

INSERT FNLC LOGOS

BC FIRST NATIONS CANNABIS STRATEGY

Draft 1 for discussion – February 2022

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INTRODUCTION

As First Nations, we have lived in our territories since time immemorial, and have been the caretakers of the lands, waters, animals, and people. Our languages, ceremonies, songs, laws, and governance systems provide us with the understanding of what we need to be well and how to accomplish this. Today, our inherent rights to self-determination and self-government, which preceded colonial law – remain and inform all facets of life. Through the individual and collective efforts of our Nations, we are strengthening our communities and reclaiming our jurisdictional authority. This Strategy is part of BC First Nations’ coordinated efforts to advance our vision for the cannabis sector.

In October, 2018 the federal *Cannabis Act*, S.C. 2018, c. 16 came into force. Provincially, the *Cannabis Control and Licensing Act*, [SBC 2018] c. 29 (“**CCLA**”), the *Cannabis Distribution Act*, [SBC 2018] c. 28, and the *Motor Vehicle Act*, [RSBC 1996], c. 318 among other legislation, also came into force. These pieces of

federal and provincial legislation set out how cannabis was to be produced, distributed, sold, and regulated. Unfortunately, despite numerous attempts at providing input, First Nations were not properly consulted or considered in the implementation of cannabis legislation.

Preceding the passage of the federal and provincial legislation, the government of Canada adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (S.C. 2021, c. 14) (“**UN Declaration**”). The UN Declaration subsequently became part of federal legislation with the passage of Bill C-15, and the *United Nations Declaration on the Rights of Indigenous Peoples Act* (“**UN Declaration Act**”). The UN Declaration has also become part of provincial legislation, with British Columbia’s implementation of the *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019], c. 44 (“**DRIPA**”). The *UN Declaration Act* and *DRIPA* have affirmed that First Nations have an inherent right to self-government, and economic self-determination. These rights extend into the domain of cannabis.

Mandate

During February and March, 2021 resolutions were passed by the Union of BC Indian Chiefs (“**UBCIC**”), First Nations Summit (“**FNS**”), and BC Assembly of First Nations (“**BCAFN**”), respectively: #0221.13 Development of a BC First Nations Cannabis Strategy, [no. 2021-26](#) Development of a First Nations Cannabis Strategy, and [Resolution 16/2021](#) in support of the development of a BC First Nations Cannabis Strategy (collectively, the “**resolutions**”). The resolutions provide a mandate from Chiefs and Leadership for the UBCIC, FNS, and BCAFN to work together collectively as the First Nations Leadership Council (“**FNLC**”) to develop a BC First Nations Cannabis Strategy (the “**Strategy**”) that addresses: jurisdiction, law-making and regulation, enforcement, economic development, taxation, revenues, health, safety, and, among other matters, education.

These resolutions mandate that the FNLC representatives on the BC-FNLC Cannabis Working Group should lead work to develop the BC First Nations Cannabis Strategy through engagement with:

- BC First Nations including Chiefs and leadership,
- relevant First Nations organizations,
- those directly involved in governance and cannabis-related businesses and economic development, and
- with appropriate collaboration and support from the provincial and federal governments.

Vision

Goals

The Strategy has been developed following key and overarching goals:

1. Advance the recognition of First Nations inherent jurisdiction over cannabis.
2. Advance First Nations Cannabis Taxation and Revenue Sharing Jurisdiction.
3. Support First Nations Cannabis Businesses and Entrepreneurs through collaborative partnerships and ongoing economic development advocacy work.
4. Prioritize community safety by ensuring cannabis products and byproducts meet quality assurance standards. Work collaboratively with BC First Nations and different enforcement agencies Provincially and Federally to ensure that First Nations are protected from adversarial activity which threatens their self-determination.

5. Support institutions like the First Nations Health Authority (the “FNHA”) with their Health and Wellness advocacy work. Continue advocacy of public education on the use of cannabis as a health and wellness product.
6. Advance the development of the necessary infrastructure, institutions and other supportive resources that BC First Nations require to be successful in the Cannabis market Provincially, Nationally and Internationally.

CONTEXT

Engagement with First Nations

This Strategy was created based on feedback received during a series of engagement sessions hosted by the FNLC which took place on August 11th, 2021, November 17th, 2021, November 19th, 2021, and January 13th, 2022.

- The August 11th, 2021 ‘Pre-Session’ set the context for BC First Nations leadership and community members. Additionally, discussion questions invited feedback on upcoming key legislative initiatives: The federal *Cannabis Act* review, and the DRIPA draft Action Plan.
- The November 17th, 2021 session focused on the topic of economic development work in cannabis, and sought ideas for advancing the First Nations cannabis market in BC.
- The November 19th, 2021 session focused on First Nations experiences in advancing the recognition of First Nations jurisdiction over cannabis, the creation of a cannabis institution, and health and safety in cannabis.
- The January 13th, 2022 session provided an overview of potential cannabis taxation and revenue sharing models for BC First Nations.

GOAL # 1: ADVANCE THE RECOGNITION OF FIRST NATIONS’ INHERENT JURISDICTION OVER CANNABIS

Objective: Ensure that First Nations inherent jurisdiction over cannabis is respected and upheld in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples Act* (“UN Declaration”) and the *Declaration on the Rights of Indigenous Peoples Act* (“Declaration Act”). This goal can be advanced along two tracks:

1) Strengthening First Nations laws and governance

First Nations governments are on the front lines of strengthening and exercising our inherent Title and Rights, and Treaty rights. Revitalizing First Nations cultures, knowledge, and systems of governance, and building capacity among First Nations to advance these rights through their own self-determined paths, is at the heart of self-government. In this respect, cannabis is no different than any other sector. Further, cannabis has implications on many areas of jurisdiction including health, agriculture, economic development, and justice and policing.

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2) Increasing Crown Capacity for recognition and jurisdictional reconciliation

While First Nations rights are inherent and don't require enabling legislation from federal or provincial governments, provincial and federal legislation can provide Crown governments the authority and tools they need to support First Nations rights and jurisdiction and implement right relationships among Canada's orders of government. Opportunity exists through the Federal *Cannabis Act* review as well as the Province of BC's efforts under the *Declaration Act*.

Federal Legislation - Cannabis Act Review

The *Cannabis Act* currently divides jurisdiction over cannabis production, licensing and sale exclusively between the Federal, Provincial and Territorial governments. This fails to recognize First Nations governments' inherent jurisdiction, which has implications for self-determination, health and safety, and the economic benefits that the cannabis industry can provide.

The revised *Cannabis Act*, or any new, related, pieces of legislation, must contain provisions that recognize First Nations cannabis laws and regulations related to cannabis. First Nations must no longer have to wait to implement the cannabis laws they have created due to incompatibility with the *Cannabis Act*. First Nations must be recognized in the *Cannabis Act* as equal governments and not subordinate governments. The next section of the Strategy outlines potential mechanisms for recognition and sets out a path forward.

New Legislation

First Nations could advocate for the co-development of new legislation that would recognize First Nations jurisdiction with respect to cannabis in the context of a mutually agreeable jurisdictional framework; for example, as was done in the case of Bill C-92, *An Act respecting First Nations, Inuit and Metis children, youth and families* (S.C. 2019, c. 24). While dedicated legislation may be desirable, this analysis sets out how pursuing amendments to existing legislation and new regulations may be more advantageous given that a legislative review process is underway and new legislation requires more political willpower and resources; new legislation is not necessarily more effective; and the *Cannabis Act* provides a comprehensive framework for health and safety that First Nations can utilize as a baseline for their own initiatives.

Amendments to the Cannabis Act

One of mechanisms that exists within the *Cannabis Act* is section 140(2). It currently provides that¹:

The Minister may, on any terms and conditions that the Minister considers necessary, by order, exempt any class of persons, or any cannabis or any class of cannabis in relation to any class of persons, from the application of all or any of the provisions of this Act or the regulations if, in the

¹ Cannabis Act 140(2)

opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

This clause currently enables the Minister to provide exemptions from the requirements of the *Cannabis Act* and its Regulations if it is in the public interest. One possible way forward could be create a similar provision within the *Cannabis Act*, which provides a mechanism tailored specifically to First Nations. In this way, the federal *Cannabis Act* could enable First Nations and the federal government to enter into agreements that recognize respective jurisdictions, similar to the section 119 agreements enabled in BC's *Cannabis Control and Licensing Act*².

Another option is to revise the federal *Cannabis Act* to amend all mentions of **'government(s)'** to **include First Nations governments**. This could require significant revisions to the *Cannabis Act* throughout. While this approach correctly recognizes that First Nations governments are in fact authoritative orders of government, in itself, it is not sufficient to deal with the complexity that recognizing First Nations jurisdiction will entail – for example, the implications for inter-governmental coordination and responsibilities.

Case Study: Mohawk Council of Kahnawà:ke

The Mohawk Council of Kahnawà:ke's (the "MCK") efforts to leverage the current regime provide a helpful starting point for examining how current legislation can be amended to support First Nation's goals. While not fully utilizing section 140(2) of the *Cannabis Act* in the way described above, the Mohawk Council of Kahnawà:ke (the "MCK") entered into a Memorandum of Understanding (the "MOU") with Health Canada allowing for a dual-licensing regime³. Under this MOU the MCK's Kahnawà:ke Cannabis Control Board (the "KCCB") and Health Canada are both required to issue a license in order for a cannabis production or processing facility to be approved. This arrangement has been an important step for the MCK towards advancing recognized jurisdiction in their territory. In addition to having more control over who is licensed to operate on their territory, they are able to assist with inspections of facilities as required.

The MCK recognized that in order to take over certain cannabis jurisdictional aspects, they would need the necessary infrastructure and resources. One of the resources identified by the MCK was knowledge and education. The MOU helps provide for this transfer of resources and knowledge between the MCK and Health Canada, so that the MCK can take over jurisdiction in the areas set out in the MOU. Recognizing the complexity of taking over these jurisdictional areas, the MCK also endeavored not to take over too many areas at once, but to instead take an iterative approach. Eventually the MCK will advance talks beyond licensing and inspections, looking towards changes in taxation, among others.

Considerations

There are several considerations to keep in mind when advancing legislative amendments to the *Cannabis Act*:

- The federal government may not have an appetite to enter into a large number of individual agreements due to administrative burden and concerns about patchwork regulation.

² CCLA s 119

³ Need to link MCK health canada agreement

Commented [SF2]: Suggest removing this comparison has 119s set a low bar and wouldn't want prov or feds to get the idea that they are going well.

- Holding individual negotiations with each interested First Nation in the country may slow the rate of progress and support the Crown’s divide and conquer tactics.
- Vastly different laws and regulations among First Nations could lead to difficulties in coordination, capacity, consumer awareness, economic opportunity, and enforcement of cannabis laws.
- If the clause is worded in a discretionary manor, First Nations will be left in a subservient position and vulnerable to changes in political goodwill
- First Nations will require capacity support to enter into agreements

Path Forward

Given First Nation’s diverse objectives, the considerations above, and what we can learn from MCK’s efforts, the following recommendations will guide the path forward on amending the *Cannabis Act*. For First Nations who are interested in implementing various jurisdictional powers, including their own licensing regimes, a clear mechanism must exist to develop bi-lateral agreements with the federal government. This mechanism:

- Must provide legislative guarantees of capacity support for First Nations to negotiate an agreement;
- Must place an obligation on the federal government to negotiate an agreement when they receive a notice of interest from a First Nation within one year;
- Must enable negotiations related to all areas of federal jurisdiction, including those delegated to provinces and territories through the *Cannabis Act*;
- Must enable recognition of First Nations jurisdiction within First Nations traditional territory and not only reserve land;
- May utilize amended regulations co-developed with First Nations as a framework for agreements (see below);
- Must allow, but not require, First Nations to enter into negotiations jointly with other First Nations;
- Must enable negotiations in relation to other related pieces of jurisdiction and legislation;
- **Others?**

Amendment to Related Pieces of Legislation

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New Regulations

A new set of Regulations could be created under the *Cannabis Act* and tailored specifically to First Nations. This would require a provision within the *Cannabis Act* exempting its application to First Nations, subject to this set of Regulations. Any First Nations-specific regulations which would function as a way for the federal government to recognize First Nations jurisdiction, would likely still need to provide a framework under which First Nations laws would be recognized. This framework could be co-developed, taking into account the following considerations:

- Available to any First Nations on an opt in basis (Voluntary)

- Addresses basic concerns regarding administrative burden of negotiating Nation-to-Nation agreements, and potential patchwork of laws/regulations in as least prescriptive as possible way, only setting minimum standards
- Agreements must provide for financial commitments to enable implementation of First Nations jurisdiction
- May provide for the participation of provincial and territorial governments
- Others?

First Steps

The Cannabis Act review process, which occurs every three years, is the primary vehicle for advancing amendments. The first review is happening ----, and legislative amendments are set to be tabled ----.

The FNLC will look to advance the implementation of this Strategy through participating in the Cannabis Act review process, including through channels provided through the Assembly of First Nations. Moreover, the FNLC will work to ensure federal departments involved in the review meet with interested First Nations directly. First Nations voices need to be respected and incorporated into any revisions.

Provincial Legislation

BC’s Action Plan under the Declaration Act includes the following action in relation to cannabis:

4.36 – Advance a collaborative approach to cannabis-related governance and jurisdiction between First Nations and the Province that reflects common objectives to protect youth, prioritize public health and safety, strengthen First Nations governance capacity and secure economic benefits for First Nations. (Ministry of Public Safety and Solicitor General)

Commented [SF4]: To be replaced once plan is finalized

While the action is notably weak as a concrete commitment, First Nations can continue to advance cannabis-related rights as affirmed by the UN Declaration, and leverage the Declaration Act, in particular:

- Section 3 alignment of laws process to address the CCLA, and the Cannabis Distribution Act.
- Section 6 and 7, agreements and statutory decision-making agreements; acknowledging the authority of Indigenous laws, and First Nations jurisdiction and legal orders when making decisions related to regulations, marketing and all other areas of cannabis.
- Actions within the Action Plan referencing new economic and government-to-government relationships to secure recognition of jurisdiction and commitment to taxation and revenue sharing⁴

Section 119 Agreements

First Nations must be supported in their efforts to negotiate section 119 agreements of the CCLA or Section 7 of DRIPA with the Provincial government. This will continue to be an ongoing source of advocacy work for the FNLC as more Nations become interested in these agreements.

⁴ Cite and include once Action Plan is finalized

Negotiations are proceeding too slowly, with a lack of responsiveness, capacity, and political mandate from the province to enter into agreements using a rights-based approach.

Section 119 agreements currently only apply on-reserve. First Nations jurisdiction must be recognized both on and off reserve.

Negotiations have also attempted to dictate who and how First Nations in the cannabis industry can and cannot do business with. It is not appropriate for the provincial government to define the structures of First Nations' businesses. In the same vein, the Provincial government should remove caps on the limits of First Nations partnering with other First Nations in the market, enable more First Nations to be involved in vertical integration and inter-nation trade. The Province should also adjust fees owed by First Nations due to the Province's lack of jurisdiction over First Nations' land.

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Section 119 agreements are currently limited in scope and allow for only narrow economic advantages. The scope must be expanded to include negotiations regarding all areas of "provincial jurisdiction", including licensing, distribution and other aspects of regulation.

Considerations: If First Nations are successful in securing recognition at the federal level that removes the delegated jurisdiction of the province under the *Cannabis Act*, the nature of negotiations will change. However, Section 119 and Section 7 agreements may still be valuable coordination mechanisms.

Potential Actions

- Hold a Section 119 negotiators forum for First Nations (explore interest in negotiating a collective framework agreement either through Section 119 CCLS or Section 7 DRIPA?, and evaluate need for tripartite negotiating mechanism)
- Background paper, including a legal discussion of recognizing rights off reserve and potential for Section 7 agreements
- Implement alignment of laws process once agreed upon for the CCLA, and the Cannabis Distribution Act

GOAL #2: ADVANCE FIRST NATIONS CANNABIS TAXATION AND REVENUE SHARING JURISDICTION

BC First Nations leadership and community members have expressed strong interest in pursuing taxation and revenue sharing regimes. Due to the lack of consultation and inclusion of First Nations in the implementation of the Federal Cannabis Act, First Nations were left out of any sharing of taxes or revenues. The First Nations Tax Commission advocated for the inclusion of First Nations in the development of taxation frameworks around the time of legalization, but their recommendations were not adopted⁵. First Nations have been left to pick up the costs of community safety, and other necessary expenses to deal with the results of legalization of cannabis without proper consultation. Additionally, in order to create the necessary frameworks to advance recognized jurisdiction over cannabis, and other developments, financial resources are necessary.

⁵ Supra note 4

First Nations can consider a range of potential taxation and revenue sharing models⁶. The question is not whether First Nations should be party to revenue sharing and taxation powers if they wish to, but rather *how* – and how they may opt out of such processes if they wish. Ideas have been put forward, ranging from the implementation of tax-free zones, excise tax exemptions, changes to the excise tax, the creation of revenue sharing agreements, among other possibilities.

The cannabis sector has two economic streams: Firstly, taxation through the Federal Excise Tax, 5% GST to the Federal government, and 7% PST to the Province.

Federal excise taxation occurs at a rate of \$1.00 per gram of cannabis product⁷. Cannabis licensees are required to pay applicable duties on their products⁸. The Federal government also collects 5% federal GST on retail sales.

The Province of BC collects 7% PST on all cannabis sales and has additional revenue streams related to cannabis; ⁹The second revenue stream comes to the Province of BC through the revenues and profits they are generating through the BC Liquor Distribution Branch (**the “LDB”**)¹⁰. Through the LDB the Province is a wholesaler of product through their BC Cannabis Stores¹¹. Wholesale and retail sales through the LDB have a 15% profit margin

There is a lack of clear information on cannabis revenues generated through the province’s revenue streams. What the LDB has reported, though, is that \$400 million in cannabis sales have been made since cannabis was legalized¹². From analyzing financial statements, it appears that the LDB indicated a gross profit of 40% on products sold, and a profit of 28% on their wholesale activities through their stores¹³.

The current cannabis taxation regime provides that 75% of revenues generated by excise tax go to the Provinces and Territories, with 25% going to the Federal government with a cap of the federal portion of the cannabis excise tax revenue at \$100 million every year¹⁴. This excise tax formula is set out in the *Excise Tax Act*¹⁵ and the federal *Cannabis Act*¹⁶.

When it comes to revenue sharing agreements, BC has entered into revenue sharing agreements with BC First Nations collectively and individually¹⁷. One example is the Forestry Revenue sharing agreement which provides that First Nations receive 3% of the stumpage revenues collected within their traditional territories¹⁸. These agreements are based on First Nations territory; when territory is shared Nations

⁶ Michael Bonshor, “BC First Nation Cannabis Taxation and Revenue Sharing Paper: Discussion and Strategy Paper”, January 13th, 2022

⁷ Ibid

⁸ Ibid

⁹ Supra note 4 at pg 3

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Cite excise tax act provision

¹⁶ Cite cannabis act provision

¹⁷ Ibid

¹⁸ Ibid

Commented [SF6]: Is the 15% margin applicable to wholesale and retail sales or only retail through the provincial stores?

Commented [SF7]: Can we send a request for this info to BC? And an FOI request if this doesn't yield results? Will need to confirm \$ available for tax and rev share now and any projections they have for the future.

receive a shared revenues for this area¹⁹. Mining revenue sharing also exists and is on a project-by-project basis between the Province and BC First Nations. The First Nations Clean Energy Business Fund revenue sharing agreement is a hybrid revenue sharing model, with 50% of revenues from water and land rentals for projects are sent to the First Nations Clean Energy Business Fund, and 75% of those funds are shared with territory First Nations²⁰. A unique arrangement also exists regarding BC First Nations and their agreements with BC regarding carbon credit offsets²¹.

One very prominent, and long negotiated, revenue sharing arrangement is the BC First Nations Gaming Revenue Sharing and Financial Agreement (**the “agreement”**). BC First Nations annually receive 7% of net revenues from the BC Lottery Corporation²². Over the entirety of the agreement, it is estimated that BC First Nations will receive \$3 billion²³. The BC First Nations Gaming Revenue Sharing Limited Partnership was created in order to distribute revenues from the agreement to First Nations²⁴. The distribution of the funds follows a formula²⁵:

- 50% of revenues distributed to each First Nation equally
- 40% of revenues distributed by population, and
- 10% of revenues distributed for isolated and remote First Nations

Insert reporting requirements of FNs and criteria for what the funds can be spend on

Other revenue sharing models exist in Manitoba, New Brunswick, Newfoundland, Northwest Territories and Ontario. These arrangements cover mines, minerals, and among other resources, timber.

There is some urgency to ensuring taxation and revenue sharing commitments between First Nations and the Crown as the Union of BC Municipalities is also seeking a share of BC’s portion of the Cannabis Excise Tax to go to municipalities²⁶. There is a precedent already for municipalities receiving a share of these revenues in Ontario, where the Province of Ontario has agreed to share 40% of its revenues with local governments²⁷. If they are successful, this could impact the amount of revenues available to BC First Nations²⁸.

Path Forward

First Nations in BC should target efforts toward

- 1) Securing a portion of the federal excise tax

Commented [SF8]: Can we verify if the UBCM proposal is inclusive of First Nations? For example, if it uses the language of “local governments”. Their advocacy creates urgency, but it could also strengthen our position given some of the similar challenges FNs are facing.

¹⁹Supra Note 4 at pg 4
²⁰ Supra Note 4 at pg 8
²¹ Ibid
²²Supra Note 4 pg 9
²³ Ibid
²⁴ Ibid
²⁵ Ibid
²⁶ Supra Note 4 at pg 10
²⁷ Ibid
²⁸ Ibid

First Nations can seek a percentage of the tax or levee collected be directed to First Nations²⁹. The taxes could be distributed directly to First Nations or collected in a First Nations account or institution. This would require negotiations between First Nations and BC and the Federal government³⁰.

2) Integrating cannabis into existing First Nations taxation frameworks, such as FNGST

Commented [SF9]: Can reference Tax Commission recommendations here

3) Legislative mechanisms that recognize First Nations tax jurisdiction

Another potential approach is for First Nations to assert taxation jurisdiction over cannabis sales on reserve lands by revising the *Excise Act* to include enabling language to First Nations³¹. This would allow First Nations to tax cannabis sales on reserve lands³².

It could ensure First Nations products produced and processed within First Nations territory are not subject to the federal excise tax and that First Nations retail stores are not subject to the province's profit margins.

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4) Securing commitments from the provincial government to share profits from wholesale and retail sales

Revenue Sharing is another possibility, one already existing model that could be utilized would be from the Gaming Revenue Sharing arrangement. BC First Nations could negotiate with the LDB in a similar way to that of the BC Lottery Corporation with their Gaming Revenues. A first step to take would be to get clear figures from the LDB in terms of their net revenues earned from wholesale and retail cannabis sales³³. Once these figures have been obtained a formula could be established and negotiated for³⁴.

The next section will outline several models that could be pursued for First Nations in Revenue Sharing³⁵:

Distinct First Nation Model

Under this model, First Nations develop their own Cannabis Revenue Agreement Framework through a designated body like the FNLC and then negotiate on this framework with the Provincial and Federal governments³⁶. Individual First Nations can then opt into this Agreement³⁷.

Provincial First Nation Model

First Nations through a designated body would negotiate an agreement with BC and Canada on the Provincial level³⁸. First Nations would then be beneficiaries of the benefits and jurisdiction terms of the

²⁹ Supra Note 4 at pg 11

³⁰ Ibid

³¹ Supra Note 4 at pg 13

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Supra Note 4 at pg 14

³⁶ Ibid

³⁷ Ibid

³⁸ Supra Note 4 at pg 13

agreement through a newly established First Nations Cannabis Partnership which would deliver the funds³⁹. This model would strongly resemble the approach found in gaming revenue sharing.

Individual First Nation Model

The last model would involve First Nations individually or Tribally negotiating their own Cannabis revenue sharing agreements with the Provincial and Federal Governments⁴⁰.

In order for First Nations to have any negotiations whatsoever with the Provincial or Federal government, it is an absolute requirement that there be complete transparency regarding the financial information from cannabis sales since legalization began. Once First Nations have received this information, next steps can be evaluated, such as creating the revenue sharing formulas mentioned.

Considerations

Feedback has been mixed about whether to pursue, or not pursue the Gaming Revenue Sharing model. There are worries that there is not enough market revenue to warrant the amount of work it would take to get all BC First Nations to the table to approve it, unlike that of gaming. Others believe the Gaming Revenue Sharing model might be the best method to pursue right now because it is an established model. With timing being important, the sooner that discussions can be had, the better. It is clear there is no initial consensus on which model to pursue, and approaches may differ depending on whether a First Nation is pursuing the cannabis market from the lens of sovereignty or from the perspective of the regulated market. More conversations need to be had with First Nations leadership and community members in BC to come to greater clarity about which approach to take. It is also possible that work could begin on developing a framework for the 'Distinct First Nation Model' while these talks are taking place.

Alternatively, there is a possibility that First Nations might disregard revenue sharing arrangements with the Federal and Provincial governments entirely and pursue revenue sharing in a form where unregulated cannabis businesses give a share of their profits back to their communities. There are industry members who are currently advocating for this approach.

Some First Nations, like the MCK have also found other innovative ways to generate revenues from cannabis businesses in their communities through the form of royalties. Where a cannabis business that wants to set up within MCK territory would need to pay a community contribution fee, or royalties on sales which is put into a socio-economic development fund and used for underfunded community development projects. This is an approach that other First Nations looking to enter the market might be able to proceed with in the interim until a taxation or revenue sharing agreement is in place.

There is still broad support to pursue Nation-to-Nation collaboration on developing a revenue sharing framework. Another positive aspect of pursuing this approach could be healing divisions present between First Nations pursuing the regulated and unregulated markets, bringing Nations together towards a collective goal. This work will also take a considerable amount of time, and it has to start somewhere. Any areas under discussion for taxation and revenue sharing agreements have to include traditional territories of First Nations and not just reserve lands.

³⁹ Ibid

⁴⁰ Supra Note 4 at pg 13

Some suggestions as they pertain to the Gaming Revenue Sharing Agreement to keep in mind: the revenue sharing agreement in that space was negotiated for 25 years, it might be a better idea here to negotiate a shorter agreement.

One downside of these discussions around taxation and revenue sharing agreements is they do not necessarily support urban First Nations cannabis entrepreneurs who do not reside within their traditional territory or reserve land. The financial benefits received from these agreements would only impact First Nations who have some connection to their community. This could be where Provincial and Federal programs providing assistance to cannabis businesses become more important, to fill these gaps. This is important to consider so urban First Nations are not left behind in these conversations. There may be a need to advance talks, or develop frameworks, for Provincial or Federal programming providing financial benefits or assistance to urban First Nations cannabis businesses.

Commented [SF11]: Synthesize into key take aways to inform the path forward. Can we propose the foundations of a model given what we know and what we've heard? In my perspective we need to put together something concrete.

First Steps

GOAL # 3: SUPPORT FIRST NATIONS' CANNABIS BUSINESSES AND ENTREPRENEURS THROUGH ECONOMIC DEVELOPMENT WORK

Access to Capital

First Nations need support and increased advocacy regarding access to capital issues making it prohibitive, if not impossible, to enter the cannabis market. Banks are unwilling to accept Cannabis business deposits. It is hard for lenders to provide the necessary capital to cannabis businesses who find it difficult to get the necessary, and sometimes prohibitively, expensive insurance necessary for a lender to assume the risk of lending. This is problem is compounded for First Nations, who find it more difficult to receive bank financing due to complex lending dynamics for First Nations businesses functioning on reserve. First Nations are being economically discriminated against.

There are reports of First Nations cannabis businesses being told to obtain Band Council Resolutions before financing approvals can be given. This is unacceptable, businesses would not be asked to receive approvals from a municipality before financing could be agreed to, so First Nations should not either. This situation is made more difficult for First Nations entrepreneurs who are not part of an Economic Development arm of a First Nation, or are otherwise not part of a band owned business. This issue needs to be remedied quickly, as there is a very real fear that larger, multinational companies might enter the market as cannabis is legalized in more countries. A space exists for BC First Nations cannabis companies to remain competitive exists, but that space is disappearing.

There are also First Nations wanting to enter into the cannabis market because they see the opportunities the industry provides, but due to an inability to access capital entering the regulated becomes impossible. The unregulated market is also not necessarily accessible to First Nations, as there are risks that might come with operating in that sphere. Products which do not meet quality assurance standards might open up a First Nations cannabis business to liability from lawsuits. This is just one threat in a list of potential risks that First Nations might face on the side of the industry which is not protected by the Federal government's regulatory standards. Some organizations functioning in the

unregulated market offer long-lasting agreements protecting First Nations by assuming liability on their behalf, but taking a significant share of revenues.

However, the lengths of these agreements are prohibitive, as due to the variety of unknowns in the industry currently it is difficult to predict where a First Nation might see themselves decades from now in the cannabis industry. Despite the restrictive length of the contracts, this could represent a model which might successfully incentivize participation in the regulated market if a regulated partner could offer to assume the risks for a First Nation and assist with the start-up of their business provided that partner offer a share of their profits to said organization. More analysis needs to be done on these agreements, as well as creative work to envision a framework for how such a partnership could be provided to First Nations.

Continued Support of Cannabis Programs

One of the primary ways that First Nations are being supported in the short term in their cannabis business initiatives is through the FNLC's work on cannabis programs with the Provincial and Federal governments. The Cannabis Strategic Partnership Initiative is a program that has been developed with BCAFN, FNS, Health Canada, ISC and the Provincial Cannabis Secretariat through BC's Ministry of Public Safety. It will provide funding, pathfinding services, and capacity building assistance to First Nations looking to establish or expand cannabis projects. The Cannabis SPI is keenly aware of the issue of access to capital, and is hoping to help provide solutions to that difficulty by leveraging partnerships to provide surety to lenders.

The FNLC is working with The Province of BC on the First Nations Cannabis Market Access project, which is meant to provide an analysis of strategic opportunities for First Nations looking to enter the cannabis market, and provide further feasibility work regarding a BC First Nations Cannabis institution. The initiative will be important to collect useful market data that can be used to tailor supports to BC First Nations cannabis businesses.

The FNLC is also providing input in other Provincial BC First Nations cannabis programming, like the Indigenous Shelf Space Program, which will highlight BC Indigenous cannabis products in retail stores. There is also the Direct Delivery Program, which will allow Indigenous producers to have their products delivered directly to retailers.

These programs will all provide crucial supports for First Nations in the cannabis market. However, the FNLC's resources towards this end are constrained, and as a political organization the FNLC's mandate is not directed at program implementation. So in depth involvement in the implementation of these programs would likely require the involvement of another trusted First Nations-led cannabis organization, or increased support of the FNLC. These First Nations cannabis programs should continue to be supported and created as the opportunity arises.

Transportation

Transportation costs for First Nations is also an issue and remains a costly one. Nations need support with seed to sale transportation. One suggestion has been the development of an oversight body which supports Transportation of products between First Nations. Analysis of this situation is needed, as well as research into the feasibility of the creation of such a service.

Innovative Approaches to Job Creation

There are many jobs in the cannabis market that might be less obvious, but are essential. For example, cannabis plants need trimmers, and there is often a shortage of these types of skilled labourers. These specialized positions also create a need for specialized education. Currently for some of these positions, it is a requirement that community members might have to go out of Province to receive the training they need. This could create a need for something like a BC First Nations Cannabis Institution to provide skills training and other types of education. There needs to be a more thorough analysis of the types of jobs that exist in this sector and the educational training needed for them.

Branding & Advertising

A BC First Nations stamp of certification or approval on products available in mainstream products would help to emphasize First Nations products in the National and International markets. This is a development occurring with the Indigenous Shelf Space Program which will require the FNLC and interested First Nations to provide input on the logo that will be used to identify First Nations cannabis products. Some First Nations cannabis businesses have found financial success through their collaborations with the entertainment industry.

First Nations have also had difficulties with the Federal government's packaging requirements. The excessive amounts of packaging required create another prohibitive, costly barrier to First Nations wanting to enter the regulated cannabis industry. More engagement needs to be undertaken on this piece, as it will likely be an area where change is required in the Federal Cannabis Act review.

GOAL # 4: PRIORITIZE COMMUNITY & PRODUCT SAFETY

Central to any discussion around cannabis in First Nations communities is the topic of safety. First Nations communities want to ensure that their members are protected from bad products, from bad actors setting up stores in communities, and from negative enforcement actions from Police or the Community Safety Unit.

Product Testing

There has been a strong desire from First Nations leadership and community members to utilize an existing First Nations organization, or a newly created organization, in order to administer cannabis product testing. The First Nations Health Authority was an organization floated as a candidate for the administration of this kind of testing regime. Unfortunately, though they do have a research regime in place, the FNHA is not equipped or staffed to the capacity they would need to be to undertake an initiative like a cannabis product testing regime. In order to take on this sort of work, the FNHA would need research support to set up a laboratory containing the necessary analytical work. There would also need to be feasibility studies to see if the FNHA would be the right choice to take on a testing regime as well, as other First Nations organizations may be better suited potentially.

The FNHA is interested in finding an interim solution to this interest by First Nations in a First Nations-led cannabis product testing regime. They have expressed an interest to do further engagement work on this point. Regardless of if the FNHA will be involved in cannabis inspections or testing, as First Nations achieve recognized jurisdiction over cannabis, the FNHA would still like to ensure that their training is adequate to keep up with the needs of BC First Nations.

Nevertheless, First Nations producers are still calling for a First Nations led testing, quality assurance or inspection provider. Having this in place could also help First Nations and entrepreneurs to get into the industry.

First Nations have had varying levels of success in ensuring that products are safe in the unregulated market. There have been complaints of unsanitary product shipments as a result of a lack of quality assurance. This is not a result that any First Nations cannabis business wants. All Nations share a goal of ensuring that their community members will be purchasing safe, healthy products. First Nations would like to see a set of standards which are uniform across the regulated and unregulated markets.

This goal could be realized with the use of a First Nations-led cannabis testing regime which meets or exceeds the required health and safety standards as set out in Federal law by Health Canada. This has been a frequent request and topic of conversation at many of our engagements. A desire for such an institution exists, but what would be required to develop a Health Canada compliant, First Nations-led regime has not yet been explicitly set out in a workable framework.

Community Safety Unit

Advocacy work must be consistently taken on to ensure that the relationship between the Community Safety Unit and First Nations cannabis businesses is respectfully maintained. This means that the Community Safety Unit must continue to not take enforcement action on First Nations territories without the explicit consent of First Nations leadership. There have also been reports of other tactics being used, like fining the owners of the buildings that are leasing their property to cannabis businesses. There have also been reports of exorbitant fines being threatened against businesses by the CSU. These and similar tactics are confrontational and result in distrust from First Nations in their dealings with the CSU.

To some First Nations communities, cannabis is considered a wellness product and a medicine. For the CSU to interfere or seize this medicine is unacceptable. The CSU has been receptive to these criticisms and have so far expressed an interest in maintaining these boundaries pertaining to cannabis enforcement. Nevertheless, the relationship is tense, and value could still be found from convening more regular conversations between the CSU and First Nations leaders and community members who are working in the cannabis industry. First Nations leadership and community members would like to hear assurances from the CSU that their families operating cannabis businesses on their territory will be safe from enforcement action.

First Nations community members are also worried about the potential for money laundering to occur in their communities. Another prominent concern is keeping children safe and away from cannabis. More research and advocacy needs to be done to support First Nations interested in establishing their own security forces on their territory. Initiatives that assist with this need to be integrated into First Nations cannabis work.

GOAL # 5: SUPPORT PUBLIC EDUCATION ON HEALTH & WELLNESS IMPACTS WITH CANNABIS

Public Education

There has been a resounding need for support of public education on health and wellness impacts on cannabis. As many First Nations leaders and community members in BC have expressed that stigma of cannabis still exists. Some First Nations community members have experienced negative attitudes about, and resistance to, harm reduction approaches in their communities. However, many community members are finding success in using cannabis for pain management, in addition to other medicinal benefits. Topical cannabis products, or CBD products, among others, are being used to help treat different ailments.

While there are positive benefits to cannabis, there are public health risks that can be alleviated by educational outreach as well. Cannabis might have an impact on youth brain development, could exacerbate mental health difficulties and potentially cause pregnancy risks. Cannabis products also sometimes come in edible forms which resemble and taste like candy, and so could be mistakenly consumed by children if not stored safely.

Since cannabis is such a new product for many First Nations community members, public education can assist with helping new users understand risks with usage. New users of cannabis might be unsure about the dangers of substance mixing with cannabis, or the strength of the products they are purchasing. Lack of information in these areas can lead to potentially dangerous results.

Another area where public education is important is cannabis use in the workplace. The FNHA has noted some essential components to their fitness for work plan, including:

- Being free from impairment, which means possessing the physical capacity to do a job properly.
- Some jobs require no impairment whatsoever, such as jobs requiring the operation of large vehicles.
- Striving to meet people where they are at, and there has to be accommodations made for those who would need to use cannabis for medical purposes during the work day.

In order to reduce stigma and inform First Nations communities about the potential health and wellness benefits of cannabis, or potential dangers, public education and outreach is necessary. The FNHA is likely the advocacy body that is best placed to develop this educational outreach. The FNLC can assist the FNHA's outreach efforts by convening gatherings, or townhalls, to discuss cannabis from a health & wellness perspective. While engagement sessions have been effective, more work at the individual community level is needed.

Medical Access to Cannabis

Many First Nations community members view cannabis as a health and wellness product. In this capacity it is treated as a medicine to be utilized for various purposes, such as: as a pain management treatment post-surgery, for mental health issues, problematic sleeping, or to assist with treatment of addictions. However, for those members who need it but are lacking the financial resources to obtain it, they are unable to obtain it through medical coverage. Eliminating the barriers to medical access to cannabis will require advocacy work with Health Canada, and support of the FNHA.

Health Canada needs to pursue research into the medical benefits of cannabis, and particularly the benefits of the ways in which First Nations cannabis users are already using. Research in this area is slow, and has not caught up to the ways people are actually using cannabis now. This is essential information that needs to be obtained and assessed to ensure that priority areas for medical access to

cannabis can be supported. Advocating for research will be the first barrier that requires change in order to get to the goal of medical access to cannabis.

The next step, as the FNHA sees it, is to get consensus from the medical community to support that research. As the prescribing of cannabis as a medicinal product will come from the adoption of these research findings by medical professionals. This would be an additional advocacy point to pursue once the progress has been made on the research front.

Engagement session participants have noted that a large number of their clients, if not the majority, are elders or medical users. This could provide a huge benefit to those community members if their cannabis purchases could be subsidized or fully-covered by insurance. However, it is possible that with insurance coverage, the price of medical cannabis could increase, making it more inaccessible. This would further limit access in more remote First Nations communities where access to cannabis might only be through a local pharmacy. This potential barrier has to be considered when advocating for medical coverage for cannabis.

There is also potential that cannabis might be used as a treatment method, or a favourable substitute to opioid usage that is happening in many communities across BC. An argument could be made that cannabis' could be promoted as a harm reduction tool for opioids and other substance addictions. If research supports this, it could lead to cost savings in communities and might incentivize medical access.

Spiritual & Ceremonial Usage

An aspect of cannabis that is overlooked, but potentially relevant to the First Nations context of cannabis use, is spiritual and ceremonial usage. However, there does not appear to be data on cannabis use in this way. More research needs to be undertaken on this point, as it could provide an additional dimension to the health and wellness benefits that cannabis provides.

GOAL # 6: ADVANCE NECESSARY INFRASTRUCTURE, INSTITUTIONAL AND OTHER DEVELOPMENTS TO ENSURE FIRST NATIONS SUCCESS IN THE CANNABIS MARKET

Cannabis Institution

Given the scale of many of the various types of projects that are highlighted, it has often been suggested that a new First Nations-led cannabis institution or organizational body (the "Institution") be created. The functions that this organization would serve are not clear yet, but through engagement it has become clear that there are significant gaps that First Nations need from a First Nations-led organization that possesses a regulatory authority equivalent to, or exceeding that of Health Canada.

Dr. Michelle Corfield created an outline of the potential purposes that the Institution could take. It could have a standards and testing facility aspect for cannabis products. There has also been interest expressed in having it function as a coordinating institution between First Nations just entering the market and those who are experienced in it. The Institution could provide an advocacy function, working with different levels of government. The Institution could potentially be a licensing body.

It could also serve as an educational institution, where regular events could be held to facilitate information sharing and help First Nations communities work together. The Institution could obtain

market data, and provide brand exposure through member directories and access to international trade. It could also assist with the implementation of programming and development of Federal and Provincial First Nations programming, which is currently managed by the FNLC.

The Institution could also advocate for public education. Another important endeavor it might take on is to try and provide equal access to banking for First Nations in the cannabis industry. As noted, banks are currently unwilling or reluctant to work with First Nations cannabis businesses, even if they are protected under Federal and Provincial laws. An Institution would have the capacity to put more resources into finding solutions for this and to help develop frameworks that would give banks more confidence to lend money.

The Institution could also support advancements related to the development of cannabis derivative products like industrial hemp and CBD. The Institution could also provide a platform for international marketing and prioritize support for inter-Nation trade initiatives for First Nations cannabis businesses.

Dr. Corfield presented potential organizational structures for the Institution, including different types of memberships, with a potential revenue stream embedded in the Institution by a membership fee coming from Indigenous Cannabis Businesses, though BC First Nations would have no membership fee.

All of these different potential purposes for the Institution provide a comprehensive overview of the areas in which First Nations cannabis businesses need support and innovative solutions. The hope is that the Institution can provide support in these areas, but given how different each of these needs are, the Institution's purposes need to be defined more narrowly.

A key piece of feedback received from First Nations regarding the Initiative is that it should not occupy the same spaces that the FNLC already exists in. Rather than being a helpful overlap, having multiple organizations negotiating or advocating for the same purposes could end up being a hinderance. The Provincial government has already stalled negotiations on different areas of cannabis using their work with the FNLC as a justification. Having more organizations taking up space in the same field could cause further delays, inconsistent approaches and confusion.

The FNLC can generally serve as a political advocacy body, and can assist First Nations in their negotiated cannabis agreements. The FNLC would be well placed to move forward on issues like the advancement of recognized jurisdiction in various areas of cannabis. The FNLC does assist with the development of Provincial and Federal cannabis programs and assists with their implementation. However, there is a need for more dedicated supports to focus on these efforts as the FNLC's resources to do so are limited. The Institution would be well placed to have dedicated support staff that could take on the work of developing and implementing these various cannabis projects.

There could be a benefit in having the Institution provide cannabis business governance assistance. First Nations communities and entrepreneurs are having difficulties navigating the cannabis market, and the Institution could provide a way to get connected to resources like different contractual templates, approved agreements, and other informational resources. It could also serve as a hub where First Nations could get more information about retail and the newest legislative issues. A service like this will likely be a necessity to justify a membership fee.

An Institution could also act as a coordinating body to connect First Nations negotiating cannabis agreements with the Provincial and Federal governments. Since First Nations are negotiating in a siloed

government-to-government capacity, this can sometimes lead to inconsistent approaches and a lack of information-sharing between First Nations involved in similar processes. An Institution could provide a point of connection between these nations to share strategically with each other. Collective meetings could be organized to facilitate this information sharing.

Another key way that the Institution could provide value to First Nations in the cannabis industry is by providing jobs, skills training and education. First Nations have expressed a desire to work in the cannabis industry, and have had questions about how they could get involved. Currently there are specialized positions in the cannabis industry that sometimes require moving out of Province. The Institution could ensure that training for these jobs remains in Province and close to First Nations communities. First Nations are already developing cannabis related educational courses that are being delivered by post-secondary educational institutions. It is possible that these courses could be delivered through the Institution, providing another source of revenue.

A need keeps being expressed for a First Nations-led testing regime. First Nations are unsatisfied with the hold Health Canada has over this regulatory regime. The costs associated with it have been prohibitive. Given that individual First Nations communities may be uninterested in or unable to devise an entire testing and licensing regime, it may be worth looking at the Institution providing this service. Health Canada has worked with First Nations like the MCK to develop regulatory knowledge transfer arrangements to assist in a hand-off of authority in the areas of licensing and inspections.

These two are core functions of Health Canada in regulating the production and processing of cannabis. It is not necessarily the case that the Institution would have to take over licensing or inspections in order to provide testing services to First Nations. However, if the Institution did not take over these functions, Federal and Provincial enforcement services would likely still need to be involved in the overall production and processing aspects of Cannabis.

To be come a testing laboratory approved by Health Canada, as per the Cannabis Regulations, SOR/2018-144 (the "Regulations") only individuals who are designated as an accredited laboratory under section 2.1 of the Seeds Act, RSC 1985, c. S-8 are authorized to conduct certain testing activities under the Cannabis Regulations. Under section 2.1 of the Seeds Act – an accredited laboratory is any designated by the Minister, effectively granting this power to Health Canada to determine which testing laboratories are acceptable.

If the Institution was able to obtain the necessary infrastructure and testing materials as set out by the standards of Health Canada, the Minister could approve its testing facilities as an accredited laboratory. The Institution could then offer this service to other First Nations in the province, as well as fulfill the role that a Health Canada accredited laboratory would in the need for testing to ensure that compliance with regulatory standards were being met. The Institution could have a role as a type of central body which could be useful for standards and testing. Standards vary a lot between unregulated retail stores and facilities, so having a coordinating body that ensures products are meeting quality standards could be beneficial. It could also assist with marketing by providing a seal of approval common to products tested and assured by the Institution.

First Nations leaders and community members in BC have been seeking some common ground, and less divisiveness from the regulated and unregulated market participants. There are commonalities in that both see the need for safe products in communities as an absolute priority. While Health Canada might

not provide testing services for products from the unregulated market, there could be a unique opportunity here for the Institution to provide their services to those participating in the regulated and unregulated markets. The Institution could provide this unique service to help protect First Nations communities ensuring that no matter which direction is taken in the market, safe product can be assured. The legal frameworks which might enable this would need to be more fulsomely examined in the Federal Cannabis Act review.

A SWAT or gap analysis could be helpful to provide a sense of the needs that First Nations cannabis businesses have. Once this is obtained, an analysis of existing institutions and their range of functioning could help to ensure that there are no overlaps where existing services already exist. Once these steps have been taken, the range of purposes of the Institution can be narrowed further and development can occur.

The creation of the Institution will likely be costly, so beginning it with a narrowed scope could be necessary. In order to provide a benefit to members to justify their fees, it needs to likely help solve some of the hinderances First Nations cannabis businesses and entrepreneurs are facing getting to market. There are also upcoming initiatives like the creation of a Centre of Excellence, which might occupy some of the current economic development-related gaps for First Nations in cannabis. While the FNLC could continue to advocate for the recognition of First Nations jurisdiction in all areas of cannabis. This leaves a strong role for the Institution in product testing, or providing regulatory support to First Nations cannabis businesses through eventual licensing and inspections supports.

Future Developments

Failing to consult and develop the Federal Cannabis Act with First Nations has resulted in the current need for extensive reworking of multiple legislative frameworks, and was another failed example of economic reconciliation by the Federal government. Cannabis is not the last substance that will be decriminalized and legalized by the Federal government. Lessons need to be taken from what has happened before so that history does not repeat. There have already been develops on behalf of the Federal government to proceed along this path with psilocybin⁴¹. The Federal government has recently amended the Food and Drugs Act to permit the ability to sell certain restricted drugs, such as psilocybin, in special treatment situations through the Special Access Program.

As research comes out which confirms the medicinal benefits of psilocybin, and other psychedelics, the path towards decriminalization and legalization becomes more likely. A framework should be developed for such a future development to ensure that what happened with the legalization of cannabis does not happen again. The immediacy of these developments is uncertain, but advocacy work needs to be directed towards this end so that First Nations are able to capitalize on the economic opportunities future legalization of substances might provide.

⁴¹ <https://www.gazette.gc.ca/rp-pr/p2/2022/2022-01-05/pdf/g2-15601.pdf>