

A REVIEW OF BAND BY-LAW ACTIVITY

1975-1986

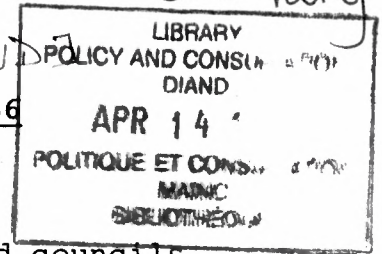
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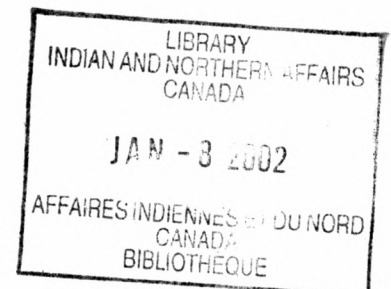
Sections 81, 83, and 85.1 of the Indian Act give band councils certain powers to pass by-laws. These by-laws have a status similar to that of regulations of a general nature made by federal or provincial Order-in-Council, or to territorial regulations in the Northwest Territories. A valid band council by-law would override any provincial or municipal law which would otherwise apply on a reserve. This is because a band council by-law is part of federal law and federal law, under one of the enumerations of powers in Section 91 of the B.N.A. Act such as "Indians and lands reserved for Indians" in Section 91(24), overrides otherwise valid provincial legislation or municipal by-laws made under provincial legislation.

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Scope of By-Law Jurisdiction in Sections 81, 83, and 85.1

Section 81 provides for by-law making powers in the following areas:

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases. This provision is not broad enough to control intoxicants.
- (b) the regulation of traffic. By-laws must conform to Indian Reserve Traffic Regulations, Section 6 of which adopts all laws and regulations relating to motor vehicles in force in the Province except those which are inconsistent with these regulations.
- (c) The observance of law and order. This provision is an insufficient basis for policing, criminal law, or the creation of a judicial system.
- (d) prevention of disorderly conduct and nuisances.



- (e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties, and the provision for fees and charges for their services.
- (f) the construction and maintenance of water courses, roads, bridges, ditches, fences, and other local works.
- (g) the dividing of the reserve or a portion thereof into zones, and the prohibition of the construction or maintenance of any class of buildings, or the carrying on of any class of business, trade, or calling in any such zone.
- (h) the regulation of the construction, repair, and use of buildings, whether owned by the band or by individual members of the band.
- (i) the survey and allotment of reserve lands.
- (j) the destruction and control of noxious weeds.
- (k) the regulation of bee-keeping and poultry raising.
- (l) the construction and regulation of the use of public wells, cisterns, reservoirs, and other water supplies.
- (m) the control and prohibition of public games, sports, races, athletic contests, and other amusements. This sub-section has been interpreted as an insufficient basis for lottery and bingo by-laws.
- (n) the regulation of hawkers, peddlers, or others who enter the reserve to buy, sell, or otherwise deal in wares and merchandise.
- (o) the preservation and protection, and management of fur-bearing animals, fish, and other game on the reserve. This provision has been the source of much controversy because of conflicts of law with federal fisheries regulations and provincial environmental legislation.

(p) the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prohibited purposes.

(p.1) the residence of band members and other persons on the reserve.

(p.2) to provide for rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band.

(p.3) to authorize the Minister to make payments out of capital or revenue monies to persons whose names were deleted from the Band list of the Band.

(p.4) to bring section 10(3) or 64.1(2) into effect in respect of the Band. This sub-section enables the band council to extend their electorate to include non-resident band members for the purpose of voting on membership rules.

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section. This provision has been used sparingly to establish by-law enforcement officers, as a necessary ancillary jurisdiction to the power to pass by-laws on other subject matters.

(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 a violation of a by-law made under this section.

Section 83 permits a band which has been declared by the Governor-in-Council as having reached "an advanced stage of development" to pass money by-laws. The Department does not actively seek out band councils which merit this description but responds to specific requests from the band. Criteria used to determine whether a band has reached the advanced development stage include whether:

1. the Band has been given a clear audit opinion or if not, whether the band administration has taken corrective action to overcome observations made by the auditors;
2. the Band has demonstrated good financial control;
3. funds have been used as authorized; and
4. Band management has been consistent and of high quality.

These criteria are apparently no longer followed. The "Kamloops Proposal", a proposed amendment to the Indian Act which would give bands increased money-related by-law powers, is currently being prepared to go before Parliament. The proposal removes the requirement that Indian bands be at an advanced stage of development before being able to pass money by-laws.

One hundred and eleven bands now have the authority to pass by-laws under Section 83. These bands, in addition to enacting money by-laws, may also exercise greater jurisdiction in terms of taxation. Revenue Canada's Interpretation Bulletin 1T62 states that:

"The powers exercised by band councils that have reached the advanced stage of development required by Section 83 of the Indian Act, and the powers exercised by Canadian municipalities, are so similar that such band councils will be regarded as Canadian municipalities for purposes of subparagraph 110(1)(a)(iv) and paragraph 149(1)(c) of the Income Tax Act".

Section 83 enables a band to enact by-laws on the following:

- (a) the raising of money by:
 - (i) the assessment and taxation of interest in land in the reserve of persons lawfully in possession thereof;
 - (ii) the licensing of businesses, callings, trades, and occupations;

- (b) the appropriation and expenditure of monies of the band to defray band expenses;
- (c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any monies raised pursuant to (a);
- (d) the payment of remuneration, in such amounts as may be approved by the Minister, to chiefs and counsellors out of any monies raised pursuant to (a)
- (e) the raising of money from band members to support band projects; and
- (f) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

Section 85(1) of the Indian Act allows the council of a band to make by-laws:

- (a) prohibiting the sale, barter, supply, or manufacture of intoxicants on the reserve of the band;
- (b) prohibiting any person from being intoxicated on the reserve;
- (c) prohibiting any person from having intoxicants in his possession on the reserve; and
- (d) providing for exceptions to any of the prohibitions established pursuant to paragraph (b) or (c).

A by-law may not be made under this section unless it is first assented to by a majority of the electors of the band.

By-laws pursuant to Sections 81 and 83 of the Indian Act come into force forty days after a copy of the by-law is forwarded to the Minister of Indian Affairs and Northern Development, unless it is disallowed by the Minister. Section 85(1) by-laws must be forwarded to the Minister within 4 days after they are made, but are not subject to disallowance.

By-Law Activity 1975-1986

Documentation on band by-law activity in the period 1976-1986 was compiled by Millie Nickason in the fall of 1986. A specific review of the by-laws passed in 1985 was written in April 1986, by Mary Ellen Turpel, Lands, Revenues and Trusts. This section on band by-law activity is based on the data collected for these two projects.

Of 570 Indian bands examined in the years from 1975-1986, 381 or 67% passed by-laws. The average number of by-laws passed by a band was 6. Regional breakdowns of these figures are displayed in Table 1. Table 2 shows allowed and disallowed by-laws for the same period, broken down by Indian Act Sections 81, 83, or 85.1. The apparent decrease in the percentage number of by-laws disallowed in 1985 and 1986 is due to the inclusion of section 85.1 by-laws in Table 2 and Figure 1. Bill C-31 provided for the by-law making authority of section 85.1, which is not subject to disallowance.

It is evident from these tables that, prior to 1980, the Ministerial disallowance power in Sections 81 and 83 was used very sparingly. This approach was adopted on the assumption that the courts ought to decide points of law, and that the disallowance power was merely an administrative device. In the 1980's, however, the Department's approach to by-laws began to change as a result of the coming into force of the Canadian Charter of Rights. A review of by-laws for potential conflicts with the Charter is now conducted. The Department's legal advisors also were of the opinion that the Ministerial authority to disallow a by-law had to be exercised whenever there was any uncertainty as to the substantive or territorial jurisdiction for a by-law or if the by-law was improperly drafted. Legal's opinion was that a failure to disallow would be tantamount to approval of a by-law, and that the Department might be held liable for the unlawful actions of a band council under a by-law. The extent of the Department's possible liability has however not yet been explored. The increased use of the disallowance

provision is also premised on the belief that to leave by-law matters to the courts is inappropriate in that reserve residents are not in a position to challenge invalid by-laws. They lack, in many cases, a degree of access to the court system, and may be reluctant, if not financially unable, to challenge the actions of a Band Council.

Leading Reasons for Disallowance

The following factors were outlined in Mary Ellen Turpel's review of 1985 by-laws as leading reasons for by-law disallowance:

1. Drafting and Delegation Problems

The most evident and common defect in the 1985 by-laws was one of drafting: the intent of the by-law was often unclear; by-law contained terms which were undefined or defined in such a way as to be meaningless; the by-law employed inconsistent terms for apparently the same matter; and the by-law attempted to sub-delegate entire areas to the discretion of the band council.

2. Ultra Vires

The by-law sought to administer or regulate a subject matter or territory which was seen to exceed the band council's jurisdiction under the Indian Act. This was a source of constant antagonism between the bands and the Department. The bands often took the position that the Department's interpretation of the Act was too restrictive and not in accordance with the prevailing principles of statutory interpretation. The Department's legal advisors, on the other hand, felt that the by-laws were, in many cases, clearly excessive (i.e. where the Band purported to usurp federal jurisdiction by passing by-laws on Criminal Code matters).

3. Specific Policy Matters

Many of the by-laws were disallowed for "policy reasons". Unfortunately, because little policy has been developed on a range of subject matters (i.e. residence, fishing, trespass), by-laws were often disallowed apparently out of concern that they might conflict with whatever future policy might be developed in a particular area.

It is also obvious from Table 1 that, even though 67% of bands have used by-laws at one time or another, by-laws are seriously underutilized by bands. The average number of by-laws per band in 1975-1986 was six. From the 1985 review, it was found that the subject matters most often addressed in a band council by-law in 1985 were: fishing, game, and conservation matters; zoning, building, and residence matters; noise and public order, trespass, and policy matters; budget, expenditures, and taxation matters; traffic matters; and games, bingo, and lottery matters. More Section 85.1 by-laws were passed regulating intoxicants than any other subject areas, but these have been omitted from the previous list as they are not subject to disallowance. It is interesting to note that, of the 111 Bands who have been granted Section 83 authority, only 46 have ever enacted a monetary by-law.

Reasons for Disuse of By-Law Making Powers by Bands

Seven factors have been isolated by Bands and regional and field officers of the Department to explain the disuse of by-laws (M.E. Turpel):

1. By-laws are expensive to draft, often requiring the advice of a lawyer or a municipal planner.
2. The by-law information, documentation, and training provided by the Department to bands is inadequate and out-of-date. Many of the models provided are anachronistic and do not address subject matters relevant to bands.

3. There is no clear understanding on the scope of the jurisdiction for by-laws in the Indian Act. The bands must determine by trial and error the Department's interpretation of the by-law sections of the Act.
4. By-law seminars are run by some regional offices. These are, however, with the exception of Saskatchewan, very rudimentary and do not clarify jurisdictional questions.
5. Most bands do not have the authority to pass monetary by-laws, because they either have not requested the authority or are unable to meet the "advanced stage of development" criteria.
6. Bands decline from exercising their by-law powers based on past experiences with the Department. They see no point in enacting by-laws which they believe will be inevitably disallowed.
7. Bands are unable to enforce their by-laws. Those bands without by-law enforcement officers require the assistance of the local policing agency, which may or may not have special officers to serve the reserve, or a policy to enforce all band by-laws. Provincial Crown attorneys may also decline to prosecute band by-laws. Few bands have the resources to pay for prosecution from private law firms. In many cases, the bands lack access to the court, resulting in time delays and frustration. These problems may be ameliorated by a recent Department of Justice initiative which would allow ticketing for minor federal regulatory offenses. Discussions are underway to include by-law and other Indian Act offenses within this initiative.

A review of by-law procedures is currently underway. Lands, Revenues and Trusts has recommended to the Deputy Minister approval of guidelines which would establish priorities and procedures respecting the review of band council by-laws by the Department. Such reviews would consider whether the by-law:

1. is authorized by the terms of the Indian Act and has complied with any pre-conditions set out in that legislation;
2. conforms with the Canadian Charter of Rights and Freedoms;
3. purports to have a retro-active effect without express authority having been provided for in the legislation;
4. imposes a fine, imprisonment or other penalty without the express authority having been provided for in the legislation;
5. tends directly or indirectly to exclude the jurisdiction of the courts without that authority having been provided for in the legislation;
6. appears for any reason to infringe the rule of law;
7. trespasses unduly on rights and liberties;
8. makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
9. makes some unusual or unexpected use of the powers conferred by the Act; and
10. is defective in its drafting or for any other reason requires clarification as to its form or purport.

The above procedures and criteria are essentially those, which although unwritten, have been followed over the past few years.

Cree Naskapi By-Law Making Activity

Section 9 of the James Bay and Northern Quebec Agreement, and Section 7 of the Northeastern Quebec Agreement, established a government obligation to recommend to Parliament special legislation relating to local government on the lands held by Canada for the use of the Cree and Naskapi bands. The Cree-Naskapi (of Quebec) Act was accordingly passed in 1984. The

Act replaced the Indian Act for the Naskapi band and for eight Cree bands. It removed from the Minister of Indian Affairs and Northern Development the authority to exercise direct control over the Cree and Naskapi, and established new legal and political regimes in the form of local governments accountable to the bands.

The powers of the bands to enact by-laws are outlined in Section 45 of the Act. By-laws apply to all persons residing on Category 1A or IA-N lands. Local government powers are broader than those provided for in the Indian Act, and include the following areas:

1. public order, health, and hygiene;
2. land and resource use and zoning;
3. local taxation - these by-laws are subject to the regulations of the Governor-in-Council;
4. the establishment, maintenance, and operation of local services, and the right to charge users for the provision of such services;
5. the operation of businesses, including the power to require business licenses or permits;
6. the protection of the environment and the prevention of pollution; and
7. hunting, fishing, and trapping. In accordance with the JBNQA, these by-laws must be submitted to a co-ordinating committee and the responsible minister may disallow them.

Band elections are dealt with in Part II of the Cree-Naskapi Act. A band may pass by-laws which govern the election of a council and determine its term of office. The band can then, by by-law, outline the council's structure and determine its rules of procedure. This allows band to institute different procedures of local governments which follow their traditional systems.

Since 1984, the Cree-Naskapi have passed over 100 by-laws pursuant to the Cree-Naskapi Act. However, aside from adopting by-laws relating to administration and financial systems, bands have been reluctant to adopt by-laws which deal with substantive

matters such as hunting, fishing, and trapping; access to and residence on 1A and 1A-N lands by non-band members; the regulation and licensing of business activity; health and hygiene; public order and safety; and the protection of the environment.

This reluctance largely stems from the lack of resources to enforce such by-laws if they were in place. Essential enforcement mechanisms - a police force and a justice system within band jurisdiction - are presently deficient. No wildlife conservation officers exist who could police hunting, fishing, and harvesting activities should the band adopt such by-laws. Furthermore, provincial Crown prosecutors are not available to prosecute band by-law offences. The bands themselves must retain a lawyer to conduct prosecutions on their behalf. This creates an additional financial burden for which there are no resources. Other obstacles to greater by-law activity have been outlined in the 1986 Report of the Cree-Naskapi Commission. They are: a lack of training and qualified personnel; and insufficient financial resources with which to effectively administer local government matters.

Nevertheless, it is apparent that by-law activity is perceived by the Cree-Naskapi Bands as an effective tool for achieving self-government in their communities.

Self-Government Community Negotiations and Band By-Law Authority

In a May 1987 note to the Deputy Minister, R.B. Kohls, ADM, Lands, Revenues and Trusts, suggests that the current proposed guidelines are an attempt to strike a balance between self-government and the protection of individual band members. Unfortunately, it appears that the present by-law making structure is quite limited in the degree to which it can

contribute to self-government as it is envisaged in the Self-Government Negotiations Branch. If self-government means that Indian bands are to move towards greater control of their political, economic, and cultural environments, current by-law making procedures will do little to promote this objective.

Self-government within the by-law making process is severely circumscribed by the generous use of the Ministerial disallowance, by the deficient training and funding available to bands, and by the difficulty of enforcing by-laws. The passing of an average of six by-laws by each band since 1975 means that no real control over local matters has taken place through the use of by-laws. A greater degree of control could conceivably be achieved through the by-law making process if it could be restructured to more effectively address band concerns, and provided for a continuing measure of real control over band affairs. The latest departmental initiative in this respect, the writing up of previously informal criteria, does nothing to enhance the self-government potential of by-law making authority. Bands are likely to continue to pass few by-laws, addressing minor or passing problems which have little bearing on overall control of community affairs.

The primary differences between by-law making authority under the Indian Act and the Cree-Naskapi Act are: the absence of Ministerial disallowance; a greater, albeit unresolved, allocation of financial resources for the provision of services; and a wider range of potential by-law making areas, allowing the Cree-Naskapi greater control over issues of concern to their communities.

By-laws can obviously be a valuable tool for establishing self-government in Indian communities, if the scope of by-law authority is extensive enough, if the financial resources are there to facilitate training of personnel and provision of services, and if improvements could be made to the current by-law enforcement system. The history of by-law activity by Indian bands other than the Cree-Naskapi of Quebec, however, has been sporadic, ad hoc, and ineffective, a response to minor problems rather than part of a comprehensive effort to secure local control.

Caroline Marion

June 8, 1987

TABLE 1
SECTION 81, 83 AND 85(1) BY-LAW ACTIVITY, 1975-1986

| Region | Number of Bands | Number of Bands Using By-Laws | Number of By-Laws Allowed | Number of By-Laws Disallowed | Average # of By-Laws per Band | % of Bands Using By-Laws |
|---------------|-----------------|-------------------------------|---------------------------|------------------------------|-------------------------------|--------------------------|
| New Brunswick | 15 | 12 | 57 | 15 | 6 | 80 |
| Nova Scotia | 13 | 8 | 48 | 15 | 8 | 62 |
| Quebec | 39 | 30 | 319 | 59 | 13 | 77 |
| Ontario | 121 | 88 | 471 | 89 | 6 | 73 |
| Manitoba | 60 | 48 | 275 | 12 | 6 | 80 |
| Saskatchewan | 68 | 38 | 100 | 16 | 3 | 56 |
| Alberta | 44 | 29 | 157 | 37 | 7 | 66 |
| B.C. | 197 | 125 | 472 | 65 | 4 | 63 |
| Yukon | 13 | 3 | 20 | 0 | 7 | 23 |
| TOTAL | 570 | 381 | 1,919 | 308 | 6.5 | 65% |

Figure 1

TOTAL NUMBER OF BY-LAWS ALLOWED AND DISALLOWED PER YEAR (1975-1985)

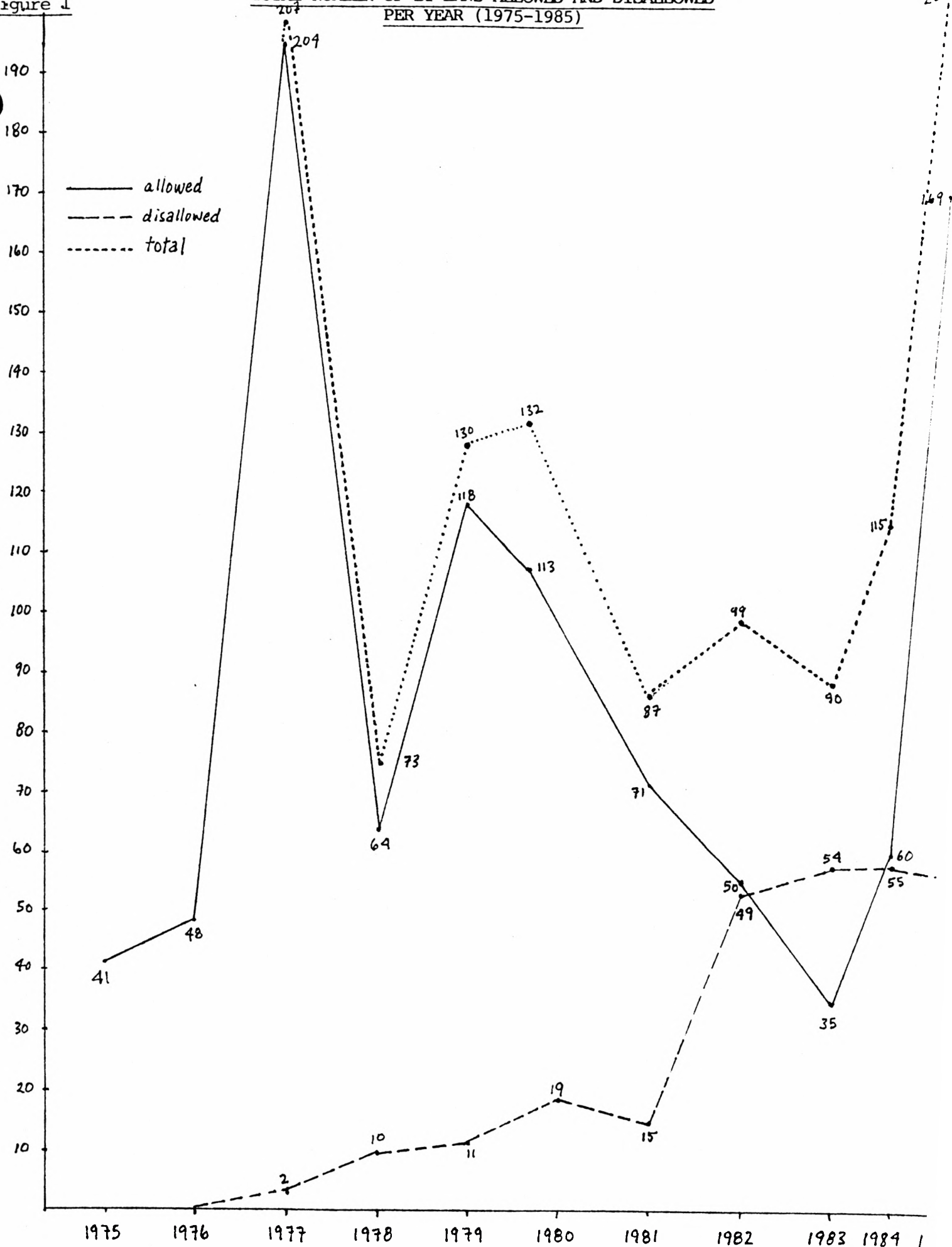


TABLE 2
BY-LAWS ALLOWED AND DISALLOWED, BY SECTION, JANUARY 1975 TO JULY 1976

| Calendar Year | Section 81 | | Section 83 | | Sections 81 & 83 | | Section 85.1 | | Cree-Naskapi | Total |
|---------------|------------|----|------------|---|------------------|---|--------------|---|--------------|-------|
| | A | D | A | D | A | D | A | D | | |
| 1975 | 40 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 41 |
| 1976 | 48 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 48 |
| 1977 | 202 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 207 |
| 1978 | 59 | 10 | 3 | 0 | 1 | 0 | 0 | 0 | 0 | 73 |
| 1979 | 112 | 10 | 3 | 0 | 4 | 1 | 0 | 0 | 0 | 130 |
| 1980 | 109 | 18 | 4 | 1 | 0 | 0 | 0 | 0 | 0 | 132 |
| 1981 | 61 | 13 | 10 | 2 | 1 | 0 | 0 | 0 | 0 | 87 |
| 1982 | 36 | 50 | 13 | 0 | 0 | 0 | 0 | 0 | 0 | 99 |
| 1983 | 30 | 53 | 5 | 2 | 0 | 0 | 0 | 0 | 0 | 90 |
| 1984 | 36 | 50 | 9 | 1 | 0 | 4 | 0 | 0 | 15 | 115 |
| 1985 | 46 | 51 | 9 | 2 | 0 | 0 | 67 | 1 | 46 | 222 |
| 1986 | 39 | 9 | 1 | 0 | 0 | 0 | 18 | 0 | 11 | 78 |