Developing a Section 35 Aboriginal and Treaty Right to Cannabis Framework for Millbrook First Nation

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Introduction

The following draft text has been developed using the framework of affirming a Section 35 Aboriginal and Treaty Right to cannabis. Sections 25 and 35 of the Canadian Constitution were means of "entrenching" Aboriginal and Treaty Rights in the highest law of the land. The inclusion of Sections 25 and 35 were achieved through negotiations with the National Indian Brotherhood and its President, Chief Del Riley. A detailed account of the constitutional negotiation process from an Indigenous perspective can be found in Chief Riley's autobiography, The Last President.

The great strength of Sections 25 and 35 of the constitution is that they provide a powerful legal tool to articulate Indigenous interests in relationship to the Crown, and they provide a defensive shield to any Indian whose Aboriginal and Treaty Rights are being violated by any government employee or agency – be it Federal, Provincial or Municipal – including *Indian Act* representatives on reserves. Any law, government policy, or action may be declared unconstitutional if it violates Section 25 or 35 Aboriginal and Treaty Rights.

When it comes to cannabis policy – or indeed anything else – *Indian Act* Band Councils are strictly limited in what they can do. The authority and jurisdiction of the Chief and Council of "Millbrook First Nation" is determined by the *Indian Act*, and all decisions of the Council are ultimately subject to Ministerial approval. *Indian Act* Band Councils are creations of the Canadian Parliament and they exist to discharge the Crown's fiduciary responsibility to Indians. Though the representatives on Chief and Council are elected by Indians, they are not responsible to their electorate – only to the Minister of Indian Affairs.

As entities, Band Councils are not "Indians." They are municipal corporations empowered by federal legislation that can sue and be sued. Band Councils did not sign any treaties with the Crown, and they do not have any Section 25 or 35 Aboriginal and Treaty Rights. The individual members of Chief and Council hold Aboriginal and Treaty rights as individual "Indians" but as a collective, the Band Council has no such rights — only the powers it is delegated under the Indian Act.

Note: this is not to say that Micmac people — whether in Millbrook specifically, or throughout all Micmac territory in general — are not capable of "collectively" expressing their rights or interests. They may, but in order for these expression of collective interest (families, associations and societies, traditional governance structures etc.) to be compatible with Section 35 rights, they must operate and exist within the Micmac world in accordance with Micmac customs and convention, rather than in the world of corporate Canada and the Crown. A "collectivity" can not be imposed from outside of the Micmac nation.

As a result of the limitations of the *Indian Act*, Band Councils do not have the authority or jurisdiction to make an independent "cannabis law" on lands reserved for Indians. As Canadian government spokesperson William Olscamp stated, "There are no specific authorities or definitions in *The Indian Act* for the regulation of cannabis." The Band Council can no more make a "cannabis law" than it can make a "cocaine law" on reserve or overrule any other aspect of federal Canadian law.

Keep in mind that even Band Council Resolutions and bylaws are not enforceable by Canadian police authorities. The BCR has the legal power of a wish, nothing more. The powers that John A. MacDonald gave to Chief and Councils are extremely limited by the *Indian Act*, and they do not extend to making laws about cannabis.

Band Council regulations concerning cannabis must "harmonize" any cannabis regulation they make with Federal and Provincial cannabis laws, or risk incurring severe legal liabilities. When it comes to cannabis, the key issue is where the cannabis is sourced from. Does it come from Health Canada's Licensed Producers – the only legal option under Canada's laws? Or does it come from independent Indigenous sources, sourced through a "red," "grey," or "black" market of growers and manufacturers?

This is the dilemma for any Band Council cannabis regime. If laws are passed saying that all cannabis on the reserve must come through Health Canada, than the Band Council is violating the Section 35 rights of the Indians on reserve. If on the other hand, the cannabis product does not come through Health Canada, then the Band Council and its employees are liable for breaking the Federal and Provincial *Cannabis Acts* and may face severe financial penalties as well as a maximum sentence of up to 14 years in jail.

When a version of Kahnawake's "cannabis law" — which was insufficiently "harmonized" with Canadian cannabis laws — was implemented at Six Nations, the Six Nations Cannabis Commission was prevented from holding a bank account and had to do all its business as a wholesaler in cash. When it became clear that Canada had no intention of ever recognizing the validity of the Six Nations' law, and that the members of the commission would be legally liable for the "illegal" cannabis law they were trying to implement, the commissioners all resigned. Six Nations spent more than $4 million dollars in consulting and management fees to create an

unenforceable, illegal law and an unworkable cannabis committee. Now over 30 grassroots cannabis shops dot the reserve, and they either self-regulate themselves through a community association, or operate independently.

While a Band Council cannot make its own cannabis law, we do note that it is possible for the Band Council to proclaim what we have termed a “Section 35 Compatible Millbrook Cannabis Framework.” This document affirms the inherent Micmac Aboriginal and Treaty Rights to cannabis, and promotes health and safety norms compatible with the customs and conventions of the Micmac people.

Such a cannabis framework cannot be enforced on anyone, but should band members vote in favour of ratifying the document as a statement of rights in a referendum, it may be used as a tool to defend and extend these rights and to legitimize a growing Micmac economy.

Understanding Aboriginal and Treaty Rights

What actually constitutes an “Aboriginal and Treaty Right” was left undefined in the constitutional negotiations between the National Indian Brotherhood and the Federal Government that led to Section 25 and 35 of the *Constitution Act*. The government promised to hold a series of further constitutional meetings with Indigenous organizations to discuss the matter, but after the first such gathering, the government never came back to the table.

Consequently, the Canadian Supreme Court made a series of rulings concerning Section 25 and 35 Aboriginal and Treaty Rights in which an all non-Indigenous court, based on a deeply racist and self-interested legal tradition, defined its own notion of Aboriginal and Treaty Rights for Indigenous people. While the supreme court justices made close examinations of treaty texts in decisions such as *Guerin, Van der Peet, Marshall*, they interpreted Aboriginal and Treaty Rights in a one sided way – contrary to the spirit of the Constitutional negotiations and to the Indigenous understanding of our own rights and treaties.

In referring to the constitutional negotiations of the late 1970s and early 1980s, Chief Del Riley wrote in his autobiography that,

> “Leaving 'Aboriginal Rights' undefined at this time gave First Nations many advantages. Firstly, it gave First Nations exclusive rights to define their own rights and sovereignty. I felt that this was justified since our people defended the borders of Canada since the British invaded our First Nations territories in the 1760's, up until when the Americans failed to defeat First Nations people in the war of 1812 after the British abandoned the war. We as First Nations have every right to define our own rights as undefeated nations. The British may have

> defeated and wiped out the Indigenous peoples in dozens of other nations, but here in Canada, they were forced to sign treaties and honor our nationhood."

Chief Riley continues: "Having the term 'Aboriginal Rights' entrenched into the Canadian Constitution meant the crucial recognition of our rights as sovereign nations established before European contact. We also considered that these rights may evolve with our own sovereignty, rights, and interpretations. Our interpretation of Aboriginal Rights may not have been what the All-Party Committee wanted to hear, but we articulated a nation to nation interpretation of rights and treaties. This was the 'outside the box' thinking that I searched for, and the type of thinking that was delivered in our own constitutional think tank meetings."

Chief Riley and the rest of his constitutional negotiating team produced their own document to describe what was meant by the term "Aboriginal Rights." This "Declaration of First Nations" continues to inspire the Assembly of First Nations, and a framed signed copy of the document hangs in their office. The text reads as follows:

> We the Original Peoples of this land know the Creator put us here.
>
> The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind.
>
> The Laws of the Creator defined our rights and responsibilities.
>
> The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs.
>
> We have maintained our Freedom, our Languages, and our Traditions from time immemorial.
>
> We continue to exercise the rights and fulfil the responsibilities and obligations given to us by the Creator for the land upon which we were placed.
>
> The Creator has given us the right to govern ourselves and the right to self-determination.
>
> The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.

As Chief Riley notes in his autobiography that, "We understood this First Nations declaration to be the basis for Aboriginal and Treaty Rights for all First Nations in North America. Most importantly, the declaration is based on a spiritual position. Or as a European would say, it is a religious position. They can't trivialize it. A group of well respected elders and political leaders came together to write this declaration. The elders insisted that we add the spiritual component

while discussing our rights. What is so significant about the spiritual context is that it's shared by First Nations right across Turtle Island. Unlike the Christian religions where they have infinite doctrinal differences, for our people in North America, there's only one interpretation of our spiritual and traditional position, and it's there in the declaration."

The declaration was accompanied by a series of "Treaty and Aboriginal Rights Principles" articulated by the Joint Council of the National Indian Brotherhood which reads as follows:

> 1. The Aboriginal title, Aboriginal rights and treaty rights of the Aboriginal people of Canada, including:
>
> (a) all rights recognized by the Royal Proclamation of October 7th, 1763;
>
> (b) all rights recognized in treaties between Crown and nations or tribes of Indians in Canada ensuring the Spiritual concept of Treaties;
>
> (c) all rights acquired by Aboriginal people in settlements or agreements with the Crown on Aboriginal rights and title;
>
> are hereby recognized, confirmed, ratified and sanctioned.
>
> 2. "Aboriginal people" means the First Nations or Tribes of Indians in Canada and each Nation having the right to define its own Citizenship.
>
> 3. Those parts of the Royal Proclamation of October 7th, 1763, providing for the rights of the Nations or tribes of Indians are legally and politically binding on the Canadian and British Parliaments.
>
> 4. No law of Canada or of the Provinces, including the Charter of Rights and Freedoms in the Constitution of Canada, shall hereafter be construed or applied so as to abrogate, abridge or diminish the rights specified in Sections 1 and 3 of this part.
>
> 5. (a) The Parliament and Government of Canada shall be committed to the negotiation of the full realization and implementation of the rights specified in Sections 1 and 3 of this Part.
>
> (b) Such negotiations shall be internationally supervised, if the Aboriginal peoples parties to those negotiations so request.
>
> (c) Such negotiations, and any agreements concluded thereby, shall be with the full participation and the full consent of the Aboriginal peoples affected.

6. Any amendments to the Constitution of Canada in relation to any constitutional matters which affect the Aboriginal peoples, including the identification of the definition of the rights of any of those peoples, shall be made only with the consent of the governing Council, Grand Council or Assembly of the Aboriginal peoples affected by such amendment, identification of definition.

7. A Treaty and Aboriginal Rights Protection Office shall be established.

8. A declaration that Indian Governmental powers and responsibilities exist as a permanent, integral fact in the Canadian polity.

9. All pre-confederation, post confederation treaties and treaties executed outside the present boundaries of Canada but which apply to the Indian Nations of Canada are international treaty agreements between sovereign nations. Any changes to the treaties requires the consent of the two parties to the treaties, who are the Indian Governments representing Indian Nations and Crown represented by the British Government, the Canadian Government is only a third party and cannot initiate any changes.

Joint Council of the National Indian Brotherhood, November 18, 1981

Signed by Delbert Riley, President, N.I.B. and Chief Charles Wood, Chairman, Council of Chiefs.

These documents provide a foundation for the understanding of Aboriginal and Treaty Rights as understood by the Indigenous leadership which succeeded in entrenching these rights into Canadian law. Because the specifics of nature of Aboriginal and Treaty Rights will vary from nation to nation and from treaty to treaty, the oral history and specific understandings of the Indigenous peoples towards their treaty are vital to ensure that these rights are correctly articulated.

It is also important to note that when the treaties were made, the treaty text and process were not constructed by the Indigenous parties in the process. While the European nations were required to express themselves in a manner that was culturally intelligible to Indigenous people, there was very clearly a language barrier. The Indigenous people making these treaties did not understand or subscribe to European concepts of law, royal sovereignty, and private property.

The treaties should be understood as essentially an introduction between two sovereign nations willing to make peace for their mutual benefit. Correct interpretations of any treaty require a response to the document from the Indigenous nation involved, and require an interpretation of the treaty *and* the corresponding Aboriginal rights which animate it. Aboriginal and Treaty rights thus need to be understood as always being *interlinked* and should not be viewed as separate.

Most aspects of our Aboriginal rights were not articulated in our treaties, although the treaties themselves give recognition to our sovereign nationhood.

A Section 35 Compatible Millbrook Cannabis Framework

The following elements constitute Section 35 Aboriginal and Treaty Rights pertaining to cannabis and trade which could be proclaimed by the Millbrook First Nation and the Micmac Rights Association to help provide political clarity on these matters.

1. The Micmac people are a free and sovereign people with the inherent right to individual and collective self-determination, including the development of a self-supporting, self-regulated economy outside of the system of the Crown and its Canadian government.

2. All Micmac people have their own special relationship with the Creator/Creation and are free to live as they please. The only limits on their freedom are that they do not cause harm to others.

3. Cannabis is a medicine provided by creation. It grows upon Micmac land. All people have a right to a relationship with creation, and Micmac people have the right to sustain themselves through their relationship with creation on their own lands.

4. In the process of sustaining themselves from creation, Micmac people create an economy and engage in trade with “free liberty” with others from within and outside their nation. Such trade is a means for existance, and is an inherent Aboriginal right which is so described in the Peace and Friendship treaties made with the British Crown. The treaty of 1752 notes that the Micmac shall “have free liberty of Hunting & Fishing as usual: and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be Exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.”

5. Collective self-determination is organic and flows from family relationships and the selection of leadership from within and among the people using consensus decision making systems where all have equal voice and decision making power. Family and kinship relations are the responsible entities for dealing with individuals in their clan/extended family who are causing harm to others. The seven distinct regions or districts of Mi'kma'ki represent the territories of local families and their chieftainships. Customary forms of collective decision making have suffered greatly from the impacts of

colonialism and the imposition of the *Indian Act*, but they are being rebuilt and they are the appropriate forums for collective decision making – not racist and colonial entities created by the *Indian Act*, that are influenced by foreign religious thinking and residential school indoctrination.

6. As per Section 35 of the Canadian Constitution, the *Indian Act* Band Council system does not have the right to limit or control the individual or collective Aboriginal and Treaty Rights of the Micmac people.

7. Micmac lands and waters have never been surrendered to the Crown. The treaties between the Micmac and the Crown are “peace and friendship treaties” and do not involve the surrender of any lands, waters or resources. Micmac people thus have the right to exercise all inherent Aboriginal and Treaty rights throughout all their unceded lands – not just on the reserves established through the *Indian Act*.

8. Micmac people have the Aboriginal and Treaty right to trade tax free in all goods and services that are legal in Canada — including cannabis, tobacco, alcohol, and gaming.

9. Because the Micmacs are a free and sovereign people, Micmacs do not pay or collect tax to, or for the Canadian government, the Crown, or anyone else.

10. Licences are for privileges, not rights. Micmac people do not need to buy licences for their rights to participate in their national economy on their unceded lands.

11. Micmac people have the inherent sovereign right to use natural medicines, and the inherent sovereign responsibility to provide medicines to those who need them. Micmac people have the sovereign right to grow, process, and sell cannabis, tobacco and any other product in accordance with their customs and traditions.

12. Micmac people have the right to freely organize and associate together to improve the quality and safety of the cannabis industry. One such approach is that followed by the Micmac Rights Association which is organized in such a way as to be consistent with our Section 25 and 35 Aboriginal and Treaty Rights. The Association has issued a set of Community Standards for the sale of cannabis at Micmac Dispensaries that member stores agree they will uphold for the public interest and consumer safety.

Attached below are community standards for the sale of cannabis at Micmac dispensaries that has been adopted by the Micmac Rights Associations, a grassroots group which brings together many Micmac cannabis dispensary owners and which meets at least twice a year. This Community Standards document can be built on, and provides an actually existing framework for the self-regulation of health and safety standards at Micmac cannabis dispensaries.

Micmac Rights Association Community Standards for the sale of Cannabis at Micmac dispensaries

1. **General**
    - **a.** These community standards on the safe operation of cannabis dispensaries have been adopted by the members of the MRA to protect the Micmac people and our visitors.
    - **b.** The community standards document is a “living document” that may be altered through the decision making process of the MRA at one of its biannual meetings.
2. **Youth Protection**
    - **a.** Micmac Cannabis Dispensaries owners who belong to the MRA undertake to accept the following regulations concerning youth access to cannabis.
    - **b.** Don’t sell cannabis products to those under 19.
    - **c.** ID people looking under 25.
    - **d.** Don’t sell products that are marketed to a youth market.
3. **Health and Safety**
    - **a.** All products sold by members of the MRA on the Territory of the Micmac Nation must be:
        - **i.** Tested for their potency.
        - **ii.** Inspected to ensure that they are not mouldy.
        - **iii.** Packaged in childproof containers.
        - **iv.** When handling cannabis products, all employees should wear gloves and take steps not to mix different types of cannabis products together.
4. **Customer info**

a. All retailers belonging to the MRA must prominently display a MRA made sign in their business indicating that they belong to the association and follow its Community Standards.

b. All retailers must hold their customer data in a secure place.

5. Complaints

a. Any and all complaints about the conduct of a member of the MRA shall be referred to the MRA executive or the MRA Ombudsperson where the matter shall be addressed.

6. Labelling of product

a. Wherever possible, cannabis products should be labelled as to how they were grown, ie. as Hydroponics, Indoor, Outdoor, Organic, etc.

7. Security

a. Shops undertake to keep their premises safe, and the community as a whole.