Reconciliatory rhetoric and legislative genocide? The Cannabis Act as a case study in Canadian Indigenous policy

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Bachelor of Arts (Hons.), Simon Fraser University, 2015

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Thesis Submitted in Partial Fulfillment of the

Requirements for the Degree of

Doctor of Philosophy

in the

School of Criminology

Faculty of Arts and Social Sciences

SIMON FRASER UNIVERSITY

Fall 2022

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Abstract

Through archival analysis this research examines the *Cannabis Act* as a case study in the creation of the Government of Canada's Indigenous policy. After nearly a century of prohibition, the legalization of recreational cannabis was a policy reversal with the potential to significantly impact Indigenous communities in terms of economic benefits, public health, and criminal justice. Prior to cannabis legalization the federal government committed to engage with Indigenous peoples and governments, ostensibly to incorporate their perspectives into cannabis policy. However, the eventual *Cannabis Act* ignored Indigenous interests and cannabis jurisdiction was split between the federal and provincial governments. The jurisdictional exclusion of Indigenous governments was termed legislative genocide by some stakeholders and prompted multiple Indigenous nations to implement their own cannabis regulations, some of which conflict with the *Cannabis Act*. This analysis relies on purposively sampled documents to create a timeline of Indigenous-Crown consultation. The sample includes witness submissions and testimony provided to the Standing Senate Committee on Indigenous Peoples' cannabis study, reports produced by the Government of Canada and Indigenous organizations, and resolutions adopted by the Assembly of First Nations. The consultation process is examined using an analytic framework created by the Royal Commission on Aboriginal Peoples comprised of four discourse paradigms: assimilationist, citizens plus, rights based, and sovereigntist. While Indigenous participants in cannabis consultation engaged sovereigntist paradigms, government actors consistently adopted assimilationist paradigms. This suggests that despite the federal government's claims of support of Indigenous self-government and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), the federal government is not yet willing to accept Indigenous nations as sovereign. Also examined are Indigenous cannabis regulations, categorized in this analysis as Crown-compliant, hybrid, or sovereign. Rights-based arguments made by Indigenous stakeholders for jurisdictional inclusion under domestic and international law are explored, as are the responses of the federal government. The varied approaches to asserting Indigenous jurisdiction over cannabis are discussed within the context of reconciling Indigenous and Crown sovereignties.

Keywords: Cannabis Act; Indigenous cannabis laws; marijuana legalization; cannabis legalization; Indigenous sovereignty

Dedication

Dedicated to my amazing Mom who always made sure I had any and every book I ever wanted.

Acknowledgements

There are a few professors I would like to thank for helping me reach this point. I would like to thank Neil Boyd for teaching an inspiring cannabis class and for facilitating an unforgettable research opportunity. *Paris était incroyable !* I would also like to thank Sheri Fabian for her wisdom, support, and assistance with my teaching career. I extend my deepest gratitude to Ted Palys for his mentorship over the past eight years. His thoughtful and honest feedback on my work has been invaluable in helping me learn to tell a story. Finally, I would like to thank my family who spent many long days and nights waiting for me to finish studying and writing over the past ten years. To my son Hunter, thank you-for being my 24-hour tech support and computer-builder extraordinaire. Now that I have the time, you can finally teach me how to play video games.

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List of Acronyms

AANDC	Aboriginal Affairs and Northern Development Canada
ACMPR	Access to Cannabis for Medical Purposes Regulations
AFN	Assembly of First Nations
AOCC	All Ontario Chiefs Conference
APPA	Standing Senate Committee on Aboriginal Peoples/Standing Senate Committee on Indigenous Peoples
BC	British Columbia
BCAFN	British Columbia Assembly of First Nations
CCC	Chiefs Committee on Cannabis
CCLA	Cannabis Control and Licensing Act
COO	Chiefs of Ontario
DIAND	Department of Indian Affairs and Northern Development
FMA	First Nations Fiscal Management Act
FNGST	First Nations Goods and Services Tax
FNHA	First Nations Health Authority
FNLC	First Nations Leadership Council
FNLMA	First Nations Land Management Act
FNPP	First Nations Policing Program
FNTC	First Nations Tax Commission
FPIC	Free, prior, and informed consent
IBA	Indigenous Bar Association
INAC	Indigenous and Northern Affairs Canada
IPCA	Indigenous Peoples Cannabis Association
JWG	Joint Working Group on Non-Medical Cannabis Regulation and Legalization
KCCB	Kahnawà:ke Cannabis Control Board
LMG	Listuguj Mi'gmaq Government
MBQ	Mohawks of the Bay of Quinte
MCA	Mohawk Council of Akwesasne
MCK	Mohawk Council of Kahnawà:ke

MOU	Memorandum of Understanding
NICHC	National Indigenous Cannabis and Hemp Conference
NIHB	Non-Insured Health Benefits
OECD	Organisation for Economic Co-operation and Development
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
SCC	Supreme Court of Canada
TFN	Tobique First Nation
TMC	Tyendinaga Mohawk Council
TPF	Thunderbird Partnership Foundation
TRC	Truth and Reconciliation Commission of Canada
UBCIC	Union of British Columbia Indian Chiefs
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USA	United States of America
WLFN	Williams Lake First Nation

Chapter 1. **Introduction**

The Government of Canada's Indigenous policy has historically failed Indigenous peoples and one-sidedly served its own interests. The current government enthusiastically claims to have embarked on, "a reconciliation journey" with Indigenous peoples, "based on the recognition of rights, respect, and partnership" (Government of Canada, 2022b, para. 1). The question of whether the government has truly adopted these principles in its dealings with Indigenous nations--or whether these claims are simply reconciliatory rhetoric--demands exploration. This research uses cannabis legalization as a case study in the creation of the Government of Canada's Indigenous policy to determine if evidence of this new approach to Indigenous-Crown relations exists. Through archival analysis this research examines Indigenous-Crown consultation regarding cannabis legalization, the implications of the resultant policy, and what this means when assessing claims that Indigenous and Canadian governments are now true partners. This research endeavors to establish if the Government of Canada has lived up to its proclamations of commitment to reconciliation.

Cannabis legalization was announced as part of the campaign platform of Justin Trudeau's Liberal party prior to his election as Prime Minister in 2015 (Elliott, 2015). The federal government provided the public with three reasons for this policy reversal: to limit cannabis accessibility to youth, to protect public health and safety, and to dismantle Canada's illicit cannabis market (Task Force on Marijuana Legalization and Regulation, 2016). However, some scholars question why the federal government has promoted these policy objectives as priorities rather than acknowledging and addressing the harms associated with its war on drugs (Kaiser, 2016; Owusu-Bempah & Luscombe, 2021). Kaiser notes,

> At what might be the end of more than a century of an aggressive, although futile, war on drugs, Canada is poised to make some wise and humane policy decisions. The battlefield is still littered with the damaged reputations and interrupted lives of thousands of harmless users and petty traffickers of marijuana, while the higher echelons of the trade have prospered. The cloud of criminalization still lingers over any debate on legalization, but there is, at last, an opportunity to undo some of the damage that Canada has inflicted upon itself. (Kaiser, 2016, p. 15)

It is argued that Canadian drug policy was initially a product of racism (Boudreau & Hamill, 2021; Ruston, 2021). Owusu-Bempah and Luscombe (2021) note, “Canada’s early anti-drug laws have always been firmly rooted in racialized discourses about the ‘other’” (p. 2). Solomon and Green (2005) argue Canada’s first criminal drug law of 1908, “reinforced alarmist views of drug use and users” (p. 351). They describe,

> Parliament and the public were presented with stereotypical drug villains, who were primarily non-Christian, non-white, and who more than deserved the progressively harsher laws that were passed. The federal police and government drug bureaucracies, which were established in the early 1920s, aligned themselves with the moral reformers and anti-Asiatic forces in calling for stricter laws. In a series of near-annual amendments, Canada’s drug statute was transformed into one of the country’s most stringent pieces of criminal legislation. (Solomon & Green, 2005, p. 351)

In 1923 Canada became one of the world’s first nations to criminalize cannabis use when it added cannabis to the schedule of prohibited narcotics. This was a puzzling inclusion because cannabis use was extremely rare in Canada at that time. There were no seizures of cannabis in Canada until 1937 (Carstairs, 2004) and no cannabis arrests until 1947—more than 20 years after cannabis had been criminalized (Owusu-Bempah & Luscombe, 2021). This has led some to term cannabis prohibition as ‘a solution without a problem’ (Erickson & Hyshka, 2010; Owusu-Bempah & Luscombe, 2021). While research has failed to identify the specific driver behind cannabis criminalization the drug discourse of the era likely contributed. Ruston notes,

> The contemporary links between addiction, drug use, and racism likely transformed any prohibitive drug control measures into the kind of policy that did not require debate or analysis on the part of Parliament. Drugs and racial minorities were presented as connected threats to the integrity of the white Canadian population and to moral order, and moral reformers capitalized on this connection to support the criminalization of drugs. While the documentary source of the criminalization of cannabis remains unknown, these discursive conditions are of far greater importance in understanding why cannabis was criminalized. (Ruston, 2021, p. 458)

There is some evidence of this in the historical record. In 1921 Canadian judge, and ‘Famous Five’ suffragist Emily Murphy was among the first authors in Canada to publish a critique of cannabis use in her book *Black Candle* (which was a bestseller) (Erickson & Hyshka, 2010; Haines-Saah et al., 2014). The book warned of the danger cannabis-using immigrants and other non-white people posed to white middle-class women and girls (Murphy, 1921). Murphy (1921) claimed the ‘new curse’ (cannabis) was

a threat to the moral fabric of Canadian settler society itself. Within two years of the publication of Murphy's book, cannabis was criminalized. This lends some support to Ruston's hypothesis.

Canada's 'solution without a problem' cannabis policy has been challenged with questions of its efficacy since that time. Between 1969-1973 the Commission of Inquiry into the Non-medical Use of Drugs (1973) (the Le Dain Commission) was tasked with researching illicit drug use and was instructed to offer policy recommendations based on its findings. Hearings were held across Canada and extensive scientific data were gathered in relation to drug use. The Inquiry published four reports between 1970-1973. The *Final Report of the Commission of Inquiry into the Non-medical Use of Drugs* recommended the gradual cessation of the use criminal law for non-medical drug offences and proposed repealing the offence of cannabis possession. The release of the reports created a great deal of controversy and debate. Mullen (1972) noted, "law enforcement agencies (especially the Royal Canadian Mounted Police) and certain politicians of long standing are vehemently opposed to a more liberal or permissive outlook on the Cannabis problem" (p. 556). The Centre for Addiction and Mental Health describes the government's response to the Le Dain Commission's recommendations.

> After its release in 1970, the Minister of Health, John Munro, announced that the government intended to move cannabis laws from the *Narcotic Control Act* to the *Food and Drugs Act*, in keeping with the interim recommendation. This proposal took concrete form in 1974, with the introduction of Bill S-19, which also would have reduced fines and eliminated imprisonment for simple possession of cannabis, in line with the Commission's advice. The bill died on the order paper of Parliament in 1976, the apparent victim of disagreement among Liberal politicians about the political ramifications of such a law. (Centre for Addiction and Mental Health, 1995, paras. 8-9)

Despite the Le Dain Commission's findings, cannabis remained criminalized for several more decades.

During the past century of cannabis prohibition in Canada questions of racial discrimination related to drug policy enforcement have persisted. Many researchers argue that people of colour and Indigenous peoples continued to be disproportionately targeted under prohibitionist policies. Owusu-Bempah and Luscombe (2021) lament, "Unfortunately, due largely to the inaccessibility of racially-disaggregated criminal justice data in the Canadian context, Canadian academics have been unable to empirically

assess whether and to what extent cannabis arrests are racialized across the country" (p. 1). While Canadian statistics related to race and cannabis arrests are scant, an article written by Browne (2018) for *VICE News* utilized data obtained through freedom of information requests fulfilled by six Canadian police services. The data were analysed by criminologists from the University of Toronto and the results indicated that Indigenous peoples made up a greater proportion of cannabis arrests relative to their population proportions than white people in all six responding jurisdictions--despite research which indicates similar rates of cannabis use between these groups (Browne, 2018). Indigenous peoples were found to be overrepresented in cannabis arrests in Regina in the two years preceding cannabis legalization and accounted for 41% of cannabis possession charges (a rate seven times that of white people) (Browne, 2018). Indigenous peoples were also overrepresented in cannabis arrests to lesser extents in Vancouver, Ottawa, Edmonton, and Calgary (Browne, 2018). A recent study by Owusu-Bempah and Luscombe (2021) employed a similar methodology and obtained cannabis arrest data through freedom of information requests fulfilled by Canadian police services across five provinces. They note,

> We found that Black Canadian and Indigenous people are more likely to be arrested for cannabis possession than White people…For Indigenous people, the starkest disparities were in Vancouver and Regina. Indigenous people in Vancouver were 6.3 times more likely to be arrested for cannabis possession than would be predicted by their representation in the general population. (Owusu-Bempah & Luscombe, 2021, p. 5).

Adinoff and Reiman (2019) also report the social costs of cannabis prohibition, "have fallen most heavily upon disadvantaged minority populations" (p. 673). They argue the history of economic, individual, and societal disadvantages faced by marginalized individuals due to cannabis prohibition should be redressed by governments post-legalization through facilitating diversity in emerging licit cannabis regimes (Adinoff & Reiman, 2019). However, diversity in Canada's federally sanctioned cannabis industry has yet to materialize: an analysis published in the *Montreal Gazette* found that Canada's top five cannabis corporations were predominantly white, and people of colour only accounted for 3% of management staff (Solyom, 2018). Due to the belief that marginalized individuals have faced harsher penalties under cannabis prohibition it has been suggested that cannabis legalization should be utilized to make reparations at both individual and structural levels (Valleriani et al., 2018). Cannabis legalization was

therefore an opportunity for the Government of Canada to affirm its commitments to Indigenous peoples regarding advancing reconciliation.

Prior to cannabis legalization the federal government committed to engaging with Canadians and Indigenous governments and representative organizations to design the new legislative and regulatory framework for cannabis (Task Force on Marijuana Legalization and Regulation, 2016). For some, this raised expectations of opportunities for Indigenous involvement in the industry. The potential to generate revenue through cannabis markets is significant. According to a report published by Allied Market Research (2022) the global cannabis market generated $25.7 billion USD in 2021 and is projected to reach $148.9 billion by 2031. Cannabis data company BDSA reported a similar assessment for 2021 estimating the global cannabis market to be worth $30 billion (DeAngelo, 2022). In Canada, the licit recreational cannabis market reported sales of $908 million in the first year following legalization (while it was notably still in its infancy) (Statistics Canada, 2019), and medical cannabis sales for 2019 totalled an additional $618 million (Lamers, 2021). Around the same period Sen and Wyonch (2018) estimated that Canada's illicit cannabis market was valued at a minimum of $2.5 billion. Given the potential for economic benefit, the opportunity to participate in the licit market was of interest to many people in Canada, including Indigenous peoples.

The announcement of the specific inclusion of Indigenous governments within planned cannabis policy consultation was not particularly surprising given Trudeau's professed commitment to work with Indigenous peoples and governments. Shortly after his election, Trudeau spoke to hundreds of Chiefs and First Nations delegates at the Assembly of First Nations' (AFN) annual meeting and announced, "It's time for a renewed nation-to-nation relationship with First Nations peoples, one that understands that the constitutionally guaranteed rights of First Nations in Canada are not an inconvenience but rather a sacred obligation" (as cited in Mas, 2015, para. 2). The *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* provide a similar commitment in the following declaration: "The Government of Canada (2018) is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change" (p. 3).

Despite the federal government's expressed interest in advancing new nation-to-nation relationships with Indigenous nations, the 2018 *Cannabis Act* divided control over cannabis production, licensing, and distribution between the federal, provincial/territorial, and municipal governments. The partnership principle reportedly guiding Indigenous-Crown nation-to-nation relationships was conspicuously absent and Indigenous engagement in the licit cannabis market was only allowed under federal and provincial control. First Nations governments faced jurisdictional exclusion in their own territories and the cannabis excise tax was split between federal (25%) and provincial/territorial (75%) governments (Government of Canada, 2017). The exclusion of Indigenous jurisdiction—and by extension their exclusion from potential economic benefits--was considered a violation of Aboriginal and Indigenous rights by many stakeholders. In the context of Canada's, "promise that Indigenous nations will become partners in Confederation" (Government of Canada, 2018, p. 3), some have suggested the *Cannabis Act* was a missed opportunity. Meaningful consultation in relation to Indigenous interests and concerns regarding cannabis legalization should have worked towards advancing nation-to-nation relationships, redressing past harms, and achieving reconciliation (Crosby, 2019; Donovan, 2019; Valleriani et al., 2018).

This research first examines the engagement process employed by the federal government in relation to Indigenous interests in cannabis legalization in the context of well-established domestic and international criteria for meaningful consultation. Next, I examine the public policy discussions engaged in by Indigenous organizations and governments in relation to cannabis legalization and jurisdiction. Of note is the refusal of many Indigenous governments to recognize federal and provincial jurisdiction over cannabis production, distribution, taxation, licensing, and sale in their territories as exercised through the creation of Indigenous cannabis regulations. Key issues and rights-based arguments raised by Indigenous peoples, organizations, and governments are examined through archival analysis. Data include resolutions adopted by the AFN, submissions to the Standing Senate Committee on Indigenous Peoples (APPA) regarding cannabis legalization, reports and documents produced by Indigenous organizations and the federal government, and cannabis regulations created by First Nations governments. This research seeks to identify what these discussions reveal about the current relationship between Indigenous governments and the Crown. Using the analytic framework provided in the Royal Commission on Aboriginal Peoples'

(RCAP) *Overview of Major Trends in Public Policy Relating to Aboriginal Peoples: Soliloquy and Dialogue*, by Graham et al. (1996) elements of cannabis policy consultation are discussed, and the new nation-to-nation Indigenous-Crown relationship is assessed.

Chapter 2. **Literature Review**

2.1. The Government of Canada's Indigenous Policy

2.1.1. A Historical Review

Graham et al. (1996) identify three types of Indigenous policy: federal and provincial policy about Indigenous-specific issues, policy areas of central interest to Indigenous peoples where Indigenous representation and issues lie on the margins, and policy areas that will impact Indigenous peoples. They suggest that since the 1960s a movement has emerged to dissolve the three types of policy outlined and, "Institute a system in which Aboriginal people and their representatives are involved as Aboriginal people (rather than as individual citizens) in all policy discussions that affect their collective interests" (Graham et al., 1996, p. 39). This chapter discusses the Government of Canada's Indigenous policy through examining the events and motivations that shaped policy discussions, noting who was involved, how discussions occurred, and what was said about Indigenous issues during seminal events in Canadian history. The analytic framework in Graham et al.'s (1996) research on policy related to Indigenous affairs suggests policy discussions can be characterized as soliloquy or dialogue. Soliloquy includes examples of policy discussions where discussants are largely talking to themselves, while the achievement of dialogue relies on three preconditions:

> Commensurate participation by all those affected by decisions; establishment of a process for sustained discussion that recognizes different starting points and preferences in style of communication and that focuses on problem solving; and evolution toward a common vision of what is to be discussed, based on frank exchanges. More frequent achievement of these conditions speaks to the fundamental nature of the power relationship between Aboriginal peoples and their representatives and Canadian governments, the importance of getting the arrangements and institutions of Aboriginal/Canada policy discussions right, and the need to confront and explore different meanings for concepts used in policy discussions and to recognize the paradigms that underlie policy proposals. (Graham et al., 1996, p. xiii)

They note adequate engagement has rarely been achieved in Canadian public life; the challenge that needs to be met to improve policy development is replacing soliloquy with dialogue (Graham et al., 1996). The achievement of dialogue not only requires Indigenous participation in discussions in matters pertaining to them, but also requires

the assurance that their views are given consideration before policy decisions are made. Major advances and failures in Indigenous policy and consultation will be discussed.

Graham et al. (1996) identify four paradigms that encapsulate Indigenous-Crown policy discussions. The first is assimilationist which sees Indigenous peoples assuming the same rights as non-Indigenous Canadian citizens. While assimilation is rarely made explicit in the language used in policy discourse, the, “objective may be inherent in the nature of policy proposals” (Graham et al., 1996, p. 339). The second paradigm is citizens plus, which recognizes Indigenous peoples have the rights of Canadian citizens as well as additional rights and special legal status. The concept of citizens plus was first advanced in the Hawthorne Report which noted this special status was derived from, “promises made to them, from expectations they were encouraged to hold, and from the simple fact that they once occupied and used a country to which others came to gain enormous wealth in which the Indians have shared little” (Cairns et al., 1966, p. 6). The citizens plus paradigm also includes recognition of status Indians as provincial citizens who are entitled to provincial services (Graham et al., 1996). The third is a rights-based approach that recognizes treaty rights as well as status and entitlements for all First Peoples. These rights are inherent to Indigeneity and can be derived from various sources including the Creator, treaties, and international law. A rights-based paradigm provides a greater degree of Indigenous self-determination (but remains subject to Canada’s constraints). The final paradigm is sovereigntist, which acknowledges Indigenous rights derived from pre-existing nationhood--rather than from within the Canadian federation—encapsulating the spirit of true nation-to-nation relationships. Government discourse has evolved over time from assimilationist to citizens-plus and has more recently professed to have moved to a rights-based paradigm, while Indigenous groups have consistently rooted themselves in rights-based and sovereigntist paradigms.

Before the arrival of European settlers, Indigenous nations were sovereign and had their own distinct legal traditions. Venne (2000) notes, “In Canada, Indigenous nations have their own legal systems and their own political accords for entering into and concluding treaties” (p. 8). The earliest nation-to-nation treaty between Indigenous nations on record is the Great Law of Peace, which, “is at least 500 years old (and possibly much older)” (Bedford & Workman, 1997, p. 87). Norse voyages and settlement of the Arctic lasted until the 1340s and Europeans began arriving in increasing numbers

beginning in the late 1400s (RCAP, 1996). Their relationship with the Indigenous inhabitants was one characterized by diplomacy and co-operation as the two groups made economic and military alliances to further their mutual interests (Indigenous and Northern Affairs Canada [INAC], 2010). By the 18th century Peace and Friendship treaties were established with European settlers and Indigenous nations shared their land but retained their rights to govern themselves and pursue their economic interests without interference (Monchalin, 2016). Fisher (2014) details the evolution of Indigenous-Crown relationships in British Columbia (BC) since contact and notes a clear distinction between the fur trade era (contact) and the later settlement era (conflict), explaining that early European contact, “was not an unmitigated disaster” for Indigenous peoples (p. xi). Fisher (2014) argues notions of the ‘ruthless exploitation’ of Indigenous peoples during early contact are inaccurate as the era was marked by considerable interdependence and exchanges of mutual benefit.

In 1763 following England’s victory over France in the Seven Years War, King George III issued the *Royal Proclamation* claiming North America as a British territory and reserving a vast portion of the interior for the exclusive use of Indigenous peoples. The proclamation was the first public recognition of Indigenous rights to land and title (INAC, 2010; Monchalin, 2016). Despite later colonial interpretations that conceive the *Royal Proclamation* as a unilateral declaration made by the Crown—indicating political subservience and dependence on behalf of Indigenous governments—Borrows (2002) maintains that the historical context under which the document was introduced proves otherwise. While some First Nations had allied with the French, there is evidence at least one colonial official indicated Indigenous peoples considered themselves sovereign following the war (Borrows, 2002). Borrows (2002) explains the *Royal Proclamation* must also be considered alongside the events at Niagara the following year to correctly interpret the foundations of Indigenous-Crown relationships. The *Treaty of Niagara* (1764) included oral declarations and the exchange of a, “two-row wampum belt [which] illustrates a First Nation/Crown relationship that is founded on peace, friendship, and respect where each nation will not interfere with the internal affairs of the other” (Borrows, 2002, p. 64). Borrows (2002) notes Ojibway Chief Minavavana declared at the time, “Englishmen, though you have conquered the French, you have not yet conquered us” (p. 157).

While still benefitting from the support of their Indigenous allies during the War of 1812, once it had ended and the Crown had no further use for those allies, their nation-to-nation relationships began to change. Successive waves of European immigrants brought diseases that Indigenous peoples had no immunity to, and Indigenous populations were decimated. These factors led to what Monchalin (2016) calls an organized takeover through a conspiracy of legislation: treaty promises were reinterpreted less favourably for Indigenous interests and, “the procurement of Indigenous land and the displacement of Indigenous peoples became policy drivers” (p. 90). As settlement continued across Canada Indigenous peoples in Québec and the Maritimes were dispossessed of their land without treaties or compensation. The treaty making process begun by James Douglas in BC between 1850-1854 establishing Indian reserves was halted, existing reserve lands were reduced in size, and the province refused thereafter to acknowledge Aboriginal title (Borrows, 2017; Monchalin, 2016).

The *British North America Act* (1867) gave the federal government exclusive authority over, “Indians and Land reserved for Indians,” and the exercise of this control could hardly be characterized as benevolent. Legislation including the *Act to Encourage the Gradual Civilization of the Indian Tribes in the Canadas* (1857), and *An Act for the Gradual Enfranchisement of Indians* (1869) were combined, culminating in the eventual *Indian Act* (1876). Canada’s obligations to Indigenous peoples were redefined as the ‘Indian problem’ which policy makers sought to solve through assimilation. Although completely self-serving by undermining Indigenous governance and authority, government policies related to Indigenous interests became infused with paternalism. ‘Indian laws and policy’ were imposed on Indigenous peoples ‘for their own good’ with neither consent nor concern for their interests, which had devastating effects on Indigenous families, communities, independence, and culture. The first *Indian Act* of 1876 not only limited political organization and forbade traditional governance but also enabled human rights violations responsible for generations of trauma (AFN, 2018).

The policy objectives pertaining to Indigenous interests following confederation are abundantly clear: the assimilation of Indigenous peoples into the state to facilitate exploitation of land and resources. Graham et al. (1996) argue the *Indian Act*, “reflected a circumscribed and control-centred definition of the federal relationship with Indian people” in which, “federal responsibilities were not recognized as emanating from treaties, except within the framework of the act” (p. 4). Cairns notes:

> The discourse of assimilation enjoyed a long hegemony largely because those who were opposed to it—especially the status Indian population—were silenced by their marginalization and by official policy. There was a potential debate throughout the assimilation era, but it was not joined. The majority society did not hear the other side. (Cairns, 1991, p. 5)

Palmater (2014) suggests, “Although historians often describe government policies of the day as well-intended assimilatory policies, the reality presents a much darker picture” (p. 28). Palmater (2014) argues that the methods employed under Canadian policy to seize control of land and reduce the population of status Indians—including scalping, residential schools, and the forced sterilization of Indigenous women—are best described as elimination tactics. The Truth and Reconciliation Commission of Canada (TRC) makes a similar argument:

> For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide.” (TRC, 2015, p. 1)

Reflecting on the transformation of Indigenous-Crown relationships from allies to subservience, Fisher (2014) suggests, “the process of establishing white domination was complete by the end of the 1880s” (p. xi).

2.1.2. Re-evaluating The Government of Canada’s Indigenous Policy and Addressing the ‘Indian Problem’

It was not until the 1950s that Indigenous policy objectives and practices came under scrutiny by non-Indigenous Canadians. Graham et al. (1996) point to two international developments that influenced how the perception of Indigenous policy began to change in Canada in the 1950s and 1960s: the post-war anti-colonial movement and the rise of the civil rights movement in the United States of America (USA). The Canadian government was under pressure from multiple sources demanding that something be done to address the ‘Indian problem.’ Senior officials in the Indian Affairs Branch (at that time a part of the Department of Citizenship and Immigration) were also reportedly frustrated with the failures of department programs and the fallout from their assimilationist policies (Weaver, 1993). In 1963 the government commissioned H.B. Hawthorn's *Survey of the Contemporary Indians of Canada* (the

Hawthorn report) to better understand the reality of Canada's Indigenous peoples. Hawthorn's associate director, Marc-Adelard Tremblay noted:

> There were pressing demands on the part of the indigenous communities to have sizable increases in their share of the "national income" and...there were rising conflicts in the federal-provincial relations concerning their respective jurisdictions in the fields of health and welfare, education and economic development. It was at a time, too, when many Indian leaders expressed their concern over the fact that despite growing capacity for self-government Indian communities were submitted to greater bureaucratic, administrative and economic controls. There were also, on the part of many whites, a growing fear that the "economic burden" of the indigenous communities was to become intolerable on the part of the white taxpayer. (Tremblay as cited in Weaver, 1993, p. 76)

Hawthorn assembled a team of 52 social scientists, many of whom were anthropologists assigned to reserves to oversee specific studies (Weaver, 1993). Data were gathered through a Research Questionnaire sent to all agencies, firsthand observation, and interviews (Cairns et al., 1966). Policy discussions between Hawthorn's team and senior officials from the Indian Branch began before the research was complete. Officials, who were, "eager, even over anxious for the findings at the outset, provided full access to files and personnel and easy and informal exchange of views, which led to the mutual shaping of many recommendations," some of which were implemented before the report was published in two parts in 1966 and 1967 (Weaver, 1993, p. 78). The Hawthorn Report outlined massive inequalities related to health, economic well-being, and education between Indigenous and non-Indigenous Canadians and concluded Indigenous peoples were Canada's most marginalized and disadvantaged group. The report warned, "Today there is the growing danger that a majority of Indians together with a small minority of Whites may become a more-or-less permanently isolated, displaced, unemployed or under-employed and dependent group who can find no useful or meaningful role in an increasingly complex urban industrial economy" (Cairns et al., 1966, p. 21).

The Hawthorn Report did not advocate for the assimilationist policies of the past to solve these problems, but instead advocated for 'citizens plus' status for Indigenous peoples in response to its findings. The report argued, "in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community" (Cairns et al., 1966, p. 6). The report suggested that if the government confused legal equality with socio-economic equality, it would create

disastrous consequences for Indigenous peoples. While The Hawthorn Report advocated for Indigenous peoples making their own choices, the authors of the report were non-Indigenous and policy discussions emerging from it were limited to policy makers and researchers (Graham et al., 1996). Graham et al. (1996) describe Indigenous peoples as *objects* of policy discourse at this time and note, “policy makers were engaged in what was in effect a soliloquy or monologue” (p. 48).

In response to the Hawthorn Report newly elected Prime Minister Pierre Elliott Trudeau set out to amend the *Indian Act*, which appeared aligned with his campaign platform to build a ‘just society’ through participatory democracy. Trudeau’s Department of Indian Affairs and Northern Development (DIAND) released *Choosing a Path: A Discussion Handbook for the Indian People* and sent copies to Bands across Canada (DIAND, 1968). The handbook indicated it was designed to facilitate the consultation process: “It explains some of the questions which must be resolved in preparing a new Act and it is intended to help individual Indians, families and communities to define their views” (DIAND, 1968, p. i). Each Band was required to choose a member to gather community responses and meet with representatives in Ottawa. The handbook included 34 questions: some related to Indian status, the particulars of Band governance, taxation, property ownership, and education. It appeared the government was serious about amending the *Indian Act* and that Indigenous peoples would be a part of that process: participants in democracy with the goal of a just society.

A year later Trudeau and the Minister of DIAND (Jean Chretien) released *The Statement of the Government of Canada on Indian Policy, 1969* (the White Paper). The White Paper was not aligned with the concept of citizens plus nor continuing recognition of Aboriginal rights and instead suggested freedom for Indigenous peoples could only be achieved through equal citizenship and identical rights to other Canadians (rather ironically, exactly what The Hawthorn Report argued against). The White Paper proposed to do this by eliminating the *Indian Act*, dissolving the DIAND, getting rid of Indian status, and eliminating existing treaties. Ownership of reserve land would be transferred to individuals and federal jurisdiction would be transferred to the provinces. The disconnect between what Indigenous peoples contributed to consultation and the contents of the White Paper was not well received. Assimilation under the guise of equality was no more palatable to most Indigenous peoples than the elimination policies of the past. Cree leader and Indigenous rights activist Harold Cardinal’s scathing

response to the White Paper was published in his bestselling book *The Unjust Society* that same year in which he challenged Trudeau and Chretien, “to reexamine their unfortunate policy, to offer the Indians of Canada hope instead of despair, freedom instead of frustration, life in the Just society instead of cultural annihilation” (Cardinal, 1969, p. 2). Cardinal co-authored a second rebuttal with the Indian Chiefs of Alberta titled *Citizens Plus* (the Red Paper) that was released the following year:

> In his White Paper, the Minister said, “This review was a response to things said by Indian people at the consultation meetings which began a year ago and culminated in a meeting in Ottawa in April.” Yet, what Indians asked for land ownership that would result in Provincial taxation of our reserves? What Indians asked that the Canadian Constitution be changed to remove any reference to Indians or Indian lands? What Indians asked that Treaties be brought to an end? What group of Indians asked that aboriginal rights not be recognized? What group of Indians asked for a Commissioner whose purview would exclude half of the Indian population in Canada? The answer is no Treaty Indians asked for any of these things and yet through his concept of “consultation,” the Minister said that his White Paper was in response to things said by Indians. (Indian Chiefs of Alberta, 1970/2011, p. 190)

The Canadian government was again proposing assimilation, leading to overwhelming dissatisfaction with the flawed consultation process (Graham et al., 1996, p. xii). The White Paper faced resounding criticism and was scrapped. Sally Weaver‘s (1981) book about the White Paper’s creation--*Making Canadian Indian Policy: The Hidden Agenda 1968-1970*--noted most of the controversy was due to the secretive nature of its creation:

> Despite government commitment to Indians that they would participate in the process, the production of the White Paper had many earmarks of political deception. For its critics, the policy was, at best, a perversion of ‘consultative democracy’ and, at worst, a case of duplicity. (Weaver, 1981, p. 3)

The White Paper conflict and the disastrous implications for Indigenous-Crown relations led to the requirement that governments make their intentions clear in consultations with Indigenous peoples, and Indigenous groups demanded, “a more iterative process, not bound so heavily by rigid time lines” (Graham et al., 1996, p. 31). The White Paper prompted Indigenous groups to start collectively organizing on a scale that had not been seen--particularly in the North--where the Indian Brotherhood of the Northwest Territories began challenging federal and territorial jurisdiction (Roburn, 2018).

By the 1970s it became clear that the Canadian government needed to implement more effective processes to consult with Indigenous peoples regarding policy creation. The government introduced commissions of inquiry and royal commissions when considering decisions that may impact Indigenous peoples and communities (Graham et al., 1996). A noteworthy inquiry was commissioned in 1974 when DIAND Minister Jean Chretien asked Thomas Berger to lead consultations related to a proposed natural gas pipeline in the Mackenzie Valley (the Mackenzie Valley Pipeline Inquiry, or the Berger Inquiry) (Berger, 1988).The Berger (1988) Inquiry met with scientific experts and residents of the Mackenzie Valley and Western Artic—including First Nations, Inuit, Métis and non-Indigenous residents—to collect testimony from over 1000 people related to possible impacts on the environment, economy, and Indigenous communities. Many of the areas in question were the subject of ongoing land claims, and there was uncertainty regarding their outcomes.

The Berger Inquiry held 35 community hearings across the Northwest Territories and the Yukon, and an additional ten hearings in the Southern Canadian cities. Berger (1988) was not bound by rigid timelines that had raised ire during the White Paper debacle and consultations lasted three years. An important aspect of the Berger Commission was the array of Indigenous perspectives that were included in discussions, including hunters, fishers, gatherers, Elders, and women from across the Mackenzie Valley and elsewhere. Graham et al. (1996) note that the oral evidence submitted at public hearings had, “significant influence on the written legacy that informed subsequent policy discussions and decisions” (p. 6). Berger (1988) also gathered evidence outside of official proceedings, visiting archaeological sites of spiritual importance, observing food gathering, witnessing ceremonies, and making special visits to Elders who were unable to attend community hearings. Roburn (2018) states Berger managed the consultative process in a way that aligned with the egalitarian and community-based decision making inherent in Indigenous governance.

Berger also was able to leverage his position to secure $500,000 in funding so the hearings could be broadcast by the *CBC* in six Indigenous languages and made the pursuit of additional press coverage a priority of his staff (Roburn, 2018). Ultimately, this, “extended the reach and power of Indigenous knowledge and Indigenous protocols” (Roburn, 2018, p. 171). Berger’s inquiry set the standard for Indigenous-Crown

consultation, and he was revered by many Indigenous leaders for his integrity and vision. Berger (1988) ultimately recommended:

> There should be no pipeline across the Northern Yukon. It would entail irreparable environmental losses of national and international importance. And a Mackenzie Valley pipeline should be postponed for ten years. If it were built now, it would bring limited economic benefits, its social impact would be devastating, and it would frustrate the goals of native claims. Postponement will allow sufficient time for native claims to be settled and for latest programs and new institutions to be established. (Berger, 1988, p. 29)

Because Berger was forbidden from recommending against the pipeline under the original terms of the Inquiry, Berger needed to, “strike a balance between pipeline construction and the protection of the environment and aboriginal rights” (Indigenous Foundations, 2009, para. 15). However, the consultation process showed there was little Indigenous support for economic expansion and resource extraction in the North at that time.

Graham et al. (1986) note Indigenous peoples were, “Aware of how few opportunities there were for even once-removed consultation with government about rights and grievances” and government-sponsored inquiries beginning in the 1970s were unprecedented in giving Indigenous voices a platform in policy discussions (p. 80). While public hearings were informal in nature, “they also entrenched the requirement of consultation with Aboriginal people by governments and their agents” (Graham et al., 1996, p. 322). Despite a very promising start to dialogue during the Berger Inquiry that included the preconditions for dialogue of (1) the commensurate participation of those affected by development in the North; and (2) an adequate process for discussions that Indigenous peoples were willing to engage in, it did not meet the criteria for achieving dialogue because there was no evolution to a common vision: Canada and the USA signed a deal to build the pipeline, which was not aligned with the various Indigenous viewpoints presented during the Inquiry (Graham et al., 1996, p. 348). Ultimately, however, the pipeline was never built.

2.1.3. Increasing Involvement of Indigenous Peoples in Policy Discussions

In the 1980s Indigenous voices became more prominent in Indigenous policy discussions with the Crown. Graham et al. (1996) attribute the increased involvement of Indigenous peoples in these discussions to three factors: intense constitutional debates regarding Aboriginal rights; the creation of national Indigenous organizations; and the more extensive engagement of provincial governments beyond their jurisdictions. Other factors also played a role, such as Indigenous environmental activism in BC that increasingly involved the courts (Ceric, 2020), increasing numbers of Indigenous peoples engaging in post-secondary education with the will and skill to engage in policy discussions (MacIvor, 2012), and the establishment of the Working Group on Indigenous Populations at the United Nations (UN) (2022). During this period, “successive court decisions related to lands and title and to Aboriginal rights more generally made it evident to provincial governments that they could not ignore fundamental issues of lands, resources and governance” (Graham et al., 1996, p. xii). In the period between 1980-1990 the number of Indigenous participants engaged in policy discussions expanded rapidly to include non-status First Nations, Inuit, and Métis, who were eager to evolve the concept of citizens plus to a rights-based discourse inclusive of non-status actors (Graham et al., 1996). During this period the government was inching from the assimilationist paradigms of the past and sometimes adopting a citizens plus paradigm in policy discussions that acknowledged Aboriginal rights (Graham et al., 1996).

As Indigenous peoples struggled for sovereignty, so did non-Indigenous Canadians as Canada sought to patriate its constitution. In 1980 Pierre Trudeau announced plans for patriation and included plans for a companion Charter of Rights; this created a crisis for Indigenous peoples who realized proposals did not include recognition of Aboriginal rights (Smith, 2005). Intense lobbying by national First Nations, Métis, and Inuit organizations created enough momentum to convince the government to reconsider (Smith, 2005). One of the leaders of this protest was Chief George Manuel, the head of the Union of BC Indian Chiefs (UBCIC). Manuel chartered two trains from Vancouver to Ottawa—the Constitution Express--ultimately carrying over 1000 passengers protesting in solidarity for recognition of Aboriginal rights in the Constitution and receiving considerable media attention while doing so (Manuel & Derrickson, 2015). Manuel went on to visit, “Australia, New Zealand, Sámi Land and Africa, to talk about the

rights of Indigenous peoples," and Indigenous groups began looking to international forums for support (discussed in more detail in the next section) (Venne, 2011, p. 563). Multiple grassroots movements inclusive of diverse Indigenous groups demanded their rights be recognized:

> The national Indian, Métis and Inuit organizations in Canada had energetically pressured the Joint Parliamentary Committee to amend the proposed resolution to entrench aboriginal and treaty rights. In a dramatic reversal of policy, the federal government agreed in late January to a number of important changes which, at least partially, met the requests of the native organizations. Section 25 of the proposed resolution, dealing with "un-declared rights," was amended to state that the provisions of the charter could not violate the rights of aboriginal peoples. Section 34 of the resolution was amended to entrench aboriginal and treaty rights. Finally, section 37 obligated the federal and provincial governments to future constitutional meetings with aboriginal leaders on all of the other outstanding issues. The Joint Parliamentary Committee unanimously approved the amendments on 30 January. (Romanow et al., 1984, pp. 121-122)

While the inclusion of Indigenous leaders in constitutional discussions was described as, an unprecedented, "degree of access for Indigenous peoples to the pinnacle of Canada's mechanisms of intergovernmental relations" the momentum was short-lived (Peach, 2011, p. 5). Despite greater involvement in policy discussions, Indigenous peoples and the government were still failing to arrive at a common vision.

2.1.4. The Royal Commission on Aboriginal Peoples

It was not until the late 1980s and early 1990s that a rights-based paradigm occasionally emerged from government actors in policy discussions, although Graham et al. (1996) suggest the government still favoured a citizens plus approach. In 1990 the Kanehsatà:ke Resistance (Oka Crisis) brought discussion related to Indigenous rights back to the attention of non-Indigenous Canadians. Plans to expand a golf course further into the traditional territory of the Mohawks of Kanehsatà:ke resulted in a blockade and armed stand-off between the Mohawks and the Sûreté du Québec and the Canadian army (Peach, 2011). As the events unfolded, non-Indigenous Canadians were presented with a televised and shocking depiction of colonialism and Indigenous resistance, all regarding the expansion of a golf course. This led to the development of the RCAP to address rising public concern about the crisis.

The RCAP was established in 1991 as a means for Canadians to develop a deeper understanding of Indigenous issues including, “the legacy of residential schools, the high incidence of suicide, urban and rural poverty, and racism” (Graham et al, 1996, p. 2). In addition to hearings, consultations, research, and initiatives, a further goal of RCAP was to revise the process of policy making in relation to Indigenous interests (Graham et al., 1996). RCAP’s commissioners noted:

> We held 178 days of public hearings, visited 96 communities, consulted dozens of experts, commissioned scores of research studies, reviewed numerous past inquiries and reports. Our central conclusion can be summarized simply: The main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong. (Government of Canada, 2010, para. 11)

The final report was published in five volumes five years later and included hundreds of recommendations designed to restructure the relationship between Indigenous and non-Indigenous peoples and governments. Among them, RCAP suggested drafting a new *Royal Proclamation* aligned with a fresh set of ethical principles to guide Indigenous-Crown relationships. The new principles would respect Indigenous cultures and values, acknowledge Indigenous nationhood, and reaffirm the inherent right to self-determination.

The scope of RCAP’s report far exceeded the Hawthorn Report, but its release was largely ignored by the government. In an interview with *CBC News* former National Chief of the AFN Ovide Mecredi described the government’s actions during the period following the conflict: “The Liberals did respond—half-heartedly—and their response is totally meaningless. And so they came up with a document they called *Gathering Strength* [Volume 3 of RCAP’s Report]. Our people called it gathering dust” (CBC, 2000, 12:34). Mecredi’s despondence was not related to the contents of the report, but rather the federal government’s lack of response to the recommendations. Reflecting on the same period following the release of RCAP’s report Borrows (2001) notes, “In some respects the colonial relationship is less oppressive and coercive than it has been in the past. Most Aboriginal peoples are no longer subjected to explicit policies of forced assimilation that attempt to completely eradicate their societies and cultures,” (pp. 618-619). However, Borrows (2001) maintained this did not resolve ongoing Indigenous issues. Though the period following RCAP saw some increased recognition of Indigenous rights, the government had the ability to infringe, modify, or extinguish those

rights as they saw fit (Borrows, 2001). In terms of achieving dialogue in policy discussion during this period, Borrows (2001) observed, “Aboriginal peoples are increasingly associated with and influenced by national development, yet are unable to significantly influence the terms by which this development occurs” (p. 621). Despite the scope of RCAP, the Canadian government and Indigenous peoples were still failing to reach a common vision regarding Indigenous policy.

A later attempt to amend Indigenous policy faced similar criticisms to the White Paper, suggesting the government was not inclined to learn from its mistakes. In 2002 the Chiefs of Ontario (COO) hired retired professor Dr. Peter Douglas Elias to analyze the methods employed by the DIAND in consultations with First Nations regarding proposed changes to the *Indian Act* (Barnsley, 2002). Elias concluded DIAND’s, “methods were poorly devised, of little scientific value, had reporting methods that were inconsistent from one session to the next, cost a minimum of $1,250 for every person consulted and were sabotaged early on by the minister himself” (Barnsley, 2002, p. 1). Of the many issues noted by Elias, the most critical was a statement made by Minister Robert Nault early in the process that suggested information gathered during consultations would have no bearing on the outcome (Barnsley, 2002). In addition, there was no way of knowing if data gathered through the Internet were actually provided by Indigenous peoples: a serious methodological flaw when the research was intended to articulate Indigenous views on changes to the *Indian Act* (Barnsley, 2002). Elias offered only two possible explanations: (1) the government had failed to design an adequate consultation process; or (2) as suggested by some Chiefs, the entire process was a sham (Barnsley, 2002). Ultimately, the failed process angered and offended the Indigenous participants and the final consultation numbers indicated, “Indian Affairs can’t claim to have consulted anyone” (Elias as cited in Barnsley, 2002, p. 3).

2.1.5. The Truth and Reconciliation Commission of Canada

The final matter with the potential to shape and inform Indigenous policy discussed in this chapter is the creation of the TRC and its subsequent report. As part of the Indian Residential School Settlement Agreement the Government of Canada (2021b) commissioned the TRC to facilitate reconciliation between those impacted by residential schools and broader Canadian society.

> Between 2007 and 2015, the Government of Canada provided about $72 million to support the TRC's work. The TRC spent 6 years travelling to all parts of Canada and heard from more than 6,500 witnesses. The TRC also hosted 7 national events across Canada to engage the Canadian public, educate people about the history and legacy of the residential schools system, and share and honour the experiences of former students and their families. (Government of Canada, 2021b, para. 3)

The TRC's ultimate goal was transformative change through, "advancing reconciliation in ways that honour and revitalize the nation-to-nation Treaty relationship" (TRC, 2015, p. 183). Like the RCAP, the views gathered by the TRC were firmly rooted in a sovereigntist paradigm. The TRC issued 94 *Calls to Action* intended to address issues plaguing Indigenous communities in relation to child welfare, education, health, justice, language, and culture. Many of the principles and recommendations outlined in the TRC's final report were reminiscent of those issued by RCAP nearly two decades earlier. In many regards, very little had changed. However, unlike the muted federal response that greeted RCAP's final report, the TRC's findings were met with a great deal of enthusiasm from government officials. Prime Minister Justin Trudeau released the following statement:

> This is a time of real and positive change. We know what is needed is a total renewal of the relationship between Canada and Indigenous peoples. We have a plan to move towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, and we are already making it happen. (Office of the Prime Minister of Canada, 2015, para. 7)

In the current era the language of the federal government appears to be embracing a sovereigntist paradigm that recognizes Indigenous nationhood, however, recent policies and policy objectives appear to suggest the government may be clinging to an assimilationist paradigm in relation to Indigenous affairs. How does the current era of reconciliation--where Indigenous nationhood is ostensibly recognized by government and transformative change is the stated goal--influence policy discussion paradigms favoured by the federal government and Indigenous groups? This research will address that question using cannabis legalization as a case study to separate political rhetoric from government objectives and to understand how current Indigenous conceptions of nationhood and sovereignty are being exercised in practical terms.

2.2. Indigenous Rights Under Domestic and International Law

2.2.1. Aboriginal Rights in Canada

Indigenous rights in Canada are derived from the continued use and occupation of territories before European contact and are recognized under domestic and international law. They include the rights to land and resources, the rights to practice one's culture and customs, and the right to self-determination. This section first describes the nature of these rights under domestic and international law and goes on to discuss the challenges inherent in exercising self-determination within the confines of Canadian federalism. Aboriginal rights in Canada are characterized as *sui generis*, meaning 'of their own kind,' or 'unique' from other rights under common law. Borrows and Rotman (1997) note Canadian jurisprudence has always regarded Aboriginal rights differently than other rights; they propose the conception of Aboriginal rights as *sui generis* is not a threat to the common law, but a means to reconcile cultural issues within Canada's common law framework.

> This approach to interpreting Aboriginal rights is appropriate because, in many respects, Aboriginal peoples are unique within the wider Canadian population. Before their characterization as sui generis, previous common law doctrines often penalized Aboriginal difference. Now, the sui generis appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection. Its very existence recognizes that Aboriginal rights stem from alternative sources of law, that reflect the unique historical presence of Aboriginal peoples in North America. (Borrows & Rotman, 1997, p. 11)

In Canada, Aboriginal rights are affirmed in the *Constitution Act, 1982*. The *Canadian Charter of Rights and Freedoms* comprises Part I of the constitution and Aboriginal rights are protected under Section 25:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 of the *Constitution Act, 1982* affirms:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Borrows and Rotman (1997) discuss the nature of Aboriginal rights under Canadian law:

> Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant and concerns the underlying purpose for the right in question - namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. (Borrows & Rotman, 1997, p. 39)

While Aboriginal rights are recognized under Canadian law, defining practices constituting Aboriginal rights is a complex process. There is little uniformity in specific activities recognized as Aboriginal rights across Canada. Treaty signatories may have some practices defined in these agreements, however, many treaties from the later settlement period may be vague or difficult to interpret in a modern context. As discussed previously, policies and agreements implemented after settlement often had little regard for Indigenous well-being or legal principles as indicated by the refusal of the BC government to acknowledge the Douglas Treaties (or Aboriginal title in general) (Monchalin, 2016).

> The Crown's obligations under such treaties were considered to be entirely political rather than legal. They were seen as existing only at the sufferance of the Crown and were often trivialized to the point of extinction. Even where the Crown's treaty obligations were viewed as binding, they remained subject to abrogation or elimination by the Crown. (Borrows & Rotman, 1997, pp. 17-18)

The Government of Canada (2020d) acknowledges 70 historic treaties signed between 1701 and 1923. Not surprisingly, Indigenous peoples living under historic treaties score lower on the Community Well-being Index--which takes into account

education, labour force activity, income, and housing—than any other group in Canada (Aboriginal Affairs and Northern Development Canada [AANDC], 2006). Following *Calder v British Columbia (Attorney-General)* (1973)—in which the Supreme Court of Canada (SCC) recognized Aboriginal title as a legal right under Canadian law—26 modern treaties (or comprehensive land claim agreements) have been signed with 97 Indigenous groups (Government of Canada, 2020d). Despite this, Monchalin (2016) suggests, “So far, the general population of Canada has reaped the benefits of Indigenous land and resources while Indigenous peoples have been disrupted from thriving” (p. 202). It should be recognized that the treaty-making process is ongoing across Canada. In BC 54.5% of all *Indian Act* Bands in the province are currently engaged in treaty negotiations (BC Treaty Commission, 2021). For groups whose treaty rights are in question and non-treaty Indigenous Peoples, Aboriginal rights are often defined through the courts.

Slattery (2007a, 2007b) suggests it is helpful to conceptualize two types of Aboriginal rights under Canadian law: generic rights that apply to all Indigenous peoples, and specific rights--themselves rooted in generic rights--that are held by distinct groups. The distinction between these two types of rights emerged from judgements in *R. v. Van der Peet* (1996) and *Delgamuukw v. British Columbia* (1997). The judgment in *R. v. Van der Peet* (1996) maintained specific rights are defined by factors that vary between Indigenous nations and often take specialized forms, such as the harvesting of certain species of resource for a specific purpose. Dorothy Van der Peet, a member of the Stó:lō Nation, was charged with selling fish caught under a food fishing licence. She argued her right to sell fish was protected under Section 35 of the *Constitution Act, 1982*. The Crown did not agree that selling fish was her Aboriginal right--despite the Stó:lō tradition of engaging in the sale and barter of resources--because these practices emerged following contact as a result of European influence. This unpopular, disputed, and frankly incomprehensible limitation assumes any and all adaptations over time by Indigenous peoples could only occur as a result of European influence. This limitation has come to be known as the ‘frozen rights’ approach (Borrows, 2017; Monchalin, 2016). This approach also frames Aboriginal rights as historic rights rather than human rights, which are more broadly conceived (Borrows, 2017). The Supreme Court’s ruling resulted in the Van der Peet Test (or the Integral to a Distinctive Culture Test). Through assessing ten criteria a claimant must prove the asserted right is integral to their specific

cultural group to have that right recognized. Slattery (2007a) notes that the SCC held that all Aboriginal rights in Canada were specific rights in the Van der Peet decision.

However, *Delgamuukw v. British Columbia* (1997) reversed the Crown's position that all Aboriginal rights were specific rights, and generic rights were also recognized when the hereditary chiefs of the Gitxsan and Wet'suwet'en claimed Aboriginal title to a substantial tract of land in northern BC, which the provincial government opposed in light of proposed development. The legal arguments illuminated a vast difference between how Indigenous groups and the government perceived Aboriginal title. The government viewed Aboriginal title as variable and dependent on historical cultural practices at the point of European contact, whereas many Indigenous groups saw Aboriginal title as uniform, and not dependent on specific cultural practices. Writing for the unanimous court, Chief Justice Antonio Lamer suggested the group holding title has the right to the exclusive use of that land not limited to traditional practices, thus almost opening the door to potential self-determination: resource extraction, and residential, commercial, or industrial uses by Aboriginal title holders (Slattery, 2007a). However, this judgement also found that land held in Aboriginal title is subject to 'inherent limit,' which means the land cannot be rendered unusable for future generations (Slattery, 2007a). Olszynski (2014) acknowledges the inherent limit inclusion in Aboriginal title law has raised concerns, "that it is paternalistic, that it has never been satisfactorily sourced or rooted in indigenous laws…and that it creates uncertainty for development" (para. 1). These arguments suggest the judgement's inherent limit inclusion vastly diminishes the likelihood that self-determination could be actualized within this framework. In addition to the right to ancestral territory, generic rights also include the right of cultural integrity, the right to honourable treatment by the Crown (the duty of the Crown), the right to customary law, and the right to self-government (Slattery, 2007b).

Though parsing out specific rights is often done through the courts, Monchalin (2016) argues this system has several drawbacks: not only is the process extremely slow and expensive, but it may also include negative consequences for Indigenous litigants. Monchalin (2016) notes, "In a strange twist, defining a right in law simultaneously limits it" referencing the 'frozen rights' approach adopted in Van der Peet that fails to recognize Indigenous cultures as dynamic, and fails to consider that Indigenous peoples exist in modern contexts (p. 215). Borrows (2017) surmises, "The Supreme Court of Canada has created a narrow framework for recognizing Aboriginal

and treaty rights in Canada's Constitution by reference to historic moments of contact, assertions of sovereignty, and negotiated agreements" (p. 114). In addition to the narrow framework adopted for recognizing rights, the decision in *R. v. Sparrow* (1990) provided criteria (the Sparrow Test) that allowed for governments to infringe on Aboriginal rights if the infringement serves a valid legal objective, i.e., making it clear Aboriginal rights are not absolute under Canadian law. A further issue related to defining Aboriginal rights through the courts is that it, "entrenches Indigenous peoples further within a foreign imperial power and governance structure" (Monchalin, 2016, p. 215). This view questions the logic of defining Aboriginal rights within a colonial system that has historically regarded Indigenous peoples as objects to marginalize, assimilate, or eliminate. Borrows and Rotman conclude:

> For close to one hundred years the majority of judicial decisions concerning Aboriginal rights primarily involved the competing legislative and commercial interests of the federal and provincial governments, rather than the laws and interests of Native peoples. The preponderance of these decisions held that Aboriginal rights were premised entirely upon the benevolence of the Crown. (Borrows & Rotman, 1997, p. 17)

This suggests there is clearly a disconnect between how Indigenous peoples and the courts view Aboriginal rights.

2.2.2. Indigenous Rights Under International Law

Rather than accepting the premise that Aboriginal rights are derived from the 'Crown's benevolence,' Poplar offers an alternative:

> Instead of cooperating with the government we have to remember that we are Nations of people, and remember what it was we were fighting for in the first place. We were never fighting for section 35, we were fighting to preserve our Nation-to-Nation relationship, for recognition as Sovereign Nations, and to Decolonize Our People. In some ways, section 35 has diverted our people, and the new leadership instead of fighting for our rights, is negotiating to help Canada and the provinces define them…Section 35 might be one more tool to uphold the fiduciary duty that the Crown owes to Our People, but our real fight is to rebuild our Nations and to gain recognition at the international level. (Poplar, 2003, pp. 27-28)

International forums are incredibly important arenas for Indigenous peoples attempting to have their rights recognized (Graham et al., 1996). Indigenous nations have never surrendered their sovereignty—a claim Canadian governments generally

ignore. Martínez (1999) claims the fact that treaties (nation-to-nation agreements) were created between Indigenous groups and Europeans in itself indicates even the Europeans accepted Indigenous sovereignty. However, “In the course of history, the newcomers then nevertheless attempted to divest indigenous peoples…of their sovereign attributes, especially jurisdiction over their lands, recognition of their forms of societal organization, and their status as subjects of international law” (Martínez, 1999, p. 18). Martinez describes the ‘domestication of the Indigenous question’ as, “The process by which the entire problematique was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous States” (p.30). He continued,

> It is not possible to understand this process of gradual but incessant erosion of the indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by “juridical tools,” always arm in arm with the military component of the colonial enterprise. (Martínez, 1999, p. 30)

Considering this, the need for international oversight over Indigenous-Crown relations becomes apparent. Attempts to re-establish recognition as nations under international law in the 20th century was a long journey for Indigenous peoples. In Canada it began in the 1920s when Haudenosaunee hereditary chief Deskaheh attempted to speak at the League of Nations to seek membership within the league for the Haudenausaunee but was unsuccessful due to strong opposition from Canada and Great Britain (Venne, 2011). The first international treaty related to Indigenous rights was adopted by the International Labour Organisation, a specialized agency of the UN. Its *Indigenous and Tribal Population Convention, 1957 (No. 107)* was intended to protect Indigenous peoples from discrimination, however, concern with the obligation of governments to facilitate the ‘progressive integration’ of Indigenous peoples into political states firmly planted the convention in an assimilationist paradigm (Gómez Isa, 2019; Venne, 2011).

It was not until 1982 that the UN held its first official meeting for Indigenous peoples at the newly established Working Group on Indigenous Populations (although it should be noted the Indigenous participants and representatives in the group referred to it as the Working Group on Indigenous Peoples) (Venne, 2011). The Working Group rejected the previous assimilationist approach and focused on issues related to exploitation, marginalization, and oppression, and created the first *Draft Declaration on*

the Rights of Indigenous Peoples (1994). The document was incredibly significant. As noted by Venne,

> The *Draft Declaration on the Rights of Indigenous Peoples* is a precedent-setting international instrument. It is the first UN instrument to develop standards on Indigenous Peoples' rights. It is also the first UN instrument drafted with the direct participation by Indigenous Peoples in the process. Hundreds of Indigenous delegates over a long period of time attended and participated in the discussions leading to the final Draft Declaration. Consequently, the potential effect on the UN processes for developing international instruments on Indigenous Peoples and on international law norms are also likely to be precedent-setting, sweeping and significant. It is now impossible for international bodies to develop credible instruments affecting Indigenous Peoples without their direct and active participation. The drafting of a Declaration on the rights of Indigenous Peoples moved Indigenous Peoples towards being subjects of international law and away from being treated as objects. (Venne, 2003, p. 137)

The draft was officially adopted in 1994, but the UN General Assembly vote was not held until September 13, 2007 (UN, 2021). The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) passed with 144 states in favour, 11 abstentions, and four votes against (cast by Canada, the USA, Australia, and New Zealand) (UN, 2021). Some of the specific articles in the UNDRIP (2007) most salient to this research likely overlapped with those the settler colonial states objected to. Articles 3-5 outline rights related to self-determination, self-government, and economic development. Articles 19 and 27 of the UNDRIP (2017) include the following rights:

> Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Each of the four settler colonial states which initially rejected the UNDRIP eventually reversed their positions. Canada endorsed the Declaration without qualification and committed to its implementation (Government of Canada, 2021a) in

2016. In 2020 the Government of Canada (2021a) introduced Bill C-15 to facilitate the UNDRIP's implementation, and the legislation received Royal Assent. The Government of Canada (2021a) currently characterizes the adoption of the UNDRIP as "a framework for reconciliation" (para. 4). The TRC's final report notes:

> What is clear to this Commission is that Aboriginal peoples and the Crown have very different and conflicting views on what reconciliation is and how it is best achieved. The Government of Canada appears to believe that reconciliation entails Aboriginal peoples' acceptance of the reality and validity of Crown sovereignty and parliamentary supremacy, in order to allow the government to get on with business. Aboriginal people, on the other hand, see reconciliation as an opportunity to affirm their own sovereignty and return to the 'partnership' ambitions they held after Confederation. (TRC, 2015, p. 187)

If the federal government truly sees the UNDRIP as a framework for reconciliation, it will need to reevaluate its presumption of Crown sovereignty and parliamentary supremacy.

2.2.3. Sovereignty

Differing conceptions held by the government and Indigenous groups in relation to sovereignty, reconciliation, self-determination, and self-governance pose problems. Past research on Indigenous-Crown consultation suggests parties often hold different understandings of the central concepts being discussed; these understandings may also change over time (Graham et al., 1996; Weaver, 1981). Missens offers:

> It is important to emphasize that the First Nations' view of sovereignty is far different from that that has evolved from European kings in that in the First Nations' view sovereignty is not 'man-made'…[but] comes from the laws and responsibilities that have been set out for them by the Creator. (Missens, 2008, p. 4)

Bauder and Mueller (2021) describe sovereignty as, "not naturally given…[but] claimed, asserted, and enacted by those who have the ability to do so" (p. 2). They further argue the distinction between Westphalian (or state sovereignty) and Indigenous sovereignty cannot be reconciled:

> Westphalian sovereignty is a Eurocentric concept implicated in the colonialisation of Indigenous peoples in settler societies. Conversely, Indigenous sovereignty is a broader idea that involves social and cultural aspects, recognises the inter-dependencies between political actors and

> relationships to the land, and acknowledges the contextualised nature of sovereignty. (Bauder & Mueller, 2021, p. 1)

Alfred (2006) describes sovereignty as an inappropriate term to use when discussing Indigenous nationhood. He argues, “Traditional indigenous nationhood stands in sharp contrast to the dominant understanding of “state”: there is no absolute authority, no coercive enforcement of decisions, no hierarchy, and no separate ruling entity” (p. 323). Alfred (2006) describes European claims of sovereignty over Turtle Island (North America) as a ‘fictive legal premise’ based on an illegitimate doctrine. He argues Indigenous claims of sovereignty therefore perpetuate this false premise because it, “allow[s] indigenous political goals to be framed and evaluated according to a statist pattern” (Alfred, 2006, p. 325). Alfred (2006) suggests the concept of sovereignty is implicitly tied to power, whereas a more productive and culturally appropriate basis for Indigenous governance would be respect between people and regard for the natural world.

2.2.4. Self-determination

Article 1 of the UN’s *International Covenant on Economic, Social and Cultural Rights* (1966) states, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” RCAP (1996) notes, “Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action” (p. 105). RCAP explains, “In its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction” (p. 106).Peach and Rasmussen further contextualize,

> When we speak of collective self-determination, we mean specifically the creation of institutions of government and rules of social ordering that are culturally relevant and responsive to the members of the community, rather than to the dictates of an external governor. (Peach & Rasmussen, 2005, p. 4)

Aquash (2013) describes self-determination as an essential requirement to overcoming trauma related to the colonization Indigenous peoples have experienced from Canadian policies and institutions. Aquash (2013) argues , “self-determination processes provide an opportunity for First Nation communities to find their own answers” (p. 120).

However, self-determination is yet another concept which the federal government has chosen to interpret in ways aligned with its view of the world. The Government of Canada (2018) claims, “All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination” (p. 5). However, Mashford-Pringle (2016) argues the federal-government has attempted to conflate Indigenous self-determination—an inherent right-- with administrative or bureaucratic control over federally-approved programs and services within Indigenous communities. This ignores a critical conceptual requirement: self-determination involves individuals freely making choices without qualifications or limitations.

2.2.5. Self-government

RCAP (1996) suggests self-determination and self-government are intrinsically connected, offering, “Self-government is one path Aboriginal people may take in putting the principle of self-determination into effect. Self-government flows from the principle of self-determination” (p. 106). Slowey (2007) adds, “the well-being of First Nations in the new economic order is a function of their ability to compete as autonomous, self-governing, and self-sufficient entities in the global marketplace, rather than as wards of the state” (p. 16). Despite this, most current models of Indigenous self-governance are subject to Canada’s restrictions; these limitations are infused in policies created by the Government of Canada, most notably the *Indian Act.* To stifle and disrupt traditional forms of Indigenous governance the *Indian Act* imposed the band and council system on Indigenous communities and outlawed traditional governance practices. Indigenous self-governance under Canadian federalism must be understood as being controlled by the federal government: it can be easily limited or taken away. Borrows recognizes the struggle related to exercising Indigenous autonomy within a colonial framework, but notes through resilience, some Indigenous nations have successfully maintained traditional governance despite the imposition of a foreign system.

> With the arrival of an alien people who were intent on settling in the midst of First Nations people, the governing structures of our society were challenged and the ability of our people to perpetuate the task of governance was tested…The continued existence of self-government among the Chippewas of the Nawash is significant to the aspirations of Native people in our quest for greater autonomy. Its enduring existence suggests that self-government is an inherent obligation which First Nations

> people must continue to exercise in order to preserve our world view. (Borrows, 1992, p. 293)

The recognition of self-government as a right under Canadian law stems from the Crown's acknowledgement that Indigenous peoples would not accept British claims of sovereignty without ensuring they maintained control of their own internal affairs. As described in the SCC judgement in *R. v. Sioui* by Justice Lamar:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible. (*R. v. Sioui,* 1990, p. 27)

Brown (1995) suggests Canadian federalism reflects, "shared power and coordinate spheres of government, each sovereign in its jurisdiction," but notes recognizing Indigenous interests under Canadian federalism, "has become increasingly ineffective" (p. 2). The Government of Canada (2020a) maintains, "the fundamental basis for federalism in Canada…was and remains the need to reconcile, balance and accommodate diversity" (para. 1). One could argue Indigenous exclusion from the division of powers puts the validity of this assertion in question. Three decades ago, RCAP offered:

> Can the various visions of governance held by Aboriginal peoples in Canada be realized today? In our view, the answer is a resounding yes. We believe that the right of self-determination and the constitutional right of self-government together provide a strong basis for realizing Aboriginal aspirations. (RCAP, 1992, p. 156)

RCAP (1992) suggested Indigenous governance could be improved if there was greater focus on empowering and building capacity for governments of Indigenous nations rather than individual Indigenous communities (referencing the band and council system introduced under the Indian Act). RCAP (1992) further suggested a redrafting of the *Royal Proclamation* and the establishment of an Indigenous Parliament. None of these suggestions were realized or given serious consideration by the government; consequently, Indigenous peoples are still waiting for their aspirations to be realized. Missens (2008) argues the biggest obstacles for Indigenous governance are related to capacity and perceptions of illegitimacy.

> One of the challenges to First Nations' sovereignty arises when they have too little of it. Around the world, many governments lack the legitimacy and

> capacity to translate their nominal sovereignty into effective governance. The sovereignty gap for First Nations will only ensure a "status quo." Only through the exercise of their sovereign responsibilities will First Nations governments create sustainable development and poverty reduction within their communities. A strengthened system of First Nations governance is at the center of this development – it is also the most effective and economical way to create this change. Sovereignty without the capacity for governance will have very little impact on the socio-economic lives of First Nations people and the greater community. It is one thing to have sovereign powers and responsibilities and another to exercise them to positively impact the lives of people. (Missens, 2008, p. 5)

Various new frameworks for Indigenous governance have been introduced through modern treaties or self-government agreements, but it should be recognized that all current frameworks exist within the confines of Canadian federalism despite the government-stated support for self-determination among Indigenous peoples. There are 25 self-government agreements in place across Canada that apply to 43 Indigenous communities, and an additional 50 communities are currently involved in negotiations (Government of Canada, 2020c). The federal government notes:

> The Government of Canada is working in partnership with Indigenous peoples to undo federally imposed systems of governance and administration in favour of Indigenous control and delivery. Canada is working with Indigenous peoples to support them in their work to rebuild and reconstitute their nations, advance self-determination and, for First Nations, facilitate the transition away from the *Indian Act* and toward self-government. (Government of Canada, 2020c, paras. 6-7)

According to the Government of Canada (2020a), "This can include making decisions about how to better protect their culture and language, educate their students, manage their own lands and develop new business partnerships that create jobs and other benefits for their citizens" (para. 9). With respect to the goal of reconciliation, the Government of Canada adds:

> Self-government negotiations are one way to work together in partnership toward this goal and advance Indigenous self-determination, which is a fundamental Indigenous right and principle of international law, as set out in the *United Nations Declaration on the Rights of Indigenous Peoples*. (Government of Canada, 2020a, para. 7)

Despite claims of support for Indigenous self-determination, Christie (2019) notes federal and provincial governments have historically employed minimal effort in cooperating with independent Indigenous legal and political authority. McGuire and

Palys (2020) suggest Canada, “portrays Indigenous sovereignty as an impossible dream…which frames relations between Indigenous and settler peoples as an adversarial one—a zero-sum game where Indigenous gains somehow involve Canadian losses” (p. 71). Brown makes a similar argument:

> The exercise of what might be termed as even a modest degree of power by self-determining and self-governing Aboriginal Peoples has often been seen by non-Aboriginal Canadians as threatening not only to their economic and social interests but also to their political institutions, including the federal system itself. (Brown, 1995, p.2)

Brown (1995) adds, “the federal system is being challenged to adapt to the renaissance of autonomous Aboriginal political communities and to change its institutions accordingly” (p. 1). Borrows (2005) suggests this is not inconceivable, noting, “If reconciliation is the lens through which the courts interpret the parties’ relationships, there are sound arguments that Aboriginal governance is compatible with the Crown’s assertion of sovereignty” (p. 182). However, major institutional change may be a challenge Canada is not willing to engage; governments appear disinterested in restructuring and redistributing power. Stacey notes:

> Whether Indigenous peoples are acknowledged as one of Canada’s founding nations alongside its English and French settlers, or are recognized as distinctive peoples within its multicultural society, these calls affirm Indigenous peoples as sovereign nations deserving of at least some of the powers that the provinces have. (Stacey, 2018, p. 669)

While these arguments suggest Canada has employed minimal effort in making space for the exercise of Indigenous authority, the government of Canada consistently claims to support it:

> The Government recognizes that Indigenous self-government and laws are critical to Canada’s future, and that Indigenous perspectives and rights must be incorporated in all aspects of this relationship. In doing so, we will continue the process of decolonization and hasten the end of its legacy wherever it remains in our laws and policies. (Government of Canada, 2018, p. 3)

Taken at face value, one could surmise the Canadian government has the political will to facilitate the inclusion of Indigenous legal authority. The reality is that Indigenous law is not often recognized alongside common and civil legal traditions in Canada (Borrows, 2005).

2.2.6. Indigenous Law

Current frameworks for reconciliation demand Indigenous legal orders be acknowledged and accepted by the state (Minnawaanagogiizhigook, 2008; TRC, 2015). Minnawaanagogiizhigook suggests non-Indigenous actors have consistently misunderstood Indigenous law:

> Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly replaced by Canadian law, or existing only within and according to the terms set by Canadian law. (Minnawaanagogiizhigook, 2008, p. 78)

Because Indigenous legal traditions are rooted in cultural teachings, Indigenous laws vary across nations and reflect unique understandings, codes of conduct, traditions, and principles. Christie (2019) states, “Indigenous law refers to the authority of particular Indigenous communities, tied to particular lands and waters, to make decisions binding all in regard to how these lands and waters are approached” (p. 24). Like other sources of law, Indigenous law must be understood to exist in a constant state of development and applicable to modern context (Minnawaanagogiizhigook, 2008). Borrows suggests:

> People must…reject ideas that hold that indigenous peoples lose their Aboriginality if they adopt contemporary codes of conduct. The authenticity of indigenous law and governance is not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities. (Borrows, 2005, p. 200)

Missens (2008) proposes good governance under a traditional First Nations model would include natural laws flowing from the Creator and man-made laws decided by community consensus--both of which would supersede federal and provincial authority within its nation. Christie notes an obstacle for Indigenous law is the lack of recognition of Indigenous legal and political authority:

> There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities, those entities that determine the nature and functioning of legal orders under contemplation. To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed. (Christie, 2019, pp. 24-25)

Georges Erasmus (a former Chief of the AFN) and Joe Sanders suggest a more effective division of power is possible under Canadian federalism:

> We don't want to scare Canadians with our terminology. No one is scared in this country by the fact that Ontario or Manitoba can make laws in education and not a single power in the world can do anything about it. They are sovereign in their area of jurisdiction. We, likewise, want to have clear powers over our territories. Canada is already set up for it, because we have a confederation that lends itself very easily to what our people are asking for. We have the federal government, we have federal powers. We have provinces, we have provincial powers. We have some areas where the two overlap. We could easily have a third list of First Nations powers. (Erasamus & Sanders, 1992, p. 11)

There are difficulties when attempting to harmonize various sources of law. Borrows (2019) suggests, “views about international and national law often leave little room for Indigenous law to question and perhaps even overturn the assumptions of practitioners in these other traditions” (p. xix). Despite these difficulties, Slattery (2007a) argues, “Aboriginal peoples have the right to maintain and develop their distinctive systems of customary law within an all-embracing federal framework that features multiple overlapping legal systems and levels of government” (p. 116). Borrows offers,:

> The fact that different, sometimes contradictory laws are passed by different legal regimes in Canada does not bring the legal system into disrepute. In fact, the respect it enjoys is heightened because the passage of different laws demonstrates a much-needed ability to respond to local circumstances. When one adds to this mix the idea that provincial governments each pass different regulations under identical federal laws when given the responsibility to administer such statutes, these variations are usually applauded because they allow legislators to be sensitive to purely local matters. Few would suggest that such provincial and regional variation is a departure from the principle of one law for all Canadians. (Borrows, 2005, p. 213)

Borrows (2005) concludes, “the recognition of indigenous legal traditions in the Canadian state is bound to be contested and create difficulties in law and policy” (p. 221). In the context of cannabis legalization and Indigenous jurisdiction, this appears to be the case.

2.3. Consultation

In light of the free, prior, and informed consent (FPIC) requirement in the UNDRIP, consultation can be characterized as the minimal standard of engagement within the Indigenous-Crown relationship. The earlier section on Indigenous policy provided examples of Indigenous-Crown consultation related to policy development that

ranged from inclusive (the Berger Inquiry) to what Indigenous leaders have described as totally meaningless (the White Paper and DIAND's later attempt to amend the *Indian Act*). Historically, consultation has not been effectively utilized in the development of Canadian Indigenous policy. Graham et al. note:

> It has been argued that the federal government has tended to see consultation with the public and interest groups as a necessary evil. Consultation has often been tangential to the policy process, and the results of elaborate consultation exercises have often appeared after the main decisions have been made. In short, consultation has not been part of the central system of federal policy making. (Graham et al., 1996, p. 30)

Beginning around 1995, Rasmussen (2015) notes that there has been, "a proliferation of instruments of public consultation in liberal democracies" and consultation, "has played a prominent role in the governance agenda" (p. 271). Opportunities for Indigenous peoples to engage with Canadian governments have also increased in the decades following Graham et al.'s (1996) analyses, but ineffective consultation exercises that fail to perceptibly influence Indigenous policy remain a point of contention and frustration among Indigenous people/s. This leaves consultation on its own, a sometimes-impotent process, arguably due to the power differential between Indigenous peoples and the Canadian government. This section discusses the purpose of consultation, the role of consultation in the creation of regulatory policy, and explores the 'duty to consult' and potentially accommodate Indigenous interests under domestic and international law. Current issues with consultation from government and Indigenous perspectives are explored.

2.3.1. The Purpose of Consultation

Consultation is an important way to improve efficiency, transparency, and effectiveness of policy (Rodrigo & Amo, 2006), and may also heighten citizen trust in the government and confidence in the democratic process (Rasmussen, 2015). According to Holland (2002), "consultation is meant to be a touchstone of modern democracy. It is supposed to make government both more responsive to the community and more legitimate in the eyes of that community" (p. 76). However, Holland cautions:

> The costs and benefits of consultation need to be weighed against each other, and effective consultation processes are likely to be carefully linked to specific outcomes. It also seems clear that people's capacity to be

> involved in a participatory process is often pre-determined by the type of process itself. The design of consultation processes is thus critical, but must be mediated by the objectives governments are trying to achieve. Public consultation, inappropriately pursued, will not enhance policy coherence or policy legitimacy. (Holland, 2002, pp. 76-77)

In the context of regulatory policy, the Organisation for Economic Co-operation and Development (OECD)—an international organization mandated to promote prosperity, equality, and opportunity through policy development—note public consultations may occur in several ways, ranging from informal to highly prescriptive (Rodrigo & Amo, 2006).

The OECD reports Canada encourages informal consultation processes (often called engagement) prior to formal consultation but caution this approach limits transparency and accountability because governments may opt to include interest groups that have the potential to function as lobbyists (Rodrigo & Amo, 2006). In countries such as the USA, informal consultation in the creation of regulatory policy is seen as, “a violation of norms of openness and equal access, and in many cases is a violation of the *Administrative Procedure Act* requiring equal access for all interested parties” (Rodrigo & Amo, 2006, p. 3). The second (and one of the most common) methods of public consultation involves circulating concrete regulatory proposals for public comment, which can be facilitated through the Internet at a modest expense. A third means is public notice-and-comment, which is a more formal procedure. Public notice-and-comment was adopted in Canada in 1986, (a practice called pre-publication), however the practice is only outlined in policy directives and has no legal force. A fourth method is public hearings; in Canada these hearings are conducted by committees in Parliament and are a required step in the development of regulatory law.

Rodrigo and Amo (2006) suggest there are three overlapping forms of interaction that may occur in policy development: notification, consultation, and participation. Notification is described as a one-way process which simply alerts the public to proposals and provides stakeholders the opportunity to prepare for consultation. Consultation is described as a two-way process that facilitates the exchange of ideas; this assumes that gathering an abundance of information will result in higher quality regulation, thus the most effective exchanges feature continuing dialogue. The third form of interaction is participation: “the active involvement of interest groups in the formulation of regulatory objectives, policies and approaches, or in the drafting of regulatory texts”

(Rodrigo & Amo, 2006, p. 1). Rodrigo and Amo (2006) caution participation is critical, as it allows stakeholders to provide alternatives, help regulators balance opposing interests, and provide governments the opportunity to foresee potential problems and consequences.

The Government of Canada (2020b) describes its *Policy on Regulatory Development* as being grounded in four principles: (1) the protection and advancement of public interest and the support of good government through promoting public health, safety, security, and economic well-being; (2) a process that is open, transparent, and modern that, "meaningfully engages the public and stakeholders, including Indigenous peoples, early on" (Government of Canada, 2020b, para.7); (3) decisions that are evidence based and open to public scrutiny; and (4) the support of a competitive and fair economy. The Government of Canada (2020b) adds: "Regulations should aim to support and promote inclusive economic growth, entrepreneurship, and innovation for the benefit of Canadians and businesses. Opportunities for regulatory cooperation and the development of aligned regulations should be considered and implemented wherever possible" (para. 7).

2.3.2. The Duty to Consult

In Canada the concept of consultation becomes complex in the context of Indigenous-Crown interactions, because it is often undertaken as the result of a legal concept within Aboriginal law known as the 'duty to consult.' In this context consultation becomes highly prescriptive and entails meeting legal requirements which may include collecting input from a variety of experts or undertaking scientific research.

> Once the existence of the duty to consult is established, its content must be evaluated, and the level of consultation required must be determined. As each case is evaluated on its own merits and is highly context-specific, the scope of the required consultations can vary significantly. With this in mind, the Supreme Court has set out a "spectrum" of obligations that guide consultation requirements. Certain factors must be considered in determining the level of consultation required: the strength of the claim, the nature of the right and the severity of the potential harm of a Crown decision or action on the Aboriginal or treaty right. (Brideau, 2019, p. 5)

The duty to consult is most often discussed in relation to resource extraction and infrastructure projects with the potential to negatively impact the environment and the

implication of this for Aboriginal or treaty rights. AANDC (2011) describes consultation as a part of good governance and sound policy creation, but concede it is a legal obligation:

> The Government of Canada consults with Canadians on matters of interest and concern to them. Consulting is an important part of good governance, sound policy development and decision-making. Through consultation, the Crown seeks to strengthen relationships and partnerships with Aboriginal peoples and thereby achieve reconciliation objectives. In addition to pursuing policy objectives, the federal government consults with Aboriginal peoples for legal reasons. Canada has statutory, contractual and common law obligations to consult with Aboriginal groups. The process leading to a decision on whether to consult includes a consideration of all of these factors and their interplay. (AANDC, 2011, p. 5)

In relation to the reconciliation objective noted by the federal government it should be recognized, “This reconciliation is of sovereignties, with its ultimate expression being in developing shared and collaborative patterns of how sovereigns will interact with each other with respect to governing and making decisions” (First Nations Leadership Council [FNLC], 2013, p. 11).

Consultation (and potential accommodation) with Indigenous groups was designated a legal obligation under domestic law pursuant to a series of judgements issued by the SCC beginning in 2004. Though AANDC (2011) describes consultation as serving two purposes—good governance and legal reasons—the legal trigger appears to take primacy. It is argued, “Any federal policy shifts to engage in consultation or negotiation processes has evolved largely not out of good will but, rather, in response to conflict and litigation” (FNLC, 2013, p. 107). The *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (referred to hereafter as the 2011 Guidelines) notes three SCC decisions which guide federal departments and agencies in determining when the duty to consult may arise. Theses cases include *Haida Nation v. British Columbia (Minister of Forests)* (2004), *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004), and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005).

In the two former cases the SCC ruled governments have an obligation to consult with Indigenous peoples if their actions may infringe on potential Aboriginal or treaty rights, while the latter case confirms the duty to consult also exists where treaty rights have been established. The first judgement, from *Haida Nation v. British Columbia (Minister of Forests)* (2004) created, “a general framework for the duty to consult and

accommodate" and as Chief Justice McLachlin explained, "As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate" (para. 11). Since 2004 there have been hundreds of court challenges regarding the lack of adequate consultation and accommodation related to decisions made by federal, provincial, and territorial governments (Gray, 2016).

In *Haida Nation v. British Columbia* (2004) Justice McLachlin noted, "The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (para. 32). Slattery (2005) points out that in both the Haida and Taku River judgments the SCC refer to the Crown's sovereignty as 'asserted' rather than 'acquired,' describing it as *de facto* (illegitimate) rather than *de jure* (rightful or just), suggesting, "the Crown's claims of sovereignty over Aboriginal peoples will continue to be legally deficient until there has been a just settlement of their rights through negotiated treaties" (Slattery, 2005, p. 438). Given the ongoing status of treaty negotiations across BC, this likely will be a lengthy process. As cases filter through the courts—particularly in the province of BC—case law guiding the consultation process is continually evolving. Slattery (2005) explains the Haida and Taku River decisions ushered in, "a new constitutional paradigm governing Aboriginal rights" (p. 436).

> According to this approach, when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples. The 'honour of the Crown' obliges the Crown to respect Aboriginal rights, which in turn requires it to negotiate with Aboriginal peoples with a view to identifying those rights. (Slattery, 2005, p. 436)

The principle of honour of the Crown can be traced to the *Royal Proclamation* of 1763, in which the British Crown pledged its honour to the protection of Indigenous peoples from exploitation by non-Indigenous peoples (Martin & Telfer, 2018). The *Royal Proclamation* espoused:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should

> not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them.

The government of Canada currently maintains:

> The Government of Canada recognizes that it must uphold the honour of the Crown, which requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples. The honour of the Crown gives rise to different legal duties in different circumstances, including fiduciary obligations and diligence. The overarching aim is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation. (Government of Canada, 2018, p. 8)

The concept of honour of the Crown is the constitutional basis from which the duty to consult springs; the SCC has also indicated the honour of the Crown must be upheld even when the courts determine a formal duty to consult does not exist. The question of whether Canada's government had a duty to consult with Indigenous peoples prior to implementing legislation was unanswered in Canadian law during the planning stages of the *Cannabis Act*. Rather ironically, the SCC rendered this decision exactly one week before the *Cannabis Act* came into force. In *Mikisew Cree First Nation v. Canada* (Governor General in Council) (2018) the complainants argued that two pieces of omnibus legislation (with the potential to significantly impact environmental protections) were introduced into Parliament without consultation. The Mikisew argued the legislation would adversely affect their treaty rights to fish, trap, and hunt, which they argued triggered the duty to consult. The SCC unanimously held the Federal Court lacked jurisdiction to dispose of the claim, however the court offered divergent sets of reasonings.

Regarding whether enacted legislation could trigger the duty to consult the Majority (7-2) ruled the duty to consult could not be triggered at any stage of the legislative process. Four justices (led by Brown and Rowe) suggested the duty to consult does not apply to the creation of legislation under any circumstance. Three justices (led by Karakatsanis) suggested the duty to consult could not be triggered during the creation of legislation, but if the honour of the Crown was not upheld, future action could be taken. The SCC's Justice Karakatsanis, stated:

> I conclude the law-making process—that is, the development, passage, and enactment of legislation—does not trigger the duty to consult. The

> separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action. (*Mikisew Cree First Nation v. Canada*, 2018, para. 32).

However, Justice Karakatsanis continued:

> I add this. Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. The constitutional principles—such as the separation of powers and parliamentary sovereignty—that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation on the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown qua sovereign is absolved of its obligation to conduct itself honourably. (*Mikisew Cree First Nation v. Canada*, 2018, para. 52).

The judgement *in Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018) was not intended to condone the government's behaviour but resulted from the court's interpretations of the doctrine of parliamentary sovereignty, the separation of powers under Canadian federalism, and parliamentary privilege. In a minority decision Justice Abella (Martin J. concurring) stated, "the legislative sphere is not excluded from the honour of the Crown, which attaches to all exercises of sovereignty" (*Mikisew Cree First Nation v. Canada*, 2018, para. 78). While the SCC did not rule in favour of the Mikisew in this case the reasonings provided by Justice Karakatsanis had implications for future challenges. Justice Karakatsanis noted other protections may be recognized in the future, stating, "the Crown's honour may well require judicial intervention where legislation may adversely affect--but does not necessarily infringe--Aboriginal or treaty rights" (*Mikisew Cree First Nation v. Canada*, 2018, para. 3).This statement opened the door to future challenges, however, Justice Karakatsanis added, "the resolution of such questions must be left to another day. In this appeal, the issue was framed in terms of whether the duty to consult doctrine should apply to the law-making process. I find that it should not" (*Mikisew Cree First Nation v. Canada*, 2018, para. 3). As noted by Long and Jenkins:

> While it was held [in *Mikisew Cree First Nation v. Canada*] that there was no constitutional requirement to consult prior to passing legislation, the court unanimously endorsed the value and wisdom of consulting

> Indigenous groups prior to enacting legislation. Accordingly, this decision will likely raise the expectations by Indigenous groups that they be consulted as part of the legislative process. (Long & Jenkins, 2018, para. 15)

Despite the SCC's ruling that consultation prior to the implementation of legislation is ill-suited within the framework of Canadian federalism, Article 19 of the UNDRIP (2007) requires, "free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." When the Harper government finally signed the UNRDIP in 2010, it qualified that support by expressing concern related to the requirement of FPIC, maintaining that the UNDRIP was an aspirational document only and expressed concern that FPIC effectively gave Indigenous peoples a veto (Gray, 2016; Institute on Governance, 2014). At least four separate court decisions (between 2013-2015) held that the UNDRIP's provisions were not legally binding in Canada and did not change Canada's existing duty to consult (Gray, 2016).

> The new federal and Alberta [and BC] governments have since committed to implementing [the] UNDRIP but it remains to be seen how the FPIC provisions will be interpreted and implemented by these governments and what impacts this will have on consultation and accommodation. (Gray, 2016, p. 8)

In 2017, with the Trudeau government in power, Canada endorsed the UNDRIP without qualification, and committed to its implementation, although FPIC remains a condition that Indigenous groups and governments often interpret differently. Joffe (2015) argues governments have conflated the concept of FPIC with veto power. Others suggest:

> This veto point is often overrated and misunderstood by Crown representatives. A veto is quite a different legal beast than is reaching agreement or consent by the wish of the parties to the relationship. True reconciliation cannot give either party a veto. (FNLC, 2013, p. 24)

Joffe (2015) suggests, "The government's portrayal of the dangers of FPIC are designed to foster alarm. They run counter to Canada's endorsement of the UN Declaration. Such extreme positions are the antithesis of reconciliation" (p. 1). The UBCIC (2015) suggest FPIC is vital.

> Free, prior and informed consent is the right of Indigenous Peoples to say 'no' to the imposition of decisions that would further compound the marginalization, impoverishment and dispossession to which they have been subjected throughout history. FPIC is also the power to say 'yes' to

> mutually beneficially initiatives that can promote healthy and vital Indigenous Nations for the benefit of present and future generations. (UBCIC, 2015, para. 11)

Despite the expressed concerns of governments in relation to FPIC it is likely governments will continue with business as usual until the UNDRIP is force in effect under Canadian law.

> What implementation of [the] UNDRIP means in today's Canadian legal context is evolving. To date, however, the federal government has largely adopted the view that [the] UNDRIP and the notion of FPIC require only a good-faith effort to obtain consent, and not actually obtain consent in every instance. This is consistent with contemporary duty to consult case law indicating that consent is not required and there is no duty to agree. However, it is certainly foreseeable that this area of the law will continue to change. (Wright, 2020, p. 5)

Gray (2016) also notes how FPIC will be interpreted in the future remains to be seen, and suggests this makes both governments and industry nervous:

> Aboriginal groups have advocated for the implementation of [the] UNDRIP since 2007 but other affected stakeholders, particularly in the resource development industry, have raised serious concerns about the implementation of the FPIC provisions. While these provisions could be implemented in a way that is consistent with Canada's legal and constitutional framework, they are very broadly worded and open to multiple interpretations. Depending on how they are interpreted, these provisions could go substantially beyond what is currently required in Canadian law. For example, unlike the duty to consult, the requirement for FPIC in [the] UNDRIP is technically not limited to impacts on asserted or established Aboriginal or treaty rights and applies more broadly to any impacts on Aboriginal peoples. In the context of legislation, this could require FPIC for virtually any legislation of general application passed by the federal government, although others have suggested a more narrow interpretation. (Gray, 2016, p. 66)

Schreiber (2006) notes, "The ability of consultation to overcome the legal claims that may arise when Native rights are infringed may be one reason that industries and governments have so eagerly embraced consultation" (pp. 23-24). While it has not yet been established that the government is obligated to obtain consent when the duty to consult is triggered, government engagement in the consultation process must be meaningful. The White Paper consultation and its chilling effect on Indigenous-Crown relations is a prime example of why governments must do more than go through the motions only to produce the same policy they had intended all along (Weaver, 1981).

Schreiber (2006) notes, “In order to resist the engrained nature of colonial power, we must first recognize that colonialism is alive and well in the most unlikely of places: the apparently cooperative relationships involved in the practice of consultation” (p. 20).

The federal government describes the principles it believes are inherent in meaningful consultation in its 2011 Guidelines:

> A meaningful consultation process is one which is: carried out in a timely, efficient and responsive manner; transparent and predictable; accessible, reasonable, flexible and fair; founded in the principles of good faith, respect and reciprocal responsibility; respectful of the uniqueness of First Nation, Métis and Inuit communities; and, includes accommodation (e.g. changing of timelines, project parameters), where appropriate. (AANDC, 2011, p. 13)

Despite the admirable policy objectives indicated by government agencies, achieving meaningful consultation has been elusive according to many Indigenous stakeholders. The FNLC (comprised of members from the UBCIC, and the BC Assembly of First Nations [BCAFN]) describe some serious issues with current government practices:

> Rather than building the relationships, trust, and momentum required for the transformational change that reconciliation requires, the Crown’s approaches to consultation and accommodation are fueling growing impatience, frustration, and conflict…Real change on the ground is still perceived to be a distant goal as Crown policies and approaches have failed to live up to the principles and spirit of the court decisions, political assertions and, most importantly, the purpose of section 35 of the *Constitution Act, 1982*. (FNLC, 2013, p. 7)

The FNLC (2013) suggest there are several ways to improve upon Indigenous-Crown consultation, beginning with rejecting unilateral government control of defining the process by which the duty to consult and accommodate is fulfilled. They also argue Indigenous values, worldviews, and laws are crucial to both process and outcome.

The FNLC is not the only group that takes issue with several aspects of Indigenous-Crown consultation. A report prepared by Gray (2016) for the Minister of AANDC offers insight from Indigenous and federal government participants. Gray (2016) notes the 2011 Guidelines were singled out by Indigenous groups as taking a superficial approach to reconciliation through minimizing the Crown’s responsibilities in favour of a process that was more concerned with checking boxes than engaging in meaningful dialogue, suggesting the government favours procedure over purpose. The same report

noted federal officials involved in consultation felt Canada had implemented the necessary steps to improve the process, but that there was still considerable room for improvement. Federal officials also suggested meaningful consultation would require more guidance, training, resources, and policy authorities. Another concern noted by federal officials was the inability to meet the expectations of Indigenous groups if those expectations went beyond what they believed could be delivered or beyond the requirements of case law. The report noted:

> There is no single recipe for meaningful consultation. However, the successful approaches of some industry proponents and government entities have certain common ingredients, such as bringing the right attitude and outlook to the table, a focus on building relationships and trust, and engaging as early as possible in the decision-making process. The federal government needs to lead by example and place a greater focus on these key foundational elements of meaningful consultation. This will require it to first shift its mindset on and approach to the duty to consult. In particular, Canada needs to move from seeing consultation as primarily a legal obligation to manage or a process to document concerns to instead seeing it as a valuable tool and opportunity to improve its relationship with Aboriginal groups and advance reconciliation and other shared objectives. Consultation and accommodation is a means to an end, not an end in itself. (Gray, 2016, p. 2)

The FNLC also argued consultation must be purposive:

> This consideration of the fundamental foundation and purpose of the law of section 35 of the Constitution is an essential backdrop to the duties of consultation and accommodation. It reminds us that these duties exist as one element and aspect of a much larger and significant enterprise. They are not an end in themselves, but one important means for advancing the fundamental purposes of honourable reconciliation. The mechanics of how to consult and accommodate should not and cannot be understood apart from a substantive understanding about how they are to be a means towards broader goals. (FNLC, 2013, p. 95)

Clearly many of the complaints related to Indigenous-Crown consultation suggest that current failures are related to the Government of Canada's apparent preoccupation with process over purpose. Consultation has become so overly regimented that the reason for engaging in it—the reconciliation of Indigenous and Crown sovereignties—is all but forgotten. The underlying problem is that consultation as an isolated activity disregards the power dynamic in the Indigenous-Crown relationship and is ill-suited to advance Indigenous self-determination.

Canadian Indigenous policy has historically served the interests of Canada at the expense of Indigenous peoples. Over the last several decades Indigenous peoples have advanced from objects of policy discussion to participants in the process, however, the resultant policies somehow still fail to benefit Indigenous peoples and/or reflect their contributions to policy discussions. The purpose of this research is to better understand the Indigenous-Crown relationship in the current era of reconciliation, in which Canada describes Indigenous nations as partners in confederation. Has the Canadian government truly adopted a nation-to-nation approach in its dealings with Indigenous governments as it claims, and employed the reconciliatory principles it espouses in relation to these dealings? In examining Indigenous-Crown consultation regarding proposed changes to Canadian cannabis policy, this research describes the Indigenous-Crown consultation process, presents the arguments advanced regarding Indigenous interests and concerns related to cannabis legalization, and describes the implications of Indigenous exclusion in the resultant cannabis policy. Issues related to Indigenous rights, sovereignty, self-government, and Indigenous legal orders will be presented to help elucidate the current state of the Indigenous-Crown relationship.

Chapter 3. **Research Methods**

This research used a historiographical approach based on the critical examination of purposively sampled documents. Histography uses details from those sources to create a narrative of events based on the content of the documents and the perspectives of the documents' authors. This method is used to create a chronology of events during a particular period to reconstruct human behaviour in relation to the concept of interest. The concept of interest in this research was cannabis legalization in Canada within the context of Indigenous-Crown relations. To facilitate this, my research examined events and discussions related to cannabis policy and its creation to construct a record of what transpired between 2016-2021. The chronology created is representative of the public exchange between Indigenous groups, Indigenous governments, and Canadian government officials during the creation and implementation of Canada's recreational cannabis policy.

To qualify for inclusion in the sample the documents needed to be representative of public discussions and political processes occurring amongst Indigenous organizations and governments, and the Government in Canada in relation to cannabis legalization. To satisfy this criterion the sample included submissions made to the Standing Senate Committee on Indigenous Peoples (formerly the Standing Senate Committee on Aboriginal Peoples),[1] reports and documents published by Canadian governments,[2] resolutions passed by the AFN,[3] reports and documents created by Indigenous organizations and governments, [4] and Indigenous cannabis regulations.[5] The decision to rely on documents rather than other methods was made to ensure that the Indigenous arguments included in analysis were available to, and presumably considered by, the federal government while cannabis policy was being designed. This was done to illustrate the process of policy development and to determine to what extent Indigenous input was evident in the final policy. All the documents used in analysis included events the Canadian government participated in, or reports or resolutions that

[1]Appendix A: Standing Senate Committee on Indigenous Peoples (APPA)

[2]Appendix B: Government Documents (GD)

[3]Appendix C: Assembly of First Nations Resolutions (AFN res.)

[4]Appendix D: Indigenous Documents (ID)

[5]Appendix E: Indigenous Cannabis Regulations

were available to it (e.g., resolutions passed by the AFN and public reports published by Indigenous organizations). The focus was capturing the exchange between government and Indigenous actors during the development of cannabis policy, to describe how the Canadian government responded to various arguments and calls for Indigenous inclusion, and to examine the justifications the Canadian government offered for its decisions in relation to cannabis policy. Also examined were the implications of these exchanges when Bill C-45 became law.

To articulate the issues and arguments Indigenous organizations and governments raised in the public arena in relation to the prospect of recreational cannabis legalization, data from the 42nd Parliament, 1st Session (December 3, 2015 - September 11, 2019) were obtained from the Senate of Canada's website. Data included 14 letters, briefs, and documents submitted to APPA between February 27, 2018, and April 17, 2018, in relation to 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*, insofar as it relates to the Indigenous peoples of Canada. Transcripts from six proceedings related to the committee's study of Bill C-45 also were included in the analysis. Transcripts include witness testimony from representatives of Indigenous groups, individuals, governments, and organizations, as well as Canadian government officials. APPA's fifth meeting in relation to their study of Bill C-45 was held in camera on April 25, 2018. During this meeting APPA adopted its draft report and requested a complete and detailed response from the federal government. APPA's final report (tabled in the Senate on May 1, 2018) was also included in analysis, as were two federal government responses to the report.

Documents related to cannabis consultation were collected from Government of Canada websites and included reports produced by the Task Force on Cannabis Legalization and Regulation and Health Canada's Cannabis Legalization and Regulation Branch. The AFN's website was searched for resolutions related to cannabis adopted between 2016-2021 (immediately following Trudeau's 2016 announcement to legalize recreational cannabis). To compile a purposive sample of Indigenous cannabis regulations, the word 'cannabis' was searched in online database of the *First Nations Gazette*, which provides public notice of First Nations' laws and by-laws. The terms 'First Nations cannabis law' and 'Indigenous cannabis law' also were searched using the *Canadian Newsstream* database. This yielded 1,198 and 858 results respectively; the

resulting headlines were scanned for relevance and to avoid duplicate articles published by different news providers. The *Canadian Newsstream* search included English language Canadian newspapers published between 2016 and 2021. In addition, every issue of three Indigenous magazines published in Canada related to Indigenous engagement in the cannabis industry were reviewed for articles discussing Indigenous cannabis regulations: *Smoke Signals* (started in 2017), *Growth and Prosperity* (started in 2019) and *Dispensing Freedom* (started in 2020). Cannabis regulations for nations purported to have them were found through links in news media, the *First Nations Gazette*, Internet searches, and on Band and First Nations websites. The sample included 15 cannabis laws, 12 by-laws, 12 band council resolutions, four other regulations, two provincial government agreements, and one Memorandum of Understanding (MOU). Also included in the analysis were five draft laws and by-laws that were undergoing community consultation. In total, the cannabis regulations represented 33 First Nations.

The cannabis regulations and other documents were loaded into NVivo for analysis. The first step was to create a timeline of events related to cannabis legalization beginning with the Liberal government's announcement to legalize recreational cannabis and extending through 2021. This captured the chronology of events related to Indigenous-Crown cannabis consultation prior to cannabis policy creation, incorporated when calls for Indigenous inclusion in cannabis policy were made publicly by various stakeholders, and noted when events engaged in by Indigenous groups and Canadian governments occurred. All documents used in analysis were inductively coded. In the first pass of coding, the concerns noted by various Indigenous stakeholders were categorized. Several subsequent passes were employed, and subcategories were created in relation to the arguments, concerns, and interests found in the data. Government responses to specific issues and justifications for policy decisions were identified and collected from APPA's cannabis study. The Indigenous cannabis regulations collected were coded in a separate NVivo project. The first pass of coding made note of specific inclusions (e.g., whether the regulations covered sales, production, or licensing). The regulations were assigned file classifications based on the type of regulation (e.g., law, by-law, band council resolution, or another type of regulation) to enable matrix coding queries and distinguish patterns in the data. Once the chronology and categories had been established the documents were coded for

emergent themes in relation to the consultation process and Indigenous-Crown relationships.

Chapter 4. **Results and Discussion**

4.1. Bill C-45: Optimism and Apprehension

This research examines discussions regarding proposed recreational cannabis legalization, the Indigenous-Crown consultation process, and what transpired after the passage of Bill C-45: *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (the *Cannabis Act*). Various perspectives were shared during APPA's cannabis study and expressed through resolutions adopted by the AFN leading into legalization. Most arguments were firmly planted in either optimism regarding the potential economic benefits or apprehension related to increased accessibility to cannabis and the implications of this for public health. There was no pan-Indigenous voice that encompassed the perspectives of every Indigenous person, group, or government in Canada in relation to cannabis policy (see also Graham et al., 1996); concerns regarding recreational cannabis legalization varied by nations, locations, and motivations. The following section discusses various Indigenous perspectives regarding proposed recreational cannabis legalization and outlines some of the rights-based arguments made in favour and against the legislation as proposed in Bill C-45.

4.1.1. Jurisdiction and Economic Benefits

The federal government has maintained cannabis legalization was intended to limit youth access and end the illicit cannabis trade. The Canadian government has consistently highlighted its cannabis policy's public health approach and downplayed the economic benefits (Boyd, 2019), but in the context of the multi-billion-dollar cannabis industry, the opportunity to participate in the licit market is of considerable importance. Indigenous engagement in the cannabis trade was well-established prior to the Liberals announcing their plan to legalize recreational cannabis. Engagement sometimes occurred through licensed medical cannabis dispensaries, while other Indigenous cannabis entrepreneurs profited during recreational cannabis prohibition through 'grey-market' dispensaries that operated on the margins of Canada's medical cannabis laws and sometimes failed to meet Health Canada's licensing and regulation requirements under the *Access to Cannabis for Medical Purposes Regulations* (ACMPR). Like non-

Indigenous grey-market businesses prior to recreational cannabis legalization, some Indigenous cannabis businesses operated with no interference from law enforcement, while others faced raids and proprietor arrests. The many cannabis businesses which operated on-reserve have been termed by some Indigenous cannabis entrepreneurs—such as former Ontario Regional Chief and AFN Cannabis Task Force co-chair Isadore Day--as the Red Market. For example, Ontario's Alderville First Nation was home to a stretch of road coined the 'Green Mile' by locals, where nearly a dozen shops sold cannabis prior to legalization (George-Cosh, 2018).

Proposed cannabis legalization was seen by some as a path to economic freedom: there would be profits to be made in production, processing, distribution, licensing, sales, and taxation. In relation to Bill C-45, Mike Fontaine, Vice President of IndigiCo (an Indigenous led cannabis company) offered,

> This bill is, without a doubt, a generational opportunity for creating economic dignity for Indigenous people…there is no more need to perpetuate this romantic notion that Indigenous peoples are historic curiosities wandering aimlessly on this *terra nullius* hunting and gathering as we go. That just has to end. What better time than now? (Fontaine, APPA Proceedings, 26/3/2018, p.8) [6]

In addition to Indigenous-led cannabis corporations, other groups lobbied early on for Indigenous inclusion in the licit market, including the AFN, the First Nations Tax Commission (FNTC), the Indigenous Bar Association (IBA), the Indigenous Peoples Cannabis Association (IPCA), and multiple individual and collective Indigenous governments and organizations across Canada. The importance of jurisdiction was not only tied to engaging in the cannabis economy, but also included perspectives which sought to avoid or delay the introduction of licit recreational cannabis into Indigenous territories. Multiple proposals were advanced intended to benefit Indigenous communities through inclusion in the cannabis trade. Proposals ranged from setting aside production licences for Indigenous applicants, to Indigenous taxation powers, to complete Indigenous control of all aspects of cannabis regulation, production, distribution, sale, licensing, and taxation in Indigenous territories through the recognizing Indigenous nations as third orders of government with law-making authority.

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[6] Witness testimony provided to the Standing Senate Committee on Aboriginal Peoples' (APPA) cannabis study are cited (Witness, APPA Proceedings, date, page number)

Many of these proposals were paired with rights-based arguments in support of Indigenous jurisdiction and economic opportunities within Canada's licit cannabis regime. These rights-based arguments referenced both domestic and international legislation regarding Indigenous rights, the TRC's *Calls to Action*, treaties and self-government agreements, and invoked the principles of honour of the Crown, sovereignty, and nation-to-nation relationships. When assessing the proposed legislation, the IBA was adamant, "Bill C-45 could be vastly improved by recognizing Indigenous Nations' rights and interests in controlling their own regulations, taxation revenues, medicinal uses, ceremonial uses, and education needs, in keeping with their unique and distinct Indigenous cultures" (IBA, APPA Submission, 23/3/2018, p. 9). [7]

The AFN adopted several resolutions in relation to impending cannabis legalization beginning in December 2016, the majority of which discussed jurisdictional inclusion in the regulatory framework. A resolution adopted shortly before cannabis legalization,[8] *Federal Recognition of First Nations Jurisdiction over Recreational and Medicinal Cannabis* outlined the AFN's argument for jurisdictional inclusion. The AFN cited Article 21 of the UNDRIP, noting: "Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the area of education, employment vocational training and retraining, housing, sanitation, health and social security" (AFN Res no. 02/2010, p. 1). The resolution stated, "First Nations have inherent jurisdiction over economic development initiatives, both federally and provincially, and possess the authority to manage production, licensing and distribution of legalized cannabis" (AFN Res no. 02/2010, p. 1). The IBA submitted a 20-page brief to APPA outlining their concerns, which included amending the legislation to, "include an exemption for Indigenous Nations and an opt-in basis, by which a Nations' own Indigenous laws can be recognized at the federal level" (IBA, APPA Submission, 23/03/2018, p. 19). The IBA applauded the legalization of recreational cannabis but questioned why, "Bill C-45 essentially creates a trading monopoly over the new legal Cannabis trade for provincial and federal governments and their selected entities" (IBA, APPA Submission, 23/3/2018, p. 4).

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[7] Document submissions to the Standing Senate Committee on Aboriginal Peoples' (AAPA) cannabis study are cited (Author, APPA Submission, date, page number)

[8] Assembly of First Nations Resolutions are cited as (AFN Res. number, page number)

The IBA argued the recognition of Indigenous law-making authority would be critical to successful cannabis legalization:

> The key to successful legalization of Cannabis is meaningful inclusion of Indigenous peoples and economies. True reconciliation can only be achieved if Indigenous peoples are included as equal partners in both the discussions and development of economic benefits. The inherent laws of Nations have meaning to their respective peoples. For implementation of a nation-wide scheme which aims to reduce the burden on the courts, control the illicit market, protect young persons, and promote public health, Indigenous laws must be recognized and enabled to operate congruently and harmoniously in a constitutionally inclusive legislative scheme. (IBA, APPA Brief, 23/3/2018, p. 19)

These arguments align with those made in the previous chapter by scholars Minnawaanagogiizhigook (2008) and Borrows (2005) who argued Indigenous law should be conceived as being in a constant state of development and applicable to the contemporary context. However, the Canadian government has historically shown a lack of political will to include Indigenous authority meaningfully in Canada's political system.

The possibility of legalizing recreational cannabis was of considerable interest to many Indigenous communities seeking economic opportunities. In his statement to APPA, IPCA Executive Director Bill Robinson explained that prior to cannabis legalization his team, "met with and provided regulatory and business development advice and information to well over 100 Indigenous communities, tribal councils and individuals" (Robinson, APPA Proceedings, 28/02/2018, p. 2). Robinson also advocated for jurisdictional inclusion for Indigenous nations in what was widely anticipated to be an emerging global industry.

> There are concerns about the need for licensing by First Nations communities that wish to produce and sell cannabis on First Nations sovereign land — questions about the need for licensing. Also, Indigenous producers of cannabis should collect, possess and utilize the excise tax garnered from production on reserve land to support their functions as another order of government. Some of these concerns are derived from the recent Canadian government decision on [the] UNDRIP, as well as past reports, such as the report from the Task Force on Cannabis Legalization and Regulation, and from the Truth and Reconciliation Commission report. These concerns are consistent with jurisdictional approaches to a new fiscal relationship between Canada and its Indigenous peoples. These issues represent action on Articles 4 and 36 of [the] UNDRIP. (Robinson, APPA Proceedings, 28/02/2018, p.3)

Article 4 of the UNDRIP recognizes, “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.” The argument related to Article 36 of the UNDRIP recognized the potential for Indigenous participation beyond reserve-based cannabis shops, noting there was potential for Indigenous participation in the global cannabis market. Article 36 of the UNDRIP notes:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
>
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Chief Commissioner of the FNTC, C.T. (Manny) Jules also advocated for jurisdictional inclusion and provided APPA with four reasons underpinning the commission’s proposal regarding First Nations tax power in the upcoming cannabis market: (1) increasing fiscal self-sufficiency among First Nations; (2) directing tax revenue towards health, infrastructure, education, and regulations related to cannabis legalization within First Nations; (3) reducing the likelihood of grey market sales of cannabis from First Nations, and; (4) as a practical example of reconciliation with First Nations governments. Jules sought First Nations tax power in the cannabis economy, arguing, “Confederation was brought about by pretending that First Nation governments and our pre-existing jurisdiction and title no longer existed” (Jules, APPA Proceedings, 28/02/2018, p. 1). Echoing the perspectives of Indigenous scholars in the previous chapter, Jules characterized this as ‘legal fiction’ and added,

> First Nation governments have always existed and always exercised tax jurisdiction. In fact, my ancestors had a word for it: *taksis*. *Taksis* monies were used for infrastructure, lawyers and to support our fight to have our lands, jurisdiction and tax powers restored…We need to restore our tax power and the decision-making power that went with it. We cannot have our priorities subject to second-guessing from Ottawa. (Jules, APPA Proceedings, 28/02/2018, p. 1)

Jules believed the *First Nations Fiscal Management Act* (FMA)—optional legislation used by over 230 First Nations to generate revenue and decide how to use it--

was the appropriate tool to create First Nations taxation power in the regulatory framework (Jules, APPA Proceedings, 28/02/2018). By allowing an opt-in measure for interested First Nations to initiate tax power, nations with the appropriate capacity and expertise could participate; alternatively, nations that lacked the capacity or interest to participate could decline. The FNTC proposed to facilitate this through legislative amendments to Bill C-45, the *Excise Act, 2001* and the *First Nations Goods and Services Tax Act* (FNGST Act) and the proposed amendments were drafted by the FNTC and submitted to APPA (FNTC, APPA Brief, 4/4/2018). The FNTC envisioned a First Nations regulatory option that would ultimately include excise tax revenues, FNGST revenues, First Nations licensing and regulation fees, and possible First Nation provincial sales tax revenues pursuant to provincial agreements (FNTC, APPA Brief, 4/4/2018). Advancing this position in terms of the potential boosts for economic self-sufficiency and self-determination in Indigenous communities, Commissioner Jules opined,

> No country in history has ever escaped poverty by being dependent on aid and transfers. As my ancestors said over 100 years ago to Prime Minister Laurier in their historic meeting: "We expect much of you as the head of this great Canadian Nation, and feel confident you will see that we receive fair and honourable treatment"…Many First Nations leaders have been part of this effort to restore their lands, their tax powers and their governments. Great progress has been made in the courts. We had our rights asserted into the Constitution. The federal government has accepted the *United Nations Declaration on the Rights of Indigenous Peoples*. I am particularly proud of our work to restore fiscal powers and a revenue-based fiscal relationship through the *First Nations Fiscal Management Act*. It created revenues and allowed us alone to decide how to use them. (Jules, APPA Proceedings, 28/02/2018, p.1)

Jules suggested that Indigenous inclusion in the recreational cannabis industry could provide the opportunity for Indigenous nations to shape their own financial destinies and escape poverty.

Speaking on behalf of the IBA, Josephine de Whytell noted the exclusion of Indigenous jurisdiction served to perpetuate a status quo that was no longer acceptable.

> The regulation of trade and social order has become a mechanism for the subjugation of Indigenous peoples and economies and the advancement and enfranchisement of European settlers in terms of social status and wealth, so renewing the original nation-to-nation relationship requires recognizing Canada's adoption of [the] UNDRIP, the *United Nations*

> *Declaration on the Rights of Indigenous Peoples*, and empowering Indigenous peoples to reconcile their equal status in Canadian society. (de Whytell, APPA Proceedings, 26/3/2018, p. 24)

As this suggests, an Indigenous jurisdiction option could provide Indigenous communities with tangible economic opportunities.

4.1.2. Public Health

Concerns related to public health expressed by APPA's witnesses varied across organizations and nations: some were optimistic that accessibility to cannabis may benefit public health in some regards, while others had considerable concerns that widespread availability of legal cannabis would be detrimental to Indigenous communities, many of which already faced health-related struggles. There were complaints regarding current shortcomings and inequities within the medical cannabis regime, worries related to increased levels of substance abuse, and concerns about the implications of legal recreational cannabis on mental health, particularly for youth. The First Nations Health Authority (FNHA) argued, "there are a number of key issues around the legalization of non-medical cannabis that may have a direct impact on the health and wellness of First Nations" (FNHA, APPA Brief, p. 2).

The FNHA noted, "For First Nations people, mental health and substance use challenges must be understood as symptoms of intergenerational trauma" (FNHA, APPA Brief, 4/4/2018, p. 5). The FNHA argued that colonialism and the resulting intergenerational trauma, coupled with racial discrimination found in many health care interactions involving Indigenous peoples, could cause some to turn to recreational cannabis to self-medicate as had been the case with alcohol, commercial tobacco, and opioids. The FNHA suggested, "Hardwiring cultural safety and humility into all actions and efforts related to accessing non-medical cannabis is paramount" (FNHA, APPA Brief, 4/4/2018, p. 3). The FNHA requested the development of culturally appropriate public education regarding the dangers of cannabis in Indigenous languages to offset this risk. Similar concerns were echoed from those in Northern communities, many of whom did not anticipate reaping any economic benefits in relation to cannabis legalization.

The FNHA also raised concerns related to the implication of recreational cannabis legalization on mental health when many Indigenous communities were already struggling with a critical lack of mental health and addiction services. As noted by Carol Hopkins, Executive Director of the National Native Addictions Foundation, "in the Yukon, the Northwest Territories and Nunavut, they have been requesting residential treatment centres, for the Indigenous population specifically, for many years…I know there are no treatment centres there that are Indigenous-governed and Indigenous-run" (Hopkins, APPA Proceedings, 26/3/2018, p. 22). The FNHA noted,

> Research has shown that cannabis use has the potential to increase the risk of developing mental illnesses like psychosis or schizophrenia, and can increase the risk of suicide, anxiety and depression. It is crucial that the Committee recognizes the link between non-medical cannabis use and increased mental health risks as a major concern. The Committee should consider the impact that legalization, and potentially increased usage of cannabis, will have on mental health issues and associated services. (FNHA, APPA Brief, 4/4/2018, p. 5)

Valerie Gideon, Acting Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch agreed that many Indigenous communities were already struggling with addiction and mental health adding, "I think youth mental health issues in the Indigenous context is well recognized as being in a very serious state" (Gideon, APPA Proceedings, 27/2/2018, p.6). A submission from the Isuarsivik Treatment Centre emphasized this point: "Suicide rates are high in all Inuit regions and Nunavik has one of the highest youth suicide rates in the world. The region's suicide rate has been rising since the 1990s and is now about 10 times the Québec average" (Isuarsivik Treatment Centre, APPA Submission, 15/3/2018, p. 2). Speaking at APPA's proceedings, Nunavut's Geela Arnauyumayuq noted, "It's like we're in a state of emergency, one suicide after another. It's hard. We're asking the government if they can help us. We're reaching out. We need help" (Arnauyumayuq, APPA Proceedings, 26/3/2018, p. 4). The potential implications of increased cannabis accessibility in the North were amplified in the context of communities already in crisis. Elder Issac Shooyook of Nunavut offered,

> With the legalization of cannabis, I don't know how we'll deal with it if we have no support system. In Nunavut, there's none. There's no support. There's no preventative measures… Today there are no social counselling services. There are police in the systems. There are nurses and social workers, but they cannot help the people who really need that kind of help. (Shooyook, APPA Proceedings, 26/3/2018, p. 27)

Senator Patterson of Nunavut engaged in extensive discussions with his constituency and noted cannabis legalization was conceptualized by many as a significant threat to their already troubled communities:

> Let me say, in conclusion, honourable colleagues, that I found the citizens of Nunavut, young and old alike, generally to be expressing great apprehension about the impact on a population that is reeling from mental health problems, alcohol addiction, family violence and suicide on the heels of a history of relocation, dog slaughter and residential schools, in communities where school attendance is sadly often around 50 per cent already, without this new threat. (Patterson, APPA Proceedings, 28/3/2018, p. 8)

While the lack of mental health and addiction facilities in remote communities was a critical concern, the FNHA also expressed optimism when referencing research which suggests cannabis may be useful in treating opioid addiction. Others argued impending cannabis legalization was an opportunity to revisit current and inequitable government policies related to the medical cannabis that inhibited Indigenous access. The IBA argued the current medical cannabis regime under the AMCPR was inaccessible to many Indigenous peoples due to its high cost and the requirement of a credit card to make medical cannabis purchases (IBA, APPA Brief, 23/2/2018). AFN Resolution no. 123/2016 and AFN Resolution no. 03/2017 also described Canada's existing medical cannabis regime as inequitable to Indigenous peoples in terms of both Indigenous inclusion in the regulatory system and as health care clients of Canada's Non-Insured Drug Benefit (NIHB) which did not cover medical cannabis for Indigenous peoples. Resolution no. 03/2017: *NIHB Coverage of Medical Cannabis*, noted the federal government did cover medical cannabis for Canadian veterans, bringing into question the equity of Canadian Indigenous policy. This inequity was echoed by others, including Randall Phillips, Chief of Oneida Nation of the Thames:

> There is no question about the need for it [medical cannabis] and the use of it in our community. I'll be honest with you, senators; I've had to personally dish out a few hundred dollars for seniors in my community because the Non-Insured Health Benefits Program doesn't pay for this prescription, yet it does for veterans. (Phillips, APPA Proceedings, 28/2/2018, p.3)

The IBA also argued cannabis was a medicine, and in that context, argued Indigenous nations should have jurisdiction to prescribe or forbid its use in their own territories.

> These practical and socio-economic barriers are nothing compared to the failure to recognize inherent rights, as protected by Treaties and s.35 of the *Constitution Act, 1982*. The Crown cannot purport to subsume the public interest of all Indigenous Nations with respect to their use of a powerful plant/medicine without violating s.2, s.7 and s.15 of the Charter in respect of the equal rights of Indigenous peoples to be able to participate individually, or collectively, in the planning and implementation of their health care. (IBA, APPA Brief, 23/3/2018, p. 16)

The IBA also referenced the TRC's *Calls to Action* 18-21 and Article 24 of the UNDRIP which discussed the need for equality in Indigenous health care through Indigenous control. The IBA added,

> The conversation about legalization of Cannabis requires equal recognition of Indigenous Nations' rights to control the regulation of their own health care. It is over-simplified, if not the product of Colonial ignorance, to assume that the widespread legal introduction of a medicine within a territory of a First Nation or Indigenous community is a matter that is local or private to a province, rather than a First Nation. In any event, it would be inconsistent with the honour of the Crown, the modern approach to Indigenous treaty interpretation, and the inherent right of Indigenous governments to self-determination to allow s.88 of the *Indian Act* to underpin the new era of Cannabis trading relations between the Crown and Indigenous peoples.
>
> Indigenous Nations must have the authority to exercise their own world view and be responsive to the specific needs and cultural expectations of their communities. One way to achieve the TRC's aforementioned *Calls to Action* and bring force to the promise of [the] UNDRIP would certainly be to recognize Indigenous Nations' rights to create their own laws governing this new widely available medicine, and enable Indigenous communities to determine their own standards on appropriate use of it. Some Nations may embrace recreational marijuana, others may not; some Indigenous people/Nations may wish [to] revitalize the spiritual element of engaging and connecting with the energy of the plant, and restrict its use for that purpose. It is a matter strictly for each unique and distinct Indigenous Nation to decide for themselves. (IBA, APPA Brief, 23/3/2018, pp. 17-18)

Chief Phillips also suggested cannabis should be conceived as medicine, offering, "It has a use. It always has. You use it ceremonially. You do the proper protocols with respect to treatment and a plan and then this medicine will work. It's a medicinal plant; it always has been. That's what our elders are saying" (Phillips, APPA Proceedings, 28/2/2018). This was reiterated in a briefing note created by the TPF which included data collected from Elders across Canada. The briefing note described two ways cannabis had been used by Indigenous peoples historically.

> 1. The cannabis was prepared in a culturally appropriate way to create a topical solution to treat pain, such as arthritis. However, it was not ingested or smoked.
>
> 2. The cannabis was prepared in a culturally appropriate way and within ceremony to lessen symptoms of psychosis (undiagnosed), such as schizophrenia. (TPF, ID, 2018, p. 5)

A position paper filed by the National Indigenous Medical Cannabis Association suggests,

> It should not surprise any Canadian that cannabis especially its low THC strain, was used widely by various Indigenous or First Nation tribes thousands of years before colonization of what we refer to as Turtle Island. We have our own Indigenous records dating back to 1605, where our ancestors used cannabis and hemp for clothing, hunting and gathering (matts, nets, fishing line, etc.) selling, trading and exporting. Our ancestors extracted and processed cannabis and hemp long before any settlers reached our shores. (National Indigenous Medical Cannabis Association, ID, n.d., p. 2)

While there is a lack of consensus within scholarship if cannabis existed in North America pre-contact or if it was used traditionally in Indigenous societies, a report titled *Historical and Cultural Uses of Cannabis and the Canadian "Marijuana Clash"* prepared for the Senate Special Committee on Illegal Drugs states, “Some scholars believe that cannabis probably existed in North America long before the Europeans arrived” (Spicer, 2002, p. 13). Lending support to early cannabis use in Canada, the report describes Bill Fitzgerald’s 1985 discovery of, “resin scrapings of 500-year-old pipes in Morriston, Ontario” containing traces of hemp (Spicer, 2002, p. 13). Spicer’s (2002) report also cited a book titled *Green Gold: Marijuana in Magic and Religion* which argued, “there is some very good physical evidence that indicates cannabis played a part in some of the native cultures prior to the arrival of Columbus” (Bennett et al. as cited in Spicer, 2002, p. 13). Robinson’s (1996) *The Great Book of Hemp* claims use of the cannabis plant dates to 400 BCE in North America, citing clay pipes containing cannabis residue and hemp cloth uncovered in the ‘Death Mask Mound’ left by the Mound Builders of the Great Lakes and Mississippi Valley. However, Ren et al. (2019) counter, “archaeological evidence for ritualized consumption of cannabis is limited and contentious” (para. 1).

A resource for health care providers created by the FNHA nonetheless argues, “The Indigenous people of North America used psychoactive herbs to help with their ceremonies (such as Sundance and vision quests)” (FNHA, ID, n.d, p. 2). The IBA made

similar claims citing Angel's (1997) research about an Indigenous spiritual society. Angel (1997) described the Anishinaabe practice of *Midewiwin* and its rituals in the 19th century. The IBA noted,

> Although Indigenous peoples across Canada are extremely diverse in respect of their beliefs, laws, practices and customs, powerful herbs, roots and other medicines have been used in combination with ceremony since time immemorial. Indigenous peoples have an inherent right to self-determination which includes providing for the hearts and minds of their people. (IBA, APPA Submission, 23/3/2018, p. 4).

While Angel's (1997) research did not specifically mention cannabis as among the powerful herbs used in *Midewiwin* ceremony, universally accepted evidence remains elusive because much of ceremony and religion was completely extinguished through policies introduced by the Government of Canada or driven underground during the settlement period.

In the context of cannabis as traditional medicine, the IBA also expressed concern regarding biodiversity and intellectual property in relation to regulating the cannabis industry, noting Bill C-45, "provides such governments and their agents with wide discretion and criminal law powers to protect their intellectual property in this new industry" (IBA, APPA Submission, 23/3/2018, p. 4). The IBA further noted,

> An element of Cannabis use among traditional Indigenous peoples, that the federal and provincial governments are not adept to comprehend or regulate, is the traditional knowledge that Indigenous peoples have kept sacred, and retained within their families and communities. Only traditional knowledge keepers can authorize and regulate how this knowledge is shared and transmitted to future generations. Both the *Convention on Biological Diversity* and [the] UNDRIP recognize this. (IBA, APPA Submission, 23/3/2018, p. 11)

It was clear that some arguments for jurisdiction went beyond economic benefits and medicinal properties and drew on deeper cultural aspects related to the cannabis plant.

4.1.3. Criminalization

When noting how Indigenous populations were at greater risk of criminalization for cannabis offences under prohibition, the FNHA expressed support for, "approaches that minimize the societal and health concerns related to the criminalization of cannabis" (FNHA, APPA Brief, 4/4/2018. p. 2). However, under the proposed legislation, some

expressed concern that aspects of cannabis would remain criminal; under Bill C-45 some cannabis-related offences carried harsher penalties than had been imposed under prohibition. The IBA suggested that this could continue the pattern of criminalization within Indigenous populations.

> With the stated purpose of protecting the public from health risks and ensuring the safety of young people, Bill C-45 unduly criminalizes many ongoing aspects of the use of Cannabis, that will foreseeably be enforced disproportionately against Indigenous peoples, indirectly apply to more Indigenous peoples, and may lead to the over-incarceration of more Indigenous offenders. This is not in keeping with the other stated purpose of this proposed legislation, which is to reduce the burden on the courts. (IBA, APPA Brief, 23/3/2018, p. 8).

In referencing the strict penalties articulated in Bill C-45, IBA speaker de Whytell provided a specific example of how Bill C-45 had the potential to further criminalize Indigenous peoples:

> By way of example, Bill C-45 imposes on indictment a maximum 14-year sentence for offences such as possessing, distributing, selling and cultivating in excess of four plants in a dwelling house, among others, automatically denying judges any opportunity to issue a conditional sentence or discharge.
>
> In the case of an Indigenous offender coming before the courts on any of these charges, the sentencing judge would be statutorily disabled from applying Gladue principles and exercising discretion to rebalance the tilt of injustice that brings a disproportionate number of Indigenous people before the courts…It is reasonably foreseeable that by failing to include Indigenous nations in the legislative scheme in Bill C-45 without including an opt-in or opt-out provision for First Nations, the enforcement of Bill C-45 will result in Indigenous peoples being unfairly criminalized. (de Whytell, APPA Proceedings, 26/3/2018, p. 24)

For this reason, the IBA suggested the *Criminal Code* should not apply to any aspect of cannabis under Bill C-45, and further suggested such offences should be regulatory rather than criminal. Mary Bird--Area Director of Nishnawbe-Aski Legal Services—also voiced concerns with the continued criminalization of cannabis offences under Bill C-45.

> I mean, it's open season. People will hear that marijuana is legal. We know the average person on the street, that's all they will hear. We will have people who will be growing it and distributing it without understanding the law…It will put people in a position where they will conduct themselves in a manner they think they are acting legally, and they are not. The last thing we need is more criminal charges in these communities. (Bird, APPA Proceedings, 26/3/2018, p. 27)

Concerns related to the further criminalization of Indigenous peoples under the *Cannabis Act* were well-founded in consideration of how Indigenous peoples and people of colour have historically been the most heavily targeted under cannabis prohibition (Vallerini et al., 2018).

4.1.4. Policing

Cannabis legalization and implications for the criminal justice system were not limited to the ongoing criminalization of Indigenous peoples. Inspector Steve Burton, a criminal investigative psychologist from Tsuut'ina Nation Police Service suggested many Indigenous communities were not adequately prepared for legalization (Burton, APPA Proceedings, 3/28/2018). Burton acknowledged the challenges inherent in the First Nations Policing Program (FNPP), including the expectation of service delivery while 'undermanned' and 'under-resourced.' Burton pointed out, unlike other policing agencies in Canada, First Nations policing was not considered an essential service and thus operated on five-year service contracts that stipulated funding. He added,

> When we're looking at trying to enforce the upcoming legislation, we don't have the tools. We don't have the people trained, the drug recognition experts. Those are training programs that require extensive time…For us to arrange that training when we're already low on manpower, we have to find a way to backfill that position or positions with other officers. So that's overtime, that increases. When you look at trying to enforce it on the roadways, right now the only option we have is taking blood in order to test it, and we're not comfortable with that. So there are some problems. (Burton, APPA Proceedings, 3/28/2018, p. 3)

Budgetary concern in relation to preparing for the new legislation was not limited to the FNPP. Concern was also noted by the Royal Canadian Mounted Police (RCMP) which stated it would also require increased funding and personnel for its Contract and Aboriginal Policing business line, "to enhance awareness of the impacts and dangers of substance use and misuse from a law enforcement perspective" (RCMP, APPA Submission, 3/26/2018, p. 2). Much like health care concerns, concerns related to policing were heightened because many Indigenous services were already struggling to keep up with community demands stemming from dysfunction related to intergenerational trauma caused by Canadian Indigenous policy and the limited resources available to Indigenous communities.

Indigenous concerns related to Bill C-45 were diverse. While some saw jurisdictional inclusion in the cannabis industry as a rare and unique opportunity for Indigenous communities to generate own-source revenue and become self-sustaining, others believed legalization would antagonize mental health crises, addiction, and the criminalization of Indigenous peoples. However, regardless of whether individuals and organizations were optimistic in relation to opportunities to join a billion-dollar industry, or apprehensive of possible implications for public health in communities already in crisis, there was consensus in one regard: it would be critical to respect the right of Indigenous nations to make their own decisions with how to proceed within their own territories for the health, safety, and prosperity of their citizens.

4.2. Consultation

Despite the centrality of consultation in the Indigenous-Crown political sphere, it is useful to consider it just one (albeit important) step in the pursuit of what Graham et al. (1996) term ‘achieving dialogue’ in the context of policy creation. The following section outlines the consultation process as described through published government documents prepared by the Task Force on Cannabis Legalization and Health Canada’s Cannabis Legalization and Regulation Branch. Also included are resolutions passed by the AFN prior to cannabis legalization, and evidence presented to APPA’s cannabis study.

4.2.1. The Task Force on Cannabis Legalization and Regulation Consultations

The Government of Canada assembled the Task Force on on Marijuana Legalization and Regulation in June of 2016 (Government of Canada, GD, 2016). The task force was later renamed the the Task Force on Cannabis Legalization and Regulation (or simply the Task Force). The Task Force included Ministers from Justice Canada, Health Canada, and Public Safety Canada. The Ministers were tasked with designing a new legislative and regulatory framework for cannabis. Internal, and heavily redacted Justice Canada files released under freedom of information requests indicate, “no Indigenous person was seriously considered to sit as a Task Force member” (Crosby, 2019, p. 637). The goal of the nine-member Task Force was to collect public

and industry input regarding proposed cannabis legislation. The stated focus, “ranged from global treaty obligations to the homes and municipalities in which we live” (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 1). Minister of Health, Ginette Petitpas Taylor confirmed, “the Task Force on Cannabis Legalization and Regulation was the primary means of consulting Indigenous peoples on the proposed legalization of cannabis” (APPA, GD, 2018, p. 8).

The first AFN resolution related to recreational cannabis legalization-- *First Nations Inclusion in the Emerging Cannabis Economy*--was passed on December 8, 2016, six months after the Task Force was announced (AFN Res. no. 123/2016). The preambulatory clause in this first resolution: (1) speculated cannabis legalization would attract millions of dollars in investments and could generate billions of dollars in revenue; (2) indicated that the Government of Canada had commissioned an expert report from the Task Force that was not yet public; (3) predicted a small number of (non-Indigenous) licensed medical cannabis producers would monopolize the market as they had under the medical cannabis regime; and (4) argued, “Licensed production by First Nations would provide a new economic opportunity for First Nations communities, particularly remote communities who have few other economic opportunities” (AFN Res. no. 123/2016, p. 1). The resolution stated:

> THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:
>
> Call on the Government of Canada to ensure that any new legislation or licensing conditions for the production of medical or recreational cannabis set out priorities and incentives to ensure that First Nations are given the opportunity to participate and benefit fully from the development of this new and emerging economic sector. (AFN Res. no. 123/2016, p. 1)

This resolution was a public proclamation of Indigenous interest in participating in both recreational and medical cannabis markets, making clear the AFN’s ambitions in relation to cannabis jurisdiction.

The Task Force met with 410 individuals and organizations over a five-month period, including, “provincial, territorial and municipal governments, experts, patients, advocates, Indigenous governments and representative organizations, employers and industry” (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 2). In exercising its role as the ‘primary means of consulting Indigenous peoples on the proposed legalization of cannabis,’ the Task Force acknowledged specifically meeting

with Indigenous individuals and groups in expert roundtables, bilateral meetings, and Indigenous people s' roundtables. The 12 Indigenous groups and individuals involved in these events represented 2.9% of all parties acknowledged by the Task Force in its final report as being involved in direct discussions.

The Task Force accepted emails, letters, and written submissions from 300 individuals and organizations (Task Force on Cannabis Legalization and Regulation, GD, 2016). Additional consultations were held online after a regulatory proposal was made available to the public (Task Force on Cannabis Legalization and Regulation, GD, 2016). This is among the most common consultation methods used in Canada due to its modest expense. The regulatory proposal was a 27-page document titled *Toward the Legalization, Regulation and Restriction of Access to Marijuana: Discussion Paper*. The document outlined the government's reasons for legalizing cannabis, provided background on cannabis research in relation to prevalence of use, health risks, and benefits, and discussed the elements that would need to be addressed in the legislation. Online consultation garnered 28,800 response submissions; however, it should be noted respondents who completed each of the five sections were counted as having provided five response submissions. Online consultation spanned 60 days between June 30 and August 29, 2016. Regarding online consultation, the Task Force reported little Indigenous representation:

> Compared to the Canadian population as a whole, [online] consultation participants were much more likely to be male, English-speaking, living outside of Québec (particularly in Ontario, British Columbia (BC) and Alberta), younger (i.e., much more likely to be between 18 and 34 years of age), and possessing a higher level of formal education with a university degree or professional accreditation. (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 84)

Of the 28,800 responses, 265 respondents identified themselves as organizations, 17% of which claimed to represent Indigenous governments or groups (Task Force on Marijuana Legalization and Regulation, GD, 2016). An issue that should be noted is that past research has established asking online participants to self-identify as Indigenous poses serious methodological risk if attempting to attribute responses to Indigenous individuals and organizations.

The results of the Task Force's consultation efforts were published in *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report*

of the Task Force on Cannabis Legalization and Regulation in December 2016. Despite limited Indigenous representation in the Canada-wide consultation process, the final report offered several suggestions in relation to Indigenous interests; the term Indigenous appeared in the report 34 times. The Task Force suggested co-ordination and communication between all levels of government—including Indigenous governments--would be key:

> The federal, provincial, territorial, municipal and Indigenous governments will need to work together on information and data sharing and co-ordination of efforts to set up and monitor all of the components of the new system. The Task Force believes that Canada should prioritize engagement of Indigenous governments and representative organizations, as we heard from Indigenous leaders about their interest in their communities' participation in the cannabis market. (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 7)

The Task Force's recommendations included engaging with, "Indigenous governments and representative organizations to explore opportunities for their participation in the cannabis market," and, "engaging Indigenous communities and Elders to develop targeted and culturally appropriate communications" (Task Force on Marijuana Legalization and Regulation, GD, 2016, p. 7). The Task Force also recommended setting aside taxation revenue to support Indigenous communities and enforcement, and further noted, "Municipalities and Indigenous national organizations and representatives should be included in discussions regarding the equitable allocation of revenues" (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 27). The Task Force added:

> Canada should prioritize engagement of Indigenous governments and representative organizations regarding their interests, perspectives and roles as the new system is designed and implemented. The Task Force also heard from Indigenous leaders and organizations of their interest in participating in the forthcoming cannabis market and of economic opportunities which may contribute to creation of new jobs in their communities. A particular interest of Indigenous representatives is the opportunity for Indigenous governments or individuals to acquire cannabis production and distribution licenses. (Task Force on Cannabis Legalization and Regulation, GD, 2016, p. 53)

The Task Force had provided a comprehensive description of a variety of Indigenous interests and concerns and offered practical advice to the Canadian government in

addressing Indigenous calls for jurisdictional inclusion, economic considerations, and culturally appropriate public health education.

4.2.2. Health Canada's Cannabis Legalization and Regulation Branch Consultations and the Race to Royal Assent

While the Task Force was described as the primary means of consultation with Indigenous peoples regarding recreational cannabis legalization, Health Canada's Cannabis Legalization and Regulation Branch also implemented a team dedicated to engaging with Indigenous organizations and communities in July 2017 (Government of Canada, APPA Brief, 28/9/2018). The government noted, "The primary role of this team is to reach out to, and engage with, Indigenous governments, organizations and communities to create understanding of the *Cannabis Act*" (Government of Canada, APPA Brief, 28/9/2018, p. 4). The terminology used by the government during this second consultation effort—"to create understanding of the *Cannabis Act*"—is a peculiar way to describe a process that was presumably initiated to include Indigenous perspectives into the regulatory design.

Nearly a year after the Task Force published their initial recommendations noting the importance of Indigenous inclusion in cannabis policy, Health Canada released its discussion paper: *Proposed Approach to the Regulation of Cannabis*, in November 2017 (Health Canada, GD, 2017). Health Canada's focus was on licensing, security clearances, cannabis tracking systems, and classifying cannabis products. Arguing regulatory requirements would need to be in place before the *Cannabis Act* came into force, Health Canada announced they would be building on regulations already in place for medical cannabis. This was likely not appreciated by groups like the AFN and the IBA who had already maligned the inequities in Canada's medical cannabis regulations and the perceived monopoly controlling medical cannabis production (IBA, APPA Brief, 23/2/2018; AFN Res. no. 123/2016).

Health Canada's secondary focus (beyond creating understanding), appeared to be expedience:

> To meet the government's commitment of bringing the proposed *Cannabis Act* into force no later than July 2018, the final regulations will need to be published in the *Canada Gazette, Part II,* as soon as possible following Royal Assent. As such, it is important that interested parties provide

> feedback on the regulatory proposals in this consultation paper, as draft regulations will not be pre-published. Instead, Health Canada intends to publish a summary of comments received, as well as a detailed outline of any changes to the regulatory proposal, which will continue to provide industry and stakeholders with as much information as possible on the proposed regulatory requirements. (Health Canada, GD, 2017, p. 7)

Of note was Health Canada's refusal to provide pre-publication of the draft regulations (a consultation practice also called public notice-and-comment). Public notice-and-comment has been standard procedure since it was first outlined in Canadian policy directives in 1986, however, the policy directive has no legal force (Rodrigo & Amo, 2006). Also of note was Health Canada's insistence on adhering to a strict timeline while the federal government's own 2011 Guidelines on consultation state meaningful consultation, "includes accommodation (e.g. changing of timelines)" where appropriate (AANDC, 2011, p.13). The belief that Bill C-45 was being rushed through without adequate consideration was expressed by a variety of witnesses, including Aluki Kotierk, President of Nunavut Tunngavik Incorporated.

> At our October 27 annual general meeting, there was a resolution passed by the Nunavut Tunngavik Incorporated membership calling upon the Government of Canada to postpone the legalization of cannabis to allow more time to consult with Inuit on the timing and appropriate mitigation measures. (Kotieurk, APPA Proceedings, 26/3/2018, p. 3)

Senator Mary Jane McCallum of Manitoba also questioned the logic of rushing through the legislation, noting,

> When I look at our history of residential schools, the missing and murdered women and the children in care, this will add another level of crisis to our lives. I am very upset about it because people seem to be marching toward passing the bill, and many First Nations have said, "We need more time." (McCallum, APPA Proceeding, 27/2/28, p. 8)

The strict timeline imposed to facilitate recreational cannabis legalization was also of concern among justice agencies, including First Nations police.

Despite the FNTC's early and repeated engagement with the government regarding taxation jurisdiction, these efforts had no impact on policy. The FNTC had proposed the Minister of Justice review the FMA and provide amendments to include a cannabis tax power for interested First Nations in April 2017 (FNTC, APPA Brief, 14/3/2018a). The FNTC reportedly reiterated the request in the FNTC's Pre-Budget Submission to the House Standing Committee on Finance in August 2017 and continued

to advance its proposal to the federal government and interested First Nations over the following seven months. The FNTC also indicated some First Nations had independently sent proposals to the provinces and the federal government while the cannabis tax framework was still in development (FNTC, APPA Brief, 14/3/2018a). However, on December 11, 2017, following a day-long meeting with federal and provincial finance officials Finance Minister Bill Mourneau announced the excise tax on recreational cannabis would be split between the provinces (75%) and the federal government (25%) (Blatchford, 2017). Despite ongoing calls for jurisdictional inclusion, Morneau did not mention Indigenous governments, nor address the amendments proposed by the FNTC in his announcement. The announcement was not well received by the FNTC.

> We need a First Nation cannabis tax jurisdiction to meet our challenges. After all the promises of a new fiscal relationship, [the] UNDRIP and the recognition of our jurisdictions, how could this not have been recognized?...The provincial governments argued that they required a large share of this revenue because the regulatory, health and educational requirements associated with the cannabis act fell more heavily on provincial responsibilities. But what about the health and educational responsibilities First Nations have to their members? The challenges they face are even larger than those of the provincial governments. (Jules, APPA Proceedings, 28/2/2017, p. 2)

As Health Canada sought to expedite the passage of Bill C-45, the AFN joined those who sought to delay the process. Following Morneau's announcement, two more cannabis resolutions were passed during December 2017's Special Chiefs Assembly: *Support for a Cannabis Working Task Force* and *Support to Delay Cannabis Legalization.* The latter noted, "First Nations people across Canada require the appropriate time and capacity to determine a response and action plan to the legalization of cannabis" (AFN Res. no. 110/2017, p. 2). *Support for a Cannabis Working Task Force* stated the Chiefs in Assembly supported the establishment of an AFN Task Force, "comprised of leadership, technicians and knowledge keepers to undertake the work required to formalize a response and position on the legalization of cannabis and implementation of new laws" (AFN Res. no. 90/2017, p. 2). The Chiefs in Assembly added the AFN Task Force was directed to immediately begin researching cannabis revenue generated by Canada, the provinces, and territories.

The AFN Task Force was directed to gather relevant data and report to the Chiefs on a monthly basis to prepare for meaningful discussions with the Canadian

government in relation to Indigenous interests in the soon to be licit market. The AFN Task Force and its objectives appear to have been encouraged by the federal government, which relayed, “Indigenous Services Canada invested $500,000 over 2017-18 and 2018-19 to support an Assembly of First Nations Cannabis Task Force” to, “assist them in addressing public safety, health, economic development and jurisdictional issues” (Government of Canada, APPA Brief, 28/9/2018, p. 4). It is noteworthy that the time frame provided by the federal government to help finance the AFN Task Force investigate economic development and jurisdictional issues extended beyond the proposed date of cannabis legalization (at that time expected to happen sometime in July 2018). In *Support to Delay Cannabis Legalization* the AFN stated it did, “not feel fully equipped or informed about the proposed legislation in order to be responsive in a manner that is in alignment with our community values” (AFN Res. no. 110/2017, p. 2). The resolution indicated that a one-year delay was required to, “develop community-level public health and jurisdictional responses” (AFN Res. no. 110/2017, p. 2).

In March 2018 Health Canada, published the results of the consultations held following the release of its discussion paper in a report titled *Summary of Comments Received During the Public Consultation* (Health Canada, GD, 2018). It had collected 3,218 online submissions, 450 written submissions, and hosted seven in-person roundtable sessions for 192 interested parties. Health Canada (2018) also hosted webinars for 343 parties, which included, “licensed producers, the hemp industry, prospective licensees, and current licensed dealers” (Health Canada, GD, 2018, p. 3). The inclusion of industry members already a part of Canada’s cannabis licence monopoly could be construed as problematic due to their potential to function as lobbyists in favour of duplicating the licensing regime used for medical cannabis. To gather Indigenous input Health Canada reported nine bilateral meetings which included the AFN, Inuit Tapiriit Kanatami and Inuit Land Claim Holders, and the Métis National Council. As the anticipated date of cannabis legalization drew nearer, Health Canada noted, “Regular meetings and collaborative work will be ongoing throughout 2018 to share information, support the development and delivery of effective public education and communication, and address key areas of interest raised by First Nations, Inuit and Métis across Canada” (Health Canada, GD, 2018, p. 3). They reiterated Indigenous groups had previously been invited to provide submissions:

> All Modern Treaty Holders, First Nations Provincial-Territorial Organizations, Métis Governing Members, and many other Indigenous representative organizations were invited to provide submissions on the proposed regulatory framework, and on their broader interests related to cannabis legalization and regulation. (Health Canada, GD, 2018b, p. 3)

Given the Indigenous groups Health Canada claims to have consulted, it is curious that there was no mention of Indigenous interests in its summary of public comments. The summary only mentioned Indigenous peoples when noting they had been consulted; any discussion related to what Indigenous peoples contributed to the consultation process was conspicuously absent from the *Summary of Comments Received During the Public Consultation*.

Following the publication of Health Canada's summary, another resolution was adopted at the Special Chiefs Assembly, on May 2, 2018: *Federal Recognition of First Nations Jurisdiction over Recreational and Medicinal Cannabis*. The regulatory preamble referenced Article 21 of the UNDRIP (the right to improve economic and social conditions) and spoke of its, "inherent jurisdiction over economic development initiatives, both federally and provincially" (AFN Res. no. 02/2018, p. 1). The resolution noted Indigenous governments, "possess the authority to manage production, licensing and distribution of legalized cannabis," adding, "As it currently stands, Bill C-45 makes no room for the inclusion of First Nations governments within the proposed Act" (AFN Res. no. 02/2018, p. 1). The regulatory preamble described the 75/25 provincial/federal split of cannabis excise tax as, "a missed opportunity for the federal government to demonstrate its commitment to a nation-to-nation relationship that incorporates First Nations governments into the federation" (AFN Res. no. 02/2018, p.1). The resolution read:

> THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:
>
> 1. Direct the Assembly of First Nations (AFN) to inform Canada that First Nations must be consulted by the federal and provincial governments to ensure their full involvement in the design of licensing, production, distribution, and sale of legalized cannabis, including revenue sharing.
>
> 2. Call upon Canada to amend Bill C-45 to recognize that First Nations jurisdiction supersedes provincial legislation and regulation as it pertains to cannabis licensing, production, distribution and sale of legalized cannabis that incorporates community safety and well-being, particularly for children and youth. (AFN Res. no. 02/2018, p. 2)

4.2.3. Conflicting Views on the Consultation Process

The federal government has noted Indigenous-Crown consultation serves two objectives: good governance and meeting legal obligations (AANDC, 2011). While the SCC ruled in *Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018) there is no duty to consult when legislation is created, this judgement had not been reached before the cannabis consultation process, making unclear which objective—good governance or meeting legal obligations--was driving cannabis consultation on behalf of the government. Despite calls for the government to view consultation, "as a valuable tool and opportunity to improve its relationship with Aboriginal groups and advance reconciliation and other shared objectives" (Gray, 2016, p. 2), Indigenous-Crown cannabis consultation did not live up to that expectation by most Indigenous accounts, despite the government's insistence that it did.

In discussions held during APPA's cannabis study, Acting Assistant Deputy Minister of Health for Canada's Cannabis Legalization and Regulation Branch, Eric Costen relayed three themes the federal government extracted from consultations with Indigenous peoples and organizations: (1) the need for public health education and addiction supports in Indigenous communities; (2) the need for economic opportunities for Indigenous communities; and (3) the need to define local rules (Costen, APPA Proceedings, 27/2/2018). Costen noted, "Indigenous peoples want to understand what the proposed legislation means for their communities, how the legislation and the regulations would apply to on-reserve, treaty and settlement lands." (Costen, APPA Proceedings, 27/2/2018, p. 2). Costen's assertions partially align with what was found in this analysis. The need for culturally relevant public education and addiction supports was indeed the position of the FNHA, and the AFN, various representatives from justice agencies and members of Indigenous governments. As articulated by Costen, the need for economic opportunities in Indigenous communities was apropos and reiterated by multiple stakeholders throughout APPA's proceedings. However, rather than acknowledging Indigenous peoples were overwhelmingly demanding to define local rules within their own territories, Costen framed the jurisdictional issue as one that Indigenous peoples simply wanted to 'understand.'

It is clear some Indigenous governments and organizations had the opportunity to participate in discussions regarding Bill C-45 with the federal government prior to the

passage of the *Cannabis Act*. Whether the engagement reached a threshold that could be characterized as 'meaningful' was a matter of intense disagreement by government officials and Indigenous stakeholders. APPA's study of Bill C-45 showed considerable disparity between how the federal government and Indigenous groups evaluated the adequacy of cannabis consultation. The AFN was noted by the government as being involved in consultations with both the Task Force and Health Canada's Legalization and Regulation Branch, however, the AFN consistently expressed through resolutions that these exercises were inadequate and Indigenous rights under both domestic and international law were being ignored.

Persisting with the federal government's own view of the world, Costen described consultations as 'numerous' and 'extensive' at the first APPA proceeding on February 27, 2018. Costen was not alone among government officials using this characterization: similar statements were made during APPA's proceedings by Minister of Health Petitpas Taylor who characterized consultation as 'substantive,' and Minister of Border Security and Organized Crime Reduction Bill Blair, who claimed the government 'engaged extensively' with Indigenous peoples. Each witness rattled off lists of Indigenous groups and communities with whom they or their departments had met. Minister of Health Ginette Petitpas described:

> Engaging with Indigenous communities started off very early on. As we have indicated, the task force that was put in place, chaired by the Honourable Anne McClellan, has really done tremendous work over that summer. They certainly lost a summer that year, making sure they went from coast to coast to coast and met with as many Canadians, individuals, groups and leaderships to make sure they received the information that was required...With respect to the consultations we've done with different Indigenous organizations, communities and groups, I have to say we've had substantive consultations. I have a list of the different meetings and sessions we've had. I'd be more than happy to provide this list to the committee, if you have not received it yet. We have certainly engaged with many groups and organizations over the past two years. I personally have, with many of the national groups and communities, and my parliamentary secretary, Bill Blair, has been very busy going from coast to coast to coast and from north to south in order to meet with different individuals to hear their concerns, thoughts and ideas on the issue of consultation. (Pepitas Taylor, APPA Proceedings, 17/4/2018, p. 7)

Despite the busy travel schedules of the Ministers, the belief that Indigenous-Crown consultation was adequate was not universally held. When speaking to Pepitas Taylor during proceedings, Deputy Chair Tannas noted,

> We happened to be travelling on another file and met with a number of chiefs of some of the largest Indigenous communities in the country who indicated they had not been consulted at all. I don't doubt your list. [But] We've heard this over and over. (Tannas, APPA Proceedings, 17/4/2018, p. 7)

This was certainly true among APPA's witnesses and expressed in AFN resolutions: complaints of no or inadequate consultation were repeatedly made by multiple Indigenous stakeholders. In response to the Minister of Health's offer to supply a list of meetings, [9] Deputy Chair Tannas followed up:

> I have a question for you, minister, with respect. I understand you are the lead of the consultation exercise on Bill C-45, and you've indicated you'll provide a list of activities with respect to consultation with Indigenous communities…A number of times we've heard from leaders who say consultation isn't when the cake is baked and you put it in front of us and say, "What do you think?" and then make no changes. Consultation happens as you're developing something. I'm just wondering if you can point to anything that is in the bill today as it sits as a result of the consultation. Anything? (Tannas, APPA Proceedings, 17/4/2018, p. 7)

Rather than point to specifics in her response, Minister Petitpas Taylor's was decidedly vague:

> Those thoughtful discussions were certainly represented in the task force report, and I'm sure that probably all of you have read that recommendation and those reports. If we look at our legislation that's been brought forward, most, if not all, of the recommendations that are in that piece of legislation are as a direct result of the recommendations that were brought forward by the task force. A part of the report that was presented was as a result of all the consultations, including that of Indigenous and non-Indigenous Canadians. (Petitpas Taylor, APPA Proceedings, 17/4/2018, p. 7)

Petitpas Taylor was correct in that many of the concerns expressed by Indigenous groups were incorporated into to the Task Force's final report, which did an excellent job of describing the range of Indigenous perspectives. However, very little of what the Task Force recommended was reflected in the proposed legislation, which ostensibly was the point of the consultation exercise. As noted by Gray (2016), if the shared objective of Canada and Indigenous peoples is reconciliation, meaningful

[9] A list of the parties consulted was not among the documents available in APPA's cannabis study repository. Appendix F includes all Indigenous-Crown consultations noted in the Cannabis Task Force's report, Health Canada's Cannabis Legalization and Regulation Branch report, and the Government Response to the Standing Senate Committee on Indigenous Peoples' Eleventh Report

consultation requires a shift in how the government conceives the process: from conceiving of it as meetings to document concerns, to focussing on outcomes that address those concerns. Petitpas Taylor's response was inexplicable when looking at the Task Force's recommendations of working closely with Indigenous governments regarding taxation, inclusion in the regulatory regime, and the decriminalization of all cannabis related offences. Consultation should have been a means to come to mutual agreement through shared understanding *before* the legislation was enacted. To borrow a metaphor from Senator Tannis, it was starting to appear as though the Bill C-45 cake was baked, and the federal government alone selected the ingredients.

After its cannabis study was complete, APPA took the position that Indigenous-Crown consultation was indeed lacking. In May of 2018 APPA released their eleventh report: *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*. APPA noted the Committee had met with a diverse group of witnesses from Indigenous communities across Canada and heard from officials representing five federal departments. APPA's report concluded there were several areas of concern:

> 1. a lack of consultation with Indigenous communities and organizations in the development of Bill C-45;
>
> 2. a lack of culturally specific public education materials on the legislation pertaining to the legalization of cannabis and on the health effects of cannabis;
>
> 3. a lack of access to, and funding for, culturally specific mental health and addictions services;
>
> 4. an imperative for action recognizing the inherent rights of Indigenous communities to exercise jurisdiction over the regulation, sale, consumption and taxation of cannabis in their communities; and
>
> 5. a desire from Indigenous communities to fully participate in the economic opportunities and own source revenue potential occasioned by the legalization of cannabis. (APPA, GD, 2018, p. 3)

APPA noted,

> There was an alarming lack of consultation particularly given this Government's stated intentions of developing a new relationship with Indigenous people, respecting section 35 Aboriginal and treaty rights recognized under the *Constitution Act, 1982*, and the rights of Indigenous communities to be consulted. Had sufficient consultation occurred, the

> problems identified by the Committee would likely have been solved, and the solutions incorporated into Bill C-45. (APPA, GD, 2018, p. 8)

Given the context of this critique, it is not surprising APPA is currently studying, "the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Métis peoples and any other subject concerning Indigenous Peoples" (Lafrenière, 2022, para. 3). In summation, APPA offered two recommendations to the Government of Canada: (1) delay Bill C-45 for up to one year, and; (2) set aside at least 20% of cannabis production licences for producers under the, "jurisdiction or ownership of Indigenous governments" (APPA, GD, 2018, p. 17).

4.2.4. Tokens and Promises

Before the government submitted its formal response to APPA's report, the Ministers of Health and Indigenous Services submitted a letter to APPA's Chair and Deputy Chair dated June 6, 2018 (Government of Canada, APPA Submission, 6/6/2018). The Ministers thanked APPA for their work, assured them their concerns had been noted, and promised to address the issues raised should Bill C-45 be approved by Parliament. The Ministers further promised continued consultation with Indigenous communities, governments, organizations, and APPA itself, and reaffirmed their commitment to, "upholding existing Aboriginal and treaty rights, as recognized in section 35 of the *Constitution Act, 1982*" (Government of Canada, APPA Submission, 6/6/2018, p. 1). The letter made no mention of Indigenous rights under the UNDRIP. In the letter, the Ministers promised to report on their progress and address the action areas identified by APPA. In this initial response the Ministers seemed most responsive in two areas: improving mental health and addictions services in Indigenous communities and educating Indigenous peoples.

> With regard to the provision of services, the Government understands concerns have been raised as to whether the implementation of C-45 would create unmet need in Indigenous communities for mental health and addiction services. Rest assured, the Government will continue to work closely with Indigenous communities and leaders to address these needs, specifically in front-line services for mental health and addictions treatment. As a first step, we have committed $200 million over five years to enhance the delivery of culturally appropriate addictions treatment and prevention service services in communities with high needs. Rest assured, we will continue to work closely with Indigenous communities to identify needs in these services and will ensure additional resources are in place in order to

> support front-line services for mental health and addictions treatment. (Government of Canada, APPA Submission, 6/6/2018, pp. 1-2)

The commitment to start adequately funding programs for Indigenous mental health and addictions was a start—but hardly reassuring—as the letter failed to acknowledge addiction and mental health had long been underfunded by the government. The letter also failed to address that much of the addiction and mental health crises in Indigenous communities were the result of Canada's previous disastrous Indigenous policies and the resultant intergenerational trauma. The government was very receptive to creating cannabis public education materials and committed $62.5 million in Budget 2018 to develop materials for, "community-based organizations and Indigenous organizations" (although the portion of funds designated exclusively for Indigenous organizations was not specified) (Government of Canada, APPA Submission, 6/6/2018, p. 2).

In reference to jurisdictional issues the government was less accommodating (Government of Canada, APPA Submission, 6/6/2018). Once again, the government made a promise of ongoing engagement regarding cannabis policy. The government has previously claimed its, "overarching aim is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation" (Government of Canada, 2018, p. 8). In reality, however, Canada has continued the narrative which sees Indigenous gains as Canadian losses, as noted by McGuire and Palys (2020). Rather than recognizing Indigenous nations as partners in confederation and making space for Indigenous regulations, the government instead offered to navigate Indigenous peoples through its colonial licensing process. The Ministers referenced the Indigenous Navigator service implemented by Health Canada to assist Indigenous entrepreneurs in undertaking the 'complexity' of the federal licensing process. This could be considered a token, or worse, an indictment of Indigenous capabilities. As noted in a media release by Marc Storm, the marketing officer for Nations Cannabis, "my criticisms are with the limitations of the Navigator program and the limitations of the federal government," which he argued could not begin to help Indigenous applicants overcome structural barriers (Storm as cited in Lamers, 2020, para. 13). With respect to Indigenous production licences, the government noted in its letter there were already five licensed producers with 'Indigenous affiliations' among Canada's 105 licensees.

The government suggested interested First Nations could instead partner with federally licensed corporate producers (Government of Canada, APPA Submission, 6/6/2018). This avenue into cannabis production had been discussed during APPA's proceedings. Phillip Chief, Interim Director of Onion Lake had noted, "I think there is definitely no problem in finding possible partners. They came out of the woodwork once the announcement was there for Bill C-45" (Chief, APPA Proceedings, 26/3/2018, p. 17). Bill Robinson, Executive Director of the IPAC also noted a significant number of First Nations had been approached by corporations but added there was concern related to potential partnerships and, "how those decisions are going to impact everything from financial well-being for bands, treaty councils, *et cetera*" (Robinson, APPA Proceedings, 28/2/2018, p. 9). He cautioned,

> I can tell you that what I've learned from the business development side from First Nations relative to building and approaching First Nations and the use of First Nations land by large corporations versus ownership by First Nations is startling. It's something that's going to have to be addressed. (Robinson, APPA Proceedings, 28/2/2018, p. 7)

While corporate partnerships may benefit some nations, they are certainly not an adequate substitute for Indigenous sovereignty. In their letter, the Ministers specifically acknowledged First Nation *by-law making authority* (rather than Indigenous *law-making authority*), and added, "The Government recognizes and respects the jurisdiction of Indigenous communities. We commit to continued engagement and work with First Nations, Inuit and Metis communities going forward" (Government of Canada, APPA Submission, 6/6/2018, p.1). In the context of cannabis policy, it appears Indigenous law-making authority was not worthy of a mention. In consideration of the many Indigenous cannabis regulations that were created in response to the exclusion of Indigenous interests in Canada's cannabis policy, it is unclear whether this was an oversight or a strategic omission. The Ministers added,

> Questions have also been raised regarding revenue sharing with Indigenous communities. The Government has previously agreed that our commitment to a new fiscal relationship with Indigenous communities will include discussions about revenue sharing and taxation arrangements. As you asserted to us, this must include discussions with National Indigenous Organizations and organizations like the First Nations Tax Commission, among others. We are committed to advancing a new fiscal relationship with Indigenous communities based on the need for sustainable, sufficient, predictable and long-term funding arrangements. We will advance this new fiscal relationship with Indigenous communities by our commitment to

> sustainable, sufficient, predictable and long-term funding arrangements, in addition to supporting the continued development of First Nations taxation and regulatory regimes. (Government of Canada, APPA Submission, 6/6/2018, pp. 2-3)

The 'new fiscal relationship' alluded to by the government would apparently be explored some time *after* cannabis legalization, despite the FNTC's early and repeated attempts to motivate the government to include First Nations tax power in the regulations. In response to the absence of First Nations tax power in the regulatory scheme, Commissioner Jules of the FNTC stated,

> I, like many other free people, have been inspired by recent statements by the Prime Minister, the Minister of Justice and others in support of a nation-to-nation framework supported by an appropriate fiscal relationship that recognizes and implements our jurisdictions…. After all the promises of a new fiscal relationship, [the] UNDRIP and the recognition of our jurisdictions, how could this not have been recognized? (Jules, APPA Proceedings, 28/2/2018, p.2)

The government provided more details as to why it failed to include Indigenous jurisdiction in the formal *Response of the Government of Canada to the Eleventh Report of the Standing Committee on Aboriginal Peoples*, which was dated September 28, 2018, and signed by the Minister of Finance, the Minister of Indigenous Services, the Minister of Health, and the Minister of Border Security and Organized Crime Reduction. This lengthier response noted, "On behalf of the Government of Canada, we trust that this response demonstrates our ongoing commitment to ensuring the interests of First Nations, Inuit and Métis continue to be carefully considered throughout the implementation of the *Cannabis Act*" (Government of Canada, APPA Submission, 28/9/2018, p. ii). Regarding APPA's suggestion to delay the implementation of the *Cannabis Act*, the government response signed by the Ministers noted, "Such a delay would only have perpetuated a system that is not working," adding, "The risk of criminal convictions may be more acute for specific populations, including Indigenous Peoples" (Government of Canada, APPA Submission, 28/9/2018, p. 2). The Ministers also added, "The criminal records that can result from cannabis-related charges have serious, lifelong implications" (Government of Canada, APPA Submission, 28/9/2018, p. 2). The government's response argued pushing the legislation through without delay was in the best interest of Indigenous peoples, despite multiple Indigenous stakeholders articulating that they needed more time. The government's refusal to adjust the legalization timeline suggests it believes it can determine what is in the best interest of Indigenous peoples

regardless of what Indigenous peoples believe to be in their best interest. This was not surprising; the Canadian government has a long history of paternalism in its dealings with Indigenous peoples. Historically, government paternalism provided few benefits to Indigenous peoples, despite the government's stated intent. Paternalism does not embody the spirit of the nation-to-nation relationship the federal government continually claims exists. Not surprisingly, the same Ministers did not suggest expunging cannabis convictions of people facing the 'lifelong implications' of criminalization due to cannabis offences.

The federal government again expressed an interest in providing support for Indigenous services and promised to funnel money into cannabis education. The government also noted it had, "substantially increased funding to frontline health service delivery, in particular in mental health and prevention and treatment for substance use" in Budget 2017 and Budget 2018 (Government of Canada, APPA Submission, 28/9/2018, p. 7). While Canada's northern Indigenous communities had some of the world's highest suicides rates, it was cannabis legalization that finally provided the impetus for the government to address a lack of mental health and addiction services. The government also addressed the woefully underfunded FNPP and noted,

> For the first time, the federal funding commitment is ongoing and will include an annual increase to keep up with inflation so that First Nations and Inuit communities can rely on it to strengthen public safety in the long term. (Government of Canada, APPA Submission, 28/9/2018, pp. 9-10)

Certainly, this was welcome news, but given the inequities between Canada's Indigenous and non-Indigenous policing services, this was long overdue. In the arenas of policing and mental health, Indigenous communities were well behind non-Indigenous Canadians, and these considerations simply served as a means to catch up to the rest of the country.

In response to requests to recognize Indigenous jurisdiction, the government again claimed to support Indigenous rights, sovereignty, self-government, and self-determination, but deemed consistency more important.

> Support for the self-determination of Indigenous Peoples is a key objective of the Government. This must be balanced against the need to ensure that the legal and regulatory framework for cannabis, including criminal prohibition, is applied consistently across the country. As such, similar to

> the *Criminal Code*, the *Cannabis Act* is a federal law of general application that will apply to all people in Canada, including Indigenous Peoples. (Government of Canada, APPA Submission, 28/9/2018, p. 6)

This was likely not a surprise to the IBA which had warned against, "overwriting Indigenous culture from common law and slowly eroding and replacing Indigenous laws and customs with non-Indigenous laws of 'general application'" (IBA, APPA Submission, 23/3/2018, p. 6). The government response noted cannabis distribution on-reserve would indeed require provincial or territorial regulation. The government went on to add, "Some provinces have taken specific steps to include Indigenous populations in the design of their [regulatory] systems" (Government of Canada, APPA Submission, 28/9/2018, p. 6). This suggests future partnerships would not be nation-to-nation, but at the whim of provincial and territorial governments—incidentally, exactly what Senator Lovelace Nicholas had argued against during APPA's proceedings:

> My concern is that, in all the years I've lived in a First Nations community, the province doesn't always have the best interests of the Indigenous people. That's a big concern. I have heard in talking to people in my community and that's exactly their concern. They don't want the province to have anything to say about cannabis or marijuana growing. (Lovelace Nicholas, APPA Proceedings, 27/2/2018, p. 8)

Cannabis production would require a federal licence, and the government lamented it was unable to accommodate APPA's request to reserve a portion of licences for Indigenous governments stating, "because cannabis will not be a supply-managed commodity, the Government is not in a position to reserve a portion of the market for certain groups" (Government of Canada, APPA Submission, 28/9/2018, p. 10). In terms of access to the licence monopoly, Indigenous governments would be treated as any other Canadian organization. By the Government of Canada's (2020b) own admission, "Regulations should aim to support and promote inclusive economic growth, entrepreneurship, and innovation for the benefit of Canadians and businesses. Opportunities for regulatory cooperation and the development of aligned regulations should be considered and implemented wherever possible" (para. 7). Given the focus on inclusivity, this statement appears to be at odds with the federal response in regard to Indigenous licences for cannabis production. The government reiterated Health Canada's Indigenous Navigator service would be accessible to self-identified Indigenous applicants stating, "A licensing professional is fully dedicated to guiding and assisting them in successfully meeting the regulatory requirements and obtaining a licence," and

again advanced the notion of Indigenous-corporate partnerships (Government of Canada, APPA Submission, 28/9/2018, p. 10).

The government added there were existing sources of funding for economic development on reserve land, noting, “the Government has modernized Indigenous economic development programs so that Indigenous communities are now eligible to receive support for cannabis-related activities,” but cautioned, “Projects to support economic opportunities in these areas will be subject to assessment and regulatory processes, as with any other proposal” (Government of Canada, APPA Submission, 28/9/2018, p. 11). The government suggested there were several federal organizations to support economic development available to all licensed cannabis producers that Indigenous affiliates could apply for provided they had already successfully obtained a licence. The response noted,

> The Government is continuing to explore ways to facilitate Indigenous participation in the cannabis industry for those communities wishing to do so. Efforts are underway for Government departments, including regional development agencies, and other partners to work collaboratively so that as departments we are able to collectively respond to requests from Indigenous communities and businesses and, where possible, leverage funding. The Government is also committed to track and monitor progress in facilitating Indigenous participation and will keep the Committee informed as the *Cannabis Act* is implemented. (Government of Canada, APPA Submission, 28/9/2018, p. 11)

In regard to taxation, the government noted First Nation or other Indigenous self-governments which had already entered into agreements with Canada for the implementation of the FNGST could collect these monies, provided they met federal and provincial regulations. The government also expressed, “its willingness to facilitate arrangements between Indigenous governments and a P/T in respect of direct sales taxes” (Government of Canada, APPA Submission, 28/9/2018, p. 12). The government reiterated the excise tax revenue would be split between the provincial and federal governments and noted Indigenous cannabis producers would not be exempt from paying excise duties on cannabis products under the *Indian Act*. Once again, the government framed taxation discussions as ongoing, noting, “the Department of Finance is engaging with the Assembly of First Nations on how to best move forward with collaborative work on access to tax revenues” (Government of Canada, APPA Submission, 28/9/2018, p. 12).

The federal government previously stated, “Through consultation, the Crown seeks to strengthen relationships and partnerships with Aboriginal peoples and thereby achieve reconciliation objectives” (AANDC, 2011, p. 5). Cannabis consultations appear to have missed the mark. As noted by the IBA,

> A legalization bill which still engages the criminal law in a justice system that disproportionately targets and underserves Indigenous (and other marginalized) people, continues to serve a one-sided primarily non-Indigenous economy…Since the TRC demanded and set the stage for reconciliation, the federal government must ensure its legislation meets the standards of equality that are expected. It is recommended that Bill C-45 must be revised, having regard to Indigenous peoples’ inherent and Treaty rights, as protected by s.35(1) *Constitution Act, 1982*, and in recognition of the honour of the Crown, and its fiduciary obligations to Indigenous peoples by virtue of Canada’s claim to sovereignty. (IBA, APPA Submission, 23/3/2018, p. 10)

Speaking on behalf of the IBA, barrister de Whytell described Bill C-45 as legislative genocide.

> The IBA’s brief focuses on the disproportionality of Bill C-45 against Indigenous peoples by looking at how it perpetuates the status quo of genocide. Canada’s genocide against Indigenous peoples of this country is not limited to the forcible removal of innocent children from Indigenous homes and communities but can be understood through all aspects of Canadian legislation and policies concerning Indigenous peoples prescribing their activities and organization. Legislation drafted without Indigenous input or consent assumes it is culturally appropriate, beneficial and necessary for implementation by each unique and distinct Indigenous nation, regardless of that nation’s perspectives and actual needs, a term some chiefs have taken to calling legislative genocide. (de Whytell, APPA Proceedings, 26/3/2018, p. 24)

The IBA’s written submission to APPA further explained its position on the implications of legislative genocide.

> The effect of legislative genocide is that indirect discriminatory effects of legislation on Indigenous peoples, contrary to s.15 Charter, compounds upon its own correctness in an echo-chamber of Euro-Canadian principles due to issues faced by Indigenous people in the justice system. These include multiple levels of systemic discrimination and a notable lack of access to justice. Without resources to bring successful Charter challenges due to socio-economic factors, and an overwhelmed Legal Aid system, a singular narrative can be perpetuated and preserved. All of which has the effect of overwriting Indigenous culture from common law and slowly eroding and replacing Indigenous laws and customs with non-Indigenous laws of “general application.” Genocide, however, it is defined, has been

> used as a tool for the disenfranchisement of Indigenous peoples before and under the law; the harm it causes to its victims is intolerable in a free and democratic society. (IBA, APPA Submission, 23/3/2018, pp. 5-6)-

As Rodrigo and Amo (2006) note, a basic premise of consultation assumes that gathering an abundance of information will result in higher quality regulation. However, simply gathering information without considering the perspectives gathered is not aligned with the purpose of consultation and is essentially pointless. In this case, the exercise in pointlessness appears to have harmed the Indigenous-Crown relationship. Invoking the term genocide—in regulatory context or otherwise—indicates at least some Indigenous stakeholders found consultation to be grossly ineffective.

Ironically, one of the most tangible outcomes of Indigenous-Crown cannabis policy consultation was the promise of more discussions. Nearly every government official that spoke at APPA's proceedings referenced ongoing engagement and consultation and promised Indigenous inclusion in future discussions. The Acting Assistant Deputy Minister of Health Canada's Cannabis Legalization and Regulation Branch noted,

> Looking ahead, collaborating with Indigenous populations will continue to be a significant priority. The dialogue that began with the government mandated task force has continued to today, and it will not diminish going forward. (Costen, APPA Proceedings, 27/2/2018, p. 3)

Minister of Border Security and Organized Crime Reduction Bill Blair also described consultation as 'ongoing' and defined recreational cannabis legalization as a process. He noted,

> It's really important to acknowledge that the process of consultation and engagement is a process and not simply an event; it's not simply a matter of saying, "We've talked to these people. We're done." In my experience, it's an ongoing process of engagement with communities, and that's their expectation. From the outset, with our task force, and subsequently with our senior officials and our government, we've been engaging and consulting with communities across the country. We've heard that they want to continue to work with us. (Blair, APPA Proceedings, 17/4/2018, p. 3)

While policy discussions need to be ongoing to address unanticipated outcomes related to cannabis policy changes, the framing of Indigenous-Crown cannabis discussions as perpetually ongoing becomes a double-edged sword: any government actions related to the contents of those discussions can be conveniently rolled over to an

indeterminate future date after the legislation is already in place. Some expressed prolonging the inclusion of Indigenous interests in cannabis policy would result in their eventual exclusion. As articulated by Chief Phillips,

> It's a billion-dollar-a-year industry. Can you always rethink your politics, your legislation and your regulations? As Mr. Jules has said, we've been here for 30 years. No. If you don't take the opportunity to open those paths now, it's going to be very difficult to open them up in a few years. (Phillips, APPA Proceedings, 28/2/2018, p. 9)

Despite the warning, the government chose not to open those paths, and Indigenous peoples were expected to wait. Waiting for the government to act on Indigenous interests is familiar territory for Indigenous peoples. While ongoing consultation is certainly important, the government proved it lacked the will, vision, imagination, and foresight to incorporate Indigenous considerations into Bill C-45 before it became law, suggesting Indigenous aspirations of economic benefit and the Indigenous-Crown jurisdictional relationship were not priorities of the government; discussions regarding Indigenous economic and jurisdictional interests would have to wait.

The new Indigenous-Crown relationship referenced by the federal government *ad nauseum*, appears to look a lot like the old one. While the Canadian government uses all the right words in terms of nation-to-nation partnerships, sovereignty, and respecting Indigenous jurisdiction and authority, this review of cannabis consultation indicates Canada is embracing what Graham et al. (1996) termed an assimilationist paradigm in policy discussions, in which Indigenous peoples assume the same rights as non-Indigenous Canadians (at least in relation to cannabis policy). Discussions could be framed as soliloquy rather than dialogue; cannabis legalization enacted through the *Cannabis Act* gave little consideration to any of the many rights-based arguments advanced during consultation, making it appear as though Indigenous peoples were largely talking to themselves.

Indigenous aspirations for economic dignity, self-sufficiency, and inclusion as partners in confederation would not be achieved through Bill C-45. When the *Cannabis Act* came into force on October 17, 2018, it seemed cannabis legalization was not going to be the once in a generation economic opportunity many Indigenous peoples had hoped for. The considerable chasm between how the federal government and Indigenous groups construed the adequacy of Indigenous-Crown cannabis consultation

was not related to the number of meetings the very busy Ministers attended, but the product of a lack of Indigenous consideration present in the final policy. Much like the White Paper consultations which Weaver (1981) characterized as an exercise in going through the motions that ultimately presented the same policy intended all along, it is difficult to find any aspect of the *Cannabis Act* that reflects the contents of what Indigenous peoples contributed to Indigenous-Crown discussions. This is not surprising. Information gathered during the consultation process has not historically been utilized in the creation of federal policy in Canada, and as noted by Graham et al. (1996), "the results of elaborate consultation exercises have often appeared after the main decisions have been made" (p. 30). In the context of cannabis policy and Indigenous inclusion, it appears this is still the case.

4.3. Contesting Jurisdiction

The *Cannabis Act* came into force on October 17, 2018, however, jurisdiction and Indigenous prospects related to the economic benefits of cannabis remained unresolved and discussions were categorized as 'ongoing' by the Canadian government. Shortly after cannabis legalization former regional Chief and AFN Cannabis Task Force co-chair Isadore Day published an editorial noting, "The fact that federal government had done little or no consultation with First Nations has become a blessing in disguise. The door is wide open for First Nation control of cannabis" (Day, ID, 2019a, para. 1). He added,

> We have already seen that both Canada and the provinces have had difficulty with the major Licenced Producers, who have not been able to meet the demand. Some of these producers have tried to cut corners by growing in facilities that have not been licenced. Others have produced inferior cannabis products.
>
> Can our communities control the licensing, cultivation, and sale of cannabis and hemp? Yes. Will our community members benefit from long-term employment in the cannabis industry? Yes. First Nations can do a better job of protecting their community members, while generating wealth and improving health through a natural, green industry.
>
> We have already seen First Nation dispensaries open across the country. Every single one appears to be doing a booming business by selling safe, quality products, mostly to mainstream consumers. More importantly, First Nation cannabis retailers have established a reliable national supply chain of products that is far superior to that of the Licenced Producers.

> The challenge that First Nations now face is to ensure that we will be able to cultivate, process, and retail cannabis that is entirely legal and legitimate in the eyes of the federal and provincial governments. (Day, ID, 2019a, paras. 3–4)

Following legalization and the exclusion of Indigenous consideration in Canada's cannabis policy, Indigenous groups collectively organized to pursue cannabis interests and held multiple cannabis conferences across Canada. Days following the *Cannabis Act* coming into force an Issue Update posted to the AFN's website noted the AFN's Cannabis Task Force had, "been working to facilitate communications, coordinate dialogue and engagement with First Nations to better consider implications related to the legalization of cannabis" (AFN, IU26, 10/2018, p. 2). [10] The AFN pointed to unresolved issues with cannabis policy and indicated its next steps included developing a tri-lateral round table with federal and provincial/territorial governments and planning a national cannabis summit. Many Indigenous nations across Canada—with the encouragement of Indigenous governmental organizations-- began writing their own cannabis regulations and in some cases declared jurisdiction over cannabis in their territories.

4.3.1. The Assembly of First Nations and the Federal Government Double-Down

In December of 2018 (two months after cannabis legislation came into force), Health Canada published proposed amendments to the *Cannabis Regulations* in the *Canada Gazette, Part I, Volume 152, Number 51: Regulations Amending the Cannabis Regulations (New Classes of Cannabis)* to address three new classes of cannabis that had not been included when cannabis was initially legalized: edibles, extracts, and topicals (Health Canada, GD, 2018). In the Rationale Section of the Executive Summary Health Canada made a commitment to, "continue to engage and work closely with Indigenous governments, organizations and communities across the country to help ensure the specific interests of Indigenous peoples are carefully considered" (Health Canada, GD, 2018, p. 3). Unlike its previous consultation summary, Health Canada acknowledged the themes that consistently emerged in Indigenous-Crown cannabis consultation including those related to public health and education, taxation revenue generation, Indigenous authority over activities related to cannabis, and economic

[10] Issue Updates retrieved from the AFN's website are cited (AFN, month/year, issue update number, page number)

development. It is of note Health Canada did not share any of the information they gathered with the public in consultation reports or summaries *before* the *Cannabis Act* came into force; however, these issues were brought to light through the Cannabis Task Force and APPA's cannabis study. Health Canada noted:

> Broadly speaking, Indigenous regulatory authority derives from different sources, including rights recognized and affirmed in section 35 of the *Constitution Act, 1982,* historic and modern treaties and land claim agreements, self-government agreements, and federal legislation, such as the *Indian Act.* For example, section 81 of the *Indian Act* allows band councils to make by-laws in relation to the health of residents on the reserve and for the observance of law and order. First Nations would determine the types of restrictions they can establish, based on their interpretation of the authorities provided in the *Indian Act.* Such by-laws could co-exist with the *Cannabis Act* as long as they do not conflict with the Act or frustrate its purpose… Support for the self-determination of Indigenous peoples is a key objective of the Government of Canada. This must be balanced with the need to ensure that the legal and regulatory framework for cannabis, including criminal prohibitions, is applied consistently across the country. Therefore, similar to the *Criminal Code*, the *Cannabis Act* is a federal law of general application that applies to all people in Canada, including Indigenous peoples, whether they live on a reserve or not. (Health Canada, GD, 2018, pp. 33-34)

As the government doubled-down on laws of general application, the AFN doubled-down on Indigenous jurisdiction. During the same period in December 2018 at the Special Chief's Assembly, a resolution titled *First Nation Cannabis Jurisdiction* was carried by consensus (AFN Res. no. 02/2018). The regulatory preamble again referenced Article 21(1) of the UNDRIP, the TRC's *Calls to Action* (number 18), First Nations' exclusion from the *Cannabis Act,* the Prime Minister's promise of a new fiscal relationship, APPA's support for Indigenous cannabis jurisdiction, and First Nations' exclusion from excise tax revenue. The Chiefs-in-Assembly called for a licence quota for First Nations, revenue sharing, an assurance that laws of general application would not apply on reserve where First Nations have jurisdiction, and the development of a framework to implement a First Nations cannabis jurisdiction option by summer 2019 for interested First Nations.

In July of 2019, the Government of Canada delivered its *Progress Report on Priorities Identified in the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples* as promised by the Ministers of Health and Indigenous Services in their letter to APPA the year prior; incidentally, it still did not suggest any movement

towards a First Nations cannabis jurisdiction option. The government outlined its efforts related to ongoing engagement; however, this engagement featured a one-way exchange of information in which the government's focus was, again, educating Indigenous peoples.

> Immediately following Royal Assent of the new *Cannabis Act*, personalized letters were sent to more than 800 First Nations, Inuit and Métis community leaders, indicating a willingness to visit their communities and provide information and support. These letters also provided an overview of the new legislation and the public education, health and wellness, and economic development supports and resources that the Government has made available specifically to support Indigenous communities. (Government of Canada, GD, 2019, p. 3)

The government reiterated its financial commitment to develop culturally and linguistically relevant public education materials and again noted its $62.5 million commitment, "to support the work of community-based and Indigenous organizations in educating their communities" although the portion allotted to Indigenous organization was again unspecified (Government of Canada, GD, 2019, p. 7). The government noted it had provided the Thunderbird Partnership Foundation (TPF) $1 million over 2018 and 2019 to fund a cannabis dialogue project focused on harm reduction and promised $4.4 million to other Indigenous organizations starting in 2019 to develop culturally relevant educational materials. Regarding mental wellness services and substance use and prevention treatment, the government reaffirmed the pledge made by the Ministers of Health and Indigenous Services, "to address unmet needs for front-line mental wellness and substance use services" (Government of Canada, GD, 2019, p. 9). This included a federal contribution to, "the construction and ongoing operation of a mental wellness and substance use treatment centre in Nunavut," adding, "This is one of the subjects of the Truth and Reconciliation Commission's Twenty-First Call to Action" (Government of Canada, GD, 2019, p. 10). The report also reiterated the increased investments in the FNPP noted in the 2018 government response to APPA's cannabis study.

In a section titled 'Indigenous Authority and Jurisdiction' the government noted, "many Indigenous communities and governments are interested in pursuing regulatory models that support and respond to their needs and interests" (Government of Canada, GD, 2019, p. 13). When noting some communities may wish to restrict or prohibit cannabis, the government added, "Indigenous communities would need to ensure that any restrictions that they wish to establish are duly grounded in the appropriate by-law

making authority and that they do not conflict with the *Cannabis Act* or frustrate its purpose" (Government of Canada, GD, 2019, p. 14). The government added,

> Under the *Cannabis Act*, those who wish to produce and sell cannabis products must obtain the appropriate federal or provincial or territorial licences. In addition to obtaining appropriate federal or provincial or territorial authorization, anyone wishing to produce, sell or conduct other activities with cannabis has to ensure compliance with other applicable rules. In the case of an Indigenous community, these may include any validly made by-laws or regulations. (Government of Canada, GD, 2019, p. 14)

The government also noted they were aware of unlicensed cannabis production and sale in Indigenous communities and spoke of its objective to displace the 'illegal market' and eliminate 'unauthorized dispensaries.'

> Engagement has also taken place with community leaders that are seeking to address unauthorized and unregulated activities on their lands, and to collaborate on finding solutions to ensure that activities with cannabis take place in a way that does not pose risks for the health and safety of community members. This engagement could form the basis for developing partnerships that could serve to test new models or approaches by which communities can exercise greater control over activities with cannabis, supporting both self-determination as well as our shared objectives of protecting public health and safety and displacing the illegal market. The Government is committed to continuing to engage with Indigenous communities, in collaboration with provincial and territorial governments where there is willingness and commitment to do so or bilaterally if necessary, to advance these objectives. (Government of Canada, GD, 2019, pp. 5–6)

The government stated it remained, "committed to facilitating further Indigenous participation" in the legal cannabis sector noting, "as of April 2019, ten Indigenous-owned or affiliated businesses have met the strict regulatory requirements under the *Cannabis Act* and been granted a Health Canada licence to cultivate or process cannabis, including one on reserve" (Government of Canada, GD, 2019, p. 16). The government again mentioned the Navigator Service for self-identified Indigenous applicants, advising it, "can reduce or eliminate the need for applicants to hire consultants when preparing their application" (Government of Canada, GD, 2019, p. 17). The government also noted that it had modernized Indigenous economic programs and removed restrictions on funding cannabis related activities and reiterated the possibility of Indigenous partnerships with the provinces.

In terms of taxation, discussions related to these issues were described—not surprisingly—as ongoing.

> In Budget 2019, the Government reaffirmed its recognition of the important role that tax powers and tax arrangements can play in establishing a new fiscal relationship and in supporting self-sufficiency and self-determination for Indigenous governments. Finance Canada has been engaging Indigenous groups on tax matters, and has prioritized discussions related to cannabis taxation. (Government of Canada, GD, 2019, p. 20)

The government added, “To further advance tax discussions, Finance Canada officials are examining the potential to engage regionally with First Nations on cannabis excise revenue sharing options” (Government of Canada, GD, 2019, p. 21). In terms of Indigenous interests, the statement, ‘examining the potential to engage’ indicated the progress report conveyed very little progress and did not include any information that met the expectations of the AFN.

The AFN was not the only governmental organization that opted to disregard federal and provincial cannabis authority. In June of 2019 at the 45th All Ontario Chiefs Conference (AOCC) the COO also passed a resolution enabling the 133 First Nations it represents to, “assert complete jurisdiction to govern all cannabis operations within their territories” (COO, ID, 2020, p. 47). The reasoning for the directive was obvious. The Ontario government had initially allocated only eight licences for retail cannabis shops on-reserve in a province with 133 First Nations (Alcohol and Gaming Commission of Ontario, GD, 2022). The COO noted,

> Moved by Thessalon First Nation Chief Edward Boulrice, with Garden River First Nation Chief Paul Syrette acting as the seconder, this resolution acknowledges that First Nations may consider following federal and provincial regulations while exploring opportunities within the cannabis industry. Still, it clearly defines that First Nations have the jurisdiction to establish their laws and regulations. The document also urges federal and provincial governments to eliminate barriers and to “cease interference that would impede nation-to-nation trade and commerce.” (COO, ID, 2020, p. 20)

At the AFN’s Annual General Assembly in July of 2019, the AFN adopted three more cannabis resolutions: The *Chiefs Committee on Cannabis, Support of Cannabis as Part of Indigenous Culture,* and *Support for First Nations Self-Determined Right to Govern the Cultivation, Processing and Retail of Cannabis.* The regulatory preamble of the resolution titled *Chiefs Committee on Cannabi*s again referenced the right to improve

economic and social conditions under Article 21 of the UNDRIP. The AFN noted the implementation of the *Cannabis Act* included, “little or no community consultation by the federal government and there are still no provisions in the legislation which address First Nation social and cultural needs, and rights to economic development, health and public safety” (AFN Res. no. 36/2019, p. 1).

The resolution pointed to the adoption of the UNDRIP by the federal government, and argued, “economic reconciliation must include the meaningful development of a First Nation cannabis jurisdiction” (AFN Res. no. 36/2019, p. 1). The AFN argued First Nations across Canada have an opportunity to, “become safely and responsibly involved in the industry” (AFN Res. no. 36/2019, p. 1). The resolution noted First Nations may wish to explore existing opportunities under Health Canada and provincial retail regulations, however, it advised, “First Nation communities also have the opportunity and the jurisdiction to establish their own laws and regulations” (AFN Res. no. 36/2019, p. 1). The resolution further stated, “First Nations must have their autonomy and authority recognized as rights holders at the table as governments when asserting their interests in the cannabis sector” (AFN Res. no. 36/2019, p. 2). The resolution reiterated full jurisdiction over cannabis in First Nations territories in relation to its cultivation, processing, and sale. The resolution also noted the work begun by the First Nations Cannabis Task Force would be taken over by the newly formed Chiefs Committee on Cannabis (CCC), “which would directly provide First Nations with economic, health and safety information where the federal government has failed to do so to date” (AFN Res. no. 36/2019, p. 2).

In *Support for First Nations Self-Determined Right to Govern the Cultivation, Processing and Retail of Cannabis* the AFN also asserted jurisdiction over cannabis production and sale in its territories and urged, “provincial and federal governments to eliminate barriers and to cease interference that would impede nation-to-nation trade and commerce” echoing the sentiments of the COO (AFN Res. no. 54/2019, p. 2). The resolution requested the following actions be taken by the federal government:

> 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;

> 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. (AFN Res. no. 54/2019, p. 2)

The third cannabis-related resolution adopted at July's General Assembly was titled *Support of Cannabis as Part of Global Indigenous Culture.* The regulatory preamble cited seven Articles in the UNDRIP related to cultural diversity and promoting acceptance of Indigenous traditions and aspirations; the secure enjoyment of means of subsistence; the right to be active in the development of health, housing, and other economic and social programs; and "the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes" (AFN Res. no. 48/2019, p. 1). A noteworthy inclusion that cited international Indigenous rights in the regulatory preamble referred to Article 31 (1) in the UNDRIP:

> Article 31 (1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures. (AFN Res. no. 48/2019, p. 2)

The resolution stated, "Cannabis is an emerging and a substantiated element of Indigenous heritage and cultural expression of Indigenous communities around the globe. Its use is protected by the fundamental human rights to self-determination, freedom of expression and freedom of thought" (AFN Res. no. 48/2019, p. 2). The resolution also mentioned the negative implications experienced by Indigenous peoples within the criminal justice system because of long-standing drug policies in both Canada and the US. The arguments here laid the groundwork for making a cultural claim to cannabis and implementing Indigenous cannabis laws.

4.3.2. Indigenous Organization and Information Sharing

The lack of Indigenous consideration in Canadian cannabis policy became a catalyst for Indigenous organization and information sharing. Conferences, gatherings, and information sessions were held within and between Indigenous communities across Canada before and after the *Cannabis Act* came into force. The Anishinabek Nation held

a cannabis gathering in Sudbury, Ontario March 6-7, 2018, to, “provide information to leadership on the status of the cannabis legislation, licensing requirements, as well as to discuss the positive and negative ramifications that will affect First Nations” (Anishinabek Nation, ID, 2018, p. 4). Representatives of the COO and federal and provincial governments hosted 50 attendees from approximately 20 First Nations. The resultant *Cannabis Report* released by the Anishinabek Nation noted governance and jurisdiction among the priorities and concerns of those in attendance. The report indicated a belief that, “First Nations should have been involved in drafting the legislation” and that, “First Nations have their own jurisdictions and have the right to that authority” (Anishinabek Nation, ID, 2018, pp. 9–10). The Anishinabek Nation’s report suggested, “There is a need for us to develop our own laws to ensure we are handling issues in accordance with our own traditional values and beliefs,” and noted the meeting was just the beginning of a much longer conversation (Anishinabek Nation, ID, 2018, p. 10). In conclusion, the report indicated

> Participants concluded that First Nations need to focus on their own laws and to pressure governments to secure support and recognize First Nations legal rights to governance over this issue. This can be achieved through development of by-laws, land codes, enforcement measures with funding mechanisms to support them. The Anishinabek Nation (Union of Ontario Indians) supports community-driven perspective and positions on cannabis and will continue to advocate for information sharing as well as enhanced partnerships with all levels of government and organizations involved in the cannabis sector. (Anishinabek Nation, ID, 2018, p. 12)

The 1st National Indigenous Cannabis and Hemp Conference (NICHC) was held at Tsuut’ina Nation in Calgary, Alberta November 19-21 in 2018. This first NICHC was chaired by Isadore Day and attracted 500 participants, including representatives from Health Canada and Indigenous Affairs (NICH, ID, 2018). The themes of the conference were jurisdiction, economic sovereignty, health and safety, and community impacts (NICH, ID, 2018). The NICHC noted, “In order to follow-up on the pressing issues and themes that emerged during this past week, the second National Indigenous Cannabis and Hemp Conference will be held in Ottawa, Ontario on February 19-21, 2019” (NICHC, ID, 2018, para. 7). A promotional flyer for that event noted,

> The inclusive atmosphere and themes of the program create a valuable networking opportunity for those Nations looking to enter into business relationships with other Nations and industry experts. Panels of leading Indigenous cannabis experts from the fields of medicine, business, law,

> economic and policy development will address the questions your communities should be asking. (NICHC, ID, 2018, para. 6)

In addition to networking the conference offered workshops in relation to cannabis and hemp cultivation and processing, harm reduction models, and recreational cannabis retail stores. The main themes of the conference were described as, “Sovereignty, Indigenous partnerships, [and] licencing” (Hendry et al., 2019, p. 6). The event included Indigenous organizations, such as the Canadian Indigenous Hemp Cannabis Consortium, First Nations government representatives, doctors, lawyers, and representatives from cannabis corporations (Hendry et al., 2019). Also in attendance were provincial cannabis regulators from Saskatchewan, Ontario, and BC, as well as federal delegates from Health Canada, Indigenous Services, and Indigenous Affairs (Hendry et al., 2019). This second conference--also chaired by Day--attracted fewer delegates (300) but counted Minister of Health Petitpas Taylor and Minister of Border Security and Organized Crime Reduction Bill Blair among attendees (Hendry, 2019). According to a media report,

> When asked by a delegate if the government would respect the Algonquin sovereign right to produce and sell cannabis in the territory that includes Ottawa, Minister Blair replied: “We acknowledge and respect the jurisdiction of First Nations. There is an important nation to nation discussion on how both of our jurisdictions are recognized, especially in the health and safety of our peoples.” (Hendry, 2019, para. 4)

In March 2019 the BCAFN, the First Nations Summit, and UBCIC held the BC First Nations Cannabis Forum (BCAFN, ID, 2022). The goal of the forum was to create an action plan for FNLC members on BC’s Joint Working Group on Non-Medical Cannabis Regulation and Legalization (JWG). Panels discussed federal and provincial regulation, First Nations jurisdiction, taxation, and health, however most presentations were related to economic development opportunities. Presenters at the event included lawyers speaking about jurisdictional issues, representatives from cannabis corporations and investment firms, Manny Jules of the FNTC, and TPF the among others.

The AFN’s Mental Wellness Forum in April of 2019 also included sessions specifically addressing issues related to cannabis. At the event, the TPF shared the results of their Regional Cannabis Dialogue Project which utilized focus groups, regional reports, and a cannabis survey to gather community input (TPF, ID, 2019). The national recommendations centred on community-based policies, initiatives, and decision-making

in relation to cannabis, and presentations described the various resources and tools that were in development to support Indigenous communities (TPF, ID, 2019). In June of 2019, Isadore Day hosted the First Nation Cannabis Reception: Growth, Prosperity and Cultivating a Green Economy, in Sault Ste. Marie (Hopkin, 2019). This event was limited to First Nations cannabis retailers with the intention of forming an association that would ultimately design a framework for certification, testing, and compliance under Indigenous authority (Hopkin, 2019). A third NICHC was held in Kelowna BC, November 26-28, 2019, and hosted by the Westbank First Nation. Key topics of discussion included sourcing project capital and developing Band policies in relation to cannabis, and workshops included hemp production and community wellness programs; the opportunity to network remained a priority (NICHC, ID, 2019).

The AFN's First Nations Cannabis Summit was held in Vancouver, BC on September 4-5, in 2019 (AFN W, 2019a).[11] The AFN noted on its website, "The Summit is an opportunity for participants to hear updates and engage in dialogue on key issues relating to cannabis and First Nations, including policy consultations, safety, health, social development, economic development and awareness building" (AFN W, 2019a, para. 2). The program agenda noted, "The AFN National Cannabis Summit will host plenary and dialogue event to facilitate discussion on the implications of the legalization of cannabis" (AFN W, 2019b, p. 2). The AFN invited Chiefs and their representatives; First Nations organizations and technicians interested in cannabis policy; industry and academia involved in First Nations cannabis issues; and representatives from federal and provincial/territorial governments. The sessions included a review of cannabis-related resolutions that had been adopted by the AFN thus far. Other sessions focused on health included *Impacts of Cannabis on First Nations* led by Dr. Carol Hopkins of the TPF, *Cannabis Used in Medical Practice,* and *Cannabis Used in Harm Reduction.*

Information sessions also included engaging in the cannabis sector within the government's regulatory framework. Representatives from cannabis corporations led *Cannabis Business Ventures* and *Participating in the Cannabis Industry* sessions to discuss federal licensing, First Nations investments, and engaging in the current legal market. For First Nations willing to explore provincial partnerships, BC's Working Group

[11] Documents from the Assembly of First Nations Website are cited as (AFN W, year, paragraph/page number)

on Cannabis--which included members from the BCAFN, the UBCIC, and the First Nations Summit—discussed, “challenges and opportunities in establishing a new fiscal relationship and economic development” through First Nation/Provincial agreements (AFN W, 2019b, p. 3). Lawyer-led sessions included *Licensing and Regulation*, which discussed, “the operational and regulatory aspects of participating in a new industry under inherent/shared jurisdiction,” and a second session dedicated to shared jurisdiction discussed possible solutions, “in dealing with Federal and Provincial officials regarding cannabis operations on reserve” (AFN W, 2019b, p. 4).

Sessions for those interested in exercising Indigenous jurisdiction over all aspects of cannabis regulation and trade within their territories also were available. Manny Jules, Chief Commissioner of the FNTC led a *First Nations Exercise of Jurisdiction over Cannabis* session. Lawyer-led sessions were available to, “Share practical experiences working with First Nations who have chosen to exercise their self-governing authority over the cultivation, processing, and sale of cannabis outside of the federally regulated cannabis regime” (AFN W, 2019b, p. 3). A session titled *First Nations Cannabis Acts* included presentations by Chief Darcy Gray of Listuguj Mi’gmaq First Nation, Chief R. Donald Maracle of the Mohawks of the Bay of Quinte (MBQ), and Grand Chief Joe Norton of the Mohawk Council of Kahnawà:ke (MCK). This session included practical advice regarding community consultations and the creation and enforcement of First Nations laws, and noted the need to, “occupy the field when it comes to cannabis legislation on reserve” (AFN W, 2019b, p. 3). As will be discussed in the following section, many Indigenous communities acquiesced.

4.4. Occupying the Field: Indigenous Cannabis Regulations

Some Indigenous governments were willing and prepared to define local rules regarding cannabis on-reserve: between 2018 and 2022 a series of Indigenous cannabis regulations were created. The contents of these regulations displayed a diverse array of perspectives, goals, approaches, and motivations. The sample of Indigenous cannabis regulations in this analysis represent 32 First Nations and include 12 band council resolutions, 12 by-laws, 15 laws, four other/interim regulations, six draft laws/by-laws, two Indigenous-provincial government agreements, and one MOU between the MCK

and Health Canada.[12] Some regulations were designed to comply with provincial and federal regulations and others were not. About half of the by-laws were limited in scope and only discussed retail cannabis sales, however the remainder also included provisions related to possession, zoning of various cannabis activities, cultivation, production, processing, and distribution, as did most laws in the sample. Laws were generally longer and more comprehensive than by-laws (but not always). The draft laws and by-laws were at various stages of development and made available for public input. The 'other/interim regulations' category included temporary and additional regulations, some of which were instituted alongside laws and by-laws.

In all but two cases band council resolutions also were adopted alongside other regulations and were included in the sample because they contained additional information. The two band council resolutions that did not accompany other regulations each announced moratoriums on cannabis sales on-reserve and provided public notice that unauthorized cannabis activities in the community would not be tolerated. For example, the Algonquins of Pikwakanagan First Nation resolved,

> A recent survey, as well as a poll at 2 different Community consultation meetings, showed clear statements and indications from Pikwakanagan Members that Council should immediately take measures and steps to take control and management of the cannabis and cannabis products industry in Pikwakanagan…Council reserves the authority on behalf of the First Nation to take the necessary steps to authorize the shutting down of any cannabis and/or cannabis products business. (Algonquins of Pikwakanagan First Nation, BCR, 2019, p.1)

A similar notice was made by the Eelünaapéewi Lahkéewiit Council, which advised, "there will be no unlicensed cannabis dispensaries within the Eelünaapéewi Lahkéewiit territory (Moraviantown) until there are proper Tribal law and regulations in place" (Eelünaapéewi Lahkéewiit First Nation, BCR, 2018, p. 1).

[12] Indigenous cannabis regulation citations are formatted as (Government, regulation type, year, page number); Regulation type denotation within citations: Band Council Resolution (BCR), Other/Interim Regulation (OR), Provincial Agreement (S119), Memorandum of Understanding (MOU), Law, By-law

4.4.1. Community Consultation: Developing Indigenous Cannabis Regulations

The lack of adequate Indigenous-Crown consultation before the passage of Bill C-45 was noted by the Mohawk Council of Akwesasne (MCA) which addressed the issue in a council resolution. The MCA noted, “the adjacent jurisdictions of Canada, Québec, and Ontario have recently adopted legislation to legalize and regulate cannabis without prior consultation of the Mohawks of Akwesasne with respect to the impact of legalization” (MCA, BCR, 2018, p. 1). The sample revealed several instances in which Indigenous nations engaged in an alternate approach to the creation of law than the federal government: their goals were community consensus. Before passing its law the Eel River Bar First Nation noted community consultations had been held, a draft law had been reviewed—and most importantly—the draft law had been revised to reflect input gathered from the community during consultation. Incorporating the perspectives gathered during consultation into eventual cannabis policy is where the Canadian government fell short. Aitchelitz First Nation included provisions in their regulations that required prospective cannabis business owners to first pay for a community ratification vote and, “achieve a successful result in the ratification vote of at least 50% plus one of the Members who turn out and cast valid ballots” (Aitchelitz First Nation, Law, 2019, p.7).

The Muscowpetung First Nation also opted to put regulations in place with the understanding that it would need to continually check in with its members, and occasionally revise policy as it built capacity. It noted,

> It is intended that this *Cannabis Act* will serve as a foundational and living document to be adapted to fit the capacity and aspirations of the Muscowpetung First Nation as they evolve over time and to eventually address the governance of all aspects of cannabis production, distribution, sale, possession and use within and on the Muscowpetung Reserve. (Muscowpetung First Nation, By-law, 2018, p. 1).

Because of the importance of community consultation during the development of Indigenous law, some nations enacted interim regulations to occupy the field while allowing time for extensive community engagement before the implementation of formal law. Two Mohawk nations—the MCA and the MBQ--also opted for interim measures during the process of community consultation. The *Akwesasne Interim Cannabis Regulation* was adopted by band council resolution in October 2018. In the resolution the MCA noted,

> The Mohawk Council of Akwesasne intends to initiate the development process for a cannabis control law under the *Akwesasne Legislative Enactment Regulation* during the 2018-2021 term; AND THEREFORE BE IT RESOLVED THAT, the Mohawk Council of Akwesasne deems the imminent legalization of cannabis in neighboring jurisdictions to represent a sufficiently serious risk to the rights, interests, and welfare of the Mohawks of Akwesasne that requires immediate interim measures. (MCA, BCR, 2018, p. 2).

Likewise, two weeks later the MBQ passed its *Interim Cannabis Control Regulation* as a temporary measure. The 18-page document was quite detailed; following its adoption the MBQ hosted a series of community events and a plebiscite to determine whether the more extensive draft *Tyendinaga Mohawk Cannabis Control Law* should be passed (MBQ, ID, 2019a). The plebiscite results indicated 167 were in favour and 159 dissented (MBQ, ID,2019b). In a statement issued by the Tyendinaga Mohawk Council (TMC) on November 18, 2019, the TMC reported,

> While we would like to thank community members for participating in the plebiscite vote, TMC believes that the results of the vote are not fully representative of the community's needs or interests to move forward with a mandate at this time. A low voter turnout indicates that increased community engagement and discussion needs to take place. As elections for Chief and Council will take place in December with a new Council taking office on December 18, 2019, TMC will make recommendations on next steps for the incoming Council to consider on this issue. (TMC, ID, 2019b, para. 2)

There were no further community-wide engagements regarding cannabis advertised on the MBQ's website. This could suggest the interim regulations were satisfactory for the time being, or a possible implication of the appearance of COVID-19. Despite the momentum behind cannabis engagement across Indigenous communities, the World Health Organization's designation of COVID-19 as a pandemic in March 2020 likely stalled progress. On March 24, 2020, the AFN declared a State of Emergency in relation to COVID-19 and the implications for First Nations (AFN W, 2020). Under the circumstances, local priorities were redirected, and activities related to the creation of Indigenous cannabis regulations were put on hold.

Taking the time required to ensure cannabis regulations were well-planned and met community needs was also a priority of the Squamish Nation. The Squamish Nation introduced a by-law to prohibit cannabis production and sale in 2018 to allow time to develop an appropriate cannabis policy. In 2019, Council approved the Squamish Nation

Cannabis Policy Framework (Squamish Nation, ID, 2019). The policy framework was intended to:

> (1) Exercise jurisdiction as an Indigenous government; (2) develop land use policy and by-laws to guide where cannabis can be sold and produced; (3) ensure children and members are safe and protected; (4) support member initiatives in cannabis-related business opportunities; and to (5) explore partnerships for Nation economic development with cannabis business opportunities. (Squamish Nation, ID, 2019, p. 2).

Among nations which opted to impose prohibition on cannabis sales in their territories, at least some were simply taking the time to ensure their cannabis regulations would meet the needs of their communities.

4.4.2. Deriving and Asserting Jurisdiction

The Squamish Nation was not the only Indigenous government planning to assert jurisdiction. The vast majority of the regulations sampled argued for jurisdiction using the same reasoning provided during APPA's cannabis study and those mentioned in AFN resolutions. The Aboriginal/Indigenous rights that supported Indigenous jurisdiction were described as 'inherent' and supported by legal arguments under Canadian and international law. As articulated by the Chippewas of Nawash,

> The Chief and Council of the Chippewas of Nawash Unceded First Nation Band Council has the authority under its inherent jurisdiction to control the production, distribution, and consumption of Cannabis, and that jurisdiction is confirmed by international law, including the *United Nations Declaration on the Rights of Indigenous Peoples*, section 35 of the *Constitution Act, 1982*, and sections 2 and 81 of the *Indian Act.* (Chippewas of Nawash, BCR, 2020, p.1)

In similar fashion, most regulatory preambles in Indigenous cannabis regulations pointed to the Government of Canada's recognition of the inherent Aboriginal rights to self-government and self-determination documented in the *Constitution Act, 1982* and in treaties. The MCA noted, "the Mohawks of Akwesasne have the existing and inherent right of self-determination, which includes the inherent jurisdiction over their lands, peoples and territory" (MCA, BCR, 2018, p. 1). The Squamish Nation argued, "We have an inherent right to self-determination and self-government which emanates from our people, culture and land, and which is recognized and affirmed by section 35 of the *Constitution Act, 1982*" (Squamish Nation, BCR, 2018, p. 1). A similar statement was

included in regulations created by Wahnapitae First Nation, which noted, “section 35 of the *Constitution Act, 1982* recognizes and affirms the existing aboriginal self-government and treaty rights of the aboriginal peoples of Canada” (Wahnapitae First Nation, By-law, 2019, p. 1).

Most regulations recognized Indigenous rights were enshrined in international law and noted the UNDRIP guaranteed their right to pursue economic development. The Listuguj Mi'gmaq Government (LMG) noted,

> WHEREAS the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") recognizes the right of the Mi'gmaq of Listuguj, as represented by the Listuguj Mi'gmaq Government, to autonomy and self-government in matters relating to their internal and local affairs in the exercise of their right to self-determination, as well as the right to freely pursue and control their economic development. (LMG, Law, 2018, p. 2)

A similar argument was included in Eel River Bar First Nation’s regulations:

> The *United Nations Declaration on the right of Indigenous Peoples* (UNDRIP) recognizes the right of the Mi'kmaq of Eel River Bar First Nation, as represented by the council of Eel River Bar First Nation Government, to autonomy and self-government in matters relating to their internal and local affairs in the exercise of their right to self-determination, as well as the right to freely pursue and control their economic development. (Eel River Bar First Nation, Law, 2022, p. 3)

The Chippewas of Georgina Island First Nation pointed to Canada’s endorsement of the UNDRIP, and included, “Canada and other states worldwide reaffirmed their solemn commitment to respect, promote and advance the rights of indigenous peoples and to uphold the principles of the *United Nations Declaration on the Rights of Indigenous Peoples”* (Chippewas of Georgina Island First Nation, By-law, 2019, p. 1). The MCK asserted jurisdiction citing multiple international covenants:

> The aforementioned rights of the Kanien’kehá:ka of Kahnawà:ke, as Indigenous Peoples, have been recognized and affirmed in international covenants and declarations, including the *International Covenant on Civil and Political Righ*ts, the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples.* (MCK, Law, 2018, p. 2)

Also discussed were rights to create by-laws under the *Indian Act* and law-making authority afforded signatories of the *First Nations Land Management Act* (FNLMA). The Canadian government describes,

> First Nations Land Management enables First Nations to opt-out of 40 sections of the *Indian Act* relating to land management. First Nations can then develop their own laws about land use, the environment and natural resources and take advantage of cultural and economic development opportunities with their new land management authorities. (Government of Canada, GD, 2022, para. 2)

Among the online resources offered on the First Nations Lands Advisory Board's website was a collection of Indigenous cannabis laws—perhaps explaining the popularity of including mention of Land Code in reference to law-making authority amongst the laws in the sample (Lands Advisory Board, ID, 2021).

In November 2018 a Land Code workshop and cannabis information session was co-hosted by the Stó:lō nations Semá:th and Tzeachten in Chilliwack, BC. The event was attended by approximately 100 participants including First Nations leadership and lands managers, lawyers, the RCMP, Health Canada, and provincial regulators (Fraser Valley Regional District [FVRD]- Aboriginal Relations Committee, GD, 2018). A report discussing the event was created by the FVRD--a local government headquartered in Chilliwack--which provides services to six Fraser Valley municipalities and eight unincorporated electoral areas (FVRD, 2022). The report noted, "The workshop provided a great deal of clarity regarding the application of cannabis laws and regulation on-reserve" (FVRD – Aboriginal Relations Committee, GD, 2018, p. 2). The report included discussion related to the status of development of cannabis laws in the hosting First Nations as well as those being developed by the Kwaw'Kwaw'Apilt and Shxw'ow'hamel First Nations (FVRD – Aboriginal Relations Committee, 2018, GD, p. 2). Regarding Land Code, it reported,

> There is functionally no difference in application of laws or allotments of excise tax between *Indian Act* bands under Land Code, and Treaty First Nations...All First Nations must adhere to these regulations at minimum on-reserve, while those who are operational under Land Code may further limit the personal amount, or limit where or how much household growing can happen, through laws passed under Land Code. Through the same process, First Nations may regulate aspects of commercial growing (where, how, and if) they allow growing through zoning processes. It will remain legal to grow only those seeds supplied by the provincial government, and any commercial grow operation must be licensed federally and provincially. (FVRD – Aboriginal Relations Committee, GD, 2018, p. 2)

After discussing the information it gathered at the workshop, the report concluded, "Cultivation and sale of cannabis most likely would not meet the legal test to be

considered a protected Aboriginal right" (FVRD - Aboriginal Relations Committee, GD, 2018, p. 2). Incidentally, eight First Nations in the sample instituted cannabis laws under Land Code, including the conference hosts and three additional Stó:lō nations .

The importance of ensuring jurisdictional integrity and local control of domestic affairs was noted in a dozen regulations. The MCK noted its *Kahnawà:ke Cannabis Control Law* was intended to, "protect the jurisdictional integrity of the Territory by ensuring mutual respect and cooperation in relation to jurisdiction, economic advancement and enforcement of Kahnawà:ke's domestic affairs" (MCK, Law, 2018, p. 4). Similarly, the *Tyendinaga Mohawk Cannabis Control Law* proposed the purpose of the draft law was to, "protect the jurisdictional integrity of the Tyendinaga Mohawk Territory by self-determining economic advancement and enforcement of the Tyendinagaro:non's domestic affairs" (MBQ, Draft Law, 2018, p. 6). The Chippewas of Rama First Nation indicated cannabis jurisdiction was necessary, "to prevent the interference of external law enforcement in Rama First Nation domestic affairs" (Chippewas of Rama First Nation, By-law, 2019, p. 5).

The importance of Indigenous authority with respect to traditional territories was evidenced in inclusions that reflected Indigenous worldviews. Stó: lō laws by the Aitchelitz, Cheam, Kwaw-kwaw-a-pilt, Shxw'ōwhámel, and Skowkale First Nations included identical passages that highlighted their traditional philosophy with respect to stewardship of the environment:

> SYUW A:LELH - Stó:lō Laws
>
> "S'olh Temexw te ikw'elo. Xolhmet te mekw'stam it kwelat"
>
> This is Our Land, we have to take care of everything that belongs to us
>
> "Xaxastexw te mekw'stam"
>
> Respect all Things
>
> "Ewe chexw qelqelit te mekw'stam Loy qw' esli hokwex yexw lamexw ku:t"
>
> Don't waste, ruin or destroy everything, only take what you need
>
> "T'xwelatse"
>
> Do things in a good way, respect each other

The inclusions of stewardship, relationships with the natural world, and the interconnectedness of all things in the preface of these laws stands in contrast to the purpose section of the *Cannabis Act* which focuses on human health and regulating human behaviour.

Despite the AFN's resolution noting its *Support of Cannabis as Part of Global Indigenous Culture* (AFN Res. no. 48/2019), some nations were adamant that cannabis culture and their culture would not be conflated. The Six Nations of the Grand River utilized its cannabis regulations to protect sacred words, concepts, and symbols from being used in cannabis marketing. Its cannabis regulations specifically forbid any reference to the Great Law, the Haudenosaunee, the tree of peace, eagle feathers, lacrosse sticks, wampum belts, or, "Other words, phrases, symbols or brand elements associated with Haudenosaunee traditional culture, including but not limited to Ceremonies, Medicines, Foods, Dances, Games, [or] Clothing in the promotion of cannabis products" (Six Nations of the Grand River, OR, 2021, p. 25).

The creation of Indigenous cannabis regulations was utilized by some nations as an opportunity to assert jurisdiction over medical cannabis. This is not surprising in consideration of the grievances noted in previous sections in relation to Canada's medical cannabis regime (IBA, APPA Brief, 23/2/2018; AFN Res. no. 03/2017). Indigenous claims to medical cannabis jurisdiction were not new, as indicated by the multiple Indigenous grey-market dispensaries that existed long before recreational cannabis legalization. Tobique First Nation (TFN) was among the earliest to assert jurisdiction through regulations when it introduced the *Compassionate Use Act of Tobique* in 2012. The Act facilitated any resident of Indigenous territories in Canada or the USA authorization to possess or obtain medical cannabis while in TFN territory without federal approval under the ACMPR. The TFN Regulatory Commission instituted personal and designated-grower production licences, and issued distribution licences to healing centres, buyers' clubs, compassion clubs, and cooperatives.

Recreational cannabis legalization inspired other nations to seize jurisdiction of medical cannabis, and they went about this in different ways. The by-law adopted by the Chippewas of Nawash First Nation was only intended to regulate recreational cannabis and noted any medicinal or traditional use of cannabis would not be subject to regulation under the by-law.

> The Chippewas of Nawash First Nation strongly believes that the Anishinaabeg have an inherent right to personally use traditional plants, herbs, and medicines for food and ceremonial purposes. This law does not purport to interfere with the right of Members to use plants, herbs, and medicines for food and ceremonial purposes. This purpose of this law, for greater certainty, is to control cannabis use for recreational purposes to persons 19 years of age or older, and to provide a legal framework for the production, distribution and retail sales through licenced commercial activities. (Chippewas of Nawash, By-law, 2020, p. 4)

Alternatively, Pheasant Rump First Nation did not create regulations related to recreational cannabis, but in 2019 its Council of Elders approved designating cannabis a 'Traditional Medicinal Plant' to be regulated under the *Pheasant Rump Traditional Medicinal Plants Act*. The attendant *Cannabis Regulation* included provisions for the sale and distribution of cannabis within Pheasant Rump's territories through permit. Pheasant Rump regulations stated, "as part of its regulation of the production and distribution of Traditional Medicinal Plants Pheasant Rump has always engaged in practices of sale, bargain and exchange with non-Members pursuant to its Traditional Governance Practices" (Pheasant Rump Nakota First Nation, Law, 2019, p. 1).

Many regulations in the sample required local licensing for medical cannabis production, distribution, and sale regardless of whether these activities were already approved under the ACMPR, the *Cannabis Act,* or provincial regulations. For example, Six Nations of the Grand River First Nation instituted its own system for issuing medical cannabis permits allowing permit holders to grow their own medical cannabis or designate a medical grower to cultivate cannabis on their behalf. This regulation noted that regardless of the number of cannabis plants Health Canada authorization permitted, individuals would be, "limited to producing the amount of cannabis specified in the [Six Nations] medical use permit, if any, without regard to what is specified in Health Canada's registration certificate" (Six Nations of the Grand River, OR, 2021, p. 26).

However, not all regulations sought jurisdiction over medical cannabis activities that were approved under Canadian law and many regulations deferred to Health Canada in matters related to medical cannabis. A by-law from the Sylix Okanagan Nation noted, "The provisions of this Law do not apply to production and distribution of Cannabis for medical purposes licensed by Health Canada under federal enactments" (Okanagan Indian Band, By-law, 2020, p. 3). Similar inclusions were found in regulations created by the Tk'emlúps te Secwẻpemc, the Chippewas of Nawash, and Wahnapitae

First Nations. In relation to possession and consumption of cannabis, the MCA noted, “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 and its regulations, but solely for the purposes of the person’s medical treatment” (MCK, OR, 2018, p. 8).

4.4.3. The Potential for Economic Benefit

Federal and Indigenous governments have diverged in acknowledging--or failing to acknowledge--the potential economic benefits related to recreational cannabis legalization. The Government of Canada has consistently downplayed potential economic benefits, whereas most Indigenous cannabis regulations directly addressed them. The potential for generating revenue through exercising local control over cannabis activities was a common inclusion in Indigenous cannabis regulations. Regulations discussed prosperity, fiscal self-sufficiency, tangible community benefits, and the socio-economic developments that could be achieved through instituting local cannabis policies in Indigenous territories. Many nations limited cannabis business licences to members (or majority-membership entities) or included requirements that cannabis businesses make every effort to hire First Nation members.

Some regulations indicated certain cannabis activities would be limited to Council or entities created by it. For example, the Eel River Bar First Nation included, “Eel River Bar Government owns and controls 100% of the distribution and sale of cannabis within the lands of Eel River Bar First Nation” (Eel River Bar First Nation, By-law, 2022, p. 9). The MBQ noted,

> Notwithstanding any other provision of this Regulatory framework, a Standard Cultivation Licence and a Standard Processing Licence will only be issued to an entity in which Council, or an entity created by Council on behalf of the First Nation has an ownership interest to ensure a community-wide benefit. (MBQ, OR, 2018, p. 11)

All other potential licences issued by the MBQ were limited to micro-cultivation and micro-processing.

Cannabis regulation also included ways for Indigenous governments to generate revenue without directly participating in cannabis production and sale through application

and licensing fees, monitoring fees, mandatory community contributions, community health and benefit fees, revenue sharing, surcharges, export fees, point-of-sale royalties, and taxes. This most inexpensive application fee in the sample was Shawanaga First Nation, which only cost $60, however, most application fees ranged between $2,000 and $5,000 and were non-refundable. The costliest application fee was Six Nations of the Grand River's two-step screening process for cultivation and processing licences which noted a $5,000 application fee for phase one and $15,000 fee for phase two. Some regulations noted different fees for members and non-members. Cheam First Nation instituted a sliding scale for application fees to sell or produce cannabis: $2,500 for Cheam First Nation entities, $3,750 for Cheam band members, and $5,000 for non-members and partnerships. Annual fees licensing cannabis activities ranged from $500 per year to operate a cannabis store in Ermineskin Cree Nation, to $25,000 per year for cultivation and processing permits in Six Nations of the Grand River. Non-members operating any cannabis businesses in Cheam First Nation were also required to pay a $25,000 annual fee, as were all cannabis businesses in Skowkale First Nation.

The exact price of mandatory community contributions and other fees were not specified in any regulation. In relation to mandatory community contributions, the MCA noted, "The contribution shall not exceed the amount that would be collected as an excise duty on the sale of cannabis in a neighbouring jurisdiction" (MCA, OR, 2018, p. 6). Community contributions were explained to fund recreation, community initiatives, and drug programs. There were various models related to revenue sharing, in one case a percentage due on gross sales. Other additional fees related to cannabis activities were also unspecified and noted the cost would be determined at a future date. Ermineskin Cree Nation's regulations noted, "Subject to the Tipakaywin Custom Law the Council may, from time to time, impose any royalties, duties, fees or levies on Cannabis grown, produced, distributed or sold within Ermineskin" (Ermineskin Cree Nation, Law, 2019, p. 5).

Tax regimes were also unarticulated in regulations. The Tk'emlups te Secwepemc government indicated it was waiting for guidance from the FNTC. It stated, "The Council of the Tk'emlups te Secwepemc will align the Tk'emlups te Secwepemc Cannabis Bylaw and Law with the with the First Nation Tax Commission Cannabis Law once First Nations Tax Commission develops a Cannabis Law" (Tk'emlups te Secwepemc, By-law, 2018, p. 1). In consideration of the various approaches to

regulation undertaken, a thriving cannabis industry could potentially generate a considerable amount of money for Indigenous governments.

4.4.4. Lawlessness or Law and Order?

One feature that was universal across all Indigenous cannabis regulations was the stated purpose: to protect the health and safety of those within its territories. There were different models proposing how best to achieve this goal ranging from moratoriums on cannabis sales on-reserve to Indigenous regulation and oversight of all aspects of cannabis activities. However, across the entire sample the stated impetus for Indigenous regulations was always community well-being.

> Atikameksheng Anishnawbek acts through its elected Gimaa (Chief) and Council in exercising its rights, powers and privileges and in carrying out its duties, functions and obligations as a First Nation, including the development and implementation of laws, regulations and policies that are deemed necessary to ensure the well-being of Atikameksheng Anishnawbek. (Atikameksheng First Nation, By-law, 2018, p. 1)

Indigenous regulations also consistently echoed the Government of Canada's purported rationales for legalizing recreational cannabis: limiting cannabis access to youth and combatting the illicit market, thus protecting youth and curbing crime and community disorder were common inclusions in Indigenous cannabis regulations. In relation to protecting young people, some nations did not believe provincial regulations were sufficient. A media release from the MCK noted,

> At the request of the local public and safety organizations, the legal age limit under the *Kahnawà:ke Cannabis Control Law* is set at 21 years old despite the fact that the legal age limit in Québec is set to 18 years old. This was done to ensure that Kahnawà:ke's youth would be unable to access cannabis from local licence holders until at least the age of 21 as studies show the brain remains under development until the age of 25.
>
> Although young people between the ages of 18 and 21 will be able to purchase licenced cannabis off of the Territory, it was deemed important to establish a higher age limit in Kahnawà:ke in order to send a clear message to dissuade Kahnawà:ke's youth from consuming mind-altering drugs. (MCK, ID, 2018, p. 5)

Nipissing First Nation also instituted 21 years as the minimum age for cannabis use in its regulations, which was higher than required in the surrounding province of Ontario. In addition to imposing higher age minimums for cannabis use, several regulations were

strict regarding home cultivation of cannabis plants. The *Cannabis Act* grants the provinces the option to allow home cultivation of up to four plants. Regardless of the policy in the surrounding provinces, Indigenous regulations included provisions that banned all home cultivation (such as the MCK), allowed for fewer plants (Shxw'ōwhámel First Nation), or prohibited cultivation in public housing (Kwaw-Kwaw-Apilt First Nation). Under regulations created by the Aitchelitz and Skowkale First Nations home cultivation of up to four plants required registering one's home as a residential cannabis production site, which is not a requirement under any provincial regulation.

Nearly all regulations included requirements that subjected licence applicants to police background checks and indicated applicants who had been convicted of offences involving dishonesty, theft, fraud, or malicious misconduct would not be eligible for licences. Violations of Indigenous cannabis regulations contained a series of penalties including licence suspension or revocation, fines, and imprisonment. Most fines noted in the sample were up to $1,000 for first the first violation. Aitchelitz First Nation indicated violators could face up to 30 days imprisonment under summary conviction, fines of up to $10,000, or both. In relation to violating the provisions of cannabis business licences, Alderville First Nation proposed, "Each day that a contravention of a provision of this Law continues is a separate offence," and further that, "All fines levied in prosecutions pursuant to this subsection shall become the property of AFN and contributed to the Recreation Fund" (Alderville First Nation, Draft Law, 2021, p. 15). Fines for violating regulations created by the Chippewas of Nawash First Nation, the MCK, and the LMG could reach $100,000, however, the costliest violations were found in the *Shawanaga First Nation Cannabis Law 2022.* Under this law repeat violators could face fines of up to $250,000.

Most Indigenous cannabis regulations in the sample included provisions that established regulatory bodies outside of Council to oversee compliance with local rules and facilitate the licensing of cannabis activities. The MCK noted its Cannabis Control Commission would, "function at arm's length from the MCK," and also established a Cannabis Health and Safety Committee to work with the Commission (MCK, Law, 2018, p. 6). Similarly, the MBQ proposed a Cannabis Health and Safety Commission to include representatives from Council, health services, social services, youth groups, "and any other appropriate agency of organization within the Territory" (MBQ, OR, 2018, p. 10).

Nations that were signatories of the FNLMA, such as Cheam and Shxw'ōwhámel First Nations, delegated cannabis oversight to the Lands Office or Lands Manager.

Six Nations of the Grand River's cannabis law noted one of its purposes was to, "minimize the risk that the Six Nations cannabis industry becomes a monopoly or an oligopoly" (Six Nations of the Grand River, Law, 2021, p.2). Likely operating with similar intent, some nations stressed the importance of procedural fairness within regulatory bodies. The Chippewas of Nawash established a Cannabis Control Commission to issue licences and oversee compliance with its regulations, "In the First Nation's best interests; Consistently with the Band Council's policies; and According to the highest standards of impartiality, independence, transparency and integrity" (Chippewas of Nawash First Nation, By-law, 2020, p. 5). Eel River Bar First Nation established a five-member Cannabis Control and Quality Assurance Office, noting potential members must, "not have any interest, whether directly or indirectly, in a private entity having an actual or potential interest in a matter related to the application of this Law" (Eel River Bar First Nation, By-law, 2022, p. 7). An identical passage—indicating Indigenous governments were sharing information--was included by the LMG in relation to potential employees of its Cannabis Control Office. The Canadian government has noted that any activities related to cannabis production or sale outside of its regulatory regime is illicit under Canadian law, however, several Indigenous regulations specifically expressed that local control was intended to, "deter illicit and illegal activities in relation to cannabis" (MCK, Law, 2018, p. 4). Regulatory preambles in many Indigenous cannabis regulations promoted the ideals of law and order, but not necessarily the laws imposed by Canada.

4.4.5. Crown-compliant, Harmonized, and Sovereign Approaches

In the 2019 issue of his publication *Indigenous Cannabis and Hemp Magazine: Growth and Prosperity*, former regional Chief and AFN Cannabis Task Force co-chair Isadore Day argued,

> First Nations today that wish to assert their interests in this industry are faced with persecution and labelling of being a grey market, or as having ties with a black market. It is being suggested that what First Nations are developing, despite colonial incursion on their cannabis rights, is the Red Market. Intrigue has been sparked by the determination in approach by Indigenous entrepreneurs, and the impact that First Nations who are not prepared to allow a colonial narrative to be perpetuated are having on the

> industry….Taxation, law-making authority, land, and an Indigenous worldview goes a long way in an industry that is based on a product that is living, comes from the land, and requires organic intelligence. (Day, ID, 2019b, p. 4)

According to Day, there are three ways First Nations can engage in the Red Market: Crown-compliant, sovereign, or a harmonized approach which blends elements of each (Hopkin, 2019). The regulations in this sample included or omitted requirements to follow provincial and/or federal law, thus spanned the spectrum. The approaches adopted by individual nations were influenced by local aspirations, capacity, capital, and constraints imposed by outside regulations.

Provincial regulations may create opportunities for Indigenous businesses or governments or shut them out completely. For example, the provincial governments in New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island, and Québec have a monopoly on retail cannabis sales and are the only authorized retailers in those provinces (Government of Canada, 2022a). By extension, any Indigenous cannabis regulations that allow cannabis sales in those provinces are sovereign, because they disregard provincial legislation and the provincial monopoly of retail sales. In this sample, provincial monopolies rendered regulations created by the LMG, the MCK, the MCA, TFN, and the Eel River Bar First Nation in conflict with Canadian law. Provinces that allow for private cannabis retailers provide some opportunity for Indigenous engagement in the cannabis industry. Alberta, Manitoba, Nunavut, and Saskatchewan only licence private cannabis stores; the remaining provinces and territory—BC, Newfoundland and Labrador, Ontario, and the Yukon--allow for government-run and private cannabis retailers (Government of Canada, 2022a). However, it should be recognized that even in provinces that licence private cannabis retailers, there are a limited number of licences and an abundance of applicants. The diversity among cannabis regulations across the country has prompted Boyd (2019) to describe the *Cannabis Act* as a patchwork quilt in progress; this characterization is also apt in reference to Indigenous cannabis regulations.

4.5.1. Crown-compliant Approaches

Crown-compliant regulations included provisions requiring applicants applying for cannabis licences in First Nations territories to possess—or be in the process of obtaining—federal and provincial authorization. Federal authorization is required for

cannabis production and processing, and provincial authorization is required for retail cannabis sales and distribution. Most of the regulations implemented as laws in the sample were Crown-compliant. Aitchelitz First Nation's law requires potential applicants to obtain provincial and federal authorization in addition to local authorization. The regulations stated no person was authorized to carry on a cannabis business unless they had, "applied for and received valid and subsisting authorizations under the Canada *Cannabis Act*, the B. C. *Cannabis Control and Licensing Act* and the B.C. *Cannabis Distribution Act* and any other applicable federal or provincial legislation, as appropriate" (Aitchelitz First Nation, Law, 2019, p. 5).

Similar Indigenous cannabis regulations in BC (a province that allows both government-run and private retailers), also noted the need to follow federal and provincial authorization, including Cheam First Nation, Skowkale First Nation, and Shxw'ow'hamel First Nation. The Crown-compliant model allows for communities to assert some control over cannabis activities in their territories, plan local zoning, limit the number of businesses, include additional local rules, and impose additional licensing and other fees to benefit Indigenous governments. The obvious limitation to the Crown-compliant model is that many Indigenous nations do not have the opportunity to acquire provincial authorization.

4.5.2. Harmonized Approaches

There were two regulations that adopted a harmonized approach in the sample, and both were in the province of BC. However, inclusions in other regulations indicated that they too may be inclined to harmonize their laws with those of other jurisdictions. The MBQ included a passage related to harmonization in its interim regulation.

> This Regulation 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 First Nation Cannabis Control Board and other First Nations and other regulatory and law enforcement agencies. However, this Regulatory framework is not dependent on the approval of, or cooperation from, any other governmental body or agency. (MBQ, OR, 2018, p. 4)

The Chippewa's of Nawash First Nation also noted,

> This Law may serve as the basis for:

> (a) The harmonization of laws concerning Cannabis among the First Nation and other jurisdictions;
>
> (b) Co-operation and mutual assistance among the Cannabis Control Commission and other regulatory and law enforcement agencies; and
>
> (c) Agreements with other jurisdictions with respect to Cannabis Activities, including, without restricting the generality of the foregoing:
>
> (i) The supply of Cannabis to Licensees; and
>
> (ii) Coordination between Licensees and licensed Cannabis retailers in other jurisdictions. (Chippewas of Nawash First Nation, By-law, 2020, p. 4)

The first harmonized approach to cannabis regulation in Canada was finalized in September 2020 between the Williams Lake First Nation (WLFN) and the province of BC. The agreement was facilitated under section 119 in BC's *Cannabis Control and Licensing Act* (CCLA). The agreement states,

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that approval is given to the Attorney General and the Minister of Finance to enter into, on behalf of the government, an agreement with the Williams Lake First Nation that is substantially in the form attached to this order. (WLFN-BC, S119, 2020, p. 1)

The agreement requires WLFN to follow federal and provincial regulations but exempts it from certain CCLA provisions. WLFN is allowed to participate in both the production and retail sectors, thus bypassing the tied-house rules imposed by the CCLA intended to reduce the risk of a retailer promoting one licensed producer's product at the exclusion of another. Exemptions also allow WLFN to sell its cannabis products in other stores across the province and to sell cannabis directly from the same site that houses its micro-production facility. This farm-to-gate sales approach is the first of its kind in BC. The agreement also allows WLFN to sell regionally produced Indigenous arts and crafts from its retail store, exempting it from provisions under the CCLA that require cannabis retailers to only sell cannabis, cannabis accessories, and shopping bags. Under the provisions of this agreement WLFN's cannabis business may serve as an attraction and day-trip destination for locals and tourists alike, giving a boost to the local economy.

The second section 119 agreement under the CCLA included in the sample was between the province of BC and the Cowichan Tribes and was enacted in December 2020 (CT-BC, S199, 2020). This agreement differed from WLFN's in that it was a

limited-term agreement (one year) and the Cowichan Tribes only held 51% interest in the cannabis retail and production entities, as opposed to WLFN's government which held 100% interest. The Cowichan Tribes agreement only permitted cannabis sales on-reserve and did not allow for selling cannabis products to other retailers. A news release indicates as of July 20, 2022, the BC government has entered into an additional four section 119 agreements with BC First Nations and extended the Cowichan Tribes' agreement (Government of BC, GD, 2022).

BC has shown some success in creating opportunities for Indigenous engagement in the cannabis industry using this harmonized approach. This may be attributed to early engagement between BC's Indigenous leadership and the province. A 2018 resolution adopted by the BCAFN indicated BC's Cannabis Legalization and Regulation Secretariat had invited it and the FNLC to engage in discussions regarding provincial cannabis regulations months ahead of cannabis legalization.

> 1. The BC Chiefs-in-Assembly fully supports the BCAFN's participation in the establishment and work of a joint sub-group with the Province and the FNLC to provide an ongoing forum for engagement on the regulation of non-medical cannabis in BC; and
>
> 2. The BC Chiefs-in-Assembly direct the Regional Chief to report back to the Chiefs at the AGM in 2018 regarding progress made by the joint sub-group. (BCAFN Res. no. 03(e)/2018)

In 2019 the BCAFN noted,

> A First Nations Cannabis Framework and Action Plan has been prepared to support the principled and strategic direction of the BCAFN on the JWG, flowing from the existing work of the JWG and the BC First Nations Cannabis Forum held on March 27, 2019. (BCAFN Res. no. 21(b)/2019, p. 2)

The BC government and its delegates appear to be inclined to work towards agreements that benefit some Indigenous parties; however, these agreements are government-to-government, not nation-to-nation.

4.5.3. Sovereign Approaches

Sovereign cannabis regulations do not defer to provincial authority and may or may not recognize federal regulations related to cannabis activities within their territories. Half a dozen regulations in the sample proclaimed First Nation regulations to

be the law of the land. The Chippewas of Nawash stated, “In the event of a conflict between this Law and provincial or federal laws, this Law shall prevail to the extent of the conflict” (Chippewas of Nawash First Nation, By-law, 2020, p. 3). Likewise, the Muscowpetung First Nation included an identical passage in its regulations. Alderville First Nation—home of the Green Mile--also proposed, “In the event of conflict between this Law and any federal or provincial law, the terms of this Law shall prevail” (Alderville First Nation, Draft Law, 2021, p. 16). The Mi’kmaq of Nova Scotia (a province in which the provincial government has a monopoly on retail sales) also proposed ignoring provincial and federal authority.

> In any instance of conflict between the federal *Cannabis Act* or the provincial *Cannabis Control Act*, we declare this Mi’kmaq regime to be paramount on Mi’kmaq reserves, and in dealings between indigenous communities. We reject and expressly displace the applicability of the *Cannabis Control Act* on our reserves, including in particular section 20 thereof. (Mi’kmaq of Nova Scotia, Draft Law, 2019, p. 3)

Even though Indigenous by-laws more often employed a sovereign approach and laws were more often Crown-compliant, there were a couple of noteworthy exceptions. Six Nations of the Grand River First Nation’s cannabis law came into force in June of 2021. The *Six Nations of the Grand River Cannabis Control Law* was the most comprehensive law in the sample at 36 pages and included an additional 129 pages of cannabis control regulations. The law stated, “Through the enactment, application and enforcement of this Act and its regulations, Council is occupying the jurisdiction of cannabis regulation at the exclusion of the federal and provincial governments of Canada” (Six Nations of the Grand River, Law, 2019, p. 1). The law regulated cannabis possession, medical use, and all licensing required for cannabis distribution, transport, import, export, production, processing, cultivation, and sale. All of these activities were to take place under the oversight of the Six Nations Cannabis Commission and were not bound by federal or provincial regulations. The law stated,

> The Council is asserting its inherent right to self-determination, which includes the right to freely determine its political status and freely pursue its economic, social and cultural development. To advance and protect the political integrity and economic security of Six Nations, the Council shall ensure the development of a safe, strong regulated cannabis economy on its Territory from seed to sale. In upholding its responsibility, the Council shall respect the socioeconomic needs of the Six Nations people, with a vision of respecting and providing for the faces coming beneath the earth. (Six Nations of the Grand River, Law, 2019, p. 1).

In addition to claiming jurisdiction, the law also included provisions related to the legal defence of its cannabis regime:

> The Commission shall defend itself, Council, any Six Nations governmental agency recognized by Council, and any person holding (in good standing) a licence issued by the Commission under this Act, and shall be responsible for all reasonable costs, charges, expenses, damages and other liabilities sustained or incurred by such bodies or persons, in connection with any action, suit or other proceeding which is commenced against them if such action, suit or other proceeding challenges the validity or enforceability of this Act, its regulations or the right of Six Nations or Council to establish the cannabis regulatory regime contemplated hereunder. (Six Nations of the Grand River, Law, 2021, p. 4)

The willingness to assume legal responsibility in order to uphold the jurisdictional integrity of the sovereign model was unusual within the sample. The vast majority of regulations which employed a sovereign approach—as well as those that did not--sought to distance themselves from potential liability and included indemnity provisions for Chiefs and Council. Among them was Peepeekisis Cree Nation, which noted,

> No liability attaches to the Council or Board, including its members, or any agent or employee thereof, and no action or proceedings may be brought against the Council or Board, including its members, or any agent or employee thereof, as a result of anything done or omitted to be done under this Act. (Peepeekisis Cree Nation, Law, 2019, p. 21)

Some by-laws also adopted the sovereign approach and did not include any requirement for provincial and federal authorization in their regulations. For example, the Sylix Okanagan Nation noted, “A licence issued by a regulatory authority outside of the Reserves has no validity within the Reserves unless the licence holder has also been issued a Licence under this Law” (Okanagan Indian Band, By-law, 2019, p. 3). The by-law also indicated that a licence issued by the First Nation would not protect the licensee from potential criminal liability from Canadian officials, but nonetheless, the regulations did not stipulate applicants required provincial or federal authorization before being approved by First Nation government. Similarly, the Chippewas of Nawash’s *Cannabis Control Law* made no mention of any requirement for provincial or federal authorization. In many cases regulations that did not include requirements for federal or provincial authorization did include specific provisions related to cannabis packaging and promotion, allowable business hours and locations, required security measures, the training of staff, limitations on amounts of cannabis allowed for possession and sale, and

health and safety requirements that would have otherwise been stipulated under federal and provincial regulations.

Some regulations ignored provincial authority but required federal licensing for production and processing. The Chippewas of Georgina Island First Nation in Ontario enacted a by-law to licence one cannabis retailer on its lands without including the requirement for a provincial licence. The by-law only stipulated cannabis production and cannabis products would need to comply with Health Canada regulations. Similarly, Wahnapitae First Nation notes retail cannabis operators do not require provincial licences but notes they, “Must obtain all supplies, inventory, and cannabis products from a licenced producer that is licenced by Health Canada” (Wahnapitae First Nation, By-law, 2019, p. 6).

Kwaw-Kwaw-Apilt First Nations did not include provisions requiring provincial authorization, but the question of whether applicants would have to comply with federal regulations was not definitive. The Kwaw-Kwaw-Apilt *Cannabis Law* noted:

> No person may carry on cannabis-related business on Kwaw-Kwaw-Apilt Lands unless that person has:
>
> (a) applied to the Kwaw-Kwaw-Apilt Lands Office to carry out the business in an area where such business is permitted under this Law, the *Kwaw-Kwaw-Apilt Zoning* and other laws;
>
> (b) applied for and received a valid and subsisting development permit, if necessary, under the *Kwaw-Kwaw-Apilt Subdivision, Development and Servicing Law*;
>
> (c) applied for and received a valid and subsisting Cannabis Business Permit for cannabis-related businesses issued by Kwaw-Kwaw-Apilt under this law or another Kwaw-Kwaw-Apilt Law; and
>
> (d) if required by Council, applied for and received valid and subsisting authorizations under the Canada *Cannabis Act*, and any other applicable federal legislation, as appropriate. (Kwaw-Kwaw-Apilt First Nation, Law, 2019, p. 4)

The law did not indicate the appropriate circumstances under which Council may impose this requirement.

The MCK employed a sovereign approach in its 2018 *Kahnawà:ke Cannabis Control Law* which outlined regulations related to, “the cultivation, processing,

distribution, sale, possession and use of cannabis within and from the Territory" (MCK, Law, 2018, p. 1). MCK territory is located in Québec, which has imposed a provincial monopoly on retail cannabis sales, however, the law made the MCK's position on jurisdiction abundantly clear: "The Kanien'kehá:ka of Kahnawà:ke have consistently and historically exercised ultimate and exclusive jurisdiction over the Territory" (MCK, Law, 2018, p. 1). However, the law also included provisions which indicated the MCK was open to harmonization:

> 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 Kahnawà:ke Cannabis Control Board 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. (MCK, Law, 2018, p. 3).

The law further indicated the Kahnawà:ke Cannabis Control Board (KCCB) was not yet fully prepared to monitor production and processing in terms of ensuring responsible health and safety standards. The law required dual licences for production and processing: one from the KCCB and one from Health Canada. The law suggested this arrangement was temporary as the MCK built capacity.

> The requirement in section 16.1 of this Law to hold an equivalent licence issued by Health Canada will remain in force until such time as Kahnawà:ke establishes a public health agency that has a capacity and standards comparable to Health Canada regarding the issuance of cannabis-related licences in compliance with the criminal laws of general application. (MCK, Law, 2018, p. 3)

In 2021, despite the fact that the MCK's cannabis law disregarded provincial regulations, the MCK entered into a MOU with Health Canada instituting the first nation-to-nation cannabis agreement regarding cannabis between federal and Indigenous governments. The MOU was not, however, related to jurisdiction, but the sharing of information. This arrangement allows the MCK to build health and safety knowledge through its partnership with Health Canada, while still controlling the cannabis industry within its territories. The agreement notes,

> The purpose of this MOU is to set out the terms and conditions that will govern the sharing of information between the Parties, which are committed to establishing a process for cooperation and information-

> sharing on a number of cannabis-specific activities, as outlined in this agreement. (MCK-Canada, MOU, 2021, p. 2)

A press release from the MCK noted, “This MOU is an important step in the ongoing work to create a safe well-regulated industry within the territory” (MCK, ID, 2021, p. 1). The agreement provided for:

- Cooperation between Health Canada and the KCCB in terms of inspections;
- Information sharing between Health Canada and the Peacekeepers; and
- Health Canada assistance to the KCCB in acquiring more expertise in the oversight of the cannabis supply chain (MCK, ID, 2021, p. 1)

It is clear from inclusions in the MCK’s cannabis law that it sees this partnership as temporary, and that it aspires to be completely self-regulated when it has the capacity.

The different approaches taken by different nations in the creation of cannabis regulations were shaped by a variety of circumstances. The various Mohawk regulations from eastern Canada shared several similarities; they were sovereign, they included multiples licences covering small- and large-scale cannabis production and processing, and they included provisions suggesting they would be open to harmonizing regulations with other First Nations in the future. Alternatively, the west coast’s Stó:lō Nations’ regulations were mostly Crown-compliant and created under the authority of Land Code. Whether Indigenous nations adopted sovereign, Crown-compliant, or harmonized approaches was also dependent on the provincial regulations in which Indigenous territories were located. While BC’s government started early in negotiating presumably mutually satisfactory agreements with First Nations that provided some additional incentives to go the harmonized route, Indigenous communities in many provinces were not given that option. For nations without that option the only opportunity to economically benefit from cannabis required regulations be in conflict with provincial law, thus required a sovereign approach.

4.5. Limitations and Future Research

Because histography uses archival analysis there are limitations inherent in the selected methodology. Archival analysis was useful in highlighting how the Government

of Canada responded and attempted to justify its positions regarding various arguments provided by Indigenous stakeholders during APPA's hearings, in published reports, and in resolutions adopted by the AFN. This methodology was also suitable for developing a timeline of events related to the creation of Canada's cannabis policy. However, the Indigenous perspectives included are largely organizational or governmental in nature (aside from data provided by a handful of individuals who appeared during APPA's cannabis study). Most of the arguments included were given in the context of how they may influence Canadian policy creation. This research does not presume to speak for Indigenous peoples or examine the complexities related to their decisions regarding cannabis but has endeavored to report and critique the behaviour of the Canadian government in response to calls for Indigenous jurisdiction and other matters Indigenous groups raised related to cannabis legalization in the public arena.

The various Indigenous perspectives and arguments included in this analysis should be recognized as existing within the context of colonial political processes (e.g., government hearings). This research only captured the contributions of Indigenous groups who had the means, opportunity, and interest in engaging in these processes. There are certainly Indigenous peoples who did not wish to participate in public dialogue, as well as those who wanted their voices heard but did not have the opportunity. The latter includes Indigenous groups, governments, and individuals who were not invited or involved in APPA's cannabis study and those who were not involved in the creation of Indigenous organizational reports. There were also dissenting views among Chiefs within the AFN as indicated by resolution votes; while each resolution used in analysis was adopted, none passed unanimously. Future research should explore Indigenous perspectives on cannabis and cannabis related activities free from this context and seek to develop a deeper understanding of Indigenous viewpoints.

Indigenous cannabis regulations also deserve future attention in scholarship. These regulations were found to be heavily shaped by the provincial regulations of the surrounding jurisdictions. As provincial policies are updated and modified, Indigenous cannabis regulations may also adjust in response. Additionally, many of the Indigenous cannabis regulations were characterized by their authors as living documents, described as interim measures, were at various stages of development, or were hastily put in place to occupy the field. As cannabis markets in Canada continue to expand and change, so

too will cannabis policies. This may include those developed by Canada, the provinces, and Indigenous nations.

Chapter 5. **Conclusion**

Canada's legalization of recreational cannabis after nearly a century of prohibition was a dramatic policy reversal on behalf of the Canadian government, and one with the potential to significantly impact the economic prospects of First Nations with the capacity and will to participate in this billion-dollar industry. In reference to Graham et al.'s (1996) three typologies of Indigenous policy—policy about Indigenous-specific issues, policy areas of central interest to Indigenous peoples, and policy areas that will impact Indigenous peoples—the data suggest recreational cannabis legalization was indeed a policy area of central interest to Indigenous peoples. The duty to consult with and potentially accommodate Indigenous peoples prior to the passage of Bill C-45 may not have been a requirement under Canadian law due to the SCC's ruling in *Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018), however, with the implementation of the UNDRIP and its FPIC provisions, consultation alone has become the minimum standard of engagement within the Indigenous-Crown relationship; according to Graham et al. (1996), consultation is only the first step towards achieving dialogue. Accordingly, the Government of Canada committed to consultation with Indigenous nations, ostensibly to incorporate their perspectives into cannabis policy. This was the only reasonable option given the federal government's stated goal of reconciliation, its commitment to implementing the UNDRIP, and the expectations this raised among Indigenous peoples and governments. However, adequate consultation must transcend going through the motions and should be engaged meaningfully and in good faith. By the government's own admission,

> A meaningful consultation process is one which is: carried out in a timely, efficient and responsive manner; transparent and predictable; accessible, reasonable, flexible and fair; founded in the principles of good faith, respect and reciprocal responsibility; respectful of the uniqueness of First Nation, Métis and Inuit communities; and, includes accommodation (e.g. changing of timelines, project parameters), where appropriate. (AANDC, 2011, p. 13)

By most Indigenous accounts, the government did not come close to meeting these thresholds.

Indigenous-Crown cannabis policy discussions included many of the consultation failures noted in the research of Graham et al. (1996) as well as those discussed by Weaver (1981) in her review of the White Paper. Considering the decades that have

passed and the work done by the TRC in interim, this is incredibly disappointing. These failures include: (1) the federal government's commitment to engage with Indigenous peoples regarding policy creation only to rush them through a process dictated by rigid timelines; (2) a final policy that failed to include Indigenous contributions to policy discussions; and (3) dissatisfaction with the resultant policy that fuelled Indigenous stakeholders to collectively organize amongst themselves. One of the outcomes of organization amongst Indigenous groups was the rejection of the *Cannabis Act* by several Indigenous nations—not the outcome the Government of Canada was hoping for--but certainly one it should have anticipated if it was paying attention. Graham et al. (1996) opined Indigenous-Crown policy discussions can be characterized as either soliloquy or dialogue. When assessing cannabis consultation, it appears Indigenous participants were once again engaged in soliloquy and talking to themselves.

This research indicates the Canadian government and most Indigenous peoples had wildly conflicting views regarding how the consultation process was engaged: the government characterized consultation as extensive and substantive, whereas Indigenous stakeholders characterized it as ineffective or non-existent. As noted by the FNLC (2103), the implications of this are considerable: "Rather than building the relationships, trust, and momentum required for the transformational change that reconciliation requires, the Crown's approaches to consultation and accommodation are fueling growing impatience, frustration, and conflict" (p. 7). This was indeed the case regarding Indigenous-Crown cannabis consultation. The exclusion of Indigenous interests from cannabis policy following the failed consultation process furthered Indigenous distrust in the federal government and the subsequent enactment of Indigenous cannabis regulations in conflict with the *Cannabis Act* indicate the Indigenous-Crown relationship is more adversarial than reconciliatory. A recent study commissioned by Public Safety Canada reveals that unlicensed cannabis sales in Indigenous territories are among the top concerns of law enforcement professionals tasked with enforcing the *Cannabis Act* and provincial cannabis regulations in Canada (Reid & Boyd, 2022). The same report indicates that from a policing perspective, sovereign approaches to cannabis sales in Indigenous territories will require a political solution and cannot be solved through law enforcement (Reid & Boyd, 2022).

The joint creation of Canadian cannabis policy could have been a vehicle to advance reconciliation, but instead the federal government replicated the hallmarks of

policy paradigms noted by Graham et al. (1992) in policy discussions that took place between the 1960s and the 1990s. This indicates a striking lack of progress if reconciliation is truly the goal. Of the four paradigms that Graham et al. (1996) suggest encapsulate Indigenous-Crown policy discussions—assimilationist, citizens plus, rights-based, and sovereigntists—Indigenous-Crown cannabis consultation reveals the federal government continues to engage the assimilationist paradigm. Under cannabis policy, Indigenous peoples and governments were granted the same rights as any other Canadians and organizations. There was no serious recognition by the federal government of the many rights-based arguments for jurisdictional inclusion that were advanced in consultations and described throughout this study.

Graham et al. (2016) note that the assimilationist paradigm is rarely made explicit in the language used in policy discourse and this is clearly evident when using the *Cannabis Act* as a case study in Canadian Indigenous policy creation. The federal government said all the right things yet again neglected to follow through with what can only be characterized as reconciliatory rhetoric. With aspects of cannabis policy that were delegated to the provinces, the BC government has in some ways done what the federal government failed to do and engaged a rights-based paradigm that acknowledges Indigenous peoples have additional rights stemming from their Indigeneity, yet these additional rights remain subject to Canada's constraints. Alternatively, Indigenous participants in policy discussions employed sovereigntist paradigms, regardless of whether they wanted to engage in the cannabis industry or if they wanted no part of it. Indigenous peoples and governments consistently maintained that they had inherent rights derived from their pre-existing nationhood that were recognized under international law and endorsed by Canada itself.

Reconciliation has become a mantra of contemporary Canada. Canadian society has become more cognizant of the historical injustices burdened upon Indigenous peoples because of short-sighted self-serving policies created by the Canadian government. Today Canadians are increasingly aware that failed Indigenous policies are responsible for generations of trauma which continue to confine the lives and limit the economic prospects of Indigenous peoples in Canada. This knowledge has led to the inclusion of principles relating to reconciliation in strategic plans, mandates, and visions of public schools, colleges, universities, corporations, and community and government organizations. The Canadian government has gone to great lengths to publicize both its

commitment to reconciliation and its intent to actualize a true nation-to-nation relationship, making admirable claims of mutual respect, sacred commitments, and enthusiastic proclamations of support of Indigenous self-determination, sovereignty, and self-government. However, it appears that the government and Indigenous peoples still do not agree on what this means in practical terms. As noted by the TRC,

> What is clear to this Commission is that Aboriginal peoples and the Crown have very different and conflicting views on what reconciliation is and how it is best achieved. The Government of Canada appears to believe that reconciliation entails Aboriginal peoples' acceptance of the reality and validity of Crown sovereignty and parliamentary supremacy, in order to allow the government to get on with business. Aboriginal people, on the other hand, see reconciliation as an opportunity to affirm their own sovereignty and return to the 'partnership' ambitions they held after Confederation. (TRC, 2015, p. 187)

This statement fittingly encapsulates the conflict over cannabis jurisdiction. The government invested nominal effort in going through the motions of consultation and rushed Bill C-45 through in order to get on with business. The conflict over cannabis jurisdiction has shown that much like the Canadian government, Indigenous nations are also ready to get on with business, but as partners rather than colonial subjects. Indigenous nations have made clear that tokens and promises of ongoing discussions are no longer acceptable placeholders for the recognition of Indigenous sovereignty, Indigenous control over local affairs, or tangible opportunities for economic benefit and self-sufficiency for Indigenous communities.

The jurisdictional exclusion of Indigenous nations from Canadian cannabis policy presents as an example of the federal government's lack of commitment to reconciliation and its indifference to forging a new nation-to-nation relationship with Indigenous peoples. This is not without repercussions. Recreational cannabis legalization was a brand-new industry that offered an unprecedented opportunity to treat Indigenous nations as partners and redefine the Indigenous-Crown relationship as reconciliation requires. The government could have worked with Indigenous nations to design legislation that recognized Indigenous jurisdiction, and by extension, Indigenous sovereignty. There were no historical agreements confining Indigenous participation as found in other arenas because the rules and regulations for the recreational cannabis industry were yet to be written. However, the current federal government chose to impose unnecessary limitations on Indigenous participation and criminalized the

assertion of Indigenous jurisdiction. The federal government's suggestions that Indigenous nations work out agreements with the provinces or find government-approved corporate partners to facilitate access to the cannabis industry is grossly inadequate. The federal government insists that Indigenous cannabis regulations which frustrate the purposes of the *Cannabis Act* are illegitimate which indicates Canada is opposed to accepting First Nations legislative powers alongside those of the federal and provincial governments--something that Erasamus and Sanders (1992) argued would be easy to facilitate within Canadian federalism—which indicates the government still considers Indigenous gains as Canadian losses (McGuire & Palys, 2020). If this is the new Indigenous-Crown relationship, it looks a lot like the old one.

Perhaps one of the lessons that can be gleaned from utilizing cannabis legalization as a case study in Indigenous policy is that if Indigenous nations want to be treated as nations in the nation-to-nation relationship, they are ill-advised to wait for Canada's permission to exercise sovereignty. As noted by Bauder and Mueller (2021) sovereignty is, "not naturally given…[but] claimed, asserted, and enacted" (p. 2). The MCK's success in claiming jurisdiction—despite this jurisdiction being granted to Québec under the *Cannabis Act*--while simultaneously entering a nation-to-nation agreement with Health Canada to ensure health and safety of the Mohawk people should serve as a template for other nations with a similar capacity to do so. Building capacity to facilitate participation in the cannabis industry will undoubtedly become a priority for many other Indigenous nations. As Missens (2008) noted,

> One of the challenges to First Nations' sovereignty arises when they have too little of it. Around the world, many governments lack the legitimacy and capacity to translate their nominal sovereignty into effective governance. The sovereignty gap for First Nations will only ensure a "status quo". Only through the exercise of their sovereign responsibilities will First Nations governments create sustainable development and poverty reduction within their communities. (Missens, 2008, p. 5)

Missens' statement rings true in terms of cannabis jurisdiction. Indigenous governments and organizations like the AFN, have repeatedly made clear the status quo is no longer acceptable. Despite Indigenous cannabis regulations being deemed illegitimate by the Canadian government, some Indigenous governments—as exemplified by several Haudenosaunee nations--refuse to accept claims of Indigenous illegitimacy and continue to assert their sovereignty. Other nations with the capacity to implement cannabis

regulations supported by experts, capital, and knowledge of the industry should follow suit. As indicated in this research, there is no shortage of rights-based arguments for Indigenous jurisdiction—both domestic and international--and no shortage of legal experts willing to litigate.

Whether Indigenous exclusion from Canadian cannabis policy is labelled a missed opportunity, a strategic oversight, or legislative genocide, the implications remain the same: it shows the Government of Canada's commitment to reconciliation is weak to non-existent, despite the rhetoric it continually employs. The federal government needs to redesign its cannabis policy and acknowledge Indigenous jurisdiction. A half century ago, Harold Cardinal (1969/1999) pulled back the buckskin curtain of Canadian indifference and revealed the ongoing trampling of Indigenous rights and the lack of economic development opportunities afforded Indigenous nations. He surmised,

> The white man's government has allowed (worse, urged) its representatives to usurp from Indian peoples our right to make our own decisions and our authority to implement the goals we have set for ourselves…These faceless people in Ottawa, a comparatively small group, perpetually virtually unknown, have sat at their desks eight hours a day, five days a week, for over a century, and decided just about everything that will ever happen to the Canadian Indian. They have laid down the policy, the rules, the regulations on all matter affecting native people… they have decided what types of social and economic development will take place and where and how it will be controlled. (Cardinal, 1969/1999, p. 7-8)

Fifty years later Cardinal's words remain salient and perfectly describe the current federal government. The Government of Canada's cannabis policy has shown it is not prepared to live up to the parameters of a nation-to-nation relationship and accept Indigenous authority, nor does it see Indigenous nations as sovereign. This should perplex all Canadians who wish to see true reconciliation. If the federal government has its way Indigenous authority within Indigenous territories will continue to be subject to federal and provincial control and Indigenous nations will continue to occupy the lowest level in the constitutional relationship. History proves that this arrangement does not work, as has been articulated in the Hawthorne Report in the 1960s, by RCAP in the in the 1990s, and again by the TRC in the 21st century. What has become clear in this analysis is that Indigenous nations are ready and willing to assert their sovereignty, pursue self-determination, and seize jurisdiction to facilitate economic development from a government not yet willing to see them as true partners in confederation.

References

Aboriginal Affairs and Northern Development Canada. (2006). *Community well-beings and treaties*. http://www.horizons.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf.

Aboriginal Affairs and Northern Development Canada. (2011). *Updated guidelines for federal officials to fulfill the duty to consult* (Issue March). https://publications.gc.ca/collections/collection_2012/aadnc-aandc/R3-111-2012-eng.pdf

Adinoff, B., & Reiman, A. (2019). Implementing social justice in the transition from illicit to legal cannabis. *The American Journal of Drug and Alcohol Abuse*, 1–16. https://doi.org/https://doi.org/10.1080/00952990.2019.1674862

Alfred, T. G. (2006). “Sovereignty” - an inappropriate concept. In R. Maaka & C. Andersen (Eds.), *The Indigenous Experience: Global Perspectives* (pp. 322–336). Canadian Scholars’ Press.

Allied Market Research. (2022). Cannabis market by product type (flowers, concentrates, edibles, topicals and tinctures), compound (THC-dominant, CBD-dominant, and balanced THC and CBD), application (medical and recreational) and region (North America, South America, Europe, and RoW) – global forecast to 2027. https://www.marketsandmarkets.com/Market-Reports/cannabis-market-201768301.html

Angel, M. (1997). *Discordant voices, conflicting visions: Ojibwa and Euro-American perspectives on the Midewiwin*. University of Manitoba. 1-376. https://www.collectionscanada.gc.ca/obj/s4/f2/dsk3/ftp04/nq23580.pdf

Assembly of First Nations. (2018). *2018 Special Chief’s Assembly on Federal Legislation - Final draft resolution*. https://www.afn.ca/wp-content/uploads/2018/04/SCA-Resolutions-2018.pdf

Aquash, M. (2014). First Nations in Canada: Decolonization and self-determination. *In education, 19*(2). 120-137. https://doi.org/10.37119/ojs2013.v19i2.142

Barnsley, P. (2002). INAC consultation methods denounced. *Windspeaker*, *19*(12), 1–5.

Bauder, H., & Mueller, R. (2021). Westphalian Vs. Indigenous sovereignty: Challenging colonial territorial governance. *Geopolitics*, 1–18. https://doi.org/10.1080/14650045.2021.1920577

BC Treaty Commission. (2021). *BC Treaty Commission: Annual report 2021*.

Bedford, D., & Workman, T. (1997). The Great Law of Peace: Alternative inter-nation(al) practices and the Iroquoian confederacy. *Alternatives: Global, Local, Political*, *22*(1), 87–111. https://doi.org/https://doi.org/10.1177/030437549702200104

Berger, T. R. (1988). *Northern frontier, northern homeland* (Revised Ed). Douglas & McIntyre.

Blatchford, A. (2017). *Feds agree to give provinces 75 per cent of pot tax revenues*. CTV News. https://toronto.ctvnews.ca/feds-agree-to-give-provinces-75-per-cent-of-pot-tax-revenues-1.3716716?cache=%3FclipId%3D373266

Borrows, J. (1992). A genealogy of law: Inherent sovereignty and First Nations self-government. *Osgoode Hall Law Journal*, *30*(2), 291–353.

Borrows, J. (2001). Domesticating doctrines: Aboriginal peoples after the Royal Commission [Article]. *McGill Law Journal*, *46*(3), 615–661.

Borrows, J. (2002). Wampum at Niagra: The Royal Proclamation, Canadian legal history, and self-government. In M. Asch (Ed.), *Aboriginal treaty rights in Canada* (pp. 155–172). UBC Press.

Borrows, J. (2005). Indigenous legal traditions in Canada. *Washington University Journal of Law & Policy*, *19*(January), 167–223.

Borrows, J. (2017). Challenging historical frameworks: Aboriginal rights, the trickster, and originalism. *Canadian Historical Review*, *98*(1), 114–135. https://doi.org/10.3138/chr.98.1.Borrows

Borrows, J., & Rotman, L. I. (1997). The sui generis nature of Aboriginal rights: Does it make a difference? *Alberta Law Review*, *36*(1), 9–45. https://doi.org/https://doi.org/10.29173/alr1018

Boudreau, M., & Hamill, S.E. (2021). Introduction-critical perspectives on cannabis in Canada. *Journal of Canadian Studies/Revue d'études Canadiennes 55*(2), 234-238. https://www.muse.jhu.edu/article/804179.

Boyd, N. (2019). Bench and Bar. *Canada's Cannabis Act: A Patchwork Quilt in Progress?*, 1–23.

Brideau, I. (2019). *The duty to consult with Indigenous peoples*. Legal and Social Affairs Division Parliamentary Information and Research Service.

Brown, D. M. (1995). Aboriginal peoples and Canadian federalism: An overview. In *Institute of Intergovernmental Relations Queen's University*.

Browne, R. (2018, April 18). Black and Indigenous people are overrepresented in Canada's weed arrests. *VICE News*. https://www.vice.com/en_ca/article/d35eyq/black-and-indigenous-people-are-overrepresented-in-canadas-weed-arrests

Cairns, A. (1991). *Citizens Plus*. UBC Press.

Cairns, H. A. C., Jamieson, S. M., Lysyk, K., Tremblay, M. A., Vallee, F. G., & Ryan, J. (1966). *A survey of the contemporary Indians of Canada: Economic, political, educational needs and policies* (H. Hawthorn, Ed.). http://caid.ca/HawRep1a1966.pdf

Calder v British Columbia (Attorney-General), [1973] SCJ No 56

Cardinal, H. (1969). *The Unjust Society*. University of Washington Press.

Centre for Addiction and Mental Health. (1995). A look back on Le Dain (Commission). *Journal - Addiction Research Foundation, 24*(2), 1.

Ceric, I. (2020). Beyond contempt: Injunctions, land defense, and the criminalization of indigenous resistance. In *South Atlantic Quarterly* (Vol. 119, Issue 2, pp. 353–369). Duke University Press. https://doi.org/10.1215/00382876-8177795

Christie, G. (2019). Indigenous legal orders, Canadian law and UNDRIP. In J. Borrows, L. Chartrand, O. E. Fitzgerald, & R. Schwartz (Eds.), *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (pp. 24–31). The Centre for International Governance Innovation.

Commission of Inquiry into the Non-medical Use of Drugs. (1973). *The final report of the Commission of Inquiry into the Non-Medical Use of Drugs*. https://publications.gc.ca/collections/collection_2014/sc-hc/H21-5370-2-1-eng.pdf

Crosby, A. (2019). Contesting cannabis: Indigenous jurisdiction and legalization. *Canadian Public Administration*, *62*(4), 634–655. https://doi.org/10.1111/capa.12351

Day, I. (2019, October 17). A message from the publisher. *Growth and Prosperity: Indigenous Cannabis and Hemp*, 3–4.

DeAngelo, A. (2022). The hockey stick turns into a bell curve: A new report sheds light on cannabis industry growth. *Forbes. https://www.forbes.com/sites/andrewdeangelo/2022/10/04/the-hockey-stick-turns-into-bell-curve-a-new-report-from-bdsa-sheds-light-on-cannabis-industry-growth/?sh=4122ff1966f2*

Delgamuukw v British Columbia, [1997] 3 SCR 1010

Department of Indian Affairs and Northern Development. (1968). *Choosing a path: A discussion handbook for the Indian people*. Queen's Printer and Controller of Stationery. https://publications.gc.ca/collections/collection_2017/aanc-inac/R32-1868-eng.pdf

Donovan, J. (2019, August 1). Canada must respect Indigenous cannabis laws. *Policy Options*.

Elliott, J. (2015). *Liberals "committed" to legalizing marijuana: Trudeau*. CTV News. https://www.ctvnews.ca/politics/election/liberals-committed-to-legalizing-marijuana-trudeau-1.2588260

Erasamus, G., & Sanders, J. (1992). Canadian history: An Aboriginal perspective. In D. Engelstad & J. Bird (Eds.), *Nation to nation: Aboriginal sovereignty and the future of Canada* (pp. 3–11). Anansi Press Limited.

Erickson, P. G., & Hyshka, E. (2010). Four decades of cannabis criminals in Canada: 1970-2010. *Amsterdam Law Forum, 2*(4), 172–179.

First Nations Leadership Council. (2013). *Advancing an Indigenous framework for consultation and accommodation in BC*.

Fisher, R. (2014). *Contact and conflict: Indian-European relations in British Columbia, 1774-1890*. UBC Press.

Fraser Valley Regional District. (2022). *What is the FVRD?* https://www.fvrd.ca/EN/main/about-the-fvrd/what-is-the-fvrd.html

George-Cosh, D. (2018, September 28). On 'Green Mile,' First Nations offer glimpse into pot's retail future. *BNN Bloomberg*.

Gómez Isa, F. (2019). The UNDRIP: An increasingly robust legal parameter. *International Journal of Human Rights*, *23*(1–2), 7–21. https://doi.org/10.1080/13642987.2019.1568994

Government of Canada. (2010). *Highlights from the Report of the Royal Commission on Aboriginal Peoples*. Crown-Indigenous Relations and Northern Affairs Canada. https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018#chp2

Government of Canada. (2017). *Backgrounder: Federal-provincial-territorial agreement on cannabis taxation*. Department of Finance Canada. https://www.canada.ca

Government of Canada. (2018). Principles respecting the Government of Canada's relationship with Indigenous peoples. In *Department of Justice*. https://www.justice.gc.ca/eng/csj-sjc/principles.pdf

Government of Canada. (2019). *Progress report on priorities identified in the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples*. https://www.canada.ca

Government of Canada. (2020a). *Federalism in Canada*. Intergovernmental Affairs. https://www.canada.ca/en/intergovernmental-affairs/services/federation/federalism-canada.html

Government of Canada. (2020b). *Policy on Regulatory Development*. Treasury Board of Canada Secretariat. https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-development.html#toc6

Government of Canada. (2020c). *Self-government*. Crown-Indigenous Relations and Northern Affairs Canada. https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314

Government of Canada. (2020d). *Treaties and agreements*. Crown-Indigenous Relations and Northern Affairs Canada. https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231

Government of Canada. (2021a). *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada*. Department of Justice. https://www.justice.gc.ca/eng/declaration/index.html

Government of Canada. (2021b). *Truth and Reconciliation Commission of Canada*. https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525

Government of Canada. (2022a). *Authorized cannabis retailers in the provinces and territories*. Cannabis Laws and Regulations .

Government of Canada. (2022b). *The reconciliation journey*. Crown-Indigenous Relations and Northern Affairs Canada . https://www.rcaanc-cirnac.gc.ca/eng/1651868378940/1651868435684

Graham, K., Dittburner, C., & Abele, F. (1996). *Public policy and Aboriginal peoples 1965-1992: Soliloquy and dialogue* (Vol. 1).

Gray, B. (2016). *Building relationships and advancing reconciliation through meaningful consultation*.

Haines-Saah, R. J., Johnson, J. L., Repta, R., Ostry, A., Young, M. L., Shoveller, J., Sawatzky R, & Ratner, Ratner, P. A. (2014). The privileged normalization of marijuana use - an analysis of Canadian newspaper reporting, 1997-2007. *Critical Public Health, 24*(1), 47–61. https://doi.org/10.1080/09581596.2013.771812

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511

Health Canada. (2018). *Summary of comments received during the public consultation*.

Hendry, B. (2019, February 22). *2nd National Indigenous Cannabis and Hemp Conference*. NetNewsLedger. https://www.netnewsledger.com/2019/02/22/2nd-national-indigenous-cannabis-and-hemp-conference/

Hendry, B., Day, I., & Narine, S. (2019, October 17). Sovereignty, Indigenous partnerships, licencing were main themes of 2nd National Indigenous Cannabis and Hemp Conference (NICHC) held February 19-21 in Ottawa. *Growth and Prosperity: Indigenous Cannabis and Hemp*, 6–11.

Holland, I. (2002). Consultation, constraints and norms: The case of nuclear waste [Article]. *Australian Journal of Public Administration*, *61*(1), 76–86. https://doi.org/10.1111/1467-8500.00260

Hopkin, J. (2019, June 10). Bimaadzwin CEO Isadore Day is hosting a cannabis reception. Here's why - Bimaadzwin. *SooToday.Com* . https://www.sootoday.com/local-news/bimaadzwin-ceo-isadore-day-is-hosting-a-cannabis-reception-heres-why-1499721

Indian Chiefs of Alberta. (1970/2011). Citizens plus. *Aboriginal Policy Studies*, *1*(1), 188–281.

Indigenous and Northern Affairs Canada. (2010). A history of treaty-making in Canada. In *Treaties and Aboriginal Government*. www.ainc-inac.gc.ca

Indigenous Foundations. (2009). *Berger Inquiry*. Indigenous Foundations. https://indigenousfoundations.arts.ubc.ca/berger_inquiry/

Institute on Governance. (2014). Towards reconciliation: The future of Indigenous governance. *Revisiting RCAP*, *October*,1–60.

Joffe, P. (2015). *"Veto" and "consent" - significant differences*. https://www.afn.ca/uploads/files/2015_usb_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf

Kaiser, H. A. (2016). A partial ceasefire in Canada's war on drugs? Reflections on the impending legalization of marijuana. *Criminal Law Quarterly, 63*(3), 1–24.

Lafrenière, G. (2022). *Standing Senate Committee on Aboriginal Peoples order of reference*. Senate of Canada. https://sencanada.ca/en/Content/SEN/Committee/441/APPA/APPA-SS-1-e

Lamers, M. (2020, September 3). *4% of Canadian cannabis licensees Indigenous-affiliated, with systemic barriers 'baked into system.'* Marijuana Business Daily. https://mjbizdaily.com/4-percent-of-canadian-cannabis-licenses-are-indigenous-affiliated/

Lamers, M. (2021, December 17). *Medical cannabis spending in Canada hits 5-year low in first half.* Marijuana Business Daily. https://mjbizdaily.com/medical-cannabis-spending-in-canada-hits-5-year-low-in-first-half/

Long, K., & Jenkins, S. (2018, October). Case summary: Mikisew Cree First Nation v. Canada (Governor General in Council) | Canada | Global law firm | Norton Rose Fulbright. *Norton Rose Fulbright.*

MacIvor, M. (2012). *Aboriginal post-secondary education policy development in British Columbia, 1986-2011.* [Doctoral dissertation, University of British Columbia]. UBC Theses and Dissertations.

Manuel, A., & Derrickson, M. (2015). *Unsettling Canada*. Between the Lines.

Martin, A. F., & Telfer, C. (2018). The impact of the honour of the Crown on the ethical obligations of government lawyers: A duty of honourable dealing. *The Dalhousie Law Journal*, *41*(2), 443–478.

Martínez, M. A. (1999, June 12). *Study on treaties, agreements and other constructive arrangements between States and indigenous populations: Final report*. https://digitallibrary.un.org/record/276353?ln=en

Mas, S. (2015, December 8). Trudeau lays out plan for new relationship with Indigenous people. *CBC News*.

Mashford-Pringle, A. (2016). Is there self-determination in Canada's First Nations communities? *Journal of Northern Studies, 10*(2), 107.

McGuire, M. M., & Palys, T. (2020). Toward sovereign Indigenous justice: On removing the colonial straightjacket. *Decolonization of Criminology and Justice*, *2*(1), 59–82. https://doi.org/10.24135/dcj.v2i1.16

Mikisew Cree First Nation v Canada (Governor General in Council), [2018] 2 SCR 765

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] SCJ No 71

Minnawaanagogiizhigook. (2008). Reconciliation without respect? Section 35 and Indigenous legal orders. In Law Commission of Canada (Ed.), *Indigenous Legal Traditions* (pp. 77–113). UBC Press.

Missens, R. (2008). Sovereignty, good governance and First Nations human resources: Capacity challenges. *National Centre for First Nations Governance*, 1-19.

Monchalin, L. (2016). *The colonial problem: An Indigenous perspective on crime and injustice in Canada*. University of Toronto Press.

Mullen, P. W. (1972). Canada's Le Dain Commission--a review to date. *Journal - Forensic Science Society, 12*(4), 553–558. https://doi.org/10.1016/S0015-7368(72)70725-2

Murphy, E. F. (1922). *The black candle* / by Emily F. Murphy "Janey Canuck". T. Allen.

Office of the Prime Minister of Canada. (2015). *Statement by Prime Minister on release of the final report of the Truth and Reconciliation Commission*. https://pm.gc.ca/en/news/statements/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation

Olszynski, M. (2014, July 10). *The 'inherent limit' post-Tsilhqot'in: Where Indigenous law and land-use planning meet* |. ABlawg. https://ablawg.ca/2014/07/10/the-inherent-limit-post-tsilhqotin-where-indigenous-law-and-land-use-planning-meet/

Owusu-Bempah, A., & Luscombe, A. (2021). Race, cannabis and the Canadian war on drugs: An examination of cannabis arrest data by race in five cities. *The International Journal of Drug Policy, 91*, 1-8. https://doi.org/10.1016/j.drugpo.2020.102937

Palmater, P. (2014). Genocide, Indian policy, and legislated elimination of Indians in Canada. *Aboriginal Policy Studies*, *3*(3), 26–54. https://doi.org/10.5663/aps.v3i3.22225

Peach, I. (2011). The power of a single feather: Meech Lake, Indigenous resistance and the evolution of indigenous politics in Canada. *Review of Constitutional Studies = Revue d'études Constitutionnelles*, *16*(1), 1–29.

Peach, I., & Rasmussen, M. (2005). Federalism and the First Nations: Making space for First Nation's self-determination in the federal inherent right policy. *Commonwealth Law Bulletin, 31*(1), 3–18.

Poplar, M. C. (2003). We were fighting for nationhood, not Section 35. In A. Walkem & H. Bruce (Eds.), *Box of Treasures or Empty Box? Twenty Years of Section 35* (pp. 27–28). Theytus Books.

R v Sioui, [1990] 1 SCR 1025

R v Sparrow, [1990] 1 SCR 1075

R v Van der Peet, [1996] SCJ No 77

Rasmussen, A. (2015). Participation in written government consultations in Denmark and the UK: System and actor-level effects. *Government and Opposition*, *50*(2), 271–299. https://doi.org/10.1017/gov.2014.16

Reid, A. & Boyd, N. (2022). Three years in: A consideration of the impacts of Canada's legalization of cannabis on law enforcement. Unpublished manuscript.

Ren, M, Tang, Z., Wu, X., Spengler, R., Jiang, & Boivin, N. (2019). The origins of cannabis smoking: Chemical residue evidence from the first millennium BCE in the Pamirs. *Science Advances. 5*(6). 10.1126/sciadv.aaw13

Robinson, R. (1996). *The great book of hemp: The complete guide to the environmental, commercial, and medicinal uses of the world's most extraordinary plant*. Simon and Schuster.

Royal Commission on Aboriginal Peoples. (1996). *Report of the Royal Commission on Aboriginal People: Vol. 1: Looking Forward Looking Back.*

Roburn, S. (2018). Power from the north: The energized trajectory of indigenous sovereignty movements. *Canadian Journal of Communication*, *43*(1), 167–184. https://doi.org/10.22230/CJC.2018V43N1A3310

Rodrigo, D., & Amo, P. A. (2006). Background document on public consultation. In *Public Governance and Territorial Development Directorate*.

Romanow, R. J., Whyte, J. D., & Leeson, H. A. (1984). *Canada ... notwithstanding: The making of the Constitution, 1976-1982*. Carswell/Methuen.

Ruston, N. (2021). "There is a new drug in the schedule": The criminalization of cannabis in Canada*. Journal of Canadian Studies/Revue d'études Canadiennes 55*(2), 458-479. https://www.muse.jhu.edu/article/804189.

Royal Commission on Aboriginal Peoples. (1992). *Restructuring the relationship* (Vol. 2).

Schreiber, D. (2006). First nations, consultation, and the rule of law: Salmon farming and colonialism in British Columbia. *American Indian Culture and Research Journal*, *30*(4), 19–40. https://doi.org/10.17953/aicr.30.4.t1h10246861230w6

Sen, A., & Wyonch, R. (2018). Cannabis countdown: Estimating the size of illegal markets and lost tax revenue post-legalization. *SSRN Electronic Journal*, (523). https://doi.org/10.2139/ssrn.3269989

Slattery, B. (2005). Aboriginal rights and the honour of the Crown. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, *29*(20), 433–445.

Slattery, B. (2007a). A taxonomy of Aboriginal rights. In H. Foster, H. Raven, & J. Webber (Eds.), *Let right be done: Aboriginal title, the Calder case, and the future of Indigenous rights* (pp. 111–128). UBC Press.

Slattery, B. (2007b). What are Aboriginal rights? *Comparative Research in Law and Political Economy*, *3*(2). https://doi.org/10.2139/ssrn.967493

Slowey, G. (2007). *Navigating neoliberalism.* UBC Press.

Smith, M. (2005). Some perspectives on the origin and meaning of Section 35 of the Constitution Act, 1982. *Public Policy Sources*, *41*, 1–19. https://doi.org/10.1017/s0197901900000453

Solomon, R. & Green, M. (2005). The first century: The history of non-medical opiate use and control policies in Canada, 1870-1970. In C. McCormick & L. Green (Eds), *Crime and deviance in Canada: Historical perspectives*.

Solyom, C. (2018, October 17). Beyond pardon, the larger question of social justice for pot convicts. *Montreal Gazette*. https://montrealgazette.com/cannabis/beyond-pardon-the-larger-question-of-social-justice-for-pot-convicts

Spicer, L. (2002). *Historical and cultural uses of cannabis and the Canadian "marijuana clash."* https://sencanada.ca

Stacey, R. (2018). The dilemma of Indigenous self-government in Canada: Indigenous rights and Canadian federalism. *Federal Law Review*, *46*(4), 669–688. https://doi.org/10.1177/0067205x1804600411

Statistics Canada. (2019). *The retail cannabis market in Canada: A portrait of the first year.* www150.statcan.gc.ca/n1/en/pub/11-621-m/11-621-m2019005-eng.pdf?st=TkB_2U5a

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 SCR 550

Task Force on Marijuana Legalization and Regulation. (2016). *Toward the legalization, regulation and restriction of access to marijuana: Discussion paper*.

Truth and Reconciliation Commission of Canada. (2015). *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada*. Truth and Reconciliation Commission of Canada.

United Nations. (2021). *United Nations Declaration on the Rights of Indigenous Peoples*. Department of Economic and Social Affairs. https://doi.org/10.4324/9780203119235

United Nations. (2022). *Indigenous Peoples at the United Nations*. Department of Economic and Social Affairs. https://www.un.org/development/desa/indigenouspeoples/about-us.html

Union of BC Indian Chiefs. (2015). *Joint Open letter: Prime Minister Justin Trudeau - United Nations Declaration on the Rights of Indigenous Peoples and free, prior and informed consent*. https://www.ubcic.bc.ca/pmtrudeau_undrip_fpic

Valleriani, J., Lavalley, J., & McNeil, R. (2018). A missed opportunity? Cannabis legalization and reparations in Canada. *Canadian Journal of Public Health*, *109*(5–6), 745–747. https://doi.org/10.17269/s41997-018-0121-y

Venne, S. H. (2000). Treaty doubletalk in Canada. *Indigenous Law Bulletin, 5*(1), 8–11. https://search.informit.org/doi/10.3316/ielapa.200104817

Venne, S. H. (2003). *Our elders understand our rights: Evolving international law regarding Indigenous peoples.* Theytus Books.

Venne, S. H. (2011). The road to the United Nations and rights of Indigenous peoples. *Griffith Law Review*, *20*(3), 557–577. https://doi.org/10.1080/10383441.2011.10854710

Weaver, S. M. (1981). *Making Canadian Indian policy: The hidden agenda*. University of Toronto Press.

Weaver, S. M. (1993). The Hawthorn Report: Its use in the making of Canadian Indian policy. In J. B. Waldram & N. Dyck (Eds.), *Anthropology, public policy, and Native peoples in Canada* (pp. 75–97). McGill-Queen's University Press.

Wright, D. V. (2020). Cross-Canada infrastructure corridor, the rights of Indigenous peoples, and "meaningful consultation" [Book]. *The School of Public Policy Publications*, *13*(24), 1–56. https://doi.org/https://doi.org/10.11575/sppp.v13i0.69222

Appendix A. Evidence from the Standing Senate Committee on Indigenous Peoples

A.1. Report

Standing Senate Committee on Aboriginal Peoples. (2018). *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*.

A.2. Transcripts from the Proceedings of the Standing Senate Committee on Indigenous Peoples

A.2.1 Issue No. 33: Transcript (Evidence) of Proceedings

February 27, 2018

Witnesses: Department of Indigenous Services Canada: Valerie Gideon, Acting Senior Assistant Deputy Minister, First Nations and Inuit Health Branch. Department of Crown-Indigenous Relations and Northern Affairs Canada: Sheilagh Murphy, Assistant Deputy Minister, Lands and Economic Development. Health Canada: Eric Costen, Acting Assistant Deputy Minister, Cannabis Legalization and Regulation Branch. Department of Justice Canada: Diane Labelle, General Counsel; Stefan Matiation, Director and General Counsel. Public Safety Canada: Trevor Bhupsingh, Director General, Law Enforcement and Border Strategies Directorate.

A.2.3. Issue No. 33: Transcript (Evidence) of Proceedings

February 28, 2018

Witnesses: First Nations Tax Commission: C.T. (Manny) Jules, Chief Commissioner. Indigenous Peoples Cannabis Association: Bill Robinson, Executive Director. Oneida Nation of the Thames: Randall Phillips, Chief.

A.2.4. Issue No. 35: Transcript (Evidence) of Proceedings

March 26, 2018

Witnesses: Nunavut Tunngavik Incorporated: Aluki Kotierk, President. As individuals: Isaac Shooyook; Louis Uttak; Geela Arnauyumayuq, Support Person; George Qulaut, Support Person; Chief Ross Perley (by video conference). IndigiCo: Mike Fontaine, Vice President; Sara Loft, Vice President; Howard Morry, Legal Counsel. Mohawk Council of Akwesasne: Chief April Adams-Phillips. Canadian Indigenous Nurses Association: Marilee Nowgesic, Executive Director. Onion Lake Cree Nation: Philip Chief, Interim Director. National Native Addictions Partnership Foundation: Carol Hopkins, Executive Director (by video conference). Indigenous Bar Association: Josephine A. de Whytell, Barrister and Solicitor. Nishnawbe-Aski Legal Services: Derek Stephen, Executive Director; Mary Bird, Legal Aid Director & Area Director. Royal Canadian Mounted Police: Trevor Daroux, Chief Superintendent, National Aboriginal Policing Services; Inspector Kimberly Taplin, Acting Director, National Aboriginal Policing and Crime Prevention Services; Inspector Jason McAdam, Officer in Charge, National Crime Prevention Services.

A.2.5. Issue No. 36: Transcript (Evidence) of Proceedings

March 28, 2018

Witnesses: Tsuut'ina Nation Police Service: Steve Burton, Inspector, Criminal Investigative Psychologist. As an individual: The Honourable Senator Dennis Glen Patterson.

A.2.6. Issue No. 36: Transcript (Evidence) of Proceedings

April 17, 2018

Appearing: The Honourable Ginette Petitpas Taylor, P.C., M.P., Minister of Health; Bill Blair M.P., Parliamentary Secretary to the Minister of Justice and Attorney General of Canada and to the Minister of Health.

Witnesses: Health Canada: Eric Costen, Director General, Cannabis Legalization and Regulation Secretariat. Department of Justice Canada: Diane Labelle, General Counsel; Stefan Matiation, Director and General Counsel.

A.2.7. Issue No. 43: Transcript (Evidence) of Proceedings

October 3, 2018

Appearing: The Honourable Jane Philpott, P.C., M.P., Minister of Indigenous Services; The Honourable Bill Blair, P.C., M.P., Minister of Border Security and Organized Crime Reduction.

Witnesses: Health Canada: Eric Costen, Director General, Cannabis Legalization and Regulation Secretariat. Department of Indigenous Services Canada: Dr. Tom Wong, Chief Medical Officer of Public Health and Executive Director, First Nations and Inuit Health Branch.

A.3. Brief, Letter, and Document Submissions

First Nations Health Authority. (April 2018). *Submission to Standing Senate Committee on Aboriginal Peoples on the Study of Bill C-45.*

First Nations Tax Commission. (March 12, 2018). *First Nations Tax Commission Proposals for First Nation Cannabis Taxation and Regulation to Senate Standing Committee on Aboriginal People.*

First Nations Tax Commission. (March 14, 2018(a)). *An Overview of the FNTC and Proponent First Nation Proposal to Create a First Nation Cannabis Tax and Regulation Option.*

First Nations Tax Commission. (March 14, 2018(b)). Letter to Senator Christmas from Chief Commissioner C.T. (Manny) Jules.

Government of Canada. (September 28, 2018). *Government Response to the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples Entitled "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."*

Health Canada. February 27, (2018(a)). *Response to Follow Up Request from the Standing Senate Committee on Aboriginal Peoples.*

Health Canada. (February 27, 2018(b)). *Health Canada's response to a request for information made by the Standing Senate Committee on Aboriginal Peoples on February 27, 2018.*

Health Canada. (June 6, 2018). Letter to Senator Dyck and Senator Tannis from the Minister of Health Ginnette Petitpas Taylor and Minister of Indigenous Services Jane Philpott.

Indigenous Bar Association. (March 23, 2018). *Brief with respect to the impacts of Bill C-45.*

Indigenous Bar Association. (May 29, 2018). Letter to Standing Senate Committee on Aboriginal People from Katherine Hensel and Josephine de Whytell.

Isuarsivik Treatment Centre. (December 2017). *Special consultations and public hearings on Bill 157, An Act to constitute the Société Québécoise du cannabis, to enact the Cannabis Regulation Act and to amend various highway safety-related provisions.*

Royal Canadian Mounted Police. (March 26, 2018). *Bill C-45 (Cannabis) RCMP Follow-up*.

Shooyook, Isaac. (March 14, 2018). Letter to Standing Senate Committee on Aboriginal People from Isaac Shooyook.

Appendix B. Canadian Government Documents

Alcohol and Gaming Commission of Ontario. (2022). *Results of allocation process for cannabis stores on First Nations reserves.*

Fraser Valley Regional District - Aboriginal Relations Committee. (April 11, 2018). Corporate report: *Cannabis regulations on-reserve in BC.*

Government of British Columbia. (July 20, 2022). Public Safety and Solicitor General BC Gov News*. Shxwhá:y Village, B.C. sign cannabis agreement.*

Government of Canada. (2016). *Toward the legalization, regulation and restriction of access to marijuana*.

Government of Canada. (2019). *Progress report on priorities identified in the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples*.

Government of Canada. (2022). *First Nations land management*. Land Management. https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165

Health Canada. (November 2017). *Proposed approach to the regulation of cannabis.*

Health Canada. (March 19, 2018). *Summary of the public comments received during the public consultation.*

Health Canada. (December 22, 2018). *Canada Gazette, part i, volume 152, number 51: Regulations amending the cannabis regulations (new classes of cannabis).*

Health Canada. (October 20, 2022). *Summary from the engagement with First Nations, Inuit and Métis.*

Lands Advisory Board. (2021)*. Cannabis laws*. First Nations Land Management Resource Centre. https://labrc.com/resource/cannabis-laws/

Task Force on Cannabis Legalization and Regulation. (2016). *A framework for the legalization and regulation of cannabis in Canada: The final report of the task force on cannabis legalization and regulation.*

Task Force on Marijuana Legalization and Regulation. (2016). *Toward the legalization, regulation and restriction of access to marijuana: Discussion paper.*

Appendix C. Assembly of First Nations Documents

C.1. Assembly of First nations Resolutions

AFN Resolution no. 123/2016. (December 8, 2016). *First Nations inclusion in the emerging cannabis economy.*

AFN Resolution no. 03/2017. (July 26, 2017). *NIHB coverage of medical cannabis*

AFN Resolution no. 90/2017. (December 7, 2017). *Support for a Cannabis Working Task Force*.

AFN Resolution no. 110/2017. (December 7, 2017). *Support to delay cannabis legalization.*

AFN Resolution no. 02/2018. (May 2, 2018). *Federal recognition of First Nations jurisdiction over recreational and medicinal cannabis.*

AFN Resolution no. 90/2018. (December 6, 2018). *First Nations cannabis jurisdiction.*

AFN Resolution no. 36/2019. (July 25, 2019). *Chiefs Committee on Cannabis.*

AFN Resolution no. 54/2019. (July 25, 2019). *Support for First Nations self-determined right to govern the cultivation, processing and retail of cannabis.*

AFN Resolution no. 48/2019. (July 25, 2019). *Support of cannabis as part of global Indigenous culture.*

AFN Resolution no. 101/2019. (December 5, 2019). *Assembly of First Nations priorities on cannabis and legislative amendments to Bill C- 45, the Cannabis Act*

AFN Resolution no. 12/2020. (December 9, 2020). *First Nations representation in cannabis legislation*

C.2. Assembly of First Nations Issue Update

AFN Issue Update 26. 10/2018. (2018). *Working Group on Cannabis*.

C.3. Assembly of First Nations Website

Assembly of First Nations. (2019a). *AFN National Cannabis Summit*. https://www.afn.ca/national-first-nations-cannabis-summit-2019/

Assembly of First Nations. (2019b). *AFN National Cannabis Summit program agenda*. https://www.afn.ca/national-first-nations-cannabis-summit-2019/

Assembly of First Nations. (March 24, 2020). News. *Assembly of First Nations declares State of Emergency on COVID-19 pandemic*. https://www.afn.ca/assembly-of-first-nations-declares-state-of-emergency-on-covid-19-pandemic/

C.4. British Columbia Assembly of First Nations Resolutions

BCAFN Resolution no. 03(e)/2018. (March 9, 2018). *Engagement with the BC Cannabis Legalization and Regulation Secretariat.*

BCAFN Resolution no. 21(b)/2019, (September 19, 2019). *BC First Nations cannabis framework and action plan.*

Appendix D. Indigenous Government and Organization Documents

Anishinabek Nation. (2018). *Anishinabek First Nation Cannabis Report 2018.*

British Columbia Assembly of First Nations. (2022). *BC First Nations cannabis forum.*

Chiefs of Ontario. (2018). *Chiefs of Ontario annual report 2019-20: Keeping the circle strong.*

First Nations Health Authority. (n.d). *Cannabis historical and cultural uses*

Mohawks Council of Kahnawà:ke. (April 23, 2018). *FAQs Kahnawà:ke Cannabis Control Law.*

Mohawks Council of Kahnawà:ke. (July 2021). *MCK signs Cannabis Memorandum of Understanding with Health Canada*. Press Release.

Mohawks of the Bay of Quinte. (October 27, 2019a). *Cannabis and our community.*

Mohawks of the Bay of Quinte. (November 18, 2019b). *Statement from the Tyendinaga Mohawk Council regarding the cannabis plebiscite vote.*

National Indigenous Cannabis and Hemp Conference. (2019). *National Indigenous Cannabis and Hemp Conference November 26 – 28, 2019 at the Delta Grand Okanagan Resort Kelowna*, BC. Nation Talk.

National Indigenous Cannabis and Hemp Conference. (November 22, 2018), *Indigenous peoples stake more claim in the cannabis and hemp industry.* Nation Talk.

National Indigenous Medical Cannabis Association (NIMCA). (n.d.) *Position statement – Indigenous People, Cannabis and Bill C-45*

Squamish Nation. (January-March 2019). *Quarterly report from council*.

Thunderbird Partnership Foundation. (2018). *Legalized cannabis: The pros and cons for Indigenous communities*

Thunderbird Partnership Foundation. (2019). *National cannabis dialogue report.*

Appendix E. Indigenous Cannabis Regulations

E.1. Memorandum of Understanding

Mohawks of Kahnawà:ke. (June 28, 2021). *Memorandum of Understanding on Cooperation and for the Sharing of Information Between Health Canada and the Mohawk Council of Kahnawà:ke.* Québec.

E.2. Section 119 Agreements with the Province of British Columbia

Cowichan Tribes. (December 21, 2020). Section 119 agreement under the *Cannabis Control and Licensing Act* with the Province of British Columbia.

Williams Lake First Nation. (September 20, 2020). Section 119 agreement under the *Cannabis Control and Licensing Act* with the Province of British Columbia.

E.3. Laws

Aitchelitz First Nation. (March 9, 2020). *Aitchelitz First Nation Cannabis Law.* BC. Law

Cheam First Nation. (March 17, 2020). *Cheam First Nation Cannabis Control Law.* BC. Law.

Ermineskin Cree Nation. (January 17, 2019). *Cannabis Law*. Alberta. Law.

Kwaw-kwaw-a-pilt First Nation. (January 30, 2019). *Kwaw-kwaw-a-pilt First Nation Cannabis Law*. BC. Law.

Listuguj Mi'gmaq First Nation. (October 16, 2018). *Listuguj Cannabis Law.* Québec. Law.

Mohawk Council of Kahnawà:ke. (December 10, 2018). *Kahnawà:ke Cannabis Control Law.* Québec. Law.

Nipissing First Nation. (July 2, 2019). *Nipissing First Nation Cannabis Law.* Ontario. Law.

Peepeekisis Cree Nation. (January 10, 2020). *Peepeekisis Cree Nation Cannabis Act.* Saskatchewan. Law.

Pheasant Rump Nakota Nation. (June 19, 2019). *Traditional Medicinal Plants Act*. Saskatchewan. Law.

Shawanaga First Nation. (March 28, 2022). *Shawanaga Cannabis Law, 2022.* Ontario. Law.

Shxw'ow'hamel First Nation. (December 10, 2018). *Shxw'ow'hamel First Nation Cannabis Law, 2018.* BC. Law.

Six Nations of the Grand River. (June 21, 2021). *Cannabis Control Law.* Ontario. Law.

Skowkale First Nation. (November 10, 2020). *Skowkale Cannabis Law*. BC. Law.

Tobique First Nation. *Compassionate Use Act of Tobique.* New Brunswick. Law.

Williams Lake Indian Band. (January 16, 2012). *WLIB Cannabis Law 2019-01.* BC. Law. (January 2019).

E.4. Interim/Other Regulations

Mohawk Council of Akwesasne (October 1, 2018). *Akwesasne Interim Cannabis Regulation.* Ontario & Québec. Interim Regulation.

Mohawks of the Bay of Quinte. (October 16, 2018). *Interim Cannabis Control Regulation.* Ontario. Interim Regulation.

Pheasant Rump Nation. (November 22, 2020). *Cannabis Production Regulation*. Saskatchewan. Regulation.

Six Nations of the Grand River. (June 21, 2021). *Six Nations of the Grand River Cannabis Control Regulations.* Ontario. Regulation.

E.5. By-laws

Atikameksheng Anishnawbek. (October 29, 2018). *Atikameksheng Cannabis Vending By-Law*. Ontario. By-law.

Brokenhead Ojibway Nation. (August 15, 2019). *A By-law to Prohibit Illegal Drugs.* Saskatchewan. Bylaw.

Chippewas of Georgina Island First Nation. (August 15, 2019). *CGIFN Cannabis Control By-law.* Ontario. By-law.

Chippewas of Nawash First Nation. (December 4, 2020). *Cannabis Control Law.* Ontario. By-law.

Chippewas of Rama First Nation. (July 8, 2019). *RFN Cannabis By-Law.* Ontario. By-law.

Eel River Bar. (April 20, 2021). *First Nation Law for the Distribution and Sale of Cannabis.* New Brunswick. By-law.

Muscowpetung First Nation. (November 12, 2018). *Muscowpetung First Nation Cannabis Act*. By-law. Saskatchewan.).

Okanagan Indian Band. (May 4, 2020). *Okanagan Indian Band Cannabis Control Law.* BC. By-law.

Squamish Nation. (November 7, 2018). *Squamish Nation Cannabis Law, 2018*. BC. By-law.

Tk'emlúps te Secwẻpemc. *Tk'emlúps te Secwẻpemc Cannabis Regulation Bylaw.* BC. By-law. (August 27, 2018).

Tseycum First Nation. (July 26, 2019). *First Nation Cannabis Law.* BC. By-aw.

Wahnapitae First Nation. (June 28, 2019). *Wahnapitae First Nation Cannabis Retail Regulation Bylaw.* Ontario. By-law.

E.6. Band Council Resolutions

Algonquins of Pikwakanagan First Nation. (May 23, 2019). *Cannabis Band Council Resolution.* Ontario. Band Council Resolution.

Cheam First Nation. (March 17, 2020). *BCR No. 2013.* BC. Band Council Resolution.

Chippewas of Nawash First Nation. *Motion No. 686.* Ontario. Band Council Resolution. (December 4, 2020).

Eelünaapéewi Lahkéewiit First Nation. (August 29, 2018). *Unlicensed Cannabis Dispensaries.* Ontario. Band Council Resolution.

Mohawks of Akwesasne. (October 1, 2018). *Akwesasne Mohawk Council Resolution 2018/2019-#212.* Ontario & Québec. Band Council Resolution.

Mohawks of the Bay of Quinte. (October 16, 2018). *MCR # 2018/19-044*. Ontario. Band Council Resolution.

Peepeekisis Cree Nation. (January 10, 2020). *Peepeekisis Cree Nation Cannabis Act.* Saskatchewan. Band Council Resolution

Pheasant Rump Nation. (October 22, 2020). *BCR #01.* Saskatchewan. Band Council Resolution.

Shawanaga First Nation. (March 28, 2022). *Prescribed Fees.* Ontario. Band Council Resolution.

Six Nations of the Grand River. (June 10, 2021). *Special Council Motion Memorandum.* Ontario. Band Council Resolution.

Squamish Nation. (November 7, 2018). *Band Council Resolution No. 2018-2674*. BC. Band Council Resolution.

Tobique First Nation. (November 6, 2012). *Government Resolution.* New Brunswick. Band Council Resolution.

E.7. Draft Laws/By-laws

Alderville First Nation. (2021). *Alderville First Nation Cannabis Law, 2021*. Ontario. Draft by-law.

Mi'kmaq of Nova Scotia. (2019). *Mi'kmaq Cannabis Regime.* Nova Scotia. Draft Law.

Splatsin First Nation. (March 2, 2020). *Splatsin te Secwépemc Business Licence By-law.* BC. Draft By-law.

Mohawks of the Bay of Quinte. (October 22, 2019). *Tyendinaga Mohawk Cannabis Control Law.* Ontario. Draft Law.

Wasauksing First Nation. (September 24, 2021). *Wasauksing First Nation Cannabis Law.* Ontario. Draft Law.

Yakweakwioose First Nation. (September 2018). *Yakweakwioose Cannabis Law*. BC. Draft Law.

Appendix F. Indigenous Involvement in Cannabis Consultation

Included below is a list of the Indigenous parties the Government of Canada noted were involved in consultations. The groups were identified through their inclusion in reports created the Cannabis Task Force (*A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*) and Health Canada's Cannabis Legalization and Regulation Branch (*Summary of Comments Received During the Public Consultation*). Additional meetings were noted by the government in its response to APPA's cannabis study (*Response of the Government of Canada to the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples*).

F.1. The Task Force on Cannabis Legalization and Regulation Consultations

Assembly of First Nations

Elder Jane Chartrand

Chiefs of Ontario

First Nations Chiefs of Police Association

First Nations Health Authority

Indigenous Peoples' Assembly of Canada

Inuit Tapiriit Kanatami

Listuguj Mi'gmaq Government, Mi'gmaq Nation

Métis National Council

Vancouver Aboriginal Friendship Centre Society

F.2. Health Canada's Cannabis Legalization and Regulation Branch Consultations

Assembly of First Nations

Inuit Tapiriit Kanatami

Inuit Land Claim Holders

Métis National Council

Modern Treaty Holders, First Nations Provincial-Territorial Organizations, Métis Governing Members, and other Indigenous representative organizations were invited to provide submissions

F.3. Consultations Noted in the Government's Response to the Eleventh Report of the Standing Senate Committee on Indigenous Peoples

The *Response of the Government of Canada to the Eleventh Report of the Standing Senate Committee on Aboriginal Peoples* (September 28, 2018) indicated the following Indigenous groups had been consulted to date:

Officials had participated in approximately 70 engagement sessions with Indigenous leaders, organizations and communities including:

- fora and meetings with a wide reach including with political territorial organizations that convened leadership and administrators from up to 30 First Nations at a time, large national and regional Chiefs' Assemblies and First Nations Secretariats that have convened 5-10 First Nations for dialogue on cannabis;

- meetings and dialogue with key committees that include representation from all regions of the country and Indigenous experts, such as the National Inuit Committee on Health, National Inuit Youth Council, the Assembly of First Nations Chiefs Committee on Health, Mental Wellness Committee;

- meetings in individual First Nations with Chief and Council, tribal council staff and executives; and,

- full-day community-wide fora in individual First Nations that convene a broad audience from tribal council staff to police, health professionals and interested community members.