HENSEL BARRISTERS PROFESSIONAL CORPORATION

The Honourable Lillian Dyck
Chair of the Standing Senate Committee,
On Aboriginal Peoples,
The Senate
Ottawa, Ontario K1A 0A4

March 23, 2018

Dear Madam Chair:

As an Honourary Member of the Indigenous Bar Association, I have the honour to transmit to you for tabling in the Senate, the enclosed Brief with respect to the impacts of Bill C-45 (*An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts).*

Sincerely,

Katherine Hensel
Josephine de Whytell

Encl.

cc. Mark Palmer, Committe Clerk

HENSEL BARRISTERS PROFESSIONAL CORPORATION
300-160 JOHN STREET
TORONTO, ON M5V 2E5
OFFICE: 416.966.0404
FAX: 416.966.2999

KATHERINE HENSEL, B.A., LL.B

JOSEPHINE DE WHYTELL, LL.B

MOLLY CHURCHILL, LL.B., B.C.L., M.S.W.

ALISSA SAIEVA, B.A. (HONS), J.D.
ARTICLING STUDENT

Before the Senate Standing Committee on Indigenous Peoples

On behalf of the Indigenous Bar Association

Brief with respect to the impacts of Bill C-45

(*An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*).

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PREFACE

The Indigenous Bar Association ("IBA") is a national organization representing Indigenous lawyers, paralegals, elders, law students, judges and practitioners of Aboriginal law in Canada.

The IBA is pleased to provide submissions about the impact of Bill C-45 and brings a unique perspective in terms of addressing the concerns most commonly brought to the attention of IBA members by Indigenous clients.

I. Introduction

The legalization of Cannabis is certainly a welcome move by the federal government in terms of reducing the overcriminalization of individuals, and groups of individuals, who use marijuana contrary to the current legislative scheme, and exhaust judicial and police resources without practical value to the overall health and wellbeing of society.

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.[1] Indigenous peoples have an inherent right to self-determination which includes providing for the hearts and minds of their people.

The original Nation-to-Nation relationship between Indigenous and non-Indigenous peoples in Canada, has devolved to the point where 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.[2] Renewing the original Nation-to-Nation relationship requires recognizing Canada's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), and empowering Indigenous peoples to reconcile their equal status in Canadian society.[3]

The IBA supports the federal government's initiatives towards reconciliation, but queries why Bill C-45 essentially creates a trading monopoly over the new legal Cannabis trade for provincial and federal governments and their selected entities. Equally, this bill provides such governments and their agents with wide discretion and criminal law powers to protect their intellectual property in this new industry. It does so amidst a justice system that repeatedly fails to serve Indigenous peoples and communities.[4] The discretion reserved for the Minister under Bill C-45, has no regard to Indigenous self-determination including the governance authority, wishes, cultures, and needs of First Nations, Inuit,

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[1] Discordant Voices, Conflicting Visions: Ojibwa and Euro-American Perspectives on the Midwiwin, Michael R. Angel, University of Manitoba, 1997 https://www.collectionscanada.gc.ca/obj/s4/f2/dsk3/ftp04/nq23580.pdf

[2] Royal Commission on Aboriginal Peoples, p102 and Part 4, generally

[3] https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958

[4] Royal Commission on Indigenous Peoples: *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996), p.309 ; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, para. 47

Metis and Indigenous communities. Respectfully, this is fundamentally inconsistent with the message and intent of reconciliation.

II. Achieving Reconciliation

The Truth and Reconciliation Commission of Canada ("TRC") was created by the Indian Residential Schools Settlement Agreement, which settled the class actions of Indigenous people who had been taken from their families as children, forcibly if necessary, and placed for much of their childhoods in residential schools.[5] Forcible transfer of a group's children was the only form of cultural genocide specifically prohibited by the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.[6] There are, however, eight dimensions of genocide, according to Polish professor, Raphael Lemkin, which he directly drew from his own experiences of nazi Germany. These include: Political; Social; Cultural; Religious; Moral; Economic; Biological; and Physical genocide.[7]

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 the Nation's perspectives and actual needs. A term that some Chiefs have taken to calling this phenomenon is "legislative genocide."[8]

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-

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[5] Truth and Reconciliation Commission: Final Report: Executive Summary, p.1 http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf

[6] Article 2(e) *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948 at https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf

[7] Genocide – A Modern Crime, Raphael Lemkin, April 1945; http://www.preventgenocide.org/lemkin/freeworld1945.htm

[8] Chief Matthew T. Peigan of Pasqua First Nation, and Kukpi7 Wayne Christian of Splats'in First Nation

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 overwiting Indigenous culture from common law and slowly eroding and replacing Indigenous laws and customs with non-Indigenous laws of "general application."[9] 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.

Throughout Canada, Indigenous Nations are revitalizing Indigenous laws and legal traditions. Pursuant to Call to Action No. 50, the University of Victoria is now offering the world's first Indigenous Law degree.[10] The IBA itself has more Indigenous students and young lawyers joining its ranks who bring fresh hope and Indigenous perspectives to the legal profession. Healing from the effects of genocide will undoubtedly be a slow and arduous process of mutual growth, however, there is momentum.

There are Nations and Tribal Councils, Regional and National associations, which regulate and serve inter-Nation rights and interests. Capacity has been building in spite of adversity, through new and honourable relationships with shared future goals. According to the First Nations Tax Commission, "[t]here are 148 First Nations that have created and implemented property taxation laws under the *First Nations Fiscal Management Act*, or by-laws under section 83 of the *Indian Act*."[11] As of 2016, there were 95 First Nations who had opted into the First Nations Land Management Regime.[12] As of 2018, there are 30 Indigenous Nations who have opted to impose a First Nation Goods and Services Tax,[13] and there are many more initiatives and voices seeking to overturn Canada's paternalistic dynamics

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[9] S.88, *Indian Act*. R.S.C., 1985, c. I-5

[10] https://www.uvic.ca/news/topics/2018+jid-indigenous-law+media-backgrounder

[11] http://fntc.ca/property-tax-fns/

[12] https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973

[13] https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/gst-hst-indigenous-peoples/first-nations-goods-services-tax.html

that continue to inhibit Indigenous self-determination.[14]

Legislative exclusion continues to serve a one-sided relationship. To effect meaningful reconciliation, any legislative scheme around the legalization of Cannabis must take into consideration the variety of diverse interests and perspectives surrounding marijuana and its use and place in society within Indigenous Nations. Rebuilding justice for Indigenous communities must commence with full recognition that Indigenous Nations have the knowledge and credibility within their communities to know what is appropriate and beneficial for their communities. This is in line with Indigenous peoples' inherent rights to self-determination. Article 4 of UNDRIP provides that:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions.

It is appropriate to consider revisions to Bill C-45 which would develop the new Nation-to-Nation relationship; "based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future."[15]

As such, the below sections deal with how Bill C-45 disproportionately impacts Indigenous peoples, contrary to s.15 of the *Charter*, through the imposition of criminal sanctions, exclusion from the economy, and denial of access to traditional methods of healing and self-determination.

a) Disproportionate Criminalization of Indigenous Peoples

The overrepresentation of Indigenous offenders in the prison system is a systemic problem identified by the Supreme Court in both *Gladue*[16] and *Ipeelee*[17]. There is a common understanding of which judges are to take judicial notice. The impact of colonialism, displacement, and residential schools on

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[14] https://www.theglobeandmail.com/opinion/indigenous-memo-to-canada-were-not-your-incompetent-children/article37511319/

[15] *Truth and Reconciliation Commission Call to Action 45(iii)*

[16] *R. v. Gladue*, [1999] 1 S.C.R. 688

[17] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R.

Indigenous offenders is related to the frequency and manner in which many Indigenous offenders, or alleged offenders, find themselves involved with the criminal justice system.

Indigenous peoples, as well as other marginalized peoples, are unfairly targeted by law enforcement, by legislation, and by sentencing structures and mandatory minimum penalties.[18] 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.

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.[19] This automatically denies 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 re-balance the tilt of injustice that brings a disproportionate number of Indigenous people before the Courts.

There are a number of socio-economic barriers faced by Indigenous peoples who might wish to become legal producers, distributors, sellers, importers, growers, or medical patients under, the current licensing system. It is reasonably foreseeable that failing to include Indigenous Nations in the

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[18]Report of the Royal Commission on Aboriginal Peoples, http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637

Report of the Commission of Inquiry Relating to the Death of Neil Stonechild, http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Stonechild/Stonechild.pdf

Executive Summary, the Report of the Ipperwash Inquiry, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_4/pdf/E_Vol_4_Full.pdf

Royal Commission on the Donald Marshall Jr. Prosecution, https://novascotia.ca/just/marshall_inquiry/

Report of the BC Missing Women Inquiry, http://www.missingwomeninquiry.ca/reports-and-publications/

Report of the Aboriginal Justice Inquiry of Manitoba, http://www.ajic.mb.ca/volume.html

[19] Bill C-45

legislative scheme of Bill C-45, or without including an opt-in/opt-out provision for First Nations, enforcement of Bill C-45 will result in Indigenous peoples being unfairly criminalized.

It is surprising that Indigenous interests and legal rights associated with the regulation of a new industry within their territories, has not been embraced as the opportunity for many Indigenous Nations to develop and advance their own traditional economies as an autonomous means of financing their own affairs, through a level playing field in this new industry.

Just as the tobacco trade was usurped by European settlers, and transformed into an economy that was far removed from any spiritual or honourable meaning,[20] Bill C-45 fails to consider the different health needs, interests, and desires of Indigenous Nations with respect to Cannabis and fails to include Indigenous Nations within the legislative scheme. In fact, 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. This oversight certainly brings awareness to the challenge of reconciliation. It does, however, also provide an exceptional opportunity for real and dynamic changes to be brought forward, such as the amendments being proposed by C.T. (Manny) Jules of the First Nations Tax Commission ("FNTC").[21] The IBA supports the four-part proposal being put forward by the FNTC to: (1) amend the First Nations Fiscal Management Act to provide for a First Nation law-making power to levy cannabis excise tax on its reserve lands; (2) amend the Excise Tax Act and the First Nations Fiscal Management Act to enable First Nations to collect tax efficiently; (3) Enable First Nations to retain local cannabis revenue for their own infrastructure, health care and education, among other things; and (4) recognize First Nations' responsibility for their own regulatory frameworks including business licensing, zoning, and enforcement.[22]

Maintaining and strengthening distinct economic institutions is a protected right under Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples:

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[20] Smoke Signals, The Native Takeback of North America's Tobacco Industry, Jim Poling Sr., 2012, p27-28

[21] http://fntc.ca/cannabis-tax-jurisdiction/

[22] First Nations Tax Commission, Brief re: Bill C-45

> Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[23]

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. Legislation has been used throughout the Nation-to-Nation relationship (between Crown and Indigenous Nations) to promote Crown control and achieve oppression of Indigenous peoples, including cultural and "legislative genocide".[24] This was noted by the Manitoba Justice Inquiry at Volume 1, Chapter 3, as follows:

> The assumption of the original *Indian Act* was that, as they gained experience with European-Canadian life, Indians would want to leave their bands and join the larger society. The formal transfer from "Indian" to "Canadian" status would occur when they acquired the franchise. However, very few Indians followed this path. In 1920, as a result, the Act was amended to give the federal cabinet power to take away Indian status from an Indian family head (and his family) and to make his enfranchisement compulsory. This clause was repealed in 1922, reinstated in 1933 and finally dropped in 1951. It illustrated that the destruction of Indian culture and the control of political decisions remained at the heart of federal government policy in the 20th century. As the department's deputy minister, Duncan Campbell Scott, wrote: "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department."[25]

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.

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[23] *United Nations Declaration on the Rights of Indigenous Peoples*, Article 5

[24] Ibid, footnote 5

[25] Report of the Manitoba Justice Inquiry, Volume 1, Chapter 3, Political Responses, citing Miller, *Skyscrapers Hide the Heavens*, pp. 206–7.

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.[26] Both the *Convention on Biological Diversity* and UNDRIP recognize this:

> Convention on Biological Diversity:
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> Article 8(j)
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> State parties shall, as far as possible and as appropriate:
>
> Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.[27]
>
> UNDRIP
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> 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, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

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[26] Discussion with Elder, Wes Fineday, Sweetgrass First Nation

[27] https://www.cbd.int/traditional/

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* was adopted by the United Nations in Montreal in 2011, which aims to establish clear rules and procedures for informed consent and mutually agreed terms between Nations, however, Canada is not yet a signatory.[28]

To prevent illicit trade from flourishing once Cannabis is legalized, Indigenous peoples need to be invested in, and see benefit from, participating in a regulatory scheme that serves their interests and does not marginalize and criminalize them unfairly. Principles of denunciation and deterrence are far removed from what it takes to properly maintain healthy use of traditional medicines on Indigenous Nations.

Everything has a spirit and energy within it, whether animate or inanimate. The health of the peoples and the remedies needed to treat them are ultimately connected to the environment and the land. As such, medicines are sacred and one has to engage with them in a meaningful way in order to receive their healing benefits.[29]

It would be appropriate to exempt Indigenous peoples and Nations from the *Cannabis Act*, and enable negotiation of specific agreements with First Nations, who can either adopt the federal and provincial legislation as applying to them, or choose to follow their own law with respect to this new Indigenous trade.

b) Disproportionate restrictions on Indigenous economies

With the legalization of Cannabis on the rise in North America, Harvard economist Jeffrey Miron has conservatively estimated the size of the United States' Cannabis market at $14 billion.[30] The prospective European market has also been estimated as worth up to 56 billion euros ($89.2 billion).[31] Unlike when the tobacco industry took off in the 1700s – 1800s, there are Indigenous entities with

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[28] https://www.cbd.int/abs/nagoya-protocol/signatories/

[29] Discussion with Leon Thompson of Sweetgrass First Nation, University of Saskatchewan Law graduate, 2018

[30] https://www.cnbc.com/id/36179677

[31] http://business.financialpost.com/commodities/agriculture/for-cannabis-heavyweights-the-real-prize-is-becoming-worlds-premier-medical-marijuana-dealers

capacity at the turning point of the end of Cannabis prohibition, who are poised and ready to capitalize on the upcoming market, if they are not disproportionately excluded from its bounty.[32]

The federal government has confirmed that any First Nations owned and operated business on reserve land will not have to pay GST/HST on any cannabis products. However, under the currently proposed regime, this is not going to be extended to excise duties which will apply to cannabis products.[33]

An historic deal has been reached between the federal and provincial governments, carving out their share of pending Canabis tax revenues in a 75-25% split in favour of the provinces.[34] Presumably, in fairness, both levels of Crown government can relinquish a proportionate share to Indigenous governments who will face all the same, if not more, challenges from the legalization of Cannabis in their territories.[35] It is the position of the IBA that Indigenous Nations should have an option to impose and collect excise taxes on Cannabis products.

There continues to be disagreement about whether federal and provincial governments have any right to impose legislative and regulatory measures on the sale of tobacco, itself a traditional Indigenous commodity. The Association of Iroquois and Allied Indians, for example, takes quite a firm position that Inter-Nation Trade is an inherent right.

> Indigenous peoples have historically traded with each other and continue to do so in modern contexts today. Inter-nation trade can include a broad suite of activities from tobacco trade to hunting and fishing agreements. Our historical trading practices are a form of economic development which supports the growth and prosperity of our communities.[36]

The IBA supports this position, finding a basis in s.7 of the *Charter* to support not only the right to life (through representative socio-economic policy), and liberty (through self-determination) but also, security of the person (through psychological integrity). Furthermore, this position must extend to

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[32]http://www.cbc.ca/news/canada/sudbury/first-nations-marijuana-phil-fontaine-1.4466317

[33] Brad Bellegarde, CBC http://www.cbc.ca/news/indigenous/first-nations-tax-exempt-cannabis-1.4481386

[34] http://www.cbc.ca/news/politics/finance-ministers-pot-tax-1.4442540

[35] http://www.cbc.ca/news/politics/first-nations-cannabis-excise-tax-1.4564121

[36] Inter-Nation Trade (Tobacco) Association of Iroquois and Allied Indians, http://www.aiai.on.ca/policy-areas/inter-nation-trade-tobacco/

marijuana, hemp, and other natural resources that are in keeping with Indigenous traditional economies.

Tobacco's mind-altering properties were well-known to Indigenous populations and observed by early settlers.[37] Fire and smoke, however, was associated with the devil throughout most of Christian Europe and the spiritual role that tobacco held for Indigenous people was beyond their comprehension.[38] The fear and condemnation of tobacco has been largely associated with the expanded modern use of it, causing widespread addiction and public health liabilities. This has served to tarnish the Indigenous value of tobacco, including its use among Indigenous communities.[39]

Both Tobacco and alcohol industries developed at the mercy of Indigenous peoples, providing symptomatic relief of collective residential school trauma[40] within a legislative scheme that perpetuates Indigenous peoples' criminalization for their over-reliance, or non-regulated use. The addictive properties of these substances are slowly changing social and legal policies with respect to how society accepts treating their over-use. However, imposing 14 year sentences in relation to Cannabis offences, as mentioned in the previous section, significantly hampers the ability for Bill C-45 to address health concerns about addiction to Cannabis in any meaningful way.

The stigma surrounding trade of intoxicating substances often touches on religious or spiritual grounds, as well as public health concerns.[41] These stigmas vary between individuals as they vary between communities, provinces, Nations, and countries, and have different impacts on local trade and acceptance of such trade. As Settler industries have amassed great wealth and power in society, they have dominated over, and excluded Indigenous Nations from the market through legislation, by being over-regulated and controlled by provincial governments.[42] The Cannabis trade should not be permitted to follow the same course through an avenue of privilege and monopoly at the expense of

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[37] Smoke Signals, ibid, p19

[38] Smoke Signals, ibid, p26-27

[39] https://www.leavethepackbehind.org/tobacco-use-in-indigenous-communities/

[40] *First Nations Child and Family Caring Society v. Canada*, 2016, CHRT 2, para. 417-121

[41] https://othersidefarms.com/blog/how-can-the-cannabis-industry-overcome-stoner-stigma-stereotypes/#.WrfseojwaUk

[42] Smoke Signals, ibid

Indigenous peoples' equality and economic autonomy.

c) Disproportionate control over Indigenous health and healing

Bill C-45 intends to protect the public health and access by young people to Cannabis, before it is safe for their consumption. It is suggested that public awareness campaigns and education on the risks of Cannabis on young people could instill moral alliance with the government's objective, across cultural divides, without running into the constitutional challenges that disproportionate criminalization invites.

Traditional healing continues to provide significant relief to Indigenous peoples across the country.[43] The availability of legal marijuana will add an additional ingredient to the host of traditional herbs that are already being used across Canada to treat Indigenous peoples outside the context of Western medicine.[44] In particular, Cannabis indica strains will provide a viable alternative to opioids.[45] Given the greater need for symptomatic relief among Indigenous populations that could benefit from the medicinal effects of marijuana,[46] the offences connected with this legislation would disproportionately impact Indigenous people who might legitimately be using marijuana safely, for a medicinal purpose.

There are practical, moral, and socio-economic barriers which may serve to disqualify Indigenous people from reasonable exemptions associated with medicinal use of Cannabis under Bill C-45, where they are self-prescribing, or receiving guidance from their Elders, or medicine persons, as opposed to obtaining a license from a doctor. Failure to recognize and include traditional Indigenous healing

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[43] Robbins, J. A. , Dewar, J. (2011). Traditional Indigenous Approaches to Healing and the modern welfare of Traditional Knowledge, Spirituality and Lands: A critical reflection on practices and policies taken from the Canadian Indigenous Example. The International Indigenous Policy Journal, 2(4) . Retrieved from: http://ir.lib.uwo.ca/iipj/vol2/iss4/2 DOI: 10.18584/iipj.2011.2.4.2

[44] http://www.cbc.ca/news/canada/saskatoon/indigenous-medicinal-walk-1.4235900 - August 5, 2017

[45] https://www.scientificamerican.com/article/high-hopes-ride-on-marijuana-amid-opioid-crisis/

[46] *First Nations Child and Family Caring Society v. Canada*, 2016, CHRT 2, para. 417-121

within the scope of the legalization regime could unfairly criminalize otherwise reasonable and responsible use, that causes no harm to the public.

A person seeking to use marijuana as medication under the *Access to Cannabis for Medicinal Purposes Regulations*, for example, first needs to find a doctor willing to prescribe it. Then there is usually a minimum purchase of 5g of marijuana, at a cost of approximately $75, and it requires the patient to have access to a credit card. According to 2016 census data, 81% of First Nation reserves have median incomes below the lowered income amount of $22,133.[47] This means that a disproportionate number of Indigenous peoples are effectively priced-out of medical marijuana under the current Licensed Producer model, because it is simply too expensive. They will have to rely on the recreational market available to them for their medicinal use, unless there are local First Nations industries which can provide for their communities.

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.[48]

The TRC's Calls to Action 18 – 21 are particularly relevant to inform discourse on Indigenous health and respond to a growing crisis of inequality in Indigenous health and access to culturally appropriate health care.

> 18. We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.

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[47] https://globalnews.ca/news/3795083/reserves-poverty-line-census/ and http://www12.statcan.gc.ca/census-recensement/2016/rt-td/ap-pa-eng.cfm

[48] World Health Organization, Declaration of Alma-Ata (Copenhagen: WHO Regional Office for Europe, 1978), art 4.

> 19. We call upon the federal government, in consultation with Aboriginal peoples, to establish measurable goals to identify and close the gaps in health outcomes between Aboriginal and non-Aboriginal communities, and to publish annual progress reports and assess longterm trends. Such efforts would focus on indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.
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> 20. In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.
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> 21. We call upon the federal government to provide sustainable funding for existing and new Aboriginal healing centres to address the physical, mental, emotional, and spiritual harms caused by residential schools, and to ensure that the funding of healing centres in Nunavut and the Northwest Territories is a priority.

These goals are further in line with Article 24 of UNDRIP, which reads as follows:

> Article 24
> 1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
> 2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

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,[49] the modern approach to Indigenous treaty interpretation,[50] and the inherent right of Indigenous

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[49] *R. v. Badger*, 1996 CanLII 236 (SCC) [1996] 1 S.C.R. 771, para. 41; *Ochapowace First Nation v. Canada (Attorney General)*, 2009 FCA 124, para. 20; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14, para. 128

[50] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18, at p. 36

governments to self-determination,[51] 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.[52] One way to achieve the TRC's aforementioned Calls to Action and bring force to the promise of 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 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.

With respect to the public health concerns related to addiction issues, it is useful to compare traditional tobacco use by Indigenous people. Jim Poling, in Smoke Signals, writes that "[t]he subject of tobacco addiction among early Indians is a controversial one…since it involves the conflict between the sacredness of tobacco and its recreational use." He notes that the time it took to cultivate tobacco, and the spiritual value of the plant, meant it was conserved and used more sparingly. There was not the ability for Indigenous peoples to become addicted in the 1600's in the same way that mass availability of the modern day cigarette has created a public health crisis.

Assimilation has caused recreational use of Cannabis among Indigenous peoples,[53] however, with the revitalization of Indigenous laws, institutions and in turn, the vibrancy and health of Indigenous Nations, a traditional and ceremonial use of Cannabis can be protected.[54] The right of Indigenous

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[51] *R. v. Van der Peet*, 1996 CanLII 216 (SCC) [1996] 2 S.C.R. 507; *R. v. Pamajewon*, 1996 CanLII 161 (SCC) [1996] 2 S.C.R. 821, [1996] S.C.J. No. 20, at paras. 24-25;

[52] Chief Isadore Day, Ontario Regional Chief with Chiefs of Ontario, http://www.cbc.ca/news/canada/sudbury/first-nations-legal-cannabis-1.4443700

[53] Discussions with Elder, Wes Fineday of Sweetgrass First Nation

[54] Article 24, UNDRIP

Nations to resolve addiction concerns within their own communities, in ceremonial ways that are meaningful to Indigenous peoples, should be recognized, without undue criminalization which perpetuates their engagement with the justice system.

III. Recommended changes to the legislation

It is the IBA's position that Cannabis regulation should not engage the *Criminal Code of Canada* in relation to offences of possession, distribution, selling, importing/exporting, or cultivation, and that regulatory offences should be simple and easy to follow, with minimal encroachment on the private and collective interests of Indigenous Nations, individuals, and businesses.

This can be achieved by recognizing Indigenous Nations as unique and distinct, and having rights to control their own economies and public health. It is recommended that Bill C-45 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, including in respect of excise tax.

IV. Conclusion

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.

Indigenous governance of the use, distribution, trade and policing of Cannabis should obviously also

apply for tobacco[55] and hemp[56] – as it should with all Indigenous resources,[57] including land, water, clean air, educating and caring for children,[58] and the right to heal and resolve Indigenous communities' own issues with health, economic advancement, and resource management.[59] Recognition of self-determination in the Cannabis industry would provide an invaluable leap-forward in the trajectory of reconciliation and ultimately economic independence.

It is certainly not too late for this Bill to reflect a more positive Nation-to-Nation relationship, but exemptions for Indigenous Nations must be incorporated, and the criminalization of Cannabis, respectfully, should be abandoned.

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[55] Inter-Nation Trade (Tobacco) Association of Iroquois and Allied Indians, http://www.aiai.on.ca/policy-areas/inter-nation-trade-tobacco/

[56] Indigenous Hemp: http://nebula.wsimg.com/1d536437c715121177e34995648d6e4d?AccessKeyId=D9A9A0B6EA4ADABADA85&disposition=0&alloworigin=1;

[57] Discussions with Donald E. Worme, Q.C., IPC, Semaganis Worme, re: Inter-First Nation Trade;

[58] *First Nations Child and Family Caring Society v. Canada* 2016 CHRT 2; Saskatchewan v STC Health & Family Services Inc, 2016 SKQB 236;

[59] Reconciling Aboriginal Rights with International Trade Agreements: Hupacasath First Nation v. Canada, Kathryn Tucker; https://www.mcgill.ca/mjsdl/files/mjsdl/tucker_9-2.pdf