



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

BY-LAWS COURSE

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TABLE OF CONTENTS

- SESSION 1: DEFINITION OF A BY-LAW
- SESSION 2: LEGISLATIVE FRAMEWORK
FEDERAL AND PROVINCIAL LEGISLATION
- SESSION 3: APPROPRIATE AUTHORITIES IN THE INDIAN ACT
- SESSION 4: PRINCIPLES OF DELEGATED AUTHORITY
- SESSION 5: DRAFTING REQUIREMENTS
- SESSION 6: BY-LAW ENACTMENT
- SESSION 7: AMENDING AND REPEALING A BY-LAW
- SESSION 8: BY-LAW ENFORCEMENT
- SESSION 9: DEPARTMENTAL PRACTICES AND POLICIES

SESSION 1

DEFINITION OF A BY-LAW

1.1 DEFINITION

A band by-law is a local law that is passed by a band council to help control certain activities within the community. By-laws can be passed by band councils under the authority given to them in the Indian Act. The by-law has absolutely no effect outside reserve boundaries. A by-law is strictly a local law.

1.2 USES OF BY-LAWS

Other local government systems pass by-laws to provide for the administration and control of activities that take place within their jurisdiction. For example, they have by-laws to control jay-walkers, the height of buildings, business licenses, weeds on private property, parking on the streets, animals on the streets, garbage, water and sewer rates, the location of buildings, and property taxes.

The band council can make by-laws that will regulate many areas of activity on the reserve. Some of the more important areas are: traffic control, residency, health, nuisances, wildlife conservation and zoning.

1.3 AUTHORITY TO MAKE BY-LAWS

Canadian Indian bands get their legal authority to make their own local laws through sections 81, 83, and 85.1 of the Indian Act. By-laws are passed when the council decides that it has a need to establish some regulations or control over certain activities on the reserve.

Band councils that have been duly elected by their band members pursuant to the provisions of the Indian Act, or under band custom, may enact by-laws in accordance with sections 81, 83, and 85.1.

Since the coming into force of the Kamloops Amendment (Bill C-115) in July 1988, a band no longer requires to be declared to be in an "advanced state of development" in order to pass money by-laws (section 83). One important point to underline with respect to these money by-laws is that they must receive ministerial approval. These must be sent to the:

**Indian Taxation Advisory Board
Terrasses de la Chaudière
10 Wellington Street
Ottawa, Ontario
K1A 0H4**

for review and recommendation to the Minister.

A band council may also pass a by-law relating to intoxicants in pursuant to section 85.1.

1.4 LIMITATIONS

By-laws are of a local nature. There are, however, some restrictions on what councils can control through their by-laws. According to section 81 of the Indian Act, band councils may make by-laws so long as they are not contrary to:

- the Indian Act,
- the Indian Act regulations enacted pursuant to section 73 of the Indian Act,
- or other federal laws.

1.5 GUIDELINES

By-laws apply to all people on a reserve. These by-laws govern the activity on all of the reserve lands under the control of the council that passed it. By-laws apply to everyone(native or non-native) being on the reserve, whether they normally live on that reserve land or not.

A by-law can only be enacted if it covers a subject or area that is within the powers provided to the council under section 81 of the Indian Act. Therefore, it is necessary to check through the list of areas of authority that are listed under section 81. By so doing you may determine if a by-law that you wish to enact is within the council's authority or not.

A by-law, of course, must also be properly enacted. It is not a law and cannot be enforced in the courts until it has been properly enacted and made into a legally registered federal instrument enacted under a federal law.

Other points to remember about band council by-laws are that by-laws should be enacted only when they are needed; before they are enacted, they should have general band membership acceptance.

There is no sense enacting a by-law when there is no real need for it, or when the general feeling of most of the band membership would be against that particular by-law. Often this results in the by-law being challenged in the courts and sometimes it can even be declared void.

SESSION 2

LEGISLATIVE FRAMEWORK

FEDERAL AND PROVINCIAL LEGISLATION

2.1 INDIAN ACT

The Constitution Act, 1867, then known as the British North America Act, created a federal state in which the powers of government were divided between the federal government and the provincial governments. Subsection 91(24) gave the federal government jurisdiction over "...Indians, and lands reserved for Indians". The federal government utilized this authority in the early years of Confederation by concluding a series of numbered treaties in western Canada. This continued the British policy, set out in the Royal Proclamation of 1763, of making treaties with the Indians occupying the land which settlers wished to develop. In addition, the federal government enacted the first Indian Act in 1876.

Today, the Indian Act is the principal legislation dealing with the federal government's responsibility to, and jurisdiction over, Indians and the lands reserved for Indians. The Indian Act contains many provisions which are specific to Indians, including a scheme for the holding of land in Indian reserves, a system for membership lists for bands, a succession law system, an electoral system for band councils, an outline of the council's authority, provisions regarding schools for Indians and many other matters. In addition, the Act provides that the Governor in Council may make regulations concerning a number of items enumerated in Section 73 of the Indian Act, as well as "...regulations to carry out the purposes and provisions of the Indian Act." This authority has been used by the government in a few instances (i.e. Indian Reserve Traffic Regulations, Indian Health Regulations, Indian Reserve Waste Disposal Regulations, Indian Estates Regulations, etc.).

It is important to note that the Indian Act takes precedence over regulations made pursuant to the Act. In addition, section 81 of the Indian Act specifies that by-laws made by band councils may not be inconsistent with the Indian Act or regulations made pursuant to the Act. In effect then, a legislative hierarchy dealing with Indians and their lands, consisting of the Indian Act, regulations made pursuant to the Act, and by-laws enacted by band councils, exists today.

2.1.1 SECTION 88 OF THE INDIAN ACT

Section 88 deals with the applicability of provincial laws to Indians and lands reserved for Indians. The paramountcy of Acts of the Parliament of Canada and treaties made with Indians over provincial legislation is stated in section 88. However, all provincial laws of general application not inconsistent with the Indian Act, or regulations or by-laws made pursuant to the Act, apply to Indians in that province. This means that there are in fact many provincial laws and regulations which apply to Indians, both on and off-reserve.

2.2 PROVINCIAL JURISDICTION

The degree to which a provincial law applies on a reserve will depend upon the extent to which the Indian Act provides for that subject matter, as well as the extent to which regulations made pursuant to the Act or band by-laws deal with the subject matter covered by the provincial law.

For example:

Child Welfare legislation is an area of legislation for which the provinces have jurisdiction. The Indian Act does not address the issue of child welfare, nor are there regulations enacted pursuant to section 73 of the Act in this area. Band councils are not given authority to make by-laws concerning this subject. As a result, provincial child welfare legislation applies to Indians on reserve. This has been confirmed by a number of courts in different provinces.

In a similar area of law, matrimonial property legislation, also an area of provincial competence, the courts have generally held that, while orders concerning the division of property are applicable to Indians, the partition or sale of reserve land cannot be ordered under provincial legislation in the same manner as land held in a provincial land-holding system. This is because the land-holding system on Indian reserves is unique and different from provincial systems, and because the Indian Act deals extensively with the Indian land-holding system.

2.3 OVERLAP OF PROVINCIAL AND FEDERAL JURISDICTION

On the other hand, certain areas of legislation are dealt with specifically under both the Indian Act and provincial regulatory schemes. A good example of this type of overlap is the regulation of highway traffic.

The Indian Reserve Traffic Regulations (Regulations) are limited in scope, but they specifically provide that provincial laws and regulations regarding motor vehicles apply on Indian reserves, except to the extent that they are inconsistent with the Regulations. However, because the Regulations state that they apply on "roads" on Indian reserves, which are defined in the Regulations as being open to the public, courts have held that provincial traffic legislation does not apply to persons driving motor vehicles on parts of the reserve which are not roads open to the public, such as laneways and trails.

Therefore, if a the by-law, "road" is a "public road", and that is a question of facts, the provincial law and the Indian Reserve Traffic Regulations will supersede the by-law enacted pursuant to paragraph 81(1)(b) of the Indian Act.

Take for example the case where the province has expropriated a road on a reserve. That road is a public road, exclusive property of the province and only the provincial law will be enforceable. On the other hand, if the road has not been expropriated, but according to the evidence put forward, it is a public road being maintained by the province, but on a reserve, then both sets of legislation, the provincial law and the Regulations apply.

We could have another situation where the road, according to the facts, is not a public road within the definition of the provincial law or the Regulations. In that case, there would be no law applicable unless the band council had enacted a traffic by-law under paragraph 81(1)(b) and this by-law would apply to "private roads" on the reserve.

The "regulation of traffic" authority in section 81 does not give band councils the authority to license motorists and require insurance for on-reserve drivers. These matters are governed by provincial legislation.

2.4 BAND COUNCIL JURISDICTION

Finally, there are a number of areas in which band councils have authority to legislate, such as zoning, the licensing of businesses on reserves pursuant to section 83 of the Indian Act, the regulation of hawkers and peddlers, residency of band members on the reserve. These areas of jurisdiction may be curtailed by regulations made pursuant to section 73 of the Indian Act and, if no by-laws are enacted, there may be applicable provincial legislation. However, generally, these are areas which come under the band council jurisdiction.

SESSION 3

APPROPRIATE AUTHORITIES

IN THE INDIAN ACT FOR THE ENACTMENT OF BY-LAWS

This session is designed to assist band councils, departmental officers, and field staff in the drafting or review of by-laws within the scope of sections 81 and 85.1 of the Indian Act.

3.1 SECTION 81 - GENERAL POWERS

Each paragraph of section 81 is analyzed in an effort to describe what can be legally included in each of the powers granted to band councils. Where appropriate other applicable legislation is indicated. The following examination of items included in each paragraph is not exhaustive but should serve as general guidance only.

We have attempted to list the usual subject-areas covered by section 81. But each case is a test case. If you are encountering problems of a specific nature in your community, you should discuss them with the local enforcement agencies and your regional or district manager. We strongly encourage creativity. A combination of the powers granted pursuant to section 81 may be the solution. Before enacting by-laws in "grey" areas, we recommend that you send in draft by-laws. These can then be reviewed in light of the most recent legal developments on the matter.

3.1.1 PARAGRAPH 81(1) (a) - HEALTH

This paragraph stipulates that a by-law can be passed to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases.

Items covered under (a):

- Pest prevention
- Garbage disposal
- Health hazards
- Health and safety standards
- Contamination of water works or water courses originating on the reserve

Bear in mind that the scope of the power regarding health is limited by two regulations adopted under section 73 of the Indian Act: the Indian Health Regulations, which deal with the prevention of the spread of infectious diseases and the Indian Reserve Waste Disposal Regulations which deal with landfill sites and make the operation of such sites dependent upon the issuance of a permit by the Minister.

In interpreting paragraph (a) particularly as it relates to health and waste disposal, it should be recognized that the above-cited regulations exist and would supersede any band by-laws. The wording of paragraph (a) appears misleading in that it implies broader powers than those which actually exist.

The question of social services is quite distinct in that it does not come within the scope of the general powers of band councils under section 81. The Constitution Act, 1982 gives provincial governments exclusive jurisdiction regarding social services.

3.1.2 PARAGRAPH 81(1) (b) - TRAFFIC

This paragraph provides for the making of a by-law for the regulation of traffic.

Items covered under (b):

- Use of all terrain vehicles
- Use of motor vehicles
- Use of snowmobiles
- Parking
- Traffic and safety
- Riding bicycles on roads
- Traffic signs and speed limits

The scope of traffic by-laws is limited by the Indian Reserve Traffic Regulations which stipulate that provincial laws apply on reserves, except to the extent that those laws are inconsistent with the Regulations (see section 6 of the Regulations). There are conflicting court decisions regarding:

- the application of provincial traffic legislation
- the definition of reserve roads as private or public roads.

The courts, however, have generally held that provincial laws dealing with insurance and licensing are not applicable to "private roads" on the reserve because those roads do not fall within the definition of "highway" contained in most provincial laws. Private roads are maintained by the band and access is restricted whereas highways are open to the public in general. To this effect, see the comments made earlier on in Session 2.

3.1.3 PARAGRAPH 81(1) (c) - LAW AND ORDER

This provides for the enactment of a by-law for the observance of law and order. There are severe jurisdictional limits upon the use of this paragraph.

Items covered under (c):

- Curfew: although not considered to be within the scope of section 81, because it is of a purely local nature, by-laws in this area are allowed to stand.
- Fire Controls: although not considered to be within the confines of section 81, because by-laws are of a local nature, they are allowed to stand.
- Regulation of public meetings, gatherings, and demonstrations
- Agreements with surrounding municipalities for fire protection
- Appointment of by-law enforcement officers

3.1.4 PARAGRAPH 81(1) (d) - DISORDERLY CONDUCT AND NUISANCE

This paragraph permits the passing of by-laws for the prevention of disorderly conduct and nuisances. It is usually used in tandem with paragraph (c). The wording of the paragraph seems to permit a wide range of possibilities.

Items covered under (d):

- Regulation of burning (grass fires, tires, garbage)
- Prohibition of the obstruction of passages
- Regulation of the use of dangerous materials (stove pipes, chimneys, gas tanks, etc.)
- Regulation of noise

3.1.5 PARAGRAPH 81(1) (e) - CONTROL OF ANIMALS

Paragraph 81(1)(e) deals with the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers and the regulation of their duties and the provision for fees and charges for their services. This paragraph is mainly used to regulate dogs' behaviour.

Items covered under (e):

- Control of dogs running at large
- Regulation of dogs' behaviour (e.g. persistent barking, scattering of garbage)
- Control of dogs (e.g. fencing, muzzling)
- Fees for licences: reasonable fees
- Impounding and procedure to claim animals
- Destruction of animals after notice to the owner when not claimed.
- The Criminal Code deals with the unlawful destruction of animals.
- Destruction of animals without notice to the owner for humane reasons (example: diseased animals, rabies)

3.1.6 PARAGRAPH 81(1) (f) - LOCAL WORKS

This paragraph permits the enactment of by-laws respecting the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works.

Items covered under (f):

- Water services
- Sewage services
- Sanitation services
- Type and height of fences and boundary fences
- Illumination of streets and lands
- Electric power system: its financing, the area in which it is to apply, the levying of a fee for its use

3.1.7 PARAGRAPH 81(1) (g) - ZONING

This paragraph stipulates that a by-law can be adopted to divide the reserve or a portion thereof into zones and to prohibit 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. The object and purpose of this paragraph is to cover some of the items covered below.

Items covered under (g):

- Land use
- Determination of commercial, residential, industrial, institutional and conservation zones
- Cottage sites
- Protection of forest
- Camping sites
- Fees for camping sites: using (q) (ancillary powers under the Act) in tandem with this paragraph

3.1.8 PARAGRAPH 81(1) (h) - BUILDINGS

It provides for the passing of a by-law for the regulation of the construction, repair and use of buildings, whether owned by the band or by an individual member of the band.

Items covered under (h):

- Property maintenance standards
- Occupancy standards
- Preservation and keeping in good repair of houses
- Pest prevention if dealing with cockroaches, ants, termites, etc.
- Fire resistance rating: has to comply with the National Building Code
- Thermal insulation: has to comply with the National Building Code
- Building standards: has to comply with the National Building Code
- Building standards for cottages.

It should be remembered that when a by-law concerns the construction or repair of any building, it has to comply with the National Building Code which is applicable throughout Canada. Furthermore, if there is no valid by-law in this area of jurisdiction, the building code of the province in which the reserve is located, will apply if not inconsistent with the federal legislation.

3.1.9 PARAGRAPH 81(1) (i) - LAND SURVEY

This paragraph deals with the survey and allotment of reserve lands among the band members, the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments, and the setting apart of reserve lands for common use if authority has been granted under section 60 of the Indian Act.

The scope of this paragraph is limited by the requirement for authorization from the Governor-in-Council under section 60 of the Act.

Items covered under (i):

- Allotment of lands for a community centre, churches, schools, stores, (see subsection 18(2) of the Act) etc.
- Allotment of lands to band members (see section 20 of the Act).

3.1.10 PARAGRAPH 81(1) (j) - NOXIOUS WEEDS

It deals with the destruction and control of noxious weeds.

Items covered under (j):

- Control the spreading of noxious weeds
- Provide for the cutting of noxious weeds
- Prevent the growth of noxious weeds: regulate the use of chemical products to control them
- Permit the searching for noxious weeds by a by-law enforcement officer using paragraph (q) in tandem with this paragraph
- Notice to the owner of the land to destroy noxious weeds
- Provide for the cleaning of any vehicle or machine used to process noxious weeds to prevent their spreading

3.1.11 PARAGRAPH 81(1) (k) - BEES AND POULTRY

It deals with the regulation of bee-keeping and poultry raising.

The power has been seldom exercised by band councils.

3.1.12 PARAGRAPH 81(1) (l) - WATER SUPPLIES

It provides for the making of a by-law concerning the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies.

Items covered under (l):

- Location of public wells, cisterns, reservoirs
- Building standards
- Supply of water
- Regulation of the use of water on a domestic, industrial, and commercial basis
- Establishment of user fees
- Cut-off of water supply for non-payment: could be included in a water supply by-law as being adopted under paragraph (q) (ancillary powers of the Act) as an essential requirement for the application of a by-law under this paragraph.

The issue of pollution of water supplies has been raised and it has been suggested that it would be better to prohibit certain activities in some areas, in a zoning by-law for the purpose of protecting that area (e.g., prohibit the use of pesticides near a water supply area), instead of dealing with the issue of the protection of the environment under this paragraph.

3.1.13 PARAGRAPH 81(1) (m) - PUBLIC GAMES

It provides for the enacting of a by-law to control and prohibit games, sports, races, athletic contests and other amusements.

The main power claimed by Indian bands under this paragraph is the regulation of bingos and lotteries but the scope of this paragraph has been at issue many times before the courts and it has been confirmed that bingos and lotteries cannot be regulated by a by-law enacted pursuant to this paragraph.

Games of chance are regulated by the Criminal Code of Canada. However, since June 1985, the authority to license lottery schemes (games of chance) has been delegated from the federal government to the provinces which establish conditions for gaming within the restrictions of the Criminal Code. Furthermore, the Criminal Code is considered to be paramount over the Indian Act, so the argument that the more specific legislation (the by-law enacted under the Indian Act) applies before the more general legislation (Criminal Code) does not stand here because the authority of band councils is not explicit in section 81 of the Indian Act.

Items covered under (m):

- Pool rooms, dance halls, electronic arcades, only if it is to regulate the hours of business, the safety standards etc. Otherwise, band should enact pursuant to subparagraph 83(1)(ii), the licensing of businesses, callings, trades and occupations
- Public games as sporting or athletic events (e.g. Olympics)
- Physical activities
- Complete prohibition of such games

3.1.14 PARAGRAPH 81(1) (n) - HAWKERS AND PEDDLERS

Paragraph 81(1)(n) provides for the making of a by-law regulating hawkers and peddlers or others who enter the reserve to buy, sell or otherwise deal in wares and merchandise.

The scope of this paragraph is quite clear. However, problems arise when band councils try to prohibit such activity. The Act permits the "regulation" of hawkers and peddlers, not its total prohibition.

Items covered under (n):

- Submit an application to the council in order to receive a permit
- Establishment of a fee
- Hours and days of business
- Type of kiosks
- Type of advertisement

3.1.15 PARAGRAPH 81(1)(o) - WILDLIFE

This paragraph stipulates that a by-law can be passed regarding the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

Controversies arise regarding this subject, not only because of the scope of many of these wildlife by-laws, but also because of conflicting federal fisheries legislation and provincial environmental legislation. Case law respecting this paragraph usually holds that by-laws, as specific legislation, will apply over the more general legislation or regulations passed pursuant to federal legislation (e.g. Federal Fisheries Act Regulations).

It is important to appreciate that the scope of this section is narrower than provincial statutes regulating game, hunting and fishing practices. Hunting, fishing and trapping should be regulated pursuant to this section as a necessary element of the "preservation, protection and management of game. It should not be regulated as an activities themselves. This authority is subject to federal laws, such as the Migratory Birds Convention Act, R.S.C. 1985, c. M-7, the Canada Fisheries Act, R.S.C. 1985, c. F- . However the authority to hunt and trap on the reserve would override provincial game laws that are inconsistent or that deal with a matter covered in a by-law enacted under this paragraph.

It should also be noted that where no by-law is adopted, the provincial fishing, hunting and trapping legislation will apply pursuant to section 88 of the Act.

Please note that the essential element of this power, is to "*protect*" wildlife, fish and game. It is essential that the by-law demonstrate reasonable measures of such protection.

Items covered under (o):

- Provide for a co-management plan with the Department of Fisheries and Oceans
- Provide for a nature preservation area
- Regulate, protect and manage the environment as it relates to habitat for wildlife
- Issuance of permits to non-band members for hunting and fishing and the establishment of criteria. (Such issuance can be subject to the possession of a provincial license to hunt and fish)
- Provide for fees and the criteria for such fees
- Fish cultivation on a small scale
- Safe hunting and fishing

3.1.16 PARAGRAPH 81(1) (p) - TRESPASS

It deals with the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prohibited purposes.

It should be remembered that the purpose and scope of this paragraph is specifically limited to the removal and punishment of trespassers. There are other provisions in the Indian Act, sections 30 and 31, that regulate trespassing and a by-law enacted under this paragraph must not be inconsistent with the trespassing provisions above-noted.

This paragraph is not to determine what constitute "trespass" but is only to deal with the removal and punishment of trespassers on the reserve. The actual offence to the by-law is be the fact that a person fails or refuses to leave when ordered to do so, or resists a person who is lawfully removing that person. When removing a "trespasser" the person who is lawfully doing so, can use as much force as reasonably necessary. The band council, it appears, would also be enabled to decide what constitutes "prohibited purpose".

Items covered under (p):

- Procedure to warn trespassers that they are trespassing and that they may be prosecuted
- What constitutes "prohibited purpose"

3.1.17 PARAGRAPH 81(1) (p.1) - RESIDENCY

This paragraph provides for the residence of band members and other persons on the reserve.

Items covered under (p.1):

- Criteria to obtain residency permit
- Temporary or permanent residency
- Procedures to review applications for residency
- Criteria for the renewal or revocation of permits
- Rights of permittee, lessees and dependent children
- Appeal mechanism when permit denied

3.1.18 PARAGRAPH 81(1) (p.2) - RIGHTS OF SPOUSES AND CHILDREN

It provides for the 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 affecting the band members.

This paragraph may be used whenever a by-law makes a distinction between band members and non-band members. The paragraph was included in Bill C-31 to underline the jurisdiction of the council over all residents of the reserve, including non-band members.

Items covered under (p.2):

- Residency
- Limiting participation in the political life of the band (e.g. general assemblies)

3.1.19 PARAGRAPH 81(1) (p.3) - CAPITAL AND REVENUE MONIES

Authorizes the Minister to make payments out of capital or revenue monies to persons whose names were deleted from the band list of the band. A by-law enacted under this paragraph must be applied in conjunction with section 64 of the Indian Act.

Items covered under (p.3):

- Must apply to all members
- General by-law with objective criteria establishing the amount payable

3.1.20 PARAGRAPH 81(1) (p.4) - SECTIONS 10(3) AND 64.1(2)

It is used to bring subsections 10(3) or 64.1(2) into effect with respect to the band.

This paragraph gives authority to the council to extend the voting right on membership rules to non-resident band members. The by-law can also require individuals who have previously received a share of a band fund to reimburse money received in excess of \$1,000 before they can use services financed under sections 64, 66 and 69 of the Indian Act.

The by-law is usually worded in order to put into application these two subsections.

3.1.21 PARAGRAPH 81(1) (q) - ANCILLARY POWERS

It deals with any matter arising out of or ancillary to the exercise of powers under section 81.

This provision may cover the appointment of by-law enforcement officers, the establishment of user fees, etc., as a necessary ancillary power to pass by-laws on other subject matters.

Every by-law should include a statement that this paragraph is part of the authority for a by-law enacted by the council.

3.1.22 PARAGRAPH 81(1) (r) - PENALTY PROVISIONS

It permits the imposition on summary conviction of a fine not exceeding one thousand dollars or of imprisonment for a term not exceeding thirty days or both, for the violation of a by-law made under section 81.

The incorporation of penalties in by-laws is a matter of policy for the band council to determine. In many instances, band councils may determine that the imposition of the maximum penalties permitted in the Act are neither desirable nor warranted, as the offenses do not warrant a severe sanction. In other cases, in which the by-law regulates "civil" matters, a penalty which will be enforced by means of summary conviction proceedings in the provincial courts may not be appropriate. Accordingly, the band council has the authority to incorporate a lesser penalty than that permitted by the Act, although the band council is not able to provide for a minimum penalty.

For example:

A by-law enacted to regulate the destruction and control of noxious weeds (81(1)(j)) may be enforced by the imposition on summary conviction of a fine not exceeding \$100.00.

On the other hand, the band council may not provide for a minimum fine of \$100.00 for the breach of 81(1)(j) as the issue of a minimum sentence must be left to the judge sentencing a convicted accused.

Every by-law should include a statement that this paragraph is part of the authority for a by-law enacted by the council.

3.2 SECTION 83 - MONEY BY-LAWS

Bill C-115, known as the Kamloops Amendment, expanded the taxation powers of band councils to all interests in reserve and designated lands (surrendered for lease). All by-laws passed under section 83 must be forwarded to the Indian Taxation Advisory Board in headquarters of the Department.

**Indian Taxation Advisory Board
Terrasses de la Chaudière
10 Wellington Street
Ottawa, Ontario
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3.3 SECTION 85.1 - INTOXICANT BY-LAWS

In Bill C-31, the powers of band councils were extended to include the making of by-laws to prohibit intoxication on reserve, or the sale and the possession of liquor.

Provincial laws on liquor generally apply on all reserves except to the extent that band councils have passed by-laws under section 85.1. The Indian Act does not grant full regulatory authority to bands over liquor. Bands are limited to three specific prohibitions:

1. *prohibition against the sale, barter, supply or manufacture of intoxicants;*
2. *prohibition against being intoxicated; and*
3. *prohibition against the possession of intoxicants.*

However, because there is no disallowance power for the Minister under this section, the department merely records the by-laws it receives. It will be up to the courts to hand down decisions regarding the validity or constitutionality of intoxicant by-laws.

They are also authorized to set out specific exemptions, providing that these exemptions are very clearly defined in the by-law.

The wording of section 85.1 indicates that band councils have the choice to either prohibit the above activities, or by choosing not to pass a by-law, allowing the various provincial laws dealing with intoxicants to prevail on-reserve.

The Act provides for a **special procedure** to enact a valid **Intoxicant By-law under section 85.1**. We recommend that bands follow all the steps leading to the enactment of the by-law by abiding by the requirements set out in the Act. These may be summarized as follows:

- The by-law must be drafted in accordance with the terms of paragraphs 85.1(1)(a),(b) and (c).
- Provide for appropriate exceptions, such as weddings, funerals or pow-wows. The organization or individual responsible for such events would have to abide by the provincial law and obtain the necessary permits

Anyone in breach of the by-law would have to be prosecuted pursuant to paragraph 85.1(4)(a) or (b) of the Act. It is therefore suggested that you state so in the by-law under the heading "penalties".

The band should provide the department with a Band Council Resolution which could state that:

1. *a special meeting of the electorate took place;*
2. *the date of the meeting;*
3. *the number of members in attendance;*
4. *the fact that a vote was taken; and*
5. *the number of votes for and against the by-law.*

Once the Minister receives the by-law, it is recorded with the department. This is a purely administrative function. The by-law will come into effect on the date that it was passed at a duly convened meeting of the band council.

These procedural requirements will be looked at further on in Session 6.

SESSION 4

PRINCIPLES OF DELEGATED AUTHORITY

4. INTRODUCTION TO PRINCIPLES

The exercise of delegated regulatory authority is always subject to a number of general legal principles. These legal principles apply to all delegated legislation. Since it is the Indian Act that delegates regulatory authority to the council of a band, a council cannot exercise this authority properly unless it is familiar with the following principles:

4.1. PRINCIPLE #1 -IN MAKING BY-LAWS, A BAND COUNCIL MUST ACT WITHIN THE LIMITS OF ITS AUTHORITY

Delegated authority does not constitute autonomous regulatory authority; it exists only to the extent that an Act expressly delegates its exercise. By-laws are thus subordinate to the enabling Act (Indian Act) under which they are made; the Indian Act is the legislative authority that enables a council to exercise specific powers by enacting by-laws. The by-law thus derives its force and authority from the Indian Act.

To determine what conditions and limits the Act places on such authority, we must first turn to the provisions of the Act itself. Section 81 confers powers on the council in the following general clause:

"The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely..."

It follows from this general statement of powers that a by-law established under section 81 cannot run counter to other sections of the Indian Act or to regulations of the Governor in Council made under the Act. (Such regulations are authorized under section 73 in fourteen different areas.) This does not mean that a council cannot make a by-law in an area already covered by a section of the Act or one of its regulations; it only means that the by-law cannot conflict with provisions of the Act or regulations that are already in effect.

This general statement is followed by a list of the purposes for which a by-law may be made. **The purpose of a by-law must be within the scope of these stated powers**; otherwise, the by-law may be deemed "ultra vires". It is generally accepted that the explicit power to do something includes the implicit powers required to achieve that end.

Moreover, section 88 of the Indian Act allows laws of general application in force in any province to apply on Indian reserves except to the extent that these provincial laws are inconsistent with the Act, or regulations or by-laws authorized by the Act.

Even though some provincial laws are not dependent upon section 88 for their application on Indian lands (e.g. traffic laws, liquor laws), such laws cannot prevail over an inconsistent federal law. Because a band council by-law is a federal regulation passed pursuant to federal law, it will normally prevail over an inconsistent provincial law.

Normally, a band council by-law will pre-empt a provincial law that deals with the same subject matter. One exception are the Indian Reserve Traffic Regulation, C.R.C. 1978, c. 959 because section 6 of the Indian Act specifically states that provincial traffic laws apply on reserve lands.

It is also important to remember that a by-law is applicable only within the area where the band council has jurisdiction (ie: on reserve).

In summary, this first principle has four components:

- i) a by-law must not be inconsistent with the Indian Act or a regulation made by the Governor in Council under the Act;
- ii) a by-law must lie within the powers granted by the Indian Act;
- iii) by-law must not run counter to federal acts or to provincial laws of general application in force on the reserve in accordance with section 88 of the Act;
and
- v) a by-law is applicable only within the area administered by the band council.

4.2 PRINCIPLE #2 -A BY-LAW MUST RESPECT ALL THE FORMALITIES PRESCRIBED FOR ITS ADOPTION

The Indian Act prescribes other conditions for the exercise of regulatory authority.

A band council must abide by all these conditions. If any one of them is not met, a court of law may conclude that the by-law is not enforceable and of no effect. For example, paragraph 2(3)(b) of the Act specifies an important condition for the exercise of power by band councils in stipulating that:

"..a power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened."

Another precondition for the exercise of regulatory power is set out in subsection 85.1(2) of the Act. Pursuant to that subsection, an intoxicant by-law referred to in section 85.1 may not be made unless assented to by a majority of the electors present at a special meeting of the band which was called for the purpose of considering the by-law.

4.3 PRINCIPLE #3 -A BAND COUNCIL CANNOT, IN A BY-LAW, DELEGATE TO A COMMITTEE, TO AN OFFICIAL OR TO ITSELF THE POWER (a) TO PRESCRIBE THE CONTENT OF THE BY-LAW; OR (b) TO EXERCISE DISCRETION EXCEPT IN ACCORDANCE WITH CRITERIA PRESCRIBED IN THE BY-LAW.

(a) There is a general legal principle that delegated authority may not be subdelegated. This means that the holder of regulatory authority cannot give itself power or give powers to a third party. For example, a by-law that confers upon a band council subsequent authority to regulate by resolution of the council would run counter to this principle, since the council would be giving itself, in another form, the powers vested in it under the Act.

(b) However, a band council may, in a by-law, delegate administrative duties to officials and committees, and to itself, in which case the scope of these functions must be defined.

Where delegates are authorized to make decisions involving discretion, criteria for those decisions must be set out in the by-law. Otherwise, the band council would be giving to the official or committee the very task the Indian Act requires the band council to perform.

In exercising its regulatory authority, a band council must establish the objective standards to ensure the subsequent observance and enforcement of the by-law.

A vague by-law may be deemed to include discretionary powers because of the absence or inadequacy of standards. To eliminate this arbitrariness, standards must be sufficiently clear and precise that a person reading the by-law can grasp the extent of the powers and obligations conferred therein. In this way, the band council will avoid decisions that are arbitrary, unreasonable or contrary to the ultimate purpose of the by-law.

4.4 PRINCIPLE #4 - BY-LAW CANNOT APPLY RETROACTIVELY TO EVENTS OCCURRING BEFORE IT COMES INTO FORCE OR DEPRIVE SOMEONE OF RIGHTS ACQUIRED BEFORE THE MAKING OF THE BY-LAW

The first principle, of non-retroactivity, leads to the second, of acquired rights. The authority to make a law apply retroactively to events that occurred before the law was passed must be expressly given by Parliament. Section 81 of the Indian Act contains no such authority. Accordingly, a by-law cannot be applied to conduct or situations that took place before the effective date of the by-law.

The second principle is to the effect that by-laws cannot eliminate rights which were acquired prior to the making of the by-law. This does not mean that a by-law cannot change the existing state of the law. It means that a by-law cannot take away "vested" rights. Although it is difficult to define "vested" rights except in an abstract way, a primary example would be property rights. The application of the principle can best be seen in the area of zoning. Although a zoning by-law could alter the potential uses to which land might be put in the future, it could not interfere with an existing lawful use of the land. A claim to vested rights might also arise if the making or amending of a residence by-law were to prevent an existing resident from continuing to reside on the reserve.

To respect this principle, a by-law should identify categories of persons whose acquired rights would be affected by changes to an existing situation, and expressly exempt them from the by-law's application.

4.5 PRINCIPLE #5 -A BY-LAW MUST NOT PRESCRIBE SANCTIONS EXCEPT AS EXPRESSLY PERMITTED BY THE ENABLING LEGISLATION

By-laws that prohibit or require certain actions may provide for a sanction in cases of violation. The Indian Act stipulates the maximum penalties that a by-law may establish. The sanction imposed by a by-law may not be more severe or of a different nature than that permitted by the Act.

For example, a sanction that allowed authorities to tow away vehicles which were parked in violation of a by-law established under section 81 would not have effect, because that is not a penalty permitted by this section.

No power is given to a band council to authorize any other penalty for violating a by-law than that set out in paragraph 81(1)(r). This does not mean, however, that violating a by-law cannot have other legal consequences for the offender. For example, it may be a ground on which a licence can be revoked as an administrative decision. This is legitimate as long as there is a reasonable connection between the by-law violation and the suitability of the person to hold a licence. For example, a condition upon which a hawkers' and peddlers' licence is issued may be that the licensee comply with all the regulatory requirements of the by-law and not sell wares that are not covered by the licence. Proof that a licensee has been carrying on unauthorized activities may be a suitable ground for taking away that licence, as part of the licensing regime. On the other hand, if a violation of a traffic by-law were used as a ground for revoking a hawkers' and peddlers' licence, it would likely be seen as a penalty for the traffic offence, rather than as the legitimate enforcement of the hawkers' and peddlers' licensing regime. As such, the revocation of the licence would be unauthorized.

4.6 PRINCIPLE #6 -A BY-LAW MUST CONFORM TO THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS. IT MUST NOT BE INCONSISTENT WITH THE PRINCIPLES OF NATURAL JUSTICE.

The Canadian Charter of Rights and Freedoms provides that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination, in particular without discrimination on the grounds of race, sex, age or mental or physical disability. A by-law cannot, on those grounds, or on "analogous" grounds that relate to the "personal characteristics" of an individual, impose a burden, obligation or disadvantage on one individual or group that is not imposed on others, or withhold from one group or individual access to opportunities, benefits and advantages that are available to others. A band council may draw distinctions between situations or persons, but not where that would amount to "discrimination".

The right of an individual to equality before the law and the protection of the law without discrimination is also recognized in the Canadian Bill of Rights.

Respect for the preceding principles becomes particularly important if a by-law is challenged in court; a by-law that does not conform to these rules may be vulnerable if proceedings are brought against its application.

SESSION 5

DRAFTING REQUIREMENTS

When drafting by-laws, band councils should be aware that by-laws enacted under the authority of the Indian Act will apply only upon the territory over which the band council has jurisdiction. Band councils must also bear in mind the fact that by-laws are a type of legislation, authorized by an Act of Parliament of Canada and, as such can come under the scrutiny of the courts. Accordingly, band councils may find the services of a lawyer to be of invaluable assistance.

5. BASIC REQUIREMENTS

Whether the band council drafts the by-law itself or takes the matter to a lawyer, certain basic drafting requirements must be met.

5.1 TITLE AND NUMBERING OF BY-LAW

A by-law should have a title which sufficiently describes its purpose. If the title is lengthy, the by-law may designate a "short title" for common usage. It is also helpful to number by-laws in a logical fashion.

A consecutive numerical system should be used when numbering by-laws. The year of enactment should form part of the number. For example, "By-law No. 1991.15" would mean the fifteenth by-law enacted in 1991. For each new year, the numbers would start again at number 1.

5.2 RECITALS

The recitals to the by-law should include a brief statement of its purpose and recital of the authority in the Indian Act upon which the by-law is based.

5.3 ENACTING CLAUSE

The band council should include an enacting clause in order to show that the band council enacted the by-law, and that the by-law is in fact a by-law and not simply a band council resolution.

5.4 CLARITY AND DEFINITIONS

The operative sections of the by-law should be clearly written and concise. It is useful to include a definition section to clarify the meaning of any terms that could prove to be problematic.

Definitions should be used to define words in a by-law which might require interpretation in the context of the by-law, if not defined. Words that are not defined in the by-law may be defined in the Interpretation Act, R.S.C. 1985, c. I-2, or in the Indian Act, and this will have a bearing on the words chosen for a by-law.

Words used in a band by-law, if defined in the Indian Act, have the meaning given to them in the Indian Act unless a contrary intention appears in the by-law (sections 3 and 16, Interpretation Act, R.S.C. 1985, c. I-21). Although it may be possible in some circumstances to define a word in a by-law more broadly than it is defined in the Indian Act, in most cases to do so would affect the legality of the by-law. It is especially important not to expand in a by-law the meaning of any word used in section 81, 83 or 85 of the Indian Act, if that word is defined in the Indian Act. Although it is usually permissible to define a word in a by-law more narrowly than it is defined in the Indian Act, the legality of this may also be questioned in some instances.

Accordingly, as a matter of practice, when drafting by-laws it is advisable not to define words and phrases differently than they are defined in the Indian Act, unless it is absolutely necessary and the band has sought legal advice on the question.

The definition of a word should be introduced by the verb "means" if it is intended to restrict the meaning of the word to the definition that is given. If, however, the intention is to extend the normal meaning of the word to other meanings that the word might not ordinarily bear, or to give examples of the intended meaning, it should be introduced by the verb "includes". For example, "boat" means a motor boat, or "boat" includes a motor boat, sail boat, row boat, canoe, sailboard and any other device used to transport persons by water. Alternatively, it would be appropriate to say: "boat" means any device used to transport persons by water, and includes a motor boat, sail boat, row boat, canoe, and sailboard.

Words to be defined should be arranged in alphabetical order, and should not be lettered if the by-law is to be translated into another language, in which the alphabetical order would be different.

5.5 READABILITY AND LOGIC

The by-law should be logically divided into sections and subsections, to ensure its readability and to facilitate its interpretation. The main body and content of a by-law should be written as clearly, succinctly and briefly as possible. A by-law that is vague or ambiguous could be disallowed by the Minister, and may be held invalid by a court. To avoid complex and lengthy provisions, sections should be separated into subsections, paragraphs, subparagraphs, and if necessary, clauses and subsections. The sections of a by-law should flow in a logical manner. The main body of a by-law dealing with a particularly complex matter should be broken down into Parts.

The main body of a by-law will include substantive rules of conduct as well as measures for administering and enforcing the by-law. An acceptable format would be to have administrative provisions precede the substantive rules.

5.6 OFFENCES AND PENALTIES

The by-law should state that a person who violates any provision of the by-law, or a specified provision of the by-law, commits an offence.

The penalties for violation of a section 81 by-law cannot differ in nature from those set out in paragraph 81(1)(r) of the Indian Act (ex: you can impose a lesser monetary penalty than the \$1,000.00 specified in the Act, but the penalty may not specify another type of punishment, such as community work).

5.7 DATE BY-LAW WAS PASSED AND SIGNATURES

A statement to the effect that a by-law was made by a band council at a duly convened meeting on a particular date must be included. As well, the signatures of the members of the band council who voted in favour of the by-law should appear at the end of the by-law.

5.8 DATE THAT TRUE CERTIFIED COPY OF ORIGINAL BY-LAW WAS FORWARDED TO THE MINISTER

It is essential that the date on which the true certified copy of the original by-law mailed/faxed/hand delivered (as the case may be) to the Minister be recorded on the original by-law, as a by-law enacted pursuant to section 81 comes into force forty days after such date (section 82(2) of the Indian Act).

5.2.1 REQUIREMENTS OF THE STATUTORY INSTRUMENTS ACT

By-laws made by band councils pursuant to the provisions of the Indian Act are statutory instruments within the meaning found in the Statutory Instruments Act. As such, by-laws should meet the drafting requirements set forth in that Act.

*** SAMPLE HAWKERS AND PEDDLERS BY-LAW**

* *Please note that this is a sample bylaw only. Any submission of a bylaw which is based on this sample bylaw does not automatically ensure that the bylaw will be allowed to come into force. The bylaw must be considered in its entirety before such a determination can be made. The Minister of the Department of Indian Affairs and Northern Development cannot guarantee the present or future validity or enforceability of a bylaw which is based on this sample bylaw.*

By-law No. 1991-1
of the _____ Indian Band

**A By-law to Regulate the Conduct and
Activities of Hawkers, Peddlers or Others on the Reserve**

WHEREAS the Council of the _____ Indian Band desires to make a by-law for the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

AND WHEREAS the Council of the _____ Indian Band is empowered to make such by-law, and with respect to any matter arising out of or ancillary to the exercise of the power, and for the imposition of a penalty for a violation thereof, pursuant to paragraphs 81(1)(n), (q) and (r) of the Indian Act;

AND WHEREAS it is deemed to be expedient for the welfare of the inhabitants of the _____ Indian Reserve No. ____ to licence and regulate hawkers and peddlers;

NOW THEREFORE the Council of the _____ Indian Band hereby enacts the following by-law:

Short Title

1. This by-law may be cited as the " _____ Indian Band Hawkers and Peddlers By-law".

Interpretation:

2. In this by-law,

"Council" means the Council, as defined in the Indian Act, of the _____ Indian Band;

"*hawker and peddler*" includes a hawker, peddler, transient trader, itinerant seller or other person who, enters the reserve to buy, sell or otherwise deal in wares or merchandise, or offer or exposes for sale to any person, by means of samples, patterns, cuts, blue prints or pictures, wares or merchandise to be sold at that time or to be delivered afterwards or shipped onto the reserve;

"*itinerant seller*" means a seller whose business includes soliciting, negotiating or arranging for the signing by a buyer, at a place other than the seller's permanent place of business, of a contract for the sale of wares or merchandise;

"*licence*" means a licence issued pursuant to this by-law permitting the licensee to conduct business on the reserve;

"*licensee*" means a person to whom a licence is issued pursuant to this by-law;

"*licensing agent*" means the person appointed by the Council pursuant to section 4 to receive applications and issue licences pursuant to this by-law;

"*officer*" means any police officer, police constable or other person charged with the duty to preserve and maintain the public peace, and a by-law enforcement officer or any other person appointed by the Council for the purpose of maintaining law and order on the reserve pursuant to By-law No. _____ Relating to Law and Order;

"*reserve*" means the reserve of the _____ Indian Band and includes the _____ Indian Band's Reserves No. _____ and No. _____.

Requirement for Licence

- 3.(1) No person shall conduct business as a hawker and peddler of wares or merchandise on the reserve unless that person holds a valid and subsisting licence issued pursuant to this by-law with respect to the type of wares or merchandise that person deals in.
- (2) Subsection (1) does not apply to a person who
 - (a) is a resident of the reserve;
 - (b) has a permanent place of business on the reserve; or
 - (c) is a member of the band.

Licensing Agent

- 4.(1) The Council may, by band council resolution, appoint a licensing agent who shall receive applications and issue licences for the purpose of this by-law.
- (2) The Council may, in the band council resolution, provide for reasonable remuneration to be paid to the licensing agent.

Duties of Licensing Agent

5. The licensing agent shall
 - (a) receive and deal with all applications for licences to be issued under this by-law;
 - (b) maintain a record of all applications for licences and retain on file a copy of all licences issued, together with their particulars;
 - (c) ascertain, as far as reasonably practicable, that all information furnished by the applicant in connection with an application for a licence is true in substance;
 - (d) as often as may be necessary, make inquiries and inspections to determine whether every holder of a licence issued pursuant to this by-law complies in every respect with the licence issued and the by-laws of the Council;
 - (e) report in writing to the Council bi-monthly, or as otherwise requested by the Council, stating the number of licences issued, the types of wares and merchandise being sold under each licence, the duration of each licence, and the amount of money received since the previous report along with a summary stating the total number of licences issued and the total amount of money received to date for the current year;
 - (f) perform such other duties as may be assigned by the Council from time to time.

Licences

- 6.(1) A licence shall specify the types of wares or merchandise the licensee is permitted to deal in.
- (2) A licence shall be valid throughout the reserve.
- (3) A licence shall be in Form 1.

Application for Licence

7. Any person who wishes to conduct business as a hawker and peddler on the reserve shall make an application in writing to the licensing agent in Form 2, and shall truthfully disclosed all information required to be disclosed on the application form.

Fees

8. The fees payable for a licence issued under this by-law are:
- (a) _____ dollars per calendar year;
 - (b) _____ dollars per calendar month;
 - (c) _____ dollars per calendar week; and
 - (d) _____ dollars per day or part thereof.

Issuance of Licence

9. The licensing agent shall make out and deliver a licence to the applicant if:
- (a) the applicant has disclosed all information required to be disclosed in the application form and the licensing agent is satisfied that all information disclosed by the applicant is true;
 - (b) the licensing agent is satisfied that the applicant has complied with the appropriate provincial requirements with respect to the conduct of the applicant's business, including registration and bonding;
 - (c) the applicant has not, within the preceding three years, been convicted of an offence under the Criminal Code (Canada), for which the applicant has not been pardoned, relating to the conduct of this business as a hawker and peddler, whether on or outside the reserve; and
 - (d) the required fee for the licence has been paid.

Duration of Licence

10. Every licence issued pursuant to this by-law shall be for the calendar year current at the time of issuing thereof and shall expire on the 31st day of December following the date of issuance, unless issued on a monthly, weekly or daily basis.

Producing Licence Upon Request

11. Every licence shall carry the licence issued while conducting business on the reserve and shall produce the licence upon the request of the licensing agent, an officer, or any person with whom the licensee transacts or attempts to transact business.

Licence Not Transferable

12. A licence issued under authority of this by-law is not transferable.

Hours

13. No person conducting business as a hawker and peddler shall call at any residence on the reserve between the hours of 8:00 p.m. and 9:00 a.m., or on Sundays or holidays, unless previously invited by the occupier of the residence to all at such time.

No Refund

14. No rebate or refund of any part of a licence fee shall be made to any licensee by reason of forfeiture of a licence, or a non-usage of the rights and privileges thereby granted, or for any other cause.

Revocation or Suspension of Licence

15. The Council may, by band council resolution, after notice and hearing, suspend for a period not exceeding ninety days or revoke any licence issued under this by-law, where it has been shown that the licensee:
 - (a) has failed to comply with this by-law;
 - (b) has been convicted of an offence under the Criminal Code (Canada), for which the licensee has not been pardoned, in relation to the conduct of the licensee's business as a hawker and peddler, whether on or outside the reserve; or
 - (c) has conducted his business in a manner that is detrimental to the interests of consumers on the reserve.

Penalty

16. A person who violates any of the provisions of this by-law commits an offence and is liable on summary conviction to a fine not exceeding \$1,000.00 dollars or to imprisonment for a term not exceeding 30 days, or to both.

FORM 1
HAWKERS AND PEDDLERS LICENCE

(Name of licensee) is hereby authorized to conduct business as a hawker and peddler dealing in the following wares and merchandise _____ on the _____ Indian Reserve for the period commencing (date), 199 __, to (date), 199 __.

(Signature of Licensee Agent)

(Date)

FORM 2
HAWKERS AND PEDDLERS LICENCE APPLICATION FORM

1. Applicant's Name: _____
2. Permanent Address: _____
3. Phone Number: home: _____
4. Occupation: _____
5. Employers Name and Address: _____

6. Social Insurance No.: _____
7. Period for which Licence is Required: _____ (Give exact dates)

8. Types of wares and merchandise to be sold on the reserve:

9. Locations where wares and merchandise are to be sold on the reserve:

10. Are you presently registered with the provincial government with respect to the conduct of your business? Yes ___ No ___ (If yes, applicant must provide proof and give details below).

11. Are you bonded with a bonding agency with respect of the conduct of your business? Yes ___ No ___
(If yes, applicant must provide proof and give details below).

12. Have you, within the previous three years, been convicted of a criminal offence for which you have not been pardoned?
Yes ___ No ___ (If yes, please give details below).

This by-law is hereby passed at a duly convened meeting of the Band Council of the _____ Indian Band,
this ____ day of _____, 199__.

Voting in favour of this by-law are the following members of the Council:

- _____ member of council
- _____ member of council
- _____ member of council
- _____ member of council

being the majority of those members of the Band Council of the _____ Indian Band present at the aforesaid meeting of the Council.

The quorum of the Band Council is _____ members.

Number of members of the Band Council present at the meeting : _____.

I, _____ Chief/Councillor of the _____ Indian Band, do hereby certify that a true copy of the foregoing by-law was mailed/faxed/hand delivered (as the case may be) to the Minister of Indian Affairs and Northern Development at the District/Regional/Hull office (as the case may be) pursuant to subsection 82(1) of the Indian Act, this ____ day of _____, 199__.

(Chief/Councillor)

(Witness)

NOTES

General

Section 81(1)(n) provides that a band council may make by-laws for

- (n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

The power to regulate has been held by the courts not to include the power to prohibit. Regulation involves the continued existence of the matter to be regulated and by-laws which totally prohibit the carrying on of a business are ultra vires if made under a regulatory power. It follows that in the absence of an express statutory power of prohibition, there is no right to prohibit certain kinds of businesses. Furthermore, a by-law which purports to regulate, but which is in substance prohibitory, is invalid.

Although the effect of the sample by-law is to prohibit someone from carrying on the business of hawking and peddling on the reserve if that person does not have a valid licence, the scheme as a whole is one of regulation, not of prohibition. The sample by-law assumes the continued existence of the matter to be regulated, i.e. the conduct of the business of hawking and peddling, and simply imposes common requirements of a licensing scheme to ensure that the business is conducted according to specified rules and regulations.

Section 2

In this sample by-law, "hawker and peddler" is used in a descriptive, rather than a legal, sense. There are people who would be brought within the scope of this definition who might not qualify as either a "hawker" or "peddler". However, the wording of paragraph 81(1)(n) allows the by-law to cover "others who enter the reserve to buy, sell or otherwise deal in wares or merchandise". The definition of "hawker and peddler" includes these "others".

The definition covers not only those who go from house to house, or place to place, on the reserve, but also those who enter the reserve on a periodic basis to sell in a fixed location.

Section 3

Subsection 3(1) applies to hawkers and peddlers of all types of wares and merchandise. A by-law cannot discriminate among classes of hawkers and peddlers. It cannot empower a band council to provide for the licensing of some hawkers and peddlers but not others unless there is a strong justification for such action. Arguably, it may be possible for a band council in a by-law to provide that a licence cannot be issued to authorize dealing in specific wares and merchandise considered by the band council to be detrimental to the interests of the band and/or band members.

Subsection 3(2) creates certain exceptions to the licensing requirement. It is arguable that persons covered by paragraphs (a) and (b) would not be regulated in any event, since the power to regulate given by paragraph 81(1)(n) of the Indian Act covers only those "who enter the reserve". Apart from that, the distinction is probably justifiable on the basis that residents of the reserve, or those with permanent businesses on the reserve, are known and readily locatable. Paragraph (c) may be a more questionable exception, at least with respect to members of the band who are resident off the reserve. It may or may not be seen as discriminatory to extend a benefit to one class of persons (i.e. non-resident band members) who enter the reserve to do business, and not to other classes.

Section 6

Subsection 6(2) authorizes hawkers and peddlers to do business anywhere on the reserve. A band council that wishes to restrict the areas of the reserve on which a hawker and peddler can conduct business must set out the specific areas in its by-law. A band council cannot leave it to the discretion of a licensing agent to decide this matter. Accordingly, if the band council wishes to restrict the scope of the area in which business can be carried on, subsection 6(2) should be adjusted. This should probably be done in conjunction with a by-law to divide the reserve into zones, pursuant to section 81(1)(g).

Section 8

Licence fees may be imposed as part of a licensing scheme established under a band by-law as long as the fees are designed only to cover the costs involved in the administration of the by-law. In other words, the fees prescribed by the by-law cannot be so inordinately high that they are seen, in effect, to be a "tax" as opposed to a fee required to cover the administrative costs of the by-law licensing scheme.

It would be permissible for the band council to provide that a percentage of the licensing fee be retained by the licensing agent, as a means of remunerating the licensing agent (see subsection 4(2)).

Section 9

Hawkers and peddlers by-laws have in the past often been disallowed because they provide for a licensing scheme which delegates discretion to a licensing agent to issue a licence. If the decision whether or not to issue a licence is left to an official who has absolute discretion, it will constitute an illegal delegation of discretion, and the by-law will be found to be invalid. It is therefore important to limit as much as possible the scope of the discretion left to the licensing agent in applying the criteria for the issuance of a licence.

In this sample by-law, the decision to issue a licence is given to a licensing agent who can only issue it upon certain conditions being fulfilled. The licensing agent has very limited discretion in issuing a licence.

Section 13

The issue of whether or not an enactment can prohibit the carrying on of business on Sundays is still before the courts. Some courts have held that "Sunday shopping" infringes both section 2(a) and section 15 of the Charter of Rights and Freedoms, but is justifiable under section 1 of the Charter. Other courts have held there is no infringement of the Charter. Each case depends on its facts, and in particular the manner in which the legislation or by-law is drafted. It may be seen as reasonable to prevent a hawker and peddler from going door to door on Sundays, whereas it may not be seen as reasonable to prevent a fruit or vegetable merchant from coming onto the reserve to set up a roadside vegetable stand. Similarly, it may be seen as unreasonable to prohibit an itinerant fast food vendor from selling merchandise at a public gathering taking place on a Sunday.

Generally speaking, the regulation of hours in a by-law is a complex matter. Bands may wish to have a regulatory regime that is more sophisticated than the one set out in the sample by-law, but this will require careful consideration to avoid the freedom of religion and equality issues that are invariably raised when regulating hours of business.

Section 14

Hawkers and peddlers by-laws are often disallowed because they provide for a licensing scheme which is discretionary in nature with respect to the revocation or suspension of a licence. If a decision to revoke or suspend a licence is left to a body or official who has absolute discretion, the by-law will be held to be invalid.

In this sample by-law, the power to revoke or suspend a licence can only be exercised by the band council after notice and the opportunity of a hearing has been given to the licensee. The band council is not given absolute discretion to revoke or suspend a licence. Rather, it can only do so where it has been shown that the licensee has violated a provision of the by-law, has been convicted of a criminal offence, or has conducted his business in a manner that is detrimental to the interests of consumers, and where the Council is also satisfied that it would not be in the interests of the residents of the reserve to continue the licence.

It would not be necessary to prosecute a licensee for a violation of the by-law prior to revoking or suspending the licence. The administrative procedure under section 15 is separate and distinct from the prosecution procedure under section 16. Nonetheless, a person could be prosecuted under section 16, and also, on the same facts, be subjected to an administrative proceeding under section 15 to determine whether or not the person should continue to hold a licence.

SESSION 6 BY-LAW ENACTMENT

6.1 INTRODUCTION

A by-law cannot deal with matters falling under both section 81 and section 83 heads of authority. It cannot deal either with both section 81 and section 85.1. Separate by-laws must be made because the procedural requirements for a by-law under section 81 differ from those of a by-law made under section 83 or under section 85.1. In particular, section 81 by-laws do not require the actual approval of the Minister in order to come into force, whereas section 83 by-laws do require such approval before they become effective. A section 85.1 by-law comes into force the day it is enacted by the band council.

Band councils passing by-laws should be sure to follow the procedural requirements for the enacting of by-laws contained in the Indian Act. Enactment simply refers to the process of having a by-law legally passed, recorded and registered so that it becomes an official law that can be enforced in the courts.

This session is extremely important because a by-law will have no effect unless it is properly enacted. A by-law is not a law until all of the procedures for legal enactment are followed.

6.2 ENACTMENT REQUIREMENTS

Paragraph 2(3)(b) of the Act makes it clear that a by-law, which must be enacted by the band council, must be approved by a majority of the councillors of the band present at a duly convened meeting of the council.

2(3)(b). " a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened. "

By-laws made pursuant to section 85.1 must be asserted to by a majority of the electors of the band who voted at a special meeting of the band called by the band council for the purpose of considering the by-law. This requirement is set out in subsection 85.1(2).

6.3 PROOF OF PROPER PROCEDURES

Band councils passing by-laws pursuant to these sections should ensure that they are able to prove that the actions required of them by the Indian Act have been taken properly. Such proof may be required in the event the by-law is to be relied upon in court. For example, the use of registered mail to show the date of mailing of a by-law and affidavits certifying the fact that a band meeting was held could be used to show that a by-law was properly enacted.

6.4 ADMINISTRATIVE PROCESS

Once a by-law has been drafted and the band council has decided that they are satisfied with what it says, and what it will do for the community, then there is a very formal procedure for enacting it or bringing it into law.

6.4.1 CONVENING A BAND COUNCIL MEETING ACCORDING TO THE BAND COUNCIL'S RULES OF PROCEDURE OR ITS CUSTOM.

A by-law must be passed by the majority of the band councillors present at a duly convened meeting of the band council.

The Indian Band Council Procedure Regulations, C.R.C. 1978, c. 950 - Regulations Respecting Procedure at Indian Band Council Meetings set out a code of procedure for meetings of those band councils falling under section 74 of the Indian Act.

Band councils which are not elected pursuant to section 74 of the Indian Act and are chosen according to the custom of the band need only show to the Minister of Indian Affairs that their by-laws were passed by the majority of the band councillors present at a duly convened meeting.

6.4.2 INTRODUCING THE BY-LAW ON MOTION

Any member of the band council may move that the by-law be passed and, when duly seconded, the by-law shall be considered by the band council.

6.4.3 "READING" A BY-LAW

The first step, once the council has had the final draft of the by-law presented to them for their consideration, is the process referred to as the "reading" of the by-law.

The "reading" of the by-law is simply a procedure wherein the council reads the entire by-law out loud to give the final check on it before it is signed and made law. The Indian Act, which gives authority to band councils to make by-laws, does not specify any procedure for the reading of the by-law. It would be wise, therefore, for a band council to adopt, as its own custom, the procedure used in many levels of government which requires at least three readings of a by-law by the council before it can be passed and signed. The purpose of the multiple readings is simply to assure that all members of the council are aware of its intent and that full and honest discussion can take place. The readings also make more band members aware that the by-law is being passed.

Some bands and municipalities even serve public notice that a by-law is being passed by having it posted in public places and printed in the newspaper. An additional note of interest in relation to the reading of by-laws is that by-laws, during the stages of drafting and reading, are often referred to as "bills". After they are signed, they are then referred to as "by-laws".

6.4.4 "VOTING" ON THE BY-LAW

A by-law is passed if the majority of the band councillors present at a duly convened band council meeting vote in favour of the by-law.

A vote is taken the same way a council would vote on any other matter. The council takes a vote to decide if they will or will not enact and sign a certain by-law. The fact that the council decides to enact a certain by-law must be recorded in the minutes of the meeting.

4.5 RECORDING THE RESULT OF THE VOTE IN THE MINUTES OF THE MEETING

The record of the vote should look and sound something like this:

"Moved by Councillor "X"
Seconded by Councillor "Y"

T h a t t h e b y - l a w e n t i t l e d
_____ be made
as By-law No. _____ of the _____ was passed.
Motion passed".

Number of Band Council members present: _____
Those voting in favour of By-law No. ____: _____ (put number and names)
Those voting against By-law No. ____: _____ (put number and names)

6.4.6 SIGNING THE BY-LAW

Once a band council has approved the passing of a by-law, then the next step, is to sign it.

Now that the band council has drafted a by-law, read it the required number of times, approved the signing of it in a motion, and signed it, then the next step is to have it registered so that it becomes a valid law.

Because Indian band council by-laws are special federal laws under the Indian Act, there is a very special procedure that must be followed in order to have them legally processed.

6.4.7 COPYING A BY-LAW

The Indian Act specifies in sections 82 and 85.1 that a "copy" of a by-law enacted by the band must be forwarded to the Minister. It is in the best interest of every band council to ensure that such a copy is a certified true copy of the by-law, or at least a copy of the by-law which is stated to be a true copy in a covering letter from the chief or a councillor.

6.4.8 FORWARDING BY-LAW

By-laws made under the authority of sections 81 and 85.1 must be forwarded by mail to the Minister within four days of being enacted by the band council. This requirement is set out in subsections 82(1) and 85.1(3) of the Indian Act, respectively.

Band by-laws are deemed to be forwarded by mail to the Minister if they have been mailed or otherwise delivered (e.g., hand-delivered or sent by Facsimile) to any departmental office or staff member. Where by-laws are delivered to district or regional offices, a copy of the by-law should be kept by that office and the copy received from the band council should be forwarded to the Band Governance Directorate at headquarters as quickly as possible after receipt.

6.4.9 THE STORAGE AND DISTRIBUTION OF BY-LAWS

There are two other administrative matters that you should be aware of before we conclude this session. As you know, the original signed by-law stays in the possession of the band council. However, because it is the original, it should be kept in a safe place and only photocopies of it should be removed from the office, or used in day-to-day operations. Your original by-law should be kept in its original perfect condition. Under no circumstances should it be marred or changed, since it may, at some point, have to be produced in court.

The other administrative matter is supplying a certified copy of your by-laws to the members of the police and the courts who are going to help you enforce your by-laws. Many bands keep their by-laws in a special part of their filing system, filing them according to their numbers, and allowing no one to remove them from the cabinets except to photocopy them. Whatever system you use, the important thing is to take care of your original by-laws. When you have enacted a large number of by-laws, you should have a by-law register in which you list all of your by-laws for quick reference.

6.5 SUMMARY

To summarize, these are the steps that we have studied in this session:

1. Read the by-law the required number of times according to the procedure established by the band council.
2. Pass and record a motion approving the passing and signing of the by-law.
3. Sign the original by-law in accordance with the procedure established by the band council.
4. Certify on the original by-law that an exact and true copy of the by-law was mailed to the Minister of Indian Affairs and indicate the date of mailing.
5. Mail your certified true copy of your by-law to the Minister of Indian Affairs' office, retaining the original for the permanent band file.
6. When Indian Affairs' office informs you that your by-law is recorded and the date that your by-law comes into force, record this information at the bottom of your original by-law.
7. Provide certified copies of the by-law to the local police office, crown prosecutor, and magistrate or judge.

EXERCISE 6 - 1

EXERCISE 6 - 1

BY-LAW ENACTMENTS

DIRECTIONS TO THE PARTICIPANTS

Time: 12 minutes

PURPOSE: To confirm that you are able to describe the administrative process of by-law preparation.

DIRECTIONS:

Complete the exercise on your own, in writing.

EXERCISE 6 - 1

BY-LAW ENACTMENT

Q1. What administrative steps could the band take to ensure that a by-law was properly enacted?

Q2. If a band enacts a by-law concerning intoxicants, but some of the procedural requirements are not met, will it be disallowed? Why or why not?

Q3. What happens if the Band Governance staff finds that a by-law should be disallowed?

SESSION 7

AMEND/REPEAL A BY-LAW

7.1 INTRODUCTION

It is very probable that at some time in the history of your using a by-law, you will want to make a change in that by-law. There may be parts or all of it that become dated. Or, perhaps you have taken somebody to court under your by-law, and having found a loophole in your law or otherwise deficient, the judge dismissed the charge. If your by-law doesn't work in court, then you are certainly going to have to revise the by-law and cover the loophole or correct the legal deficiency.

When amending a section of a by-law, different approaches can be considered. Where only a few words of the section are to be changed, it is acceptable to strike out the words in the original section and replace them with different words. A suggested format is the following:

1. *Section 7 of By-law No. _____ is amended by striking out the words "twenty-five dollars" where they appear therein and substituting therefor the words "fifty dollars".*

However, where there are several changes that must be made to the section, it may be cumbersome to use that format. Accordingly an alternative format is recommended, which involves repealing the entire section or subsection and substituting a new section or subsection. For example:

Section 7 of By-law No. _____ is repealed and the following substituted therefor:

7. The fee payable for a license under this by-law is:

- (a) two dollars per day, or any part thereof,*
- (b) five dollars per week, or*
- (c) fifty dollars per year.*

It is also possible to combine both approaches along the following lines:

Section 7 of By-law No. _____ is amended by striking out the words "twenty five dollars" where they appear therein and substituting therefor the words "fifty dollars", so that section 7 now reads:

7. *The fee payable for a license under this by-law is:*
 - (a) *two dollars per day, or any part thereof,*
 - (b) *five dollars per week, or*
 - (c) *fifty dollars per year.*

There is, however, a greater risk of error in that approach. It is imperative that the wording of the new section, as fully set out, accurately incorporate the changes to the specific words. If an inconsistency should arise (e.g. someone neglected to incorporate the change into paragraph (c)), the amendment would be invalid.

7.2 SUMMARY

Amending an already existing band council by-law follows exactly the same drafting, passing, and enacting procedure as a regular new by-law. A motion to pass an amendment to a band by-law still has to be recorded in the band council minutes, just as the motion to pass the original by-law was recorded.

The enactments in a by-law simply state the old words that are going to be taken out of the existing by-law and the new words that are going to be put in their place. Then, to make certain that there is no misunderstanding, the new "amended" paragraph is printed out in its entirety as a part of the new by-law.

And, as is usual in a by-law, the date of passing and the official signatures are added at the end.

Of course, as with all band by-laws, this by-law amendment has to be mailed to the Department to be registered as an official band by-law to amend a previous by-law. So, it is still necessary to mail the new by-law to the Department of Indian Affairs within four days of passing it and to have this submission certified by a department official.

Also, amendments to by-laws should be copied in original form and supplied to your local police, magistrate or judge, and Crown Prosecutor, just as the original by-laws were.

In other words, amending by-laws should be treated exactly the same as the original by-laws. The only difference is that the enactments section of the amending by-law will contain references only to those sections of the original by-law which are to be changed.

EXERCISE 7 - 1

EXERCISE 7 - 1

DIRECTIONS TO PARTICIPANTS

Proposed By-Law Amendment

You wish to amend the "Hawkers and Peddler By-law No. 1991.1.

You have decided to amend this by-law so that the hours between which a person may conduct business as a hawker and peddler be changed. Presently these persons cannot operate between 8:00 p.m. and 9:00 a.m.. You want to change these hours to be between 6:00 p.m and 10: a.m.. Please write the amending by-law.

EXERCISE 7 - 2

DIRECTIONS TO PARTICIPANTS

EXERCISE 7 - 2

PROPOSED BY-LAW REPEAL

You have enacted by-law number 1991.1 being "A By-law to License and Regulate the Conduct and Activities of Hawkers and Peddlers". Recently, however, you have decided to repeal this by-law because it had not been consistently enforced by the band staff, and trying to enforce it properly in the courts had become a problem.

They have instructed you as the band manager to draft a by-law to repeal the "Hawkers and Peddlers" by-law. Do so.

SESSION 8

BY-LAW ENFORCEMENT

1. ROLE OF THE BAND COUNCIL

An Indian band council is an elected public authority. It is dependent upon the Parliament of Canada for its existence, powers and responsibilities. A band council's authority to exercise municipal power is delegated to it by Parliament in the Indian Act. Like all other elected government bodies in Canada, a band council exercises its authority for and on behalf of its electorate, the band members who elected the council.

The Indian Act gives band councils the authority to make by-laws in sections 81, 83 and 85.1 of the Act. These by-laws serve a number of purposes: they regulate matters of a local nature on reserve; they enable the band council to legislate with regard to certain types of quasi-criminal offenses; and they enable the band council to raise money by the assessment and taxation of interests in land and the licensing of businesses. The Indian Act sets out the allowable penalties for contravention of by-laws made under each section of the Act. Band councils may incorporate these penalties into by-laws, but the penalties may not exceed those specified in the Act.

The incorporation of penalties in by-laws is a matter of policy for the band council to determine. In many instances, band councils may determine that the imposition of the maximum penalties permitted in the Act are neither desirable nor warranted, as the offenses which may be committed do not warrant a severe sanction. The mere existence of the by-law and a minimal penalty may be enough of a deterrent. In other cases, in which the by-law regulates "civil" matters, a penalty which will be enforced by means of summary conviction proceedings in the provincial courts may not be appropriate. Accordingly, the band council has the authority to incorporate a lesser penalty than that permitted by the Act, although the band council is not able to provide for a minimum penalty.

For example:

A by-law enacted to regulate the destruction and control of noxious weeds pursuant to paragraph 81(1)(j) may be enforced by the imposition on summary conviction of a fine not exceeding \$100 rather than the \$1000 fine available for section 81 by-laws, if the band council deems it appropriate.

On the other hand, the band council may not provide for a minimum fine of \$100 for the breach of a by-law dealing with the control of noxious weeds, as the issue of a minimum sentence must be left to the discretion of the judge sentencing a convicted accused.

These examples hold true where the by-law also imposes a period of imprisonment for breach of the by-law.

2. LAW ENFORCEMENT

The band council as the law-making body on the reserve, should not be directly involved in by-law enforcement. By-laws should be enforced, for the most part, by by-law enforcement officers appointed by the band council by means of a by-law, or by the local police authority responsible for policing the reserve. In addition, individuals are able to take action to have by-laws enforced by laying a complaint with the by-law enforcement officer or the police. Individuals may also take action to challenge a decision taken pursuant to a by-law (for instance, a decision regarding entitlement to residency) in a court of competent jurisdiction. Such action should not be taken without first consulting a lawyer.

Police enforcement of certain by-laws may be required by the band council. In this case, the council should consult with the law enforcement agency handling police enforcement on the reserve and possibly the provincial Attorney-General's office as well, in order to obtain their input into possible enforcement problems. However, the council should remember that by-laws are for the benefit of the community. Consultation with the police and provincial authorities should be undertaken to determine the most effective means of enforcement of by-laws, not necessarily whether or not a particular by-law should be enacted.

The Indian Act does not give band councils the authority to appoint peace officers or police officers. Police officers may be appointed only pursuant to an agreement with the provincial policing authority. However, the band council may appoint persons as by-law enforcement officers pursuant to paragraphs 81(1)(c)(q) and (r). The duties of by-law enforcement officers should be generally restricted to monitoring compliance with by-laws, providing information to the band council and laying charges under by-laws.

By-law enforcement officers cannot be given the authority to apprehend persons, seize property or enter upon property without the owner, or occupier's, consent without a warrant obtained from a justice of the peace enabling them to do so. In addition, a by-law cannot authorize the seizure of property or the entry of a person upon another's property without a warrant.

The penalty provisions of a by-law cannot provide for the disposition of money paid as fines for the violation of by-laws. This is dealt with in section 104 of the Indian Act. Under this section, fines imposed for the infraction of by-laws are usually deposited in the revenue accounts of the Bands. From time to time, however, the Government may direct that fine revenues be used to defray enforcement costs incurred by the police or the courts. There appears to be no standard policy relating to the disposition of fine receipts. In some provinces, these, or a portion of these, are retained by the province; in others, they are remitted to the bands.

Generally, R.C.M.P. practice throughout much of Canada has been to provide assistance to band councils in the enforcement of by-laws made under the authority of those paragraphs of section 81 which enable the band council to regulate quasi-criminal matters and those made under the authority of section 85.1 of the Act. The police will likely enforce by-laws made under the provisions of paragraphs 81(1)(b), (c), (d), (n) and (o), depending upon the quality of the by-law, a judgment as to whether the by-law is enforceable in a court of law and whether a conviction under the by-law is possible in the circumstances. These matters should be checked with the responsible law enforcement agency in each area.

The band council should provide the local police with certified copies of the by-laws which the police will be asked to enforce. It would be preferable for the band council to discuss these matters with the police before passage of the by-law. The police will want proof that the by-law was properly passed by the council and that all requirements contained in the Indian Act have been met. The police may also insist upon a form of adequate notice to the population of the band, particularly since publication of by-laws in the Canada Gazette is no longer required by the Statutory Instruments Act.

The enforcement of by-laws made under the provisions of the remaining paragraphs of section 81, and those made under section 83, should be the responsibility of by-law enforcement officers, or persons designated by the band council. In addition, of course, interested persons can apply to a court of competent jurisdiction to obtain certain remedies with regard to band by-laws.

3. THE COURTS

Ultimately, a by-law's validity may be determined by the courts. A court will not be able to take "judicial notice" of an Indian Band by-law. In other words, unlike federal statutes (like the Criminal Code) or provincial statutes (like a Highway Traffic Act), the court is not able to simply take notice of the fact that a by-law exists. The fact that a by-law was validly enacted and is in fact law must be proven.

One means of proving the validity of a by-law is the use of a copy of the by-law which has been certified to be a true copy, pursuant to section 86 of the Indian Act, by the superintendent. A band council may also be able to use an original copy of the by-law which has been signed by the council members, along with evidence that the by-law was forwarded to the Minister as required by the Act. This is a matter for the person(s) responsible for prosecuting a charge laid under a by-law.

The issue of the legal validity of a by-law is important because it may be raised as a defence by a person charged with an offense committed pursuant to a by-law. It is possible that the failure to strictly comply with the procedure set out in subsection 82(1) of the Act or with regard to section 85.1 by-laws, could jeopardize the validity of those by-laws. A person charged under a by-law which is not legally valid cannot be convicted.

The prosecution of a charge laid under a by-law will take place in a court which hears summary conviction proceedings, as the Indian Act specifies. In most provinces, this will be a provincial court which deals with less serious criminal offenses and charges laid under provincial statutes. The prosecution of a charge should be undertaken by someone who is a lawyer or a prosecutor with experience in court.

The penalties available to a court, upon convicting a person of violating a by-law, are limited by the provisions of the Indian Act and the terms of the by-law itself. Paragraph 81(1)(r) and subsection 85.1(4) set out the maximum allowable penalties for breach of by-laws made pursuant to sections 81 and 85.1, respectively. The court has the discretion to impose a penalty which is less than the maximum allowed. If the by-law stipulates a maximum allowable penalty which is less than the maximum permissible by the Act, the court may not impose a greater penalty.

In addition to these penalties, subsection 81(2) permits a court to impose an order prohibiting the continuation or repetition of an offence by the person convicted of that offence under a section 81 by-law. Subsection 81(3) enables the band council to initiate court action to restrain further contravention of a section 81 by-law.

Paragraphs 83(1)(e) and (e.1) of the Act enable band councils to make by-laws for the enforcement of payment of amounts due and owing, including interest, pursuant to a section 83 taxation or licensing by-law and for the recovery of those amounts. Remedies such as these would be enforced in the provincial court systems in the same manner as ordinary civil debts.

4. APPEAL

A band council cannot in a by-law prevent a court from reviewing the legality of anything done in the application or enforcement of a by-law. Band by-laws are "laws of Canada" reviewable by the Federal Court of Canada. A by-law cannot take away a person's right to appear before the court to challenge the legal validity of the by-law or its application or enforcement.

EXERCISE 8-1

BY-LAW ENFORCEMENT

DIRECTIONS TO THE PARTICIPANTS

TIME: 15 minutes

PURPOSE:

To confirm that you are able to identify the by-law enforcement process.

DIRECTIONS:

1. Answer the questions on your own, and in writing.

EXERCISE 8-1

BY-LAW ENFORCEMENT

Q1. Why should band councils take enforcement into consideration when drafting a by-law?

Q2. Who should enforce by-laws on the reserve?

Q3. How can the band appoint police officers?

Q4. How would you prove the validity of a by-law in the courts?

FORM 2
(Sections 506 and 788)

Information

Canada,
Province of,
(territorial division).

This is the information of C.D., of (*occupation*), hereinafter called the informant.

The informant says that *(if the informant has no personal knowledge state that he believes on reasonable grounds and state the offence.)*

Sworn before me this day
of A.D. (*Signature of Informant*)
at

.....
A Justice of the Peace in and
for

Note: The date of birth of the accused may be mentioned on the information or in the indictment.

FORM 6

(Sections 493, 508 and 512)

Summons to a person charged with an offence

Canada,
Province of,
(territorial division).

To A.B., of (occupation):

Whereas you have this day been charged before me that (*set out briefly the offence in respect of which the accused is charged*);

This is therefore to command you, in Her Majesty's name;

- (a) to attend court on, the day of A.D., at o'clock in the noon, at or before any justice for the said (*territorial division*) who is there, and to attend thereafter as required by the court, in order to be dealt with according to law; and
- (b) to appear on, the day of A.D., at o'clock in the noon, at for the purpose of the *Identification of Criminals Act*, (*Ignore, if not filled in.*)

You are warned that failure without lawful excuse to attend court in accordance with this summons is an offence under subsection 145(4) of the *Criminal Code*.

Subsection 145(4) of the *Criminal Code* states as follows:

"(4) Every one who is served with a summons and who fails, without lawful excuse, the proof of which lies on him, to appear at a time and place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend court in accordance therewith, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction."

Section 510 of the *Criminal Code* states as follows:

"510. Where an accused who is require by a summons to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may issue a warrant for the arrest of the accused for the offence with which he is charged."

Dated this day of A.D., at

.....
A Justice of the Peace in and for or Judge

FORM 9

(Section 493)

Appearance notice issued by a peace officer to a
person not yet charged with an offence

Canada,
Province of,
(territorial division).

To A.B. of (occupation);

You are alleged to have committed (*set out substance of offence*).

1. You are required to attend court on day, the day of A.D., at o'clock in the noon, in courtroom No., at court, in the municipality of, and to attend thereafter as required by the court, in order to be dealt with according to law.

2. You are also required to appear on day, the day of A.D., at o'clock in the noon, at (*police station*), (*address*), for the purposes of the *Identification of Criminals Act*, (*Ignore, if not filled in.*)

You are warned that failure to attend court in accordance with this appearance notice is an offence under subsection 145(5) of the Criminal Code.

Subsections 145(5) and (6) of the *Criminal Code* state as follows:

"(5) Every one who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on him, to appear at a time and place stated therein, if any, for the purpose of the *Identification of Criminals Act*, or to attend court in accordance therewith, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence."

Section 502 of the *Criminal Code* states as follows:

"502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged".

Issued at a.m./p.m. this day of A.D.
at

.....
(Signature of peace officer)

.....
(Signature of accused)

FORM 10

(Section 493)

Promise to appear

Canada,
Province of,
(territorial division).

I, A.B. of, (occupation), understand that it is alleged that I have committed
(set out substance of offence).

In order that I may be released from custody,

1. I promise to attend court on day, the day of A.D., at
..... court, in the municipality of, and to attend thereafter as required by the
court, in order to be dealt with according to law.

2. I also promise to appear on day, the day of A.D., at
..... o'clock in the noon, at (police station), (address), for the purpose of the
Identification of Criminals Act. (Ignore, if not filled in.)

I understanding that failure without lawful excuse to attend court in accordance with
this promise to appear is an offence under subsection 145(5) of the Criminal Code.

"(5) Every one who is named in an appearance notice or promise to appear, or in a
recognizance entered into before an officer in charge, that has been confirmed by a justice
under section 508 and who fails, without lawful excuse, the proof of which lies on him, to
appear at a time and stated therein, if any, for the purpose of the *Identification of Criminals*
Act, or to attend court in accordance therewith, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two
years; or
- (b) an offence punishable on summary conviction.

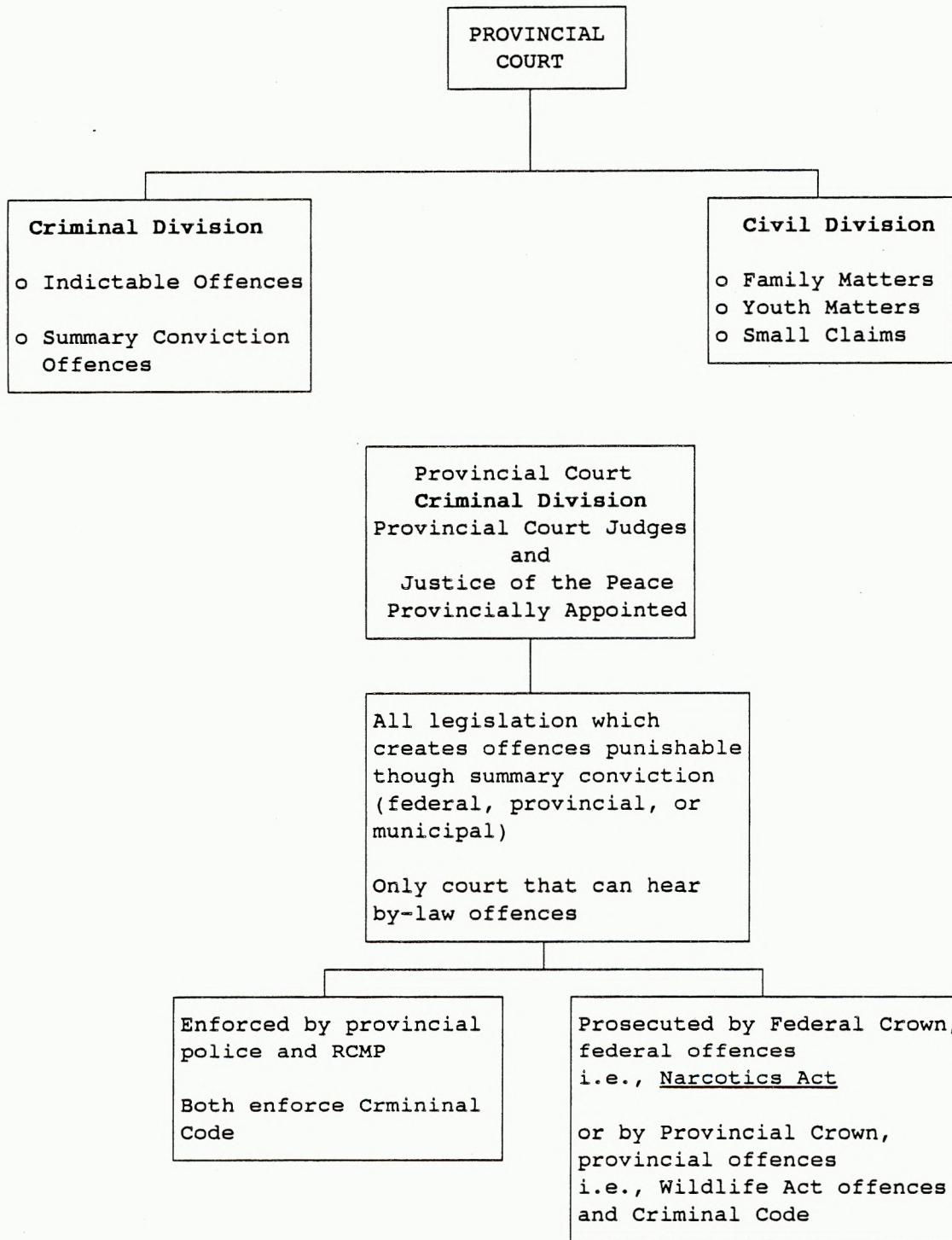
(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance
notice, promise to appear or recognizance states defectively the substance of the alleged
offence."

Section 502 of the *Criminal Code* states as follows:

"502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged".

Dated this day of A.D., at

.....
(Signature of accused)



BAND PERCEIVES COMMUNITY PROBLEM

COUNCIL DEVELOPS BY-LAW

- o draft by-law reviewed by RRBG

COUNCIL ENACTS BY-LAW

- o by-law to DIAND, sections 82 and 85.1
- o by-law DIAND, Legal Services

POLICE ENFORCE BY-LAW BY:

(A) INVESTIGATION OF VIOLATIONS; (B) LAYING OF CHARGES

CROWN ATTORNEY PROSECUTES BY-LAW INFRACTION

JUDGE HEARS MATTERS AND ACQUITS/CONVICTS VIOLATION

SESSION 9

DEPARTMENTAL PRACTICES AND POLICIES AND THE ADMINISTRATIVE PROCESS

9.1 RECOMMENDATIONS OF THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS AND OTHER STATUTORY INSTRUMENTS

In its 5th Report, the Standing Joint Committee recommended that the department's by-law review policy "... be formalized.

It should be noted that the proposal is based on the same criteria as that used by the Standing Joint Committee for Regulatory Scrutiny in its review of regulations and other statutory instruments. The policy is basically the same as the procedures which have been followed by the department for the past few years. (See draft copy of by-law review policy - Appendix "A".)

9.2 GENERAL POLICIES

The Department has developed a set of general policies as a guide in the review of by-laws:

- 9.2.1 Indian band councils have the right to pass by-laws on certain specified subjects as indicated in sections 81, 83 and 85.1 of the Indian Act.
- 9.2.2 Neither the Minister nor the Department wishes to unduly interfere with the legal rights of the council to pass such by-laws, or to stifle local initiative. However, the Department does have a statutory duty to review by-laws, which is implied by the delineation of the Minister's authority in sections 82 and 83. A review of a by-law must be sufficient to enable the Minister to exercise his discretion properly in an informed manner.
- 9.2.3 By-laws have effect and may be enforced only within the area of jurisdiction of the council, which generally will be within the limits of the Reserve or Reserves indicated in the by-law and set aside for the use and benefit of the band whose council is passing the by-law.

9.2.4 Before passing a by-law, and certainly before attempting to enforce it, the council should check these areas of jurisdiction and be guided accordingly or at least proceed cautiously on the basis of the best available legal opinion.

For example:

- a) in the absence of specific evidence to the contrary, case law provides that rivers and the waters therein, or other bodies of waters, which form the boundaries of a Reserve would not form part of the Reserve. The limits of the Reserve would be, generally, the water's edge;
- b) some bodies of water partly or wholly surrounded by Reserve lands may themselves not be part of the Reserve;
- c) a road or road allowance running through a Reserve, in one way or another, may have been separated from Reserve lands;

9.2.5 Neither the Minister nor the Department can condone or support any attempt by a council to enforce a by-law or to exercise authority which is clearly beyond the jurisdiction of the council.

9.2.6 Subject to the specific statute or evidence to the contrary, and within the subjects enumerated, precedence in law is probably as follows:

- a) Indian Act and its Regulations;
- b) other Acts of the Federal Government (i.e. Criminal Code of Canada);
- c) by-laws;
- d) other Federal Government Regulations (i.e. fisheries regulations);
- e) provincial laws of general application.

9.2.7 The recording of a by-law in the Departmental Register is considered to be an administrative function only. It is not an indication, nor does it imply, any type of Ministerial or Departmental approval of the by-law in whole or of any of its various sections; nor does it make a by-law "good law". This can only be determined by a court if and when the by-law is challenged.

9.2.8 By-laws are the responsibility of the council which passed them, and its successors. This includes the enforcement of those by-laws and any costs involved in the enforcement.

9.3. ADMINISTRATIVE PROCESS

Band councils passing by-laws should be sure to follow the procedural requirements for the enacting of by-laws contained in the Indian Act.

9.3.1 ENACTMENT REQUIREMENTS

Paragraph 2(3)(b) of the Act makes it clear that a by-law, passed either under section 81 or 83, which must be enacted by the band council, must be approved by a majority of the councillors of the band present at a duly convened meeting of the council.

By-laws made pursuant to section 85.1 must be asserted to by a majority of the electors of the band who voted at a special meeting of the band called by the band council for the purpose of considering the by-law. This requirement is set out in subsection 85.1(2).

9.3.2 PROOF OF PROPER PROCEDURES

Band councils passing by-laws pursuant to these sections should ensure that they are able to prove that the actions required of them by the Indian Act have been taken properly. Such proof may be required in the event the by-law is to be relied upon in court. For example, the use of registered mail to show the date of mailing of a by-law and affidavits certifying the fact that a band meeting was held could be used to show that a by-law was properly enacted.

9.3.3 COPY OF BY-LAW

The Indian Act specifies in sections 82 and 85.1 that a "copy" of a by-law enacted by the band must be forwarded to the Minister. It is in the best interests of every band council to ensure that such a copy is a certified true copy of the by-law, or at least a copy of the by-law which is stated to be a true copy in a covering letter from the chief or a councillor.

9.3.4 FORWARDING OF BY-LAWS

By-laws made under the authority of sections 81 and 85.1 must be forwarded by mail to the Minister within four days of being enacted by the band council. This requirement is set out in subsections 82(1) and 85.1(3), respectively. Band by-laws are deemed to be forwarded by mail to the Minister if they have been mailed or otherwise delivered (e.g., hand-delivered or sent by Facsimile) to any departmental office or staff member. Where by-laws are delivered to District or Regional offices, a copy of the by-law should be kept by that office and the copy received from the band council should be forwarded to the Band Governance Directorate at headquarters as quickly as possible after receipt.

9.4 DISALLOWANCE

9.4.1 SECTION 85.1

Section 85.1 by-laws received at headquarters are examined by Band Governance staff and recorded as being in force. If a procedural requirement does not appear to have been met, the band council will be informed of the possible problem with the by-law and advised of the dangers of the breach which has occurred. The Minister, however, has no power of disallowance pursuant to section 85.1.

9.4.2 SECTION 81

Section 81 by-laws received at headquarters are examined by Band Governance staff and a request for comments from Legal Services is made as soon as possible after receipt of the by-law at headquarters. The analysis of the by-law by Band Governance staff and by Legal Services involves an examination of whether the by-law meets the basic drafting requirements for by-laws and, if the by-law falls short, whether this justifies the disallowance of the by-law by the Minister.

If a section 81 by-law is not disallowed by the Minister, it comes into force forty days after it was forwarded to the Minister. In such a case, the by-law is registered as being in force and the band council is informed directly of that fact. A copy of this decision is also forwarded to the Regional office. In the event that the by-law is less than perfect in any respect, the council is informed of the problem or problems and advised that amending the problematic areas of the by-law will result in a better by-law. In addition, it is made clear to band councils that the coming into force of a by-law is no guarantee by the Department of Indian Affairs of the legal validity of that by-law .

If Band Governance staff feels that the by-law is one for which disallowance should be considered, a memo outlining the issues involved in the proposed disallowance, a copy of the opinion of counsel at Legal Services, and a draft order for disallowance will be forwarded to the Deputy Minister for his signature on behalf of the Minister. If a by-law is disallowed, the band council will be informed of the disallowance and the reasons therefore, as soon as possible after the disallowance. Technical assistance is also provided to the council so that an acceptable by-law can be re-submitted.

EXERCISES

9 - 1 TO 9 - 3

EXERCISES 9 - 1 TO 9 - 3

DIRECTIONS TO THE PARTICIPANTS

1. Read the following draft by-laws carefully.
2. Determine if they are valid. Justify your answer.

EXERCISE 9 - 1*

**DRAFT BY-LAWS
CURFEW**

THE COUNCIL OF THE _____ BAND

DISTRICT _____

PROVINCE _____

PLACE _____

DATE 31 st MARCH 1987

DO HEREBY RESOLVE

By-law # _____ pursuant to paragraphs (c), (d), (g) and (r) of Section 81 in the Indian Act.

A by-law to provide for the regulations of the activities of boys and girls on Reserve, actually or apparently under the age of 16 years.

In this by-law,

- a) No boy or girl on the _____ Indian Reserve actually or apparently under 16 years of age, shall loiter any place within the Indian Reserve after;
11:00 p.m. during school holidays and weekends;
10:00 p.m. in the afternoon during school days.

- b) No boy or girl on the _____ Indian Reserve actually or apparently under 16 years of age, shall be in any place of entertainment, lane, by-way or common within the said reserve after the hour of 10:00 p.m. unless accompanied by his or her parent or an adult appointed by the parent to accompany such child.

- c) A boy or girl on the _____ Indian Reserve found violating provisions of paragraphs (a) or (b) may be warned and conducted home by a police officer and if the warning is not regarded, or after the warning the boy or girl is again found disobeying said paragraphs (a) or (b), the parents of such boy or girl shall be directed to meet with the Police Committee appointed by the council of the band for the protection of the children.
- d) A parent who permits his child to violate paragraphs (a) or (b) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding \$20.00 or imprisonment for a term not exceeding 7 days, or both fine and imprisonment.

Approved and passed on the _____ day of 1983.

* It should be noted that this by-law is used only for the purpose of this exercise and should not be used as a sample by-law.

EXERCISE 9 - 2*

THE _____ BAND OF INDIANS

By-law Number _____

Being a by-law to provide for the prohibition against the ownership and possession of American Pitbull Terriers also known as American Staffordshire Terriers on the _____ Indian Reserve.

Whereas subsection (1)(e) of section 81 of the Indian Act empower the Council to make by-laws respecting the protection against and prevention of trespass by cattle and other domestic animals on the reserve and the imposition of a penalty for the violation thereof; and

Whereas it is in the interest of Council to ensure that the safety of its band members from vicious, ferocious, and unpredictable domesticated animals is addressed.

Now therefore, the Council of the _____ Band of Indians of the _____ Reserve # _____ and # _____ enacts, as a by-law the following:

1. IN THIS BY-LAW

"Council" means: the council of the Band elected pursuant to section 74 of the Indian Act.

"Reserve" means: the _____ Indian Reserve # _____ and # _____ .

"Band member" means: a person whose name appears on the Band list or who is entitled to have his/her name appear on the Band list of the _____ Band.

"Band list" means: a list of persons that is maintained under section 8 of the Indian Act by the Band or in the department.

"Visitor" means: any person/group or persons who come onto the Reserve to seek out the company of relatives, friends or acquaintances in order to socialize, or carry on some form of interaction.

"Place of Residence" means: the occupation, under normal circumstances, of one or more habitable rooms used or intended to be used together for living and sleeping purposes by one or more persons.

"Resident" means: any person or group of persons occupying a place of residence in the reserve in either his/her own household or that of another resident for a period exceeding thirty days.

"American Pitbull Terrier" or "American Staffordshire Terrier" refers to a breed of crossbred canines grouped as nonsporting dogs and are the result of a cross between a bull-dog and various breeds of short-haired terriers.

2. PROHIBITION AGAINST THE OWNERSHIP OR POSSESSION OF AMERICAN PITBULL TERRIER AND/OR AMERICAN STAFFORDSHIRE TERRIER.

- (a) No Band member who is resident on the _____ Indian Reserve shall be allowed to own or have an American Pitbull Terrier(s) or an American Staffordshire Terrier(s) in his/her possession.
- (b) Any person who is not a member of the _____ Band but who is a resident of the Band shall not be allowed to own or possess an American Pitbull Terriers(s) or an American Staffordshire Terrier(s).
- (c) No person otherwise classed as a visitor under this by-law shall be allowed to have an American Pitbull Terrier(s) or American Staffordshire Terrier(s) whilst on the Indian Reserve.
- (d) This by-law applies ipso facto to those band employees who are not members of the _____ Band and who are otherwise grouped as visitors for the purposes of this by-law.

3. COMPLAINTS

All violations of this by-law shall be initiated by complaint. A complaint is a written statement sworn to by the complaining witness and charging that a named individual has contravened a particular section of this by-law.

4. COMPLAINT SHALL

- (a) Be in writing and in the name of the Indian Band and
 - (b) Be signed by the complaining witness or witnesses
 - (c) Contain a written statement by the complaining witness or witnesses describing in ordinary language the nature of the contravention of this by-law, including the time a place as nearby as may be ascertained.
 - (d) State the name of the person or persons alleged to have committed the offence.
 - (e) State the section of the by-law alleged violated.
5. The Council of the Band may designate an individual or individuals who shall be available to assist persons in drawing up complaints and shall screen them for sufficiency.
6. (a) The Council of the Band may designate an individual from the Band as an enforcement officer for the purposes of carrying out the provisions of this by-law in whole or in part including the search and seizure of evidence to substantiate the laying of an information.
- (b) Where no person is designated as per section 6 of this by-law, the Council of the Band may direct one of its members to act as a duty officer for the purposes of carrying out the provisions of this by-law in whole or in part including the search and seizure of evidence to substantiate the laying of an information.
7. Where a suspected violation of this by-law has been substantiated by a written complaint as per section 4, the Council may attempt to have the accused correct the situation amicably. If this fails then the Council's designate or enforcement officer can proceed to charge the individual before the court.
8. The enforcement officer or Council's designate will lay an information before a justice charging the accused with violating this by-law.

9. METHODS OF LAYING AN INFORMATION

An information form is available from the local police detachment or court, which must be completed in a specific manner and sworn to before a justice. Assistance in completing a form will be available at the local police detachment. The justice will then issue a summons to the person charged with the offence to appear before the presiding judge on a specified date and time when the matter will be considered. The summons would normally be served by a police officer. At the specified time and date the accused will appear before the presiding judge to enter a plea of guilty or not guilty.

If the accused pleads "not guilty" the case will be heard by a presiding judge at a specified time and place at which time a decision will be made. The person laying the information together with such witnesses and evidence as is necessary, also must be present. If the accused proposes to fight the charge, it would be in order for Council to engage a solicitor to prosecute the case or request the services of the provincial Crown Attorney's office.

10. PUNISHMENT

Any person who is found guilty of violating any enforcement provision of this by-law shall be sentenced by way of summary conviction to a fine not less than fifty dollars and not exceeding one thousand dollars and/or imprisonment for a term not exceeding thirty days.

11. DISPOSITION OF EVIDENCE

Any physical evidence seized by duly authorized personnel in the administration of this by-law will be left to the discretion of the judge who presided over the case.

* It should be noted that this by-law is used only for the purpose of this exercise and should not be used as a sample by-law.

EXERCISE 9 - 3*

RESIDENCY "A"

BY-LAW

MOVED BY COUNCILLOR:

SECONDED BY COUNCILLOR:

WHEREAS the _____ Indian Reserve No. _____, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of the _____ and,

WHEREAS the Indian Act, section 81 (1), P, P1, P2, and P3 allows the Council to make by-laws respecting:

81(1) P: The removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prohibited purposes.

81(1) P.1: The residency of band members and other persons on reserve.

81(1) P.2: To provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matters in relation to which the council may make by-laws in respect of members of the band.

81(1) P.3: To authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the band list of the band.

81(1) 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.

THEREFORE SUBJECT TO THE INDIAN ACT SECTIONS 18.1, 28.2 AND 58.3 AND BY VIRTUE OF THE INDIAN ACT, SECTION 81(1) P, P.1, P.2, P.3 AND R, THE COUNCIL OF THE _____ BAND ENACTS THE FOLLOWING BY-LAW.

1. IN THE BY-LAW

- a) Reserve means the tract of land the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of Indians.
- b) Band member means a duly registered member of the Indian band or a person who is entitled to be registered by virtue of the Indian Act or the Membership Code once adopted.
- c) Spouse includes common-law spouse or person living together in fact as spouse.
- d) Residence means the place which has been adopted by a person as his or her principle place of habitation or home, more specifically the place where one normally sleeps each night.
- e) Non-band member means anyone who is not registered as a member of the Band or not entitled to be registered by virtue of the Indian Act or the Membership Code once adopted.
- f) Visiting means the period of time spent on reserve by a non-band member for the purpose of meeting a band member for recreation, friendship, or business purposes.

2. Only a registered member of the Band shall be entitled to reside on the land.

3. Notwithstanding section 2 of this by-law, any non-band member who resides with an Indian spouse at the time of enactment of this by-law will be allowed to reside on reserve, providing he/she continues to respect the laws of the Band.

4. Non-band members may visit members of the Band; however, visitation will be limited to 30 overnight stays a year.

5. Sections 3 and 4 of this by-law do not convey any Indian rights to non-band members who may reside on the reserve with an Indian spouse at the time of enactment of this by-law, nor do they convey any Indian rights to a non-band member who may visit, from time to time, a band member or band members.

6. No payment will be made out of band capital or revenue funds to any band members or their children who decide to wilfully withdraw their membership, or whose name's have been deleted from the band list of the Band.

7. Non-band members, who reside on reserve by virtue of section 3 of this by-law, will not benefit in any way from funding allocated by the Federal and other governments on behalf of the duly registered members of the Band, unless such funding and other Indian benefits to such non-band members as a class is approved by a majority of the band members at a duly convened general band meeting to address this issue.

8. Any other persons residing or trespassing or unlawfully frequenting the reserve shall be guilty of an offence, and shall be subjected to the imposition on summary conviction to a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of this by-law.

ENACTED BY VIRTUE OF THE INDIAN ACT, SECTION 81(1) P, P.1, P.2, P.3
 AND R, ON THIS DAY OF JUNE, 19__.

_____	_____
councillor	councillor
_____	_____
councillor	councillor
_____	_____

* It should be noted that this by-law is used only for the purpose of this exercise and should not be used as a sample by-law.

SESSION PLAN

SESSION No. 10 TITLE: Closing

TRAINING OBJ. No. 1 PERFORMANCE:

ENABLING OBJ. No. 4 PERFORMANCE:

EVALUATION DURATION

TEACHING POINTS METHODOLOGY TIME IN
MINUTES

1. Course closing	1. Remarks Evaluation of Course	20 min
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CLOSING SESSION

GENERAL

Although time may vary based on the length of the course, it is nevertheless essential to conduct a closing session on all courses. This session enables the instructor to review the course content and to help participants link what they have learned to their job requirements.

The following will provide a framework within which instructors should plan to review the course objective and presentations in order to link the opening session and participants' achievement in the course. This framework will also assist in the completion of participants' evaluations.

10.1 COURSE REVIEW

10.1.1 CONTENT

The purpose of this session is to conduct a summary review of the course. The instructor should refer to the Introductory Session where the Training Objective and the schedule were explained to participants, as well as the evaluation procedure to measure their achievement. It is suggested that the instructor:

- a) Review the training objective with participants and show how progressively working through enabling objectives and teaching points has led them to perform the task as stated in the T.O.
- b) When required, the instructor should focus on those particular sessions which were difficult for participants and review their content one last time.
- c) Assist the participants by helping them link the knowledge and skills they have learned with the work awaiting them back on the work site.

10.1.2 METHODOLOGY

Sections (a), (b) and (c) are usually an instructor-led discussion where participants are required to answer specific questions.

Whichever method the instructor selects, it is important that participants begin their transfer of knowledge and skill back to the work site before leaving the classroom.

10.2 COURSE EVALUATION

10.2.1 EVALUATION QUESTIONNAIRE

A formal evaluation is required for all courses and instructors are to use the form provided.

The instructor should provide any explanations required about the form.

The instructor should also encourage participants to provide specific comments on content, exercises and references in the space provided.

10.2.2 DEBRIEFING SESSION

This session is essential. Instructors should conduct a short debriefing session with participants with the purpose of discussing both positive and negative learning experiences during the course. It should be emphasized that the information and recommendations for improvements offered by participants are a major factor in ensuring the quality of the product and are therefore essential. This session may vary in length depending on the course duration, content and methodology; instructors are therefore required to use their judgement when planning their lesson.

10.3. COURSE REPORTS

As a normal procedure, within two working days of the completion of a course, instructors are requested to prepare a report that should reflect the instructor's and the participants' evaluation of the course.

In addition to comments concerning content, methodology, etc., all pertinent suggestions received from participants should be included.

Finally, a resume of participants' achievement of the Training Objective should be included in the report, as well as any comments from the instructor should there be exercises or evaluations for which less than 90% of participants have achieved the performance.

**ANSWER KEY
EXERCISE 5
DRAFTING REQUIREMENTS**

1. **State the title by which this by-law may be known.**

This by-law may be known as the " _____ Band Hawkers and Peddlers by-law.

2. **Assign a number to the by-law so that a proper by-law filing and identification system can be kept.**

For example let us number this by-law **BY-LAW NO.1991.1**. All this means is that 1991.1 was the first by-law passed by that band council in 1991. Another way to number by-laws is simply to number them 1, 2, 3, etc., as they are enacted, no matter what year it was done. Whatever numbering system is adopted depends on the band council. It is important to note that once the band council has selected a system, it should stay with it.

3. **Write the enabling clauses which may, among other things, state:**

- a. The authority under which the band council has created the by-law; and
b. The reason why the band council created the by-law.

The three paragraphs that begin with "Whereas" are the next step in our examination of this by-law. These paragraphs are referred to as the enabling clauses. They are referred to as enabling clauses because they spell out the special authority that the band council has which "enables" it to make this by-law. The enabling clauses also, as in the last clause, specify the reasons the council has for enacting this by-law. So, basically what the enabling clauses in this by-law are saying is that the _____ Band has the authority to make by-laws, and because hawkers and peddlers on the _____ Band Reserve need to be controlled, therefore, it will take some action.

4. **Write the enacting clause which simply states that the band council hereby enacts this by-law.**

The clause which says: "Now therefore the Council of the _____ Band enacts the following by-law:", is referred to as the "enacting" clause. This clause clearly spells out the fact that the band council is enacting a by-law.

5. Write the enactments which are the clause-by-clause listing of the real regulations, rules, restrictions, and schedules.

These are the real regulations, rules, restrictions, and schedules that are to be the new law. They are the main part of the by-law. Here, the council is able to state the rules under which the activities will take place.

The enactments must be written as clearly as possible so they will not be misunderstood. They must state specifically just what the council means. For example, this by-law would be difficult to enforce if it said that peddlers should not visit people "too early in the morning" or "too late in the day". Instead, it says quite precisely, in section 12 that peddlers cannot work on the reserve between "the hours of 8:00 p.m. and 9:00 am.m., or on Sundays or holidays".

Each statement that the by-law makes should be in a separate section by itself. Each section should deal with only one fact. For example, section 10 says that the peddler must carry his license on his person and produce it on request. Section 14 says that the council may suspend a peddler's license. Every statement of rule or regulation that appears in the by-law should be in a separate section.

The reasons for having only one fact per statement are to make the by-law less confusing, and also to make the by-law easier to interpret in court.

You will notice, in the first part of the enactments of this by-law, which is section 2, that all of the special terms that are used in the by-law are defined. In this by-law, you are told just exactly what the "council" is, and just exactly what kind of people are referred to as "hawkers and peddlers". These definitions are very important, for, as we stated earlier, if a by-law is to be enforced in court, there must be no room for misunderstanding. Everything must be clearly and precisely defined and written down.

This practice of clearly defining all of the key words at the beginning of a piece of legislation also helps to cut down on the number of words used in the legislation.

6. Write the penalty clause which states the penalty that will be imposed under law on those who contravene the by-law.

This last section in the enactments part of the sample by-law, section 15, is the clause which spells out the penalty that is to be paid by anyone convicted of violating any of the enactments or regulations as determined by this by-law. This section is sometimes known as the penalty clause.

This section provides for a penalty of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both fine and imprisonment. It is important to note that this is the only penalty clause that can be written into an Indian band council by-law.

You will recall that section 81 stated that an Indian band council may make by-laws so long as they are not inconsistent with the Indian Act. Subsection 81(r) specifies the fine that we have just described and this penalty is the maximum penalty allowed.

7. **Write the final clause, stating that the band council officially enacted the by-law and on what date.**

The next step in drafting your by-law is to write the final clause of the main part of the by-law. This clause is simply a statement that the by-law was passed at a legally convened meeting of the Band Council on the specified date.

Following this are the signatures of the officials that are designated by council policy to sign by-laws.

It is the council's choice. All that matters is that whatever system they adopt for signing by-laws should remain the same for all by-laws.

If at all possible, however, it is recommended that all band councillors sign all by-laws. This will prevent any future disagreement arising from a certain by-law.

At the very end of the by-law, a paragraph has been added to note the date the by-law was sent to the department. You will note that there is also a space provided for the department to confirm the date received.

8. **Do not forget to note the quorum of your band council.**

EXERCISE 6- 1
BY-LAW ENACTMENT
ANSWER KEY

- A1. i) by-law passed by majority of councillors of the band;
- ii) by-law sent registered mail to verify date or date verified by affidavit;
- iii) true copy of the by-law forwarded to the Minister within four days of being made.
- A2. No, it will not be disallowed. The Minister has no power of disallowance pursuant to Section 85.1
- A3. The following will be forwarded to the Deputy Minister for his signature on behalf of the Minister:
- i) a memorandum outlining the issues involved in the disallowance;
- ii) a copy of the opinion of counsel at Legal Services;
- iii) draft order for disallowance.

If the Deputy Minister then disallows the by-law, the band council is informed of the disallowance, and the reasons therefore, as soon as possible.

ANSWER KEY

SUGGESTED AMENDMENT

The following by-law is one way to amend the "Hawkers and Peddlers By-law".

EXERCISE 7 - 1

SAMPLE AMENDING BY-LAW

The _____ Band

By-Law 19__.

**A By-law to Amend By-law 1991.1
To Regulate the Conduct and Activities of
Hawkers, Peddlers or Others on the Reserve**

WHEREAS paragraphs (n) and (r) of section 81 of the Indian Act empower the council of an Indian Band to make by-laws respecting the activities of hawkers and peddlers on the Reserve and the imposition of a fine for violation of any by-laws made under that section;

AND WHEREAS the council of the _____ Band did enact by-law number 1991.1 respecting the relation and the conduct and activities of hawkers, peddlers or other on the reserve;

AND WHEREAS the said council deems it to be expedient and in the best interest of the residents of the _____ Reserve to amend the said by-law;

NOW THEREFORE the council of the _____ Band enacts as a by-law thereof as follows:

1. Section 13 of by-law 1991.1 and the same is hereby amended by deleting the words "8:00 p.m. and 9:00 a.m." in the second line thereof and inserting in lieu thereof the words "6:00 p.m. and 10:00 a.m.", so that the said section shall read:

13. No person conducting business as a hawker and peddler shall call at any residence on the reserve between the hours of 6:00 p.m and 10:00 a.m., or on Sundays or holidays, unless previously invited by the occupier of the residence to all at such time.

Approved and passed at a duly convened meeting of the council,
this _____ day of _____, 19 ____.

(Chief)

Councillor

Councillor

Councillor

The quorum is set at _____.

I, _____, Chief of the Band
of Indians do hereby certify that a true and exact copy of the
foregoing By-law ___ was mailed to the Minister of Indian
Affairs pursuant to section 82, ss (i) of the Indian Act, this

_____ day of _____, 19 ____.

(Chief)

RECEIVED BY:

(Signature)

POSITION:

OF:

_____ District.

DATE:

_____, 19 ____.

* It should be noted that this is a sample by-law only, and should be used only as a
guide for any band drafting a similar by-law.

ANSWER KEY*

EXERCISE 7 - 2

SAMPLE REPEALING BY-LAW

The _____ Band
By-Law No. 19__.
A By-law to Repeal By-law No. 1991.1
Being a By-law to Regulate the Conduct
and Activities of Hawkers and Peddlers

WHEREAS the council of the _____ Band did enact By-law number 1991.1 on the -
rd day of _____, 19__, pursuant to section 81 (n) and section 83 of the Indian Act to License
and Regulate the Conduct and Activities of Hawkers and Peddlers;

AND WHEREAS the said council is of the opinion that such a by-law is not required at this
time;

NOW THEREFORE the council of the _____ Band enacts as a by-law thereof
the following:

1. By-Law number 1991.1 enacted on the __rd day of _____, 19____, and being a by-
law to License and Regulate the Conduct and Activities of Hawkers and Peddlers be
and the same is hereby repealed.

Approved and passed at a duly convened meeting of the council,

this _____ day of _____, 19 ____.

(Chief) _____ (Councillor)

(Councillor) _____ (Councillor)

The quorum is set at _____.

* It should be noted that this is a sample by-law only, and should be used only as a
guide for any band drafting a similar by-law.

EXERCISE 8-1
BY-LAW ENFORCEMENT
ANSWER KEY

- A1. i) to ensure that the penalties they prescribe are in fact contained in the Indian Act.
- ii) if the by-law is found to be unenforceable, the whole effort is pointless.
- A2. By-laws should be enforced by by-law enforcement officers and not by the law-making body on the reserve.
- A3. The band can appoint by-law enforcement officers only through agreement with the provincial policing authority.
- A4. Validity proven if: it is a section 86 certified by-law and the council vote was documented by affidavit or individual testimony.

ANSWER KEY

EXERCISE 9 - 1

1. BY-LAW RESPECTING CURFEW

- . By-law disallowed on behalf of Minister.
- . Reasons for disallowance:
 - someone may be liable, under the by-law, for "apparently" being under 16 years of age.
 - the parents may be held liable for the actions of their children.
 - even though the authority for such by-laws is not clear, for policy reasons the program usually allows them to stand.
 - the penalty clause

ANSWER KEY

EXERCISE 9 - 2

2. BY-LAW RESPECTING THE PROHIBITION TO OWN AMERICAN PITBULL TERRIERS

- . By-law recorded and effective.
- . By-law allowed to stand even though some concerns:
 - the power of prohibition may be ultra vires.
 - clauses 3 to 9 cover criminal law procedure and should not be part of any by-law. However, we assumed that this was included for information purposes only.
 - the disposition of property would be an additional penalty not authorized under section 81.
 - in clause 11, there are indirect instructions given to judges.
 - band council was advised that a possible consequence of not amending the by-law as it currently stands may be the loss of a conviction under the by-law or the striking down of all or part of the by-law by a court.
 - clause 10 overrides paragraph 81(1)(r) of the Indian Act.

ANSWER KEY

EXERCISE 9 - 3

3. BY-LAW RESPECTING RESIDENCY "A"

- . By-law recorded and effective.
- . By-law allowed to stand even though it shows some difficulties:
 - clause 3 may create 2 classes of non-Indians, those permitted to stay because of past tolerance and all others who are refused that right.
 - clause 4 could prove impossible to enforce unless in a police state! Furthermore, a council willing to enforce this clause would have to count upon denunciations from neighbours, thereby causing a social problem.
 - the use of the term "unlawfully frequenting" in clause 8 should be defined.
 - the word "trespassing" in clause 8 has not been defined because courts have ruled that it is not within the band council's power to do so.
 - the purposes referred to in the definition of "visiting" may not be comprehensive enough to cover the wide scope of visiting rights individuals may have under the Charter of Rights and Freedoms.