related to cannabis and empower them to leverage these understandings. The BC AFN is proud to support leadership and community in having conversations regarding cannabis, and to support the potential for economic development.

"As the Chair of the AFN Chiefs Committee on Cannabis, the Regional Chief is leading work to develop a First Nations cannabis jurisdiction option for federal legislation."



Background

Indigenous peoples have used medicinal plants since time immemorial, including for spiritual and ceremonial purposes. Our connections and understandings of cannabis must be rooted in the foundation provided by our ancestors. Wellbeing and balance are key.











First Nations have the inherent right to govern the cultivation, processing, sale, and consumption of cannabis in their territories. However, this right is not recognized under the government of Canada's legislative framework. This has created a so-called "gray area", wherein some First Nations are exercising their inherent rights without the recognition of the Crown.

The exercise of these rights is supported by Articles 4, 20, 21, 23, 26, and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*. These articles set out the rights of Indigenous peoples to maintain and develop their political, economic, and social systems and activities. It affirms the rights of Indigenous peoples to their lands, territories, and resources, and obliges states to support the improvement of economic and social conditions for Indigenous peoples.

Federal and Provincial Legislation

In October 2018 the federal *Cannabis Act* came in to force, creating a legal framework for the production, distribution, sale, and possession of cannabis in Canada.¹ This included dried cannabis, cannabis oil, fresh cannabis, cannabis plants, and cannabis plant seeds. Standards, processes, and regulations were put in place, and penalties for noncompliance were set out. In October 2019 cannabis edibles, concentrates, and topicals were also legalized.

According to the *Cannabis Act*, federal, provincial and territorial governments each have responsibility for overseeing various components the cannabis regulatory system (see Table 1).²

¹ A number of regulations were also created: Cannabis Regulations, Industrial Hemp Regulations, Cannabis Act (Police Enforcement) Regulations, and Qualifications for Designation as Analyst Regulations (Cannabis).

² Health Canada, Cannabis in Canada, https://www.canada.ca/en/

Table 1: Summary of jurisdiction under federal and provincial legislation

Federal Jurisdiction

Legislation: Cannabis Act, along with a number of new and amended regulations

- · Administers licenses for Cultivation, Nursery, and
- Processing, and access to medical cannabis.
 Requirements for producers who grow and manufacture cannabis³
- · industry-wide rules and standards, including:
 - · types of cannabis products available for sale
 - packaging and labelling requirements for products
 - standardized serving sizes and potency
 - prohibitions on the use of certain ingredients
 - good production practices
 - tracking requirements of cannabis from seed to sale to keep it out of the illegal market
 - restrictions on promotional activities

Provincial Jurisdiction

BC Legislation: Cannabis
Control and Licensing Act,
the Cannabis Distribution Act,
and the Motor Vehicle Act,
along with a number of new
and amended regulations

- Responsible for developing, implementing, maintaining and enforcing systems to oversee the distribution and sale of cannabis
- · Determining safety measures, such as:
 - Increasing the minimum age in their province or territory (but not lowering it).
 - Lowering the personal possession limit in their jurisdiction.
 - Creating additional rules for growing cannabis at home, such as lowering the number of plants per residence.

³ New regulations under the Cannabis Act replaced the Access to Cannabis for Medical Purposes Regulations (ACMPR). "Patients authorized by their health care provider are still able to access cannabis for medical purposes by:

buying directly from a federally licensed seller

[·] registering with Health Canada to produce a limited amount of cannabis for their own medical purposes

designating someone to produce it for them (Health Canada, Cannabis for medical purposes under the Cannabis Act: information and improvements, https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/medical-use-cannabis.html

- Restricting where adults can consume cannabis, such as in public or in vehicles.⁴
- BC Specific:
 - Administers retail licenses and operates as the wholesale distributer, and as the only online store.
 - Raised the minimum age of buying, using, possessing, or growing non-medical cannabis to 19.
 - Delegated certain powers to local governments and First Nations on their reserve land.

Local and First Nations Governments in BC

- "Local and Indigenous governments can set additional restrictions on public use of non-medical cannabis under existing powers to establish bylaws"⁵ in relation to property, public health, safety and nuisances.
- BC requires the support of the local government or First Nation to issue retail licenses.⁶

Health Canada is the federal ministry responsible for administering the *Cannabis Act*, including the licensing application process for licenses under federal jurisdiction. In BC, there are two branches responsible for the wholesale distribution and retail sale of non-medical cannabis; the Liquor and Cannabis and Regulation Branch (LCRB) and the Liquor Distribution Branch (LDB).



⁴ Department of Justice, Cannabis Legalization and Regulation, https://www.justice.gc.ca/eng/cj-jp/cannabis/

⁵ Government of BC, Get Cannabis Clarity: What's Legal, https://cannabis.gov.bc.ca/

⁶ BC Liquor and Cannabis Regulation Branch, Indigenous Nations' Role in Licensing Non-Medical Cannabis Ret ail Stores, https://www².gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/documents/indigenous_nation_role_in_licensing_cannabis_retail_stores.pdf, [accessed January 31, 2021]

Additionally, the Community Safety Unit is responsible for compliance and enforcement under the *Cannabis Control and Licensing Act* (CCLA), with a focus on unlicensed cannabis retailers and other illegal sellers.

A number of helpful resources have been developed that explain the existing legislative and regulatory framework, as well as health and community safety considerations community leaders may want to consider:

- First Nations Health Authority: First Nations Community Guidebook to Cannabis Legalization
- Government of BC: Get Cannabis Clarity
- Government of BC: Non-medical Cannabis Licenses
- Government of Canada: Cannabis in Canada: Get the Facts

Notwithstanding the provisions made in existing legislation for First Nations, the current framework ignores First Nations jurisdiction, despite Canada's commitments and obligations, numerous recommendations, and ongoing efforts by First Nations to amend the *Cannabis Act*.

First Nations governments are also excluded from cannabis tax revenue sharing. Currently, Canada receives 25% of excise tax revenues, and the provinces receive 75 %. At the same time, the legalization and regulation of cannabis in Canada has created an additional financial burden for First Nations governments as they seek to regulate cannabis and promote public health and safety in their communities.

More work remains to be done in order to advance First Nations economic and jurisdiction-related priorities with respect to cannabis.





Economic Opportunities

The regulated cannabis market is a multi-billion-dollar industry, with regulated products slowly replacing the illicit market. Income-based Gross Domestic Product (GDP) generated by the production and distribution of cannabis in the Canadian economy was \$5.51 billion in 2018.⁷ As of October 2020, there were 126 federal licence holders located in BC. Total sales in BC for non-medical purposes in September 2020 were \$36.9 million.⁸ However, federal Indigenous license holders represent only a small percentage of these figures.

For interested First Nations, cannabis-related industries hold potential for economic development. This sector offers opportunities for job creation, economic diversification, skills development, generating revenue, and nation-to-nation trade. Economic development opportunities exist in a variety of areas; in addition to cultivation, processing, and retail of cannabis and industrial hemp, there is innovation in ancillary and support services such as quality assurance, research and development, security, training and education, distribution, waste, consumption devices, technology, consulting, and media.

First Nations governments may decide to participate directly or via an economic development corporation in operating, or investing in a cannabis-related venture. In BC, sole proprietors, partnerships, corporations and Indigenous nations can apply for a retail license.9

Aside from becoming involved in a cannabis-related business, First Nations governments can help create an environment conducive to cannabis businesses if they so choose. This can involve holding community dialogue and planning regarding cannabis, reviewing and creating new laws or bylaws, or supporting training and educational opportunities for their members in the sector.

Challenges

While there are many exciting opportunities in the cannabis economy, it is also still relatively new and is constantly undergoing change. This has sometimes made it difficult to know what to anticipate in the market. It has also meant that companies need to be adaptable as governments develop and amend regulations.

⁷ Statistics Canada, Cannabis Stats Hub, https://www150.statcan.gc.ca/n1/pub/13-610-x/cannabis-eng.htm

⁸ Statistics Canada, Cannabis Stats Hub, https://www¹⁵⁰.statcan.gc.ca/n¹/pub/^{13_610}-x/cannabis-eng.htm

⁹ BC Liquor and Cannabis Regulation Branch, Apply for a License, https://justice.gov.bc.ca/cannabislicensing/, [accessed January 31, 2020]



First Nations have also identified several specific gaps that pose a challenge to entering the cannabis market, including an outstanding need for:

- Access to expertise and information
- Skills training and capacity building
- Financial resources
- Engagement and planning on the community's approach to cannabis

Initially, lots of hype and speculation upon legalization, and large up-front capital costs contributed to a market bubble. In 2019 Deloitte projected that the number of licensed producers would likely decrease as the market consolidates and valuations level out.¹⁰ Indeed, some major companies have posted less than anticipated revenues and cut spending.11 Some producers and extractors have experienced a surplus of inventory that is unable to get to market in a timely fashion; attributable to the slow roll-out of online and brick and mortar retail locations. as well as difficulty determining consumer preferences.¹² Small producers and craft growers have also been threatened by regulations and market factors that facilitate oligopolies or monopolies.

Regulatory bottlenecks, and restrictions regarding advertising and packaging also contributed to a slow start.¹³

The COVID-19 health pandemic presents the latest challenge for this emerging sector of the economy. While retail sales continued to make gains, and federal and provincial governments took quick action to provide economic support, examples of negative impacts include delayed construction timelines, and challenges accessing capital.

While these risks should not overshadow the potential benefits of entering into the cannabis economy, they point to the need for thorough market research, solid business planning, secure investment, and due diligence regarding partnerships.

For example, one major challenge of entering the cannabis market is access to capital. Some major financial institutions are hesitant to work with small to medium cannabis-related ventures, ¹³ and funding through government grants and programs is limited.

Micro-cultivation licenses may provide an avenue for smaller First Nations to participate in the production aspect of the supply chain. Craft cannabis cultivation also represents a niche market, and may support tourism opportunities. Micro licenses require lower up-front costs than standard cultivation licenses. Micro licenses require lower up-front costs than standard cultivation licenses. Micro licenses limit the license holder to a 200 square metre cultivation space and provide for lower operational requirements.¹⁴

⁹ Ibid., p 25

¹⁰ Rodriguez, Jerimiah. (CTV News), 'Some of these guys are going to disappear': Slump hits cannabis industry, (November ¹⁵, ²⁰¹⁹), https://www.ctvnews.ca/canada/some-of-these-guys-are-going-to-disappear-slump-hits-cannabis-industry-^{1,4688416}

¹¹ Subramaniam, Vanmala. (Financial Post), Too much weed: Canadian cannabis producers are sitting on a mountain of inventory, an it's making some industry watchers nervous, (November ⁶, ²⁰¹⁹), https://business.financialpost.com/cannabis/too-much-weed-canadian-cannabis-producers-are-sitting-on-a-mountain-of-inventory-and-its-making-some-industry-watchers-nervous

¹² Ferreira, Victor. (Financial Post), Feeling burned: The first year of legal cannabis has been a complete disaster for investors, (October ⁹, ²⁰¹⁹), https://business.financialpost.com/cannabis/cannabis-business/cannabis-investing/feeling-burned-the-first-year-of-legal-cannabis-has-been-a-complete-disaster-for-investors

¹³ https://mjbizdaily.com/aurora-cannabis-closes-new-loan-deal-worth-as-much-as-ca²⁰⁰-million/

¹⁴ Health Canada, Cannabis Licensing Application Guide: Cultivation, Processing and Sale for Medical Purposes Licences Application Requirements and Process to Become a Licence Holder, https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/industry-licensees-applicants/licensing-summary/guide.html#b



In comparison, the investment required for a standard cultivation license can range from hundreds of thousands of dollars to multi-millions. While this may be a viable path for some First Nations, another alternative could be for First Nations to invest or partner in larger projects like this.

The complexity, length, and cost associated with licensing processes can also present a barrier to entering the market. The federal Navigator Service is a service available to self-identified Indigenous affiliated applicants to assist in navigating the federal cannabis licensing process.¹⁵ Applicants who wish to access this support should contact Health Canada at navig@canada.ca prior to submitting an application through the Cannabis Tracking and Licensing System. Health Canada has also released increased guidance for Indigenous and micro-license applications.¹⁶ The BC Liquor and Cannabis Regulation Branch also offers client support to applicants at LCRBCannabis@gov.bc.ca or 1-866-209-2111.¹⁷ The Government of BC has also created a Guide on How to Become a Licensed Cannabis Producer in BC.¹⁸

Market research should also help direct planning. For example, it may help you determine which segments of the cannabis supply chain present the best opportunity for you and your community; what type of products and services there is a demand for; and how business and financing models could help support your vision.

In BC, First Nations have also expressed the need for legal and policy change that will enhance opportunities and market share for First Nations. While more work remains to be done, in September 2020 the government of BC announced policy changes that will be brought into place over the next couple of years. ¹⁹ These initiatives are designed to support a robust and inclusive economy when it comes to cannabis, and include:

- The Indigenous Shelf Space Program, which will highlight cannabis products from BC Indigenous cannabis producers, therefore providing an opportunity for increased of Indigenous cannabis products and economic opportunity;
- A farm-gate sales program that will give B.C. cannabis growers the ability to sell their products from "farm-gate" stores located at their production site;
- Direct delivery, wherein government will give Health Canada-licensed small-scale producers, including nurseries, the option of delivering cannabis directly to licensed retailers

¹⁵ Health Canada, Cannabis-related resources for First Nations, Inuit and Métis, https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/resources/first-nations-inuit-metis.html, [last updated July 18, 2019]

¹⁶ Health Canada, Statement from Health Canada on changes to cannabis licensing, May ⁸, ²⁰¹⁹), https://www.canada.ca/en/health-canada/news/²⁰¹⁹/⁰⁵/statement-from-health-canada-on-changes-to-cannabis-licensing.html

¹⁷ LCRB, Liquor & Cannabis Regulation Branch Contact Information, https://www².gov.bc.ca/gov/content/employment-business/business/liquor-regulation-licensing/bc-liquor-control-and-licensing-contact-us [accessed February ³, ²⁰²⁰]

¹⁸ Deloitte, p ⁶

¹⁹ Health Canada, Consultation on potential market for cannabis health products that would not require practitioner oversight, https://www.canada.ca/en/health-canada/programs/consultation-potential-market-cannabis.html, [updated August ², ²⁰¹⁹]

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Case Study

Licenced Producer

Wes Sam is a member of Burns Lake Indian Band. He first became interested in the non-medical cannabis sector while serving as Chief of his First Nation. At the time, recreational cannabis was not yet legal.

Eight years later, Wes is now involved in the company Nations Cannabis, which at the time of writing, is a late stage applicant for a federal cultivation license. The Nations Cannabis production facility has 50,000 square feet of space and is located on fee simple land owned by the six First Nations associated with the Burns Lake Development Corporation. It will have a production capacity of 5,000 kg per year and will provide over 40 high quality jobs for the local community. Nations Cannabis is also committed to using as many local contractors as possible, which can help prompt diversification and economic resilience. The building they are repurposing into their production facility was used as part of a forestry operation in the past.

While private investment has been crucial to getting this project off the ground, it remains majority controlled by the six First Nations. Being an authentic First Nations company has also helped attract supporters. Part of their vision is to strengthen Indigenous branding for cannabis products and work with First Nations across the country. In the future, Nations Cannabis plans to expand its capacity through an outdoor cultivation license, micro-licenses, processing licence, and international export license. The cannabis economy is full of creative options, from tourism and farm-to-gate operations, to industrial hemp, to cannabis byproducts, and topicals.

Wes describes the process that brought Nations Cannabis to where it is today, and sets out the steps that lie ahead.

Firstly, starting up a cannabis business is a full-time job. It's important to ensure you have support structures, good partners, and a fulsome plan in place. Cannabis businesses present great opportunities to participate in a new and exciting market, and contribute to regional economic prosperity and diversification. However, there is still lots of stigma, structural barriers, and market fluctuations that make cannabis particularly challenging as a business venture.

It's important to ensure you have support structures, good partners, and a fulsome plan in place.

- Wes Sam, Burns Lake Indian Band

Wes maintains that the biggest challenge has been securing sufficient capital investments. This was especially true when the COVID-19 pandemic hit and cannabis businesses that were still in the process of obtaining licenses were left in the lurch. Large banks still do not fully recognize cannabis ventures so it took some time for Nations Cannabis to develop successful relationships with financial institutions. He credits the networking

and hundreds of presentations the Nations Cannabis team did for securing the capital needed. The team attended meetings, participated in social media groups, and kept meeting with potential supporters virtually once the pandemic started. Collaboration with like-minded individuals is key, and you really need to throw yourself into that crowd. One word of caution though, not everyone will have your best interests at heart so it's important to develop a savvy understanding of what a good partnership looks like for you. Try to learn from every interaction and use it to inform your judgement.

Wes also suggests taking advantage of the Health Canada Navigator Service, which is available to Indigenous-affiliated applicants. While there's no special track for Indigenous applicants, the Navigator Service can be a responsive and informative source of guidance throughout the application process. For Nations Cannabis, it was helpful to have a direct line where they could ask questions.

Forming and maintaining cooperative relationships with various levels of government was also crucial, as was engaging the community. Nations Cannabis received support from the federal, provincial, and municipal governments, as well as the regional district, and local First Nations. However, this required lots of communication.

Wes would still like to see more support for First Nations cannabis businesses, especially around access to capital. Given the unique barriers facing the cannabis industry, guaranteed loans, purchase agreements, and supports for businesses still in the application phase would help emerging businesses. A decrease in application processing time is also crucial when you have already signed a lease for space. He believes governments are listening, but that the regulated market must continue to evolve quickly if it is to support a thriving sector.



Indigenous peoples have used medicinal plants since time immemorial, including for spiritual and ceremonial purposes. Our connections and understandings of cannabis must be rooted in the foundation provided by our ancestors. Wellbeing and balance are key.

BC Assembly of First Nations Cannabis Tool Kit



Whether or not First Nations decide to engage in cannabis-related economic development, many First Nations will also be considering their role in creating and enforcing laws and regulations, and developing policies regarding cannabis. This involves considering the approach that the First Nation wants to take with respect to implementing their jurisdiction.

Implementing First Nations Jurisdiction

Indigenous peoples in Canada have the inherent right to self-government, which is affirmed in the *United Nations Declaration* on the Rights of Indigenous Peoples. This jurisdiction flows from the authority of Indigenous legal orders, which pre-exist Canadian law and extend across traditional territory. In many cases, Indigenous legal orders have been fragmented by the imposition of colonial law. However, many First Nations are choosing to revitalize and rebuild their legal orders within, alongside, and outside of Canadian legislative frameworks.

Sources of law within Indigenous legal orders include, but are not limited to: formal oral histories; intellectual and cultural property such as stories, songs, dances and crests; patterns of interaction between people and the natural world; and public deliberative processes. Legal principles, procedures, rights and obligations expressed by these sources can inform law- making regarding the production and sale of cannabis.

As with any other matter, First Nations can determine their own approach to making and enforcing cannabis laws. These approaches may operate within, alongside, or outside of Canadian frameworks.

Operating within the Crown's legislative framework would typically involve participating in either of Canada's or BC's licensing processes, and making bylaws and engaging potential businesses on reserve lands with respect to certain matters.



Case Study

100% First Nations Ownership in Retail

Tsehshat First Nation is the 100% owner of a cannabis retail location set on their reserve. It's called, Orange Bridge Cannabis. The moniker is a conversation piece that follows an increasingly popular practice of naming after local landmarks. The store's orange front door and side-of-the-highway location make it a memorable stop for locals and tourists alike.

The city of Port Alberni, where Tsehshat First Nation is located, has around seven cannabis stores, making it the most highly concentrated area of cannabis stores in BC per capita. The city's population sits under 20,000 people. There is also a substantive grey or black market in the region.

The store is strategically located right beside Tsehshat First Nations' gas station, which is especially busy in the summertime as people from all over Vancouver Island, BC, and the world drive to the Tofino area. While the onset of colder months and the COVID-19 pandemic has meant decreased travel through the region, storm watching along the Island's west coast is becoming increasingly popular during the fall and winter.

Tseshaht First Nation approached the topic of cannabis during community dialogue on their Comprehensive Community Plan where there was a desire from membership to enter the cannabis industry was expressed. The Nation invited various level of government and experts to a community engagement specifically on cannabis and share about the risks, potential benefits, and various approaches to cannabis. They got a great turn out and received direction to move forward with exploring options for how the Nation could become involved in cannabis.

Tsehshat First Nation decided to move forward with setting up a provincially regulated cannabis store. One of the reasons for this approach was that while Tsehshat First Nation isn't afraid to assert their jurisdiction, as they have done with respect to their fishing rights, they didn't want to spend the time or resources addressing any legal battles they felt might arise if their store operated without a provincial license. Tseshaht also felt asserting their rights through opening their own non-Provincially licensed retail store may have impact their future acquisition of a federal License to Produce (LP).

While they considered entering into a partnership, it was important to them for the business to be 100% Nation owned and controlled. Before proceeding, they conducted a financial and feasibility study, and double checked all the numbers.

While there were some concerns from community members during the initial phases of this project, since the store has been open the management has heard only positive reactions. There have not been the negative social impacts or issues with minors that some feared. In fact, it seems as if the store has served as a trustworthy place for diverse types of people to come and learn about cannabis. Some elders have found value in medicinal use as well.

The store's management credits the diverse cliental and increased acceptance of cannabis to the sense of safety people have with the products they sell. The role of Health Canada in regulating quality and safety standards, which was made possible through legalization, has been key. The store's modern and cosmetically appealing design, and the fact



that the store employs members from the First Nation, also contribute to this.

While having federally licensed products is a key component of the Tseshaht's approach, they note that the heavily regulated cannabis space leaves slim room for profit margins. For them, strategic decisions have been necessary to find a way to make the business work. For example, it's been important to identify products that deliver both a reasonable profit to themselves, and meet client needs for quality, affordability, and diverse types of product. Keeping prices fair is a key objective in all of this.

The store's management has worked hard to build relationships with their favorite licensed producers so that they can stay up to date on what products will be available through BC's wholesale website. This helps Orange Bridge Cannabis buy fresh products and promote consistency within their product offerings. With high demand for some products, these communication links have been critical. Still, ensuring consistency of product has been an ongoing challenge. Happily, they note that their concerns over product quality aren't an issue like they were in the beginning.

...it was important to them [Tsehshat First Nation] for the business to be 100% Nation owned and controlled.

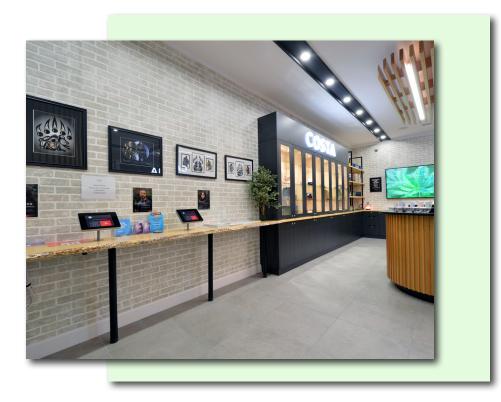
Starting this business was very challenging, owing to the fact that this is a new industry. The size of the grey and black market and availability of illicit products online means there is a whole section of consumers who won't set foot in a provincially-regulated store. Orange Bridge Cannabis wants to see the cost of licensed products decrease to better compete with these alternative sources. They also caution that it takes many businesses time to become profitable, and it is important for the leadership and community to understand this.

Tseshaht First Nation would like to see more expediency in BC's licensing and regulation processes. For example, it took a long time for all their store's staff to become licensed. Federally, they remarked that standards for excessive packaging contributes to unnecessary economic and environmental burdens. Marketing and advertising restrictions are also challenging. By and large Tseshaht First Nation is committed to following provincial and federal regulations, but some aspects are hard to swallow. They did not rule out asserting their jurisdiction if there are not progressive changes to provincial and federal frameworks.

In the future the Nation is interested in getting into cannabis production and pursing a government-to-government agreement with BC to help facilitate this. They also hope to open up opportunities to work with other First Nations across Canada and see revenue sharing for cannabis become a reality. Tseshaht First Nation is happy to speak with other Nations about their approach.



Tammy Lucas (Assistant Manager), Ron Kyle(Manager), Ken Watts (Councillor)



Costa Canna Duncan Village



Willard (Rocky) Gallic Jr. (designer), Ken Watts (Councillor)

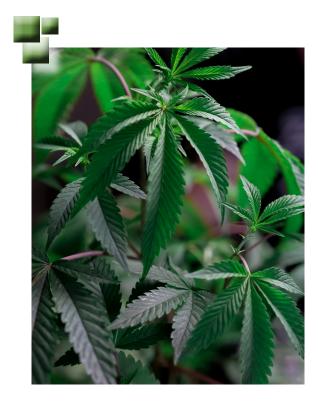


Currently, the framework outlined in Canada and BC law provides for limited authority for First Nations governments through particular processes. If First Nations choose to exercise authority beyond this scope or through different mechanisms, their approach may not be recognized by Canada or BC. First Nations considering exercising inherent jurisdiction should consider developing, implementing, and enforcing comprehensive laws that cover the content of provincial and federal laws, and take precautions to protect the Nations' assets in addition to being prepared for potential litigation. Enforcement and the assurance of health and safety may be areas particularly important to pay attention to.

While advocates are calling for Canada and BC to recognize First Nations jurisdiction and change this system, many First Nations are not waiting for change. Instead, they continue to chart their self-determined path regardless. Across Canada, First Nations are developing unique laws and approaches to governance over cannabis within their territories. If desired, there is also opportunity for First Nations to collaborate and develop new or existing institutions with respect to cannabis. For example, The First Nations Taxation Commission is advocating for First Nations cannabis tax jurisdiction²⁰ and the First Nations Health Authority has taken an active role in health promotion.

With commitments to the UN Declaration by both provincial and federal governments, these conversations are necessary to ensure First Nations jurisdiction is respected with regard to cannabis. This is the way of reconciliation.

Cowichan Tribes



²⁰ First Nations Tax Commission, First Nation Cannabis Jurisdiction Update, (June 26, 2018), https://fntc.ca/en/first-nation-cannabis-jurisdiction/

Case Study

First Nations Cannabis Governance TK'emlups te Secwépemc

Tk'emlúps te Secwépemc (TteS) has taken a Title and Rights approach to governing cannabis within their ancestral lands. The Community has passed both a Cannabis law and related bylaws to achieve their goals of governing and regulating cannabis. The Community itself is not involved in any cannabis related businesses, but instead has established itself as the licensing entity for members. There are five retail locations on reserve, one of which also has a provincial license.

The law and bylaws create the foundation for TteS regulation of cannabis. They took cues from other First Nations who are operating in a similar way. However, they hope the situation will evolve so they can implement a more tailored approach. This will require more resources and a shift in the broader legislative and regulatory frameworks.

Community engagement has been a determining factor in TteS' approach to cannabis. The Nation is navigating this governance path with support from their community and decided not to become involved in cannabis business itself because of diverse community perspectives on cannabis.

TteS notes that as a consumer-focused industry, safety standards and regulation are crucial. They see a need for a First Nations-led regulatory body to help First Nations move from the grey market into a recognized First Nations market. While jurisdiction is a priority, health and safety are paramount.

Education about the risks and potential benefits of cannabis use can also contribute toward safe use and disrupt the stigma that still surrounds cannabis. More research into the medicinal uses of cannabis would also help to shift thinking and help us be better informed about the extensive possibilities cannabis presents. Exploring these possibilities is of interest to TteS as a plant and sector that aligns with their Nations' environmental values.

The lack of First Nations jurisdiction has been the biggest challenge for TteS. The *UN Declaration on the Rights of Indigenous Peoples* has been absent in the approach of both the provincial and federal governments.

For example, the province's Community Safety Unit has been a key fixture in BC's



"This is the way to reconciliation."

Tk'emlúps te Secwépemc

"The lack of First Nations jurisdiction has been the biggest challenge"

Tk'emlúps te Secwépemc



"Tk'emlúps te Secwépemc (TteS) has taken a Title and Rights approach to governing cannabis within their ancestral lands."

-Tk'emlúps te Secwépemc

approach to enforcement of provincial cannabis laws. While the Unit initially took a collaborative approach, meeting face to face with TteS Chief and Council as a governing body, the enforcement mandate didn't change. The CSU is also a complaint-driven body. This meant that pressure from nearby provincially-regulated retailers who don't necessarily understand where First Nations are coming from in asserting their jurisdiction, contributed toward more intervention from the CSU. Chief and Council cautioned that such intervention represents a step backwards on the *Declaration on the Rights of*

Indigenous Peoples Act.

The focus on jurisdiction is critical because TteS feels that the cannabis sector could be precedent setting. As a relatively new industry, there is an opportunity to do things differently and make sure First Nations are respected as authoritative governing bodies. This could then contribute to ripple effects in other sectors and realms of governance.

For example, the First Nations Health Authority was an experiment in First Nations leadership and governance. First Nations are embarking on similar initiatives with respect to housing and children and families, and should be doing this in cannabis too. Taxation is an important part of this conversation. TteS believes that any taxes generated from on-reserve stores should stay on reserve. This is a tool for self-governance, which is required for the provision of quality services. It could also help flesh out the enforcement, health, and safety components of the First Nations' cannabis regulation.

TteS hopes to move the conversation forward in a collaborative way with other First Nations, so that First Nations can reach their larger goals and develop interim solutions as we create pathways that fit the diverse approaches First Nations have on cannabis.

Ttes is also interested in learning more about how other First Nations are approaching government-to-government agreements with BC under Section 119 of the *Cannabis Control and Licensing Act*. They want to ensure the *UN Declaration on the Rights of Indigenous Peoples* is the basis for evolution of cannabis laws, agreements, and policy.



Case Study

Inherent Rights to Retail and Trade the UN Declaration on the Rights of Indigenous Peoples

Cory Brewer, a community member from the Okanagan Indian Band, is happy to see the progressive steps that are being taken when it comes to reconciliation and the rights of Indigenous People within their territories. When cannabis became legalized, Cory watched the industry, studied existing laws, researched, and learned as much as he could from other First Nations. Once he felt he had a clear view of the landscape he helped establish a small cannabis working group that worked with staff and leadership of the Okanagan Indian Band to develop their own Cannabis Law. The law went through the required process of meeting with the membership and then was accepted and passed by the Chief and Council. The Okanagan Indian Band Cannabis Law has paved the way for the Okanagan Indian Band members to become involved in opportunities that emphasize the use of Cannabis and Hemp as a medicine as well as a source of healing physically, mentally, and economically.

While this work was in progress the *Declaration on the Rights of Indigenous Peoples Act* was passed into law in BC, affirming the collective human rights of Indigenous peoples. Cory recounts how he had seen the momentous opportunity presented by this document. The idea that Nations might create frameworks for cannabis that could meet or exceed provincial and federal standards and be a part of building fundamental governance structures on a government-to-government and nation-to-nation basis fueled his efforts and vision of success.

Cory led the establishment of several retail locations on reserve, and one off-reserve location in Vernon, BC. While he didn't receive a provincial retail licence from BC, he received licenses for his on-reserve stores pursuant to the Okanagan Indian Band's Cannabis Law, and a letter of support for his off-reserve store from Okanagan Indian Band leadership on the basis that such activities were undertaken on Syilx territory pursuant to creator-given rights. This store was raided several times by the Community Safety Unit, but Cory remains optimistic that if we do things right and work together as a whole, we can accomplish great things and find a path forward. A relationship between the two parties is being built with the common goal of understanding and respect shown towards each other. Cory states that "Tupa's Joint recognizes the ceremonial and medicinal significance of Cannabis and Hemp, the reason for the pride in being able to provide Indigenous medicines that are a source of physical, emotional, mental and spiritual healing to all people". This important factor cannot be overlooked as neither the Provincial nor Federal Governments have taken this into consideration.

First Nations rights to trade and commerce are also implicated. The Nsyilxcen





The Okanagan Indian Band developed their own Cannabis Law.



"I think about the prophecies of our Elders; that we would need to go back to our medicines, back to the land ... to heal and to help our sacred mother earth."

- Cory Brewer

speaking Peoples within the Syilx Nation and the Colville Confederated Tribes have actively participated in trade throughout their collective history, and desired to participate in trade related to industrial Hemp. Despite their rights being affirmed in the Jay Treaty, Treaty of Ghent, and United Nations Declaration, the USA-Canada border has presented challenges. More work is needed to ensure these economic opportunities and sovereign relationships are upheld. To this end, Cory has continued to correspond with the superintendent, operations branch representatives at the Osoyoos Border Crossing. This includes discussions to bring hemp seed and biomass products from our relatives south of the border, the Colville Confederated Tribes who themselves have an Industrial Hemp Grower/Processor and Marketer Combined License with the Washington State Department of Agriculture. This discussion and support took the vision he has had into the international realm. Current leadership throughout the Nation are fully aware of this and fully support the movement of our traditional foods and medicines across the border. We have excellent relationships with the border and through the Okanagan Nation Alliance our people participate in cultural activities which include taking our hand carved boats across the border of the water to celebrate our ability to move freely within our territory.

Cory states "I have witnessed and been a part of watching our young people's interest grow and they are interested in seizing opportunities related to CBD/THC, cannabis and hemp. I think about the prophecies of our Elders; that we would need to go back to our medicines, back to the land ... to heal and to help our sacred mother earth. Politicians are wanting framework agreements, some want immediate resolution and solutions as to how to support Indigenous people, some are creating their own laws; my point being, as I have said many times "I/we are not going away", and as I have stated many times, the necessity of all of us working collectively together to ensure that we as Indigenous people have economic stability and equal opportunity, is a positive step forward and will benefit us for years to come".

In addition to inherent laws, there is opportunity to pass laws based on the *Indian Act*, the *First Nations Land Management Act*, Self-government agreements, or Treaties. Laws passed pursuant to the following Acts can have varied scope:

- Indian Act bylaws in relation to cannabis production on reserve:
 - under section 81 (health, observance of law and order, nuisances)
 - under section 83 (licensing of businesses, taxation for local purposes of land)
- Indian Act bylaws in relation to cannabis sales on reserve:
 - under section 81 (health, observance of law and order, nuisances)
 - under section 83 (licensing of businesses)
 - under section 85 (prohibiting sale, barter, supply or manufacture of intoxicants on reserve; prohibiting intoxication or possession of intoxicants, making exceptions for intoxication or possession)
- Laws passed through a Land Code under the First Nations Land Management Act:
 - In relation to the management and use of reserve lands, holding of property, borrowing money, and granting of business licenses
- Laws passed under Self-government or Treaties
- Laws passed pursuant to the Cannabis Control and Licensing Act:
 - Section 35 provides that an Indigenous nation may pass a bylaw or law to 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 relates 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 licensed producer, no sales to minors, record keeping,etc.
 - Section 136 of the Regulations provides that the Lieutenant Governor in Council
 may make regulations authorizing a treaty First Nation to make laws in respect of
 cannabis that apply within the boundaries of its treaty lands, and respecting the
 enforcement of those laws.







Case Study

A Nation in Retail and Production Cowichan Tribes

Cowichan Tribes has a 51% partnership interest in Costa Canna Retail LLP that own and operate three retail stores. Two are located off reserve and one is located on reserve, and all three stores are licensed by the provincial government. They also have license applications in process for one additional store off reserve. Cowichan Tribes also has a majority interest in Costa Canna Production LLP, a production facility, which holds four licenses, that are licensed for activities falling under Health Canada's Standard Cultivation Licence and Standard Processing Licence.

Cowichan Tribes has arrived at a time-limited agreement with the government of BC under section 119 of the *Cannabis Control and Licensing Act* to provide a framework for Cowichan Tribes to be both a producer and retailer, which is not otherwise allowed under provincial legislation.

Cowichan Tribes had been working to secure a government-to-government agreement with BC with respect to cannabis jurisdiction for some time. While the interim agreement didn't address the broader priorities related to jurisdiction, it did provide a path forward for Cowichan Tribes to pursue their socio-economic interests within the context of the existing framework. Importantly, it also acknowledges Cowichan Tribes rights recognized and affirmed under section 35 of the *Constitution Act*, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples.

Cowichan Tribes' broader interests extend into topics like taxation and revenue sharing, licensing, regulation and a First Nations process parallel to the Province. With commitments to the *UN Declaration* by both provincial and federal governments, these conversations are necessary to ensure First Nations jurisdiction is respected with regard to cannabis. Cowichan Tribes views further work in this area as crucial to reconciliation. The current legal framework for cannabis in Canada is not in alignment with the *UN Declaration on the Rights of*



Costa Canna

"Cowichan Tribes also affirmed the importance of First Nations to work together, and to ensure that First Nations representative bodies are pushing for implementation of the UN Declaration."

- Cowichan Tribes

Indigenous Peoples. Cowichan Tribes' longer-term goal is to support economic opportunity for their Nation by filling major components of the jurisdictional space now occupied by the province.

Cowichan Tribes believes that reaching early agreements with First Nations could assist the province in developing a mutually agreeable path forward that could pave the way for further agreements. To this end, Cowichan Tribes is also setting up a table with Health Canada to discuss potential pathways forward; to discuss jurisdictional issues, taxation, licensing and a First Nations governance process to run parallel to the federal governments. They are optimistic about the progress that can be made on this front.

Cowichan Tribes is determined for these conversations to bear fruit but notes that the road for First Nations who want to work within the frameworks set out by provincial and federal governments is fraught with challenges. Increased transparency about regulatory processes and policy decisions could assist First Nations in navigating the issue. Cowichan Tribes also affirmed the importance of First Nations to work together, and to ensure that First Nations representative bodies are pushing for implementation of the *UN Declaration*. These representative bodies also need to shine the light on the issue of conflict, whereby the Province is the regulator, the only wholesaler, and our competition. Allowing or recognizing First Nations as equal governments that have jurisdiction over Cannabis in their territories, and their ability to produce and sell their own products, will have a negative effect on the Province's business case. We need to level the playing field and getting recognition by the Province that their legislation can include First Nations as Governments is a step in this direction - one that Cowichan Tribes is working to negotiate.



Costa Canna

Conclusion

For First Nations charting a path forward with respect to cannabis can require important dialogue at the community level. Before and throughout the process of determining an approach, fulsome community dialogue regarding the spiritual and cultural, wellbeing-related, public safety, economic development, and governance dimensions of cannabis are crucial for First Nations communities.

Given that non-medical cannabis is now legal in Canada, First Nations governments will likely want to take action to manage and regulate the cultivation, processing, sale, and use of nonmedical cannabis in their community to some extent.

Grounding these discussions in your own Nation's traditions and laws is crucial. Additionally, being aware of federal land provincial laws and regulations may also be helpful. There are many resources that can support community dialogues such as the BCAFN Cannabis Toolkit, those from the First Nations Health Authority, Thunderbird Partnership Foundation,²¹ Government of BC, and Government of Canada.

In order to uphold the *UN Declaration on the Rights of Indigenous Peoples* the federal and provincial government must take urgent steps to respect the jurisdiction of First Nations with respect to cannabis, including amendments to legislation and regulations. Amendments to the existing tax revenue sharing agreement must also be implemented.

Proactive initiatives to facilitate the participation of First Nations in economic development will help close the gap, and promote economic reconciliation. The Crown should undertake these activities in partnership with Indigenous peoples.

For First Nations, the cannabis sector represents an exciting opportunity for economic development. However, building a successful business or managing an investment in any aspect of the supply chain requires careful planning and due diligence. It is not without risks and challenges.

This is also an opportunity for First Nations to explore how they want to exercise governance in relation to cannabis, and how various sources of law may come into play. Community dialogue, and the integration of diverse perspectives, are key.



²¹ See First Nations Health Authority resources https://www.fnha.ca/what-we-do/mental-wellness-and-substance-use/non-medical-cannabis-information; and Thunderbird Partnership Foundation resources https://thunderbirdpf.org/

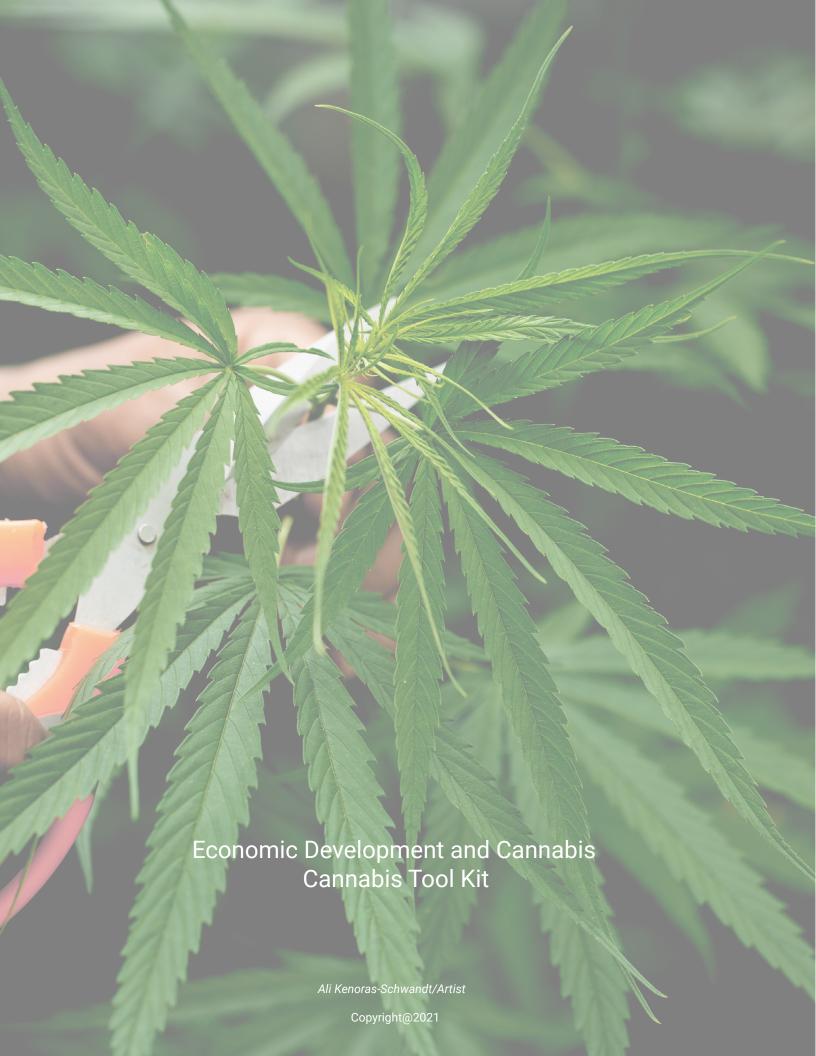


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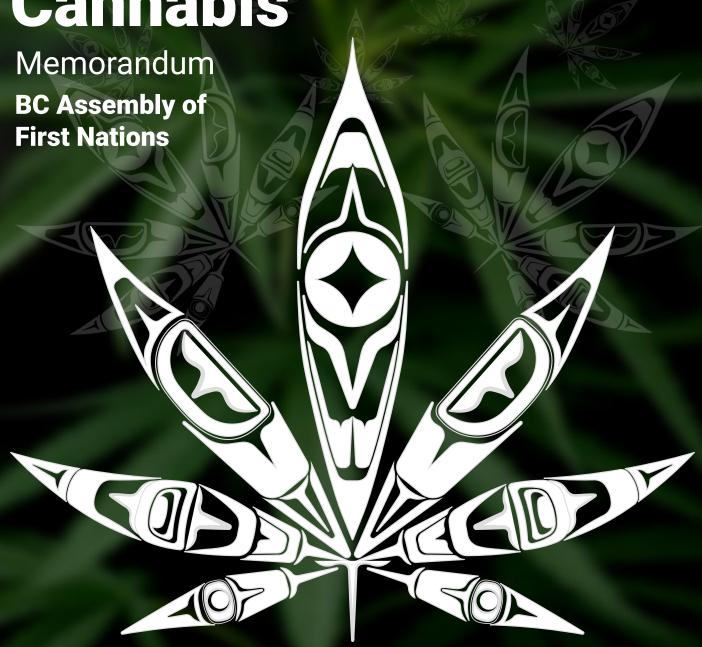








Legal and Regulatory Issues for BC First Nations Relating to Cannabis





BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

This legal memo was prepared for th BC Assembly of First Nations by Miller Titerle + Company. It does not constitute specific legal advice and should not be relied upon without consulting your own legal advisors.

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1. EXECUTIVE SUMMARY

The purpose of this memorandum is to provide an overview of the current legal framework surrounding the cannabis industry and a forward-looking analysis of First Nation participation in the cannabis industry.

Generally speaking, there are various types of businesses within the umbrella of the "cannabis industry", including within each of the stages (from supply, production/cultivation, processing, distribution/export, to sales) for various products (dried cannabis, cannabis oil, fresh cannabis, cannabis plants, cannabis plant seeds, edible cannabis, cannabis concentrates, and various pharmaceutical products). Though many persons entering into the cannabis industry consider only the production and sale of cannabis (and cannabis derived products), there are many other related businesses in the industry (both regulated and non-regulated) including: supply of cultivation equipment and technology, supply of processing and manufacturing equipment and technology, biotechnology research and development, consulting and marketing services, etc.

Cannabis businesses can add value and economic development opportunities for ancillary and support businesses (including environmental consulting, architecture, construction, agricultural supply and labour, logistics and shipping, security, etc.). If successfully established and operated, cannabis businesses can also be a source of income for First Nations governments and their economic development arms, as well as employment opportunities for community members. However, there are also many regulatory and business risks involved in the cannabis industry and cannabis businesses, especially in situations where there are uncertainties surrounding jurisdiction and regulation. Also, the cannabis industry is quickly evolving and may face contraction from over-supply in the short term, which the industry has already seen with larger production operations. However, potential supply shortages may ultimately result in the mid to long term due to increasing acceptance and use of cannabis products (including pharmaceutical formulations and edible products) domestically and changing cannabis laws around the world (making bulk exports a bigger part of the cannabis cultivation and production industry here in Canada). Lastly, the black or grey market in Canada continues be a significant part of the cannabis industry, and often boasts more varied product selection, lower prices, and higher quality due to many of the experienced black market growers continuing to produce for the black/grey market, which may affect the competitiveness of new businesses.

Many First Nations have waded into the cannabis industry, mostly in the retail or cultivation/production spaces (and this briefing note is specifically tailored to these). Of these, there are many that have relied on First Nation laws and licensing (see details below) and established their businesses on reserve. Others have established their businesses either on or off reserve (or adjacent to reserve) through Provincially or Federally licenced operations.

First Nations that choose to participate in the cannabis industry face a variety of issues, including challenges related to:

- Jurisdiction;
- Licensing and regulation;
- Taxation:
- Tax revenue sharing;
- Health and safety;
- Enforcement; and
- Legal liabilities.

Various First Nations organizations and individual First Nations have advocated for significant changes to the current regulatory framework surrounding cannabis, which largely excludes First Nations. This memorandum summarizes advocacy work done to date and provides recommendations on various matters of importance to First Nations who are involved in or considering entering the cannabis industry or who wish to be informed about these developments.

This memorandum identifies a number of measures that BCAFN may wish to advocate for and coordinate advocacy among First Nations including:

- Entering into negotiations with the Province and/or Federal government towards bi-lateral or tri-lateral agreements required to enable;
- Recognition of First Nations jurisdiction over the regulation of cannabis within First Nation territories;
- Cannabis excise tax and cannabis sales tax sharing with First Nations;
- Taxation powers for First Nations to institute a First Nations cannabis excise tax and First Nations goods and services tax on cannabis;
- Agreement with Health Canada for the provision of health and safety services or funding for the provsion of such services by the First Nations Health Authority; and
- Agreements with police forces and other bodies for the provision of enforcement services for First Nation cannabis laws and regulations, as well as to enable any required legislative amendments, new regulations, and/or exemptions necessary for the foregoing.

2. BACKGROUND ON CANNABIS LEGALIZATION

2.1 Initial Legislation

It has been just over two years since the enactment and coming into force of the *Cannabis Act*¹ and corresponding amendments to the *Criminal Code*² legalizing the production, sale, possession, and consumption (collectively, "**production and sale**") of cannabis³ for non-medicinal purposes⁴ (sometime referred to as "recreational purposes") across Canada.

Prior to the enactment of the *Cannabis Act* and the Provincial and Territorial cannabis legislation and regulations, Indigenous peoples in Canada raised several issues with the proposed cannabis legislation. Specifically, in May 2018, the Standing Senate Committee on Aboriginal Peoples ("**Senate Committee**") released a report on the *Cannabis Act* (Bill C-45) highlighting five key concerns raised by Indigenous communities about the legislation:

- 1. A lack of consultation with Indigenous communities and organizations in developing the *Cannabis Act*;
- 2. A lack of culturally specific education materials on the legislation pertaining to the legalization of cannabis and on the health effects of cannabis;

² An Act to Amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Act, S.C. 2019, c. 21.

¹ S.C. 2018, c. 16. ["Cannabis Act"].

³ The term "cannabis" is used throughout this briefing note as opposed to the term "marihuana" or "marijuana" due to the later terms' racist origins; See Alex Halperin, "Marijuana: Is it Time to Stop Using a Word with Racist Roots?" The Guardian (January 29, 2018), online: https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism>.

⁴ Prior to the Cannabis Act, since 2001, the production, sale, possession and consumption of cannabis in Canada was only for medicinal purposes, pursuant to the Marihuana Medical Access Regulations, SOR/2001-227, repealed by the Marihuana for Medical Purposes Regulations, SOR/2013-119.

- 3. A lack of access to and funding for culturally specific mental health and addictions services in relation to cannabis;
- 4. A lack of recognition of the inherent rights of Indigenous communities to exercise jurisdiction over the regulation, sale, consumption, and taxation of cannabis in their communities; and
- 5. A lack of opportunities for Indigenous communities to fully participate in the economic opportunities and own-source revenue potential following the legalization of cannbis.⁵

The Senate Committee called on the government to delay the enactment of the *Cannabis Act* to allow broader consultation to be undertaken with Indigenous communities. However, the Federal and Provincial governments proceeded unilaterally. The last few years have seen the results of these issues play out across Canada. Following the lack of consultation and inclusion of Indigenous communities in the legalization of cannabis, many First Nations across Canada have asserted their sovereignty by passing cannabis laws, pursuant to their inherent jurisdiction as self-determining nations, in relation to the production and sale of cannabis on-reserve. First Nations have also licensed or established their own cannabis-related businesses, specifically, on-reserve cultivation of cannabis and cannabis consumer sales. These businesses have seen a number of challenges. Some, especially off-reserve businesses, have been raided by the police, and others have faced political and legal pressures from Provincial authorities and sometimes their own communities. Others have had more success in operating on reserve without interference from Provincial or Federal regulators and organizations.

The Cannabis Act divides jurisdiction over cannabis production and sale exclusively between the Federal, Provincial and Territorial governments. Indigenous governments have been excluded from opportunities to exercise their rights to self-determination and self-government in relation to the legalization of cannabis. Increased uncertainty around familiar jurisdictional issues¹¹ has resulted from the failure to consult Indigenous communities; the exclusion of Indigenous governments from exercising their inherent jurisdiction; the massive economic opportunities in the cannabis industry in Canada; and corresponding exercise of sovereignty and the seizing of opportunities by First Nation governments and businesses. At the same time, these factors have also resulted in opportunities for the development of Indigenous rights to self-government and self-

⁷ The Kwaw-Kwaw-Apilt First Nation are an example (though there are likely close to a hundred others); See Randy Shore "Chilliwack First Nation writes its own cannabis law" The Vancouver Sun (November 2, 2018), online https://vancouversun.com/news/local-news/tentative-chilliwack-first-nation-writes-its-own-cannabis-law.

Nation files claim in court over cannabis dispensary", Saskatoon StarPhoenix (February 28, 2019), online https://thestarphoenix.com/

⁵ Standing Senate Committee on Aboriginal Peoples, The Subject Matter of Bill C-45: An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts (Ottawa: Senate Canada, May 2018) at 8, online https://sencanada.ca/content/sen/committee/421/APPA/reports/2018-05-01_BILLC-45_Cannabis_e.pdf.

⁶ Ibid, at 7.

⁸ The Omagakii Medical Dispensary, owned and operated by Zagime Anishinabek (formerly Sakimay First Nation) is an example; See Kendall Latimer "Cannabis dispensary celebrates soft launch on Zagime Anishinabek near Regina", CBC News (September 16, 2019), online https://www.cbc.ca/news/canada/saskatchewan/omagakii-medical-dispensary-1.5285465>.

⁹ See Paul Henderson "UPDATE: RCMP execute search warrants at cannabis shops on First Nation land", Surrey Now-Leader (July 12, 2018), online https://www.surreynowleader.com/news/breaking-rcmp-execute-search-warrants-at-cannabis-shops-on-first-nations-land/; and Molly Frommer "Protesters rally outside Sudbury courthouse after cannabis dispensary raids", CTV News (September 19, 2019), online .">https://northernontario.ctvnews.ca/protestors-rally-outside-sudbury-courthouse-after-first-nation-cannabis-dispensary-raids-1.4599286>.
https://www.leafly.ca/news/politics/saskatchewan-contends-indigenous-cannabis-store-illegal; Adam Hunter "Sask. justice minister urging federal government to enforce on-reserve pot stores", CBC News (July 8, 2019), online https://www.cbc.ca/news/canada/saskatchewan/sask-justice-minister-fed-enforcement-first-nations-cannabis-1.5204633">https://www.cbc.ca/news/canada/saskatchewan/sask-justice-minister-fed-enforcement-first-nations-cannabis-1.5204633; and The Canadian Press "Muscowpetung First"

news/local-news/muscowpetung-first-nation-files-claim-in-court-over-cannabis-dispensary>.

11 See Arthur White-Crummey "Pot shop dispute echoes gambling battle in quest for Indigenous jurisdiction" Regina Leader-Post (July 17, 2019), online < https://leaderpost.com/news/saskatchewan/pot-shop-dispute-echoes-gambling-battle-in-quest-for-indigenous-jurisdiction>.

determination in the context of changing Canadian laws and the harmonization of those laws with the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**").¹²

2.2 Federal Laws and Regulations

The Federal government regulates cannabis production ("cultivation") and ancillary activities under the Cannabis Act and corresponding Cannabis Regulations. Together, the Cannabis Act and the Cannabis Regulations provide for the overall jurisdictional framework of cannabis legislation throughout Canada. The Cannabis Act includes provisions for the following, among other things:

- specified prohibitions and offences (including for unauthorized possession, distribution, sales, importing and exporting, cultivation, promoting, packaging and labelling, and displays of cannabis and cannabis products); 14
- licensing and permitting of cannabis cultivation and non-retail sale (including applications, grounds for refusal, required security clearances, and Provincial jurisdiction for retail sales regimes);¹⁵ and
- a cannabis tracking system (to enable tracking of cannabis products, to prevent cannabis being diverted to the illicit market, and to prevent illicit cannabis from being a source of supply in the legal market).

The Regulations include provisions for the following, among other things:

- specific types of licensed activities and related requirements, including pre-licensing requirements and classes of licenses (cultivation; processing; analytical testing; sale; and research);¹⁷
- physical security measures;¹⁸
- good production practices; 19 and
- packaging and labelling standards.²⁰

Under the *Cannabis Act*, the Federal government, through Health Canada, has the jurisdiction for the licensing of various kinds of cultivation.²¹ Separate Federally-issued licences are required for cultivation, processing, analytical testing, sales (non-retail), and research. The licenses may also be divided into sub-classes depending on the size of the operation (on a per square foot basis).²²

¹¹ See Arthur White-Crummey "Pot shop dispute echoes gambling battle in quest for Indigenous jurisdiction" Regina Leader-Post (July 17, 2019), online < https://leaderpost.com/news/saskatchewan/pot-shop-dispute-echoes-gambling-battle-in-quest-for-indigenous-jurisdiction>.

¹² GA Res 61/295, UNGAOR, 61st Sess, Sup No 53. UN Doc A/61/295 (2007), online https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹³SOR/2018-144 ["Regulations"].

¹⁴ Cannabis Act, Part 1-2.

¹⁵ Ibid, Part 3-4.

¹⁶ Ibid, Part 6.

¹⁷ Regulations, Part 2.

¹⁸ Ibid, Part 4.

¹⁹ Ibid, Part 5.

²⁰ Ibid, Part 7.

²¹ Cannabis Act, Part 3; Order Designating the Minister of Health as the Minister for the purpose of that Act, SI/2019-125. These include subclasses for cultivation (micro-cultivation, standard cultivation, and nursery); subclasses for processing (micro-processing, and standard procession); subclasses for sales (including regular, and for medical purposes); Regulations, section 8.

In addition to licenses issued under the *Cannabis Act*, there are other requirements placed on licence-holders under various Federal acts and regulations, including the *Food and Drugs Act*. Licence-holders must also register under Health Canada's *Cannabis Tracking and Licensing System*, and must register for the cannabis stamping regime under the *Excise Tax Act*.²⁴

In addition to the Cannabis Regulations, there are various other regulations passed pursuant to the Cannabis Act, including: the Cannabis Act (Police Enforcement) Regulations;²⁵ the Cannabis Fees Order;²⁶ the Cannabis Tracking System Order;²⁷ the Industrial Hemp Regulations;²⁸ and the Qualifications for Designation as Analyst Regulations (Cannabis).²⁹

Most recently, amendments to the Cannabis Regulations enacted on October 17, 2019 include rules for the legal production and sale of edible cannabis, cannabis extracts, and cannabis topicals.³⁰

2.3 Provincial and Territorial Laws and Regulations

The Cannabis Act provides for Provincial and Territorial jurisdiction over distribution and retail sales. Provincial and Territorial laws³¹ provide generally for how cannabis may be sold to consumers, where cannabis stores ("dispensaries") may be located, how dispensaries³² are operated, and the licensing of dispensaries. Additionally, the Provinces and Territories have flexibility in certain matters relating to the distribution and sale of cannabis, including lowering the possession limits from those in the Cannabis Act, increasing the minimum age for purchase and possession of cannabis, restricting where cannabis may be used in public, and added additional requirements to personal cultivation.³³ The public possession limit in all provinces remains 30 grams of dried cannabis or its equivalent, but the minimum age for purchase varies by province (similar to the age minimums

for the purchase of alcohol) between 18 and 19 years of age. 34 The main differences between most Provincial

²⁴ R.S.C., 1985, c. E-15.

²⁵ SOR/2018-151.

²⁶ SOR/2018-198.

²⁷ SOR/2018-178 and SOR/2019-202.

²⁸ SOR/2018-145.

²⁹ SOR/2018-146

³⁰ See Government of Canada "Final regulations: Edible cannabis, cannabis extracts, cannabis topicals" (June 14, 2019), online https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/resources/regulations-edible-cannabis-extracts-topicals.html.

³¹ Gaming, Liquor and Cannabis Act, R.S.A. 2000, c. G-1; Gaming, Liquor and Cannabis Regulation, Alta Reg 143/1996; An Act to Control and Regulate Cannabis, S.A. 2017, c. 21; Cannabis Control and Licensing Act, S.B.C. 2018, c. 29; Cannabis Distribution Act, S.B.C. 2018, c. 28; Cannabis Licensing Regulation, BC Reg 202/2018; Cannabis Control Regulation, BC Reg 204/2018; Cannabis Distribution Regulation, BC REg 143/2018; The Liquor, Gaming and Cannabis Control Act, C.C.S.M. c. L153; Liquor, Gaming and Cannabis Regulation, Man Reg 82/2014; Cannabis Regulation, Man Reg 120/2018; Cannabis Control Act, S.N.B. 2018, c. 2; Cannabis Control Act, S.N.L. 2018, c. C-4.1; Cannabis Control Regulations, NLR 93/18; Cannabis Licensing and Operations Regulations, NLR 94/18; Cannabis Products Act, S.N.W.T. 2018, c. 6, Sch A; Cannabis Products Regulations, NWT Reg 136-2018; Cannabis Control Act, S.N.S. 2018, c. 3; Cannabis Tax Act, S.N.S. 2018, c. 4 sch; Cannabis Act, S.Nu 2018, c. 7; Cannabis Control Act, 2017, S.O. 2017, c. 26, Sch 1; Cannabis Licence Act, 2018, S.O. 2018, c. 12, Sch 2; Cannabis Taxation Coordination Act, 2019, S.O. 2019, c. 7, Sch 7; Cannabis Control Act, R.S.P.E.I. 1988, c. C-1.2; Cannabis Control Regulations, PEl Reg EC575/18; Cannabis Taxation Agreement Act, R.S.P.E.I. 1988, c. C-1.4; Cannabis Regulation Act, C.Q.L.R c. C-5.3; Règlement sur la formation relative à la vente au detail de cannabis et sur les renseignements à communiquer à l'acheteur lors de toute vente de cannabis, R.L.R.Q. c. C.-5.3, r. 1; The Cannabis Control (Saskatchewan) Act, S.Y. 2018, c. 4; Cannabis Control and Regulation, YOIC 2018/139; Cannabis Licensing Regulation, YMO 2019/43; Cannabis Control and Regulation General Regulation, YOIC 2018/184.

³² See Government of Canada "Cannabis in the provinces and territories" (June 14, 2019), online https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/provinces-territories.html.

³³ Ibid.

³⁴ Ibid.

and Territorial laws in relation to cannabis concerns the public, private, or hybrid retail environment (also similar to that of alcohol).³⁵ Only British Columbia's, Saskatchewan's, and Ontario's cannabis laws and regulations mention First Nations.³⁶ British Columbia's *Cannabis Control and Licensing Act*³⁷ provides that applicants for retail licences must consult with Indigenous Nations when proposing to establish a retail dispensary on their lands,³⁸ that Indigenous Nations may impose fees for reviewing applications from prospective licensees,³⁹ that a licence may be suspended if the licensee is convicted of an offence under the laws or bylaws of an Indigenous Nation,⁴⁰ and that the Minister may enter into agreements with an Indigenous Nation in respect to cannabis.⁴¹

2.4 BC Laws

The Cannabis Legalization and Regulation Secretariat in British Columbia led the development of Provincial laws in relation to cannabis and is the central coordinating body for cannabis regulation and policy across the Provincial government. British Columbia has two acts that specifically regulate cannabis: the *Cannabis Control and Licensing Act* and the *Cannabis Distribution Act*.⁴²

The Cannabis Control and Licensing Act and Cannabis Licensing Regulation⁴³ provide for licensing of retail cannabis sales locations in the Province. This legislation provides for a mix of privately and publicly (Provincially) owned retail locations.

The Cannabis Distribution Act⁴⁴ provides for the distribution of Federally-licensed cannabis products to Provincially-licensed retail sales locations in British Columbia. In British Columbia, the Province is the sole distributor of cannabis to retail stores located in the Province (through the BC Liquor and Cannabis Regulation Branch ("Branch")). All cannabis sold by retail operations in the Province must be purchased from the Branch. The Branch will only purchase cannabis and cannabis products from Federally licenced producers.

On September 20, 2020, British Columbia announced new sales programs to benefit cannabis producers and Indigenous businesses.⁴⁵ The new programs are aimed at providing the option for cannabis growers to deliver cannabis directly to licensed retailers. As part of this initiative, the Province has committed to developing a "farm-gate" sales program that will enable British Columbia cannabis growers to sell their products at "farm-gate" stores at their production site. The program is expected to be delivered in 2022. The details of this program remain unknown and the benefits to Indigenous businesses remain to be seen. The program will likely only be applicable to Federally-licensed cannabis producers, and as a result, the program may not apply to Indigenous business operating outside of the Federal licensing scheme.

³⁵ Alberta, Manitoba, Newfoundland and Labrador, and Saskatchewan's cannabis laws provide for privately licensed stores and online purchase (directly from the Province); New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Québec, Prince Edward Island, Nunavut, and the Yukon's cannabis laws provide for government owned and operated stores and online purchase (directly from the Province); and British Columbia, and Ontario provide for a mix of privately licensed, government owned and operated, and online purchase (directly from the Province); Ibid.

³⁶ Ontario's Cannabis Control Act provides a similar provision that the Minister may enter into arrangements and agreements with the council of a band with respect to cannabis (section 26), and its Cannabis Licence Act provides that councils may prohibit the issuance of licences to retail stores that would be located on their reserve (section 4(6) and 43); Saskatchewan's Cannabis Control (Saskatchewan) Act similarly provides that bands may prohibit the issuance of a licence for a retail store located on their reserve (section 3-3(2)).

³⁷ S.B.C. 2018, c. 29.

³⁸ Ibid, s. 33 and 35.

³⁹ Ibid, s. 35.

⁴⁰ Ibid, s. 37.

⁴¹ Ibid, s. 119.

⁴² S.B.C., 2018, c. 28.

⁴³ B.C. Reg. 202/2018.

⁴⁴ S.B.C., 2018, c. 28.

⁴⁵ Government of British Columbia, Public Safety and Solicitor General "New sales programs to benefit cannabis producers, Indigenous businesses" BC Gov News (September 20, 2020), online: https://news.gov.bc.ca/releases/2020PSSG0054-001830.

Additionally, British Columbia has established the Community Safety Unit ("CSU"), which is a special unit under the Policing and Security Branch of the Ministry of Public Safety and Solicitor General. The CSU has been delegated responsibility from British Columbia for compliance and enforcement under the *Cannabis Control and Licensing Act*. The CSU may receive complaints about non-licensed cannabis activities and undertakes a range of enforcement activities including conducting inspections, issuing tickets, obtaining warrants, issuing demands for information, summoning witnesses, conducting hearings, seizing cannabis, and issuing administrative monetary penalties. The CSU may also recommend the prosecution of offences under the *Cannabis Control and Licensing Act*. There have been instances reported by First Nations in British Columbia of the CSU sending letters to inform First Nations of complaints against cannabis retail sales operations on such First Nations reserve lands. We believe that advocacy will have to include coordination with the CSU and an understanding of the jurisdiction of First Nations over their own lands.

2.5 Taxation

The Federal government has implemented an excise tax under the *Excise Tax Act* for cannabis, which is payable by licensed cannabis producers when cannabis products they package are delivered to a non-retail purchaser. The Canada Revenue Agency ("**CRA**") is responsible for licensing cultivators, producers, and packagers of cannabis products and for collecting the Federal duties and taxes.⁴⁸ The Provincial, Territorial, and Federal governments share in the revenue generated by the excise duty with 75% going to the Provinces and Territories and 25% going to the Federal government.⁴⁹

Again, Indigenous communities were not consulted nor included in the development of cannabis taxation regulations. This is another issue that was raised by Indigenous communities and by Manny Jules (Chief Commissioner of the First Nations Tax Commission), who urged the Federal government to address taxation benefits prior to the *Cannabis Act* coming into force.⁵⁰ Since then, the First Nations Tax Commission has submitted a proposal and has garnered support from First Nations to amend the *Cannabis Act* and various regulations. The proposed amendments would establish a framework of shared taxation authority for cannabis with First Nations under the *First Nations Fiscal Management Act* ("**FNFMA**"). ⁵¹

The sale of cannabis and cannabis products to consumers in British Columbia is also subject to Provincial sales tax ("PST").⁵² Persons who sell cannabis directly to consumers in British Columbia must register to collect and remit PST on those sales. Only Provincially-licensed stores are currently allowed to register to collect and remit PST on cannabis sales. When applying to the Province for registration, the registrant must provide proof of a retail store licence issued by the Province and a lease agreement for the location at which the sales will be made. First Nations individuals who purchase cannabis products on reserve are exempt from PST on such sales.⁵³

⁴⁶ See Province of British Columbia "Community Safety Unit" (June 28, 2020), online < https://www2.gov.bc.ca/gov/content/safety/public-safety/cannabis/csu>.

⁴⁷ See Excise Duties on Cannabis Regulations, SOR/2019-78

⁴⁸ See Government of Canada "Excise duty framework for cannabis" (August 2, 2019), online https://www.canada.ca/en/revenue-agency/campaigns/cannabis-taxation.html.

⁴⁹ See Kathleen Harris, David Cochrane "Liberals reach deal with the province on sharing pot tax revenue, with price pegged at about \$10 a gram", CBC News (December 19, 2017), online https://www.cbc.ca/news/politics/finance-ministers-pot-tax-1.4442540.

⁵⁰ See John Paul Tasker "First Nations demanding a cut of cannabis tax after pot legalization", CBC News (March 8, 2018), online https://www.cbc.ca/news/politics/first-nations-cannabis-excise-tax-1.4564121.

⁵¹ S.C. 2005, c. 9; See First Nations Tax Commission "Clearing the Path" First Nations Tax Commission Quarterly Publication, Volume 12, Issue 03 (Winter 2019), online http://sp.fng.ca/fntc/fntcweb/CTP_v12_i03_Winter2019_ENG_WEB.pdf>.

⁵² See Province of British Columbia "Provincial Sales Tax (PST) Bulletin 141: Cannabis" (January, 2019), online https://www2.gov.bc.ca// assets/gov/taxes/sales-taxes/publications/pst-141-cannabis.pdf>.

⁵³ See Province of British Columbia "Provincial Sales Tax (PST) Bulletin 314: Exemptions for First Nations" (May, 2019), online < https://www2.gov.bc.ca/assets/gov/taxes/sales-taxes/publications/pst-314-exemptions-first-nations.pdf>.

Cannabis sales to consumers in British Columbia are also subject to goods and services tax ("**GST**"). As with the PST, First Nations individuals who purchase cannabis products on reserve are exempt from paying GST on such sales.⁵⁴

Some First Nations in British Columbia have instituted the First Nations Sales Tax ("FNST") or the First Nations Goods and Services Tax ("FNGST") on their reserves. The FNST is a tax that applies to on-reserve sales of alcohol, fuel, and tobacco products, pursuant to a First Nation bylaw. The FNST is the same rate as the GST but applies to all purchasers on-reserve whether they are First Nation individuals or not. The FNST is administered by the CRA, in which the CRA acts as agent for the First Nation that has instituted the FNST, collects FNST tax from registrants, and remits the collected tax to the First Nation. The FNGST is similar to the FNST but applies more broadly to all goods and services that would be subject to GST off reserve. The FNGST was created by the First Nations Goods and Services Tax Act⁵⁷ and has largely replaced the FNST (the CRA no longer enters into new agreements with First Nations to administer the FNST). Again, the CRA acts as agent to enforce the application of the FNGST for First Nations that have adopted it.

GST and PST apply to the sale of cannabis on and off reserve to non-First Nations persons. The FNGST applies to all sales of cannabis (regardless of whether they are First Nations or non-First Nations persons) on reserves where it has been adopted by the First Nation.

3. ISSUES FACING FIRST NATIONS IN RELATION TO CANNABIS LEGALIZATION

There are a wide array of issues facing First Nations in relation to cannabis legalization. Below we provide a high-level summary of some of the key issues facing First Nations in relation to cannabis legalization.

3.1 Jurisdiction

One of the primary challenges facing First Nations is the assertion of jurisdiction over the regulation of cannabis. The issue of jurisdiction is paramount because it is at the centre of most of the other issues described below.

Indigenous communities have asserted their inherent right to exercise jurisdiction over the regulation, sale, and taxation of cannabis in their communities since the development of the Federal and British Columbia cannabis regulatory regimes. However, Indigenous communities have largely been excluded from any opportunities to exercise their rights to self-determination and self-government in relation to legalization of cannabis in a way that recognizes such rights.

The Federal, Provincial, and Territorial governments have asserted <u>exclusive</u> jurisdiction over cannabis production and sale, and have failed thus far to work with First Nations and First Nation organizations on a government-to-government basis to ensure First Nation laws and processes relating to cannabis can coexist alongside Federal and Provincial/Territorial laws. This exclusion from cannabis regulatory regimes has led many First Nations to pass cannabis laws, bylaws, and regulations pursuant to their inherent jurisdiction. Section 5.1 of this Memorandum describes the various sources of First Nations legislative powers that First Nations have used to assert this jurisdiction.

⁵⁴ See Government of Canada "GST/HST and Indigenous peoples" (April 15, 2019), online:https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/charge-collect-indigenous-peoples.html.

⁵⁵ Including Westbank, Tk'emlúps te Secwépemc, Sliammon, Stz'uminus, Adams Lake, Tzeachten, Cowichan Tribes, and Little Shuswap Lake. See Government of Canada "First Nations Tax" (February 25, 2020), online: ">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html#whchsbjct>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-agency/services/tax/businesses/charge-collect-indigenous-peoples/first-nations-tax.html">https://www.canada.ca/en/revenue-agency/services/tax/businesses/charge-collect-indigenous-agency/services/tax/businesses/charge-collect-indigenous-agency/services/tax/bus

⁵⁶ Including Tsawout First Nation, Akisqnuk First Nation, Lower Kootenay Indian Band, Shuswap First Nation, ?Aq'am, Tobacco Plains Indian Band, Nisga'a Nation, Tseil-Waututh Nation, Songhees Nation, Matsqui First Nation, Kwaw-kwaw-Apilt First Nation, Tsawwassen First Nation, Cayoose Creek, Skowkale First Nation, Toquaht Nation, Ucluelet First Nation, Uchucklesaht Tribe, and Huu-ay-aht First Nations. See Government of Canada "First Nations Goods and Services Tax" (June 19, 2020), online: ">https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/charge-collect-indigenous-peoples/first-nations-goods-services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/charge-collect-indigenous-peoples/first-nations-goods-services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https://www.canada.ca/en/revenue-agency/services-tax.html#imposed>">https:/

⁵⁷ S.C. 2003, c. 15, s. 67.

However, where First Nation cannabis laws conflict with Federal or Provincial laws, First Nation cannabis laws can be vulnerable to legal challenges by the Federal or Provincial/Territorial governments. The sections below provide context for these issues, as they have been established according to current common law in Canada.

Conflict with Federal Laws

Generally, if a First Nation law conflicts with a Federal law, the legal presumption is that the general should give way to the specific.⁵⁸ However, case law suggests that *Indian Act* ⁵⁹ bylaw-making authority does not authorize First Nations to legislate matters covered under the *Criminal Code*.⁶⁰ It is uncertain whether a Court would find that a First Nation cannabis law conflicting with the *Cannabis Act* and *Regulations* would be valid and govern, given that:

- The powers to enact bylaws under the Indian Act and the First Nations Land Management Act
 ("FNLMA"), deal broadly with subject matter areas and the Cannabis Act and Regulations deal
 more specifically with cannabis; and
- The Cannabis Act and Regulations closely relate to the provisions of the Criminal Code.

Conflict with Provincial Laws

Despite "Indians and lands reserved for Indians" being under Federal jurisdiction pursuant to the *Constitution Act*, s. 91(24), Provincial laws of general application may still apply on reserve under s. 88 of the *Indian Act*. Provincial laws of general application will apply except:

- To the extent that those laws are inconsistent with the *Indian Act* or the FNFMA, or with any
 order, rule, regulation or law of a band made under those acts;
- Where a valid Provincial law infringes on Federal jurisdiction over Indian lands; 62 or
- Where a Provincial law seeks to regulate a matter at the core of s. 91(24), which courts have interpreted narrowly.⁶³

Provincial laws of general application can exist concurrently with First Nations laws, and are not automatically displaced by the enactment of First Nations laws. Generally, First Nation laws will be valid on reserve regardless of the general Provincial legislation relating to the same subject matter, and the Provincial legislation will be rendered inoperative to the extent that it is inconsistent with the First Nation law. ⁶⁴ Many cannabis retail operations on reserve that have been licensed pursuant to a First Nation's cannabis law or bylaw may nonetheless also require a Provincial licence because the licensing laws are permissive and a retailer could simultaneously comply with both First Nation and Provincial laws.

First Nations have faced political pressure and advocacy against their ability to license and regulate their own retail stores from high level politicians. For example, Saskatchewan's Justice Minister advocated to the federal Minister of Public Safety for two First Nations-owned stores on reserve to be shut down because they

⁵⁸ Native Law, at 7-1450.

⁵⁹ R.S.C. 1985, c. I-5 ["Indian Act"].

^{60 [1995] 3} F.C. 461.

⁶¹ S.C. 1999, c. 24 ["FNLMA"].

⁶² Section 88 makes no reference to "lands reserved for Indians". Lower courts have held that the absence of reference to "lands reserved for Indians" within s. 88 means that provincial laws affecting Indian lands are not saved under s. 88.

⁶³ NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45, [2010] 2 S.C.R. 696.

⁶⁴ Native Law at 7-1460.

did not have Provincial licences. The Justice Minister stated it was "problematic" that the two retail stores were in competition with Provincially regulated stores and because Saskatchewan does not track what the non-Provincially licensed stores are selling.⁶⁵ Advocating for First Nations jurisdiction alongside a pragmatic plan for sharing information between jurisdictions could help address the latter concern.

Laws made pursuant to inherent Aboriginal rights

In the current political and legal context, a First Nation that has passed a law pursuant to its inherent Aboriginal right of self-government to regulate the production and sale of cannabis on or off reserve would need to defend such rights. Canadian jurisprudence on Aboriginal rights requires First Nations to establish that the asserted right or activity be an element of a practice, custom, or tradition integral to the distinctive culture of the First Nation. Although courts have determined that all Aboriginal peoples have an inherent right to self-government protected under s. 35, courts have also held that the exact nature and exercise of that right is not overarching. Courts have held that the self-governance right must be sufficiently exact in its scope and considered in light of the specific circumstances of the case and the specific history and culture of the Aboriginal group claiming the right. In other words, according to the common law, any action taken in reliance of a claimed Aboriginal right to self-governance in relation to cannabis jurisdiction would have to be considered in its relation to an activity that was a "defining feature of the culture" of the claimant prior to contact with Europeans. By this standard, if the claimant did not exercise jurisdiction and self-governance activities in relation to cannabis historically, they may have difficulty proving an Aboriginal right to self-governance in relation to cannabis production and sale today.

Even if an Aboriginal right, including a right to regulate cannabis sale and production, is established, the right may nonetheless be subject to potential infringement by the Federal and Provincial governments. In order to determine whether a Federal or Provincial law may justifiably infringe an Aboriginal right, the courts have developed a two part test including (a) whether there been a prima facie infringement of that right and (b) whether the infringement can be justified.⁶⁸ The first part of the test asks if the limitation is unreasonable, if the law or regulation imposes undue hardship, and if the regulation denies to the holders of the right their preferred means of exercising that right. The second part of the test regarding justification has been established by the courts as a high standard in which the Federal government must demonstrate a compelling and substantial legislative objective,⁶⁹ defined as an objective that furthers the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective. A public objective aiming to limit the exercise of rights that may cause harm to the general populace or to Aboriginal peoples could fall within a valid legislative objective.⁷⁰ However, simply stating that a law is in the public interest does not satisfy this part of the test, and it must be shown that the infringing law or regulation limits the Aboriginal right as little as possible.

Although courts have interpreted s. 35 with a narrow lens, Federal policy reform and legal advancements with the passing of UNDRIP legislation may offer opportunities to advocate for a wider interpretation consistent with international human rights standards and the recommendations originally made by the Royal Commission on Aboriginal Peoples ("RCAP"). In 1992, RCAP recognized that Aboriginal peoples have an inherent right of self-government based on international law and s. 35, and that as part of the Canadian federation, Aboriginal

⁶⁵ See Adam Hunter, "Sask. justice minister urging federal government to enforce on-reserve pot stores" CBC News, July 8, 2019, online https://www.cbc.ca/news/canada/saskatchewan/sask-justice-minsiter-fed-enforcement-first-nations-cannabis-1.5204633

⁶⁶ R. v Van der Peet, [1996] 2 SCR 507 at para 49.

⁶⁷ R. v. Pamajewon, [1996] 2 S.C.R. 821.

⁶⁸ R. v. Sparrow, [1990] 1 SCR 1075.

⁶⁹ Tsilhqot'in Nation v. British Columbia (2014), 2014 SCC 44 (S.C.C.), citing with approval R. v. Gladstone (1996), [1996] 2 S.C.R. 723 (S.C.C.).

⁷⁰ Sparrow, supra note 64.

jurisdiction is not subordinate to Federal or Provincial jurisdictions; rather, it is sufficient to displace Federal and Provincial laws. RCAP recommended that Indigenous governments should be able to immediately exercise this inherent jurisdiction in core areas without the need for agreements with other orders of government and in peripheral areas that have a major impact on surrounding jurisdictions through negotiated agreements. RCAP stated that "the Aboriginal sphere of jurisdiction includes all matters relating to the good government and welfare of Aboriginal peoples and their territories", but does not differentiate between on and off reserve, simply referring to exclusive territory. RCAP goes on to state that core Aboriginal jurisdiction likely includes the jurisdiction to: "draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory." This list could certainly include the regulation and licensing of cannabis retail businesses.

In response to RCAP, Canada introduced its 1995 Inherent Right of Self-Government Policy ("IRP"), which substantially failed to include many of RCAP's recommendations in that it asserted a requirement for negotiation, treated the right as requiring delegated authority from the Crown rather than as inherent, and refused to negotiate in certain areas, including criminal law, international trade, and economic regulation.⁷³ The IRP has remained largely unchanged since 1995; however, the Federal government is currently engaged in a consultation process to reform and replace the outdated IRP and Comprehensive Land Claims Policy with a new Policy on the Recognition and Implementation of Indigenous Rights. First Nations have an opportunity to advocate for any new policies to be developed in partnership with First Nations and in alignment with the minimum standards of UNDRIP. Specifically, with regards to inherent rights to self-government, First Nations can advocate for new policies to follow the recommendations in RCAP that inherent rights are non-negotiable and that First Nations should be able to exercise jurisdiction in core areas within their territories without negotiation with the Crown or delegated authority.

Further, the minimum human rights standards of UNDRIP clarify that Indigenous peoples' inherent right to the free pursuit of economic development (Article 3) upholds the substantive rights of Indigenous peoples to set their own economic priorities and follow through with the necessary regulatory steps to support development. It also likely supports self-determination in international investment and trade, conducted through First Nations-developed institutions and according to their own laws and principles.⁷⁴

3.2 Licensing and Regulation of Retail

First Nations seeking to licence or regulate the retail of cannabis on reserve face a number of hurdles.

The British Columbia cannabis retail regulatory regime does not provide for separate First Nations processes for licencing and regulation of retail business, aside from the potential to enter into an agreement with the Province pursuant to s. 119 of the *Cannabis Control and Licensing Act* (s. 119 agreements are discussed in greater detail in section 5.5 of this Memorandum). Under the current framework, First Nations have a say in retail licenses being issued on reserve lands, but cannot license their own cannabis retail businesses.

⁶⁹ Tsilhqot'in Nation v. British Columbia (2014), 2014 SCC 44 (S.C.C.), citing with approval R. v. Gladstone (1996), [1996] 2 S.C.R. 723 (S.C.C.).

⁷⁰ Sparrow, supra note 64.

⁷¹ Canada, Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship (Ottawa: Supply and Services, 1996) at 203.

⁷² Ibid at 775.

⁷³ Government Of Canada, The Government Of Canada's Approach To Implementation Of The Inherent Right And The Negotiation Of Aboriginal Self-Government (2010).

⁷⁴ John Borrows, "Indigenous Diversities in International Investment and Trade" (2019).

Many First Nations across the country, including in British Columbia, are licencing and regulating retail businesses pursuant to their own First Nations cannabis laws on their lands, despite the fact that these retail businesses are not licensed under Provincial law. Many of these businesses have seen challenges, with some having been raided by the police and others facing political and legal pressures from Provincial authorities and sometimes their own communities. For example, in Ontario, two dispensaries operating on reserve lands without a Provincial license were subject to a joint forces raid by the Provincial police and Anishinabek Police Services, even though Chief and Council had passed an interim cannabis bylaw and was actively engaged in dialogue with the dispensaries to achieve compliance as well as with the community (who had passed a referendum supporting the sale of cannabis on reserve). The community is a supporting the sale of cannabis on reserve.

The recent experience of British Columbia First Nations indicates that retail stores located on reserve may be treated differently than stores located off reserve, with the Community Safety Unit less willing to raid stores operating on reserve pursuant to First Nations-enacted laws, even if they are not provincially licensed. 77 Tk'emlups First Nation has two dispensaries operating on reserve pursuant to its own bylaws without Provincial licenses, and CSU has not yet taken any action though they have communicated with the Tk'emlups Council regarding their intention to inspect the Tk'emlups Council regarding their intention to inspect the two dispensaries located on Tk'emlups reserve land. Meanwhile, a dispensary operated on Syilx territory in Vernon without a Provincial license but with the support of the Okanagan Indian Band ("OKIB") by one of their members was raided twice, whereas the owner's three other stores without Provincial licenses located on OKIB reserve lands were not. OKIB recently passed its own cannabis law regulating licenses for retail stores on reserve. This suggests that the CSU will tend to respect First Nations jurisdiction on reserve land with respect to cannabis licensing and work with Chief and Councils to address jurisdictional issues. While the dispensary operating off reserve is not technically covered by the OKIB cannabis law, it cites UNDRIP and DRIPA and its inherent jurisdiction to operate within its territory and displays OKIB's letter of support, and is receiving renewed interest and support from the community in Vernon. Despite the challenges of off-reserve jurisdiction when it comes to retail licensing, First Nations are actively asserting their inherent rights affirmed in DRIPA and building support within their local communities. First Nations often lack resources for enforcement or implementation of safety oversight due to a lack of resources made worse from a lack of taxation powers. As a result, Provincial enforcement can encroach on First Nations jurisdiction unless political pressure is applied to avert this. The Public Safety Minister, after much advocacy and political pressure by First Nations, recently announced that the First Nations Policing Program will be made an essential service with a clear legislative framework to ensure First Nations policing is adequately resourced and supported.78 First Nations can further advocate for this legislation to take into account cannabis law enforcement consistent with their own regulations and priorities.

Additionally, clarity (through amendments to Federal and Provincial law or through government-to-government negotiation and agreement with First Nations) is required in order to provide certainty to First Nations that their jurisdiction to govern these matters and businesses on reserve (either concurrently or to the exclusion of the Province) will be respected.

⁷⁵ See Jerry Langton "Saskatchewan Asserts That Cannabis Store on Indigenous Land is Illegal", Leafly (November 22, 2018), online https://www.leafly.ca/news/politics/saskatchewan-contends-indigenous-cannabis-store-illegal; Adam Hunter "Sask. justice minister urging federal government to enforce on-reserve pot stores", CBC News (July 8, 2019), online https://www.cbc.ca/news/canada/saskatchewan/sask-justice-minister-fed-enforcement-first-nations-cannabis-1.5204633; and The Canadian Press "Muscowpetung First Nation files claim in court over cannabis dispensary", Saskatoon Star Phoenix (February 28, 2019), online https://thestarphoenix.com/news/muscowpetung-first-nation-files-claim-in-court-over-cannabis-dispensary.

⁷⁶ See Chelsea Papineau, "Protestors rally outside Sudbury courthouse after First Nati ons cannabis dispensary raids", CTV News, (September 18, 2019) online https://northernontario.ctvnews.ca/protestors-rally-outside-sudbury-courthouse-after-first-nation-cannabis-dispensary-raids-1.4599286

⁷⁷ See Kelsie Kilawna, "Indigenous pot shop owner refuses to shut down after being raided by province", APTN News (June 11, 2020), APTN News, online https://www.aptnnews.ca/national-news/indigenous-pot-shop-owner-refuses-to-shut-down-after-being-raided-by-province/

⁷⁸ See Jim Bronskill, National Observer, Feds will make First Nations policing an essential service (June 24, 2020) online < https://www.nationalobserver.com/2020/06/24/news/feds-will-make-first-nations-policing-essential-service

3.3 Licensing and Regulation for Production

Like the cannabis retail regulatory regime, there is no carve-out in the Federal regulatory regime for First Nations processes for licensing and regulating production of cannabis on reserve.

Despite Health Canada's asserted exclusive jurisdiction in relation to the regulation of cannabis production, some First Nations are licencing and regulating cannabis production businesses pursuant to their own First Nations cannabis laws on reserve. These businesses can be at risk of investigation and prosecution if the First Nations cannabis production laws are not paramount to Federal laws.

Many First Nations have advocated for Health Canada to delegate authority and funding to First Nations or organizations, such as the First Nations Health Authority, to enable support for the application of First Nation laws in relation to production of cannabis on reserve.

3.4 Taxation

Although First Nations may be able to collect business licensing fees under *Indian Act* bylaws or Land Code laws or collect real property tax under the *Indian Act* or the FNLMA, First Nations do not have an easy path to taxing cannabis retail or production operations operating solely pursuant to First Nation laws. First Nations that have adopted the FNGST could receive tax revenue from Provincially-licensed cannabis retail facilities on reserve, but the CRA will likely not collect FNGST from First Nation licensed cannabis retail licensed operations. The First Nations Tax Commission has advocated for a change to the FNGST to enable First Nations to collect goods and services taxes on sales of cannabis on reserve. Amendments to the *First Nations Goods and Services Tax Act* would be required to enable First Nations to use the FNGST to collect cannabis taxes from First Nation licensed cannabis retailers located on reserve. Some First Nations have incorporated "point-of-sale royalty" provisions into their cannabis laws and regulations in order to collect a percentage of sales revenues from dispensaries licenced pursuant to such laws. Such royalties could potentially be challenged by the payees as being a tax without appropriate powers.

3.5 Tax Revenue Sharing

Revenue generated from the Federal government's excise tax on cannabis is shared with the Provinces and Territories, but not with First Nations. As it stands, First Nations have little opportunity to benefit from taxation of cannabis produced or sold (non-retail sales) within First Nation jurisdiction. This leads to a lack of resources available to First Nations to properly implement and enforce their laws and regulations.

Changing current excise tax revenue sharing to include First Nations is an important first step towards the recognition of First Nation governments' authority and jurisdiction relating to cannabis regulation. First Nations may be able to enter into negotiations and agreements to recoup excise tax revenue collected from cannabis businesses on reserve from the Province's share. In addition to the sharing of excise tax, First Nations should also be advocating for sharing of PST and GST revenue from the sale of cannabis.

3.6 Health and Safety

There are a variety of issues relating to First Nations health and safety and cannabis use for both medical and non-medical purposes. First Nations have concerns around the quality and safety of cannabis products, safe usage, harm reduction, use as a method of opioid treatment, mental wellness, and a focus on cannabis as traditional medicine, to name only a few issues.

Currently, Health Canada regulates cannabis production and safety. The First Nations Health Authority has been taking a leading role in promoting awareness around cannabis use and developing resources for First Nations communities. There has been push for Health Canada to delegate authority and funding to the First Nations Health Authority to increase control and oversight. First Nations should advocate for the assistance of Health Canada and the First Nations Health Authority to ensure adequate standards and safety measures

in the cultivation, production, processing, testing, and sale of cannabis subject to First Nations laws.

3.7 Enforcement

Another key issue is enforcement of cannabis legislation, which is tied to the other issues of jurisdiction, licensing, and regulation.

Enforcement of Federal and Provincial Laws

The RCMP and Provincial police have asserted responsibility for the enforcement of Federal and Provincial cannabis legislation on First Nations' lands. The RCMP and Provincial police are able to enter reserves for the delivery of routine and emergency policing services, and no advanced notice on behalf of the police is currently legally required. Band Councils cannot direct how police deliver operational policing, and police do not need to notify a First Nation's Council if members face criminal investigation.

In the context of cannabis, this can be problematic for First Nations who have enacted their own cannabis laws. First Nations may have concerns about police investigating and charging business owners who may be in compliance with First Nations cannabis laws but not Federal or Provincial laws. This may be viewed as an infringement on First Nations' jurisdiction and their rights to self-government. Further, First Nations may have concerns about police violence or bias against First Nations owned cannabis businesses.

First Nations should develop letters of expectation for police to agree to the First Nation's expectations for policing services on reserve. This can include cooperative measures such as monthly summaries of police activities and development of effective, First Nation specific policing programs.

Enforcement of First Nations Cannabis bylaws and laws

If First Nations enact cannabis laws, there may be difficulties enforcing these laws without proper infrastructure, resources, or support. Currently, in relation to First Nation laws and bylaws, there is often little or no enforcement of fines, and arrests for bylaw violations are uncommon. Typically, no photographs or fingerprints are taken when individuals contravene First Nations laws, and as a result, there are no criminal records. This raises a broader topic of the enforcement of First Nations laws generally and the opportunity to address issues in addition to a cannabis laws' enforcement.

Statutory and Civil Liability

First Nations face a number of potential liabilities when enacting cannabis laws. First, persons (including First Nations and their economic development arms) involved in cannabis businesses that rely on First Nations laws to the exclusion of Federal and Provincial laws are at risk of statutory liability, i.e. may be prosecuted for offences under Federal and Provincial laws. Non-compliant or unlicensed retail and production businesses may face fines or imprisonment or both under both Federal and Provincial legislation.

First Nations that own cannabis retail or production businesses also face the risk of product liability, whether or not they are licensed. First Nations governments may also face product liability if cannabis business are not licensed pursuant to Federal or Provincial legislation.

First Nations governments may face potential civil liability from businesses that are licensed pursuant to First Nations laws, but then are prosecuted or are forced to close because they are not licensed under Federal or Provincial legislation.

Additionally, cannabis businesses on reserve licensed pursuant to First Nation law may not be complying with laws related to taxation (by not collecting and remitting the cannabis excise tax, GST or PST), antimoney laundering laws, and other matters covered by the *Criminal Code*. Specifically, case law has found that notwithstanding that a business may be operating illegally or without a license, such business is still liable for

the collection and remittance of taxes that would otherwise be imposed on the particular transaction giving rise to such tax. ⁷⁹

Costs arising from Litigation to Assert Jurisdiction

If a First Nation undertakes litigation to assert or defend its jurisdiction over the regulation of cannabis and is unsuccessful, the First Nation may be responsible for a portion of the government's legal costs. Costs are generally awarded to the successful party in litigation to compensate them partially for disbursements and legal fees related to the action. The amount of costs will vary from case to case.

3.8 Financing

First Nations face significant barriers to obtaining financing for cannabis businesses on and off reserve. The issues facing First Nations are two-fold:

- 1. For on-reserve businesses, loans from Canadian financial institutions can be difficult to obtain because s. 89(1) of the *Indian Act* restricts the ability of creditors to obtain security against property located on reserve; and
- 2. Most financial institutions will not, or are extremely reluctant to, provide loans to small and mid-sized cannabis businesses because of the stigma attached to cannabis and the fact that cannabis is not federally legal in the U.S.

The first issue relating to s. 89(1) restrictions is an issue that First Nations and lenders have historically been able to accommodate, while the second issue raises a greater concern for First Nations and the cannabis industry.

Section 89(1) of the *Indian Act* provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian to a band." Effectively, real or personal property located on reserve is shielded from creditors. If a First Nations community wishes to obtain a loan and operate a cannabis company on reserve, they will need to arrange alternate security in the First Nation's off-reserve property or security from any corporations owned by the First Nation,⁸⁰ or find a creative way to satisfy the lender that the First Nation will be able to cover the remaining loan balance in the event that the First Nation defaults on the loan.

The risks associated with s. 89(1) are critically important to financial institutions and could prevent a financial institution from issuing a loan to a First Nation. In certain situations, financial institutions and First Nations may be able to negotiate a tailor-made lending agreement to address these risks, but if the lender deems the agreement to be a high risk, they may charge significant interest on the loan. With financial institutions already hesitant to invest in cannabis businesses, as discussed below, s. 89(1) provides an additional barrier for First Nations operating such businesses.

A similar issue is created by the fact that cannabis is a controlled-substance and securing a loan for a business operating in a controlled-substance environment can be difficult. Institutional lenders need to be creative with the collateral they choose to accept and how they secure their loan because lenders are not licensed sellers of cannabis and cannot seize and resell cannabis products. This creates another unique barrier to First Nations looking to obtain a loan to fund a cannabis business on or off reserve.

⁷⁹ Hedges v. R., 2016 FCA 19; In this case, a seller of cannabis for medicinal purposes was found to be liable to the GST payable on the supply of cannabis he sold to compassion clubs without a license.

⁸⁰ Corporations are not entitled to protection from seizure under s. 89(1) because a corporation does not constitute an "Indian" within the meaning of s. 2 of the Indian Act.

To date, financing for the legal cannabis market has come largely in the form of equity financing. Institutional lenders have been reluctant to loan to the industry due to stigma and reputational concerns and the fact that cannabis is not federally legal in the U.S. Cannabis businesses continue to have troubles finding financial institutions to partner with, as the cannabis industry is still perceived to have significant risks. Smaller cannabis businesses continue to have a difficult time obtaining loans from financial institutions. Canadian banking institutions remain hesitant to deal with companies that have "cannabis" or "marijuana" in their name mainly over concerns that banks have of being offside of U.S. federal regulation. While credit unions are in a better position to cater to the cannabis market because they have less exposure to the U.S., many choose not to work with cannabis companies. Financial institutions willing to fund cannabis companies exist, but they are limited and do not heavily advertise to cannabis clients.

Due to the barriers created by s. 89(1) of the *Indian Act* and the stigma attached to cannabis, First Nations cannabis companies need to be creative and aggressive in pursuing financing options, particularly if First Nations wish to retain full ownership over these businesses.

3.9 Banking

Cannabis businesses also face challenges opening business accounts at financial institutions. For the same reasons that financial institutions are unwilling to provide loans to cannabis businesses, most financial institutions will not, or are extremely reluctant to, open bank accounts for small to mid-sized cannabis businesses, including First Nations cannabis businesses. In situations where banks and credit unions agree to work with cannabis businesses, some institutions are requesting exorbitant service fees for bank accounts.

First Nations who plan to establish a cannabis business on or off reserve can expect there to be a lack of financial institutions willing to work with them because of the stigma attached to cannabis and the fact that cannabis has not been legalized federally in the U.S. These concerns have prevented large banks and other financial institutions from working with cannabis businesses. Even credit unions, which serve local regions and do not have the same U.S. risk as larger banks, are choosing not to work with these businesses. Depending on the credit union, they may decide that cannabis businesses do not fit with the values of their membership.

It will take time for the stigma of cannabis to disappear, and financial institutions will continue to have concerns around the illegality of cannabis outside of Canada, particularly in the U.S. Banks that are willing to consult with cannabis businesses tend to evaluate business relationships on a case-by-case basis and require businesses to have no connection to the U.S. Certain institutions are willing to work with cannabis businesses provided that these companies only conduct support work to the cannabis industry but do not own or physically handle cannabis. Given the difficulties cannabis businesses face in finding financial institutions to work with, First Nations cannabis businesses will need a strategic approach to convince a financial institution to work with them.

Cannabis businesses that operate outside of Provincial or Federal laws, including cannabis businesses operated on First Nation lands pursuant to First Nation laws, face incredible difficulties in obtaining banking services. Most if not all banks and point-of-sale companies (which process credit and debit sales) refuse to provide services to businesses that operate under an uncertain legal framework. Often, banks and payment processing service providers require evidence of Provincial or Federal licences or a solicitors' opinion letter (a letter from a law firm attesting states of fact in relation to an entity and the legal status the entity's business) before agreeing to provide services to a cannabis business. It is unlikely that any law firm or lawyer would provide a legal opinion in relation to a non-Provincially or Federally licenced cannabis business to a bank or payment processing service provider stating that the cannabis business is not breaking any Provincial or Federal laws.

3.10 Insurance

Like financial institutions, insurance companies have been hesitant to work with cannabis businesses. The

stigma attached to cannabis has turned insurers away, and many major insurers are not offering certain policies to the industry because cannabis is not legal under U.S federal law. Cannabis is unique from the standard insurance placement process, and not every insurance company is ready to underwrite the risks associated with cannabis businesses. As a result, there are a limited number of insurers, and most cannabis businesses have a difficult time obtaining affordable insurance.

One of the primary challenges facing cannabis businesses is the high cost of insurance caused by the heavy demand and lack of insurers. This is a particularly live issue for director and officer ("**D&O**") insurance policies. There has been limited insurance capacity in the D&O space. With the increasing numbers of lawsuits being issued by disgruntled shareholders against publicly traded cannabis companies, this insurance is getting increasingly tighter and more expensive. Although this is in the context of publicly traded companies, it is also expected that D&O coverage for private companies, including First Nations cannabis businesses, will be particularly expensive compared to other industries.

Additionally, there are concerns around product liability due to the novelty of cannabis products and uncertainty regarding whether product liability coverage will cover unforeseen issues with these new products. Given the novelty of the cannabis industry, the challenges with product liability are still unclear. Insurers usually include various health-hazard exclusions in their policies, and businesses may think they are getting adequate coverage when, in reality, the exclusions in their policies leave them under-insured. From an insurance perspective, the main risk for First Nations entering the cannabis business is ensuring that insurance policies provide appropriate coverage for the risks of the business. This is particularly challenging given the novelty of the industry and the fact that there are limited insurers willing to provide adequate coverage.

4. CURRENT STATUS OF FIRST NATIONS JURISDICTION AND LAW MAKING AUTHORITY

4.1 Federal Legislation

Indian Act Bylaws

Pursuant to s. 91(24) of the *Constitution Act*,⁸¹ the Federal government has enacted several pieces of legislation in relation to "Indians and Lands reserved for the Indians" including the *Indian Act* and the FNLMA, which provide First Nations across Canada (who are subject to the *Indian Act* or participants in the FNLMA and that do not have modern treaties or self-government agreements excluding them from such legislation) with bylaw and law-making powers.

Under the *Indian Act*, First Nations, as represented by their council,⁸² have the authority to enact bylaws affecting the use and occupation of reserve lands.⁸³ Section 81 of the *Indian Act* provides that bands⁸⁴ "may make bylaws not inconsistent with [the] Act or with any regulation made by the Governor in Council or the Minister". The *Indian Act* sets out various subject matter areas under which the council of a band may make bylaws,⁸⁵ including:

(i) to provide for the health of residents on the reserve;86

⁸¹ Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.).

⁸² The "council of the band" is defined in the Indian Act as the council established under section 74, under the First Nations Elections Act, or the council chosen by the custom of the band.

⁸³ The Indian Act defines a "reserve" as a tract of land, legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

⁸⁴ The Indian Act defines a "band" as a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951; for whose use and benefit in common, moneys are held by Her Majesty; or declared by the Governor in Council to be a band for the purposes of the Act.

⁸⁵ There are a total of 22 subject areas under section 81(1) including health, traffic, law and order, trespassing on reserve, public games, animal control, public works, land allotment, zoning and building standards, agriculture, wildlife management, commercial activities on reserve, and residency and trespass on reserve.

- (ii) for the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade, or calling in any zone;87
- (iii) for the regulation of the use of buildings, whether owned by the band or by individual members of the band;88
- (iv) the regulation of the conduct and activities of hawkers, peddlers, or others who enter the reserve to buy, sell, or otherwise deal in wares or merchandise;89
- (v) with consent from the electors of the band, prohibiting the sale, barter, supply, or manufacture of intoxicants on the reserve of the band, prohibiting any person from being intoxicated on the reserve, prohibiting any person form having intoxicants in his possession on the reserve, and providing for exceptions to any such prohibitions regarding possession and intoxication;⁹⁰ and/or
- (vi) with respect to any matter arising out of or ancillary to the exercise of powers under section 81.91

Section 83(1) provides bylaw-making powers relating to taxation of land and interests in land, and licensing of businesses.

Bylaws passed pursuant to the *Indian Act* no longer require ministerial approval to be effective (s. 82 of the *Indian Act*, which was repealed in 2014, allowed the Minister of Aboriginal Affairs to disallow any bylaw). Bylaws must be passed by a band council resolution (and with membership approval s.85 *Indian Act* bylaws), published, and comply with the *Canadian Charter of Rights and Freedoms*⁹² and applicable human rights legislation in order to become effective on a band's reserve lands.⁹³ Certain First Nations have enacted *Indian Act* bylaws in relation to the regulation of cannabis on their reserve lands (both in terms of prohibitions as well as licensing of cannabis businesses including cultivation and retail sales). First Nations have primarily enacted such bylaws under s. 81(1)(a) of the *Indian Act*, to provide for the health of residents on the reserve, not only with the rationale that cannabis requires regulation for health and safety, but that it is a medicinal plant and that the Nation has always governed the management of medicinal plants for the physical, mental, emotional, and spiritual health and well-being of their people.

Although First Nations have not been delegated specific authority to regulate cannabis on reserve, the argument can be made that such regulation is within the purview of a council's authority in relation to various subsections of s. 81 of the *Indian Act*. Courts have been clear that First Nations councils by necessity have powers in addition to those expressly set out in the *Indian Act*, and have cited with approval the proposition that "band councils possess at least all the powers necessary to effectively carry out their responsibilities under the *Indian Act*, even when not specifically provided for." To our knowledge, there have not been any legal challenges thus far to any such cannabis bylaws.

⁸⁶ Indian Act, section 81(1)(a).

⁸⁷ Ibid, section 81(1)(g).

⁸⁸ Ibid, section 81(1)(h).

⁹⁰ Ibid, section 85.

⁹¹ Ibid, section 81(1)(q).

⁹² Constitution Act, 1982, Part 1.

⁹³ Indian Act, section 86

⁹⁴ Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserves No. ¹³⁵, ¹⁹⁹² CanLII ⁶¹⁷⁷ (AB QB) at para ⁸, citing Jack Woodward, Native Law (Toronto: Carswell, ¹⁹⁸⁹), at ¹⁶⁶.

The FNLMA provides that First Nations may elect to remove themselves from certain sections of the *Indian Act* by creating their own Land Code.⁹⁵ First Nations under the FNLMA who have enacted a Land Code may exercise the powers, rights and privileges of an owner in relation to First Nation land and have the authority to enact their own laws in respect of the use of First Nation lands and economic development pursuant to their Land Code.⁹⁶ Pursuant to the FNLMA, First Nations may enact laws in relation to, among other matters:

- The creation, acquisition and granting of interests or rights in and licenses in relation to First Nation land and any matter arising out of or ancillary to the exercise of this power; 97
- 2. The development, conservation, protection, management, use, and possession of First Nation land;98 and
- 3. The regulation, control, or prohibition of land use and development including zoning and subdivision control.99

Although the FNLMA does not deal specifically with an authority to regulate cannabis on First Nation land, an argument can be made that such regulation is within the purview of a First Nation's ability to exercise the powers, rights and privileges of an owners and council's authority in relation to their powers under their specific Land Code. A number of First Nations have passed or are currently drafting cannabis laws pursuant to their Land Code. A sample article included in the preamble of such a law states: "Pursuant to the Land Code, [First Nation] is authorized to pass various laws relating to lands, including laws relating to the protection, management, occupation and use thereof, as well as laws relating to public nuisance" 100 , and goes on to specify that because the First Nation has a responsibility for the health, safety, and well-being of the community, including youth, it is enacting the law to minimize the risks and public nuisances that may result from the legalization of cannabis. Other wording reflects that, pursuant to their Land Code, the First Nation is "authorized to pass various laws including laws relating to the regulation, control, authorization and prohibition of access of [First Nation] lands and public and private nuisance". 101 Many of these laws focus on the protection of health and safety. Some First Nations have used the FNLMA to enact laws that create building and management standards to regulate the construction and operation of cannabis cultivation facilities on reserve lands as well as the sale of cannabis.

Section 35

Section 35 provides that: (1) The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed; (2) the "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada; and (3) for greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreement or may be so acquired. The recognition of pre-existing Indigenous sovereignty and the principle of reconciliation have been accepted as foundations of s. 35. The Supreme Court of Canada has stated:

One of the fundamental principles of s.35(1) is the reconciliation of the pre-existence of

⁹⁵ For examples of lands codes, see First Nations Land Management Resource Centre, online https://labrc.com/resource/land-codes/. [each a "Land Code"].

⁹⁶ FNLMA, section 18.

⁹⁷Ibid, section 20(1)(a).

⁹⁸¹bid, section 20(1)(b).

⁹⁹Ibid, section 20(2)(a).

¹⁰¹Kwaw-Kwaw-Apilt First Nation, Kwaw-Kwaw-Apilt First Nation Cannabis Law, 2019.

¹⁰² Ibid.

distinctive Aboriginal societies with the assertion of Crown sovereignty. 103

The purpose of s.35(1)... is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty. 104

This process of reconciliation flows from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.¹⁰⁵

Canadian courts have recognized First Nations' inherent rights to self-determination and self-government (general rights held by all Aboriginal peoples)¹⁰⁶ as well as specific Aboriginal rights held by specific Aboriginal groups including treaty rights; rights to fish, hunt, and gather; and rights to land itself, i.e Aboriginal title.¹⁰⁷ Additionally, UNDRIP provides, among other things, that Indigenous peoples have the right to self-determination; ¹⁰⁸ autonomy or self-government;¹⁰⁹ the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions;¹¹⁰ the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and institutions, to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities;¹¹¹ the right to determine and develop priorities and strategies for exercising their right to development; and the right to be involved in developing and determining health, housing, and other economic and social programs affecting them.¹¹² Many First Nations throughout Canada have exercised their sovereignty and their inherent right to self-determination and self-government, as Aboriginal rights protected by s. 35, in passing laws in relation to the production or sale of cannabis on their reserve lands.¹¹³ Many First Nation have also incorporated other inherent rights as provided in UNDRIP in passing laws in relation to cannabis.

Aboriginal Rights to Self-Government

In the Court of Appeal decision in *Delgamuukw v. British Columbia*, Wallace J.A. noted in his discussion of Aboriginal self-government that the trial judge had adopted the definition of a "law" as "any rule which will be enforced by the courts". In *Campbell v. British Columbia (Attorney General)*, It he Court was persuaded by history and a review of the authorities that the Aboriginal peoples of Canada had legal systems prior to the arrival of Europeans and that these legal systems, although diminished, continued after contact. The Court also found that Aboriginal laws did not emanate from a central publishing law-making authority similar to a legislative assembly, but instead took unwritten form. It has Court further stated that the proposition that Aboriginal laws survived Canadian confederation is bolstered by the fact that since 1867, Canadian courts have enforced laws made by Aboriginal societies, and that this demonstrates not only at least a limited right to self-government and degree of legislative power remained with Aboriginal peoples after the assertion of sovereignty by the Crown, but also that such rules, whether custom, tradition, agreement, or other decision-

¹⁰³ R v Van der Peet, [1996] 2 SCR 507 at para 49 ["Van der Peet"].

¹⁰⁴ Taku River Tlingit First Nation v British Columbia, 2004 S.C.C. 74 at para 42.

¹⁰⁵ Haida Nation v British Columbia, 2004 S.C.C. 511 at para 32.

¹⁰⁶ See Campbell v. British Columbia (Attorney General), 2001 B.C.S.C. 1400.

¹⁰⁷ For detailed analysis of Aboriginal rights, see Jack Woodward, Q.C. "Native Law", loose-leaf (Toronto, Ontario: 2017); see Tsilhqot'in Nation v. British Columbia, 2014 S.C.C. 44 on Aboriginal title.

¹⁰⁸ Declaration, Article 3.

¹⁰⁹ Ibid, Article 4.

¹¹⁰ Ibid, Article 5.

¹¹¹ Ibid, Article 20.

¹¹² Ibid. Article 23.

¹¹³ See Muscowpetung First Nation Cannabis Act, online https://openparliament.ca/bills/42-1/C-262/?tab=mention.

^{114 [1993] 104} DLR (4th) 470 (BCCA), at para 479.

¹¹⁵ Campbell v. British Columbia (Attorney General), 2000 B.C.S.C. 1123 ["Campbell"].

¹¹⁶ Ibid, at 85.

making process are "laws". ¹¹⁷ In *Campbell*, the Court also described the Aboriginal right to self-government as tied to Aboriginal title in that the latter right encompasses the right for a community to decide to what uses the land encompassing their title lands may be put. The Court stated that "[the] right to aboriginal title 'in its full form', including the right to have a political structure for making those decisions, is [...] constitutionally guaranteed by Section 35." ¹¹⁸ First Nations may find that the best avenue to pass laws in relation to the production and sale of cannabis may be under a broader Aboriginal right to self-government and pursuant to Aboriginal title claims (especially in British Columbia) especially in the context of the implementation and harmonization of Federal and Provincial laws with UNDRIP.

UNDRIP/DRIPA

UNDRIP enshrines the inherent right of Indigenous peoples to self-determination as a minimum human rights standard. Other relevant rights affirmed within UNDRIP include:

- The right to autonomy or self-government in internal affairs (Articles 3 and 4);
- The right to freely pursue their economic, social and cultural development (Article 3);
- The right to maintain and strengthen distinct political, legal, economic, social and cultural institutions (Article 5);
- The right to engage freely in all their traditional and other economic activities (Article 20.1); and
- The right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Article 23).

Canada has adopted UNDRIP without qualification and has tabled Bill C-15 to adopt and fully implement UNDRIP. 119

UNDRIP is now part of British Columbian law through the adoption of DRIPA and is binding on the Provincial government. DRIPA affirms that UNDRIP applies to the laws of British Columbia, 120 and s. 1.4 states that nothing in DRIPA shall be construed as delaying the application of UNDRIP to the laws of British Columbia. 121 These provisions can be interpreted as meaning that UNDRIP's minimum standards are currently in effect, and any laws that do not adhere to these standards are not in compliance with DRIPA. In addition, DRIPA creates an obligation on the Province to take all measures necessary to ensure the laws of British Columbia are consistent with UNDRIP, 122 which contemplates legislative amendments. The Province is currently in a process of implementing DRIPA in cooperation with First Nations, and First Nations can push for Provincial cannabis laws to be on a schedule for legislative reform. According to UNDRIP, when governments pursue legislative or administrative measures on matters affecting Indigenous peoples, they must consult and cooperate in good faith to obtain their free, prior, and informed consent (Article 19).

It remains to be seen how the implementation of DRIPA will, in practice, impact legislative reform or the ability of First Nations to enact laws on their territories, both on and off reserve, without interference. Since DRIPA

¹¹⁸ Ibid, at 137.

¹¹⁷ Ibid, at 86.

¹¹⁹ Government of Canada, "Backgrounder: Bill C-15 – United Nations Declaration on the Rights of Indigenous Peoples Act" (December 8, 2020), online: <justice.gc.ca/eng/declaration/about-apropos.html>.

¹²⁰ Ibid, section 1.1.

¹²¹ Ibid, section 1.4.

¹²² Ibid, section 3.1.

was passed into law, other regulatory bodies have recommended an "incremental approach" to the entry of First Nations regulation across their traditional territories such as regulators being required to "consider" UNDRIP and a Nation's economic development needs. However, this arguably does not meet the minimum standards of self-determination. Advocacy in relation to First Nations assertion of jurisdiction over the regulation of cannabis presents an opportunity to hold the Provincial government accountable to DRIPA. Further, the Federal Bill C-15 presents an opportunity for leverage over Federal cannabis law reform.

5. BACKGROUND ON FIRST NATIONS ADVOCACY IN RELATION TO CANNABIS

5.1 Standing Senate Committee on Aboriginal Peoples

The Standing Senate Committee on Aboriginal Peoples ("SSCA") has proposed the following legislative changes in relation to cannabis regulation:

- 1. Amendments to the *Excise Tax Act* (Canada) to include measures for sharing of excise tax revenues with First Nations;
- 2. Amendments to the *Cannabis Act* to recognize the right of First Nations to enact legislation and regulations in relation to cannabis, including business licensing, zoning, and enforcement;
- 3. Amendments to the FNFMA to provide for First Nation law-making power to levy cannabis excise taxes on reserve lands; and
- 4. Amendments to the *Cannabis Act* to reserve at least 20% of all cannabis production licences for producers on lands under the jurisdiction or ownership of Indigenous governments. 124

The Government of Canada provided a response to the SSCA's proposed amendments by providing that Health Canada continues to consult with the Assembly of First Nations ("AFN"), Inuit Tapiriit Kanatami, and the Métis National Council and that Indigenous Services Canada has provided funding to support the AFN Cannabis Task Force. Additionally, Canada stated in its response that the support for the self-determination of Indigenous peoples is a key objective that must be balanced against the need to ensure that the legal and regulatory framework for cannabis is applied consistently across the country and that the *Cannabis Act* will apply to all people in Canada, including Indigenous peoples. On this matter, again, Canada has stated that it is committed to continuing to engage with Indigenous peoples and Provinces and Territories to support Indigenous communities in an appropriate way to accommodate jurisdictional issues.¹²⁵

In relation to the SSCA's recommendation to reserve 20% of production licences for Indigenous controlled producers, Canada provided that it "is not in a position to reserve a portion of the market for certain groups". Health Canada has established the "navigator service" that is specifically designed to help guide Indigenous applications through the licensing process. Additionally, the Community Opportunity Readiness Program has been modernized to allow Indigenous communities to receive financial support for cannabis-related business activities. 126

¹²³ BC Utilities Commission, Indigenous Utilities Regulation Inquiry Final Report (2019) at 7, online https://www.bcuc.com/Documents/Proceedings/2020/DOC_57958_2020-04-30-BCUC-IUR-Inquiry-Final-Report-Web.

¹²⁴Standing Senate Committee on Aboriginal Peoples, The Subject Matter of Bill C-45: An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts (Ottawa: Senate Canada, May 2018) at 8, online https://sencanada.ca/content/sen/committee/421/APPA/reports/2018-05-01_BILLC-45_Cannabis_e.pdf

¹²⁵ Letter from the Government of Canada to the SSCAP, at 5-6, online https://sencanada.ca/content/sen/committee/421/APPA/reports/2018-09-28_C-45_Gov_11thReport_e.pdf

¹²⁶ Ibid, at ¹¹.

In terms of taxation, Canada's response to the SSCA's recommendations on tax sharing and taxation powers provided that Canada is open to negotiating tax arrangement with Indigenous governments and points to current mechanisms to collect tax available to First Nations, including the implementation of a FNGST which could be used to tax the sale of cannabis products on reserve land. Also, Canada claims it is open to facilitating arrangements between First Nations and the Provinces/Territories in respect of direct sales taxes (like the PST). Canada stated that the Department of Finance is working with the AFN on how to best move forward with collaborative work on access to tax revenues.¹²⁷

In July 2019, Canada provided a progress report on the SSCA's recommendations. In the progress report, Canada states that "the Government knows that many Indigenous communities and governments are interested in pursuing regulatory models that support and respond to their needs and interests". Canada's position on jurisdiction is that Indigenous governments can validly legislate cannabis on reserve land, but that these laws/bylaws do not replace Provincial or Federal cannabis laws (i.e. First Nations cannabis laws have concurrent application but not exclusive First Nations jurisdiction). On the tax issue, Canada stated in its progress report that "Finance Canada has been engaging Indigenous groups on tax matters, and has prioritized discussions related to cannabis taxation". They also provide examples of current mechanisms that First Nations can use to tax cannabis operations (real property, FNGST, etc.). Additionally, Finance Canada and the AFN have established a Technical Working Group on Taxation to examine possible tax arrangements (including the possibility of sharing excise tax revenues). The FNTC has also taken part in this Technical Working Group which is assessing its proposal (see below).

5.2 Assembly of First Nations

The AFN has established a Cannabis Task Force/Working Group and the Chiefs Committee on Cannabis ("CCC"). A resolution was passed at the AFN Special Chiefs Assembly in 2018 providing that the Chiefs-in-Assembly:

- Support the development of a First Nation cannabis jurisdiction option that includes First Nation distribution centres and retail, a First Nation stamp, cannabis excise tax sharing and a fuel, alcohol, cannabis and tobacco ("FACT") tax sharing option;
- Call on the Federal and Provincial Governments to ensure that a quota of the licences is dedicated to First Nations, as well as ensuring that First Nations in every Province have an equitable arrangement regarding revenue-sharing;
- 3. Support for the development of necessary amendments or recommendations to any regulations related to the *Cannabis Act*;
- 4. Call on the Federal and Provincial Governments to ensure that the laws of general application do not apply on reserve where First Nations have jurisdiction; and
- Support the development of the necessary First Nations institutional framework to to implement a comprehensive First Nation cannabis jurisdiction option by summer 2019 for interests First Nations.¹²⁸

At the 2019 AFN Annual General Assembly, two additional resolutions in relation to cannabis were passed. The first provided that the Chiefs-in-Assembly:

¹²⁷ Ibid, at 12.

¹²⁸ AFN Special Chiefs Assembly resolution #50/2018.

- 1. Direct the AFN to replace the Cannabis Working Task Force with the CCC, chaired by the Regional Chief holding the Cannabis portfolio. The CCC's mandate is to:
 - (a) Serve as a clearinghouse for information for First Nations interests in becoming educated and informed on cannabis and the cannabis industry;
 - (b) Provide recommendations for AFN cannabis-related communications (funding opportunities, public health, Indigenous health and spiritual health and safety, etc.) delivered to First Nations and stored in an online registry;
 - (c) Seek funding for the CCC to coordinate First Nations interests in the cannabis industry regionally and nationally;
 - (d) Recognize and support First Nations' assertion of inherent jurisdiction over cannabis licensing, taxation, regulation, and revenue sharing throughout First Nations' territories:
 - (e) Operate under the directives outlined in AFN Charter and the standards of AFN Chiefs Committees, including a Terms of Reference for the CCC;
 - (f) Ensure regional representation within its composition by requesting each Regional Chief appoint one Chief and one Chief alternate to serve on the CCC, supported by AFN technicians; and
 - (g) Ensure there will be no imposition of Federal or Provincial taxation in respect to First Nations territories unless agreed upon by First Nations.
- 2. Direct the AFN to report back on the CCC's progress to the Chiefs-in-Assembly at the December 2019 Special Chiefs Assembly. 129

The second resolution provided that the Chiefs-in-Assembly:

- 1. Assert and exercise complete jurisdiction over cannabis;
- 2. Assert that each First Nation has jurisdiction to govern all cannabis operations in their own territories, including but not limited to, the regulation of the growth, processing and sale of cannabis and in all its derivatives;
- 3. Assert that each First Nations' regulatory system must be recognized within their territory and urge the Provincial and Federal governments to eliminate barriers and to cease interference that would impede nation-to-nation trade and commerce;
- 4. Immediately request the following:
 - (a) That the Federal government acknowledge, through the issuance of a Ministerial Order, First Nations jurisdiction over all aspects of cannabis cultivation, processing and retail operations within their territories;

¹²⁹ AFN Annual General Assembly resolution #36/2019

- (b) The removal of the role previously delegated to the provinces and territories under the *Cannabis Act*, regarding the retail licensing of cannabis within First Nations territories; and
- (c) That the Government of Canada work with First Nations, in the spirit of Reconciliation, to establish a framework for participation that respects First Nations autonomy and sovereignty. 130

At the 2019 AFN Special Chiefs Assembly, the Chiefs-in-Assembly passed another resolution in relation to cannabis providing that they:

- 1. Direct the AFN National Chief to make First Nation jurisdiction over cannabis a top priority;
- 2. Direct the CCC to develop a First Nations federal framework with Canada for a regulatory commission on cannabis that focuses on, but is not limited to, production, processing, growing, distribution, sale, health and safety, law-making, etc. on cannabis by April 1, 2020;
- 3. Direct the CCC to work with Canada on legislative amendments to the following:
 - (a) to respect and recognize the jurisdiction of First Nations government to make laws to regulate cannabis within their territories;
 - (b) the Cannabis Act;
 - (c) the Excise Tax Act;
 - (d) the Criminal Code of Canada;
 - (e) the Canada Health Act;
 - (f) the Access to Cannabis for Medicinal Purposes Regulations; and
 - (g) any other acts or regulations where appropriate.
- 4. Direct the AFN National Chief to call upon Canada to amend Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code, and other Acts on the following
 - (a) To recognize parallel First Nation processes in regard to, but not limited to, regulation of cannabis, law-making authority on cannabis with First Nations territories, etc.;
 - (b) The development of a cannabis commission developed through the CCC that will reflect the regulation of cannabis, law-making authority on cannabis with First Nations territories, etc.; and
 - (c) To allow for Federal Excise Tax revenue sharing agreements to be made with First Nations, similar to the current Coordinated Cannabis Taxation Agreements made with the Provincial and Territorial governments.

¹³⁰ AFN Annual General Assembly resolution #54/2019

- 5. Call on Canada to provide funding to First Nation governments and First Nation organizations at the national, regional and local levels to address their interests relating to the legalizations of canabis; and
- 6. Direct the AFN to develop communication materials related to First Nations jurisdiction, economic development, and public health which can be distributed to First Nations broadly.¹³¹

At the 2020 AFN Annual General Assembly, the Chiefs-in-Assembly passed another resolution in relation to cannabis providing that they:

- Recommit to supporting the Chiefs Committee on Cannabis ("CCC") on its mandates and objectives to create a legislative framework that amends the Cannabis Act and other relevant legislation for the inclusion of First Nations participation in the cannabis industry. Further, that the CCC amend its mandate to include:
 - (a) the inclusion and recognition of First Nations laws, bylaws, and policies;
 - (b) the recognition of how First Nations policing intersects with the Community Tripartite Agreement; and
 - (c) amendments to the Excise Tax/ Amendments to the *First Nations Fiscal Management*Act to provide First Nations law making power to levy cannabis excise tax on reserve
- 2. Direct the Assembly of First Nations to call upon Canada to establish the cannabis legislative framework as part of the advocacy efforts to include First Nations in the COVID-19 economic stimulus and recovery plan.
- 3. Call on Canada to provide funding to the CCC and First Nations' organizations at the national, regional, and local levels to address the interests of First Nations in asserting jurisdiction and their inherent right to self-determination in regards to cannabis.
- 4. Direct the AFN to report back to the Chiefs in Assembly at the December 2021 Special Chiefs Assembly.

The most recently available update on the CCC was published in November 2019 and provided the following as next steps:

- 1. Develop a tri-lateral round table including Federal, Provincial and Territorial governments;
- 2. Distribute cannabis infographics and informational materials to First Nations;
- 3. The CCC will develop a national advocacy plan to support First Nations jurisdiction over cannabis.

5.3 BC Assembly of First Nations

The BCAFN has also worked to address cannabis issues for First Nations in British Columbia. At the 2018 BCAFN Special Chiefs Assembly, the Chiefs-in-Assembly passed a resolution to engage with the Cannabis

Legalization and Regulation Secretariat and to work a joint sub-group with the Province and the First Nations Leadership Council (the BC-FNLC Joint Working Group on the Legalization and Regulation of Non-Medical Cannabis in BC ("Cannabis JWG")) to provide an ongoing forum for engagement on the regulation of cannabis in British Columbia.¹³²

The BCAFN, at the 2019 Annual General Meeting, passed an additional resolution to support the work of the Regional Chief and the BCAFN in relation to the Cannabis JWG's engagement with the Province. Also, the resolution directs the Regional Chief and Cannabis JWG to:

- Advance the principled and strategic direction and activities outlined in the First Nations Cannabis Framework and Action Plan;
- Call on the Provincial and Federal governments to recognize First Nations jurisdiction over recreational and medicinal cannabis, including jurisdiction related to taxation and revenue sharing; and
- Ensure ongoing funds to enable participation in the Cannabis JWG according the Cannabis JWG's Interim Terms of Reference. 133

The Cannabis JWG's First Nations Cannabis Frame work and Action Plan was developed following the FNLC's BC First Nations Cannabis Forum in March of 2019, and consists of the Cannabis JWG's framework to address cannabis related issues (including in relation to rights recognition, self-government and Indigenous laws, and socio-economic and cultural well-being).¹³⁴

5.4 First Nations Tax Commission

The FNTC has been aligned with the advocacy of the AFN but focused on the broader issues of taxation and tax revenue sharing for FACT as well as jurisdiction using the FNFMA and FNLMA. The FNTC has developed a proposal on cannabis tax jurisdiction, made up of five distinct elements (which would require amendments to the FNFMA, Excise Tax Act, Cannabis Act, and First Nations Goods and Services Tax Act), including:

- Amending the FNFMA to enable First Nations the power to institute cannabis excise tax, FNGST and licensing fees, in order for First Nations to generate revenues to support health, education, infrastructure and regulatory requirements associated with cannabis manufacturing, distribution, sales and consumption on First Nations lands;
- 2. Amending the *Excise Tax Act* to enable First Nation cannabis excise tax through FNFMA law-making and administration agreements between Canada and First Nations;
- 3. Amending the *Cannabis Act* to provide First Nations regulatory powers for cannabis tax and to ensure that regulations can be coordinated efficiently among governments. This may include the ability of First Nations to choose to tie into and apply certain aspects of provincial frameworks on their lands for administrative efficiency; and
- 4. Amending the *First Nations Goods and Services Tax Act* to provide an option to First Nations to collect tax on specific products (including FACT).

¹³²BCAFN Special Chiefs Assembly resolution 03(e)/2018.

¹³³BCAFN Annual General Assembly resolution 21(b)/2019.

¹³⁴BC First Nations Non-Medical Cannabis Framework and Action Plan, September 2019. We can provide a copy if requested.

5.5 Individual First Nations in BC

Several First Nations in British Columbia have engaged the Minister of Public Safety and Solicitor General of British Columbia, and the Attorney General of British Columbia, in order to negotiate government-to-government agreements and gain support for Federal advocacy (tri-party negotiations) in relation to First Nation jurisdiction over cannabis regulation.

Section 119 of British Columbia's Cannabis Control and Licensing Act, provides that the Minister may enter into agreements with Indigenous nations with respect to cannabis. These agreements are subject to the Act, and cannot provide exemptions under any Federal laws. If an agreement authorizes the sale of cannabis, it must be cannabis produced by a Federal producer for a commercial purpose, 135 so Nations would still need to obtain a Federal production license. Further, if the agreement relates to the sale of cannabis, it requires that the agreement be entered into jointly with the Minister of Finance and the Minister responsible for the Cannabis Distribution Act. Despite these hurdles, the Province of British Columbia has seemed receptive to entering into agreements in relation to retail sales with First Nations. Opportunity exists, for example, through s. 119 agreements for Nations to seek an exemption from the Provincial retail licensing provisions that prevent a licensee from owning an interest in and selling product from a Federal producer while also owning an interest in one or more retail stores, so that First Nations-owned retail stores can sell from a Federal producer owned by the Nation. At the time of writing, there was only one such agreement completed - the Williams Lake First Nation ("WLFN") and Government of British Columbia s. 119 agreement ("WLFN") Agreement"). 136 The Cannabis Legalization and Regulation Secretariat has been delegated the responsibility for such agreements, and unfortunately, has been largely unresponsive in communicating with individual First Nations.

The WLFN Agreement was entered into on September 21, 2020, and is the first of its kind and is an important development for First Nations in British Columbia. The WLFN Agreement exempts WLFN from certain provisions of British Columbia's *Cannabis Control and Licensing Act*, including (a) by permitting WLFN to offer "farm-gate" sales of its own craft cannabis products from its production facility, and (b) by exempting WLFN from the prohibition against persons from having a significant ownership interest in both retail cannabis stores and cannabis production facilities. The WFLN Agreement contemplates that WLFN will operate retail cannabis stores that offer a range of cannabis products from licensed producers across Canada, including from their own production facility.

Changes to cannabis legislation may be forthcoming due to the advocacy and current work being carried out by Provincial, Federal and First Nation organizations (and individual First Nations) across the country (including possible regulations specifically regarding First Nations' jurisdiction over cannabis businesses being conducted on reserve land; and tax-revenue sharing). However, the Covid-19 pandemic has had negative impacts on much of the work that has been ongoing on these matters. In the meantime, with regard to the licensing of cannabis businesses by First Nations (without Provincial or Federal licenses, as the case may be), the Government of Canada may not be willing to enforce its cannabis laws in the face of political backlash and current negotiations towards amendments, First Nations jurisdiction, and tax revenue sharing. There remain significant risks for persons, including First Nations and their economic development groups, involved in cannabis businesses that rely on First Nation licensing to the exclusion of Provincial or Federal licensing.

6. RECOMMENDATIONS ON ASSERTION OF JURISDICTION AND FURTHER ADVOCACY

6.1 Assertion of jurisdiction pursuant to Aboriginal right to self-government

¹³⁵ Cannabis Control and Licensing Act, SBC s 119(3)

¹³⁶ Since the time of writing the Cowichan Tribes as also entered into a government-to-government agreement pursuant to Section 119 of the Cannabis Control and Licensing Act

Given the issues with *Indian Act* bylaws and Land Code laws concerning conflicts between these bylaws and laws on the one hand and Federal and Provincial laws on the other hand, the assertion of jurisdiction over cannabis regulation on First Nations land in British Columbia (on-reserve and potentially throughout a First Nation's traditional territories) is likely best accomplished by coordinated, resource-backed, First Nation legislation. This legislation should be passed pursuant to individual Nations' inherent right to self-government and self-determination (among other relevant rights provided above), relying on both First Nations' constitutionally protected s. 35 rights and Indigenous rights as set out in UNDRIP and DRIPA. Although such laws may nonetheless face challenges from Federal, Provincial, or Territorial governments due to their conflict or inconsistency with other governments laws and regulations, such challenges are more likely to be defensible with novel legal arguments and may potentially lead to changes in the common law relating to conflicts between First Nation and Canadian laws generally.

In addition to a First Nation's inherent Aboriginal right to self-government, reference in a First Nation's cannabis laws should also specifically reference the following Indigenous rights as provided under UNDRIP (and referencing DRIPA as well):

- (a) The right to autonomy or self-government in internal affairs (Articles 3 and 4);
- (b) The right to freely pursue their economic, social and cultural development (Article 3);
- (c) The right to maintain and strengthen distinct political, legal, economic, social and cultural institutions (Article 5);
- (d) The right to engage freely in all their traditional and other economic activities (Article 20.1); and
- (e) The right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Article 23).

6.2 Consistent First Nations laws in relation to Cannabis

Although no two First Nations are the same, there are significant benefits in a unified approach to First Nations' regulation of cannabis. Consistent approaches to regulation of cannabis by First Nations in British Columbia will allow First Nations to more easily share resources, information, and experiences, and may aid in future advocacy by First Nations in British Columbia with the Provincial and Federal governments for recognition and cooperation on a government-to-government basis. In addition to consistency among First Nations, a certain degree of consistency between First Nations laws and Provincial and Federal laws may aid in the implementation of First Nations laws. Specifically, in relation to health and safety concerns, many First Nations who have passed cannabis laws have taken a "meet or exceed" approach to health and safety matters contained in Provincial and Federal laws, in which they do not purport to change Federal or Provincial standards for health and safety, but instead impose standards which mimic or exceed Provincially or Federally regulations.

Agreement among First Nations in British Columbia on a general framework for the application and implementation of First Nation laws in relation to the regulation of cannabis on First Nations' land which incorporate standard processes and baseline health and safety standards may allow First Nations in the Province to avoid fears expressed by opponents (including the Provincial and Federal governments) that a "patchwork of regulation" will emerge and be untenable. The adoption of baseline health and safety standards that meet or exceed Provincial and Federal laws will also ensure that arguments against First Nations jurisdiction over cannabis regulation would not be in the public interest due to potential health and safety concerns.

Additionally, agreement among First Nations on a general framework for First Nation cannabis laws would

enable individual First Nations to spend more time and resources on specific issues that are important to their communities and to incorporate their own legal orders and processes into the implementation of their laws.

Consistency among First Nation laws for the regulation of cannabis may also:

- (a) Enable pooling of resources among First Nations for the development of these laws;
- (b) Enable more cooperation on legislative standards, processes and best practices among First Nations;
- (c) Assist in coordinating and enabling inter-nation trade of cannabis among First Nations in the Province;
- (d) Assist in coordination among First Nations (on a Provincial or regional basis) for inspections, product testing, and enforcement activities;
- (e) Assist First Nations who wish to assert their jurisdiction in relation to cannabis, but who do not have significant resources, to be more easily able to do so; and
- (f) Enable unified advocacy among First Nations and other levels of government in relation to government-to-government agreements and recognition of jurisdiction.

6.3 Coordinated Advocacy

Jurisdiction

In order for First Nations to be able to properly exercise jurisdiction over the regulation of cannabis on First Nations land, Federal and Provincial governments need to recognize the exercise of this jurisdiction and not interfere with First Nations' inherent rights to self-government, self-determination, and autonomy. Recognition of jurisdiction is a pre-requisite for cooperation on a government-to-government basis in relation to cannabis regulation by First Nations on First Nation land, taxation and tax-sharing, coordinated health and safety standards, and enforcement and policing matters. As a result, coordinated advocacy by individual First Nations and First Nation organizations ("First Nation Parties") to the Federal and Provincial governments to move towards recognition of First Nations inherent jurisdiction on First Nation lands is imperative. Given that British Columbia has enacted DRIPA, First Nation Parties should focus advocacy with the Province on the basis that the Province is required to uphold its own legislation. Section 3 of DRIPA requires the Province to take all measures necessary to ensure the laws of British Columbia are consistent with UNDRIP. Currently, British Columbia's cannabis laws and its regulation of cannabis (including on First Nation land) do not comply with Indigenous rights as described under UNDRIP. Although the Federal government has not fully incorporated UNDRIP into Canadian law, First Nation Parties should nonetheless use the proposed legislation in Bill C-15 as the basis for advocating and negotiating towards recognition of First Nation jurisdiction over cannabis regulation on First Nation lands. At the Provincial level, First Nations exercising their right to self-government as set out in UNDRIP, by passing cannabis laws applicable to their territories, should rely on UNDRIP and DRIPA when advocating and negotiating with the Province. In addition, First Nations, through engagement with the Federal government on rights recognition policy reform, can advocate for a policy that is guided by UNDRIP and follows the recommendations on inherent jurisdiction and self-governance in the RCAP.

Changes to the recognition of First Nations jurisdiction over cannabis matters in their territories could be accomplished by changes to the *Cannabis Act* and regulations at the Federal level, and changes to the *Cannabis Distribution Act* and *Cannabis Control and Licensing Act* and regulations at the Provincial level. In addition or in the alternative, the Federal and Provincial governments could work with First Nations to codevelop regulations pursuant to Federal and Provincial laws providing for the recognition of First Nations jurisdiction over cannabis regulation within their territories.

Tax Sharing and Taxation Powers

First Nation Parties should coordinate with the First Nation Tax Commission to advocate the Federal government to:

- 1. Enter into an agreement with the Province to provide for sharing of a portion of the cannabis excise tax revenue currently shared with the Province to First Nations in the Province (in a similar way that gaming revenue in the Province is shared with First Nations perhaps);
- 2. Agree on changes to the *Excise Tax Act* to allow First Nations to either collect cannabis excise tax within their territories or to allow the CRA to collect and remit to First Nations the cannabis excise tax collected within their territories; and
- 3. Agree on changes to the *First Nations Goods and Services Tax Act* to allow First Nations to impose FNGST on cannabis (as well as fuel, alcohol, and tobacco) sold within their territories.

In addition, First Nation Parties may consider advocating the Province in respect of (1) above, and also advocate for the sharing of PST collected on cannabis sales in the Province or within the territory of a First Nation with such First Nation.

Until such agreements are reached with the Federal and Provincial governments, First Nations may wish to rely on business licensing fees, "point of sale royalties", and other tax-like mechanisms to ensure that they are able to collect money from businesses in the cannabis industry engaged in business within their territories in order to fund the administration of cannabis laws (including licensing, enforcement, etc.).

Health and Safety

First Nation Parties should coordinate with the First Nations Health Authority to advocate the Federal government and Health Canada to:

- Amend the Cannabis Act and regulations to recognize First Nation licensed cultivators, producers, and distributors; to enable First Nations to enter into agreements with Health Canada for the administration of health and safety oversight of First Nation licensed facilities; and
- Concurrently or in the alternative, provide funding and authority to the First Nations Health
 Authority to administer and provide services in lieu of Health Canada's, to First Nations that
 have passed laws and regulated cannabis production, processing, and distribution on their
 territories and among other First Nations.

Also, an aspect of the advocacy for tax sharing and taxation powers should reference the need for First Nations to have the ability to provide resources to their communities for health and wellness initiatives in light of the potential risks associated with cannabis use.

Enforcement and Policing

First Nation Parties should advocate the Provincial and Federal governments in respect of:

- 1. Instructing police forces and units (including the Province's Community Safety Unit) to cooperate with First Nation governments and to respect First Nation's jurisdiction in the interim period until agreements and changes to Federal and Provincial cannabis laws occur;
- 2. Entering into agreement with First Nations for the provision of enforcement services for First Nation cannabis laws and regulations; and

3. The legislative framework for the First Nations Policing Program taking into account cannabis laws enforcement issues.

Bi-lateral and Tri-lateral agreements

The above advocacy should request the mechanism by which First Nation Parties wish to engage the Province and/or Federal governments to work towards resolution of the issues raised, including by negotiation towards bi-lateral or tri-lateral government-to-government(s) agreements. The negotiation of such agreements could encompass many of the above issues or proceed on an issue by issue basis. First Nations may wish to coordinate negotiation with the Federal and Provincial governments or proceed with separate negotiations with each. Additionally, First Nations may wish to enable First Nation organizations to advocate and negotiate on their collective behalf or may wish to advocate and negotiate separately. However, there are likely significant benefits to the former, as Provincial and Federal governments have limited resources and may wish to negotiate and agree in principle with First Nation organizations and representatives rather than on a Nation-by-Nation (or community-by-community) basis. Such agreements could provide for changes to legislation, exemptions from the application of legislation, or new regulations or legislation to achieve their provisions. In British Columbia, s. 119 of the Cannabis Control and Licensing Act may be an avenue to such agreements. Although the Federal Cannabis Act does not provide a similar power to enter into agreements with First Nations, the Minister responsible under the Cannabis Act may provide a Ministerial Order under Part 5 and exemptions under s. 140(1), which could enable the Federal government to provide required changes requested by First Nations.



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First Nations Stories of Economic Development and Cannabis

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Cannabis Tool Kit

Indigenous Nation Cannabis Jurisdiction and Licensing

Agreement







Cannabis Jurisdiction and Licensing Agreement

Pursuant to section 119 of the Cannabis Control and Licensing Act or section 7 of the Declaration on the Rights of Indigenous Peoples Act".

This Annotated Template Section 119 Agreement provides an example of the types of matters First Nations may wish to pursue in such an agreement, and provide language for consideration. Section 119 of British Columbia's *Cannabis Control and Licensing Act*, provides that the Minister may enter into agreement with Indigenous nations with respect to cannabis. Some First Nations may be interested in exploring this type of government-to-government agreement as a means to address jurisdictional and other interests with respect to cannabis.

It should be noted however, that up to this point, BC has only been willing to enter into agreements of a much narrower scope. Nevertheless, we hope this resource can convene an important conversation about the role and coordination of First Nations governance with respect to cannabis.

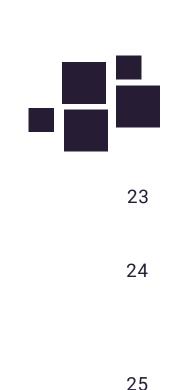
Language in the template that is in square brackets (e.g., [...]) should be revised as necessary, and the square brackets removed. Annotations are also in square brackets with the word "ANNOTATION:" preceding each of them; these annotations should also be removed.

Because different First Nations across British Columbia may wish to take different approaches in relation to regulating cannabis, there is no "one-size-fits-all" Agreement that will work for every First Nation. It is suggested that persons using this Annotated Section 119 Agreement Template consider seeking independent legal advice in drafting and negotiating their own government-to-government agreements as this Took Kit does not constitute legal advice.

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INDIGENOUS NATION CANNABIS JURISDICTION AND LICENSING AGREEMENT

pursuant to section 119 of the Cannabis Control and Licensing Act

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

as represented by the Minister of Public Safety and the Minister of Finance

("British Columbia")

AND:

[First Nation]

as represented by its Chief and Council

("Nation")1

(Each referred to as a "Party" and together referred to as the "Parties")

WHEREAS:2

- A. The Nation is a "band" under the *Indian Act*, and an "Indigenous nation" under the *Cannibis Control and Licensing Act*;
- B. The Nation is a government body exercising the Nation's inherent Aboriginal Right to self-government and self-determination, recognized and affirmed by section 35 of the *Constitution Act*, 1982, throughout the Nation's Traditional Territories;
- C. The Nation has identified the exercise of jurisdiction in relation to economic development within the Nation's Traditional Territories as a priority and wishes to secure a parallel indigenous regime to that of British Columbia's in relation to the distribution, licensing, and sale of cannabis within the Nation's Trditional Territories and other First Nation Traditional Territories;
- D. Section 119 of the Cannabis Control and Licensing Act, provides that the Minister may, on behalf of the government and subject to the approval of the Lieutenant Governor in Council, enter into agreement with an Indigenous nation with respect to cannabis, such agreement to be entered into jointly with the minister responsible for the administration of the Cannabis Distribution Act and the Minister of Finance; and
- E. The Parties wish to enter into this agreement pursuant to section 119 of the *Cannabis Control and Licensing Act*, in order to provide for the Nation jurisdiction over distribution, licensing, and sale of cannabis within the Nation's Traditional Territories and other First Nations Traditional Territories.

¹ [ANNOTATION: Some Bands/First Nations do not refer to themselves as Nations (including those that belong to a broader collective Nation); change "Nation" throughout to the common or traditional name you use to define your Band/First Nation.]

² [ANNOTATION: This section sets out the background information to the Agreement, including who the First Nation is and the basis on which the Agreement is being made. Consider whether there is other information that would be relevant to include for your Nation. For instance, if the Nation is negotiating a general government-to-government agreement with any level of government for recognition of Aboriginal rights, it would be valuable to include a 'Whereas' statement including that information. Also, if the Nation participates in the First Nations Fiscal Management Act, has laws and certificates pursuant to the First Nations Fiscal Management Act, consider including that information.]

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the Parties, the Parties hereto agree as follows:

1. INTERPRETATION

1.1 Definitions

In this Agreement:

- (a) "Aboriginal Rights" means asserted Aboriginal rights (including Aboriginal title) or determined Aboriginal rights (including Aboriginal title) which are recognized and affirmed by section 35(1) of the Constitution Act, 1982;
- (b) "Agreement" means this Indigenous Nation Cannabis Jurisdiction and Licensing Agreement, including all of its appendices, annexes and schedules;
- (c) 3"Band Council Resolution" means a resolution made by the Chief and Council, as a "council of the Band" within the meaning of the *Indian Act*;
- (d) "Cannabis Act and Regulations" means the Cannabis Act, S.C. 2018, c. 16 and any regulations enacted pursuant thereto;
- (e) "Cannabis Control and Licensing Act" means the Cannabis Control and Licensing Act, S.B.C. 2018 c. 29;
- (f) "Cannabis Control Regulation" means the Cannabis Control Regulation, B.C. Reg. 206/2019;
- (g) "Cannabis Distribution Act" means the Cannabis Distribution Act, S.B.C. 2018, c. 28;
- (h) "Cannabis Licensing Regulation" means the Cannabis Licensing Regulation, B.C. Reg 173/2019;
- (i) **4"Chief and Council"** means the duly elected council of the Nation;
- (j) "Nation Laws" means any bylaws passed pursuant to the *Indian Act,* laws passed pursuant to the *First Nations Land Management Act,* and a Nation Land

³ [ANNOTATION: Revise accordingly if the Nation has another form of governance or representative body which has the power to make decisions on behalf of the Nation, and the form document which is customarily used by such body to record its decisions.]

⁴ [ANNOTATION: See annotation 3 above.]

Code⁵, or any written laws of the Nation duly enacted pursuant to the Nation's Aboriginal Right to self-government, and any regulations enacted pursuant to the foregoing from time to time;

- (k) "Nation's Traditional Territories" means the traditional unceded ancestral territory of the Nation, as more particularly set out in Schedule A hereto;6
- (I) **"Dispute**" means any disagreement regarding the interpretation or implementation of this Agreement for which a written Notice of Dispute is given in accordance with this Agreement;
- (m) "Effective Date" means the date first above written or the date agreed by the Parties in writing;
- (n) **"Excise Tax"** means the cannabis duty payable pursuant to section 3 and Schedule 5 of the *Excise Duties on Cannabis Regulations*, SOR/2019-78;
- "Federal Producer" means a cannabis producer producing cannabis in accordance with a cannabis production license issued pursuant to the Cannabis Act and Regulations;
- (p) "Financial Integrity Screening" means the process for financial integrity required by the Liquor and Cannabis Regulation Branch;
- (q) "Financial Management Systems Certificate" means a certificate issued pursuant to section 50(3) of the First Nations Fiscal Management Act;⁷
- (r) "First Nation" means a "band" as defined in the Indian Act;
- (s) "First Nations Financial Management Board" means the First Nations Financial Management Board, established pursuant to Part 3 of the First Nations Fiscal Management Act;8
- (t) "First Nations Fiscal Management Act" means the First Nations Fiscal Management Act, S.C. 2005, c. 9;9
- (u) "Fit and Proper Screening" means the process for security screening required by the Liquor and Cannabis Regulation Branch and pursuant to Division 5 of the Cannabis Licensing Regulation;

^{5 [}ANNOTATION: Only add in the First Nations Land Management Act and Land Code if they are applicable to your Nation.]

^{6 [}ANNOTATION: Consider including in Appendix A a map or other resource that the Nation uses to delineate its Traditional Territory.

^{7 [}ANNOTATION: Only include if your Nation participates in the First Nations Fiscal Management Act.]

^{8 [}ANNOTATION: Only include if your Nation participates in the First Nations Fiscal Management Act.]

^{9 [}ANNOTATION: Only include if your Nation participates in the First Nations Fiscal Management Act.]

- (v) "Indian Act" means the Indian Act, R.S.C. 1985, c. I-5;
- (w) "Liquor and Cannabis Regulation Branch" means the Liquor and Cannabis Regulation Branch of British Columbia;
- (x) "**Member**" means a member of the Nation as shown on its band list, as that term is defined in the *Indian Act*;
- (y) "**PST**" means British Columbia Provincial Sales Tax payable pursuant to the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35;
- (z) "Retail Production Store" means a cannabis retail store for a Federal or Nationlicensed cannabis production facility;10
- (aa) "section 119 of the Cannabis Control and Licensing Act" provides the following:
 - **"119** (1) Subject to subsection (2) and the approval of the Lieutenant Governor in Council, the minister may, on behalf of the government, enter into agreements with an Indigenous nation with respect to cannabis.
 - (2) If an agreement related to the sale of cannabis, the minister may only enter into the agreement with the Indigenous nation jointly with:
 - (a) the minister responsible for the administration of the *Cannabis Distribution Act*, and
 - (b) the Minister of Finance.
 - (3) If an agreement authorizes the sale of cannabis, the agreement is subject to the following requirements:
 - (a) only cannabis that has been produced by a federal producer for commercial purposes may be sold under the agreement;
 - (b) the agreement must not allow for the sale of cannabis to minors;
 - (c) the agreement must provide for the keeping of records and government access to those records;

^{10 [}ANNOTATION: This provision is aimed at enabling Nations to facilitate farm-gate sales, where a cannabis producer can sell its product directly at a retail store at the production facility. This can be highly beneficial for small producers. The Williams Lake First Nation Section 119 Agreement contains provisions enabling farm-gate sales and the Province of British Columbia has also committed to developing a farm-gate sales program.]

- (d) the agreement must require adequate measures to reduce the risk of cannabis being diverted to an illicit market or activity.
- (4) An agreement prevails if there is any conflict between
 - (a) the agreement and this Act, other than subsection (3) of this section, or
 - (b) the agreement and the Cannabis Distribution Act.", and
- (bb) "**Traditional Territories**" means the traditional unceded ancestral territory of a First Nation in British Columbia.

1.2 Interpretation¹¹

- (a) This Agreement is to be interpreted so that all the provisions are given as full effect as possible.
- (b) This Agreement will be governed by and construed in accordance with the applicable laws of British Columbia and Canada.
- (c) If any part of this Agreement is void or unenforceable at law, it will be severed from this Agreement and the rest of the Agreement will remain in effect and fully enforceable.
- (d) If any part of this Agreement is void or unenforceable at law, the Parties agree to negotiate and attempt to reach agreement, to the extent reasonably possible and as their respective interests may require, on a replacement for the severed part with a view to achieving the intent of the Parties as expressed in this Agreement.
- (e) All headings in this Agreement are for convenience only and do not form a part of this Agreement and are not intended to interpret, define, limit, enlarge, modify or explain the scope, extent or intent of this Agreement or any of its provisions.
- (f) In this Agreement, words in the singular include the plural and words in the plural include the singular unless the context or any specific definition otherwise requires.
- (g) The use of the word "including" is to be read as not limiting the generality of the preceding term or phrase.

¹¹ [ANNOTATION: Only include if your Nation participates in the First Nations Fiscal Management Act.]

- (h) In this Agreement, any reference made to a statute includes all regulations made under that statute and any amendments or replacements.
- (i) No term, condition, covenant or other provision of this Agreement will be considered to have been waived by the Parties unless such waiver is expressed in writing by the Parties.
- (j) All references in this Agreement to a designated section or other subdivision or to an appendix are to the designated section or other subdivision of, or appendix to, this Agreement.
- (k) Any reference to a corporate entity includes and is also a reference to any corporate entity that was a predecessor to, or that is a successor to, such entity.

2. JURISDICTION OVER CANNABIS¹²

2.1 General

The Parties agree to work collaboratively to acknowledge and develop the Nation's jurisdiction over the distribution, licensing, and sale of cannabis, cannabis-derived products, and cannabis accessories (generally referred to herein as "cannabis") pursuant to this Agreement, Nation Laws, and the laws of British Columbia and Canada.

2.2 Compliance with Law

This Agreement and Nation Laws will comply with section 119 of the *Cannabis Control and Licensing Act*. Other than as provided in this Agreement, the Nation Laws in relation to the distribution, licensing, and sale of cannabis will comply with, and the Nation will adhere to as much as practically necessary, the laws of British Columbia and Canada. Until such a time as the Nation is ready and able to assert jurisdiction, in its reasonable discretion, pursuant to this Agreement and Nation Laws, the Nation will adhere to the laws of British Columbia and Canada in relation to the distribution, licensing, and sale of cannabis.

2.3 Scope of Jurisdiction

Unless otherwise provided in this Agreement, the jurisdiction of the Nation provided hereby will only be effective pursuant to Nation Laws and within the Nation's Traditional Territories, or within a First Nation's Traditional Territories with such First Nation's consent.

2.4 Possession

¹² [ANNOTATION: This section recognizes a Nation's jurisdiction over cannabis. For a discussion of First Nation jurisdiction over cannabis, please see the Cannabis Policy Memorandum, Section 3.1 and Section 6.]

For the purposes of section 14 of the *Cannabis Control and Licensing Act*, the Nation will be deemed by this Agreement to be "the government", and will be authorized thereby to possess cannabis.

2.5 **Sale**

For the purposes of section 15 of the *Cannabis Control and Licensing Act*, the Nation will be deemed by this Agreement to be "the government", and will be authorized thereby to sell cannabis, to purchase cannabis from a Federal Producer, and to authorize the sale of cannabis under a license issued by the Nation.

2.6 Promoting Sales

For the purposes of section 16 of the *Cannabis Control and Licensing Act*, the Nation will be deemed by this Agreement to be "the government", and exempt thereby from prohibitions from engaging in the activities provided therein.

2.7 Supply

For the purposes of section 17 of the Cannabis Control and Licensing Act, the Nation will be deemed by this Agreement to be "the government" and will be authorized to supply cannabis and to be supplied cannabis by a Federal Producer.

2.8 Licences

If the Nation enacts a Cannabis Law which includes a licensing scheme for production or sale of Cannabis, the Nation may elect by written notice to British Columbia that, for the purposes of Part 4 – Division 1 of the *Cannabis Control and Licensing Act*, the Nation or its authorized designate, will be deemed by this Agreement to be "the general manager" with rights and powers of the general manager provided therein, including with regard to:

- (a) issuing, renewing, transferring, or amending licences issued by the Nation;
- (b) determining application requirements for licences to be issued by the Nation;
- (c) determining "fit and proper" requirements for licence applicants;
- (d) refusing to accept applications from licence applicants; and
- (e) setting discretionary requirements for licences.

date of this Agreement and the date upon which the Nation provides notice of it being deemed "the general manager" pursuant to this section 2.8, and afterwards at the Nation's discretion notwithstanding this section 2.8, the Nation may rely on British Columbia's Fit and Proper Screening of the Nation's affiliates, subsidiaries, or partners, and any associates thereof, or any person having a connection to an associate thereof, or to the Nation or any of its affiliates, subsidiaries, or partners ("Nation Parties"), prior to entering into any partnership, joint venture, or other commercial arrangement respecting the Nation's authority set out herein. For greater certainty, upon the Nation being deemed "the general manager" pursuant to this section 2.8, the Nation may institute its own fit and proper screening process for Nation Parties and other applicants for Nation issued licenses.

2.9 Terms and Conditions

If the Nation enacts a Cannabis Law which includes a licensing scheme for production or sale of Cannabis, the Nation may elect by written notice to British Columbia that, for the purposes of Part 4 – Division 2 of the *Cannabis Control and Licensing Act*, the Nation will be deemed to be by this Agreement "the general manager" including with regard to:

- (a) determining and imposing licence terms and conditions for licences issued by the Nation;
- (b) suspending, rescinding or amending class terms and conditions for licences issued by the Nation;
- (c) determining and imposing special terms and conditions for licences issued by the Nation;
- (d) suspending, rescinding or amending special terms and conditions for licences issued by the Nation; and
- (e) determining and imposing terms and conditions respecting all matters related to the sale, supply, production, packaging, purchase and consumption of cannabis under a licence issued by the Nation and the operation of an establishment including the matters set out in section 32 of the *Cannabis Control and Licensing Act*.

2.10 Consultation with Local Governments and Indigenous Nations

For the purposes of Part 4 – Division 3 of the *Cannabis Control and Licensing Act*, the Nation or its authorized designate will be deemed by this Agreement to be "the general manager" with regard to consultation with other local governments, or First Nations, in relation to applications and approvals of licences issued by the Nation.

2.11 Record Keeping

The Nation will establish record keeping systems in relation to this Agreement and the subject matter thereof, including but not limited to:

- (a) partnership agreements;
- (b) agreements with federal producers;
- (c) purchases and sale of cannabis (including quantity sold and price charged);
- (d) when cannabis is disposed of (including the date, location, method of disposal, and amount of cannabis); and
- (e) employee records.

(collectively "Records")

British Columbia will have the right to inspect such Records, upon reasonable prior written notice being provided to the Nation, at such place as the Nation has provided for such Records to be kept, in accordance with section 89 of the *Cannabis Control and Licensing Act*.

2.12 Conduct in Government Store

Nation Laws will provide for equal or more stringent provisions to those in section 49 of the *Cannabis Control and Licensing Act*, in relation to retail stores operated by the Nation or operated pursuant to agreements signed with the Nation as majority owner.

2.13 Possession Limits

For the purposes of section 51 of the *Cannabis Control and Licensing Act*, the Nation will be deemed by this Agreement to be "the government" with regard the application of Part 5 – Division 1 of the *Cannabis Control and Licensing Act*.

2.14 Government may buy and sell cannabis

For the purposes of section 3 of the *Cannabis Distribution Act*, the Nation will be deemed by this Agreement to be "the government" with regard to the buying and selling of cannabis.

2.15 Operation of distribution and retail business

For the purposes of section 5 of the *Cannabis Distribution Act*, the Nation will be deemed by this Agreement to be "the administrator" with regard to the establishment and operation on behalf of

the Nation of warehouses for the storage and distribution of cannabis, and stores for the sale of cannabis to consumers and an online system for the sale of cannabis to retailers and consumers.

3. EXEMPTIONS

3.1 Cannabis Control and Licensing Act

Other than as provided in this Agreement, the Nation will be exempt by this Agreement from the application of the following provisions of the *Cannabis Control and Licensing Act*, in relation to any licence currently possessed by the Nation or issued in the future pursuant to Nation Law and this Agreement: sections 22-23;¹³ section 26(4);¹⁴ sections 29-32;¹⁵ sections 36-48;¹⁶ section 50;¹⁷ Part 6;¹⁸ Part 7;¹⁹ and Part 8.²⁰ Subject to section 3.4, the Nation may enter into partnership, joint venture, or other form of commercial agreement with any person in exercise of its authority hereunder, and no such person will be required to hold a license issued pursuant to the *Cannabis Control and Licensing Act* in relation to the activities pursued by the Nation and such person pursuant to such partnership, joint venture, or other commercial agreement.

For clarity, a Retail Production Store may be advertised and branded in a manner indicating an association with a production facility.²¹

3.2 Cannabis Distribution Act

Other than as provided in this Agreement, the Nation will be exempt by this Agreement from the application of the following provisions of the *Cannabis Distribution Act* within the Nation's Traditional Territories: section 6-7;²² sections 9-11;²³ and sections 21-22.²⁴

For clarity, the Nation may enact laws to enable a Federal Producer or a holder of a production license under Nation Laws that also holds a valid retail license under Nation Laws to sell the cannabis that it produces directly from a Retail Production Store.²⁵

3.3 Cannabis Licensing Regulation

Except as provided in this Agreement, unless and until the Nation enacts regulations under Nation Law similar to the *Cannabis Licensing Regulation*, the Nation will continue to be subject to and will comply with, and the Nation and its licensees will be entitled to rely upon, the *Cannabis Licensing*

¹³ [ANNOTATION: These sections have to do with application requirements and fit and proper determination powers

¹⁴ [ANNOTATION: Sections 26(4) and 50 act together to prohibit a 'tied house', i.e. a personal, financial or business connection between a cannabis retail store and a federally licensed cannabis producer. For First Nations, the Nation is often involved in both production and retail, and as a result, this prohibition can create significant barriers. The Williams Lake First Nation Section 119 Agreement contains provisions creating an exception to the tied house rule.]

¹⁵ [ANNOTATION: These sections have to do with the death or bankruptcy of a licensee and terms and conditions.]

¹⁶ [ANNOTATION: These sections have to do with compliance; information and reports; and prohibited sales methods].

^{17 [}ANNOTATION: See Note 10.]

¹⁸ [ANNOTATION: This section has to do with enforcement.]

^{19 [}ANNOTATION: This section has to do with miscellaneous matters such as staff training.]

²⁰ [ANNOTATION: This section has to do with the ability of the Lieutenant Governor in Council's ability to make regulations.]

Regulation. Notwithstanding the foregoing, the Nation will have jurisdiction to enact regulations pursuant to Nation Law relating to the subject matter of the Cannabis Licensing Regulation.

For clarity, the Nation may enact laws to enable a Retail Production Store to do the following:

- (a) share an entrance or exit with a production facility;
- (b) have a door connecting the Retail Production Store to a production facility.²⁶

3.4 Fit and Proper Determinations

Notwithstanding Part 4 – Division 1 of the *Cannabis Control and Licensing Act*, the Nation will not be required to complete any Fit and Proper Screening processes. Notwithstanding Part 4 – Division 1 of the *Cannabis Control and Licensing Act*, upon completion by any Nation Party of British Columbia's Fit and Proper Screening, such Nation Party will not be required to undergo any additional or subsequent Fit and Proper Screenings in relation to such Nation Party's involvement with any of Nation's cannabis-related enterprises engaged in pursuant to Nation's authority hereunder. All Nation and Nation Party employees involved in such cannabis-related enterprises will be screened through BC Access and be subject to a criminal record check. No Nation or Nation Party employee will be subject to screening by British Columbia.

4. NATION LAWS AND REGULATIONS

4.1 Jurisdiction

Except as provided in this Agreement, unless and until the Nation enacts Nation Laws as provided in this section 4, the Nation will continue to be subject to and will comply with, and the Nation and its licensees will be entitled to rely upon British Columbia law in relation to cannabis.

4.2 Nation Cannabis Law and Regulations

Within [X]²⁷ months of the Effective Date, the Nation will enact Nation Laws and regulations in relation to cannabis and the subject matter hereof, in accordance with the terms of this Agreement. The Nation will have jurisdiction to enact Nation Laws and regulations relating to

²¹ [ANNOTATION: This provision is aimed at facilitating farm-gate sales].

²² [ANNOTATION: These sections have to do with the registration of cannabis products and the accountability of the government's administrator.]

²³ [ANNOTATION: These sections have to do with cannabis revenue receipts and financial management; annual reporting; and support from the Liquor Distribution Branch.]

²⁴ [ANNOTATION: These sections have to do with regulations and transitional provisions.]

²⁵ [ANNOTATION: This provision is aimed at facilitating farm-gate sales.].

²⁶ [ANNOTATION: This provision is aimed at facilitating farm-gate sales by enabling the Retail Production Store to physically share space with a production facility].

²⁷ [ANNOTATION: For all highlighted sections, insert a time or number based on your needs and negotiations with the Province.]

the subject hereof over the licensing, sale and distribution of cannabis in accordance with this Agreement.

5. COLLABORATION ON CANNABIS PRODUCTION

5.1 General

The Parties agree to work collaboratively to develop and present to the Government of Canada a proposal which would provide the Nation jurisdiction over the cultivation, production, processing, packaging and sale of canabis and canabis-derived products, either through amendments to Canadian legislation, new Canadian legislation, a ministerial order under Part 5 of the *Cannabis Act*, or exemptions under section 140(1) of the *Cannabis Act* (the "Proposal").

5.2 Cannabis Production Committee

Within [X] months of the Effective Date, the Parties will establish a committee whose mandate will be to develop the Proposal for submission to the Government of Canada. The committee will consist of [one] representative appointed by each of the Parties (the "**Production Committee**"). The Production Committee will draft its own Terms of Reference to be approved by the Parties. The Production Committee will develop discussion papers and options for consideration by the Parties. The Production Committee will then, subject to the prior written approval of the Parties, develop the final Proposal for submission to the Government of Canada and develop a strategy for taking forward the Proposal including through existing jurisdictional processes or otherwise ("**Implementation Plan**").

5.3 Proposals Timing

The Production Committee and Parties will work collaboratively, and use reasonable efforts, to complete the Proposal and related Implementation Plan within [X] year[s] of the Effective Date. Following completion of the Proposals and Implementation Plan, the Parties will present the Proposals to the Government of Canada in accordance with the Implementation Plan. The Parties may by written agreement extend the time provided herein for the Production Committee to complete the Proposals and Implementation Plan.

6. REVENUE SHARING/TAXATION²⁸

6.1 Excise Tax and PST Sharing Agreement

The Parties agree to work collaboratively to negotiate and enter into a Cannabis Excise Tax and PST Revenue Sharing Agreement to provide for the sharing of Excise Tax and PST revenues received by British Columbia through the sale of cannabis and cannabis derived products in British Columbia ("Revenue Sharing Agreement").

²⁸ [ANNOTATION: For more information on issues surround revenue sharing and taxation, see the Cannabis Policy Memorandum, Sections 3.4, 3.5, 5.4, and 6.3.]

6.2 Revenue Sharing Agreement Committee

Within [X] months of the Effective Date, the Parties will establish a committee whose mandate will be to negotiate the Revenue Sharing Agreement. The committee will consist of [one] representative appointed by each of the Parties (the "**Tax Committee**"). The Tax Committee will draft its own Terms of Reference to be approved by the Parties. The Tax Committee will negotiate and provide a draft Revenue Sharing Agreement for consideration by the Parties.

6.3 Revenue Sharing Agreement Timing

The Tax Committee and Parties will work collaboratively, and use reasonable efforts, to complete and enter into the Revenue Sharing Agreement within [X] year[s] of the Effective Date. The Parties may by written agreement extend the time provided herein for the Tax Committee to complete the Revenue Sharing Agreement.

7. REPRESENTATIONS AND WARRANTIES

7.1 The Nation's Representations and Warranties

The Nation represents and warrants to British Columbia that:

- (a) its Chief and Council is a duly constituted band council under the Indian Act;
- it has the legal authority, as represented by its chief and councilors to enter into this Agreement on behalf of its Members and to make the covenants, acknowledgements and representations in this Agreement on behalf of its Members;
- (c) it has obtained or had the opportunity to obtain the advice of financial, legal, tax and other professional advisors with respect to this Agreement;
- (d) it enters into this Agreement for and on behalf of its Members and that this Agreement is binding upon its Members; and
- (e) the Nation has provided a true or certified copy of a Band Council Resolution approving the terms of this Agreement and authorizing the "Authorized Signatories" (as such term is defined in such Band Council Resolution) to enter into this Agreement and to make the covenants, acknowledgmentand representations herein on behalf of the Nation and its members, and such resolution has not varied, amended, repealed or replaced.

7.2 British Columbia's Representations and Warranties

British Columbia represents and warrants to the Nation that it has the authority to enter into this Agreement and to carry out its obligations in accordance with the terms of this Agreement and this Agreement is a valid and binding obligation of British Columbia.

8. DISPUTE RESOLUTION²⁹

8.1 General

The Parties will endeavour to resolve any Disputes in a co-operative, effective and timely manner. The Parties agree to use the processes set out in this section to attempt to resolve all Disputes.

8.2 Notice of Dispute

Any Party may give a written Notice of Dispute to the other Party which includes a summary of the particulars of the dispute.

8.3 Negotiation

Within [X] days, the Parties will meet and will attempt to resolve the Dispute through unassisted collaborative negotiation. No Party may commence a court proceeding concerning a Dispute prior to completion of the unassisted collaborative negotiation, except:

- (a) to prevent the loss of a right of action due to the expiration of a limitation period;
- (b) to obtain interlocutory or interim relief; or
- (c) if the matter is considered by the Party to be of an urgent nature.

Where a Dispute is not resolved through unassisted collaborative negotiation, the Parties may by mutual agreement agree to undertake further efforts to resolve the Dispute, or if no agreement is reached, proceed to mediation or arbitration.

8.4 Mediation

The following will apply to any mediation that the Parties agree to pursue:

²⁹ [ANNOTATION: This section deals with what happens if a dispute arises between the Nation and British Columbia in interpreting or carrying out this Agreement. It sets out the dispute resolution mechanisms, including the options for mediation and arbitration.]

- (a) the Party that issued the Notice of Dispute will prepare a Notice to Mediate that states the issue that the Parties have agreed to put to mediation;
- (b) the Parties will appoint a mediator who is neutral, objective and experienced in mediation within [X] days of the issuance of the Notice to Mediate. If the Parties cannot agree on the appointment, the Mediate BC Society, or its successor organization, will appoint the mediator from a roster maintained by that organization;
- (c) the mediator's role will be to facilitate discussion, understanding and dispute resolution between the Parties. The mediator will not have any authority to impose a solution on the Parties;
- (d) the mediation will terminate at the earliest of:
 - (i) the expiration of [X] days after the appointment of the mediator or any longer period agreed to by the Parties;
 - (ii) the withdrawal from the mediation of a Party by notice in writing to the mediator, provided that no such Party may withdraw until after the first meeting with the mediator;
 - (iii) the date on which the Parties agree in writing to terminate the mediation; or
 - (iv) the date on which the Parties sign a written agreement resolving the Dispute;
- (e) the Parties will:
 - on request of the other Party, provide timely disclosure of sufficient information and documents to enable a full examination of the subject matter being mediated, with the exception of privileged documents and subject to applicable information and privacy legislation and other laws imposing confidentiality requirements;
 - (ii) make every reasonable effort to appoint negotiating representatives with sufficient authority to reach an agreement, or with ready access to such authority;
 - (iii) negotiate in good faith;
- (f) the mediation process and all its related proceedings will be and will remain confidential, unless the Parties agree otherwise;

- (g) a Party may withdraw from mediation at any time by providing written notice of its intent to the mediator;
- (h) the mediation will not restrict in any way the positions that each of the Parties may take in any dispute, arbitration or court proceeding;
- (i) the mediator will not issue a report or make any recommendations unless requested to do so in writing by the Parties;
- (j) any agreement reached through mediation will be recorded in writing, signed by authorized representatives of the Parties and delivered to the Parties; and
- (k) the Parties will each bear the costs of their own participation, representation and appointments in the mediation. The Parties will share equally all common costs of the mediation, including fees of the mediator, costs of meeting rooms, actual and reasonable disbursements incurred by the mediator and fees of the British Columbia Mediator Roster Society.

8.5 Arbitration

The following will apply to any arbitration that the Parties agree to pursue:

- (a) the Party that issued the Notice of Dispute will prepare a Notice to Arbitrate that states the issue the Parties have agreed to put to arbitration;
- (b) the Parties will appoint an arbitrator who is neutral, objective and experienced in arbitration within [X] days of the issuance of the Notice to Arbitrate. If the Parties cannot agree on the appointment, the British Columbia International Commercial Arbitration Centre, or its successor organization, will appoint the arbitrator from a roster maintained by that organization;
- (c) the arbitration process and all its related proceedings will be and will remain confidential, unless the Parties agree otherwise;
- (d) subject to the exceptions in applicable arbitration legislation, the decision of the arbitrator is final and binding on the Parties for the term of this Agreement; and
- (e) except as otherwise ordered by the arbitrator:
 - (i) the Parties will each bear the costs of their own participation, representation and appointments in the arbitration; and

(ii) the Parties will share equally all common costs of the arbitration, including fees of the arbitrator, costs of hearing and meeting rooms, actual and reasonable disbursements incurred by the arbitrator and administration fees of the British Columbia Commercial Arbitration Centre or other appointing authority.

9. CONFIDENTIAL INFORMATION³⁰

9.1 General

- (a) The Parties will maintain as confidential the terms of this Agreement and related agreements and all data, information and documents relating to the subject matter hereof or supplied by one Party to the other Party under this Agreement whether obtained before or after the date hereof (collectively "Confidential Information"), except that such confidentiality obligation will not apply:
 - (i) to such Confidential Information that is in the public domain by reason other than a breach of this Agreement by a Party or a person to whom a Party has disclosed Confidential Information, provided however that specific items of information will not be considered to be in the public domain merely because more general information is in the public domain;
 - to the disclosure of such Confidential Information to the Members provided that such disclosure is reasonably required, in the Nation's discretion, and the Nation informs such Members of the confidentiality obligations of this Agreement;
 - (iii) to prevent a Party from disclosing such Confidential Information to any technical, financial or other professional consultants or advisors of the Party, or third party service providers which require such information to provide their services to the Party, or to a bank or other financial institution from which the Party obtains or is attempting to obtain financing;
 - (iv) to prevent a Party from disclosing such Confidential Information as required by applicable law, provided that the Party will invoke any confidentiality protection permitted by such law; or
 - (v) to prevent a Party from disclosing such Confidential Information as is necessary in connection with any dispute resolution commenced pursuant to this Agreement or any litigation commenced in respect of this Agreement.

³⁰ [ANNOTATION: This section establishes that the terms of the Agreement and all information supplied under this Agreement are confidential, and sets out exceptions to that rule. The terms regarding confidentiality can be modified, depending on the desires of the Nation. For instance, the terms of the Williams Lake First Nation Section 119 Agreement was public, and instead, the agreement identified that some information exchanged between the parties will be confidential or sensitive.]

10. COMMUNICATION

10.1 Press Releases

Press releases and other public disclosure in respect of this Agreement, other than:

- (a) the internal communications to employees of a Party, when such communication does not contain any Confidential Information; and
- (b) releases required during a situation of emergency requiring immediate action by a Party,

will be made only after being approved by the Parties. Where a press release or other public disclosure is to be made pursuant to subsection (a) or (b) above, each other Party will be given, to the extent possible, prior notice of such press release or other public disclosure and a reasonable opportunity to review, comment thereon, and approve such public disclosure's final version.

10.2 Notice and Delivery

Where in this Agreement any notice or other communication is required to be given by any of the Parties, it will be made in writing. It will be effectively given:

- (a) by personal delivery to the address of the Party set out below, on the date of delivery;
- (b) by pre-paid registered mail to the address of the Party mentioned in this Agreement, on the date the registered mail is delivered;
- (c) by facsimile, to the facsimile number of the Party set out in this Agreement, on the date the facsimile is received; or
- (d) by electronic mail, to the electronic mail address of the Party set out in this Agreement, on the date the electronic mail is received.

10.3 Addresses

The addresses of the Parties are:

British Columbia

[Addressee]

[Address]

Telephone: []

Fax: []

E-mail: []

[First Nation]

[Addressee]

[Address]

Telephone: []

Fax: []

E-mail: []

10.4 Change of Address

Any Party may at any time give notice to the other Party of any change of address or facsimile number in accordance with subsection 13.1.

11. GENERAL PROVISIONS

11.1 More Favourable Agreement

If British Columbia subsequent to this Agreement enters into any similar agreement with another First Nation ("More Favourable Agreement"), and the terms and conditions of such agreement are more favourable to the terms and conditions of this Agreement, British Columbia will notify the Nation, and the Nation and British Columbia will enter into good faith negotiations to amend this Agreement to be not less favourable to the Nation than the More Favourable Agreement.

11.2 Term

This Agreement will commence on the Effective Date and will continue for a period of [X] years, unless other terminated in accordance with the terms hereof ("**Term**").

11.3 Review

The Parties will review this Agreement every [X] years and either Party may raise any matter for discussion and negotiation during such review by providing the other Party with reasonable notice in writing of its intention to do so.

11.4 Amendment

This Agreement may be amended from time to time by mutual written agreement of the Parties.

11.5 Termination

This Agreement may be terminated prior to the end of the Term:

- (a) by either Party where the other Party is not in compliance with its obligations hereunder or where any representation or warranty made by the other Party is untrue or incorrect ("Non-compliance"), if such Non-compliance is not remedied within [X] days of notice thereof being provide to the Party that is responsible for the Non-compliance; or
- (b) by mutual agreement of the Parties.

11.6 Aboriginal Rights

- (a) This Agreement is not a treaty or land claim agreement within the meaning of sections 25 and 35 of the *Constitution Act*, 1982.
- (b) This Agreement does not establish, create, expand, amend, define, affirm, recognize, limit, deny, abrogate, extinguish, replace or derogate from any Aboriginal Rights.
- (c) British Columbia acknowledges and enters into this Agreement on the basis that the Nation has Aboriginal Rights within its Traditional Territories but that further processes are required to establish the scope, nature and geographic extent of those rights.
- (d) Nothing in this Agreement limits or precludes the Nation from:
 - continuing to negotiate, implement and take steps to enforce any revenue and benefits-sharing agreements with proponents and other governments;
 - (ii) accessing economic opportunities and benefits, which may be available to the Nation, other than those expressly set out in this Agreement;
 - (iii) participating in government programs for which the Nation may be eligible;
 - (iv) seeking recognition of the Nation's Aboriginal Rights in respect of the subject matter hereof, whether through court application or otherwise.

- (e) This Agreement is not intended to limit or diminish any present or future fiscal transfer agreements between the Parties unrelated to this Agreement; and
- (f) Nothing in this Agreement is to be construed as an acceptance of or admission by a Party of the position of the other Party or as an admission of liability and without limiting the foregoing, this Agreement is not to be construed as an admission of:
 - the validity of, or any fact or liability in relation to, any claims for compensation for alleged past or future infringements of Aboriginal Rights of any kind whatsoever or whensoever arising in relation tosuch assertions; or
 - 2. an obligation to provide financial or economic benefits, as provided in this Agreement, as part of British Columbia's obligation to consult and, as appropriate, accommodate in **relation to** any government action.

11.7 Jurisdiction

Other than as provided herein, or any other agreement among the Parties, this Agreement does not change nor affect the position either Party has, or may have, regarding its jurisdiction, responsibilities and decision-making authority. This Agreement is not intended to be interpreted in a manner that would affect or fetter the discretion of any decision-making authority of a Party.

11.8 Relationship of the Parties

No partnership, joint venture, agency, fiduciary or employment relationship will be deemed to be created by this Agreement or by any actions of the Parties under this Agreement.

11.9 Legal Proceedings

Other than as provided herein, this Agreement does not limit the position either Party may take in any legal or administrative proceedings or in any discussions or negotiations between the Parties.

11.10 Liability

Nothing in this Agreement is to be construed as an acceptance of or admission by a Party of the position of the other Party or as an admission of liability and without limiting the foregoing, this Agreement is not to be construed as an admission of:

(a) the validity of, or any fact or liability in relation to, any claims for compensation

for alleged past or future infringements of Aboriginal Rights of any kind whatsoever or whensoever arising in relation to such assertions; or

(b) an obligation to provide financial or economic benefits, as provided in this Agreement, as part of British Columbia's obligation to consult and, as appropriate, accommodate in relation to any government action.

11.11 Waiver

Failure by any Party to insist in any one or more instances upon the strict performance of any one of the covenants contained herein will not be construed as a waiver or relinquishment of such covenant, nor a reduction or waiver of any other obligations or covenants contained herein. No waiver by any Party of any such covenant will be deemed to have been made unless expressed in writing and signed by the waiving Party.

11.12 Further Assurances

The Parties will at all times do, execute, acknowledge and deliver such acts, deeds, agreements and other instruments as may be reasonably necessary or desirable to give full force and effect to the terms of this Agreement.

11.13 Counterparts

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by facsimile or electronic means will be equally effective as delivery of a manually executed counterpart thereof.

IN WITNESS WHEREOF the Parties have executed this Agreement as set out below:
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the Minister of Public Safety and the Minister of Finance
Honourable Minister [INSERT NAME OF MINISTER OF PUBLIC SAFETY]
Honourable Minister [INSERT NAME OF MINISTER OF FINANCE]
[FIRST NATION], as represented by

Name:

SCHEDULE A THE NATION'S TRADITIONAL TERRITORIES



BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

www.bcafn.ca









Cannabis Tool Kit

First Nations Stories of **Economic Development and Cannabis**



Annotated First Nation Cannabis Law Template

BC Assembly of First Nations





BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS



Annotated First Nation Cannabis Law Template

This Annotated First Nation Cannabis Law Template was developed by the BCAFN for discussion and as a resource for First Nations.

This template may be used as a starting point for First Nation governments who wish to legislate and regulate cannabis and cannabis businesses in various ways within their communities.

It provides annotations regarding different options for First Nation governments to consider in crafting a Cannabis Law that meets their community's specific needs. Language in the template that is in square brackets (e.g., [...]) should be revised as necessary, and the square brackets removed. Annotations are also in square brackets with the word "ANNOTATION:" preceding each of them; these annotations should also be removed.

The Cannabis Law Checklist provided on the following page provides references to key decisions and options contained in the Annotated First Nation Cannabis Law Template. For information on legal and regulatory issues facing First Nations in British Columbia, please see the companion Cannabis Policy Memorandum.

Because different First Nations across British Columbia may wish to take different approaches in relation to regulating cannabis, there is no "one-size-fits-all" Cannabis Law that will work for every First Nation. It is suggested that persons using this Annotated First Nation Cannabis Law Template consider seeking independent legal advice in drafting and passing a Cannabis Law as this Tool Kit does not constitute legal advice."

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Cannabis Law Checklist

Question	Answer	Section Amendments
Does the First Nation refer to itself as a "Nation" or does it refer to itself by it's band name or traditional name?	"Nation"	No changes required
	Something else	Change the definition in the Preamble A. from "Nation" to "[Name of the First Nation]". Find and replace (Control-f) the word Nation and replace with [Name of the First Nation] throughout where appropriate.
Doog the First Nation have a council	Council	No changes required
Does the First Nation have a council, or some other form of governance structure?	Something else	Change the definition in the Preamble H. from "Council" to "[Governing body of First Nation]". Find and replace (Control-f) the word Council and replace with [Governing body of First Nation] throughout where appropriate
Will the First Nation rely on only its inherent Indigenous right to selfgovernment in enacting this law?	Yes	No changes required
	No	Review section 3 and consider adding in additional jurisdiction language according to the annotation.
Does the First Nation want to harmonize its law with Provincial cannabis laws?	Yes	Keep the definition of "Provincial Cannabis Laws" in section 2.1. Keep ", including Provincial Cannabis Laws" in section 5.3 and in section 8.5.
	No	Remove the definitions of "Provincial Cannabis Laws" in section 2.1. Remove "including Provincial Cannabis Laws" in section 5.3 and in section 8.5.

Question	Answer	Section Amendments
Does the First Nation want to harmonize its law with Federal cannabis law?	Yes	Keep the definitions of: "Cannabis Act" in section 2.1.
		Keep "and the <i>Cannabis Act</i> " in section 5.3 and in section 8.5.
	No	Remove the definitions of: "Cannabis Act" in section 2.1.
		Remove "and the <i>Cannabis Act</i> " in section 5.3 and in section 8.5.
Does the First Nation wish to allow for the distribution of cannabis from the Territory to other First Nations or other areas?	Yes	Keep the definition of "distributor" and "Distribution Licence" in section 2.1.
		Keep [Distribution Licence] in section 8.2 (c).
		Keep "distribution or" in section 10.5 (b).
		Keep the entire section 11.
	No	Remove the definition of "distributor" and "Distribution Licence" in section 2.1.
		Remove [Distribution Licence] in section 8.2 (c).
		Remove "distribution or" in section 10.5 (b).
		Remove the entire section 11.
Does the First Nation wish to restrict the issuance of licences to entities that it owns (in whole or in part) only?	Yes	Keep section 8.4.
	No	Remove section 8.4.

Question	Answer	Section Amendments
Does the First Nation wish to restrict the issuance of licences to Members and entities in which the First Nation or Member(s) own (in whole or in part)?	Yes	Consider section 8.9 and revise as necessary.
	No	Consider section 8.9 and revise as necessary.
Does the First Nation wish to collect a mandatory community contribution payment from licence holders?	Yes	Keep and Mandatory Community Contributions" in section 8.7.
		Keep entire section 20.
		Keep section 24.1(g).
		Keep section 24.1(t)(viii).
		Remove "and Mandatory Community Contributions" in section 8.7.
	No	Remove entire section 20.
		Remove section 24.1(g).
		Remove section 24.1(t)(viii).
Does the First Nation wish to have dispensaries collect a point-of-sale royalty from non-First Nation purchasers (a tax-like payment on	Yes	Keep "and Mandatory Community Contributions" in section 8.7.
		Keep entire section 20.
sales)?		Keep section 24.1(g).
		Keep section 24.1(t)(viii).
	No	Remove "and Mandatory Community Contributions" in section 8.7.

[FIRST NATION] CANNABIS LAW

(Enacted by [First Nation] Council on [DATE])

PREAMBLE

WHEREAS:

[ANNOTATION: The Preamble is a section that can set out who the enacting First Nation is; the basis on which the law is enacted; and the purpose of the law. Consider whether there are any other legal bases for establishing a Cannabis Law that may be unique to your Nation and should be included in the Preamble. For instance, if you have legislation governing traditional medicinal plants and cannabis has been designated by your Nation as a traditional plant, this may be another clause to include in the preamble. Also, if the Nation is certified by the First Nations Financial Management Board pursuant to the First Nations Fiscal Management Act and has developed a Land Code, this could be included in the Preamble as well.]

- A. [First Nation] ("Nation") [ANNOTATION: Some Bands/First Nations do not refer to themselves as Nations (including those that belong to a broader collective Nation); change "Nation" throughout this template to the common or traditional name you use to define your Band/First Nation.] has and maintains Indigenous Title, Rights, and interests to its lands and resources throughout its ancestral, unceded territories ("Territory") in the Province of British Columbia ("Province");
- B. The Nation has an inherent right to self-government which emanates from its people, culture, and land, and which is recognized and affirmed by Section 35 of the *Constitution Act*, 1982;
- C. Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") provides that Indigenous peoples have the right to self-determination and the right to freely pursue their economic, social, and cultural development;
- D. Article 4 of UNDRIP provides that Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions:
- E. Article 5 of UNDRIP provides that Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State;
- F. Article 21 of UNDRIP provides that Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions;

- G. Article 23 of UNDRIP provides that Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development, and to be actively involved in development and determining economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions; and
- H. The Nation's Council ("**Council**"), [ANNOTATION: If the Band/First Nation is governed by another entity that is not a "council", including hereditary chiefs or othersimilar governance structures, change the term "Council" throughout to the appropriate entity.] pursuant to the Nation's inherent rights as described above, has the jurisdiction and authority to enact legislation and regulations in relation to the cultivation, processing, distribution, sale, possession and use of cannabis and derivative products within the Territory.

NOW THEREFORE the Council hereby enacts this *Cannabis Law*, [YEAR] as a law of the Nation.

SECTION 1

1. SHORT TITLE

1.1 This Law may be cited as the "[Nation] Cannabis Law"

2. **DEFINITIONS**

2.1 For the purposes of this Law and the regulations:

"accountable" means having a duty to provide complete and accurate information, provided the information is not subject to privilege or confidentiality;

"Approved Agent" means a person or persons approved by the Council to carry out any of the functions set forth in this Law or the regulations, on behalf of the Nation;

"Applicable Laws" means any Nation Law, and any provincial or federal law of general application [not inconsistent with Nation Laws] applicable within the Territory; [ANNOTATION: If the Nation wishes to acknowledge the applicability of federal or provincial laws (including cannabis laws) within the Territory, this section could be amended by removing the bracketed portion].

"cannabis" [ANNOTATION: This definition comes from the definition for "cannabis" under the Federal Cannabis Act, s 2(1) and Schedule 1 and 2.] means a plant that belongs to the genus Cannabis and includes

- (a) any part of a cannabis plant, including the phytocannabinoids produced by, or found in, such a plant, regardless of whether that part has been processed or not, other than a part of the plant referred to below;
- (b) any substance or mixture of substances that contains or has on it any part of such a plant; and

- (c) any substance that is identical to any phytocannabinoid produced by, or found in, such a plant, regardless of how the substance was obtained; but does not include:
- (a) a non-viable seed of a cannabis plant;
- (b) a mature stalk, without any leaf, flower, seed or branch, of such a plant;
- (c) fiber derived from a stalk referenced above; and
- (d) the root or any part of the root of such a plant;

["Cannabis Act" means the Cannabis Act, SC 2018, c 16, and all regulations enacted pursuant thereto;]

"Cannabis Licence" means a licence granted by the Council pursuant to this Law;

"consumer" means an individual that purchases cannabis for personal use;

"Council" means the duly elected Council of the Nation; [ANNOTATION: see annotation above in respect of this term.]

"cultivate" means to grow, propagate or harvest any cannabis plant or any other living thing from which cannabis may be extracted;

"Cultivation Licence" means a duly issued Cannabis Licence that is in good standing, allowing the licence holder to cultivate cannabis within the Territory, subject to the terms and conditions attached to such licence;

"cultivator" means the holder of a valid Cultivation Licence;

"dispensary" means a retail location located within the Territory that is operated by the holder of a Dispensary Licence;

"Dispensary Licence" means a duly issued Cannabis Licence that is in good standing, allowing the licence holder to sell cannabis to consumers from a physical location within the Territory, subject to the terms and conditions attached to such licence;

"distribute" or "distribution" in respect of cannabis, means giving, transferring, transporting, sending, delivering, providing or otherwise making available in any manner, whether directly or indirectly, and includes offering to distribute;

"distributor" means the holder of a valid Distribution Licence;

"Distribution Licence" means a duly issued Cannabis Licence that is in good standing, allowing the licence holder to distribute cannabis from the Territory to dispensaries [in the Territory/subject to Applicable Laws], subject to the terms and conditions attached to such licence;]

[ANNOTATION: the distribution of cannabis in British Columbia is governed by the *Cannabis Distribution Act*. The Nation may wish to allow producers licenced within the Territory to distribute cannabis to sellers licenced in the Territory or potential to other First Nations in the Province. There are risks associated with engaging in the distribution of cannabis from one Indigenous jurisdiction to another while cannabis is being transported being such jurisdictions, and therefore, a Nation may also wish to not allow such distribution and instead rely on distribution by the Province [if possible]. In such case, the references to distributor and Distribution Licence may be removed.]

"family member" means a spouse, parent, child or sibling;

"individual" means a single human being;

"licence holder" means the holder of a valid Cannabis Licence;

"Member" means a person registered on the Nation registry as a member of the Nation and

"Members" means all persons making up the Nation;

"Nation Law" means any law, bylaw, or regulation of the Nation;

"person" includes an individual, corporation, partnership, society, and any other corporate entity recognized under the laws applicable within the Territory;

"possess" in respect of cannabis, means to have cannabis in a person's personal possession or knowingly have cannabis in the actual possession or custody of another person, or have cannabis in any place, whether or not that place belongs to or is occupied by the person, for the use of the person or of another person;

"prescribed legal age" means the full age of nineteen (19) years, or such other age as is provided in the regulations;

"**process**" in respect of cannabis, means the production, packaging and labelling of cannabis products;

"processor" means the holder of a valid Processing Licence;

"Processing Licence" means a duly issued Cannabis Licence that is in good standing, allowing the licence holder to process and package cannabis at a physical location within the Territory, subject to the terms and conditions attached to such licence; [ANNOTATION: a processing licence is different from a cultivation licence in that a cultivation licence allows the licence holder to grow cannabis, but a processing licence allows the licence holder to produce cannabis products (including derivative products), and package and label cannabis and cannabis products. It is likely that a cultivator may also apply for a processing licence but not necessarily.]

["**Provincial Cannabis Law**" means the *Cannabis Control and Licensing Act*, SBC, 2018, c 29; the *Cannabis Distribution Act*, SBC 2018, c 28; and any regulations enacted pursuant to such

laws;] [ANNOTATION: Nations who wish to harmonize this law with Provincial cannabis laws may do so under this template. If the Nation does not want to harmonize this law with Provincial cannabis laws, remove this term throughout the template.]

"public area" means the buildings and areas defined by the regulations; "regulation" means any regulation enacted by the Council under this Law;

"sell" or "sale" means to transfer ownership in exchange for money or something of value and includes offer for sale, expose for sale and have in possession for sale;

"Territory" means:

- (a) the lands presently under the control and jurisdiction of the Nation, including the lands referred to by the government of Canada as "[NOTE]" [ANNOTATION: Insert the names of all reserve lands of the Nation as provided in the ILRS.];
- (b) any and all lands that may be added to the lands now under the control and jurisdiction of the Nation through the negotiation and resolution of land claims;
- (c) any and all lands that may be added to the lands now under the control and jurisdiction of the Nation as a result of any other means;
- (d) lands, which are returned to the Nation as lands within the meaning of subsection 91(24) of the Constitution Act, 1867;
- (e) the water and waterways under the control and jurisdiction of the Nation; and
- (f) lands that the Nation has not relinquished or ceded; "use" in respect of cannabis, means to smoke, vape, inhale, ingest, absorb, or otherwise consume.

SECTION 2

3. JURISDICTION

[ANNOTATION: This section establishes the jurisdiction that the First Nation is asserting to enact the Cannabis Law. The section provided focuses specifically on inherent jurisdiction as a self-determining nation as affirmed under UNDRIP and the *Declaration on the Rights of Indigenous Peoples Act* ("**DRIPA**"). As explained in the Cannabis Policy Memorandum, First Nations should focus on advocating that self-determination (as enshrined in UNDRIP and DRIPA) is the legitimate basis for enacting cannabis regulation within their territories.

Some First Nations have enacted cannabis laws, bylaws and regulation pursuant to:

- the Indian Act as bylaws related to health and safety;
- their own Land Codes:

Section 35 of the Constitution [as an Aboriginal right to self-government].

These other bases for jurisdiction are discussed in the Cannabis Policy Memorandum. If any of the below are particularly applicable to your Nation, consider adding applicable language into this section.

For example, a Nation could add the following sections if applicable:

"Council has the authority to enact *Indian Act* bylaws over matters within Council's authority, including:

- (a) to provide for the health of residents on the reserve;
- (b) for the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade, or calling in any zone;
- (c) for the regulation of the use of buildings, whether owned by the Nation or by individual members of the Nation;
- (d) the regulation of the conduct and activities of hawkers, peddlers, or others who enter the reserve to buy, sell, or otherwise deal in wares or merchandise;
- (e) with consent from the electors of the band, prohibiting the sale, barter, supply, or manufacture of intoxicants on the reserve of the band, prohibiting any person from being intoxicated on the reserve, prohibiting any person form having intoxicants in his possession on the reserve, and providing for exceptions to any such prohibitions regarding possession and intoxication;
- (f) with respect to any matter arising out of or ancillary to the exercise of powers under section 81."

"Pursuant to the Land Code, the Nation has the authority to enact laws over lands, including laws relating to the protection, management, occupation, and use thereof, as well as laws relating to public nuisance. The Nation also has the authority to enact building and management standards to regulate the construction and operation of cannabis retail and cultivation facilities on reserve land."

"The Nation has the Aboriginal right to self-government pursuant to Section 35 of the Constitution Act, 1982."]

- 3.1 The Nation has consistently and historically exercised ultimate and exclusive jurisdiction over the Territory.
- 3.2 The Nation has existing, inherent, and inalienable rights which include the right of self-determination, self-government, and autonomy and the right to promote and control economic development with the Territory.
- 3.3 The aforementioned rights of the Nation have been recognized and affirmed in

- the domestic laws of Canada, including the *Constitution Act, 1982* and other federal and provincial legislation, including the *Declaration on the Rights of Indigenous Peoples Act,* SBC 2019, c 44 in the Province.
- 3.4 The aforementioned rights of the Nation as an Indigenous people have been recognized and affirmed in international covenants and declarations, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and UNDRIP.
- 3.5 As cultivation, processing, distribution, sale, possession, and use of cannabis has a significant impact on socio-economic development within the Territory, the Council has the ultimate and exclusive right and jurisdiction to regulate and control cannabis within the Territory.
- 3.6 Given that jurisdictions surrounding the Territory are creating legislation that directly impacts the well-being of the Nation's community, the Council has the obligation to regulate and control cannabis in a way that protects and preserves the best interests of the Nation.
- 3.7 The Council, as a governing body in and for the Territory, has the power and authority to enact this Law on behalf of the Nation.

4. PURPOSES

- 4.1 The purposes of this Law are to:
 - (a) protect the health and safety of Members and other persons within the Territory and, in particular to protect the health of young persons by restricting their access and exposure to cannabis and derivative products;
 - (b) protect the jurisdictional integrity of the Territory by ensuring mutual respect and cooperation in relation to jurisdiction, economic advancement, and enforcement of the Nation's domestic affairs;
 - facilitate a regulated and controlled cannabis industry that will promote and enhance socio-economic development, fiscal self-sufficiency, and tangible benefits for the Nation;
 - (d) provide for the legal cultivation, processing, distribution, sale, possession, and use of quality-controlled cannabis within and from the Territory; and
 - (e) deter illicit and illegal activities in relation to cannabis, including but not limited to:
 - (i) preventing cannabis from being diverted into the illicit or illegal market;
 - (ii) preventing illicit or illegal cannabis from entering the source of supply

of the legal cannabis market through appropriate sanctions and enforcement measures.

5. APPLICATION

- 5.1 This Law applies to:
 - (a) all activities related to the cultivation, processing, distribution, sale, possession, and use of cannabis within, into and from the Territory; and
 - (b) all persons and business entities situated or found within the Territory.
- 5.2 This Law and the regulations may apply to the Territory to the extent that it is authorized in whole or in part by resolutions of Council.
- 5.3 Applicable Laws of general application [, including Provincial Cannabis Laws/and the *Cannabis Act*] will continue to apply to the extent they are not inconsistent with this Law or the regulations. [ANNOTATION: As mentioned in the annotation above in relation to the definition of Applicable Laws, a Nation may wish to harmonize this law with Provincial cannabis laws and/or Federal cannabis laws. Conversely, a Nation may wish to *not* harmonize this law with Provincial cannabis laws but to rely on Federal cannabis laws. For instance, because Federal laws govern the cultivation and processing of cannabis, a Nation may wish to require cultivators and processors to obtain Health Canada licences for facilities, notwithstanding the requirement to obtain a Cultivation Licence and/or Processing Licence under this Law. Amend this section as needed.]

6. HARMONIZATION

- 6.1 This Law may serve as the basis for the harmonization of laws and regulations concerning cannabis in other jurisdictions and for co-operation and mutual assistance between the Nation and other First Nations and other regulatory and law enforcement agencies. However, this Law and the regulations are not dependent on the approval of, or cooperation from, any other governmental body or agency.
- 6.2 For greater certainty, the foregoing section 6.1 is not intended to, and does not in fact, affect, compromise, or diminish the authority of internal agencies of the Nation and any other regulatory or law enforcement agency empowered under Nation Law.

SECTION 3

7. PERMITTED ACTIVITIES

7.1 A person who has attained the prescribed legal age is permitted to possess cannabis for their personal use provided that:

- (a) the cannabis has been acquired from a dispensary, from a distributor, or the person has cultivated it in accordance with Applicable Laws; and
- (b) the total amount possessed at any given time does not exceed the amount prescribed by Applicable Laws.
- 7.2 Notwithstanding the foregoing, where a person is a medical patient and holds a valid prescription from a licensed medical practitioner, the terms of the prescription will supersede this Law, but solely for the purposes of the person's medical treatment.
- 7.3 Notwithstanding the foregoing, no person is permitted to smoke or vape cannabis in a public area, including a school zone, or in any building or area that is designated by the owner to be a "no smoking" or a "no vaping" zone. [ANNOTATION: Sections 60-68 of the BC Cannabis Control and Licensing Act, sets out other public areas where consumption of cannabis is prohibited. The Nation can consider adopting language from the BC Cannabis Control and Licensing Act if it wishes to add more specificity to areas where consumption of cannabis is prohibited. A violation of this section is an offence under the BC Cannabis Control and Licensing Act.]
- 7.4 No person is permitted to use, or be under the influence of, cannabis when operating a motor vehicle and offenders may be charged and prosecuted under the applicable penal or criminal laws of general application. [ANNOTATION: The prohibition against consumption of cannabis in vehicles or boats is also set out in Section 65 of the BC Cannabis Control and Licensing Act. A violation of this section is an offence under the BC Cannabis Control and Licensing Act. The Nation can consider adding in a definition of "motor vehicle" into Section 1 and should consider whether boats and other vehicles are included in the definition.]

SECTION 4

8. LICENCES

[ANNOTATION: The Canada Cannabis Regulations provides greater detail on the different classes of licences.

Cultivation licenses are set out at Sections 11-16 of the Canada *Cannabis Regulations*. The *Cannabis Regulations* distinguishes between licenses for micro-cultivation and standard cultivation versus nurseries. The Nation may wish to consider whether a nursery cultivation licence would be useful.

Processing licences are set out at Sections 17-21.

Licences for sale for medicinal purposes are distinguished from regular licences for sale in the *Cannabis Regulations* and are set out at Sections 26-27. The Nation should consider whether it wants to differentiate between the sale of cannabis for medicinal purposes or

general consumption. This Template Cannabis Law does not distinguish between the two.

There are other federal types of licences that are not included in this Template Cannabis Law, but Nations may wish to consider if they are applicable and should be included in their Cannabis Law. These classes of licences include licences for analytical testing, for research and cannabis drug licences (i.e. pharmaceutical licences).

The BC Cannabis Licensing Regulation provides greater detail on other types of licenses such as retail store licences (Sections 4-10) and marketing licences (Sections 11- 12.1). BC does not have a distribution licence because BC is the sole distributor of cannabis to retail stores in the province.]

- 8.1 No person may conduct any commercial cannabis activity within or from the Territory without holding an appropriate Cannabis Licence issued under this Law.
- 8.2 The Council may issue a restricted number of Cannabis Licences in the following categories:
 - (a) Cultivation Licence;
 - (b) Processing Licence;
 - (c) [Distribution Licence;]
 - (d) Dispensary Licence; and
 - (e) such other licence category that the Council may create by regulation.
 [ANNOTATION: The Nation can consider whether any other types of licences would be appropriate and can look to the Canada Cannabis Regulations and BC Cannabis Licensing Regulation for more guidance on other types of licences.]
- 8.3 A permit holder may hold a Cannabis Licence from more than one category.
- 8.4 [Notwithstanding any other provision of this Law or the regulations, a licence will only be issued to an entity in which the Nation, or an entity created by Council on behalf of the Nation, has an ownership interest to ensure a community-wide benefit.] [ANNOTATION: This section is optional, depending on the aims and needs of the Nation. The Nation can also consider including which kinds of licences should be included in this section.]
- 8.5 All licence holders must comply with the provisions of this Law, the regulations, any conditions to which the Cannabis Licence may be subject, and all Applicable Laws[, including Provincial Cannabis Laws/and the Cannabis Act.] [ANNOTATION: depending on whether the Nation wishes to harmonize this Law with Provincial and/or Federal cannabis laws.]
- 8.6 All Cannabis Licences will be for a fixed term and may be revoked, amended,

- suspended, or extended by the Council in its sole discretion.
- 8.7 A Cannabis Licence is not valid unless and until any licensing fees [and Mandatory Community Contributions] prescribed by the Council have been paid in full. [ANNOTATION: see clause below on Mandatory Community Contributions.]
- 8.8 Licence holders will in recruiting, training, and hiring employees give preference to qualified Members and then Indigenous people in all job categories including management positions.
- 8.9 [Subject to the requirements for each Cannabis Licence category, the only persons eligible to apply for a Cannabis Licence are: [ANNOTATION: The Nation can consider the restrictions on who may obtain a licence in the Territory. For example, the Nation may restrict licences to members, Indigenous people, or persons resident in the Territory. This section should be amended accordingly if there are no restrictions on who may apply for and be issued a licence.]
 - (a) a natural person who:
 - (i) is a Member;
 - (ii) has attained the full age of nineteen (19) years old;
 - (iii) is resident within the Territory; and
 - (iv) who has no criminal conviction for an indictable offence or has received a full pardon for any such conviction.
 - (b) a corporation or partnership that is majority owned and operated by one or more natural persons each of whom:
 - (i) is a Member;
 - (ii) has attained the full age of nineteen (19) years old;
 - (iii) is resident within the Territory; and
 - (iv) who has no criminal conviction for an indictable offence or has received a full pardon for any such conviction;
 - (c) a band-empowered entity, corporation, or partnership in which the Nation, or a Nation-owned entity, and one or more other business entities share a commercial interest.

9. DISPENSARY LICENCES

9.1 A valid Dispensary Licence will permit the licence holder to sell cannabis to a

person who has attained the prescribed legal age from a dispensary located within the Territory.

- 9.2 The Council will not issue a Dispensary Licence to a person who intends to sell cannabis:
 - (a) where the location or proposed location of the dispensary is in a building or area that is easily accessible by persons under the prescribed legal age and such other buildings or areas as may be defined in the regulations; or
 - (b) where in the sole discretion of the Council the proposed location of the dispensary is likely to disturb or endanger Members.
- 9.3 The holder of a Dispensary Licence must not sell, barter, give or exchange:
 - (a) cannabis to a person who has not attained the prescribed legal age;
 - (b) cannabis to any person who is not a consumer;
 - (c) to any person, an amount of cannabis that exceeds the amount prescribed hereunder.

10. CULTIVATION AND PROCESSING LICENCES

[ANNOTATION: The Nation may wish to rely on a department or another organization (including Health Canada) to inspect and certify cultivation and processing facilities. Currently, Health Canada does not provide such services to non-Health Canada licenced cultivation and production facilities. The First Nations Health Authority does not provide these services either at this time, though many First Nations have suggested that it could fulfill the role Health Canada currently has in terms of health and safety regulation of cannabis.]

- 10.1 No person is eligible to be issued a Cultivation Licence or a Processing Licence unless the facility from which operations are intended to be conducted has been inspected and certified by the health and safety authorities designated by the Council[, which may include Health Canada officials.]
 [ANNOTATION: depending on whether the Nation harmonizes this Law with Federal laws, the Nation may be able to and wish to provide for Health Canada licensing and compliance activities in relation to Cultivation and Processing Licences.]
- 10.2 A valid Cultivation Licence will permit the licence holder to cultivate cannabis plants and to produce cannabis seeds, cannabis plants, fresh cannabis, and dried cannabis for the purposes of sale to the holder of a valid Processing Licence or for export off the Territory to a processor who holds a valid licence issued by a regulatory authority in the jurisdiction in which the processor resides.

- 10.3 A valid Processing Licence will permit the licence holder to purchase, possess, and process cannabis and package, label, and sell cannabis products to a distributor of cannabis pursuant to Applicable Laws.
- 10.4 The Council will not issue a Cultivation Licence or Processing Licence to a person who intends to cultivate or process cannabis:
 - (a) where the location or proposed location of the facility is in a building or area that is easily accessible by persons under the prescribed legal age and such other buildings or areas as may be defined in the regulations; or
 - (b) where in the sole discretion of the Council, the proposed location of the facility is likely to disturb or endanger Members.
- 10.5 The holder of a Cultivation Licence or Processing Licence must not sell, barter, give, or exchange:
 - (a) cannabis to a person who has not attained the prescribed legal age; or
 - (b) cannabis to any person who is not authorized pursuant to this Law[or Provincial Cannabis Laws or the] to purchase cannabis for [distribution or] sale, or directly to a consumer if not authorized pursuant to Applicable Laws.

11. [DISTRIBUTION LICENCES

- 11.1 A valid Distribution Licence will permit the licence holder to distribute cannabis within the Territory for the purpose of sale by the holder of a Dispensary Licence;
- 11.2 To effect distribution of cannabis outside the Territory, the holder of a Distribution Licence may also be required to obtain a licence from a regulatory authority in the jurisdiction in which the cannabis is being distributed.
- 11.3 The holder of a Distribution Licence must obtain cannabis only from the holder of a Cultivation Licence or Processing Licence] [ANNOTATION: the proceeding clauses deal with distribution of cannabis and include the ability to distribute outside of the Territory. This may be amended depending on whether the Nation wishes to enable such distribution.
- 11.4 The Council will not issue a Distribution Licence to a person who intends to sell, barter, give, or exchange:
 - (a) cannabis to a person who has not attained the prescribed legal age;
 - (b) to any person, an amount of cannabis that exceeds the amount prescribed hereunder.]

[ANNOTATION: Note that holders of a Cultivation or Processing Licence may also apply

for and hold a Distribution Licence. This would allow holders of a Cultivation or Processing Licence to sell directly to dispensaries. However, if a Nation wishes to occupy the role of distributor (in the same manner as the Province does), then the Distribution Licence can be limited only to the Nation.]

SECTION 5

12. LICENCE APPLICATIONS

- 12.1 A Person applying for the issuance or renewal of a Cannabis Licence must:
 - (a) make application to the Council in the form provided;
 - (b) pay to the Nation the applicable permit fee as set out in Schedule "A" hereto or otherwise prescribed by Council;
 - (c) provide the estimated number of plants projected to be cultivated per month (in the case of a Cultivation Licence) or the estimated quantity of cannabis (in grams) estimated to be stored and to be sold at the premises per month (in the case of a Dispensary Licence);
 - (d) provide a description of the premises including the exact site and structures in which the business is to be carried out;
 - (e) provide proof of ownership or legal possession of the premises from which the applicant intends to operate the business or details in relation to the applicant's intentions to secure such ownership or legal possession;
 - (f) provide a security plan for the premises from which the applicant intends to operate the business that describes adequate security measures to mitigate risks of theft or tampering at the premises;
 - (g) provide proof of a security alarm contract that includes regular monitoring at all times during the period for which Cannabis Licence is being sought;
 - if requested by the Council, provide an odour impact assessment and odour control plan;
 - (i) provide the names and contact information of the applicants, including the names of incorporated entities, the names of all directors and officers if not individual applicants, and the names of each manager; and
 - (j) provide a current police information check or criminal record check, including an enhanced criminal record check where available, for:
 - (i) each applicant (if individuals);

- (ii) each director or officer (if a corporation);
- (iii) each on-site manager; and
- (iv) any other individuals involved in the business as required by Council.
- (k) The application fees and annual permit fees are set out in the Fee Schedule attached as Schedule "A" as may be amended from time to time.

13. APPLICATION REVIEW

- 13.1 As soon as practicable after receiving the prescribed fees and a complete application, the Council or its Approved Agent shall:
 - review the application along with all relevant information and documentation;
 and
 - (b) circulate the application and all relevant information and documentation to internal Nation departments for comment.
- 13.2 For each application, the Council or its Approved Agent shall consider the following general principles and factors:
 - (a) the economic benefits to be received by the Nation and Members resulting from the issuance of the Cannabis Permit and the conduct of the business by the Permit Holder;
 - (b) potential employment and training opportunities for Members;
 - (c) potential contracting opportunities for Nation or Member-owned businesses;
 - the promotion of health, safety, convenience, and welfare of Members and of residents and occupants and other persons who have a lawful interest in the Territory;
 - (e) well-planned and orderly development of the Territory;
 - (f) compliance with any applicable Nation land use plan, Nation zoning and land use Laws, other Nation Laws, and applicable federal laws and standards and the implications of breaching any Applicable Laws;
 - (g) environmental protection and enhancement;
 - (h) the protection and enhancement of cultural and heritage resources and sites;
 - (i) the protection or improvement of viewscapes, aesthetics, and visual qualities;

- (j) ensuring adequate parking, access, and emergency access;
- (k) the minimalization of excessive noise or odours;
- (I) the potential impacts on adjacent users, lessees, and occupants; and
- (m) any other factors that may affect the Nation community, the Territory, or adjacent communities and lands.
- 13.3 After reviewing the submitted application the Council or its Approved Agent may request additional information, plans, reports, or other relevant material from the applicant.
- 13.4 The Council or its Approved Agent shall as soon as practicable after having reviewed the application, or within fourteen (14) business days of having received additional requested information from the applicant, compile, and consider the application including:
 - (a) relevant documents, maps, plans, reports, and other information;
 - (b) comments received from adjacent land-owners, interest-holders, or Members; and
 - (c) comments or recommendations from the Approved Agent (if any) and any directors of departments, managers, employees, or consultants of the Nation.
- 13.5 The Council shall consider, or its Approved Agent shall recommend:
 - (i) whether the application should be approved; and
 - (ii) suggested modifications, terms, or conditions that should be imposed by the Council.
- 13.6 As soon as practicable after receiving the application and information set out above, and considering the same, without limiting the generality of the Council's authority, the Council may:
 - (i) approve the application;
 - (ii) reject the application; or
 - (iii) approve the application subject to any terms or conditions, including, but not limited to, terms or conditions recommended by the Council or its Approved pursuant or other directors of departments, managers, employees, or consultants of the Nation.
- 13.7 If the Council approves the application, the Nation shall issue the Cannabis Licence to the licence holder and the licence holder may, subject to any

- terms and conditions of the Cannabis Licence and other requirements under Applicable Laws, commence operation of the licence holder's business in accordance with the Cannabis Licence.
- 13.8 If the Council rejects the application, the Council or its Approved Agent shall inform the applicant of the rejection of the application and shall use reasonable efforts to provide reasons for such rejection to the applicant. However, if no reasons are provided by the Council or its Approved Agent, the applicant shall not have any recourse under the Law.

14. LICENCE CONTENT

- 14.1 Each Cannabis Licence shall include, at a minimum:
 - (a) a description of the premises authorized under the licence including the exact site and structures in which the business is to be carried out;
 - (b) the name or names of the approved business operators, including the name of any incorporated entities and the name of the owner or manager responsible for the operations of the business;
 - (c) the contract information for the owner or manager including 24-hour emergency contact information;
 - (d) the maximum number of plants allowed to be cultivated per month (in the case of a Cultivation Licence) or the maximum quantity of cannabis (in grams) allowed to be stored and to be sold at the premises per month (in the case of a Dispensary Licence);
 - (e) the security measures required for the business;
 - the contact information for the third-party provider of security and fire alarm services;
 - (g) any signage restrictions or requirements;
 - (h) the measures required to prevent sales to minors;
 - (i) the insurance requirements;
 - (j) [the method by which sales will be tracked and reported to the Council on a monthly basis];
 - (k) an acknowledgement that Nation officials and enforcement officials have a right of entry to monitor and enforce this Law;
 - (I) a release and indemnity to save the Nation, Council members, Members,

- and staff, agents, and contractors of the Nation harmless from any and all claims, losses, damages, and other liabilities of any kind; and
- (m) any other information or requirements prescribed by Council.

15. AUTHORITY TO REFUSE, REVOKE OR SUSPEND A CANNABIS LICENCE

- 15.1 The Council or its Approved Agent may suspend, revoke, or refuse to issue or renew a Cannabis Licence if:
 - (a) the applicant or licence holder, or a shareholder, officer, director, or onsite manager of the applicant or licence holder breaches any terms or conditions of the Cannabis Licence or this Law or has been convicted, found guilty of, or liable for any contravention or offence relating to the conduct of a business similar to that to which the Cannabis Licence relates or any Nation Law;
 - (b) the applicant or licence holder, or a shareholder, officer, director, or onsite manager of the applicant or licence holder has been found guilty of any misrepresentation, nondisclosure, or concealment of any material fact, relating to the subject matter of the Cannabis Licence or in the application for such Cannabis Licence.
- 15.2 A decision of the Council or its Approved Agent to refuse, revoke, or suspend a Cannabis Licence may be appealed to Council by submitting a request in writing to Council within thirty (30) days of the decision.

SECTION 6

16. REQUIREMENTS FOR ALL CANNABIS RELATED BUSINESSES

- 16.1 A person carrying on a cannabis-related business must not:
 - (a) allow a person under the prescribed age on the premises;
 - (b) sell cannabis to a person under the prescribed age;
 - (c) advertise or promote the use of a cannabis to a person under the prescribed age;
 - (d) allow a person to smoke, vape, consume, or otherwise ingest cannabis or products containing cannabis on or about the premises; or
 - (e) display any advertising or sign that is visible from outside of the premises except for a maximum of two signs which:

- (f) display no images, other than the business logo;
- (i) contain only the business logo, the business name, and alpha-numeric characters; and
- (ii) are no larger than provided for in the licence holder's Cannabis Licence.

17. REQUIREMENTS FOR BUSINESSES THAT KEEP CANNABIS ON PREMISES

- 17.1 In addition to the requirements above, a person carrying on a business where cannabis is kept or present on the premises must:
 - (a) install high quality video surveillance cameras that monitor and record all entrances and exits and the interior of the business premises at all times;
 - (b) retain video camera data for at least sixty (60) days after is recorded;
 - install a security and fire alarm system that is, at all times, monitored by a third-party;
 - (d) not allow cannabis, products containing cannabis or other valuables to remain on the premises when the business is not open to the public, unless the cannabis, products and other valuables are securely locked in a safe on the premises;
 - (e) for businesses involved in cultivating or processing cannabis, install and maintain an air filtration system that effectively minimizes odour impacts on neighbouring lands;
 - (f) allow and cooperate with agents of the Nation to conduct inspections of the premises on which the business is being carried on; and
 - (g) comply with any other requirements prescribed by Council.

18. REQUIREMENTS FOR CANNABIS DISPENSARIES

- 18.1 In addition to the requirements above, a person carrying on a cannabis dispensary business must:
 - (a) only conduct the business at the premises specified in the licence
 Dispensary Licence in the Territory currently zoned for commercial purposes
 or designated by regulation or resolution zoned for the purposes of carrying
 on the cannabis dispensary business;
 - (b) prominently display a sign on the premises indicating that no persons under the prescribed age are permitted on the premises;

- (c) ensure that at least two employees are present on the premises at all times when the business is open to the public, including one manager;
- (d) not use the premises to carry on any business other than the cannabisrelated business permitted under the licence holder's Dispensary Licence;
- (e) allow Members and other First Nation individuals to use their Indian Status cards as identification;
- (f) not allow the sale of more than thirty (30) grams of dried cannabis flower or equivalent to an individual, or otherwise exceed the maximum possession amounts established by Applicable Law;
- (g) not be open for business between the hours of 11:00 p.m. and 9:00 a.m. the next day; [ANNOTATION: this provision may be amended as necessary.]
- (h) promptly bring to the attention of the Council or its Approved Agent the name of any new on-site manager; and
- (i) comply any other requirements prescribed by Council.

19. REQUIREMENTS FOR CANNABIS CULTIVATORS AND PROCESSORS

- 19.1 In addition to the requirements above, a person carrying on a cannabis cultivation or processing business must:
 - (a) only conduct the business at the premises specified in the licence holder's Cultivation Licence or Processing Licence (as the case may be) within the Territory currently zoned for commercial purposes or designated by regulation or resolution zoned for the purposes of carrying on such business;
 - (b) prominently display a sign on the premises indicating that no persons under the prescribed age are permitted on the premises;
 - (c) ensure that at least two employees are present on the premises at all times when the business is open to the public, including one manager;
 - (d) not use the premises to carry on any business other than the cannabisrelated business permitted under the licence holder's Cultivation Licence or Processing Licence (as the case may be);
 - (e) promptly bring to the attention of the Council or its Approved Agent the name of any new on-site manager; and
 - (f) comply any other requirements prescribed by Council.

20. [MANDATORY COMMUNITY CONTRIBUTIONS

[ANNOTATION: This Section 20 is optional. First Nation individuals are exempt from the payment of PST and GST on the purchase of cannabis on reserve, but non-First Nation individuals are not. Therefore, a dispensary on reserve (whether licensed pursuant to a First Nation law or Provincial law) must collect and remit PST and GST on sales to non-First Nation members. However, a First Nation may wish to assert its jurisdiction to collect such taxes to the exclusion of the Province (PST) and Canada (GST). This also ensures fairness and consistent pricing between on and off reserve retailers. This may disadvantage non-First Nation retailers who may be subject to the payment of the Royalty and PST & GST for sales to non-First Nation persons.

First Nations do not have an easy path to taxing the sale of cannabis or retail or production operations solely pursuant to First Nation Laws. The First Nations Tax Commission has advocated for a change to the FNGST to enable First Nations to collect goods and services taxes on sales of cannabis (along with fuel, alcohol, and tobacco) on reserve without having to institute the FNGST on all taxable sales on reserve, in a similar way as the First Nations Sales Tax worked prior to the introduction of the FNGST. However, because this advocacy is still ongoing, Sections 20 and 21 provide a work-around for Nations to ensure cannabis industry development creates benefits for the community without using taxation powers.]

- 20.1 Unless the Council determines that the Cannabis Licence is for the purpose of operating a socioeconomic project, in addition to any licensing fees prescribed by the Council, licence holders must remit to the Council a mandatory community contribution, the amount and frequency of which will be determined by the Council in consultation with the Council.
 - (a) A Cannabis Licence is not valid unless and until all mandatory community contributions have been paid in full.
 - (b) Council will use the amounts of mandatory community contributions collected under this Law to help fund community initiatives within the Territory.]

21. [POINT OF SALE NON-MEMBER ROYALTY

- 21.1 To preserve fairness in the cannabis market within and outside the Territory, when purchasing cannabis from a dispensary, non-First Nation consumers must pay an additional point of sale royalty equal to a percentage of the purchase price, to be established by the Council. For greater certainty, Member consumers are exempt from paying the point of sale royalty.
- 21.2 The holder of a Dispensary Licence must:
 - (a) charge and collect the point of sale fee on all sales to non-Member consumers: and
 - (b) remit all point of sale fees to the Nation on a monthly basis.
- 21.3 Council will use the amounts of point of sale fees collected under this Law to fund the administration of this Law and the regulations; the establishment

and operation of the any departments of the Nation related to this Law; and underfunded projects, community initiatives and other socio-economic projects within the Territory, including addiction prevention and education initiatives.]

SECTION 7

22. STANDARDS AND TESTING

[ANNOTATION: The Nation may wish to consider what role the Nation plays in carrying out standards and testing and potentially delegate some of these responsibilities to an Approved Agent or other organization.]

- 22.1 The Council may enact regulations to establish standards and testing procedures to ensure that all cannabis cultivated, processed, distributed, and sold within the Territory is consistently of reliably high-quality. [ANNOTATION: If the Nation wishes to have on-reserve business conduct testing, the Nation may wish to implement an analytical testing Permit similar to that set out in Sections 22-25 of the Canada Cannabis Regulations.] For greater certainty, the Council will ensure its regulations are consistent with or exceed the standards and testing procedures established by Health Canada. [ANNOTATION: The Government of Canada Good Production Practices Guide for Cannabis at section 5.0 sets out good production practices and regulatory requirements. The Nation could use this document to inform its own regulations.]
- 22.2 The Council may engage Approved Agents, which may include representatives of Health Canada, to assist and advise the Council in relation to:
 - (a) the preparation of appropriate standards to be followed by facilities that intended to be used for the purpose of cultivating or processing cannabis;
 - inspections and certifications of facilities, equipment, and materials used by facilities for the purpose of cultivating or processing cannabis;
 - (c) testing of cannabis cultivated or processed by facilities licensed under this Law and the regulations; and
 - (d) the storage and handling of cannabis.

23. PACKAGING AND LABELING

23.1 [It is prohibited for a licence holder to sell cannabis in a package or with a label that does not conform to the requirements of comparable requirements established by Health Canada.] [ANNOTATION: Federal requirements and prohibitions on labelling are set out in the Sections 25-28 of the *Cannabis Act* and Section 105 of the *Cannabis Regulations*. The Nation can consider whether any of the

requirements set out in those sections are appropriate to highlight or include directly in the Cannabis Law. Further details on packaging requirements are set out in the Packaging and Labelling Guide for Cannabis Products.]

- 23.2 It is prohibited for a licence holder to sell cannabis in a package that:
 - (a) is targeted at or could appeal to young persons;
 - (b) depiction of a person, character, or animal, whether real or fictional; and
 - (c) makes any false, misleading, or deceptive claims about the health effects or health risks of the cannabis.
- 23.3 The labeling of cannabis packages sold by a licence holder must include:
 - (a) the tetrahydrocannabinol ("THC") or cannabidiol ("CBD") content;
 - (b) the intended use of the cannabis product;
 - (c) the net weight or volume of the cannabis;
 - (d) a list of all ingredients, particularly if the cannabis product is edible, in the cannabis product;
 - (e) a control or batch number to enable tracking of the processing completion date and location of a cannabis product; and
 - (f) such other information as may be provided in the regulations.

SECTION 8

24. REGULATIONS

[ANNOTATION: This section is not exhaustive. The Nation may wish to add additional items that it wishes to regulate depending on its needs and concerns.]

- 24.1 The Council may enact such regulations it considers necessary to implement the provisions of this Law, including regulations respecting:
 - the creation of new categories for Cannabis Licences that may be issued under the regulations, which will include but not be limited to: permitted activities, prohibitions, and application requirements and procedures;
 - (b) the forms to be used and processes to be followed to apply for a Cannabis Licence;
 - (c) background and security investigations and credential verifications of

- owners, directors, and key persons associated with applicants and licence holders;
- (d) background and security investigations and credential verifications of personnel, staff, and companies contracted to conduct business with or on behalf of a licence holder;
- (e) the amount of application, annual, and other fees to be charged for Cannabis Licences;
- (f) [the amount and frequency of Point of Sale Non-Member Royalty payments;]
- (g) [the amount and frequency of Mandatory Community Contribution payments];
- (h) the days and hours during which a dispensary may operate;
- (i) the type of cannabis products that a dispensary may sell;
- the requirements to which the holder of a Cultivation Licence will be subject, including but not limited to: quality assurance standards, plant count, size of growing area, total production, and gross revenue;
- (k) limiting the total number of Cannabis Licence that will be issued;
- (I) modifying the prescribed legal age that will apply for all purposes of this Law and the regulations;
- (m) establish the maximum amount of cannabis that a dispensary may sell to a consumer within a specified period of time;
- (n) the composition, strength, concentration, potency, purity, quality or any other property of cannabis or any class or type of cannabis;
- standards and testing procedures to ensure that all cannabis cultivated, processed, distributed, and sold within the Territory are consistently reliably high-quality;
- (p) eligibility requirements to apply for or hold a Cultivation Licence or Processing Licence for the purpose of ensuring, among other things, that all facilities to be used by licence holders have been inspected, certified and licensed by the appropriate health and safety authorities;
- (q) procedures for addressing accusations that a licence holder has breached the provisions of this Law or the regulations and, if a finding of culpability is made, sanctions that may include suspending or revoking the Cannabis Licence and the imposition of fines up to one hundred thousand (\$100,000.00) dollars per breach;

[ANNOTATION: Provincial cannabis offences are set out in the BC Cannabis Control and Licencing Act, which creates offences under Section 109 and sets out penalties under Section 110, which includes fines of not more than \$100,000 for both corporations and individuals and potential imprisonment for individuals.

The Canada Cannabis Act, Part 1 also sets out certain offences which constitute criminal offences. A number of these offences can carry fines of up to \$100,000 for organizations and potential imprisonment.

The Nation can decide whether it wants to assign different fines for different offences or for corporations versus individuals.]

- (r) procedures for seizing cannabis from facilities or persons that are not in compliance with this Law or the regulations;
- (s) the maintenance of public order, security, and the safety of persons working in, and for customers of, dispensaries;
- (t) processes and systems that cultivators, processors, distributors, and dispensaries must use to ensure that:
 - (i) cannabis is safely handled and stored;
 - (ii) cannabis is safely disposed of;
 - (iii) any noise, smell, other emission or nuisance from cultivators, processors, distributors and dispensaries is minimized;
 - (iv) cannabis is not sold to anyone who has not attained the prescribed legal age;
 - (v) no person can purchase an amount of cannabis that exceeds the amount prescribed by the regulations from a dispensary or a combination of all dispensaries in the Territory;
 - (vi) the Council can accurately track all cannabis sold by a cultivator, processor, distributor, and dispensary and the price at which cannabis is sold;
 - (vii) dispensaries distinguish between sales to Members and non-Member consumers;
 - (viii) [the Council can accurately verify that all mandatory community contributions and all point of sale fees have been charged, collected, and remitted as required by the Law;

- (ix) the percentage that will be used to calculate the point of sale fee required for dispensary sales to non-Member consumers;]
- (x) the definition of "public area" for the purposes of this Law and the regulations;
- (xi) advertising and marketing that licence holders may or may not conduct;
- (xii) packaging and labeling requirements; and
- (xiii) any other regulation necessarily required to achieve the purposes of this Law.

SECTION 9

25. INSPECTOR POWER

25.1 An Approved Agent of the Council and any contractor or employee acting under such Approved Agent's authority may, at all reasonable times, enter upon any property for the purpose of administering and enforcing this Law. No Person shall prevent or obstruct, or attempt to prevent or obstruct, the entry of any authorized official upon any property as authorized under this Law.

26. OFFENCES

- 26.1 A breach of this Law or the regulations, if the breach is regulatory in nature, will be addressed by the Council in accordance with the procedures established by the regulations and, if a finding of culpability is made, will be sanctioned in accordance with the provisions of the regulations, which sanctions may include, but are not limited to, the imposition of a fine and the suspension, amendment, or revocation of a Cannabis Licence.
- 26.2 A Person who contravenes this Law, the terms or conditions of any authorization issued under this Law, or an order made by the Supreme Court of British Columbia pursuant to this Law, is guilty of an offence and liable on summary conviction to a fine of not more than ten thousand (\$10,000) dollars daily and accruing daily until rectified.
- 26.3 A breach of this Law or the regulations, if the breach is criminal in nature, will be investigated pursuant to Applicable Law and, where appropriate, criminal proceedings will be initiated and adjudicated in a court of competent jurisdiction.
- 26.4 Notwithstanding the foregoing, any person under the prescribed legal age who is found to be in possession of small quantities of cannabis or using cannabis within the Territory will not be subjected to criminal proceedings under this

Law or any other Applicable Law, but will be provided the opportunity to attend a class or program established by the Council, or by another organization identified by the Council, for the purpose of educating young persons about the risks associated with cannabis use.

SECTION 10

27. AMENDING PROCEDURES

- 27.1 Substantive amendments to this Law may only be made in accordance with Nation Law.
- 27.2 Notwithstanding the foregoing, the Council may adopt minor amendments to this Law if approved in writing by a quorum of Council.
- 27.3 Minor amendments include:
 - (a) amendments to correct typographical errors;
 - (b) amendments required to reference any relevant new or amended Nation Laws;
 - (c) amendments ordered by any court of competent jurisdiction; and
 - (d) amendments which serve to clarify this Law, where there is no reasonable dispute about the intention underlying the original provision.

28. IMMUNITY

- 28.1 No action for damages lies or may be instituted against present or past Council, Members, employees, representatives, or agents of either the Nation or Council:
 - (a) for anything said or done or omitted to be said or done by that person in the actual or required performance of the person's duty or exercise of their authority; or
 - (b) for any alleged neglect or default in the actual or required performance of the person's duty or exercise of their authority.
- 28.2 Section 28.1 does not provide a defence if:
 - (a) the person in relation to the conduct that is the subject matter of the action, has been guilty of dishonesty, gross negligence, or malicious or wilful misconduct; or
 - (b) the cause of action is libel or slander.

- 28.3 None of the Nation, present or past Council, Members, employees, representatives, or agents of the Nation or Council are liable for any damages or other loss, including economic loss, sustained by any person, or to the property of any person, as a result of neglect or failure, for any reason, to discover or detect any contravention of this Law or any other Nation Law, or from the neglect or failure, for any reason or in any manner, to enforce this Law or any other Nation Law.
- 28.4 Subject to the foregoing, any actions against the Nation (including Council and its employees) for the unlawful doing of anything that:
 - (a) is purported to have been done under the powers conferred by this Law or any Nation Law; and
 - (b) might have been lawfully done if acting in the manner established by law, must be commenced within six (6) months after the cause of action first arose.
- 28.5 The Nation is in no case liable for damages unless notice in writing, setting out the time, place, and manner in which the damage has been sustained, is delivered to the Nation within two (2) months from the date on which the damage was sustained. In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the court of appeal, believes:
 - (a) there was reasonable excuse; and
 - (b) the Nation has not been prejudiced in its defence by the failure or insufficiency.

29. CONCLUDING MATTERS

- 29.1 If any part of this Law is found by a court of competent jurisdiction to be invalid, it may be severed and will not invalidate the Law in its entirety.
- 29.2 This Law shall come into force and effect on the date that it is enacted by Resolution of the Council.

This Law may be amended in accordance with the procedure set forth the Council from time to time.

THIS LAW IS HEREBY ENACTED BY THE APPROVAL OF A QUORUM OF THE COUNCIL ON THE ____ DAY OF _____, 20__.

VOTING IN FAVOUR OF THE LAW ARE THE FOLLOWING MEMBERS OF COUNCIL:
[ANNOTATION: the above may or may not be necessary depending on the custom of the Nation government. Amend as necessary.]



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Cannabis Tool Kit

First Nations Stories of Economic Development and Cannabis

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