

FIRST NATIONS' JURISDICTION OVER CANNABIS

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INTRODUCTION

Or, What we Know About Indigenous Peoples and Cannabis

Indigenous people and cannabis are **intimately connected**; culturally, socially and politically.

See generally: Konstantia Koutouki and Katherine Lofts, *Cannabis, Reconciliation, and the Rights of Indigenous Peoples: Prospects and Challenges for Cannabis Legalization in Canada*, (2019) 56:3 Alta L Rev 709.

“The unseen history of cannabis prohibition has much less to do with any scientific assessment of the drug and its effects than it does with broader understandings of power, knowledge, class, ethnicity, and the state.”

-Konstantia Koutouki and Katherine Lofts

“There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their satanic music, jazz and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”

“Reefer makes darkies think their as good as white men.”

Harry Anslinger, Commissioner of the Federal Bureau of Narcotics - Testimony to US Congress supporting Marijuana Tax Act, 1937

CULTURAL CONNECTION

Numerous First Nation groups have as part of their histories:

- Use of cannabis use for ritual purposes
- Use of cannabis for medical purposes



SOCIAL CONNECTION

The social impact of cannabis prohibition on Indigenous peoples in Canada has been disproportionately negative:

- Cannabis prohibition is understood as a root cause of over-incarceration of Indigenous people
- Indigenous people are already victims of systemic oppression, and are thus more likely to bear the burden of drug-related harms




POLITICAL CONNECTION

- First Nations' authority to make and enforce their own laws is directly connected to self-determination
- The Truth and Reconciliation Committee called on the federal government to, in general terms, aid in economic development, address over-incarceration of Indigenous persons and affirming the nation-to-nation relationship
- On both of the above, see also *UNDRIP*



In short, First Nations' jurisdiction to govern in respect of cannabis-related activities is a **reconciliation issue.**



THE PATH TO LEGALIZATION OF CANNABIS

Courts, Campaign Promises, and (No) Consultation

PATH TO LEGALIZATION

- Despite the high profile of the cannabis issue in the election and afterward, and despite the intimate connection between Indigenous peoples and cannabis, First Nations were not consulted in the lead up to legalization of cannabis
- A number of First Nations expressed concern about the lack of consultation prior to the *Cannabis Act* receiving royal assent
- Some First Nations requested legalization be delayed so consultation may occur



Prior to legalization, in its report of May 1, 2018, the Standing Senate Committee on Aboriginal Peoples 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.**



CANNABIS LAWS TODAY

The Roles of Federal and Provincial Governments

The federal and provincial governments **share jurisdiction** over regulating cannabis for recreational purposes.

FEDERAL LAW

The *Cannabis Act* is the key federal law governing cannabis in Canada. The *Act*:

- Sets out a series of prohibitions on cannabis-related activities;
- Provides exceptions to those prohibitions for persons that are licensed by the appropriate government authority



FEDERAL LAW

Under the *Cannabis Act*, every person without the required license is prohibited from:

- Growing cannabis;
- Processing cannabis;
- Distributing cannabis; and
- Selling cannabis.




PROVINCIAL LAW

Provincial cannabis laws deal in all manner of consumer issues, including:

- Where cannabis may be consumed
- Maximum quantities of cannabis that may be possessed or produced
- Accessibility of cannabis to young persons
- The number of cannabis retail licenses awarded
- Retail display and marketing practices





FIRST NATIONS' JURISDICTION OVER CANNABIS

And How to Assert it in the Face of Current Cannabis Laws

FIRST NATION'S JURISDICTION OVER CANNABIS

1. Under Section 35 of the *Constitution Act, 1982*

1. *As an Aboriginal Right*
2. *As incident to Aboriginal Title*
3. *As a Treaty Right*

2. Under Federal Legislation

1. *Indian Act*
2. *First Nations Land Management Act*



First Nations' Jurisdiction Under the

CONSTITUTION ACT, 1982

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

...

(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.

CONSTITUTION ACT, 1982

- Constitution governs the Canadian federation
- Federal and provincial Laws that are inconsistent with the Constitution are of no force or effect
- Constitution protects Aboriginal and Treaty rights
- Laws inconsistent with Aboriginal or Treaty rights are of no force or effect



The goal is to establish an Aboriginal or Treaty right that is inconsistent with cannabis legislation.

This will render the cannabis legislation ineffective, and allow **First Nations to govern.**

Constitution Act, 1982

Aboriginal
Rights

Aboriginal
Title

Treaty
Rights

Since the wording in the Constitution affirming Aboriginal rights is so vague, it has fallen to the courts to develop a **test for recognizing them.**

R v Van der Peet, [1996] 2 SCR 507

The Supreme Court of Canada decided an Aboriginal right is “an activity [that is] an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right [prior to contact with Europeans” (at para 32).

R v Van der Peet, [1996] 2 SCR 507

The Supreme Court noted additional rules relevant to the rights-recognition exercise:

1. Perspective of the Aboriginal group to be given equal weight;
2. Right claimed must be defined precisely;

R v Van der Peet, [1996] 2 SCR 507

3. Right must be an activity of “central significance” to Aboriginal group;
4. Right claimed have been practiced prior to contact with Europeans;
5. Right must be independently significant to Aboriginal group;

R v Van der Peet, [1996] 2 SCR 507

6. The activity claimed as a right need not have been unique;
7. Courts must relax rules of evidence where Aboriginal rights are claimed;
8. Aboriginal rights attach to specific groups;

R v Van der Peet, [1996] 2 SCR 507

9. European influence on activity claimed as Aboriginal right is permitted;
10. Courts should not overemphasize Aboriginal groups' connection to land in determining whether activity is a right

What kind of Aboriginal right would give a First Nation jurisdiction to **govern cannabis related activities**?

OPTION 1: STAND-ALONE ABORIGINAL RIGHT TO GOVERN CANNABIS

Based on:

- Unique group-specific culture of the First Nation
- Oral histories of the First Nation
- The First Nation's historical practices
 - *Trading tobacco*
 - *Traditional medicine*
 - *Agriculture*
- Governing cannabis as a modern form of First Nation's historical practices



R v Dickson, 2017 ABPC 315

- Mohawk man charged under *Tobacco Tax Act* [TTA]
- Stored large quantities of cigarettes in trailers on a First Nation for commercial purposes
- Man claimed Aboriginal right to trade in tobacco
- If right was recognized, man could not be charged under *TTA*
- Judge dismissed claim, not enough evidence

R v Dickson, 2017 ABPC 315

- Given the right evidentiary foundation, arguments similar to those in *Dickson* may be made successfully
- The problem in this case was the evidence, not the argument

OPTION 2: GENERAL ABORIGINAL RIGHT TO SELF-GOVERNMENT

Same basic approach as the first argument:

- Unique group-specific culture of the First Nation
- Oral histories of First Nation
- First Nation's historical practices

But with **two important differences...**



(a) An Aboriginal right to self-government has far-reaching implications for **cannabis and beyond**;

and

(b) There are real problems with how the *Van der Peet* tests works in claims for self-government that **need to be reconciled**.

R v Pamajewon, [1996] 2 SCR 821

- Two Ojibwa men were charged with gambling offences on reserve
- The men claimed their respective First Nations had a right to make their own gambling laws, and federal gambling laws did not apply to them
- The Supreme Court of Canada held the men were actually claiming a right “to participate in, and to regulate, gambling activities”
- The Supreme Court held no such right existed, and dismissed the claim

R v Pamajewon, [1996] 2 SCR 821

This is one example of a common practice in the courts, where instead of taking seriously a claimed Aboriginal right to self-government, courts **recharacterize** the claimed right into something else.

The result is that First Nations are, in effect, **prevented** from asserting their right to self-government.

Aboriginal rights claims for self-government, made in the context of cannabis governance, offer a unique opportunity to make arguments that could **change the course of the law.**

OPTION 2: GENERAL ABORIGINAL RIGHT TO SELF-GOVERNMENT

This may be done by:

- Developing a strong record for Aboriginal claimant groups demonstrating the unique histories of self-government and self-determination
- Challenging the reductive outcomes in past claims to Aboriginal self-government
- Establishing Aboriginal self-government as central to the promise of Section 35



And most importantly, challenging the policy of evasion courts have adopted that makes impossible good-faith claims to self-government, and **denies Aboriginal claimant groups access to Canadian justice, as well as justice under their own systems.**

Constitution Act, 1982

Aboriginal
Rights

Aboriginal
Title

Treaty
Rights

ABORIGINAL TITLE

- A special kind of Aboriginal right, with a related but different test for recognition
- Proving title is similar to proving ownership
- Aboriginal title can include additional rights that are necessarily incident to title
- Supreme Court has said Aboriginal title lands may be put to commercial uses, regardless of whether Aboriginal group historically used land for commercial purposes



Tsihlgot'in Nation v British Columbia,
[2014] 2 SCR 257

To claim Aboriginal title, claimant group must show:

- Occupation of the claimed lands prior to Canada's assertion of sovereignty;
- Continuity of occupation; and
- Exclusivity of occupation.

If an Aboriginal group successfully claimed title, it could also claim the **incidental right to govern land use on title lands**, which could include use of land for cannabis-related purposes.

Constitution Act, 1982

Aboriginal
Rights

Aboriginal
Title

Treaty
Rights

TREATY RIGHTS

- Recognizing treaty rights is a matter of interpretation
- Goal is to determine the intention of the parties that signed the treaty
- Different rules for historical and modern treaties
 - *Interpreting historical treaties requires an examination of the surrounding context*
 - *Interpreting modern treaties more similar to interpreting commercial contracts*



Historical treaties offer room for arguing a treaty right to govern cannabis-related activities, particularly because the Supreme Court has said treaty rights should be **interpreted broadly**, and may be **exercised in modern ways**.

Beattie v R, [2001] 2 CNLR 26 (FCTD)

- Involved the interpretation of Treaty 11, which includes a clause guaranteeing Treaty 11 First Nations government assistance in agricultural pursuits
- Federal Court considered the historical circumstances leading up to the signing of Treaty 11 and held the “core of the treaty right to agricultural assistance...is the development of a capacity for self-sufficiency based on the use of the land base”.

TREATY RIGHTS

- Where provisions similar to the one in *Beattie* are in force, it may be argued that cultivating cannabis and other related activities are versions of developing capacity for “self-sufficiency based on the use of the land base”, and are therefore treaty rights
- Similar arguments may be made in respect of treaty rights to practice traditional medicine
- The available arguments will always depend on the particular treaty being interpreted



CLOSING NOTES ON SECTION 35

- While some Section 35 arguments are promising, they are difficult to make
- Much of the case law currently disagrees with what we have discussed today
- Section 35 arguments can be expensive and time-consuming
- There are risks associated with extinguishment and justified infringement of Aboriginal rights



First Nations' Jurisdiction Under

FEDERAL LEGISLATION

FEDERAL LEGISLATION

- First Nations authority to enact by-laws under the *Indian Act*
- First Nations authority to enact by-laws under the *First Nations Land Management Act*
- Conflict between First Nations' by-laws and:
 - *Federal laws*
 - *Provincial laws*

AUTHORITY UNDER THE *INDIAN ACT*

- There are two levels of law making authority in the *Constitution Act, 1867*
- Canada can make laws with respect to the matters set out in s. 91 of the *Constitution Act, 1867* and the provinces have the authority to makes laws with respect to matters set out in s. 92.
- Canada has been given exclusive jurisdiction over “Indians and lands reserved for the Indians” under section 91(24)
 - *The Indian Act is enacted under this authority*

AUTHORITY UNDER THE *INDIAN ACT*

- Band Councils have general powers under subsection 81(1) of the *Indian Act* to make by-laws over issues relating to reserve land.
- From a classical constitutional perspective, these by-laws are a form of subordinate legislation such as regulations, rules, codes, by-laws and ordinances.
- Subject to certain constitutional restraints, the legislative branches of government can delegate power by giving delegates the power to enact subordinate legislation.



AUTHORITY UNDER THE *INDIAN ACT*

Authority to create laws over cannabis could be found in the following subsections of the *Indian Act*:

Section	Subject
81(1)(a)	Health of reserve residence
81(1)(b)	Observance of law and order
81(1)(d)	Prevention of disorderly conduct
81(1)(g)	Authorizing zoning by-laws and by-laws prohibiting the carrying on of any class of business, trade or calling in a particular zone

AUTHORITY UNDER THE *INDIAN ACT*

Section 85.1 of the *Indian Act* deals with by-laws relating to intoxicants but this section would not apply for two reasons:

1. First, the definition of intoxicant in the *Indian Act* is limited to alcohol.
2. Additionally, the authority to make by-laws in relation to intoxicants is limited to prohibitions, not active regulation which is required to create a comprehensive law on cannabis.



First Nations have not been specifically delegated the power to regulate cannabis, but **a novel argument could be made** that there is by-law making authority under the *Indian Act* relating to the possession, production, distribution and sale of cannabis on reserve.

AUTHORITY UNDER THE *FNLMA*

- The *First Nations Land Management Act* grants First Nations with land codes the power to enact bylaws related to land use on reserve
- The main problem is that for a land code to come into force it must (a) disclose the various laws the First Nation intends to enact, and (b) get approval from the Minister
- The Minister is unlikely to approve a land code with cannabis provisions, so a First Nation is unlikely to get that lawmaking authority from the *FNLMA*



Let's say we've enacted a First Nation's by-law governing cannabis under the *Indian Act*, but it conflicts with federal and provincial laws.

What now?

CONFLICT WITH FEDERAL LAW

There is a series of cases that assist in understanding what happens when a First Nation's bylaws conflict with federal law:

- *St Mary's Indian Band v Canada*
- *Canadian Pacific Ltd v Matsqui Indian Band*
- *Friends of the Oldman River Society v Canada*
- *R v Jimmy*



St Mary's Indian Band v Canada,
[1995] 3 FC 461

- By-law making authority under section 81 of the *Indian Act* should not be construed as authorizing First Nations to deal with matters covered under the *Criminal Code*. This reasoning would likely include cannabis.
- *Criminal Code* should take precedent over the paragraph 81(1)(m) of the *Indian Act* as a matter of statutory interpretation to read the more specific as an exception to the general

Canadian Pacific Ltd v Matsqui Indian Band,
[1995] 1 SCR 3

- By-law authority under the *Indian Act* should be interpreted broadly by the courts and with a view to enhancing self-government which has been the stated intention of Parliament.
- Given that certain aspects of cannabis are now decriminalized, a good argument can be made that First Nations should be able to govern legalized cannabis as a matter of self-determination on reserve land.

Friends of the Oldman River Society v Canada,
[1992] 1 SCR 3.

Here, the Supreme Court of Canada set out the traditional constitutional approach to resolving these kinds of conflicts, which is that subordinate legislation cannot generally conflict with other Acts of Parliament, as a matter of construction a court will prefer an interpretation that permits reconciliation of the two.

R v Jimmy, 5 WWR 755 (BC CA)

Despite the Supreme Court's decision in *Oldman River*, there remain difficult but novel arguments to be made.

- In *Jimmy*, a fishing by-law made under section 81 of the *Indian Act* was found to be paramount over federal regulations under the federal *Fisheries Act*. This line of reasoning suggests that by-laws may also be paramount over other federal Acts (not just regulations), but this question has yet to be determined by the courts
- By-laws are *sui generis* or legally unique

CONFLICT WITH PROVINCIAL LAW

- Although section 91(24) of the *Constitution Act, 1867* provides the federal government with exclusive jurisdiction over “Indians, and lands reserved for Indians,” this does not mean that Indian reserves are enclaves where only federal laws apply.
- The general rule is that provincial laws apply on reserves just as they apply anywhere else in the province (either by their own force or by virtue of section 88 of the *Indian Act*).



However, this general rule is subject to
four important exceptions.

CONFLICT WITH PROVINCIAL LAW

Singling out: Provincial laws cannot single out Indians or Indian reserves for special treatment.

Interjurisdictional Immunity: Provincial laws cannot impair matters that are integral to or at the core of federal jurisdiction.

Paramountcy: Provincial laws do not apply if they are inconsistent with the *Indian Act* or any other federal law, including by-laws

Constitutional Rights: Provincial laws do not apply if they unjustifiably infringe upon any constitutionally protected Aboriginal or Treaty rights.

CONFLICT WITH PROVINCIAL LAW

- As already discussed Constitutional rights, and singling out probably does not apply
- Interjurisdictional Immunity
 - *A good argument could be made that certain aspects of the provincial cannabis laws will not apply under the doctrine of inter-jurisdictional immunity. Specifically, laws dealing with where cannabis stores can be located and where cannabis can be used on reserve.*
- Federal Paramountcy
 - *Remaining provincial cannabis laws that do not regulate the use of reserve land, may be inapplicable by the doctrine of paramountcy.*
 - *Where there is conflict of laws between a provincial cannabis law and a First Nation's by-laws, the by-law will prevail and the provincial law will be rendered ultra vires or constitutionally inapplicable.*
 - *Absent a conflict, the provincial law and by-law would both be valid laws to be followed.*

CONCLUSIONS IN LAW

- Indigenous peoples are intimately connected to cannabis
- Cannabis was legalized without consultation
- The existing cannabis regulatory regime has federal and provincial aspects, but leaves out First Nations
- First Nations' Jurisdiction Over Cannabis
 - *Under Section 35 of the Constitution Act, 1982*
 - As an Aboriginal Right
 - As incident to Aboriginal Title
 - As a Treaty Right
 - *Under Federal Legislation*
 - Indian Act
 - First Nations Land Management Act

WHERE DO WE GO NOW?

Identify your community's priorities?

Occupy the field with a strong and comprehensive regulatory regime

If aspects of your regime conflict with the federal or provincial laws, there are two ways to resolve this?

Seek a negotiated settlement with Canada, backed by a strong litigation plan. Or, litigate.

QUESTIONS?

THANK YOU

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