

# History of the Development and purpose of the Cannabis Control Law

## November 25, 2021

### Introduction

On May 4, 2020 Chief and Council passed the *Cannabis Control Law 2020* (the “CCL”). The CCL was intended to meet six objectives:

1. assert sovereignty;
2. provide Band members with employment opportunities in Cannabis production facilities
3. protect children and youth;
4. ensure consumer health and safety through proper labelling;
5. prevent organized crime involvement; and
6. enable enforcement by OKIB staff.

Early this fall, Administration provided Chief and Council with an update on a number of issues with the CCL that have arisen since the CCL was passed and suggested that the CCL either be amended or repealed. Chief and Council asked Administration to conduct a community survey to discover what the majority of OKIB members think about the CCL.

Administration intends to conduct a community survey in the next week or so. Meanwhile this article is intended to provide OKIB members with background information to make answering the survey question easier. Administration will use the survey results to determine whether the CCL is attaining its goals and, equally important, that the CCL is meeting the community’s wants and needs.

### Background

#### Federal legislation

In June of 2018, the federal government’s *Cannabis Act*, which legalized the possession and sale of cannabis in Canada, was passed. There are two aspects of Canada’s *Cannabis Act* that are important to understand.

First, Canada has retained sole authority to licence cannabis production and Canada only permits those holding a provincial licence (to distribute and sell) to purchase cannabis and cannabis products from federal licensees.

Second, the *Cannabis Act* makes it a criminal offence, among other things, for a person to cultivate a cannabis plant in a place that is not their dwelling house, unless authorized under the *Cannabis Act*. The *Cannabis Act* also makes it a criminal offence to distribute or sell cannabis unless a person is authorized to do so under the *Cannabis Act* or provincial legislation. It follows that absent a federal or provincial licence, cannabis dispensaries must obtain product from the black market. The lack of a federal licence means that anyone cultivating cannabis does so without any regulatory standards regarding pesticide use or standardized testing and so must sell their products on the black market.

#### Provincial legislation

In 2018, B.C. enacted the *Cannabis Control and Licensing Act* (CCLA). At this time officials who enforce BC’s CCLA are not engaging in ‘hard enforcement’ (i.e. not laying charges and prosecuting those who do

sell or distribute cannabis without a licence) opting to 'educate' dispensary businesses on the benefits of being licensed (i.e. can purchase regulated cannabis and products, which are tested and proven safe for human use), and thereby increase their client base and by extension be more profitable. According to BC officials this approach is working and every day a few more 'illegal' operators are applying for licences. B.C. officials will take enforcement action if and when a 'serious' case arises (i.e. selling to minors, marketing products as candy or other things that would appeal to children).

To date no cannabis dispensary or cannabis production facility operating on an OKIB Reserve has obtained a federal/provincial licence.

#### OKIB's CCL

To assert its inherent right of self-determination and jurisdiction over its traditional territory, OKIB passed the **CCL** on May 4, 2020. The **CCL** applies on Reserve lands and establishes a business licensing regime for Dispensaries and Cannabis Production Facilities, which dictates how Cannabis businesses located on Reserves shall operate. It is important to note that the **CCL** is not a by-law under the *Indian Act*, it is a law made pursuant to OKIB's inherent right of self-government that is enshrined and recognized under s.35 of *the Constitution Act 1982*.

#### **CCL: Purpose and Issues**

##### **1: Assert sovereignty over cannabis business licensing and leasing Certificate of Possession land to cannabis businesses.**

**Issue(s):** There are currently no issues related to asserting sovereignty over licensing, but there may be an issue with respect to leasing because the **CCL** defines "Lessee" as a Person who sub-leases from a head lessee, or leases or sub-leases from a Certificate of Possession holder". The **CCL** conflicts with s.28(1) of the *Indian Act*, which says that no one other than a Band member can legally use or occupy reserve land and that any deed, lease, contract, document or agreement of any kind that intends to permit a non Band member to do so is void. The only way a non-Band member could legally use or occupy reserve land under the *Indian Act* is under a permit issued by the Minister - see s.28(2) or by a lease issued by the Minister - see s. 58(3).

The issue is that it is an open question whether a court of law would find that the **CCL's** definition of "Lease" would trump the *Indian Act*.

##### **2: Provide Band members with employment opportunities in Cannabis production facilities**

There is no issue with this requirement at this time because there are currently no Cannabis production facilities operating on reserve. However, note that this requirement does not apply to Cannabis dispensaries.

##### **3: Protect children and youth (by restricting sales to anyone under the age of 19)**

So far there have been no incidents that required enforcement action regarding this second purpose; however, the reason may be related to enforcement (see discussion in 6 below)

##### **4: Ensure consumer health and safety through proper labelling.**

**Issue(s)** Currently CBD is a controlled substance under Canada's *Controlled Substances Act* and testing CBD violates the laws that police controlled substances. Thus, even if OKIB staff could obtain and have samples sent out for testing CBD levels, labs are not legally allowed to do so; consequently, there is no way for OKIB to verify whether the label information on black market CBD products is accurate.

A recent CBC Marketplace episode explained that black market CBD products don't undergo the same rigorous standards of testing that licensed CBD products go through and while testing is outlawed in Canada, it is permitted in the U.S. because CBD has been removed as a controlled substance in that country. The US Food and Drug Administration regularly tests CBD products and has found that many products do not contain the CBD claimed, and up to 50% of products tested contained undisclosed THC, which may cause unexpected drowsiness, anxiety or even paranoia.

Results from a New Brunswick study on whether or not black market cannabis products are equivalent to licensed products with respect to health and safety and potency found that claims of potency for black market products was significantly less accurate. An analysis of black market cannabis flower products shows that THC levels (which are legal to test for) are often well below what is claimed in the labels. Illegal edibles were also found to have much lower potency levels than was claimed (e.g. cookie and chocolate bar products had less than half the THC than was advertised). However, black market products still had an overall higher potency than licensed products. Current regulations prohibit a product from containing more than 10mg of THC and some black market edible products contain over 100mg. The study also found that black market cannabis and CBD products were contaminated with microbes and pesticides but not in licensed cannabis and CBD products. Contaminants can have serious health implications such as neurological symptoms that are difficult for doctors to diagnose.

## **5: Prevent organized crime involvement (i.e. keeping communities safe).**

**Issues:** There are two main issues with this purpose, which are explained below.

### Regarding 51% ownership

The provisions in the **CCL** that require that a business must be at least 51% owned by an OKIB member (or if the business is a corporation, that 51% of the shares in the company are owned by an OKIB member) were included to ensure organized crime could not become involved in a business on reserve. Verifying 51% ownership may sound easy to do, but such is not always the case. Administration has many examples of applicants, either by accident or design, who do not provide the required information. There are also instances where OKIB members have partnered with other persons or corporations, which requires that Administration investigate to determine whether the persons/corporations may be involved in organized crime. Even if every person/corporate partner provided the required information (often they do not), requires Administration to follow-up, verifying whether the documents provide all of the required information is obviously time-consuming and it is possible that the partners may have ties to organized crime. Without the time or expertise to conduct a proper investigation Administration cannot guarantee that organized crime is not involved.

### Regarding criminal record checks

The issue here is that criminal record checks are a 'snapshot in time' (i.e. are only required at time of application) because it is possible that applicants/partners involved at the time of application may not have a criminal record, there is no requirement for business owners to provide information about changes of shareholders, officers, and directors. Thus, there is no way to know if persons involved in the business have been charged and convicted of a criminal offence.

## **6: Enable enforcement**

**Issues:** there are two main issues with this purpose:

### Enforcement

OKIB's Community Safety Officer lacks the time, equipment and expertise to conduct investigations that could result in an enforcement action that may be prosecuted in court. Equally important is that because the **CCL** was not enacted under the *Indian Act* it is an open question whether the courts will hear any 'enforcement cases'.

### Co-enforcement/administration

OKIB approached BC officials to enquire whether it was possible to have B.C. government enforcement officials co-enforce the **CCL** along with OKIB's Community Safety Officer and to assist the Executive Director in performing the required background checks. In response the BC officials said that at this time the province is only considering having Indigenous nation officials enforcing BC's law and not vice versa. The officials also stated that these were early days for 'cannabis' legislation and at some point in the future it may be possible that BC may amend their laws to authorize joint enforcement, but realistically, that time is likely many years away.