

To: Fraser Valley Aboriginal Relations Committee
From: Jessica Morrison, Policy Analyst – Indigenous Relations

Date: 2018-04-11

File No: 3400-01

Subject: Cannabis Regulation on-Reserve in BC

INTENT

This report is intended to advise the Fraser Valley Aboriginal Relations Committee of the highlights of a workshop on cannabis and First Nations land code recently attended by staff. Staff are not looking for a recommendation at this time, and forward this information should members want more clarification to discuss the item further.

STRATEGIC AREA(S) OF FOCUS

Support Environmental Stewardship
Foster a Strong & Diverse Economy
Support Healthy & Sustainable Community
Provide Responsive & Effective Public Services

BACKGROUND

On November 14th and 15th, 2018, FVRD staff attended a workshop regarding Land Code and cannabis legalization on-reserve in BC. The event was co-hosted by Semá:th and Tzeachten First Nations at Tzeachten community hall in Chilliwack.

The event was well-attended by approximately 100 attendees, who included First Nation leadership and lands managers from across the region and Vancouver Island, various government officials and the RCMP.

The discussion about how cannabis is regulated on-reserve is a timely one, and it is important for everyone to understand the distinctions between how cannabis can be regulated differently on-reserve versus off-reserve in BC.

Speakers at the workshop included local First Nation lands managers, lawyers, RCMP, Health Canada, provincial regulators, and representatives of tribes from across the border in Washington State.

DISCUSSION

Applicability of Laws

The workshop provided a great deal of clarity regarding the application of cannabis laws and regulation on-reserve.

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.

Cultivation and sale of cannabis most likely would not meet the legal test to be considered a protected Aboriginal right. Meeting the test would involve demonstrating a cultural history of the practice of use, trade, or cultivation. Some First Nations have expressed an interest in co-licensing regimes, and this dialogue is happening on a case-by-case basis, and as requested by First Nations.

Currently, cannabis cannot be sold legally without a provincial license, and this includes on-reserve sales. All reserve lands are subject to federal and provincial licensing processes for cultivation, processing and sales of cannabis. First Nations cannot legalize growing, processing, sale, or use on-reserve that is otherwise illegal or unlicensed under federal or provincial law.

As long as First Nations comply with federal and provincial laws, they may cultivate, process, sell and allow use of cannabis on-reserve. First Nations who are operational under Land Code may introduce their own regulations which meet or exceed provincial and federal standards. However, First Nations may not ease regulations.

For example, the off-reserve regulation stipulates allowances as follows:

- 4 cannabis plants per household unit
- Household cannabis plants may not be visible from a public place
- Personal possession up to 30 grams

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.

Individual First Nations may regulate extensively on-reserve, as described above, but First Nation jurisdiction through Land Code applies only to reserve lands, while municipal and regional district bylaws apply off-reserve.

Land Code First Nations can also further regulate sale on-reserve, therefore BC has committed not to authorize and license sales on-reserve without First Nation approval obtained through a referrals

process. First Nations can regulate whether any licenses for sales are available on-reserve, in which areas, under what conditions, and the process for obtaining their license.

In Chilliwack, there were two on-reserve cannabis retail outlets in operation before the October 17, 2018 legalization date.

1. **The Kure** at Skwah reserve – made the decision to close in good faith before October 17, 2018, and pursue a licensing pathway through the new legal process. Skwah is not a Land Code First Nation, and as such, they must adhere to provincial and federal law regarding cannabis on-reserve, and do not currently have the ability to more closely manage or regulate on their reserve.
2. **Indigenous Bloom** at Kwaw'Kwaw'Apilt reserve – made the decision to remain open beyond the legalization date, and have no plans to pursue a provincial license to operate. Kwaw'Kwaw'Apilt First Nation has established Land Code and implemented a cannabis law (2019). The band asserts that it does not recognize provincial authority to regulate, and that its own law is the only one that applies.

It is worth noting that laws of general application regarding health (driving, licensing for distribution of products, etc.) are under provincial jurisdiction, even on-reserve. Therefore it would seem that the Kwaw'Kwaw'Apilt cannabis law cannot stand alone or replace provincial jurisdiction, and that operating Indigenous Bloom without a provincial license will continue to be considered illegal. By contrast, on-reserve activities pertaining to land (zoning, use, subdivision, development, etc.) are not considered provincial jurisdiction.

As the number of licensed retailers increases, the RCMP caution that we can expect to see an increased amount of enforcement for those retailers who are in violation, or are unlicensed.

A First Nation can apply for a retail license as an organization. The band does not need to be registered as a business, or partnered with a business to get a retail cannabis license. The Liquor and Cannabis Regulation Branch (LCRB) reviews all applications from First Nations individually, as unique situations.

BC will not be consulting with neighbouring municipalities, or other nearby First Nations, regarding on-reserve applications for licenses. Communities have expressed concern that this approach is inadequate, but this remains an outstanding issue.

The BC retailer application fee is \$7500 and the license fee is \$1500. None of those fees are shared with First Nations, but First Nations have notified BC that they are interested in sharing a portion of those fees.

Section 119 of the Cannabis Licensing and Control Act speaks to procedures for grievances between Indigenous Nations and BC. The Province may enter into agreements with individual First Nations that supersede the Act. While some have engaged the Province on this provision, no communities have yet formally entered into this process.

Enforcement

Cannabis laws are considered laws of general application (they apply both on and off-reserve), just like the Liquor Control and Licensing Act.

The RCMP will continue to pursue shutdowns for producers not licensed by Health Canada, and for retailers who are either unlicensed by BC, or those retailers selling products from unlicensed producers, including those on-reserve. Penalties for violations are much more severe under the new Act than they were before the Act was in place (i.e. fines jumped from about \$2,000 to \$50,000).

The RCMP will not be targeting users or clientele when they are investigating or enforcing violations of the Act through raids or shutdowns of those storefronts or retail outlets currently operating without licenses, or selling product from unlicensed producers.

The RCMP is actively communicating with band councils about unlicensed businesses and ensuring that they are aware of when and where violations are occurring. These are friendly collaborative conversations. They are not threatening, but just informing and ensuring that communities know that shut downs will be happening.

Taxation

First Nations were not invited to participate in the drafting and creation of cannabis legislation in Canada. As such, First Nations are now proposing recognition as equivalents to provincial governments in the legislation. This would require an amendment to how excise tax is distributed.

Other types of excise taxes (e.g. gas tax) typically come back to municipalities through funding programs, so that municipalities can invest in their local priorities, as they see fit. However, in First Nations communities, excise taxes on things like gasoline and others are returned to Indigenous and Northern Affairs Canada (INAC), and not to the communities themselves. In this way, First Nations do not have the same opportunities as municipalities for investment back into community infrastructure. Speakers stressed that when First Nation communities are deprived of tax revenues, they remain in a dependent state, and on-reserve infrastructure is not properly funded. First Nations feel they need to have access to the cannabis excise tax in order to create an equalization model for their communities.

It was noted that American tribes typically see about 50% of their resource taxes return to the state, and there is no other model where 100% of excise returned to the state (75% to BC and 25% to Canada) like the Canadian cannabis framework.

In the discussion regarding excise tax, the Canadian senate recommended a 12-month consultation period with First Nations, and those consultations are happening now. However, communities are left in a grey area regarding amendments to the legislation in the interim. Without clarity, Indigenous businesses feel that they are in an uncertain position, and subsequently at a disadvantage in the market.

First Nation Cannabis Laws in Place or in Development

The following First Nations in the Fraser Valley region are currently developing, or already have in place, laws concerning cannabis:

COMMUNITY	PROVISION HIGHLIGHTS	STATUS OF LAW
Tzeachten	<ul style="list-style-type: none">• only 1 retail outlet will be allowed in the community• retail outlet may not be within 500m of a school, daycare, or band facility• Initial application fee (\$5,000), annual business permit fee (\$50,000), will apply. Fees necessary to fund related increase in security and enforcement needs	[draft] mid 2019 anticipated implementation
Semá:th	<ul style="list-style-type: none">• Law will be subject to community ratification	[draft] community engagement
Cheam	<ul style="list-style-type: none">• No draft yet available	community engagement
Kwaw'Kwaw'Apilt	<ul style="list-style-type: none">• See attachment• No household cultivation permitted• No consumption in a public place where consuming tobacco is prohibited• No household consumption in the presence of a person under 19 years of age• Provisions focus on retail outlet regulation• Initial application fee (\$5,000), annual business permit fee (\$5,000)	[Enacted] Jan 2019
Shxw'ow'hamel	<ul style="list-style-type: none">• No use or consumption in a public park, school, highway or sidewalk, areas frequented by minors, SFN buildings or facilities• 2 plants per household limit• only 1 retail outlet will be allowed in the community• New zoning regulation on reserve for commercial cannabis production (General Commercial, Natural Resource, or Future Development are the only acceptable zones, 300m away from schools, parks or SFN buildings or facilities)• No sale of cannabis and alcohol together in the same location• Consumption lounges, delivery services, festivals and events are prohibited	[draft] Second reading

COST

The cost of the workshop was \$125.

CONCLUSION

This report is presented for information, and intended to broaden the understanding and clarify uncertainty of jurisdictional issues regarding cannabis regulation in BC. Staff will continue to monitor and inform the committee of developments with regard to cannabis regulation on-reserve.

COMMENTS BY:

Jennifer Kinneman, Director of Corporate Affairs:	Reviewed and supported.
Mike Veenbaas, Director of Financial Services:	No further financial comments.
Paul Gipps, Chief Administrative Officer:	Reviewed and supported

Attachments:

1. Land Code and Cannabis workshop agenda
2. Supply Chain for the Commercial production and Sale of Cannabis
3. Kwaw'Kwaw'Apilt First Nation Cannabis Law (2019)