



By-law Workshop Toolkit Training

National Aboriginal Lands Managers' Gathering
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Overview

1. Legislative Environment
2. Governance and Law Making
3. Drafting an *Indian Act* By-law
4. Best Practices
5. Drafting an *Indian Act* By-law (con't)
6. FNLMA
7. By-law Enactment
8. Section 81 by-laws
9. Section 83 by-laws
10. Section 85 by-laws
11. Other Sources of By-law Authority
12. Monitoring, Compliance and Enforcement



Legislative Environment

Bar Graph

What aspect of Indian Act by-laws do you most hope to learn more about in this session?

- Sources of authority
- Capacity requirements
- Engagement and consultation
- Drafting and structure
- Enforcement

Legislative Environment

Laws can arise whenever human interactions create expectations about proper conduct.

– Professor John Borrows, “Indigenous Legal Traditions in Canada”

- Subsection 91(24) of the *Constitution Act*, 1867 grants the federal government jurisdiction over “Indians, and Lands reserved for the Indians.”
- The *Indian Act* is federal legislation that, among other things, delegates certain law-making powers to First Nation Councils.

Legislative Environment

Paramountcy Test

Two levels of government can make laws on the same subject without necessarily being in conflict. The Supreme Court has established a two-part test to determine whether a conflict exists:

- 1. Operational conflicts where it's impossible to comply with both laws;**
- 2. Where it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.**

Where there is a conflict, the federal law will be “paramount”, meaning that it will prevail.

Legislative Environment

Doctrine of Paramountcy

- When there is a conflict between federal and provincial law, the federal law will prevail.
- This suggests that a First Nation by-law enacted under the *Indian Act* or a self-government agreement would prevail over conflicting provincial regulation.
- In some instances it appears that First Nation by-laws may also prevail over *some* federal legislation if they conflict.

The *Charter*

All First Nations by-laws must conform to the provisions of the *Charter of Rights and Freedoms*.

- This means that, in general, a by-law cannot:
 - Impose a burden, obligation or disadvantage on one individual or group that is not imposed on others; and cannot
 - Withhold from a particular group or individual access to opportunities, benefits or advantages that are available to others.
- by-laws can limit certain rights to just Band members and/or to Reserve residents if it can provide a **reasonable justification** for doing so. (i.e. s. 15 Charter rights)

Section 35, *Constitution Act*

Section 35

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Legislative Environment

by-laws cannot run counter to any provisions in the *Indian Act* or any regulations made under the *Act*.

- The *Indian Act* authorizes the federal government to make regulations on a number of subjects.
- Examples of regulations currently in force include: the *Indian Reserve Traffic Regulations*, the *Indian Reserve Waste Disposal Regulations*, and the *Indian Band Council Procedure Regulations*.

Legislative Environment

Section 88 and Provincial Laws

- Section 88 of the *Indian Act* effectively allows provincial laws of general application to apply on reserve unless the issue being regulated is dealt with under the *Indian Act*, a regulation, or a First Nation by-law.
- Provincial laws of general application will apply where there is no conflicting First Nation law or by-law.

Legislative Environment

The *Indian Act* provides First Nation Councils with the legislative authority to make by-laws under sections 81, 83 and 85(1).

General principles governing the scope of by-laws include:

- **by-laws are only enforceable if they have been enacted according to their formal requirements.**
- **by-laws cannot conflict with some other federal legislation, including the Criminal Code of Canada.**
- **by-laws will prevail over provincial laws of general application in cases of direct conflict.**

Legislative Environment

- First Nation by-laws only apply on reserve land.
- Unless the lands have reserve status, by-laws **do not** apply on:
 - Land owned by the First Nation in fee simple, or
 - On First Nation Treaty lands.
- by-laws apply to everyone on the reserve, whether or not they are a Band member or live on the reserve.

Legal Authority for a First Nations By-law

- Does the First Nation have legal authority to make this law?
- If yes, where is the legal authority from?
- If no, who has the authority to make a law for the issue?
- If no, is there an existing process available for the First Nation to work with the legal authority to make a law?
- Are there legal requirements or factors to consider in relation to the authority?



Governance

Band Councils

- Many First Nations' election processes are under s. 74 of the *Indian Act* which provides for a 2-year election term.
- 2-year terms are very short, especially for newly-elected officials.
- Under the *Indian Act*, all council members are elected at the same time, which can result in a Council entirely made up of new members.
- Add in preparation for the next election cycle and the time available for effective governance can get pretty limited.

Band Councils

- Outside of a comprehensive self-government agreement, there are two options for First Nations to change their election processes.
 - A. Develop a custom election code under the *Indian Act*;**
 - B. Use the optional *First Nations Elections Act*.**
- Under both options, Canada is not involved in the First Nation's elections, interpreting results or resolving appeals.

Custom Election Codes

- Under this option, the Minister removes a First Nation from the *Indian Act's* electoral provisions and the First Nation introduces a community-designed custom election process.
- Canada's "**Conversion to Community Election System Policy**" sets out the conditions First Nations need to meet to convert to a custom election system.

Conversion to Community Election System Policy

- A. Develop a written code that is consistent with the Charter, and the **principles of natural justice**;
- Fairness;
 - Impartiality;
 - Objective review of all facts and circumstances; and
 - The opportunity of each party to adequately state their case, and includes the right to receive notice, the right to know the case against them and the right to be represented.

Conversion to Community Election System Policy

- B. Devise an independent election appeals process;
- C. Provide for amendments;
- D. Include provisions for off-reserve members;
- E. Get approval from the community to implement the custom code.
 - This can be by secret ballot or any other method that the First Nation and Canada agree upon.

First Nations Elections Act

- Council can opt into the *First Nations Elections Act* by adopting a BCR requesting the First Nation be added to the schedule of the *Act*.
- The community should be given ample opportunity to discuss the proposal in advance.

Constitutions

- Constitutions are important foundational tools for good governance.
- They can help to build confidence within communities by increasing transparency about the structures of the government and how they operate.
- First Nation must ratify a constitution in order to exercise jurisdiction under self-government agreements.

Constitutions

- Constitutions generally define the elements of a government and grant or limit powers to departments and officials.
- Constitutions should have only the broadest and fundamental rules included.
 - Details of how a government operates daily should be addressed in policies or by-laws.
- It is difficult to change a constitution

Constitutions

The contents often fall into four broad categories:

- Government arrangements (i.e., the basic structure of the government, its powers and functions)
- General credo (i.e., basic values and commitments);
- Human rights; and
- The amendment, enforcement, and adoption processes for the constitution itself.



Law Making in General

Law Making

- Laws are enforceable rules to protect individuals while also balancing the rights of the collective.
- Law-making is a form of good governance that promotes transparency and accountability.
- A First Nation may consider developing a law:
 - **In response to a repeated issue or problem,**
 - **For health and safety reasons,**
 - **For long-term planning,**
 - **As required under a self-government agreement or land code,**
 - **In response to other legislation.**

Law Making

- First Nations may utilize a two-step process of having laws approved by the Council and the members.
- Some Councils use a process of conducting three readings on a proposed law before it is approved by Council.
- First Nations may consider whether parts of a law may be enacted at different times.

Word Cloud

- Councils should designate a person or committee who is responsible to oversee by-law development for the First Nation.

What words come to mind when considering the kind of talent and expertise that can be most helpful in by-law development?

Identifying the Issue

- What is the issue that needs to be addressed?
- Is this a one-time issue or a repeated ongoing issue?
- Who is affected by the issue?
- What is the cause of the issue?
- What factors in the First Nation affect the issue?
- What steps have been taken to try and resolve the issue?

Identifying the Issue (con't)

- Who has been involved in the steps to address the issue?
- How is the First Nation being impacted by the issue?
- What are the financial costs of the issue?
- What are the human and related costs of the issue?
- What is the cost if the First Nation does nothing?
- Is there community support to address the issue?

Identifying Options

- What options are available to the First Nation?
- Can the issue be addressed through policies and procedures?
- Can the issue be addressed through a by-law?
- Can the issue be addressed through a law?
- What is the preferred option to address the issue?

Identifying Options (con't)

- What are the benefits of the preferred option?
- What are the challenges of the preferred option?
- Does the community support the preferred option?
- If the preferred option is unavailable or unattainable, what will the First Nation do?

Planning to Develop a Law

- Does the First Nation have a law-making process?
- Who will be responsible for developing the law?
- What are the First Nation's capacity requirements?
- What external resources may be required? e.g lawyer
- How long will it take to develop the law?
- How much will it cost?
- How will the First Nation pay for costs to develop the law?

Approving the Law

- Are there traditional and ceremonial requirements?
- What will the process be to approve the law?
- Will a legal review be completed on the approval process?
- How will members be involved in the approval of the law?
- What are the options if the law is not approved?
- How will the First Nation notify members of approved laws?

Best Practices

- The First Nation must ensure they have the authority to develop the law.
- The support of the community in developing the law is essential to the overall success of the law.
- Before developing a law, determine if there are other available options to address an issue.
- Do not develop a law if the First Nation is not willing or able to implement and enforce it.

Best Practices

- Determine whether the First Nation has the required capacity to develop, implement and enforce the law.
 - If not, determine how this will be addressed.
- Don't rush the development process. Developing a law takes time and careful planning.
- Laws must be clearly written and easy to understand.
- Communication about laws, through the development process to the enforcement process, must be ongoing.

Best Practices

- Consider how alternative forms of dispute resolution can be incorporated into the law to resolve disputes.
- Make sure the law doesn't infringe on an individual rights protected under the *Charter, Indian Act*, or other legislation.
- It may be useful to establish a standardized process for law development and law maintenance that can be consistently used, though flexible enough to be adapted where required.
- Incorporate a process to review existing laws to evaluate their purpose, effectiveness and overall need for the laws.



Drafting *Indian Act* By-laws

General Principles

Problems that can be effectively addressed through a by-law are *general, long-term and enforceable*.

- In deciding whether to make a by-law, Council needs to determine:
 - What is the issue to be addressed;
 - What is the objectives of the by-law;
 - Whether it falls under the authority of the *Indian Act*, and
 - Whether it is enforceable.

Limits of Authority

- A by-law can only deal with one subject matter, it cannot deal with subject matters that come under more than one section of the *Indian Act*.
- by-laws must be within the authority delegated under the *Indian Act* or the by-law can be overturned by the courts.
- Only the Band Council can pass or enact a by-law.

Language and Organization

The overall structure of a by-law should include these elements:

- Title and Numbering
- Recital explaining why the by-law is necessary and its authority
- Enacting clause stating that Council enacts the by-law
- Definitions
- Main body of by-law
- Enforcement and penalties provisions
- Record of Band Council meetings
- Schedules and appendices

Drafting the Law

- What will the process be to draft the law?
- Are there templates or other resources available?
- How will the drafts of the law be presented to Council?
- Will drafts of the law be presented to others? e.g police
- Does the First Nation need to undertake initial consultations with members on what should be included in the law?

Community Engagement

- Effective community engagement can be key to the success of a by-law.
- If a by-law will have a significant impact on the community or use of reserve lands, an appropriate consultation process should be followed.
- The Council is responsible for ensuring that everyone who is using reserve land is aware of the by-laws they are expected to follow.

Community Engagement

- **For s. 83 Taxation:** public information meetings on property tax by-laws are strongly recommended.
- **For s. 85.1 Intoxicant:** these by-laws *must* be voted on by a majority of electors at a special meeting called for that purpose.

Community Engagement

- Council may wish to consult with the **police and prosecutors** before developing a by-law.
- The First Nation may wish to develop a **justice advisory committee** to provide advice or to provide alternative justice services.

Community Engagement

8 Steps to Community Engagement

1. Identify the community
2. Select appropriate activities
3. Establish a calendar
4. Draft the by-law
5. Notify the community
6. Hold meetings, if necessary
7. Discuss community input internally
8. Draft or revise the by-law as required

Consulting on the Draft Law

- Does the First Nation have a consultation process?
- How and when will members be consulted?
- How will input and feedback be received from consultations?
- How will input be incorporated into the draft law?
- How will the First Nation be satisfied that proper and adequate consultation has occurred?

Word Cloud

What words come to mind when considering how by-law development expertise can best be shared with present and future members of the First Nation?

Questions to Consider

- **Is a by-law required?**
 - What other legislation already exists on the subject?
 - First Nations by-laws?
 - Federal or provincial legislation or regulations?
 - Is there any potential conflict with other legislation?
 - Can any potential conflict be addressed?
- **What impact would the proposed by-law have?**
 - How much difference will it make?
 - Will there be any unintended consequences?

Questions to Consider

- **Who will be affected by the by-law?**
 - Are there any potential *Charter* concerns?
- **Is the issue enforceable?**
 - How can compliance be assessed?
 - Can compliance be documented or measured?
 - What will the cost be?
 - Can this cost be recovered through a user fee?
 - Does it need to be enforced?
 - Would voluntary guidelines be sufficient to achieve the Council's goals?
 - Who will enforce it?

Questions to Consider

- **Is the subject matter within the Council's authority?**
 - Which provisions of the *Indian Act* authorize Council to legislate on the subject?
 - *Consider consulting a lawyer on this questions
 - If more than one provision can apply, can the subject be addressed in a single by-law?
 - Is there any overlapping authority with federal or provincial law?
- **Is the Council best suited to address the issue?**
 - Is there another authority already able to address it?

Questions to Consider

- **What resources would be required to enact the law?**
 - What kind of consultation will be required when drafting?
 - Who should be consulted: First Nation members, business owners, property holders, other governments?
- **Will staff be required to implement the by-law?**
 - Will regular monitoring or record-keeping be required?
 - Would staff require any specialized training?
 - Is funding available?
 - Can funding be provided through a user fee?



First Nation Land Management

First Nation Land Management Act

- In 1991 a group of Chiefs approached Canada with a proposal to opt out of 32 provisions in the *Indian Act* on land and resources.
- As a result of this proposal, the *Framework Agreement on First Nation Land Management* was negotiated and later ratified by the *First Nations Land Management Act*.

Under the Framework Agreement, once a First Nation's land code comes into effect, land administration is transferred to participating First Nations.

Land Code

- A land code sets out rules and procedures for land issues.
- Certain rules and procedures are mandatory, such as conflict of interest rules for land management.
- Others are optional, such as limits on the power of Council to make First Nation laws.

Land Code

- Under a land code First Nations will have the power to enact laws over land issues such as licensing, development and management of lands, and ancillary matters.
- Section 83 of the *Indian Act* continues to apply. First Nations continue to have the authority to make by-laws under the *Indian Act*.
- The Land Code must be approved by the community.



First Nation Fiscal Management

First Nations Fiscal Management Act

The *First Nations Fiscal Management Act* ("FMA") allows First Nations to opt out of the tax provisions under the *Indian Act* and provides First Nation governments with authority over:

- a) Financial management;**
- b) Property taxation and local revenues; and**
- c) Financing for infrastructure and economic development**

First Nation Land Management Act

- Under the FMA, First Nations must first make a Financial Administration Law before any other laws.
- An independent Finance and Audit Committee is established to provide advice and recommendations to Council.
- Administrative positions such as Senior Manager, Senior Financial Officer, and Tax Administrator are required.
- Every year, the First Nation must submit its annual tax rate laws and annual expenditure laws to the First Nations Tax Commission for approval.



Enacting an *Indian Act* By-law

Enacting the Law

- When will the law be enacted?
- What financial, human and other resources are required?
- What infrastructure is required to enact the law?
- What policies & procedures are required to enact the law?
- Does the First Nation need partnerships in place? e.g policing
- What communications strategies are needed to inform members?

Enactment Process

This formal process *must* be followed to enact a by-law:

1. Convene a Band Council meeting
2. Introduce the by-law by motion
3. "Read" the by-law
4. Vote on the by-law
5. Record the result of the vote in the minutes of the meeting
6. Sign the by-law
7. Publish the by-law
8. Forward the by-law to the Minister (*Section 83 by-laws only*)

Record Keeping

- First Nations must keep the original by-laws and should keep at least one certified true copy.
- Documentation showing all required actions have been taken in passing the by-law must also be kept.
- Copies of by-laws must be provided on request.
- All original by-laws and certified copies should be kept in a secure location.
- A by-law register should be developed where a First Nation has a number of by-laws.

Best Practices

Band Councils should ensure that:

- Draft by-laws are submitted to Council, people affected, and any other authorities (e.g. FNTC) for discussion and review *prior* to bringing them to a vote.
- A Notice is published somewhere accessible describing the proposed by-law and the time and location of the meeting to vote on it.
- All steps of the enactment process are recorded as evidence that the by-law has been properly enacted.

Best Practices

- The original by-law is filed in a secure location.
- A certified copy is provided to a law enforcement agency, if necessary.
- Copies of the by-law are posted somewhere accessible on the reserve.
- A certified copy is retained in the Band Office to permit an individual to obtain a copy on request.



Section 81 By-laws

Scope and Limits of By-law Making Authority

- First Nations have legislative authority under the *Indian Act* to make by-laws.
- There are limitations to the types of by-laws that can be made under the *Indian Act*.
- There are certain requirements that must be followed to develop an *Indian Act* by-law.

Scope and Limits of By-law Making Authority

- By-laws cannot permit something that is not allowed under federal law. *E.g. Criminal Code*
- By-laws cannot prohibit something that is allowed under federal law.
 - The *Indian Act* allows a First Nation Council to regulate a wide variety of activities on reserve, but that does not include the power to prohibit those activities (with some exceptions).

Section 81 General Powers

- Section 81(1) lists what are often referred to as “general powers” for Council to make by-laws regulating activities on and use of reserve land.
- **These powers include:**
 - Regulation of traffic (b)
 - Zoning laws (g)
 - Allotting Certificates of Possession (i)
 - Protection and management of wildlife (o)

Section 81 General Powers

Every by-law passed under the authority of section 81 should contain these two elements:

- a statement that subsection 81(1)(q) is part of the authority for the by-law
- a statement that subsection 81(1)(r) is part of the authority for the by-law.

Section 81

General Powers

Powers of the Council

By-laws 81

- **(q)** with respect to any matter arising out of or **ancillary** to the exercise of powers under this section; and
- **(r)** the imposition on summary conviction of a **fine** not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section

Section 81

Public Health and Disease Control – 81(1)(a)

- By-laws can be passed to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases.
- By-laws under this section may relate to:
 - Health;
 - Contamination of water works or water course;
 - Garbage disposal;
 - Pest and animal control.

Section 81

Traffic– 81(1)(b)

- This subsection provides for the making of by-laws for the regulation of traffic on reserve roads.
- By-laws under this section may relate to:
 - Use of vehicles;
 - Weight restrictions;
 - Parking;
 - Speed limits on private reserve roads;
 - Riding bikes on roads.

Section 81(1)

(c) – (e)

- **81(c) Administration and enforcement of law & order**
 - curfews, by-law enforcement officers, regulating public meetings and gatherings, fire control, and fire protection with municipalities.
- **81(d) Disorderly conduct and nuisance**
 - regulation of burning, obstruction of passages, dangerous materials, noise, abandoned vehicles, and air and water pollution.
- **81(e) Trespass of cattle and other domestic animals**
 - control of cattle, fencing requirements, impounding cattle.

Section 81(1)

(f) – (h)

- **81(f) Local works**

- public water and sewer, sanitation, fences and boundaries, streetlights, electric power, construction and maintenance of roads and bridges, drainage, and user fees.

- **81(g) Zoning**

- control of land use, zoning, cottage sites, protecting forests, and campsites.

- **81(h) Buildings**

- property maintenance standards, occupancy standards, pest prevention.

Section 81(1)

(i) – (k)

- **81(i) Land surveys**

- rules for setting aside lands, rules for allotment of lands to members, and rules for setting apart common use land.

- **81(j) Noxious weeds**

- controlling spread, preventing growth, regulating use of chemical control, searches by by-law enforcement officers, notice to destroy.

- **81(k) Bees and poultry**

- establishing a register, rules to prevent disease, enforcement officers.

Section 81(1)

(l) – (o)

- **81(l) Water supplies**
 - location of public wells, regulating the use of water, and user fees.
- **81(m) Public games**
 - regulating hours for or *prohibiting* public games or amusements.
- **81(n) Hawkers and peddlers**
 - permits, fees, hours and days, and types of kiosks and advertisements.
- **81(o) Protection of wildlife**
 - defining hunting or fishing seasons, permits for non-Band members to hunt or fish, fees, hunting and fishing safety requirements.

Section 81

Removal of Trespassers – 81(1)(p)

“The removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes”

- By-laws under this section may relate to:
 - Establishing areas of the reserve restricted to the public;
 - Prohibiting activities from an identified group, e.g.:
 - Hunting, fishing, trapping may be limited to Band members/residents
 - Travelling sales may be limited to people holding valid licenses or permits
 - Authorization for authorized officers to remove trespassers

Section 81

Removal of Trespassers – 81(1)(p)

“The removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes”

- The *Indian Act* does not define trespassing. It is interpreted as meaning entering land where there is no just or lawful excuse or reason.
- Invited visitors would not be considered a trespasser.
- A resident of the reserve is generally not a trespasser.



Section 83 Finance By-laws

Section 83

Section 83 of the Act provides authority for by-laws dealing with matters such as taxation, the expenditure of Band moneys and business licensing

- The **First Nations Tax Commission** (“FNTC”) provides advice and direction for section 83 by-laws.

www.fntc.ca

Section 83

General Requirements

- Section 83 allows First Nations to create and collect taxes on reserve land. There are special requirements that have to be followed to create section 83 by-laws.
- Section 83 by-laws are forwarded:
 - a) to FNTC to ensure compliance with the requirements;** and
 - b) to the Minister for approval**
- Section 83 by-laws must be published in the First Nations Gazette.

Section 83

Taxation By-laws

- Multiple by-laws are required to establish a tax system.
- Taxation is a complex process.
- Many elements of tax systems require regular renewal.

Section 83

Taxation By-laws

Property taxation by-laws should include:

- procedures and requirements for appointing a tax administrator,
- preparing the tax roll and annual notices,
- tax payments,
- penalties and interests,
- collection and enforcement,
- tax exemptions, and
- grants, use and investment of funds, and confidentiality

Section 83

Assessment By-laws

- A property assessment by-law sets up an annual assessment roll (except in Quebec where assessment rolls may be completed every three years).
- The assessment roll lists every interest in land liable for taxation on the reserve.
- An assessment by-law must provide an appeal procedure, and FNTC policy dictates that the Council must establish a tribunal to review appeals.

Section 83

Financial Administration By-laws

The Band will also need to establish a system of financial administration, including:

- the appointment of a tax administrator,
 - reporting and audit policies, and
 - budget requirements.
- It must meet all requirements set out by the Financial Management Board. It is held to a high standard.
 - First Nations must meet the standard of financial competency.

Section 83

Financial Administration By-laws

A financial administration by-law should include

- The roles of Council and the Finance and Audit Committee;
- Appointment of Band Administrator, Senior Financial Officer, and Tax Administrator; and
- Provide for the fiscal year, annual budgets, audits, First Nation bank accounts, borrowing and collection requirements, financial reporting, and conflicts of interest.

Section 83

Annual Tax Rate By-laws

- The Band Council must pass a tax by-law each year to set the rates for real property taxes on the reserve.
- Annual written notice and public meetings on proposed tax rates are required.
- Tax rate by-laws should include rates based on assessed property values including for each property class and each district.

Section 83

Service or Local Improvement Tax By-laws

A tax can be levied to raise funds for work that will create a benefit for part or all of a reserve, including:

- Transportation infrastructure;
- Water treatment and supply facilities;
- Sewage collection, treatment and disposal facilities;
- Design and construction of dikes, erosion control structures, retaining walls, drainage ditches, flood boxes, sea and harbor walls, waterfront walkways.

Section 83

Business Licensing by-laws

A business licensing by-law should include

- procedures for applying and obtaining a license,
- appointment of a license inspector,
- the license period, license fee structure, refusing and revoking licenses,
- appeals procedure and penalties

A licensing by-law must apply to all business on reserve.

Section 83 Expenditure By-laws

An expenditure by-law to establish reserve funds to set aside Band monies for specific purposes should include:

- An annual budget;
- Procedures to use contingency funds;
- Establishing a new reserve fund.

Theses by-laws are required to authorize the use of funds raised through other s. 83 by-laws.

Section 83 - Pie Chart

Which section do you think is most critical in a suite of taxation by-laws?

- Financial reporting;
- Written and public notice;
- Assessment roll;
- Annual budget;
- Penalties and enforcement;
- Review and renewal;



Section 85.1 Intoxicant By-laws

Section 85.1

The *Indian Act* stipulates requirements for the enactment of a valid intoxicant by-law. These are:

- Ratification by a majority of voting members, and
- BCR providing that all procedural requirements are met

Word Clouds

Which key words would you include when drafting an intoxicant by-law?

What key concepts might leadership be trying to balance in an intoxicant by-law?



Inherent Right By-laws

Inherent Right By-laws

- S. 35 of the *Constitution* recognizes and affirms existing Aboriginal and Treaty rights.
- by-laws can be passed under the concurrent jurisdiction of the *Indian Act* and First Nations inherent rights.



Monitoring, Compliance and Enforcement

Developing Monitoring Strategies

- Monitoring strategies should be:
 - tailored to the activities being regulated through the by-law.
 - fact driven and rely on measurable data and record keeping within the First Nation.
- Licensing or permits can be useful tools to ensure compliance.
- Keep in mind that by-law officers do not have powers to search and seizure or to arrest.

Complaints – Best Practices

- Ensure complaints can be made a number of ways,
- one system should be used to record all complaints,
- the complaints process should be publicly available, and
- privacy and security concerns must addressed.
- Document all interactions with complainants
- Provide a timely response, information on steps taken, enforcement action, and other relevant information.

Compliance

- **Compliance** is the act of conforming acquiescing or yielding to certain requirements.
- **Enforcement** is the act of compelling observance or compliance with a law, rule or obligation.
- Good communication can go a long way in promoting compliance.

Enforcement and Penalties

- A by-law should have a penalty and a method of enforcement to be effective.
- Band Councils are responsible for enforcing by-laws through a by-law enforcement officer, the police or other agent that has the required authority.
- The Band Council should not be directly involved in by-law enforcement.

Enforcement and Penalties

- By-law enforcement officers are not police officers. They do not have the power to arrest or search and seizure.
- Under self-government agreements, a First Nation can appoint its own prosecutors and justices of the peace to enforce its laws.
 - otherwise the laws of the First Nation will be enforced through the provincial courts.

Monitoring and Enforcement

- Will the law be monitored internally? Externally?
- What are the consequences for not following the law?
- Does the law have an appeal mechanism?
- What are the long-term projected costs to monitor and enforce?
- What are the legal costs to defend the law if it's challenged?



Amending or Repealing By-laws

Enforcement and Penalties

- By-laws are designed to be long-term legislation, but changes will sometimes be required to keep the laws relevant and effective.
- If a by-law is amended, the original by-law and the amendment should be referred to when it is implemented and enforced.
- A by-law may be repealed when it is no longer useful to the First Nation.

Best Practice: Council should regularly review its existing by-laws

Amendment Process

- To amend a by-law, Council follows the same drafting, enactment, publication, and record keeping processes as it does to create a new by-law.
- The enactment section of the amending by-law will reference the sections of the original by-law to be changed.
- The amended by-law must be passed by a motion of Council, recorded in the Band Council minutes and be dated and signed.

Repeal Process

- To repeal a by-law, another by-law must be passed stating that the previous by-law is repealed.
- The repealing by-law must be published in the *First Nations Gazette*, and should be posted on the reserve.
- The repealed by-law must be retained by the Band.