



First Nations Tax Commission (FNTC) Proposals for First Nation Cannabis Taxation and Regulation to Senate Standing Committee on Aboriginal Peoples (SSCAP)
March 12, 2018

The FNTC supports and regulates the First Nation local revenue and tax system established by the *First Nations Fiscal Management Act* (FMA). The FMA and the FNTC is a successful method to implement First Nation tax jurisdiction. There are 114 First Nation tax systems using the FMA framework. There have been several proposals from interested First Nations to expand this framework to support greater First Nation tax powers.

In this regard, the FNTC has been working with First Nations interested in the taxation of cannabis for the last year. In April 2017, the FNTC proposed to the Minister of Justice committee reviewing First Nations legislation that the FMA should be amended to include a cannabis tax power for interested First Nations. This proposal was reiterated in the FNTC's Pre-Budget Submission to the House Standing Committee on Finance, submitted in August 2017. The FNTC continued to advance this proposal through the last 7 months to interested First Nations and to the federal government. Some First Nations have also been active in advancing First Nation cannabis tax proposals to their provinces and the federal government.

On February 28, 2018, Chief Commissioner C.T. (Manny) Jules appeared before the SSCAP reviewing C-45, the Cannabis Act, to advance this proposal to enable First Nation cannabis tax powers. His presentation provided four rationales for this proposal. First, cannabis tax revenues could be part of a more self-sufficient fiscal relationship for interested First Nations. Second, cannabis tax revenues could be used to address the health, education, infrastructure and regulation issues associated with cannabis legalization on First Nation lands. Third, comprehensive First Nation cannabis tax powers would reduce the potential for unregulated and untaxed grey market sales of cannabis on First Nations lands like the situation associated with tobacco. Fourth, recognition and implementation of First Nation cannabis taxation jurisdiction would provide a practical example of reconciling First Nation governments within Canada.

The SSCAP was supportive of the presentation and requested that the FNTC provide suggested wording for possible legislative amendments to support a cannabis taxation option for interested First Nations. This short paper contains some possible amendments for the SSCAP's consideration to C-45 in conjunction with corresponding amendments to the FMA (to create a First Nation law-making power), the *Excise Act, 2001* (which will provide for a federal excise tax on cannabis) and the FNGST Act. It is divided into four sections:

- An overview of the proposed Cannabis Legislative and Taxation Framework

- An overview of the objectives for the proposed First Nation cannabis tax and regulatory framework option
- Proposed Amendments to the FMA, *Excise Act, 2001* and *First Nations Goods and Services Tax Act* (FNGST Act)
- Proposed Amendments to Bill C-45 to support the First Nation cannabis tax option

Part 1: An Overview of the Proposed Federal and Provincial Proposed Cannabis Legislative and Taxation Framework:

The tax framework for cannabis is still in development federally and provincially. The key elements are:

1. Cannabis Act - Bill C-45 sets out a federal regulatory framework for the production, distribution, sale, and possession of cannabis across Canada. Canada will be responsible for establishing and maintaining a comprehensive national framework for regulating production/manufacturing, setting standards for health and safety and establishing criminal prohibitions. Canada will license commercial cannabis production, set regulations on what can be sold, regulate promotion and advertising, require registration and tracking of cannabis from seed to sale, control cannabis at the border and create criminal and administrative penalties.

2. *Excise Act, 2001* - Canada has indicated that it intends to amend the *Excise Act, 2001*, to create a federal excise tax on cannabis at a proposed rate of \$1 per gram, or 10% of the final retail sale price of the packaged product (whichever is greater). The last federal licensee in the supply chain who packaged the cannabis product for retail sale will be liable for the excise tax. Canada proposes to share this tax with the provinces 75%-25% in favour of the provinces, under a revenue sharing agreement.

3. Other Cannabis taxes and fees - There are three other cannabis tax and fee components. First, the federal government will levy GST on cannabis sales and HST as applicable. As a value added tax, it is paid by the final consumer and attributable to the place of final consumption. Second, the provinces will collect PST on cannabis sales where there is a provincial sales tax. Third, there is also likely to be a regulatory regime put in place by each province, with associated licensing fees.

4. Provincial regimes - Provinces can choose to establish a retail and distribution framework within the province, provided they meet minimum federal conditions. If they choose not to create a regime, cannabis would be available by mail order to that province under the federal regime.

Provincial regulation can include: licensing of the distribution and retail sale in province (including compliance and enforcement activities); raising the minimum age above 18 for the purchase or consumption of cannabis; lowering the limit on cannabis cultivation in residential premises to less than 4 plants; lowering the limit on cannabis possession to less than 30g of cannabis; area restrictions for where cannabis may be cultivated; area restrictions for where

cannabis may be consumed; provincial location rules for cannabis-based businesses; and provincial traffic and safety laws to address driving while impaired by cannabis.

5. First Nations Not Considered - Currently, the federal proposal does not provide for any First Nation regulation, licensing or taxation of cannabis.

Part 2: Overview of the Objectives for the Proposed First Nation Cannabis Tax and Regulation Option:

The FNTC and proponent First Nations envision a First Nation cannabis tax and regulation option that includes:

- First Nation cannabis excise tax revenues
- First Nation cannabis GST tax revenues through the FNGST Act and the FMA
- First Nations cannabis licensing regulation and fees
- Possible First Nation cannabis provincial sales tax revenues through agreements with provinces
- Harmonized First Nation cannabis regulatory frameworks to effectively implement these taxes

The FNTC and proponent First Nations are seeking to achieve several broad objectives with their amendment proposals. Achieving these objectives will require amendments to the FMA, the *Excise Act, 2001*, *FNGST Act* and Bill C-45.

1. Enable a First Nation cannabis tax framework that:
 - a. Generates revenues for interested First Nations to support health, education, infrastructure and regulatory requirements associated with cannabis manufacturing, distribution, sales and consumption on First Nations lands,
 - b. Provides a framework to support an improved jurisdiction-based fiscal relationship for interested First Nations, and
 - c. Recognizes and effectively implements First Nations government jurisdictions within the federation.
2. Enable a First Nation cannabis tax and regulatory framework that is harmonized with the proposed federal and provincial frameworks for interested First Nations, that:
 - a. Enables a harmonized FMA cannabis excise tax for interested First Nations,
 - b. Enables a harmonized cannabis FNGST for interested First Nations,
 - c. Enables cannabis regulations (including licensing and associated fees) for interested First Nations,
 - d. Enables agreements between interested First Nations and interested provinces with respect to harmonized PST and possible harmonized cannabis tax regulation and enforcement on First Nation lands, and
 - e. Provides options for First Nations to create regulatory frameworks on their lands for cannabis parallel to those implemented by the provinces. In this regard, it is anticipated that First Nations may choose to tie into and apply certain aspects of provincial frameworks on their lands, for administrative efficiency.

Part 3: Proposed Amendments to FMA, *Excise Act, 2001* and FNGST Act

The following amendments are proposed for the FMA, to provide an efficient and effective option for First Nations to implement cannabis excise, FNGST and licensing powers:

1. Add FMA law-making power for First Nations to levy cannabis excise tax on the First Nation's reserve lands. Revenues received from the cannabis excise tax would be "local revenues" under the FMA and subject to the existing local revenues requirements.
2. Add provisions that enable Canada to levy and collect the First Nation cannabis excise tax as an agent for the First Nation, in accordance with the *Excise Act, 2001*, and in accordance with an administration agreement between Canada and the First Nation. The excise tax could be administered by CRA on behalf of the taxing First Nation, acting as its agent for collecting and administering the tax and for enforcing the FMA cannabis excise tax law. This is like the current FNGST option used by participating First Nations.
3. Add FMA law making power to enable First Nations to make an FNGST law that is consistent with specified provisions of the FNGST Act, to enable FNGST revenues to be local revenues under the FMA.
4. Expand the current FMA fee law power to enable cannabis licensing regulation and associated fees.
5. Make consequential amendments to integrate the new tax powers into the FMA, including to section 29 (FNTC mandate), section 35 (FNTC standards) and s. 5(1)(e) (enforcement measures, to ensure First Nations have sufficient enforcement powers).

The following amendments are proposed to the *Excise Act, 2001* when that Act is amended to provide for the excise tax on cannabis:

1. Include a framework for First Nations to levy the cannabis excise tax on their reserve lands, once the First Nation enacts an FMA cannabis excise tax law and enters into an administration agreement with Canada.
2. Provide for the requirements for the administration agreement, a formula for the tax to be attributed to a First Nation, and additional administrative provisions including how payments will be made, reporting, and enforcement.

The following amendments are proposed for the FNGST Act to provide an FNGST option within the FMA:

1. Amend section 12(1) of the FNGST Act to specifically reference the FMA law-making power.
2. Make any necessary consequential amendments to enable the administration agreement between Canada and FMA First Nations, including the treatment of FNGST revenues as local revenues.

Part 4: Proposed Amendments to C-45, the *Cannabis Act* to Support the First Nation Cannabis Tax:

The following amendments are proposed to Bill C-45, the *Cannabis Act*:

1. Add needed definitions to section 1, including:

“First Nation” means a band as defined in subsection 2(1) of the *Indian Act*, and an aboriginal government as defined in the *Access to Information Act*;

“First Nation law” means a law enacted by a First Nation in respect of the regulation of the distribution, sale, consumption or possession of cannabis on that First Nation’s lands that is authorized under an Act of Parliament.

Drafting Notes: The definition of “First Nation” should be as broad as possible and include First Nations that are “bands” as defined in the *Indian Act*, as well as those with self-government agreements, land claims agreements and treaties. The definition of “First Nation law” should be broadly drafted to ensure that First Nations can enact these laws under different frameworks that may be available, including self-government agreements, land claims agreements and treaties, as well as under the *Cannabis Act* itself.

2. Add a new section 59.1:

59.1 The Attorney General of Canada may enter into an agreement with a First Nation respecting, in particular, the following matters:
(a) the prosecution of offences commenced under this Part; and
(b) the discharge and enforcement of fines and fees referred to in this Part in respect of offences that are alleged to have been committed on that First Nation’s lands.

Drafting Notes: Section 59 enables enforcement agreements with other levels of government, including the provinces and local government. This amendment would enable agreements with First Nations. Enforcement on First Nation lands is a critical component of cannabis regulation and it is anticipated that First Nations would be engaged in enforcement, in particular in relation to administrative penalties.

3. Add a new section 60.1:

Compensation agreements

60.1 (1) The Attorney General of Canada may enter into an agreement with a First Nation
(a) respecting the sharing with that First Nation of the amounts in respect of fines and fees that are collected in respect of the prosecution of offences commenced under this Part, for the purpose of Canada compensating that First Nation, in whole or in part, for the administration and enforcement of this Part; and
(b) despite subsections 17(1) and (4) of the *Financial Administration Act*, authorizing the First Nation to withhold amounts, in accordance with the terms and conditions of the agreement, from the fines and fees referred to in paragraph (a) to be remitted to the Receiver General and deposited in the Consolidated Revenue Fund.

Deemed not public money

(2) The fees imposed under a First Nation law in respect of offences under Division 1 of Part 1 are deemed not to be public money for the purposes of the *Financial Administration Act*.

Appropriation by Parliament

(3) All or a portion of the amount of fines and fees referred to in paragraph (1)(a) that are to be shared under an agreement are deemed to be appropriated by Parliament for that purpose.

Drafting Notes: Section 60 enables compensation agreements with other levels of government, including the provinces and local government. This amendment would enable agreements with First Nations.

4. Add a new section 69.1:

First Nation authorized selling

69.1 A person may possess, sell or distribute cannabis on a First Nation's lands if the person is authorized to sell cannabis under a First Nation law that contains the legislative measures prescribed by regulation.

Drafting Notes: Subsection 69(1) recognizes provincial laws that meet the legislative requirements set out in subsection 69(2). Wording similar to subsection 69(1) should be included for First Nations in respect of cannabis regulation on their lands, where a First Nation makes a regulatory law that contains specified legislative measures. Those measures may be the same as the measures set out in subsection 69(2), or they could be different. Consequently, the proposal is to include a regulatory power to enable the measures that must be met by First Nations to be prescribed by regulation.

5. Add a new subsection 70(3):

Administration and enforcement activities—First Nation laws

70 (3) Every individual who obtains cannabis in the course of activities performed in connection with the administration or enforcement of any First Nation law that authorizes the selling of cannabis is authorized to do anything that is prohibited by any provision of Division 1 of Part 1 if they do so in a manner that is consistent with the activities they are authorized to perform.

Drafting Notes: The above subsection (3) provides wording parallel to subsection 70(2), which relates to provincial Acts.

6. Add a new section 72.1:

Employees—First Nation laws

72.1 (1) Every employee of a person that is authorized under a First Nation law to sell cannabis may do anything that is prohibited by any of sections 8 to 10 if they do so as part of their employment duties and functions and in a manner that is consistent with the conditions that apply to their employer's authorization.

Agents and mandataries—First Nation laws

(2) Every individual who is acting as the agent or mandatary of a person that is authorized under a First Nation law to sell cannabis may do anything that is prohibited by any of

sections 8 to 10 if they do so as part of their role as agent or mandatary and in a manner that is consistent with the conditions that apply to their principal's or mandator's authorization.

Drafting Notes: The new section 72.1 provides wording parallel to section 72, which relates to provincial Acts.

7. Add a new paragraph to section 83:

(a.1) he or she may disclose it to a First Nation if the disclosure is for a purpose related to verifying compliance or preventing non-compliance with the provisions of a First Nation law that contains the legislative measures prescribed by regulation;

Drafting Notes: The new paragraph enables information to be shared with First Nation governments in the same manner that it can be shared with other governments.

8. Add a new provision enabling tri-partite agreements:

Agreements with a First Nation and a Province

The Attorney General of Canada may enter into an agreement with a First Nation and the government of a province to support a coordinated approach to cannabis regulation on a First Nation's lands, which agreement may include provisions that include

- (a) the application of provincial Acts on the First Nation's lands;
- (b) the coordination of provincial Acts and First Nation laws on the First Nation's lands;
- (c) the enforcement of this Act, provincial Acts and First Nation laws on the First Nation's lands; and
- (d) the allocation of licensing and other fees collected in respect of cannabis regulation.

Drafting Notes: The above wording enables tripartite agreements where appropriate. It is anticipated that such agreements could assist in coordinating legal frameworks among First Nations, provinces, and Canada, in particular with respect to the coordination of laws and enforcement regimes.

9. Add the following regulatory powers to enable First Nation frameworks to be created under the Act:

x Regulations respecting First Nations

For the purpose of enabling a First Nation to regulate cannabis on its lands, applying a provision of this Act to a First Nation, or recognizing the application of a First Nation law on that First Nation's lands, the Governor in Council may make regulations

- (a) adapting any provision of this Act or of any regulation under this Act; and
- (b) restricting the application of any provision under this Act or any regulation made under this Act,

Drafting Notes: The above regulatory power is intended to provide broad powers to enable a First Nation to undertake the regulation of cannabis on its lands, and to enable the Act to be modified as necessary in order to facilitate First Nation regulatory jurisdiction.

x.1 Regulations respecting First Nation powers

The Governor in Council may make regulations

(a) conferring any legislative or other power on a First Nation as the Governor in Council considers necessary to enable a First Nation to regulate the distribution, sale, consumption and possession of cannabis on the First Nation's lands; and

(b) establishing requirements that a First Nation must meet to utilize the powers conferred by a regulation under paragraph (a).

Drafting Notes: The above wording is intended to enable First Nation law-making powers to be created by regulation under this Act. Some First Nations will have this power under existing frameworks (such as Treaty Agreements), while other First Nations may need to rely on law-making powers specific to cannabis regulation.