Economic Development Related Legislative Needs for First Nations in Ontario

Prepared for

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INTRODUCTION

The Chiefs of Ontario ("**COO**") has asked Olthuis, Kleer, Townshend LLP ("**OKT**") to prepare a report outlining a review of legislation in Ontario which hinders economic development for First Nations in the Province. OKT's recommendations and review are underpinned by our mission to ensure that the rights of Indigenous people are recognized and affirmed and further, that Indigenous people have a decision-making role over activities that occur in their territories. These values inform our recommendations with respect to how legislation should be changed to enhance economic development for First Nations.

"**Economic development**" is a phrase commonly used to describe a broad range of initiatives by First Nation communities to build economic prosperity for themselves. Historically, opportunities for economic development for First Nation communities were minimal, in part because of barriers associated with systemic racism and the colonial legacy of the *Indian Act*. Communities were often forced to stand by as resource development companies exploited natural resources of the land and left First Nation communities with devastating after-effects and few if any benefits accruing to members from these communities. Though large-scale exploitation of lands belonging to First Nations still, in some cases, occurs without significant benefit to communities, opportunities for economic development have expanded. Some First Nations succeed in generating significant benefit for their communities through agreements with resource development companies and ventures in renewable energy projects and ancillary businesses, in addition to a wide range of thriving on-reserve businesses.

The *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") was adopted by the UN General Assembly in 2007, and Canada became a full supporter, without qualification, of UNDRIP in 2016.[1] UNDRIP sets out individual and collective rights of Indigenous peoples in areas such as culture, language, resources, education and governance. Among other things, UNDRIP recognizes the rights of Indigenous peoples to self-determination and Indigenous institutions, to lands, territories and resources, and to participate in decisions affecting Indigenous communities through free, prior and informed consent ("**FPIC**"). FPIC is properly understood as one process through which Indigenous peoples can exercise self-determination. When FPIC is incorporated into regulatory processes, it has the potential to sow the seeds of reconciliation and significantly enhance First Nation economic development. In advocating for legislative change related to FPIC implementation, COO should leverage Canada's stated support of UNDRIP, as well as the recently enacted *United Nations Declaration on the Rights of Indigenous Peoples Act* (Canada).[2] This statute requires the Government of Canada to work in consultation and cooperation with Indigenous peoples to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP. This obligation should be a key consideration in negotiating with Canada on federal legislative changes.

Pursuing economic development can strengthen the ability of First Nations to assert their rights and jurisdiction, in addition to assisting members to meet their financial needs. Given this, and the stubborn wealth gap that still persists between First Nations and broader Canadian society,

[1] United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295).
[2] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

Ontario's regulatory space must aim to maximize economic development potential for First Nations.

Where Economic Development Occurs

Because of the size of most reserves, and as a product of the challenges of navigating on reserve tenure instruments, the site of Indigenous economic development occurring across Canada is frequently outside reserve boundaries. The legal regime for conducting business on-reserve is set out in the *Indian Act* and maintains a key policy objective of the Canadian government with regards to First Nation peoples, namely, the inalienability of reserve land. As such, the business environment on-reserve is unique from the environment off reserve, creating many restrictions that can impede the speed with which business is conducted.

Reserves are federally administered lands under section 91(24) of the *Constitution Act*. Underlying title rests with Her Majesty the Queen in Right of Canada, and Canadian courts have found a fiduciary obligation in the Crown's dealing with reserve lands. As such, decisions regarding on-reserve development generally also require agreement from Indigenous Services Canada.[3] The fiduciary obligations accompanying the Crown's administration of reserve lands means there are competing priorities of the Minister when considering whether to issue land use approvals. While on-reserve economic development projects are to be encouraged, the risk of Crown liability in assenting to proposed developments requires significant Crown oversight of the diligence process. This tends to result in an inability to meet commercially reasonable timeframes necessary to bring projects to fruition. Band referendum requirements and election cycles (which are often short) add additional unpredictability to a process that has persisted as a strong and stubborn disincentive to undertake on-reserve economic development projects. These difficulties have ultimately increased the importance of off-reserve economic development, which forms the focus of the majority of this report.

An additional factor contributing to this trend is the engagements between First Nations and industry that have arisen from the body of case law requiring First Nation consultation and accommodation. Project proponents are increasingly discovering the practicality of obtaining consent from the communities in whose traditional territories their projects are located; and that this consent outweighs the uncertainty of an engagement process seeking merely to evidence consultation. This recognition has shifted the landscape of economic development significantly, with a recent departure from reliance of on-reserve development and businesses to increasingly sophisticated partnerships and benefit agreements with off-reserve proponents. Fostering a regulatory landscape that rewards consent is a common thread throughout the analysis of legislation in this report. Where proponents are incentivized to seek consent and partnership with First Nations, communities see far more benefits.

[3] Section 18 of the *Indian Act* states "the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band."

How Economic Development Occurs

In proponent-driven off-reserve economic activity, economic development for First Nations often takes the form of one of two types of consent-based agreements:

1. **Impact Benefit Agreements.** Impact Benefit Agreements largely pertain to projects where the nature of the impacts is large and/or the financial, social-cultural, or political risk of First Nation ownership in the Project is too high to justify. In these agreements, the focus is on i) the steps needed to minimize impacts; ii) the payment of compensation for impacts that cannot be avoided; and iii) opportunities for replacement of the traditional livelihoods that stand to be altered as a result of the project's implementation.

2. **Equity Partnership Agreements.** Equity Partnership Agreements largely pertain to projects that align with a First Nation's values of environmental stewardship and the financial risk of the First Nation participating are manageable, i.e., projects that First Nations want to be owners of. In these agreements the focus is on i) establishing joint ownership and arranging the financing necessary to maximize the benefits from Indigenous participation; ii) ensuring recourse back to the First Nation for risks of the Project is minimized; and iii) encouraging member participation in the Project, by influencing project design with considerations unique to Indigenous groups and through employment and sub-contracting opportunities.

Both types of consent agreements are privately negotiated, legally enforceable agreements that establish formal relationships between impacted Indigenous communities and project proponents. They apply to projects undertaken on Crown lands or privately tenured land. Each of them serves as recognition of the impacts on Aboriginal and Treaty rights that will result from development and provide a means to address these impacts. This gives a proponent both regulatory and investment certainty.

Consent agreements are the result of legal frameworks that seek to facilitate engagement and participation of groups impacted by development. While the proponent may see the consent agreement like a contract, from the Indigenous perspective these agreements serve as a step towards greater recognition of Aboriginal and Treaty rights and, by placing certain conditions on how the development may proceed, an expression of Indigenous self-determination. In considering how legislation may be modified to enhance economic development for First Nations, what is generally required are the regulatory mechanisms to encourage consent: funding to explore partnerships, regulatory guidelines to limit risk of First Nations involvement, and reducing the information burden on applications for registration for projects that have adequately addressed the need for meaningful Indigenous participation.

There is also significant economic activity that is not driven by proponents seeking consent from First Nations. In many of these cases, we recommend revising legislation and policy to reduce risks and enhance access to markets for First Nation proponents through funding and training, or to incorporate preferential treatment for First Nation-owned entities in procurement policies. This is in addition to the broader discussion on barriers to First Nation-led development discussed in greater detail in the Tax and Finance component of this report.

Limitations

This report focuses on community-led economic development, which primarily relates to economic activities undertaken by First Nation-owned entities, rather than by individual community members. Activities conducted by Indigenous individuals, with the exception of the "Taxation and Finance" section below is, for the most part, outside the scope of this report.

This report also is intended to focus on how laws can be amended now to improve economic development outcomes for First Nations in the near term. In this regard, we have taken the existing law, both in legislation and judicial decisions, as is. This is not to say that much progress isn't still needed in reforming Canada's legislative and judicial institutions to better advance indigenous rights in the country. In our view, there is a still a very long way to go before the Canadian legislative regimes associated with First Nations are in any way adequate, and there is still a very long way to go before the making of laws generally properly reflects the jurisdiction of Canada's first peoples. However, this report is intended to be a present and practical guide of matters that can be implemented now. Working with what we have, these recommendations should assist in leading to better prosperity in the near future, providing resources to continue the project of advancing indigenous rights and indigenous jurisdiction over the long term.

It should also be noted that this report does not cover every single statute in Ontario and Canada and does not examine each and every industry. This report focuses primarily on the industries that First Nations have historically participated in or are exposed to as a result of the economic activity occurring in proximity to the majority of First Nations in Ontario, which are often those industries related to natural resources. Should the Committee require a review of an industry or issues not contained in this report, OKT would be happy to conduct this follow-up research.

SUMMARY OF RECOMMENDATIONS

Aggregates

We recommend that COO advocate to:

- Incorporate a requirement for FPIC (free, prior and informed consent) in the regulatory system for aggregate projects, allowing First Nations to drive development on their terms.
- Expand the Ministry of Northern Development, Mines, Natural Resources and Forestry's policy of resource revenue sharing to aggregate mining activity on private lands. This would significantly broaden communities' entitlement to revenues.

Cannabis

We recommend that COO advocate to:

- Revise the *Cannabis Act* (Canada) to allow the Minister of Health to enter agreements with First Nations permitting them to assert collaborative regulatory control over certain aspects of the cannabis industry.
- Revise the *Cannabis Act* to allow for regulatory delegation to First Nations regarding possession, sale and distribution of cannabis, and enforcement under the *Cannabis Act*.
- Provincially, expand licensing powers for First Nations, and create an exception to the Ontario Cannabis Retail Corporation's exclusive right to sell cannabis to holders of retail store authorizations. These changes would enable First Nations to do their own licensing and sourcing, stimulating economic growth.

Commercial Fishing

We recommend that COO advocate to:

- Create express acknowledgement of a minimum commercial right to fish in Ontario's *Fish and Wildlife Conservation Act*, which would enable access to licenses and quota as of right.
- Establish funding that allows communities to purchase fishing licenses from incumbent license holders where licenses as of right are not sufficient.
- Develop federal and provincial funding opportunities in the aquaculture space, which could represent a lower risk, sustainable alternative to traditional commercial fishing activity.

Renewable Energy Generation

- We recommend that COO advocate for a procurement process to be developed for renewable energy projects to contribute to the energy supply in Ontario, and for this process to include priority scoring for entities and projects that are owned by First Nations.
- This could be modelled on Ontario's former Large Renewable Procurement program, which has been hugely beneficial for communities given renewable energy generation's steady returns and alignment with many First Nations' values of environmental stewardship.

Energy Transmission

We recommend that COO advocate for:

- A revision to Section 96(2) of the *Ontario Energy Board Act*, which outlines the factors to be considered in leave to construct decisions in the electricity context. Currently, the only factor to be considered is "the interests of consumers with respect to prices and the reliability and quality of electricity service." This provision should be repealed or revised to include a requirement to consider whether the duty to consult and accommodate has been properly discharged.
- Increased involvement as a regulator for First Nations in leave to construct decision making and planning processes.

Forestry

We recommend that COO advocate for:

- Full time employment funding for representation on interdisciplinary planning teams during the forest management process. This is commensurate with the capacity level that this involvement requires and would allow for more meaningful engagement.
- A requirement that First Nations confirm that they have been adequately consulted at each forest management planning stage to ensure that no communities are left behind as a result of strict, tight timelines.
- A long-term transition of the Ministry of Northern Development, Mines, Natural Resources and Forestry's role to become support-oriented, with approval bodies being formed from First Nations in whose territory the forestry activity takes place.

- Advocacy should also focus on:
    1. Introducing a requirement or system that prioritizes retaining First Nations' contractors;
    2. Incentives and funding for value-added production to diversify the sector;
    3. Financing programs catered to enabling First Nations and members to access training programs in forestry, and to purchase businesses owned by aging proprietors in this space.

Mining

Advocacy in the mining space should focus on:

- A revision to the *Mining Act* to require proponents to fund archaeological assessments prior to early exploration, allowing for identification of values and rights that are affected by mining activity and increasing leverage for First Nations.
- The definition of accommodation to be added to the *Mining Act*, which would clarify this often-difficult negotiating point in favour of First Nations.
- Enhancing the current "withdrawal" process by enabling First Nations to apply for landscape-level parcels of land to be withdrawn from exploration eligibility.
- A requirement in law and policy for robust engagement funding at the exploration plan or permit stage, which would settle another negotiating point at the outset of engagement.
- Investment in research and development to enable a transition away from destructive extraction practices in order to make activity in this space less harmful to rights and values.

Provincial Parks and Protected Areas

We recommend that COO advocate for:

- Increased recognition of Aboriginal and Treaty rights in the *Provincial Parks and Conservation Reserves Act*, specifically by including a provision enabling the Ministry of the Environment, Conservation and Parks to enter into agreements with First Nation governments to carry out the purposes of the Act. This would enable First Nations to plan and manage provincial parks, build capacity, and create a steady revenue stream.
- Creation of a regulated carbon market in Ontario that enables First Nations to enter into long-term environmental protection agreements in their territories, and which recognizes rights to carbon for First Nations in their traditional territories.

- Greater long-term funding to be allocated to guardian programming in Ontario and at the federal level, expanding the market available to First Nations in this space.

Procurement

- We recommend that COO advocate for revisions to Ontario's Aboriginal Procurement Program and Canada's Procurement Strategy for Aboriginal Businesses. These revisions should include mandated reductions in the value of bids made by First Nation-owned entities in contract price evaluation and ranking in procurement processes. We recommend that this advocacy focus on Northern and rural Ontario to increase its political viability.

Taxation and Finance

- **Tax.** We recommend that section 87 of the *Indian Act* remain, despite the flaws in its interpretation by courts and federal tax authorities, because it provides some level of protection against the Crown's imposition of tax. Instead, we recommend that COO advocate for tax policy that enables First Nations to exercise tax powers if and when they chose to do so and for section 87 to become subject to First Nations' jurisdiction.
- **Finance.** We recommend that COO advocate to codify the ability of status individuals and bands to waive any one of the restrictions on the attachment of security interests and seizure of property on reserve contained in section 89 of the *Indian Act*. Doing so would enable streamlined financing transactions where collateral includes on-reserve property.

Tobacco

We recommend that COO advocate to:

- Change the current security bond requirement for manufacturers and wholesalers of unmarked cigarettes and unmarked fine cut tobacco.
- Change the Ministry of Finance's new policy associated with cigar wholesaling on-reserve. This requires wholesalers to submit annual sales plans that get approved by the Ministry, and this significantly limits the potential sales volumes by these retailers.

CONSIDERATIONS FOR IMPLEMENTATION

In the context of both the federal Parliament and the provincial Legislature, laws are created by the passing of bills through the legislative branch of government. In each case, there are two main categories of bills that can be introduced to the legislative branch: public bills and private bills. In Ontario, there are three kinds of public bills: (1) **Government Bills**, which are introduced by Cabinet Ministers; (2) **Private Members' Public Bills**, which are introduced by Members of Provincial Parliament who are not Ministers; and (3) **Committee Bills**, which are introduced by the Chairs of certain Standing Committees.[4] In Canada, there are two kinds of public bills: (1) **Government Bills**, which are introduced by Cabinet Ministers; and (2) **Private Members' Public Bills**.[5] Both Ontario and Canada also have the option of private bills, which generally allow a particular person or group of persons an exemption from the general law, or provide for something that cannot be obtained under the general law. In both cases, bills proposing the expenditure of public funds must be accompanied by a royal recommendation, which can only be obtained from the government and be presented by a Cabinet Minister. **With this in mind, the vast majority of the legislative reforms recommended in this report will need to be initiated by Government Bill and will thus require advocacy to focus on Cabinet Ministers.**

In general, policy proposals will be developed by Ministers, considered by appropriate Cabinet committees, and recommendations are then made to Cabinet. If Cabinet approves, the responsible Ministry issues drafting instructions to the Legislation Section of the Department of Justice (in the context of federal laws) and the Office of Legislative Counsel (in the provincial context). A draft bill is then approved by the responsible Minister and then Cabinet before being introduced in federal Parliament or the provincial Legislative Assembly.

For each industry-specific recommendation we make in the following report, we have included a note on implementation that represents our recommended approach for advocacy. Generally speaking, we recommend advocating with the applicable Cabinet Minister for most changes to statutes and regulations and advocating with either the applicable Cabinet Minister or Ministry staff for policy changes and changes to standard operating procedures.

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[4] How an Ontario Bill Becomes Law, a guide for legislators and the public, August 2011, Legislative Assembly of Ontario, webpage: <https://www.ola.org/sites/default/files/common/how-bills-become-law-en.pdf>, page 4.

[5] How new laws and regulations are created, Government of Canada webpage: <https://www.justice.gc.ca/eng/laws-lois/index.html>.

AGGREGATE RESOURCES

Overview of Aggregate Resources Regulation

Throughout Ontario, and in particular in Southern Ontario around the Greater Golden Horseshoe, there are enormous demand-side pressures for aggregate resources. In the 20 years prior to 2016, Ontario consumed approximately 3.4 billion tonnes of aggregate, or about 170 million tonnes per year, on average, and these sums are projected to increase.[6] Given these demand pressures and considering that aggregates in Ontario are primarily sourced from material extracted from Ontario pits and quarries (rather than imports or recycled materials), significant economic activity exists in Ontario in this industry.

While we have made recommendations related to how the current regulatory regime could be changed to lead to more meaningful engagement with First Nations, we strongly recommend advocating for initiatives related to innovation in alternatives to traditional aggregate resources with a focus on sustainability, as mining traditional aggregates has negative environmental consequences. Ontario's growing communities require immense quantities of raw materials for producing foundational infrastructure. The demand associated with this will not simply "go away", and the Ministry of Northern Development, Mines, Natural Resources and Forestry ("**MNDMNRF**") should be prioritizing funding for innovative solutions to this difficult problem. Without innovative solutions that change how resources are used in this context, legislative changes will only go so far.

MNDMNRF is tasked with regulating the aggregates industry.[7] MNDMNRF, through the *Aggregate Resources Act*, has several responsibilities with regards to aggregates, including:

1. Ensuring sufficient aggregates through the "management of aggregate resources in Ontario";
2. Regulating permitting for aggregate operations in Ontario; and
3. Ensuring remediation occurs on lands from which aggregates have been excavated and minimizing the environmental impacts of aggregate operations.[8]

The *General Regulation* under the *Aggregate Resources Act* sets out the application process for aggregate mines.[9] Proponents must prepare site plans in accordance with standards set out in the "Aggregate Resources of Ontario: Site Plan Standards" dated August 2020 and published by MNDMNRF.[10] Proponents must also submit technical reports as required under "Aggregate Resources of Ontario: Technical Reports and Information Standards" dated August 2020.[11] Once a site plan and technical reports are prepared and submitted to MNDMNRF and MNDMNRF confirms that the application is complete, notification and consultation begins. After a process of consultation and addressing comments from the public by the proponent, MNDMNRF reviews the

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[6] *Supply and Demand Study of Aggregate Resources Supplying the Greater Golden Horseshoe*, Golder Associates, Report No. 1540982, August 2016, Executive Summary, page 3.
[7] Aggregate Resources, Ministry of Northern Development, Mines, Natural Resources and Forestry Webpage: <https://www.ontario.ca/page/aggregate-resources>.
[8] *Ibid*.
[9] *General, O Reg 244/97.*
[10] *Ibid*, s 0.2(2).
[11] *Ibid*, s 0.2(4).

application along with the results of the consultation process. MNDMNRF is then required to make a determination on whether any applicable objections to the application are addressed, whether an application should be approved with or without conditions, and whether to refer the application to the Ontario Land Tribunal for a decision.[12]

AGGREGATE MINING ON PRIVATE LAND

On private land, proponents need licenses in order to operate a pit or quarry, as required by the *Aggregate Resources Act*. Class A licenses are issued where more than 20,000 tonnes of aggregate are removed annually, and Class B licenses are issued where 20,000 tonnes or less of aggregates are removed annually.[13] The *General Regulation* under the *Aggregate Resources Act* obligates licensees to pay annual fees that are the greater of a flat fee ($741 or $370 depending on the amount of aggregate permitted to be mined under the license class) or 21.3 cents per tonne of aggregate excavated at a given site of a pit or quarry during the previous calendar year.[14] Fees collected from licensees are allocated according to Section 3 of the General Regulation, as follows:

- 3% to the Aggregate Resources Trust for rehabilitation and research
- 61% to the local municipality in which the site is located
- 15% to the upper-tier municipality in which the site is located
- 21% to the Crown (minimum)[15]

The allocation of fees to the Crown is, presumably, primarily related to its role as regulator in this space. Allocating funds to municipalities is attributable to the toll that aggregate mines take on local infrastructure in the vicinity of pits and quarries. This toll can be significant and the allocation of the vast majority of fees to these local governments is intended to assist with mitigating these adverse impacts.

AGGREGATE MINING ON CROWN LAND

On Crown land, proponents need to be issued a permit in order to operate a pit or a quarry, pursuant to Section 34 of the *Aggregate Resources Act*. Permit holders are subject to the requirement to pay a royalty to the Crown for every tonne of aggregate extracted. This figure is currently 53.9 cents per tonne for 2022 production.[16]

CONSULTATION OPPORTUNITIES IN THE AGGREGATE RESOURCES REGULATORY REGIME

As of 2017, the *Aggregate Resources Act* requires MNDMNRF to consider whether adequate consultation with Aboriginal communities has been carried out before exercising powers under the *Aggregate Resources Act* relating to licences or permits that have the potential to adversely affect established or credibly asserted Aboriginal or treaty rights.[17] Once approved, pits and quarries are

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[12] *Ibid*, s 0.3.
[13] *Aggregate Resources Act*, RSO 1990, c A.8, s 7(2) ["*ARA*"].
[14] *General, O Reg 244/97*, s 2.
[15] *Ibid*, s 3.
[16] Aggregate Resources, Webpage: <https://www.ontario.ca/page/aggregate-resources>.
[17] *ARA*, *supra* note 13, s 3.1.

issued for the lifetime of the quarry. Prior to 2017, there was no explicit requirement for consultation with Aboriginal communities, and concerns presented by many communities were often ignored or minimized by industry proponents and MNDMNRF alike. As a result, for quarries in existence prior to 2017 (which in many cases continue to operate), the consultation obligation with Aboriginal communities may have never been adequately discharged.

Economic Development in Aggregate Mining

The environmental degradation that accompanies aggregate mining often makes this an undesirable area for First Nation economic development. That said, aggregate mining is highly likely to continue to be a prevalent development activity in all areas of the province where infrastructure development occurs. The hallmark of this industry to date has been reluctance to import aggregates by all parties: industry and government. High transport costs create a need to source aggregates as locally as possible, with margins suffering and project costs running up where this is not possible. With these factors in mind and the likelihood of this industry remaining prevalent in Ontario, there are a number of ways economic development in this space could be enhanced for First Nations.

Firstly, the adoption of free, prior and informed consent ("**FPIC**") as part of the applicant approval process would significantly increase the leverage First Nations have in negotiating impact and benefits agreements in this sector. A consent standard could also evolve to have First Nations acting as a regulator considering and contributing to the decision to approve applications going forward. Achieving this type of engagement between Ontario and First Nations should be on a Nation-to-Nation basis, with the ultimate objective of sharing in the revenues earned by the Province from resources that are rightly the Nations'.

Secondly, Ontario's policy of resource revenue sharing for Crown land-based aggregate activity should be expanded to private land, where most aggregate mining occurs in southern Ontario. Legislative and policy changes in these core areas could significantly shift the current landscape of aggregate mining regulation and commercial activity in Ontario.

FPIC

We recommend that the regulatory system be modified to include consideration for free, prior and informed consent of affected First Nations. As noted above, demand for aggregate resources in Ontario far outstrips supply and as such, this point is only likely to be achieved in the long term.

As a start to this process, the *Aggregate Resources Act* could be embedded with stringent requirements for proponents to prove the need for a project (i.e., that there is a real market). Doing so would, in theory, allow for a prioritization system to be created. Were this to be the case, the logical addition to this system would be to award increased priority points to applications for projects that can demonstrate they have the free, prior and informed consent of First Nations communities impacted by the project. Incorporating this through "points" for either partnerships with First Nations, or through simply having this be a requirement of any project would significantly increase leverage for First Nations in negotiating with proponents and challenging project approvals.

- ***Implementation Note:*** As a highly political request, we recommend advocating for this change directly through the Premier's office, most likely by leveraging the existing advocacy channel with the Ontario Regional Chief. In terms of framing, we recommend pointing out that the federal

government has made commitments to prioritize free, prior and informed consent, and that this requirement should become a provincial one as well.

RESOURCE REVENUE SHARING

One of the key ways to enhance economic development in this space is to advocate for MNDMNRF to expand their policy of engaging in resource revenue sharing agreements similar to the ones in place for forestry and mining. This wouldn't require significant restructuring of existing legislation, as resource revenue sharing is already a component of the *Aggregate Resources Act*: as set out above, the licensing fees charged by the Province are distributed to a number of stakeholders. We suggest that First Nations be included in this list, given the outsized impacts which too commonly occur to the rights of First Nations as a result of aggregate mines. First Nations, like municipalities, must also deal with the fallout of aggregate transportation, and this ought to be reflected in the *Aggregate Resources Act*. These fees should also be increased so that payments to First Nations actually reflect the harms done to their territories.

MNDMNRF is in fact moving forward with resource revenue sharing agreements with respect to royalties (for Crown land activity), but not for fees (for private land activity). In the context of quarrying activity, particularly in southern Ontario, the majority of activity takes place on private land. As such, restricting this policy to Crown land leaves the bulk of activity in this space off the table for revenue sharing. **As a priority, this policy should be changed.**

- ***Implementation Note:*** We recommend advocating for this change through the staff at the MNDMNRF. To frame this request, we recommend framing this as an action required by the province in furthering its commitments to reconciliation, and by outlining that doing so would be reflective of a nation-to-nation relationship.

Overview of Cannabis Regulation

FEDERAL REGULATION

Federally, the *Cannabis Act* regulates the production, possession, distribution and sale of cannabis in Canada.[18] Federal licenses are required to cultivate, process and sell cannabis for non-medical purposes. In addition, the federal *Cannabis Regulations* set out a stringent regulatory ecosystem for cannabis production, processing and sale. This regulatory system provides that cannabis must be produced, packaged, labelled, distributed, stored, sampled and tested in accordance with standard operating procedures ("**SOPs**").[19] These SOPs must be designed to ensure all activities are conducted in accordance with good production practices ("**GPP**"). These practices help ensure cannabis is produced consistently and that all activities conducted by license holders meet quality standards appropriate to the intended use of the cannabis.[20] SOPs generally include requirements related to sanitation of production facilities, employee hygiene, distribution and receipt of cannabis, production and processing, sampling and testing, packaging and labelling, and storage of cannabis.[21]

The stringent requirements in the *Cannabis Regulations* create a high barrier of entry for this aspect of the industry, and largely leave First Nation governments out of the regulatory sphere. Instead of an inclusive approach, responsibility is delegated solely to Health Canada through the regulation entitled: *Order Designating the Minister of Health as the Minister for the purpose of that Act*.[22] Participation of First Nation governments in the regulatory space would allow First Nations to make recommendations to stimulate economic development. We recommend advocating for this inclusion by introducing a provision that enables the Government of Canada, as represented by the Minister of Health, to enter into regulatory agreements with First Nations that would permit First Nations to assert collaborative regulatory control over certain aspects of the cannabis industry.

The above broadening is likely to be met with strong resistance from Health Canada, as this would represent a significant delegation of authority by the federal government. However, the *Cannabis Act* already delegates some components of regulation to other parties, including provincial governments. As a baseline, we recommend that these provisions be broadened to include First Nations governments.

- ***Implementation Note:*** As noted, we recommend engaging with the Ministry of Health to advocate for regulatory control in this space. Budget 2021 outlined a commitment for the government to work with Indigenous groups and organizations on a potential fuel, alcohol, cannabis, and tobacco ("FACT") sales tax framework as an option for Indigenous governments to exercise tax jurisdiction. This request might be well suited to negotiations related to FACT sales tax, by framing this as a request to regulate *and* tax this industry. As a legislative change, this would need to come

[18] *Cannabis Act*, SC 2018, c 16.
[19] *Cannabis Regulations,* SOR/2018-44, s 80.
[20] *Ibid*, Part 5.
[21] *Ibid*, ss 79-87.1.
[22] *Order Designating the Minister of Health as the Minister for the purpose of that Act*, SI/2019-125.

through the federal cabinet in the form of a Government bill if the Ministry of Health was open to extending regulatory control to First Nations.[23]

Regulation of Possession, Sale, and Distribution

Canada has delegated authority to Ontario to authorize the sale, distribution and possession of cannabis, through Section 69(1) of the federal *Cannabis Act*. This provision states:

> **Provincially authorized selling**
>
> 69 (1) A person may possess, sell or distribute cannabis if the person is authorized to sell cannabis under a provincial Act that contains the legislative measures referred to in subsection (3).

We recommend that this provision be broadened to include the following language in bold:

> **Provincially authorized selling**
>
> 69 (1) A person may possess, sell or distribute cannabis if the person is authorized to sell cannabis under a provincial Act **or law of an aboriginal government** that contains the legislative measures referred to in subsection (3).

We recommend that "aboriginal government" be included as a defined term in the *Cannabis Act* to include both First Nations and Tribal Councils.

Regulation of Enforcement

The federal *Cannabis Act* also permits the Government of Canada to enter into agreements with provinces, municipalities and local authorities to deal with prosecutions of ticketable offences under Part 2 of the *Cannabis Act*. We recommend that this provision also be broadened to permit the Government of Canada to enter into agreements with aboriginal governments, by adding the text in bold, below.

> **Agreements**
>
> 59 The Attorney General of Canada may enter into an agreement with the government of a province**, an aboriginal government,** or with any provincial, municipal**, first nation** or local authority or any agent or mandatary of any such authority 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 in or that are otherwise within the territorial jurisdiction of the courts of the province.

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[23] Guide to Making Federal Acts and Regulations: webpage: <https://www.canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html>.

As an alternative, a special regulation could be enacted whereby agreements between provinces and First Nations that deal with regulatory control over possession, sale, distribution and enforcement are recognized as valid by the *Cannabis Act*. Such a regulation would also likely set baseline requirements for what regulatory control governing First Nations are required to exert.

- ***Implementation Note:*** From our perspective, the requests to regulate the possession, sale, distribution, and enforcement of cannabis are related to, but distinct from the request to contribute to the regulatory control exercised by the Ministry of Health. We recommend that these requests also flow through the Ministry of Health, ideally with support from Carolyn Bennett (the associate Minister of Health) and from the province. As above, these legislative changes would need to flow through cabinet and accordingly require advocacy directed at cabinet.

PROVINCIAL REGULATION

In Ontario, the provincial cannabis regulatory regime is comprised of three main statutes and the regulations that are formed under them. These statutes are: the *Cannabis License Act* ("**CLA**"), the *Cannabis Control Act* ("**CCA**"), and the *Ontario Cannabis Retail Corporation Act* ("**OCRCA**").

As a threshold issue, First Nations were, by and large, not consulted in the process of regulating the cannabis industry. Having a seat at the table invariably leads to more opportunities for economic development on the terms acceptable to First Nations. Preferably, an inclusive regime would have been established from the beginning. However, reserving a seat at the table going forward would promote future opportunities for First Nations.

The Cannabis License Act

In Ontario, the CLA dictates that in order to open a retail store and sell recreational cannabis, there are two licenses and an authorization that are generally required: a retail operator license, retail store authorization, and cannabis retail manager license. The CLA sets out eligibility criteria for each of these regulatory instruments. Ontario has established eligibility criteria for retail operator licenses that screen out individuals deemed not suitable for operation of a cannabis retail operation based on past criminal activity.[24] Retail store authorizations generally screen out proposed retail stores that conflict with public interest and the needs and wishes of the people who live in the municipality where the proposed store would be located.[25] Where the holder of a retail operator license is not the retail manager, a cannabis retail manager license will be required for the retail manager of a cannabis retail operation. This license has its own set of eligibility criteria, which generally mirror the criteria used for retail operator licenses.[26]

Jurisdiction of First Nations is partially recognized through Sections 43 and 44 of the CLA. Section 43 effectively states that First Nations may, through band council resolution, request that Ontario not issue retail store authorizations for proposed stores on-reserve. This gives First Nations veto-like powers over new cannabis retail operations. Section 44 of the CLA enables agreements to be entered into between Ontario and First Nations with respect to regulating cannabis retail stores on-reserve, including the licensing processes set out above. While this is positive, we recommend that this provision be revised to mirror Section 43. In other words, we recommend revising Section 44

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[24] *Cannabis License Act, 2018*, SO 2018, c 12, Sched 2, s 3 ["*CLA*"].
[25] *Ibid*, s 4(6)5
[26] *Ibid*, s 5.

so that, where requested by band council resolution, Ontario will delegate authority over licensing. A revision of this nature would make it more likely that regulation of cannabis on-reserve occurs on the terms that are specific and acceptable to the First Nation wishing to regulate this industry.

- ***Implementation Note:*** The above recommended request to change the CLA will flow through the Minister of the Attorney General and would occur through a provincial government bill. We recommend jointly engaging in this advocacy work with the First Nations most active in this industry in Ontario. Doing so may alleviate possible concerns at the Ministry associated with capacity and uniform service standards. In other words, this request has the highest likelihood of success if confidence is instilled at the provincial level that despite new regulatory bodies existing within Ontario's borders, the same standards related to health and safety will be maintained.

Regulated Sales by the Ontario Cannabis Retail Corporation

In addition to the jurisdictional issues noted under the CLA, we recommend that the retail supply regime be modified to streamline the process of stimulating economic development for First Nations in this industry. Currently, the Ontario Cannabis Retail Corporation has the exclusive right in Ontario to sell cannabis to holders of retail store authorizations for the purpose of resale through cannabis retail stores.[27] This right is reinforced in the CLA, which notes that the holder of a retail store authorization may only purchase cannabis for sale in the cannabis retail store from the Ontario Cannabis Retail Corporation.[28]

As with the CLA, the jurisdiction of First Nations is partially recognized by the OCRCA, which provides that, subject to engagement with all necessary Ministers, Ontario may enter into arrangements and agreements with a First Nation with respect to cannabis that is sold and delivered to a purchaser on a reserve.[29] Opening this regime up for First Nations who wish to control cannabis supply chains, along with cannabis regulation more generally, would enable communities to source products from producers connected to them, stimulating additional growth. As such, we recommend advocating for a stated exception to the Ontario Cannabis Retail Corporation's exclusive right to sell cannabis to holders of retail store authorization. The exception should incorporate First Nations who have passed band council resolutions that dictate the terms of their involvement with cannabis purchasing and supply to on-reserve retail store authorization holders. We recommend that the OCRCA should be amended by adding the language in bold:

> 2 (1) The Corporation has the exclusive right in Ontario to sell cannabis,
>
> (a) online and by any means other than by operating retail stores directly or indirectly; and
>
> (b) to a holder of a retail store authorization under the *Cannabis Licence Act, 2018* for the purpose of resale through a cannabis retail store.
>
> **Except where the Registrar receives a copy of a resolution of the council of the band in respect of a reserve stating that the council of the band intends to exercise a right to sell cannabis to the holder of a**

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[27] *Ontario Cannabis Retail Corporation Act, 2017*, S.O. 2017, c. 26, Sched. 2, s 2(1)(b) ["*OCRCA*"].
[28] *CLA*, *supra* note 24, s 19.
[29] *OCRCA, supra* note 27, s 28(2).

retail store authorization under the *Cannabis Licence Act, 2018* for the purpose of resale through a cannabis retail store.

- ***Implementation Note:*** The above recommended request to change the OCRCA will also flow through the Minister of the Attorney General and come in the form of a government bill. As with the change proposed to the CLA, we recommend jointly engaging in this advocacy work with the First Nations most active in this industry in Ontario. Doing so will instill confidence at the provincial level that despite new regulatory bodies existing within Ontario's borders, the same standards related to health and safety will be maintained.

COMMERCIAL FISHING

Overview of Commercial Fishing Regulation

The Great Lakes support the province's largest commercial fisheries, while other fisheries are conducted on many of the inland lakes. Inland fisheries generally range from small seasonal fisheries to moderate year-round fisheries.

The Government of Canada has authority over the seacoast as well as inland fisheries under Sections 91(12) and (10) of the *Constitution Act*. The Province of Ontario then has authority over property rights and matters of a "merely local and private nature" under Sections 92(13) and (16) of the *Constitution Act*.

Federally, the *Fisheries Act* sets out the regulatory framework for commercial fishing in Canada. Section 7(1) authorizes the Minister of Fisheries and Oceans to issue leases and licenses for commercial fishing or authorize leases or licences to be issued.[30] The federal legislative regime delegates the bulk of Ontario's commercial fishing-related authority and responsibility to the Province of Ontario through Section 7(1). The federal *Ontario Fishery Regulations*, enacted under the *Fisheries Act*, dictates that licenses are required to fish, and that provincially issued licenses are the valid regulatory instrument in Ontario for the purposes of the *Fisheries Act*.[31]

LICENSING

In Ontario, the MNDMNRF sets annual quotas and issues annual licences for the commercial harvest of fish, primarily in the Great Lakes.[32] Ontario's *Fish and Wildlife Conservation Act* ("**FWCA**") mandates the licensing of commercial fishing in the province. Part III of the regulation entitled *Fish Licensing, O Reg 664/98* (the "**Licensing Regulations**") made under the FWCA enables the Minister to issue commercial fishing licenses to residents and Canadian citizens.[33] MNDMNRF can specify a number of conditions in licenses that are issued, including the species, quantity, size, weight, age, sex or stage of development of fish that may be caught and retained.[34] In addition, licenses are generally issued for specific geographic locations referred to as Quota Zones, and will dictate the types of fishing gear that can be used.[35]

There are more than 600 active commercial licenses in Ontario, which, in 2018 contributed $234 million to Ontario's economy.[36] While the number of commercial licenses issued by the MNDMNRF is generally capped, a license may be transferred to another individual at the request of the license holder.[37] This creates a regulatory environment that is characterized by transferable quotas for quota-designated species. In turn, this generates a relatively significant market related to licensing and, as licenses are consolidated by single entities, effectively limits the number of players in the industry. Thus, the framework is susceptible to monopoly and high barriers to entry.

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[30] *Fisheries Act*, RSC 1985, c F-14, s 7(1).
[31] *Ontario Fishery Regulations, 2007*, SOR/2007-237, ss 1(1), 3(1) [*OFR*].
[32] *Ibid*, s 4.
[33] *O Reg 664/98: Fish Licensing*, s 31.1.
[34] *OFR, supra* note 31, s 4(1)(a).
[35] *Ibid*, ss 4(1)(d), (f).
[36] Commercial fishing, Ministry of Northern Development, Mines, Natural Resources and Forestry, webpage: <https://www.ontario.ca/page/commercial-fishing>.
[37] *O Reg 664/98: Fish Licensing*, s 31.2.

This issue is not limited to one statutory provision. Rather, it relates to the MNDMNRF's general lack of appetite to issue more licenses (a decision which is, in most cases, the correct decision due to concerns regarding fish stock health and overfishing). However, the current regulatory regime's high barriers to entry create problems for First Nations wishing to become involved in the market, because interested parties must secure licenses from incumbents at potentially high costs. As an interim solution, we recommend advocating for budget allocation for the Province of Ontario to fund the purchase of licenses by interested First Nations. This is consistent with reconciliation initiatives that have been advanced by the Department of Fisheries and Oceans off the coast of British Columbia. Doing so would enable access to the market for communities that might otherwise be excluded simply on account of historic denial of rights. And where new quota is identified, First Nations should have a right of first refusal to purchase it.

- ***Implementation Note:*** The above noted funding request would flow through the Minister of Mines, Northern Development, Natural Resources and Forestry. Our understanding of the regulatory framework is that once an individual holds a license, there are not significant regulatory fees associated with operating a commercial fishing business. However, if there are other fees associated with these industries and the MNDMNRF is hesitant to provide funding outright, requesting a waiver of these other administrative and regulatory fees may provide First Nations with an alternative reduction in barrier to entry.

ALTERNATIVES TO LICENSE PURCHASES

For communities wishing to effectively bypass the provincial regulatory regime and instead opt to acquire their own type of license and internal regulatory control, two useful precedents from Ontario may be instructive. Two First Nations groups in Ontario have engaged in agreements with the Province of Ontario that reflect their rights to engage in commercial fishing. These include the Substantive Commercial Fishing Agreement between The Chippewas of Nawash Unceded First Nation and Saugeen First Nation and Ontario, and the Memorandum of Understanding between Nipissing First Nation and Ontario. These agreements are deemed, for the purposes of the FWCA, to be commercial fishing licenses.[38] These legislative provisions provide these communities with access to the commercial fishing markets and deem these agreements to be licenses for the purpose of the commercial fishery's regulatory framework.

A number of positive outcomes result from these agreements. For instance, when communities are not required to go through the market-based approach for acquisition of commercial licenses outlined above, considerable administrative and economic barriers for entry are reduced. Communities are also now able to designate those members who may engage in commercial fishing under the Agreement and are involved in a consensus-based process for setting catch limits through an equal-representation governance committee. [39] Funding is also provided through these agreements, enabling governance capacity to be built out in this space.[40]

We recommend advocating for a mandate from the MNDMNRF to engage in agreements of this nature with any First Nation in Ontario that desires to engage in commercial fishing and build

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[38] *O Reg 664/98: Fish Licensing*, ss 31.1(2.1)-(2.2).
[39] Substantive Commercial Fishing Agreement between The Chippewas of Nawash Unceded First Nation and Saugeen First Nation and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources, February 25, 2013, s 4.
[40] *Ibid*, s 7.

capacity in this space. Without a significant capital infusion, engaging in the broader commercial licensing market may not be feasible for many communities. These agreements reduce the economic burden of First Nations' entry into the market. In addition, deeming these agreements to be licenses for the purposes of the commercial fishery's regulatory framework serves to recognize First Nations' pre-existing rights to participate in the fishery in Ontario. Advocating for the proactive creation of agreements of this nature would significantly reduce the burden associated with doing so through litigious processes and could be a far more attractive prospect for communities.

In addition, we recommend including a provision within the FWCA that explicitly acknowledges a minimum commercial right to fish. Doing so would create significant leverage in negotiating agreements of this nature with the Province of Ontario. Under the common law, this also allows this right to be accommodated as a priority allocation, which provides some measure of insulation from risk for these activities.

- ***Implementation Note:*** For Ontario to entertain the above noted recommendation, First Nations would need to be prepared to regulate and enforce fisheries laws in their territories. Ultimately these rights are generally entrenched in treaties, and that should form the basis for negotiation on a nation-by-nation basis. COO's advocacy efforts could focus on facilitating this process where it occurs, and to ensure that the MNDMNRF has a mandate to negotiate these types of agreements.

RISKS AND OPPORTUNITIES RELATED TO FISH STOCKS

While access to fishing licenses is a significant barrier to entry for First Nations in Ontario, arguably the most significant hindrance to economic development in this space is an ecological issue, not a legislative one. The reduction in fishing stocks across most fisheries has led to lower quotas in the commercial space, and this means that there is risk involved in entering the commercial market, given the risk of drop in potential return on investment for new market participants.

Given that concerns regarding overexploitation of fish stocks threatens the economic viability of many commercial fishing operations, opportunities in this space are likely to increasingly relate to aquaculture. Part II of the Licensing Regulations enables the Minister to issue aquaculture licenses, which permit the holder to culture fish in specific locations.[41] In addition, the federal Department of Fisheries and Oceans is developing proposed legislation designed to reflect the context and requirements of aquaculture management. Development of this legislation should be monitored, and this process may provide a good platform for advocacy related to increasing opportunities for First Nations in this space. At the provincial level, an advocacy campaign with the MNDMNRF to increase funding opportunities for communities wishing to engage in aquaculture activity would be highly beneficial to sustainable economic development for First Nations in Ontario.

- ***Implementation Note:*** In addition to advocating for aquaculture funding through MNDMNRF, the federal government may be interested in providing funding in this space. Engagement could flow through the Minister of Indigenous Services and Minister responsible for the Federal Economic Development Agency for Northern Ontario, the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Minister of International Trade, Export Promotion, Small Business and Economic Development, and the Minister of Rural Economic Development.

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[41] *O Reg 664/98: Fish Licensing*, s 20.

RENEWABLE ENERGY GENERATION

Overview of Renewable Energy Generation Regulation

The sale of electricity in Ontario is managed by the Independent Electricity System Operator (the "**IESO**"), which is created by Part II of the *Electricity Act, 1998* (the "**Electricity Act**").[42] Part II.2 of the Electricity Act sets out the process the IESO must follow in procuring energy for the provincial electricity grid. Part II.2 also states that the IESO shall enter into contracts for procurement of electricity supply, where required to do so under an IESO-prepared plan dealing with their strategy to meet Ontario's electricity demands.[43] One such procurement method existed through Ontario's *Green Energy Act*, first introduced in 2009.[44] The *Green Energy Act* was first introduced in an effort to phase out coal production and create a renewable energy economy in Ontario. Through the *Green Energy Act*, above market, fixed price contracts for renewable proponents were issued by way of a Feed-in-Tariff Program ("**FIT**"). As a result, otherwise reluctant proponents were induced into the market through certainty regarding the return on investment.

In early 2019, Doug Ford repealed the *Green Energy Act* due to concerns over electricity prices. The concern arose from the fact that early FIT contracts generated a significant jump from the prices Ontario had previously been paying for coal. The repeal, largely political in nature, came despite the more recent IESO procurement regimes under the *Green Energy Act* requiring projects with significantly more competitive pricing (the 'Large Renewal Procurement' regime, or "**LRP**"). In addition, the regime had a number of features that enhanced economic development for First Nations. These features have not been reintroduced to energy procurement in Ontario since the *Green Energy Act* was repealed. They include: (1) priority points allocated through the "Indigenous Support Resolution" system, which rewarded projects which received written support (generally through partnership) by proximate Indigenous communities;[45] and (2) the Indigenous Price Adder rewarded projects with Indigenous partners by increasing the price paid for the electricity generated as a function of the ownership share held by the Indigenous community.[46]

Many jurisdictions are picking up where Ontario left off in this space. Regulators are coming to the realization that obtaining the consent of Indigenous communities, through partnership, is a critical component of stabilizing electricity grids, while also eliminating the risk of challenges from those Indigenous communities around whether they were adequately consulted about the proposed development. Most recently, Nova Scotia has made commitments to supply 10 per cent of the province's electricity from renewables.[47] In doing so, Nova Scotia issued a request for proposal on February 11, 2022 to procure 350 megawatts of electricity from renewable energy projects.[48] One of the bases for evaluating proposals is "Social & Economic Benefits" (accounting for 20 out of 100 total points for the scored criteria), which uses criteria that included points for

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[42] *Electricity Act, 1998*, SO 1998, c 15, Sched A, Part II ["*EA*"].
[43] *Ibid,* Part II.2, s 25.32(2).
[44] *Green Energy Act, 2009*, SO 2009, c 12, Sched A.
[45] FIT Version 5, IESO Webpage: <https://www.ieso.ca/-/media/Files/IESO/Document-Library/FIT/archive/FIT-5-Rules-Contract-Standard-Definitions.ashx>, see Section 5.1 of the FIT Rules Version 5.0.1.
[46] *Ibid*, see definitions 180-182 of the Standard Definitions document.
[47] Nova Scotia Rate Base Procurement, Webpage: <https://novascotiarbp.com/the-procurement>.
[48] Rate Base Procurement Request for Proposals, Nova Scotia, issued February 11, 2022, webpage: <https://novascotiarbp.com/rfp>.

projects with full and part ownership by Indigenous communities in Nova Scotia.[49] Nova Scotia's procurement regime does not contain a price adder for Indigenous-owned projects, and with project costs for wind and solar farms becoming increasingly competitive, the lack of price adder is not necessarily an issue from our perspective. This precedent, like the LRP program in Ontario, should be looked to as strong examples to be followed in Ontario's next round of energy procurement.

- ***Implementation Note:*** Implementation of the above recommended changes will vary based on the type of change requested. Changes to an IESO procurement policy could be advocated for directly through the Ministry of Energy, without requiring legislative change. Conversely, a broader revision to the *Electricity Act* would require a government bill proposed to the provincial government, which is a bill brought to the Legislative Assembly by cabinet. This will require broad cabinet support, and we recommend that in addition to the Ministry of Energy, advocacy should flow through the Minister of Northern Development, Mines, Natural Resources and Forestry, and the Ministry of Indigenous Affairs.

[49] *Ibid*, s 6.4.1.1.

ENERGY TRANSMISSION

Overview of Transmission Regulation

Ontario's energy sector is primarily governed by the *Ontario Energy Board Act* (the "**OEB Act**"). The OEB Act establishes the Ontario Energy Board (the "**OEB**"), whose mandate is to regulate Ontario's energy sector in the context of natural gas and electricity. One of the primary responsibilities of the OEB is to approve the development of major new electricity transmission lines and natural gas pipelines, in addition to a wide range of responsibilities in the rate-setting context. This responsibility constitutes the major regulatory authority in the energy transmission space: the OEB Act mandates that **no person shall construct a hydrocarbon line, or construct, expand or reinforce an electricity transmission line or an electricity distribution line without obtaining an order granting leave to construct the development from the OEB.**[50] In considering applications for leave to construct a transmission project, the OEB must consider whether the work proposed is in the "public interest". If a proposed project is in the "public interest", the OEB must make an order granting leave to carry out the work. How the OEB considers whether a project is in the public interest is prescribed by the OEB Act: the OEB is required to only consider the interests of consumers with respect to prices, and the reliability and quality of electricity service.[51] In this way, the scope of considerations for the OEB is quite limited. Due to the restrictive wording of the "public interest test," it very difficult to convince regulators to consider project impacts on First Nations communities as part of the leave to construct process.

The duty to consult and accommodate is not one of the factors that makes up the public interest test, which means that this duty often conflicts with the findings of the "public interest" test and makes it an uphill battle to modify project routing or advocate for First Nations engagement and participation. As is seen in other industries, economic development can often occur through the duty to consult and accommodate and having this be considered by the OEB in leave to construct decisions would significantly change attitudes by proponents and regulators about engagement with First Nations. Put simply, requiring proponents to demonstrate that First Nations have been adequately consulted and accommodated as part of the public interest test would streamline the development process for proponents while also leading to economic benefits for First Nations. Incorporating a consent requirement into the leave to construct process would take this one step further and significantly increase the likelihood for economic development through partnership in the transmission space.

Enhancing Economic Development in Energy Transmission

We recommend negotiating an expansion of Section 96(2) of the OEB Act. Section 96(2) sets out the factors to be considered in leave to construct decisions in the electricity context. Currently, the only factor that is to be considered in these applications is, as noted above, the interests of consumers with respect to prices and the reliability and quality of electricity service. If this provision were repealed, the OEB would not be limited by the OEB Act in what evidence and arguments are to be considered, and presumably arguments regarding insufficient engagement with First Nations would be more readily accepted. In the alternative, revising this provision to

[50] *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sched B, s 90, 92.
[51] *Ibid*, s 96(2).

add a requirement to consider the duty to consult and accommodate in leave to construct decisions would ensure that these considerations are considered wherever applicable.

In addition to the revision of the leave to construct provision, a priority in the electricity transmission space might be for increased regulatory involvement from First Nations. In other contexts, legislation allows for the downloading of regulatory responsibility to First Nations that request this. In the long term, effecting this change in the transmission space would allow First Nations to be the decision makers about certain aspects of projects that are proceeding in their traditional territories. The amount of work and resources involved in this shift in the transmission context should not be understated, and we recommend that this be considered a long-term priority. The Government of Ontario would no doubt be apprehensive about incorporating these types of regimes into the transmission space, given the level of interconnection and province-wide importance of development in this space. Nevertheless, incorporating a variation on the following provision from the *Crown Forest Sustainability Act* would enable willing First Nations to adopt a role in the transmission regulation space:

> "Agreements with First Nations
>
> The Minister may enter into agreements with First Nations for the joint exercise of any authority of the Minister under this Part."

Provision	Text	Change Recommended
s. 96	Applications under s. 92 (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest: 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.	Either repeal this section in its entirety or add the following after subsection 1.: "2. Whether appropriate consultation and accommodation with Aboriginal communities has been carried out in accordance with the regulations."
N/A	N/A – this is a new provision	The Minister may enter into agreements with First Nations for the joint exercise of any authority of the Minister under this Part.

- ***Implementation Note:*** The above noted legislative changes would require a provincial government bill, which is a bill brought to the Legislative Assembly by cabinet. This will require broad cabinet support, and we recommend that in addition to the Ministry of Energy, advocacy should flow through the Minister of Northern Development, Mines, Natural Resources and Forestry, and the Ministry of Indigenous Affairs.

FORESTRY

Overview of Forestry Regulation

The *Crown Forest Sustainability Act* (the "**CFSA**") regulates the protection and use of Ontario's forested lands. The MNDMNRF is responsible for overseeing and implementing the CFSA in Ontario. Ontario's managed forests are divided into geographic planning areas known as management units.[52] Forest management plans must be prepared for every management unit before any forestry activity can take place. Forest management plans are planning tools describing forest management objectives and strategies applicable to the management unit.[53] Forest management plans are prepared for 10 year periods by professional foresters in a process that takes in input from local citizens, Aboriginal communities, stakeholders, and the public.[54] Requirements to prepare a forest management plan are generally a condition of the MNDMNRF issuing a sustainable forest license in accordance with Section 26(5) of the CFSA.[55]

Forest management plans are prepared by following the direction of the manuals prepared by the MNDMNRF. These include the Forest Management Planning Manual (the "**FMPM**"), the Forest Information Manual, the Forest Operations and Silviculture Manual, and the Scaling Manual.[56] Some of the key outcomes of forest management plans are determining how much and where harvesting can occur, where roads can be built, and how the forest will be renewed. In this way, development of forest management plans represents the significant regulatory hurdle to economic development in the forestry context. Notably, Section 23 of the CFSA enables the Minister to enter into agreements with First Nations for the joint exercise of authority of the Minister regarding forest management plans, including responsibilities for plan approval.[57]

As part of forest management planning, forest resource inventories (an "**FRI**") are required to occur on each management unit every 10 years. An FRI includes information on species, sizes, and numbers of trees in forested areas, and are used for routine planning and modelling. Annual work schedules must also be prepared every year for each management unit by registered professional foresters. Annual work schedules identify the forest operations from the approved plan that will occur in a given year and include additional details about operations. Work schedules are subject to Ministerial approval and revision.[58]

The FMPM, in directing the creation of forest management plans, represents a critical source of guidance on the main regulatory mechanism in forestry regulation in Ontario. The FMPM also describes the approach for working with First Nations to support their involvement in forest management planning. The planning process normally takes 36 months, within which time consultation with the public and with First Nations must occur.[59] Forest management plans are prepared by a plan author and are assisted by an interdisciplinary planning team and local citizens

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[52] *Crown Forest Sustainability Act, 1994*, SO 1994, c 25, s 7 ["*CFSA*"].
[53] *Ibid*, s 8.
[54] *Ibid*, s 8(3), 13.
[55] *Ibid*, s 26(5).
[56] *Ibid,* s 68.
[57] *Ibid*, s 10(2).
[58] *Ibid*, s 17(4), (6).
[59] *Forest Management Planning Manual*, Ministry of Natural Resources and Forestry, May 2020, page A-8 ["*FMPM*"] (see also Figure A-1 for the timetable for preparation of a forest management plan).

committees, including personnel from the MNDMNRF (e.g., foresters, biologists, analysts). Interdisciplinary planning teams are working bodies normally including individuals with expertise in forest management and ancillary areas, as well as representatives from First Nation communities, and individuals from the local citizens committees.

FOREST MANAGEMENT PLANNING OUTLINE

Stage One: Invitation to Participate

The forest management process begins with an updating of the FRI, assembling background information such as resource values and fish and wildlife inventories, and reviewing the status of forest regeneration activities. The planning team identifies desired benefits from the forest and set objectives to achieve these benefits at this stage.

Consultation in the forest management planning context begins with the "Invitation to Participate," which is a public notice inviting the public to participate in the development of the forest management plan. This is an initial notice designed to advise of the commencement of forest management planning, to provide the public with access to information used in the forest management planning process, to request contributions to the background information used in planning, to request the public's views on the desired forest in the management unit and benefits from it, and to invite the public to discuss interests with the planning team.

Stage Two: Development of the Long-Term Management Direction

Long term management directions are the result of strategic analysis, a process used to determine the types and levels of access, harvest, renewal, and tending activities required to balance the achievement of various management objectives for a given management unit. As part of developing the long-term management direction, the available harvest area will be determined for the unit, which considers timber and non-timber values (such as wildlife habitat, biodiversity, and landscape patterns). The available harvest area represents the maximum area that can be harvested during the 10-year period of the forest management plan.

Once a long-term management direction is developed, another public notice will invite the public to review the proposed long term management direction. This review allows the public to review and comment on the proposed long term management direction, the areas that could reasonably be harvested, the preferred areas for harvest operations during the 10-year review period, and on road routing. This review period is open for 15 days.[60]

Stage Three: Review of Proposed Operations

Once the long-term management direction is finalized, specific locations for forest operations are identified for the 10-year period. At this stage, locations are determined for access roads, aggregate extraction sites, and areas of concern (where operations may affect other values such as streams, eagle nests, cultural heritage values, etc.). Where areas of concern are identified, modified harvest, renewal and tending operations, referred to as "prescriptions," are prepared with the intention to prevent, minimize, or mitigate negative effects. These prescriptions may include altered harvesting

[60] *Ibid*, page A-93.

techniques, timing restrictions on operations, and no-harvest reserves around key values, among other things.

As part of the detailed planning of operations for the 10-year period of the forest management plan, a public information forum is held, with 30 days notice being sent out to the public. This provides an opportunity for comment on the planned areas for harvest, renewal and tending operation for the 10-year plan period, as well as road and aggregate extraction locations. The information at the information forum is also available for public review for a 30-day period after the information forum.

Stage Four: Review of Draft Forest Management Plan

Once operational planning is complete, a draft forest management plan is prepared and submitted to the MNDMNRF for review.

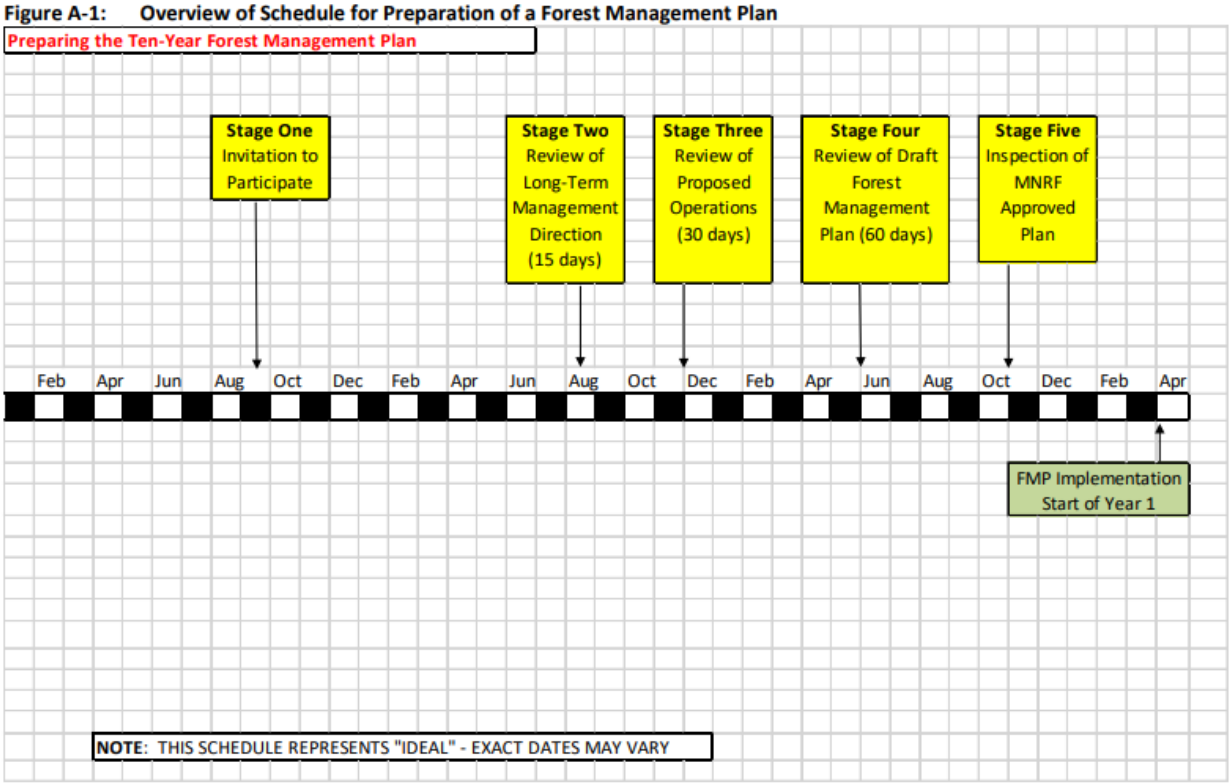
Another information forum is held upon completion of the draft forest management plan, which generally occurs 30 days after public notice of the meeting is issued. This consultation opportunity is for the public to review and comment on the draft forest management plan. Comments from the public will be considered in the finalization of the MNDMNRF's required alterations to the draft forest management plan.[61] The MNDMNRF review of the draft forest management plan occurs concurrently with the information forum, and the draft is available for public review during the 60-day public review period. As a result of the MNDMNRF review and information forum, the MNDMNRF will compile a final list of alterations to the plan author and sustainable forest licensee, along with written responses to those who requested changes to the draft plan.

Stage Five: Inspection of Approved Forest Management Plan

Upon completion of the final forest management plan, the public has the opportunity to review the MNDMNRF-approved forest management plan. This final stage of consultation simply provides an opportunity for the public to inspect the completed plan, which becomes available for public viewing for the plan's 10-year period. Individuals wishing to raise unresolved issues at this stage can do so within a 30-day inspection period, but this can only be done by individuals who have raised concerns through the FMPM's formal issue resolution process at any of the previous stages.

[61] *Ibid*, page A-96.

Figure A-1: Overview of Schedule for Preparation of a Forest Management Plan



The normal course opportunities for First Nations to engage in the forest management planning are through their appointment of representatives to the planning team and local citizens committees. In addition, the FMPM sets out an opportunity to develop customized consultation approaches with First Nations and the consultation requirements if a customized consultation approach has not been agreed upon. The consultation approach will normally include requirements regarding notices, consultation forums, information availability, written responses to comments and submissions, and opportunities to consult directly with representatives from the planning team and the local citizens committee.

CROWN FOREST LICENSES

The bulk of Ontario's Crown forests are managed by forest companies under 20-year sustainable forest licenses ("**SFL**s"). Holding an SFL gives the licensee the primary responsibility for management of the defined management area.[62] Licenses are subject to renewal every 5 years, depending on the results of a license review. After working with government and others to prepare and implement forest management plans in the manner detailed above, companies must prepare an annual report of activities conducted, monitor compliance with plans, renew the forest after harvest, pay stumpage fees to the province for the right to harvest timber, and pay fees to the Crown related to renewing the forest.

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[62] *CFSA*, *supra* note 52, s 26.

Enhancing Economic Development in Forestry

CONFIRMATION OF ADEQUATE CONSULTATION AT ALL PLANNING STAGES

As with other areas discussed in this report, it would be beneficial for First Nations in the economic development context if consultation processes in Ontario's forestry regulatory regime were more stringent.

Currently, in the FMPM, the MNDMNRF is expected to engage First Nations to appoint a representative to sit on an applicable interdisciplinary planning team. In their role as members of the planning team, First Nation community representatives are expected to share information about the planning process with their communities and to represent their communities on the planning team. The MNDMNRF may reimburse the First Nation member(s) of the planning team for reasonable out-of-pocket expenses and may provide a reasonable per diem for attendance at planning team meetings, in accordance with applicable government policies and directives.[63]

This approach in the FMPM does not sufficiently acknowledge the level of staff engagement that participation in the forest management planning process requires from First Nations. As priority negotiating points, we recommend advocating for provision for full time employment funding for representation on the applicable planning teams for applicable First Nations. In addition, we recommend advocating for provision in the FMPM or the CFSA which enables First Nations to request comprehensive training for representatives on the forest management plan development processes. In addition to funding for the representatives providing the critical consultative functions on behalf of First Nations, we recommend negotiating a critical modification to the consultation process. Due to gaps in capacity and the tight timelines associated with the planning process, some communities tend to be left behind and are not adequately consulted, particularly if a consultation approach is not negotiated at the start of the planning process. From our perspective, seeking a requirement that First Nations confirm that they have been adequately consulted at each stage of the process, and that successive confirmation at each stage results in confirmation that FPIC has been obtained, would be an appropriate and effective solution to the issues currently seen in forest management planning. In addition, the consultation approach should be developed with each First Nation significantly in advance of the FMP process starting, before the Invitation to Participate. This, coupled with the recommendation regarding funding above, would ensure that First Nations are already adequately funded and have an appropriate process in place to engage with the planning team and the MNDMNRF as soon as the planning process begins.

- ***Implementation Note:*** As these recommendations relate to advocacy for funding and changes in written policy, we recommend advocating directly to the Minister of Northern Development, Mines, Natural Resources and Forestry while simultaneously engaging MNDMNRF staff.

As a longer-term priority, we recommend advocating for a change in how forest management plans get approved. While the MNDMNRF can currently enter into agreements with First Nations to enable communities to become the approval body for forest management plans, we recommend advocating for this to be the default regulatory regime, with the MNDMNRF transitioning to a support-based role in the space. As a starting point, we recommend that Section 23 of the CFSA be modified as follows:

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[63] *FMPM, supra* note 59, A-108.

> **23** The Minister **shall, where requested by First Nations,** enter into agreements with First Nations for the joint exercise of any authority of the Minister under this Part.

- ***Implementation Note:*** As this recommendation relates to changes in the CFSA, we recommend advocating directly to the Minister of Northern Development, Mines, Natural Resources and Forestry.

ANCILLARY PRIORITIES

In addition to the regulatory changes noted above, a number of policy-based changes may be made to enhance opportunities for First Nation communities in the forestry sector. The following recommendations are outside the scope of a legislative review, and we recommend engaging with the National Aboriginal Forestry Association or similar organizations to help focus advocacy work in these practical areas.

First, introducing a requirement or system that prioritizes opportunities for First Nations' contractors would reflect the fact that forestry-based economic activities take place on the territory of First Nations. One of the positive legacies of Ontario's *Green Energy Act* is its prioritization of First Nation communities in the procurement process. Though there are no discrete procurement requirements embedded within the FMPM, we recommend advocating for a system of prioritization of license holders that are, at a minimum, partnered with Indigenous communities in the proximity of the management unit. This could apply to both harvesting and mill licenses.

- ***Implementation Note:*** As this recommendation relates to changes in written policy, we recommend advocating directly to the Minister of Northern Development, Mines, Natural Resources and Forestry.

In a similar vein, we recommend advocating for financing programs to be developed catered to enabling First Nations and their members to access education and training programs in various forestry businesses and specializations, and to support First Nations and their members in purchasing businesses owned by aging proprietors in localities of forest management units.

- ***Implementation Note:*** As this recommendation relates to advocacy for funding, we recommend framing this request as furthering the policy imperative of small business growth. We recommend doing so through the Minister of Northern Development, Mines, Natural Resources and Forestry and requesting increases to any existing funding programs related to training. On the purchase side, we recommend advocating at the federal level through the Minister of Indigenous Services responsible for the Federal Economic Development Agency for Northern Ontario, as there may be funding available through this Ministry as well as through the provincial MNDMNRF.

Lastly, we recommend advocating for incentives and funding for value-added production and companies in Ontario, with additional incentives available for First Nation owned or co-owned entities. For example, a provincial funding or preferential licensing regime for the development of First Nation owed or co-owned value-added facilities. Doing so would diversity the economy and shift dependence on extraction-based systems of economic development. While the CFSA has a requirement in section 30(1) for forest resource licenses to be subject to the condition that all trees harvested be manufactured in Canada into lumber, pulp or other products, there is no program or incentives such as grants or loan guarantees in place to ensure that value-added, or "other products" are being manufactured in Ontario, where First Nations are most likely to be able to engage in the

business (other than general northern Ontario development incentives, which are not specific to First Nations). A regime similar to the Ontario *Green Energy Act*, which encouraged proponents to partner with First Nations through preferential licensing or grants, would benefit First Nations and Ontario as a whole by encouraging the development of new businesses in the north, with First Nation ownership or co-ownership.

MINING

Overview of Mining Regulation

Ontario has identified itself as a globally significant producer of critical minerals, owing to its vast and varied geology, particularly in Northern Ontario. These features also mean that there is, from the Province's perspective, significant growth potential available to the Province, and to mining companies in this space. In light of this potential and supply chain-based uncertainties that have so far been a defining feature of the 2020s, the Province of Ontario intends to position itself as a premier global destination into mineral-based development. This is to say: despite the well-placed disapproval of mining-based development on the traditional territories of First Nations in Ontario, First Nations should expect development to continue at a fast pace. The regulatory framework in place today and that is likely to be in place moving forward will reflect the view that mineral resources should be mined and sold into the broader manufacturing economy.

In light of these considerations, the following assessment of the current regulatory environment, and recommendations for how this could be changed to enhance First Nation economic development, are reflective of our view that the status quo with regards to the Province of Ontario's attitude towards mining regulation is not likely to change in a significant way in the near future. We have made these recommendations by considering what is realistic in the current political and economic climate, and recommendations would change significantly if, for instance, the Province of Ontario indicated that mining regulation would change such that consent of First Nations for mining projects was a legislated requirement, effectively making First Nations communities a "regulator" in the eyes of the Province. As it stands, consent in the current context is currently only reflected in the industry practice of concluding benefit agreements in advance of development proceeding.

The current regulatory environment governing mineral exploration and mining projects in Ontario adopts a phased approach, and understanding the principles governing each phase is important in addressing regulatory deficiencies. Development moves through a sequence that begins with claim registration, continues with early exploration, advanced exploration, and then where feasibility studies permit, the development, construction, operation and production of a mine, and then ultimately mine closure.

EXPLORATION

Under the *Mining Act*, prospectors can no longer acquire rights to engage in certain exploration activities by merely staking a claim and having it recorded. Since the *Mining Act* was amended in 2013, once a claim has been recorded, a proponent must submit an exploration plan prior to engaging in prescribed exploration activities.[64] Submitting a plan allows engagement in the following activities: 1. any geophysical surveys that require the use of a generator; 2. mechanized drilling with a drill weighing less than 150 kilograms; 3. line cutting, where the width of the lines does not exceed 1.5 metres; 4. mechanized surface stripping that does not exceed 100 square metres in specified areas; and, 5. pitting and trenching between one and three cubic metres.[65]

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[64] *Mining Act*, s 78.2.

[65] Exploration Plans and Exploration Permits, O Reg 308/12, s 4 and Schedule 2 ["***Exploration Regulations***"]; See also Karen Drake, The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law, 2015 11-2 *McGill Journal of Sustainable Development Law* 184, <https://canlii.ca/t/70f>.

In some cases, exploration permits are also required. A permit is required where a proponent intends to engage in the following: 1. mechanized drilling with a drill weighing greater than 150 kilograms; 2. mechanized surface stripping that does exceed 100 square meters but less than 10,000 square meters; 3. line cutting, where the width of the lines cut is 1.5 metres or more; and 4. pitting and trenching where there is a single pit or trench and the total volume of the pit or trench exceeds three cubic metres but is less than 10,000 cubic meters.[66]

Despite these requirements, once a claim has been recorded the holder of a recorded claim may engage in non-prescribed exploration activities. These include low impact activities such as pitting and trenching below a prescribed threshold, as discussed below. The implication is that a proponent may engage in pitting and trenching of less than the prescribed amount without submitting an exploration plan or obtaining an exploration permit, and hence without acquiring permission from the Crown and without consultation occurring.

When Activities do not require Exploration Plans

Section 1.4(ii) of Schedule 2 of the *Exploration Regulations* under the *Mining Act* (the "**Exploration Regulations**") provides that: claim holders must submit an exploration plan prior to engaging in mechanized stripping if "two or more locations are to be stripped and the edges of a location where stripping is to be carried out are within 200 metres of the edges of another location, and the aggregate of the area of the locations to be stripped does not exceed 100 square metres." The implication is that a claim holder may engage in mechanized stripping without submitting an exploration plan and hence without engaging in consultation as long as the locations to be stripped are more than 200 metres apart.

Section 1.5(i) of Schedule 2 of the Exploration Regulations provides that claim holders must submit an exploration plan prior to digging a pit or trench between one to three cubic metres in volume. The implication is that a claim holder may dig a pit or trench less than one cubic metre in volume without submitting an exploration plan and hence without engaging in consultation.

Section 1.5(ii) of Schedule 2 of the Exploration Regulations provides that claim holders must submit an exploration plan prior to digging two or more pits or trenches within 200 metres of each other and the combined volume of the pits or trenches is between one to three cubic metres. The implication is that a claim holder may dig pits or trenches that are more than 200 metres apart or that have a combined volume of less than one cubic metre, without submitting an exploration plan and hence without engaging in consultation.

Exploration Plans and Consultation

On receiving an exploration plan, the Director of Exploration provides a copy to potentially affected Aboriginal communities.[67] Those communities then have the opportunity to respond in writing with concerns about adverse impacts on their established or asserted Aboriginal or treaty rights. If the Director receives any such response, he or she may direct the proponent to consult with the Aboriginal community, and the Director may require the proponent to obtain an exploration permit if necessary to address established or asserted Aboriginal or treaty rights. As

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[66] *Exploration Regulations*, s 4 and Schedule 3.
[67] *Ibid*, s 7.

long as the Director does not direct the proponent to obtain an exploration permit, the proponent may engage in the activities set out in the exploration plan 30 days after the plan has been sent to the Aboriginal community.[68]

The process for exploration permits is similar to that described above for exploration plans. On receiving an application for an exploration permit, the Director shall provide a copy to potentially affected Aboriginal communities, who may then provide written comments to both the Director and the proponent about adverse impacts on their established or asserted Aboriginal or treaty rights. The Director may direct the proponent to consult with the Aboriginal community. Before issuing an exploration permit, the Director must be "satisfied that appropriate Aboriginal consultation has been carried out."[69]

DEVELOPMENT, CONSTRUCTION, OPERATION AND PRODUCTION

Every advanced exploration and mining project is detailed in a closure plan filed with the MNDMNRF, and these plans are to be updated with material changes. The *Mining Act* mandates that no proponent shall commence advanced exploration unless the proponent has given notice of the project to the MNDMNRF, which is then used to determine whether the activities proposed require consultation with Aboriginal communities. Advanced exploration is contingent on public notice being given, where required by the MNDMNRF, and consultation with Aboriginal communities being carried out to the satisfaction of the MNDMNRF. Once these conditions are met, a closure plan with accompanying financial assurance is prepared.[70] Closure plans outline how the affected land will be rehabilitated and the costs associated with doing so. Closure plans are reviewed within a 45-day period, following which the MNDMNRF will either formally file the plan, or require the proponent to address deficiencies.[71]

The submission of a closure plan is the second significant regulatory hurdle under the *Mining Act*, and requirements are embedded in both the *Mining Act* and *Mine Development and Closure Under Part VII of the Act, O Reg 240/00*.[72] A successful filing paves the way for advanced exploration and mine construction, which occurs alongside other regulatory and permitting processes. Construction of mining sites involves building the mine infrastructure, roads, processing facilities, environmental management systems, employee housing and other facilities. Specific construction projects (roads, power lines, buildings, dams, and water pumping or treatment facilities) require additional municipal, provincial or federal permits.

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[68] *Ibid,* s 9.
[69] *Ibid*, s 15.
[70] *Mining Act,* s 140.
[71] *Ibid, s* 140(2).
[72] *Mine Development and Closure Under Part VII of the Act, O Reg 240/00*, ss 11-12.

Enhancing Economic Development in Mining

ENGAGEMENT FUNDING

As noted above, issuance of exploration plans is contingent on the Director being satisfied that "Aboriginal consultation has occurred in accordance with any prescribed requirements, which may include consideration of any arrangements that have been made with Aboriginal communities that may be affected by the exploration."

While the requirement for consultation is better than nothing at all, it places a heavy administrative burden on staff at First Nations. This provision ultimately results in the Crown and proponents requesting detailed descriptions of the rights impacted and that First Nations are concerned about on impacted lands. In most cases, this cannot occur without conducting in-depth studies, the cost of which places undue burden on Nation finances. There is currently no specific legal obligation to provide capacity funding to communities being consulted, and this is a priority area that should be targeted for change. We recommend doing so in the *Mining Act's* regulation dealing with closure plans. Sections 11 and 12 of that regulation, O Reg 240/00, outline a number of requirements for closure plans, and we recommend advocating for an engagement funding requirement to be included in these sections.[73]

Incorporating a requirement in law and policy for robust engagement funding at the exploration plan or permit stage would enable First Nations to conduct the studies required to have a comprehensive view of rights that are affected by mining development activity. While this requirement can and should be considered for all areas of industrial development, mining development may be the area with the most intense effects on rights of First Nations communities from the perspectives of both geographic spread and intensity of impact. As such, funding for thorough engagement should be a priority.

- ***Implementation Note:*** With regards to the above noted change in the *Mining Act*, we recommend advocating for this change directly with the Premier by way of the Office of the Regional Chief (the "**ORC**").

ARCHAEOLOGY

In addition to engagement funding to support a variety of required studies, we recommend negotiating a specific requirement in the *Mining Act* for proponents to fund archaeological assessments prior to early exploration. This requirement would recognize the fact that many archaeological sites are present within the traditional territory of all First Nations, and that understanding where these sites are and how they relate to First Nations' rights and culture is critical to an engagement process that reflects a commitment to supporting First Nations' governments. The *Mining Act* should be revised to include a requirement for compliance with the *Ontario Heritage Act* and for all exploration work to require a Stage 1 Archaeological Assessment.

- ***Implementation Note:*** With regards to the above noted change in the *Mining Act*, we recommend advocating for this change directly with the Premier by way of the ORC.

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[73] *Ibid*.

ACCOMMODATION

Ontario's current guidance on implementing the duty to consult with Aboriginal communities on mineral exploration and mine production in Ontario (the "**Ministry Guidance**") details the principles associated with accommodation.[74] While a full consent standard would be preferred, short of that a statutory description of what accommodation is would be highly beneficial to First Nations, and would provide clarity to the engagement in the development process. According to the Ministry Guidance, accommodation is comprised of avoidance, minimization, and mitigation of adverse impacts of proposed exploration and development activities. In addition to the accommodation components outlined by the Ministry Guidance, we recommend including compensation and revenue sharing in the definition. Compensation and revenue sharing can and should be included in accommodation, and both are important components of building administrative capacity in First Nations communities. Building a baseline capacity level for dealing with development proposals is a core outcome of this component of recommendations on mining regulation, given how critical this capacity will be to the relationship between proponents and First Nations in the coming years. This category of recommendation is less focused on how to promote First Nation-led business opportunities, and more about creating the baseline capacity for dealing with development proposals and deriving revenue from that process to facilitate communities' long-term, ongoing ability to do so.

Prevention

Prior to engagement on how to adapt to the existence of a mine, consideration should be given to whether or not the existence of the mine can be prevented.

Mitigation

Project impacts should, to the full extent possible, be mitigated so that existing rights are not impacted adversely.

Compensation

Mines produce devastating environmental impacts, and in and of themselves can hinder economic development for First Nations in the long term through those impacts. In recognition of these facts, mining projects must be subject to compensation payments that reflect that harm done.

Revenue Sharing

In the event that a mine goes forward in the traditional territory of a First Nation, it follows that that First Nation is entitled to share of the profits of the mine. First Nations are governments in the territories that they are present in, and this must be fully addressed in legislation. The proposed *Mineral Resources Act* in the Northwest Territories provides a strong precedent on this piece by requiring holders of mineral leases to enter into benefits agreements with each Indigenous government that the Minister considers appropriate. Including such a provision in the *Mining Act* would provide a stronger bargaining position for First Nations in Ontario, approaching a consent

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[74] Consultation framework: Implementing the duty to consult with Aboriginal communities on mineral exploration and mine production in Ontario, Ministry of Northern Development, Mines, Natural Resources and Forestry: Mines & Minerals Division, December 8, 2021.

standard more in line with what is outlined in the United Nations Declaration on the Rights of Indigenous Peoples. Suggested language would be modelled on the following provision:

> 52. (1) Subject to this section, the holder of a mineral lease shall enter into an agreement for benefits in accordance with the regulations with each Indigenous government or organization that the Minister considers appropriate in the circumstances,
>
> (a) if an undertaking authorized under the mineral lease meets the prescribed threshold; and
>
> (b) when required by the regulations in respect of a production licence under subsection 46(3).[75]

- ***Implementation Note:*** With regards to the above noted change in the *Mining Act*, we recommend advocating for this change directly with the Premier by way of the ORC.

WITHDRAWAL

The *Mining Act* should be revised to permit a withdrawal regime at the landscape level. In the current regime, parcels of land that are 25 hectares of land or less can be "withdrawn" from eligibility for exploration. While a positive step, we recommend negotiating an expansion to this withdrawal mechanism as a way for First Nations to further advance jurisdiction and regulatory control within the colonial mining regulatory regime.

Section 35 of the *Mining Act* outlines that the Minister may "withdraw from prospecting, mining claim registration, sale and lease any lands, mining rights or surface rights that are the property of the Crown." In making an order of this nature, the Minister may consider "whether the lands meet the prescribed criteria as a site of Aboriginal cultural significance."[76] This regime is discretionary: the Minister may consider withdrawal where a given piece of land is considered to be of "Aboriginal cultural significance." This determination is also discretionary: sites may be considered to be of Aboriginal cultural significance where they: (1) are strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons, including because of its traditional use by that community, according to Aboriginal traditions, observances, customs or beliefs; (2) it is in a fixed location, subject to clear geographic description or delineation on a map; and (3) its identification is supported by the community, as evidenced by appropriate documentation.[77] The Minister is also entitled to consider whether the site could be protected through other mechanisms in making these determinations.[78]

We recommend negotiating a number of changes to this regime. Priority changes should be to have this be a mandatory determination by the Minister where conditions are met, effected by a simple change of language from "may" to "shall" in both stages of the determination process. In addition, we recommend a significant expansion of the geographic area that the withdrawal process can relate to. Landscape level withdrawals would, when requested by First Nations, effectively provide

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[75] Bill 34-18(3): Mineral Resources Act, Northwest Territories.
[76] *Mining Act,* s 35(2)
[77] *General Regulation*, s. 9.10(1).
[78] *General Regulation*, s. 9.10(2).

a consent requirement for mining in traditional territories of First Nations. This would significantly advance jurisdiction for First Nations within the colonial mining regime and allow for a regulatory role that more seamlessly provides for measured economic development.

- ***Implementation Note:*** With regards to the above noted change in the *Mining Act*, we recommend advocating for this change directly with the Premier by way of the ORC.

INVESTMENT

Mining activity will continue in Ontario for the foreseeable future. As such, legislative instruments that allow for assistance in investment in projects is commensurate with the desire to enhance economic development in Ontario. While this could be done to allow First Nations to take equity stakes in mines themselves, funding for research and development in value-added businesses would allow First Nations to diminish reliance on primary resource extraction-based development, and lower investment risk.

- ***Implementation Note:*** Advocacy for this type of funding could come from the federal government through the Ministry of Natural Resources, or through the Tri-Council funding agencies. The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council (NSERC), and the Social Sciences and Humanities Research Council (SSHRC) support and promote high-quality research in a wide variety of disciplines and areas. Together, they make up the Tri-Council funding agencies, the primary mechanism through which the Government of Canada supports research and training at post-secondary institutions.

PROVINCIAL PARKS AND PROTECTED AREAS

Ontario's Provincial Park System

Ontario has over 630 parks, with 340 provincial parks, 295 conservation reserves, equalling 9.5 million hectares.[79] These areas comprise approximately 9 percent of the province and draw 10 million visitors a year. The *Provincial Parks and Conservation Reserves Act* (the "**PPCRA**") is the primary provincial statute governing parks and protected areas.[80] The PPCRA is designed to permanently protect a system of provincial parks and conservation reserves that (1) includes ecosystems that are representative of Ontario's natural regions; (2) protects provincially significant elements of Ontario's natural and cultural heritage; (3) maintains biodiversity; and (4) provides opportunities for compatible, ecologically sustainable recreation.[81] The PPCRA recognizes existing Aboriginal and treaty rights, but falls short in outlining how and when First Nations can and will be involved in management of provincial parks.

In seeking revision to the PPCRA, we recommend negotiating a provision similar to the following provision in the *Canada National Parks Act*, SC 2000, c 32:

> Agreements — general
>
> 10 (1) The Minister may enter into agreements with federal and provincial ministers and agencies, local and aboriginal governments, bodies established under land claims agreements and other persons and organizations for carrying out the purposes of this Act.

Adding a provision of this nature would enable First Nations to enter into agreements with the Government of Ontario to carry out the purposes of the PPCRA. Such an agreement would not only increase the amount of land under direct control by First Nations, but would generate revenue from contribution funding for park management. Transferring responsibility of the PPCRA to First Nations would also serve to enhance economic opportunities in employment and procurement. Given that priority systems could become entrenched in park management plans, the result would be increasing employment and entrepreneurial opportunities for members of First Nations.

- ***Implementation Note:*** With regards to the above noted change in the *PPCRA*, we recommend advocating for this change with the Minister of the Environment, Conservation and Parks, who would then seek to bring this change by way of government bill, requiring cabinet approval.

Protected Areas Incentives; Carbon Markets

One of the more nascent industries in this report relates to carbon markets and incentives for landscape-level protection. Land management decisions can help mitigate climate change by increasing carbon dioxide removals from the atmosphere or decreasing greenhouse gas ("**GHG**") emissions from the land. Recognition of this fact has created potential economic interests in land management decisions which remove existing or reduce potential carbon emissions. These

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[79] Government of Ontario, Ministry of Environment, Conservation and Parks. *State of Ontario's Protected Areas Report*, 2021, online: <ontarioparks.com/sopar>.
[80] *Provincial Parks and Conservation Reserves Act, 2006*, SO 2006, c 12 ["*PPCRA*"].
[81] *Ibid,* s 1.

economic interests take the form of carbon credits and markets. Carbon markets may, broadly speaking, be demarcated into two categories: (1) compliance-based credits that can be used for compliance with domestic or international emissions reduction regimes; and (2) voluntary credits issued in respect of projects registered with voluntary emissions reduction programs.

REGULATED CREDITS IN ONTARIO

In Canada, compliance-based credits are utilized in relation to the Output-Based Pricing System (the "**OBPS**") made through the federal *Greenhouse Gas Pollution Pricing Act*.[82] The OBPS sets emissions limits for industrial facilities, and enables proponents to pay for excess emissions through direct payment, or through the purchase of regulated carbon offset credits. These credits are authorized through a rigorous and prescriptive set of conditions, which attempt to ensure that credits represent real, quantified, verified and unique emissions reductions or removals that are additional to what would have occurred in the absence of the offset project activity. [83] In other words, offset credits must demonstrate a measurable reduction or removal of GHG emissions that are separate and additional to the pre-offset project state.

As of January 1, 2022, the Government of Ontario transitioned away from the OBPS to Ontario's own emissions performance standard ("**EPS**") program, which will regulate emissions from Ontario's large industrial facilities by setting emissions limits. The EPS is created pursuant to the *Emissions Performance Standards Regulation*, and at present does not include an offset system.[84] The Ministry of the Environment, Conservation and Parks has stated that they may consider offsets in the future once the transition from the OBPS to the EPS is compete. In addition, the Ministry of Energy has asked the Independent Electricity System Operator to assess options for the establishment and ongoing operation and management of a registry to support the creation and/or recognition, trading and valuation, and the retirement of renewable and clean energy credits.[85] These credits would be specific to energy production but will form an important piece of how Ontario forms its broader carbon credit market. The stakeholder engagement window for this project takes place between February and June of 2022, and COO should consider becoming involved in this process to assess whether there are spaces to advocate for rights and economic development for First Nations.

Incorporating an offset system specific to Ontario would enable First Nations to, where eligible, access economic development opportunities in this space. We recommend advocating for an offset system which enables First Nations to enter into long-term environmental protection agreements for traditional territory and allows these agreements to be recognized as valid offsets in the regulated market.

VOLUNTARY CREDITS IN ONTARIO

In contrast to compliance credits, voluntary credits are used to support voluntary corporate greenhouse gas reduction commitments or claims. This is an area of significant growth, with many

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[82] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, Part 2. See also the *Output-Based Pricing System Regulations*, SOR/2019-266.
[83] *Output-Based Pricing System Regulation*, s 78(2).
[84] *Emissions Performance Standards Regulation,* O Reg 241/19.
[85] Clean Energy Credits, IESO Webpage: <https://ieso.ca/en/Sector-Participants/Engagement-Initiatives/Engagements/Clean-Energy-Credits>.

companies worldwide attempting to achieve balance between emissions and removals (referred to as "**Net Zero**").

Much of the current market for carbon credits is focused on creating credits that represent real, quantified, verifiable and "additional" emissions reductions. Credit creation often focuses on "additionality," being the required condition that a given greenhouse gas emissions reduction would *not* have occurred in the absence of a market for offset credits. If reductions in greenhouse gases through making decisions to leave a forest intact would have occurred regardless of the existence of a market for carbon offset credits, then they are not additional. This is a problematic characteristic when considering how carbon offsets might be incorporated into protected area regimes. In many cases, this may present a significant limitation for access to markets for First Nations, except where First Nations are already involved or wish to become involved in forestry industry activity.

In the present day, First Nations remain the stewards of their traditional territories. This fact should bear economic value, and as the carbon credit market develops in Canada and Ontario, consideration should be given to mechanisms for inclusion of this stewardship into credit regimes.

Modelling Ontario's carbon offsets regime on British Columbia's may prove helpful in this way. A proposed offset protocol for British Columbia's forest carbon credit regime is expected to be released in early 2022, and will set out the parameters for forestry-based offset development.[86] For carbon offsets to be recognized as approved "offset units," projects must meet provincial regulations and use an approved protocol. As such, the release of the approved protocol for forest carbon in British Columbia could rapidly propel activity in this space. Once offset units are issued by the regulator through the B.C. Carbon Registry, they can be transferred to other parties for voluntary or compliance purposes. The wording of the to-be-released protocols may give rise to an opportunity for tree farm licensees to enter into agreements where they disengage from forestry activity, to instead be credited with a reduction in carbon emissions. Similar programs in Ontario could apply to the area of Crown land open to forestry activities.

Advocating for carbon rights for First Nations in these spaces should be a key negotiating point regarding carbon credit policy formation in Ontario. As Ontario begins to develop its own carbon market, we recommend that advocacy efforts focus on recognition of First Nations' rights to carbon in their traditional territories.

- ***Implementation Note:*** With regard to carbon markets, we do not recommend any specific legislative revisions at this time. Instead, we recommend that COO become engaged in the ongoing policy formation in this space to enable constituent communities to fully realize the value stored in their traditional territories. We expect that there will be difficulties in advocating for carbon rights on traditional territories that are currently Crown lands. As a starting point, lands that are expected to be subject to the addition to reserve process may be a category that advocacy could focus around. A high quantity of lands are expected to go through the addition to reserve process in the coming decades and as such, we recommend that advocacy focus on commercializing carbon rights for these parcels. These parcels of land are still technically under Crown control, but with strong treaty

[86] B.C. Offset Program consultations, webpage: <https://www2.gov.bc.ca/gov/content/environment/climate-change/industry/offset-projects/consultation#fcop>. See also *First Nations Carbon*, BC Assembly of First Nations, Discussion paper, February 2022, online: <https://www.bcafn.ca/sites/default/files/docs/reports-presentations/BCAFN-Carbon%20Offset%20Discussion%20Paper_Feb%202022_%20Web_0.pdf>.

entitlement claims to them, there may be an opportunity to argue that these lands will eventually be controlled by First Nations and as such, carbon rights in these lands should vest with those communities.

Guardians Programs

In Budget 2017, the Government of Canada announced the allocation of $25 million over a four-year period to support an Indigenous Guardians Pilot. According to the Government of Canada, "This program provides Indigenous Peoples with a greater opportunity to exercise responsibility in stewardship of their traditional lands, waters, and ice. The Pilot supports Indigenous rights and responsibilities in protecting and conserving ecosystems, developing and maintaining sustainable economies, and continuing the profound connections between the Canadian landscape and Indigenous culture."[87]

In Budget 2021, the Government of Canada proposed to provide $2.3 billion over five years to Environment and Climate Change Canada, Parks Canada, and the Department of Fisheries and Oceans as part of a commitment to nature conservation. Up to $100 million over five years (2021-2026) was delegated to support new and existing Indigenous Guardians initiatives and to support the development of Indigenous Guardians Networks for First Nations, Inuit and Métis through the Pilot's "distinctions-based governance structure."[88] In addition, Environment and Climate Change Canada announced that up to $173 million will be used to fund new and existing Indigenous Guardians initiatives and the development of Indigenous Guardians Networks for First Nation, Inuit and Métis.[89]

Based on analysis of current and future values of Indigenous Guardians work in the Northwest Territories, it has been shown that guardians programs deliver significant social, economic and environmental benefits. In the case of Lutsel K'e and Dehcho guardians programs, a $4.5 million investment has yielded $11.1 million in social, economic, cultural and environmental value.[90] Analysis of these programs shows that investment in programming leads to at least $2.5 dollars of social, economic, cultural, and environmental value for every $1 dollar invested, and that this return could increase to $3.7 dollars with increased investment.[91] This analysis supports what many already know: that Indigenous Guardian work has a profound positive effect on Indigenous people and their communities, Canadian Governments, and other stakeholders.

We recommend advocating for greater long-term funding to be allocated to guardian programming in Ontario and at the federal level. As the return-on-investment possibilities become more well known throughout Canada, a steady and continuous growth can be anticipated in this area. Thus,

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[87] Indigenous Guardians Pilot, *ECCC funding programs*, online: <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/indigenous-guardians-pilot.html>.
[88] *Ibid*.
[89] Government of Canada announces $340 million to support Indigenous-led conservation, *Environment and Climate Change Canada*, News Release, August 12, 2021, online: <https://www.canada.ca/en/environment-climate-change/news/2021/08/government-of-canada-announces-340-million-to-support-indigenous-led-conservation.html>.
[90] *Analysis of the Current and Future Value of Indigenous Guardian Work in Canada's Northwest Territories*, SVA Consulting, November 2016, online: <https://static1.squarespace.com/static/5f8367238502ed181766aaf0/t/5fb4067a20b4fb44c16568e1/1605633660632/value-in-indigenous-guardian-work-nwt.pdf>, page 5.
[91] *Ibid*.

advocating for guardian programs at the provincial level, as well as the federal level, would increase the total "market" available to First Nations in this space.

- ***Implementation Note:*** With regards to the above noted funding request, we recommend that advocacy flow through the federal Minister of Environment and Climate Change.

PROCUREMENT

Overview of Provincial Procurement Regulation

Ontario Ministries are required to comply with the Ontario Public Service Procurement Directive (the "**OPS PD**"), which applies to the public procurement of all goods and services required to meet government needs.[92] The OPS PD is intended to ensure that Ministries acquire goods and services to meet government needs in the most economical and efficient manner, through processes that adhere to a number of principles, including (1) value for money; (2) vendor access, transparency, and fairness; (3) responsible management; and (4) geographic neutrality and reciprocal non-discrimination.[93] The OPS PD sets out the compulsory general principles related to procurement planning, and the procurement process. Notably, the OPS PD requires that the evaluation process for assessing a vendor's submission must be fully disclosed in procurement documents.[94] These documents must set out: (1) mandatory requirements for bids; (2) weighting systems used for bids; (3) descriptions of the short-listing process; (4) the role of reference checks, oral interviews, demonstrations and site visits; and (5) a description of the price/cost evaluation methodology.[95]

In addition, a wide variety of entities (including many hospitals, school boards and provincially funded agencies) must comply with the *Broader Public Sector Accountability Act* and the Broader Public Sector Procurement Directive (the "**BPS PD**").[96] As with the OPS PD, the BPS PD sets out detailed requirements for content and conduct of the procurements.[97] The BPS PD mandates that evaluation criteria must be developed, reviewed and approved by appropriate authorities prior to the commencement of the procurement process.[98] Additionally, procurement documents must outline all criteria that are used to evaluate submissions; this will include, but is not limited to, any mandatory and rated criteria.[99]

In both the context of the OPS PD and the BPS PD, there are significant opportunities for economic development for First Nations in providing goods and services to Ontario's public sector entities. This is particularly important in light of the scale of public sector spending in Ontario, as Ontario spends about $29 billion annually on a wide range of goods and services.[100] Ontario currently administers an "Aboriginal Procurement Program," which seeks to help grow Indigenous businesses by increasing access to the Ontario government's procurement process. The program encourages ministries to purchase from Indigenous-owned businesses when goods and services: (1) benefit Indigenous people or communities; (2) serve the needs of Indigenous people; or (3) are culturally specific to Indigenous people. Ministries can also utilize set-asides, which are

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[92] *Ontario Public Service Procurement Directive,* Management Board of Canada, December 2014 ["*OPS PD*"]. Note that the OPS Procurement Directive does not apply to services related to advertising, public relations, media relations or creative services and acquisition of real property.
[93] *Ibid* at pages 4-5.
[94] *Ibid* at s 5.6.1.
[95] *Ibid.*
[96] *Broader Public Section Accountability Act*, 2010, SO 2010, c 25; *Broader Public Sector Procurement Directive*, Management Board of Cabinet, July 1, 2011 ["*BPS PD*"].
[97] *BPS PD*, *Ibid*, s 7.2.9.
[98] *Ibid*.
[99] *Ibid*.
[100] Doing business with the Government of Ontario, Ontario Webpage: <https://www.ontario.ca/page/doing-business-government-ontario>.

procurements reserved for competition among eligible Indigenous businesses. Ministries can also include Indigenous requirements when issuing tenders.[101]

Overview of Federal Procurement Regulation

Federally, the former Aboriginal Affairs and Northern Development Canada had created various programs to support economic development for Indigenous communities, including the Procurement Strategy for Aboriginal Business ("**PSAB**"). Under the PSAB, contracts that "serve a primarily Aboriginal population" are set aside for competition among qualified Aboriginal businesses. Federal employees are also encouraged to voluntarily set aside opportunities for competition among Aboriginal businesses whenever practical.[102]

Enhancing Economic Development in Procurement

ABORIGINAL PROCUREMENT PROGRAM DEVELOPMENT

Our recommendation with respect to public sector spending is to advocate for the revision of Ontario's "Aboriginal Procurement Program" to mandate priority points to First Nations proponents. We recommend the same addition to Canada's PSAB. This would open an incredibly broad market to First Nations-owned businesses. One particularly important precedent on this issue has been set by the Yukon Government. In February of 2021, the Yukon Government implemented a First Nations procurement policy that provides advantages to Yukon First Nations-owned businesses and businesses that employ First Nations workers when bidding on government contracts.[103]

A verified Yukon First Nations business registry has been created and it is being managed by the Yukon First Nations Chamber of Commerce.[104] Businesses that wish to be added to the registry must submit supporting documentation providing proof of Yukon First Nations citizenship and shareholder agreements. The registry allows Yukon First Nations businesses to advertise their goods and services to the public, governments and other businesses.

Critically, bid value reductions for First Nations have also been implemented through the procurement policy. In other words, the value of bids made by Yukon First Nations, that otherwise meet the applicable requirements, are reduced for purposes of price evaluation and ranking only. These reductions effectively re-rank compliant bids to reflect increased participation by Yukon First Nations businesses and people.[105] Eligible businesses may receive reductions between 5% and 15% on applicable bid or bid-component values during evaluation depending on the level of Yukon First Nations ownership and participation in the eligible businesses.[106] A bid-value

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[101] Aboriginal Procurement Program: bidding on government contracts, webpage: <https://www.ontario.ca/page/aboriginal-businesses-bidding-government-contracts>.
[102] Procurement Strategy for Aboriginal Business, Government of Canada webpage: <https://www.sac-isc.gc.ca/eng/1354798736570/1610985991318>.
[103] Yukon Government Procurement Policy, GAM 2.6 and First Nations Procurement Policy, February 28, 2022, online: < https://yukon.ca/en/procurement-policy>, s 11(7) ["*Yukon Procurement Policy*"]; Yukon Government Webpage, Learn about the Yukon First Nations Procurement Policy, online: <https://yukon.ca/en/doing-business/government-contracts/yukon-first-nations-procurement-policy>.
[104] *Ibid, Yukon Procurement Policy*, s 11(7.13); Yukon Government Webpage, Yukon First Nations Business Registry, online: <https://yukon-first-nations-business-registry.service.yukon.ca/>.
[105] *Yukon Procurement Policy, supra* note 102*,* s 11(7)(a).
[106] *Ibid*, s 11(7)(b).

reduction of up to 15% will apply for the price of labour performed by Yukon First Nations People regardless of the bidder's status as a Yukon First Nations business.[107] An additional 5% reduction is applied if the Yukon First Nations business is in a community other than Whitehorse and the contract activities will occur in the traditional territory in which the eligible business is located, in accordance with the specific procurement documents.[108]

Yukon's bid value reduction system has the potential to create paradigm shifting change in economic development for First Nations communities and individuals, and should be looked to as a model on which Ontario could base a procurement policy on.

- ***Implementation Note:*** Yukon and Ontario have significant differences in terms of demographics and urbanization. What is tenable politically in Yukon in many cases would not be politically tenable in more densely populated areas of Ontario. With this in mind, we recommend taking a "zoned" approach to this advocacy. In areas of Ontario where the proportion of First Nation individuals is significantly higher than in urban areas, we recommend advocating for the above noted revisions to Ontario's Aboriginal Procurement Program. Even if such a policy is not possible in the Greater Toronto Area or in other major urban centres in the south, we believe such a policy is significantly more viable in more rural settings and in most of Northern Ontario. In addition to advocating through the Ministry of Government and Consumer Services, we recommend advocating through the provincial Minister of Indigenous Affairs. At the federal level, advocacy could flow through the Minister of Public Services and Procurement. This would be relevant for any federally-run project in Ontario.

[107] *Ibid*, s 11(7)(b)(iii).
[108] *Ibid*, s 11(7)(b)(ii).

TAXATION AND FINANCE

First Nation tax reform is a widely discussed topic by First Nations across Canada, particularly regarding the section 87 *Indian Act* tax exemption. First Nation tax policy is shaped by federal legislation and policy. The introduction of limited tax tools for First Nations, some modern treaties and tax agreements, and multiple and often conflicting court decisions have shaped the relationship between the Canadian tax system and its application to First Nations and their citizens.

This section will focus on the section 87 *Indian Act* tax exemption[109] and how its restrictive and inconsistent interpretation by courts and federal tax authorities has hindered economic opportunities for many First Nations in Ontario. What to do with this tax exemption is a timely issue. While Nations across Canada have expressed different interests and preferences, most agree that some form of tax reform is needed.

Although outside of the purview of this report, it is important to note that there are federal legislations that delegate certain tax powers to First Nations, including: the *First Nations Goods and Services Tax Act*, real property taxes under the *Indian Act*, and real property taxes under the *First Nations Fiscal Management Act.* Any powers exercised by First Nations under these legislations will be limited to the frameworks established by the federal government.

Overview of *Indian Act* Tax Exemption

Section 87 of the *Indian Act* exempts from tax the interest and personal property of an Indian or band (the term "Indian" and "band" have the meaning set out in the *Indian Act*) on reserve:

> **87(1)** Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.

Of particular interest is subsection 87(1)(b). Personal property has been interpreted by courts and the Canada Revenue Agency ("**CRA**") to include tangible property and intangible property and rights, such as income. The exemption also applies to sales taxes, such as HST in Ontario, charged to Indians and bands and some band-owned entities on property and services located on-reserve under specific criteria.

Due to conflicting policy and legal interpretations, subsection 87(1)(b) has been the cause of many widespread misconceptions[110] and uncertainty, especially as it concerns locating intangible

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[109] There are other sources of income tax exemptions available to First Nations, which are not included in this section, such as subsection 149(1)(c) of the *Income Tax Act* – the public body provision in which band governments generally fall and subsection 149(1)(l) of the *Income Tax Act* – the non-profit tax exemption. First Nations have also argued for an inherent right to tax immunity but to date, this has not succeeded in courts.

[110] A common misconception is that First Nations and its members do not pay taxes in Canada. However, that is simply incorrect. As noted above, the application of section 87 does not apply to Inuit, Metis and non-status Indians. In addition, approximately 60% of status Indians live in rural areas off-reserve and in urban areas (see Annual Report to

property, such as income, on a reserve. In 1992, the Supreme Court of Canada found that when determining whether income is situated on a reserve under section 87, consideration must be given to the "connecting factors"[111] that connect the property to a reserve. This is known as the "connecting factors test."

The "connecting factors test" still applies today and has some resemblance to the test for determining the residency of an individual under the *Income Tax Act*, but it has been applied much more inconsistently by courts and the CRA. Moreover, while both tests call for a fact-driven analysis, case law suggests that tying intangible property to a reserve will be significantly more complex than tying an individual to Canada.

Part of the inconsistency, which has resulted in a restrictive application of the tax exemption by courts and the CRA, is the disconnect between the stated underlying purpose of this exemption and the economic realities of First Nation communities today.

The purpose of the tax exemption has consistently been characterized by courts as protecting Indian property on reserve "from intrusions and interference of the larger society" and ensuring Indians "are not dispossessed of their entitlements."[112] In other words, section 87 ensures that the imposition of tax by the Crown does not erode the use of Indian property on reserves.

However, in determining that the purpose of section 87 was to protect only on-reserve property, the Supreme Court of Canada in *Mitchell v Peguis Indian Band* noted that section 87 (and other provisions of the *Indian Act* such as section 89) was not meant to remedy the economically disadvantaged position of Indians. If a status Indian deals with off-reserve property, they do so on the same basis as all other Canadians.[113]

In agreeing with the above logic, Justice Gonthier for the Supreme Court of Canada in *Williams v Canada* said the following:[114]

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian. [emphasis added]

Parliament 2020, online: Government of Canada <https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711>). Most of these individuals will be paying sales tax, income tax, and property taxes.

[111] *Williams v Canada* [1992], 3 CNLR 181 (SCC). See also *Desnomie v R*, [2000] FCJ No 528 (FCA).

[112] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85. The Supreme Court of Canada noted that the legislative protection of Indian property was linked to the signing of the Royal Proclamation of 1763, wherein the Crown was "honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base."

[113] *Mitchell, ibid*. These comments are consistent with federal policies that were aimed at enfranchising First Nations' people – a First Nation person that became a Canadian citizen could lose their tax exemption.

[114] *Williams, supra* note 110 at 887.

Linking the purpose of the tax exemption to the "commercial mainstream" has been used by courts as a way to minimize the availability of the tax exemption often because income was not derived from activities that were "integral to the life of the reserve"[115] or activities that benefitted the "traditional Native way of life."[116] As one author put it succinctly: "the courts have shown a marked tendency to apply the exemption restrictively and require that the source of income have a demonstrably "Indian" character."[117]

It wasn't until 2011, in the seminal cases *Bastien Estate v Canada*[118] and *Dubé v Canada*[119] (released concurrently), that the Supreme Court of Canada finally ruled that the courts, for too long, had focused and relied too heavily on the "Indian" character concept. The Court made several significant findings, including:

- There is no requirement that the personal property be integral to the life of the reserve or preserve the traditional way of life as was previously held by many courts.[120]
- Caution must be taken against using the "commercial mainstream" principle to conclude that income is not situated on a reserve (it should not be a determinative factor).[121]

While *Bastien* and *Dubé* resulted in a necessary shift in the tax exemption policy, the CRA still chooses to apply the decisions narrowly when determining the tax exemption of investment income. Where investment income is earned from fixed-income instruments (e.g., Guaranteed Investment Certificates or the like) in an on-reserve financial institution, the investment income will likely be situated on a reserve. Conversely, where the investment income is earned in the equity markets, at this time, it is legally unclear whether such property would be considered "situated on a reserve." The CRA has indicated that they will not treat such income as exempt. Accordingly, until the courts decide on this issue (in favour of tax exemption), the CRA will likely deny section 87 exemptions to Indians earning investment income in equity markets as a matter of policy.

Hindrance of Economic Opportunities

Given the restrictive and inconsistent interpretation and application of the "connecting factors" test by courts and the CRA, it can be challenging for First Nations and their members to have any certainty concerning employment, investment and business opportunities. This factor, coupled with the courts focus on the "Indianness" of the source of income for decades, has likely hindered economic growth within many First Nation reserves in Ontario by discouraging entrepreneurship and the pursuit of economic gains.

Because of this, when providing tax advice to our clients, we recommend that they locate their business (e.g., office, administrative duties, board/governance decisions, etc.) and employment opportunities on-reserve to ensure there are as many connecting factors as possible to connect the income to a reserve. However, this is often impossible because our clients are operating part of

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[115] *Recalma v Canada*, 1998 CanLII 7621 (FCA).
[116] *Recalma, ibid*.
[117] Martha O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track", (2002) 50:5 Can Tax J at 1571.
[118] 2011 SCC 38 (CanLII) [*Bastien*].
[119] 2011 SCC 39.
[120] *Bastien, supra* note 117 at para 30.
[121] *Ibid* at para 52.

their businesses off-reserve given the extensive challenges associated with economic development on-reserve, namely because of the *Indian Act*.

In addition, having to relocate off-reserve often is not a choice many status Indians can make. The most prominent barrier to living and working on reserve for most First Nations people is the availability of appropriate housing, education and employment opportunities. A First Nation member that has to locate off-reserve will often have to forego their rights to the tax exemption, despite having connections to their communities.

During the COVID-19 Pandemic, the CRA updated its policies to reflect the temporary re-location of many band members off-reserve for employment or housing reasons.[122] However, other than this policy, it has done little to change its position on the applicability of the section 87 tax exemption.

Recommendation

Section 87 tax reform has been widely discussed over the past years. The interests and preferences expressed by First Nations across Canada vary, as expected, given that each First Nation's needs and fiscal capabilities are different.

Many First Nations believe that section 87, despite the restrictions imposed by courts and the CRA, is one of the only benefits conferred under the *Indian Act*. For the band members and First Nation businesses that can avail themselves of the tax exemption, repealing this section would remove the tax exemption protections and significantly increase the taxes paid by such individuals and businesses.

In modern-treaty negotiations in British Columbia and the North, some First Nations were forced to gradually remove the tax exemption after a certain period (called a 'sunset period'). Consequently, some members of these First Nations refused to enrol with their new First Nation government and opted to become members of other bands to ensure they could still avail themselves of the tax exemption. The 'sunset clause' policy is now recognized as a significant barrier to future modern treaty settlements, and Canada is consulting widely on whether or not section 87 should be retained in future modern treaty or self-government contexts.

Recommendation:

An amendment to section 87 would not, in our opinion, provide the best outcome for First Nations in Ontario, especially if there isn't a corresponding overhaul of the *Indian Act*. Any amended section would still be subject to court interpretation and is still likely to be applied restrictively by the CRA.

In our view, despite the many flaws in how it is being interpreted and applied by the courts and the CRA, section 87 does provide some level of protection against the Crown's imposition of tax, and for this reason, we do not believe this section should be repealed.

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[122] "CRA and COIVD-19 Indigenous income tax issues", online: <https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-application-indian-act-exemption.html>.

An option that could better serve First Nations in Ontario would be to have section 87 continue to apply but to make the application of section 87 subject to First Nations jurisdiction. We recommend that COO advocate for tax policy that would enable First Nations to exercise tax powers if and when they chose to do so.[123]

We recognize that circumstances vary widely among First Nations, and that each First Nation would need to consider whether exercising any tax powers is sustainable and advisable for its Nation. Tax jurisdiction could be taken up incrementally, and only in areas and at times when the First Nation government chooses to exercise such powers.

For this to occur, there would need to be enabling legislation implemented by Canada and Ontario that would ensure that laws enacted by each First Nation (or collectively by the First Nations in Ontario) that enable them to exercise tax powers over its residents would be recognized as valid by the courts. There would also need to be corresponding tax treatment agreements with Canada and Ontario, as applicable. As we recommend that the existing section 87 remain unchanged, the new laws would need to be drafted in such a way as to "referentially incorporate" section 87 into the new legislation. This would empower First Nations to exercise their own jurisdictions with respect to tax without losing the section 87 tax exemption from Crown taxation.

This recommendation could advance First Nation sovereignty in this space and enhance economic opportunities within a Nation by enabling a Nation to generate its own revenues from income and property on or connected to their territories if and when they choose to do so.

Provision	Text	Changes recommended
s. 87	87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation: (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve.	Keep section 87 and advocate for a new tax policy to enable First Nations in Ontario to take up tax powers.

[123] We understand that there may be sensitivities existing in communities when taxes are introduced to members that are otherwise availing themselves of tax exemptions. We also understand that the use of the word "tax" may not be favourable to some communities. But there are many different models the Chiefs of Ontario could explore. Consultations across the different regions in Ontario would be advisable, to fully understand the different interests and concerns of the Nations. Some Nations in Canada have revenue sharing agreements with the federal and provincial or territorial governments, whereby a portion of collected taxes are remitted back to the Nation.

Section 89 of the *Indian Act*

Closely related to section 87 is section 89 of the *Indian Act*, which provides that the property of an Indian or band (as defined in the *Indian Act*) that is "situated on a reserve" is not subject to seizure or the attachment of a security interest by anyone other than an Indian or band. Subsection 89(1) of the *Indian Act* states:

> **89**. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Similar to section 87, the purpose of subsection 89 has been held by courts to be the protection of reserve land bases and personal property of Indians and bands, to ensure that property on reserve is not eroded by the ability of governments to tax or creditors to seize.[124] However, in practice, this also has the effect of severely curtailing access to secured loans, both through the inability of non-First Nation lenders to seize collateral, and the uncertainty regarding whether property is "situated on a reserve" for section 89 (this is because locating property on-reserve for legal purposes is determined by applying the "connecting factors test" discussed above).

The language of section 89 does contain some limited exceptions to the rule against seizure of property, including where the creditor is an Indian or an Indian band[125] and where a leasehold interest is charged.[126] In addition, the courts have also found certain exceptions with the applicability of section 89. However, these exceptions are of somewhat limited utility in the context of commercial lending, and section 89 poses a fairly significant legislative encumbrance on economic development for First Nations.

One option that has been used to address complexities caused by the restrictions of section 89 comes in the form of a waiver by the band or status Indian debtor. Legal opinions in transactions where a status individual or band wishes to secure a loan with on-reserve property typically attest to the validity of collateral by making reference to the Manitoba Court of Appeal case, *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson et al.*, to support the notion that Indian and bands are able to waive section 89. There, the Manitoba Court of Appeal held that an "Indian" (as defined in the *Indian Act*) could effectively waive Section 89 rights with respect to a commercial transaction on a reserve and endorsed the lower court's decision citing authority that a First Nation band could also do so. As a decision of the Manitoba Court of Appeal is merely persuasive on the courts of Ontario, we caution that there remains some doubt in respect of whether such waiver would be upheld by Ontario courts.[127]

While section 89 could, in theory, be repealed, we do not recommend this approach. Instead, we recommend negotiating a codified ability for status individuals and bands to waive section 89 with respect to certain transactions. This approach removes the need for workarounds in legal opinions that rely on a relatively unsettled area of case law and respects the individual autonomy of

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[124] *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58.
[125] *Mitchell, supra* note 112 at 133-134.
[126] *Indian Act*, RSC 1985, c I-5, s 89(1.1).
[127] *Tribal Wi-Chi-Way-Win Capital Corp. V. Stevenson* et al.*,* 2009 MBCA 72.

community members and First Nations alike. Codifying this ability provides certainty that section 89 can indeed be waived and would reduce the need to litigate this issue.

Provision	Text	Changes recommended
s. 89	**Restriction on mortgage, seizure, etc., of property on reserve** 89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band. **Exception** (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution. **Conditional sales** (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.	Addition of a new subsection 89(3) which deals with the express ability of an Indian or a band to waive any one of the restrictions concerning the attachment of security interests and seizure of property on reserve contained in section 89(1) of the *Indian Act*. Such a provision could state: **Waiver** (3) For greater certainty, an Indian or a band may expressly waive any one of the restrictions concerning the attachment of security interest and seizure of property on reserve contained in subsection (1).

TOBACCO

Overview of Tobacco Regulation

In Ontario, the Ministry of Finance is responsible for administering the *Tobacco Tax Act*, which is the primary regulatory instrument in the tobacco industry. Ontario generally imposes a direct tax on tobacco products which is payable by consumers.

Status Indians living on-reserve do not have to pay provincial tax on cigarettes if the cigarettes are purchased on-reserve. To limit the illegal sale of cigarettes to individuals other than status Indians, many provinces, including Ontario, have set quotas on the number of cigarettes that can be sold on each reserve. In Ontario, this occurs through Ontario's First Nations Cigarette Allocation System. This system permits authorized wholesalers to sell limited quantities of unmarked cigarettes and fine cut tobacco to authorized reserve retailers, for sale to First Nations.

Security Requirements

Off-reserve, consumers pay tobacco tax when they purchase tobacco products. To facilitate the collection of tax, wholesalers and retail dealers pay an amount equal to the tax when they purchase tobacco products from their suppliers.[128] The suppliers remit the tobacco tax to the Ministry every month. To protect against risk of non-compliance with the requirement to remit tobacco tax to the Ministry each month, the *Tobacco Tax Act* requires manufacturers, suppliers and wholesalers to post security between $10,000 and $1,000,000, depending on the type of registration with the Ministry.[129] When wholesalers and retail dealers sell tobacco products to their customers, they will include the tobacco tax, effectively reimbursing themselves for the amount paid to their supplier. These security sums constitute a high barrier to entry for this industry, and because of the mechanics of how taxes are recouped, the security sum is effectively held by the Ministry for as long as an entity remains in business. Manufacturers and wholesalers of unmarked cigarettes and unmarked fine cut tobacco are required to post security through sections 12(2)(f) and 12(2)(f.1) of the *Tobacco Tax Act*. From our perspective, this sum is a major piece of the tobacco legislative regime that hinders economic development for First Nations in this space (particularly with regards to manufacturing and wholesaling). While it may be unlikely to have this repealed or modified, we would recommend advocating for flexibility in the sums required for persons permitted to sell unmarked cigarettes and unmarked fine cut tobacco. The security bonds for holders of these permits are required to post security in the amount of $500,000, and this likely represents a barrier to entry for many potential First Nations-owned businesses.

- ***Implementation Note:*** We recommend beginning this advocacy at the level of the Ministry of Finance. As a legislative change, this change will require cabinet approval and a government bill, meaning that advocacy would need to extend to cabinet.

Cigar Regulatory Changes

Starting in the 2022 permit year, the Ministry of Finance has modified their policy for cigar wholesalers who operate under the administrative concession and sell cigars on-reserve without collecting an amount on account of tax (i.e., untaxed cigars). These wholesalers, who were

[128] *Tobacco Tax Act*, RSO 1990, c T10, s 4.
[129] *Ibid*, s 12(2).

previously permitted to sell cigars without collecting taxes from retailers, will be required to consult with the Ministry by submitting a cigar sales plan as part of the yearly permit process.[130] In general, wholesalers are required to collect an amount on account of tax on all cigar sales. However, to facilitate the tax-exempt purchase of cigars on a reserve by First Nations individuals, the Ministry does not generally enforce this pre-collection of tax requirement in specific situations. For instance, the pre-collection of tax does not occur when the cigars are delivered and sold on a reserve by a wholesaler directly to an authorized on-reserve retailer acting in their capacity as a retailer. This administrative concession helps minimize financial and administrative burden for on-reserve retailers.

According to the Ministry, reviewing a wholesaler's cigar sales plan will allow the Ministry to evaluate whether a wholesaler's proposed cigar sales on-reserve represents reasonable retail volumes. Additionally, this procedure is purported to allow for transparent communication between the Ministry and wholesalers with the goal of ensuring that sales volumes represent the Ministry's view of reasonable retail volumes.

Note that in 2022, wholesalers will not be required to submit a sales plan if the wholesaler's historical untaxed cigar sales are considered reasonable as defined through the Ministry's process. Where these wholesalers anticipate increased cigar sales volumes in 2022, above their historical volumes, the Ministry requires these wholesalers to submit a 2022 cigar sales plan that contemplates this increase. Wholesalers were notified by letter from the Ministry on their status with regards to the requirement to submit a sales plan in 2022. First drafts of cigar sales plans for 2022 were due on January 14, 2022. A review and approval of the plans was expected to be complete by March 31, 2022. Permits have been issued from January 1, 2022, to June 30, 2022, and once plans are approved, permits for the remainder of the year will be issued.

Cigar sales plans submitted to the Ministry must contain (1) the name of each on-reserve retailer, (2) the location of each retailer, including the reserve's name, and (3) the total volume of anticipated individual untaxed cigars to be sold to each retailer. According to the Ministry, if a wholesaler's sales plan does not meet requirements, the Ministry will work with the wholesaler and provide support with aligning the wholesaler's sales plan, or alternatively, provide the wholesaler with an opportunity to communicate justification for the higher sales volumes. In the event that wholesalers fail to provide a proposed sales plan with reasonable retail volumes under the administrative concession, the Ministry may not issue a wholesaler permit. In these cases, the Ministry will notify the affected wholesalers of the intention to refuse the permits and afford a hearing opportunity to explain why the permits should not be refused.

The changes to cigar sales regulation appears to originate from the 2021 Budget, where the Ontario government committed to measures addressing the sale of unregulated tobacco. According to the 2021 Budget:

> *Since 2020, the government has been consulting on unregulated tobacco with public health stakeholders, industry and retail associations, as well as First Nations partners. Building on the commitments made in the 2020 Budget, the Province has launched engagement with First Nations on tobacco in February*

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[130] Ministry of Finance: Cigar Sales on First Nations Reserves. Webpage: <https://www.ontario.ca/document/tobacco-tax/cigar-sales-first-nations-reserves>.

> *2021. These conversations are being led by independent Indigenous facilitators and are essential to informing solutions to unregulated tobacco. This engagement with First Nations will support the development of a made-in-Ontario tobacco strategy.*[131]

One of the stated actions being taken by the government in the 2021 Budget is, "Working closely with cigar wholesalers to clarify and strengthen guidance regarding on-reserve sales."[132]

No mention of cigar sales or cigar sales plans were identified in transcripts released by the Ontario Legislature, or its Committee on Finance and Economic Affairs. In sum, it appears as though the new regime being implemented by the Ontario government is rooted in a motivation to address the sale of unregulated tobacco.

In addition to the security requirements under the *Tobacco Tax Act*, we point to the on-reserve cigar sales regulatory framework as one that will hinder economic development for First Nations. The increased administrative and financial burden associated with producing business plans for wholesalers is likely to reduce margins for retailers and wholesalers and impose a cap on the quantity of cigars that can be sold on a given reserve. As with the security requirements, while it remains unclear whether the Ministry is open to modifying this policy, we recommend advocating in this space if economic development in this industry is desired.

- ***Implementation Note:*** As a discrete policy change not requiring cabinet approval, we recommend advocating directly with the Ministry of Finance for this policy.

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[131] *2021 Ontario Budget — Ontario's Action Plan: Protecting People's Health and Our Economy*, March 24, 2021, Annex: Details of Tax Measures and Other Legislative Initiatives, online: <https://budget.ontario.ca/2021/contents.html>.
[132] *Ibid*.

CONCLUSION

This report represents OKT's collective knowledge with regards to how Canada and Ontario's legislative systems can be changed to enhance economic development for First Nations. The common threads throughout our recommendations underscore the fact that economic development often occurs as a result of meaningful engagement between First Nations, industry proponents, and settler governments. Short of complete legislative overhauls, our recommendations generally attempt to create more leverage for First Nations in regulatory processes, increasing the likelihood that First Nations benefit from economic activity occurring in their territories. Many of the success stories observed over the past decade come in the form of partnerships between First Nations and proponents, and our recommendations accordingly attempt to make these partnerships more appealing to all parties to economic development activity.

Where possible, we have also attempted to recommend changes that confer specific benefits on First Nation-owned businesses in procurement and contracting processes. We do this with the intention of enhancing economic development independent of input from and reliance on industry proponents. These recommendations reflect a key goal of building entrepreneurial capacity for First Nation-owned businesses, conferring benefits to communities for the long-term.

Our recommendations also attempt to foster a regulatory environment which includes significant delegation of responsibility to First Nations. Doing so with appropriate funding develops capacity for communities and enables economic development to occur in ways that are acceptable to First Nation governments. We view this as a critical long-term shift in all of industries discussed in this report. Our core philosophy is that there will be no real justice until Indigenous peoples have control over their own fates and futures, including their lands and economic and political decision-making. This philosophy is reflected in our recommendations to develop capacity and delegate regulatory control in the long-term.