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Connecting the Dots to Reveal a New Picture: A Report on Indian Act By-Law Enforcement Issues Faced by First Nations in Nova Scotia and Beyond

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Connecting the Dots to Reveal a New Picture

A Report on *Indian Act* By-Law
Enforcement Issues Faced by First
Nations in Nova Scotia and
Beyond

Prepared by Burchells LLP for
Mi'kmaq Tripartite Forum Justice
Committee

By Naiomi Metallic and Roy Stewart
With research support from Ashley Hamp-
Gonsalves

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Disclaimer

While the current project was initiated by the Mi'kmaq Tripartite Forum Justice Committee, which is comprised of the Mi'kmaq of Nova Scotia, Canada and the Province of Nova Scotia, the views expressed regarding the law and conclusions in this report do not necessarily reflect those of

- a) the Department of Justice Canada and the Government of Canada; or
- b) the Department of Justice Nova Scotia and the Government of Nova Scotia.

The views expressed are those of the author.

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Executive Summary

The project and the process

In the summer of 2018, the Mi'kmaq-Nova Scotia-Canada Tripartite Forum ("TPF") put out a statement of work ("SOW") on "Mi'kmaq Jurisdictional Authority Over By-Laws, Phase 1." The SOW requested research based on interviews, a literature review and a legal analysis of the challenges facing First Nations in assuming jurisdictional control through *Indian Act*, RSC 1985 c I-5 ("*Indian Act*") by-laws, particularly in areas of enforcement.

We conducted interviews, examined community by-laws and conducted the literature review from Fall 2018 to Spring 2019. This work revealed common themes concerning the existing barriers that prevent the successful development and enforcement of First Nation by-laws. Interviewees consistently cited the following barriers:

- (1) A lack of administration of justice and by-law-specific funding for First Nation governments;
- (2) A lack of internal capacity of First Nation governments (which is closely tied to the lack of funding);
- (3) Police refusing to enforce by-laws;
- (4) Jurisdictional and legislative uncertainty surrounding by-laws;
- (5) Government prosecution services are unwilling to prosecute by-laws; and
- (6) A lack of education/awareness regarding *Indian Act* by-laws.

Over 2019-2020, we took these results and conducted an in-depth legal analysis of every stage related to by-laws, from development to enforcement, prosecution, adjudication and sentencing. We thoroughly reviewed the evolving constitutional, legal and political context that now informs approaches to by-laws. This is crucial because, although the language of the *Indian Act* by-law provisions has changed very little over the years, developments in the law mandate a very different approach to by-laws than was the case in earlier decades. Over 2021-2022, we presented our findings to the TPF Committee and key stakeholders, and incorporated feedback we received into the report.

We see the bringing together of modern interpretive and constitutional principles related to by-law interpretation and a detailed legal analysis of each stage of the by-law process as 'connecting the dots.' Connecting these dots now creates a picture that presents more options and opportunities than most assume is possible with *Indian Act* by-laws.

Indian Act by-laws 101

By-laws are tools that First Nations can use to exercise greater control over their affairs. They can be used alongside other laws that give First Nations more control (like the *First Nations Land Management Act*, the *First Nations Fiscal Management Act*, and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, etc.) as well as inherent powers.

Some version of the by-law powers existed in the earliest versions of the *Indian Act*. Today, the most promising of the by-law rules is section 81(1), which lists about 22 subjects that bands can pass laws on. This includes areas like health, regulation of traffic, law and order, disorderly conduct and nuisance, local works, zoning, buildings, public games, wildlife, removal of trespassers, residency, ancillary powers and more.

One thing that makes these powers promising is the ability to interpret them broadly. The other is that, in 2014, the *Indian Act* was amended so that First Nations no longer had to submit s. 81(1) by-laws to the Department of Indigenous Services (INAC or ISC) for approval. First Nations are now able to pass by-laws on what they believe is covered by the s. 81(1) powers. That said, the courts continue to oversee the by-law power and can find a by-law to be invalid if it is outside of the jurisdiction conferred by s. 81(1) or violates other constitutional rules.

Beyond s. 81(1) by-laws, there are ‘money by-laws’ under s. 83, but these require ministerial approval, on the advice of the First Nations Tax Commission. Section 83 by-laws are not a major focus of this report. There are also s. 85.1 ‘intoxication by-laws’ over the prohibition, sale, barter, supply, possession or consumption of intoxicants. These by-laws must be consented to by band members through a majority referendum vote.

By-laws are viewed as a form of delegated law, meaning they are law-making powers granted by the federal government and not inherent. Because of this, they are seen as federal laws. As such, these laws must adhere to the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and administrative law requirements. However, these requirements might not apply identically as they do to other governments given First Nations’ differences, and Mi’kmaq law principles could influence how these legal instruments and doctrines are applied. Further study is needed in this area.

The status of being ‘delegated’ does not mean that by-laws are any less binding. They have equal force to other federal laws and regulations.

In the past, by-laws were interpreted narrowly by both the courts and ISC and, because of this and the challenges in enforcing them, many First Nations rarely used them.

What is different now?

The exercise of by-law powers today must account for several legal and political developments that require state governments and courts to give more respect to First Nations' rights to self-determination and self-government and their human rights to receive services that meet their needs and circumstances.

These developments include several important court and human rights tribunal decisions in the last decade or so, the recommendations of several crucial reports (the Marshall Inquiry Report, the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission Final Report and the Missing and Murdered Indigenous Women and Girls Final Report), as well as the *United Nations Declaration on the Rights of Indigenous Peoples*.

These things tell us a new interpretation of by-laws is necessary. Features of this new interpretation include understanding *Indian Act* by-laws as:

- (1) Covering a broad array of powers, including the power to pass procedural laws dealing with enforcement;
- (2) Being able to co-exist with laws passed by other governments;
- (3) In cases of conflicts with other government laws, recognizing that *Indian Act* by-laws will supersede provincial laws as well as many federal laws, except rules in the *Indian Act* or regulations under the *Indian Act*; and
- (4) Requiring courts to show significant deference to the exercise of self-government and Indigenous laws.

What does this mean for by-law enforcement?

a) First Nations-led solutions

There is now significant room for First Nations to exercise jurisdiction. **First Nations have significant powers to devise their own enforcement solutions.** They do not have to wait for the federal or provincial governments to amend or pass new laws. For example, we find that, if communities wish, they can use their by-law powers to do any or all of the following:

- (1) Appoint by-law officers or other enforcement officers (including police or some alternative enforcement officer) to enforce their by-laws. Note that it may not necessarily be practical or even ideal to have by-laws enforced only by one type of enforcement officer (e.g., a police officer) and, depending on the types of by-laws a community has, there could be different types of enforcement positions, with different powers and different approaches.

- (2) Set out the investigative, search and other enforcement powers of by-law officers (including police).
- (3) Create a summary ticketing process to lessen the number of by-law offences that need to be fully prosecuted.
- (4) Appoint First Nation prosecutors to prosecute by-law offences. While these prosecutors could be Mi'kmaq lawyers, it is not a requirement for by-law prosecutions that prosecutors have legal training. A prosecutor could be a community member who receives targeted training. Community members could equally be trained to act to defend people who are charged with by-law offences.
- (5) Create adjudicative mechanisms (e.g., courts, JPs, tribunals, etc. – there is no magic in the name) to address disputes under by-laws, including the adjudication of offences and hearing disputes between individuals and First Nations relating to by-laws. In designing their own adjudication processes for by-law offences and other disputes, there is flexibility available to First Nations to develop processes that reflect their needs and culture.
- (6) Set out additional or alternative penalties and sentencing approaches for by-law offences beyond fines and imprisonment, including taking a more restorative approach.

Of course, many First Nations lack own-source revenue to fund any of these things on their own. We take the position that both the federal and provincial governments have obligations to provide a whole number of by-law enforcement services to First Nations and, where First Nations prefer to offer these services on their own, these governments instead should fund these services. We believe that these are binding legal obligations based on human rights and the *Charter*, as well as other laws and Crown commitments.

When funding becomes available, should First Nations wish to undertake any of the above-listed services on their own, given the size of some First Nations and capacity needs, it may be beneficial for communities to share or pool resources. For example, two or more communities might wish to share a prosecutor or Justice of the Peace between them to address their by-law enforcement needs. Communities may also want to share drafts of by-laws, or pool resources to develop model by-laws. If training is developed, perhaps this can be co-resourced and shared between two or more communities.

There are also other mechanisms available to communities, such as private arbitration legislation, that could provide an alternative to by-law prosecutions to address some types of civil disputes. This gives decisions arising from community-based dispute resolution processes the same status as an order of the Nova Scotia Supreme Court. This provides a way for First Nations to enhance their law and enforcement capacities even beyond by-laws.

b) Federal and provincial governments' obligations

For a long time, there has been much confusion over roles when it comes to *Indian Act* by-law enforcement. Often, the constitutional division of powers between federal and provincial governments has been cited as preventing one level of government from taking on a role. Based on our legal analysis, we conclude that there are no legal or constitutional impediments to governments fulfilling the following roles:

- (1) Canada, through the Department of Indigenous Services (“ISC”), should be providing enhanced support and assistance to First Nations on by-law development and drafting. By-law support services were discontinued after the 2014 amendments and were more recently reinstated by ISC in 2019. However, the services provided remain minimal. More robust services could include providing expert advice and resources on by-law development, and funding expenses related to communities’ by-law development such as consultations, drafting and legal review. A 2021 Report of the House of Commons Standing Committee on Indigenous and Northern Affairs recommended greater support be offered by Canada, including the creation of a First Nation Centre of Excellence for knowledge-sharing on enforcement and justice issues.
- (2) Local police can and should be enforcing by-laws, in particular those dealing with law and order, such as the prohibition of intoxicants, disorderly conduct, and traffic offences, for example. Enforcement of First Nations’ by-laws by local police is now happening in Ontario and should be happening in Nova Scotia and, indeed, across the country. Determinations of which types of by-laws are more appropriate for by-law officers versus police officers should be decided in discussions between the First Nation and the local police services.
- (3) Responsibility for ensuring First Nations receive adequate law and security enforcement services is shared between the federal and provincial governments.
- (4) The province can designate First Nation by-law officers as “Aboriginal police officers” (“APO”) under the *Police Act*. This would give the by-law officers the same powers and protections given to peace officers when enforcing by-laws. This effectively creates a ‘special constable’ position, who can work alongside the local RCMP to provide by-law and community support services. Alberta currently offers an accredited special constable program that trains by-law officers to act in this way. This could fill an important law enforcement of communities, but NS has yet to appoint any under the *Police Act*.
- (5) The province can enter into agreements with First Nations in the province (like it has with the federal government) to allow First Nations to use the province’s summary ticketing system (if First Nations prefer this to developing their own).
- (6) Canada, through Public Prosecution Services Canada (“PPSC”), can and should be prosecuting First Nation by-law offences. It has done so sporadically over the years and was prosecuting COVID-19 by-laws temporarily during the pandemic but PPSC could and should be doing this on a general basis as it does with other federal laws.

- (7) The province, through its Public Prosecution Services, can prosecute federal laws, including *Indian Act* by-laws, and should prosecute First Nations by-laws, but has yet to do so. The absence of explicit recognition of such in the *Prosecution Act* is not a barrier to the province acting (there is precedent on this).
- (8) Provincial courts can hear the prosecution of *Indian Act* by-law offences. This certainly includes the two provincial courts that are in Mi'kmaq communities (Eskasoni and Wagmatcook), but this can happen in all other provincial courts as well.
- (9) Provincial courts could sit at locations outside provincial courthouses to hear *Indian Act* by-law offences.
- (10) Provincial Presiding Justices of the Peace (PJPs) can hear the prosecution of *Indian Act* by-law offences. PJPs could hear matters within First Nation communities.
- (11) The province, through its Department of Justice, can and should appoint PJPs, particularly Mi'kmaq lawyers, to hear the prosecution of *Indian Act* by-law offences. There are currently no Mi'kmaq PJPs.
- (12) Alternatively, to solidify its commitment to Mi'kmaq justice issues in the province, the province could establish a new category of JP with the specific function of providing justice services to Mi'kmaq communities, including hearing *Indian Act* by-law offences. The qualifications and other possible duties of the JPs, such as adjudicating other disputes within the community, could be negotiated between the Mi'kmaq and the province.
- (13) Canada, through the Department of Justice, can and should appoint Justices of the Peace under s. 107 of the *Indian Act* to hear by-laws in First Nations communities. Canada discontinued making such appointments in 2003, but without any clear reason.

Our research confirmed that, in most situations, governments could be acting to provide services to First Nations, but aren't. This is depriving First Nations of important justice services that other Canadians have provided to them by governments and take for granted. As a result, these governments should seek, as soon as possible, to work with the Mi'kmaq to address these gaps. If not providing these directly, at the very least they should be providing funding to First Nations to provide these services themselves. Failing this, we find that **First Nations have grounds to bring human rights and *Charter* complaints against both Nova Scotia and Canada for failing to provide them adequate justice services, which includes being able to pass and enforce their laws and *Indian Act* by-laws.**

In many situations, such as ensuring enforcement by the RCMP, appointing more by-law officers, prosecutors, and JPs, we find that the provincial and federal governments are equally responsible for providing services and/or funding. When both governments have concurrent jurisdiction and First Nations are entitled to a service, under the human rights principle, "Jordan's Principle," there should be no delay or denial based on jurisdictional wrangling and the government of first contact should provide the service. After that, the two levels of government

can work out how the costs should be shared between themselves. As noted by the Manitoba Human Rights Adjudication Panel, in *Pruden v Manitoba*, where both the federal and provincial governments have jurisdiction to service First Nations (in that case, concerning health services on reserve), “[t]he Canadian constitutional framework does not amount to a reasonable justification for ... discriminatory treatment ...”.

We recommend that both levels of government commence negotiations with the Mi’kmaq of Nova Scotia immediately to identify ways to better address Mi’kmaq justice needs in the province.

In providing comments on this report, the Department of Justice advised that the Government of Canada is committed to working with Indigenous communities to address these gaps as effectively and efficiently as possible and they believe this is best accomplished collaboratively. The province also signaled a preference for collaboration to address the current gaps in by-law enforcement.

Canada, Ontario and the Chiefs of Ontario (“COO”) recently launched a Tripartite Collaborative Table on Enforcement and Prosecution of First Nations laws. This is intended as a forum to identify the underlying obstacles and barriers to the enforcement and prosecution of First Nations laws and by-laws, and work towards developing recommendations on how to overcome them. In addition, the federal Minister of Justice’s mandate letter instructs the Minister to “advance the priorities of Indigenous communities to reclaim jurisdiction over the administration of justice in collaboration with the provinces and territories, and support and fund the revitalization of Indigenous laws, legal systems and traditions.” The federal Ministers of ISC and Crown-Indigenous Relations and Northern Affairs are similarly directed to advance and support Indigenous initiatives.

These developments signal a growing openness by Canada and the province to work collaboratively with First Nations on the administration of justice issues. We agree that collaboration and negotiation with governments can be an effective avenue to address the various issues in enforcement of *Indian Act* by-laws and should be pursued by the Mi’kmaq of Nova Scotia when governments present themselves as willing partners. However, where governments are unwilling to participate in meaningful collaboration, we find that the Mi’kmaq have grounds to pursue redress of this ongoing discrimination in by-law enforcement and administration of justice through human rights commissions or the courts.

We also found that the following legislative amendments could be undertaken by governments. Many of these are not crucial to permit enforcement of *Indian Act* by-laws (since First Nations can remedy several gaps in Canadian law through their own by-law making power). That said, some of these amendments would provide helpful clarifications or additional tools for First Nations in enforcing by-laws.

- (1) Canada could amend the *Indian Act* to make several procedural issues in relation to by-laws clearer. For the most part, however, First Nations are able to address most of these gaps

through their own by-law making power. One area that would be helpful to see amended is the maximum amount for fines and the ability to lay separate charges for each day of a continuing offence.

- (2) The province could amend its *Motor Vehicle Act* to make it expressly clear that the enforcement process for unpaid fines applies to fines under *Indian Act* by-law offences.
- (3) We conclude that Nova Scotia can prosecute *Indian Act* by-laws and that the absence of explicit recognition of this in the *Prosecution Act* is not a barrier to the province's acting. Nonetheless, as it stands, the *Prosecution Act* is underinclusive, potentially raising a *Charter* issue. Accordingly, the province should consider clarifying the *Public Prosecutions Act* to expressly provide that it can prosecute *Indian Act* by-laws.
- (4) Nova Scotia could amend its *Justices of the Peace Act* to allow for the appointment of Mi'kmaq Justices of the Peace with the power to hear the prosecution of *Indian Act* by-laws. Like Nunavut, they could allow for the appointment of non-lawyer JPs with significant cultural knowledge.
- (5) The *United Nations Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*"), is an international instrument on the fundamental individual and collective rights of Indigenous peoples. As an international human rights instrument, the *UN Declaration* can and should be used to interpret domestic law. However, it is widely recognized that implementation legislation is a helpful way to clarify both government and courts' obligations vis-à-vis the *UN Declaration*. Canada has now passed implementation legislation, and this will guide the federal government's implementation of the *UN Declaration* over the long term. This legislation also confirms that courts should be interpreting domestic law following the *UN Declaration*. It is also important for provinces to have such legislation, particularly to guide the provincial government's implementation of the *UN Declaration*. British Columbia passed such a law in 2019. Some other provinces and territories are currently contemplating similar laws. We recommend, as both an important symbolic and practical step, that Nova Scotia commit to the *UN Declaration* through legislation.

c) The need for education

There is a general lack of awareness of First Nations law-making powers, and by-laws more particularly, among several important stakeholders, from police agencies to judges and justices of the peace, federal and provincial public prosecution services, First Nation governments and employees and community members, as well as policy-makers within both levels of the provincial and federal government. In some cases, direct training, discussions and meetings will be necessary. In other cases, written materials, such as a "toolkit" that addresses by-law drafting, training, education, enforcement and prosecution, could be an effective educational tool.

We recommend that the Mi'kmaq of Nova Scotia, with their provincial and federal partners on the Tripartite Committee, create a plan to develop training and materials on *Indian Act* by-laws

and their enforcement, and prioritize key stakeholders in need of education.

d) Further research

As noted earlier, because the *Indian Act* by-laws are federal laws, they can be assessed against *Charter*, human rights and administrative law obligations. This means in drafting by-laws, First Nations will have to consider how their proposed laws affect peoples' rights to freedom of expression and association, freedom from unreasonable search and seizure, equality rights and procedural fairness, for example. However, these requirements should be applied in ways that respect First Nations' differences in worldview when it comes to balancing collective and individual rights. This is an opportunity to infuse *Indian Act* by-law making with Mi'kmaq law principles.

We, therefore, recommend that Mi'kmaq engage in a study of their own legal principles on protecting individual rights and how this is balanced with collective rights. These research findings could be used by those developing by-laws for communities.

Further research into how the Mi'kmaq Peace and Friendship Treaties inform a "two-legged" justice system is also recommended.

e) Options for moving forward

This report shows that Mi'kmaq in Nova Scotia have several options available to them in moving forward with having their by-laws enforced and, in general, strengthening justice services within their communities. Several initiatives could be undertaken, and communities will have to prioritize what they wish to focus on.

Below we identify initiatives that promote greater involvement of Mi'kmaq in addressing their justice needs and identify key actions and steps that need to happen concerning these.

1) The Mi'kmaq address gaps in by-law enforcement powers by passing by-laws on such powers.

- By-law development work needs to be appropriately funded by the Government of Canada. By-laws are a part of First Nation governance and Canada is responsible for providing needs-based governance services to communities according to its *Department of Indigenous Services Act*.

2) Appointing more Mi'kmaq by-law enforcement officers and having them appointed as APOs.

- More by-law officers need to be funded and both governments bear the responsibility to either ensure such services are provided through their policing services or to fund additional services in the communities.
- By-law officers will need appropriate procedural powers to carry out their functions:
 - The province could designate by-law officers as "Aboriginal Police Officers" to give First Nation officers powers and protections of peace officers when enforcing by-

laws. Like with the older 'special constables' position that used to be funded by Canada, these officers can work alongside the local RCMP to provide by-law and community support services. Alberta currently has an accredited special constable program that trains by-law officers to act in this way.

- Mi'kmaq can also create their own laws on by-law officers' powers.

3) The Mi'kmaq develop their own ticketing system.

- Such systems increase the likelihood that most by-law offences will be resolved through payment of fines without having to be prosecuted.
- There are precedents of other First Nations developing their own ticketing systems that can be drawn on.
- Alternatively, Mi'kmaq could negotiate with the province to use its ticketing system.

4) Appointing Mi'kmaq by-law prosecutors.

- Mi'kmaq could appoint their own prosecutors through a by-law creating this role and setting out the prosecutors' functions.
 - Prosecutors do not necessarily need to be lawyers. A training program could be developed to teach community members to carry out prosecutorial functions.
 - Alternatively, there are several Mi'kmaq lawyers who could be appointed to act.
- The federal and provincial governments have the responsibility to fund such services (or otherwise fund the Mi'kmaq to create and run their own prosecution services).

5) Appointing Mi'kmaq Justices of the Peace.

- This is the optimal way to ensure the prosecution of First Nations by-laws within the communities.
- Through a by-law, bands could appoint their own Justices of the Peace, or some other adjudicative body that can hear by-law offences and disputes.
- Alternatively, the province could appoint Mi'kmaq Presiding Justices of the Peace under its *Justice of the Peace Act*.
 - This may be one of the fastest and most effective routes to address by-law enforcement issues. There are several Mi'kmaq lawyers who could act as JPs.
- Alternatively, the province could establish a new category of JP with the specific function of providing justice services to Mi'kmaq communities, including hearing *Indian Act* by-law offences. The qualifications and other possible duties of the JPs, such as

adjudicating other disputes within the community, could be negotiated between the Mi'kmaq and the province.

- This route might be slightly longer than simply appointing Mi'kmaq PJPs as it requires the government to amend its regulations (but this takes less time than passing legislation). But it would ensure the designation of specific Mi'kmaq JPs meets the needs of communities. It might be important for such JPs to have additional or different functions than PJPs (e.g., hearing not only by-law offences but other disputes within the community). It might be desired that they have different qualifications than PJPs as well.
- Alternatively, Canada could appoint JPs under s. 107 of the *Indian Act* (though it has refused to do this since 2003, but the reasons for this are not clear).
- Both Canada and the province have the responsibility to fund Justice of the Peace services within First Nations.
- Alternatively, by-law offences can be prosecuted in provincial courts, including Eskasoni, Wagmatcook, as well as courts located off-reserve in the province.

6) Developing restorative initiatives for by-law violations.

- JPs already have several tools to address by-law violations (from restorative alternatives to fines and imprisonment).
- The Mi'kmaq could consider making arrangements with the Mi'kmaq Legal Support Network to provide restorative or sentencing circles in relation to by-law offences.

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1 Introduction to the project

In the summer of 2018, the Mi'kmaq-Nova Scotia-Canada Tripartite Forum (“TPF”) put out a statement of work (“SOW”) on “Mi'kmaq Jurisdictional Authority Over By-Laws, Phase 1.” The SOW detailed how, despite amendments to the *Indian Act*, RSC 1985 c I-5 (“*Indian Act*”) in 2014 that gave greater freedom to First Nations to enact by-laws without government oversight, there remain major challenges for First Nations in Nova Scotia to exercise jurisdictional control through by-laws. These range from questions to who and how by-law offences are compelled to court, what court (federal, provincial or First Nation) can hear the matter, who prosecutes the matter, how by-law fines are processed and many other questions. The SOW directed that answers to these questions should be sought through a literature and case review, by compiling and analyzing First Nations by-laws from Nova Scotia and throughout the rest of Canada, and through interviews with First Nation representatives in Nova Scotia and beyond, government representatives and others with experience in First Nations by-laws.

There is very little research into First Nation governments’ use and prosecution of *Indian Act* by-laws. During our interviews, we heard numerous times from government representatives and others how much of a need there is for such research and there are high hopes that this report will provide answers not just for Nova Scotia Mi'kmaq but assist and apply in other parts of Canada as well.

Although the focus of the project is specifically on *Indian Act* by-laws, many of the enforcement issues that will be discussed in this report touch on broader issues of enforcement that present not only in relation to ss. 81-86 of the *Indian Act*, but under other legislation and agreements recognizing increased First Nation jurisdiction. Beyond jurisdiction recognized in Canadian law, the research also touches on issues related to Indigenous peoples’ inherent jurisdiction and its exercise.

1.1 Methodology

1.1.1 Interviews with Nova Scotia Mi'kmaq community representatives

To determine the barriers to *Indian Act* by-law enforcement in Nova Scotia, we set out to interview the band administrator and/or in-house legal counsel of Nova Scotia Mi'kmaq First Nations to obtain their first-hand impressions. Our questionnaire developed for community interviewees is in [Appendix A](#).

We interviewed representatives from six Nova Scotia First Nation Governments: Membertou First Nation; Pictou Landing First Nation; Glooscap First Nation; Sipekne'katik First Nation; Potlotek First Nation and Millbrook First Nation. Despite numerous attempts, we were unable to interview anyone from the following First Nation Governments: Acadia First Nation; Annapolis Valley First Nation; Bear River First Nation and Paqtnkek Mi'kmaq Community. Also, we sent an invitation to the Eskasoni, Potlotek, We'koqma'q and Wagmatcook First Nations.

We also gathered a list of the by-laws of all Mi'kmaq communities of Nova Scotia to analyze their enforcement provisions. These by-laws were either publicly available online on individual First Nation websites and the *First Nations Gazette* or provided to us by interviewees. A chart summarizing the by-laws that we accessed is available in [Appendix B](#).

1.1.2 Interviews with others with Indian Act by-law experience

In addition to interviewing representatives from First Nation governments in Nova Scotia, we also interviewed numerous federal and provincial government employees (“government interviewees”), lawyers with experience working with First Nation by-laws and representatives of First Nations organizations. This allowed us to capture different perspectives, experiences and recommendations regarding the development, enforcement and prosecution of by-laws. Our questionnaire developed for individuals with *Indian Act* by-law experience is in [Appendix C](#).

A number of the interview participants were aware of this project and thought it was much needed to flesh out the problems First Nations are currently facing. The picture painted by the discussion with interviewees reveals that enforcement of by-laws is a relatively unknown and patchwork regime. The interviews produced common themes concerning the existing barriers that prevent the successful development and enforcement of First Nation by-laws. Interviewees consistently cited the following barriers:

- A lack of administration of justice and by-law-specific funding for First Nation governments;
- A lack of internal capacity of First Nation governments (which is closely tied to the lack of funding);
- Police refusing to enforce by-laws;
- Jurisdictional and legislative uncertainty surrounding *Indian Act* by-laws;
- Government prosecution services are unwilling to prosecute by-laws; and
- A lack of education and awareness regarding *Indian Act* by-laws.

The views of various interviewees will be explored in further detail throughout the report, sometimes by reference to this group as a whole, to the particular group they represent, or to the specific institution they work for. For this reason, it is helpful to give an overview of who these interviewees represented and their experience.

1.1.2.1 Government interviewees

The federal and provincial co-chairs of the Tripartite Committee facilitated contacts with several government departments that we identified as having experience dealing with *Indian Act* by-laws.

Department of Justice - Canada

Two lawyers and a senior policy analyst from Justice Canada's Aboriginal Law Centre ("ALC") participated in a group interview. The ALC is a centre of expertise on Aboriginal law and other Indigenous legal and policy matters within Justice Canada's Aboriginal Affairs Portfolio ("AAP"). The objectives of the AAP include contributing to the resolution of Aboriginal legal issues and claims, as well as the development of Aboriginal legal policy and national law practice management".¹ The ALC provides legal advice to other government departments and litigation teams on constitutional and common law matters related to Aboriginal law and Indigenous rights (including the *UN Declaration on the Rights of Indigenous Peoples*) and is the lead office for policy relating to Indigenous legal issues within Justice Canada. Also with the AAP are lawyers who are embedded within ISC and CIRNA (Departmental Legal Services Units) who provide day-to-day legal advice on corporate, litigation and other matters within the responsibilities of those departments.

The interviewees from the ALC work as a team to address administration of justice issues, which are usually bigger constitutionally-related questions. Concerning *Indian Act* by-laws, ALC does not provide internal government advice on by-laws but operates as a unit to "touch base" or "double-check with" for other federal departments and their dedicated legal services units. However, from their experience with the administration of justice and enforcement authorities, the ALC interviewees were familiar with First Nations by-law enforcement issues.

We also interviewed a lawyer with the federal Department of Justice, in the Northern Regional Office. This lawyer's experience is in working with 11 Yukon First Nations in the context of modern treaties and self-government agreements. While not directly related to *Indian Act* by-laws, the lawyer's experience with self-government agreements is relevant to the drafting of laws, enforcement and the overall administration of justice for First Nations.

Department of Justice – Nova Scotia

A lawyer with the Nova Scotia Department of Justice, in the Legal Services Division did not participate in an interview but did provide us with written responses to our questions. However, that lawyer has had limited experience with First Nation by-laws. She also canvassed other lawyers in her department, but none knew about by-law-related issues.

Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services

The federal department of Indigenous and Northern Affairs Canada ("INAC") was divided into two separate departments in September 2017: the Crown-Indigenous Relations and Northern Affairs Canada ("CIRNAC") and Indigenous Services Canada ("ISC"). INAC used to play a significant role in *Indian Act* by-laws, but this changed with amendments to the *Indian Act* in

¹ See Department of Justice website at: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/aap-paa/p3.html>.

2014. Following these amendments, First Nations were no longer required to submit their by-laws for ministerial approval.

We reached out to representatives from ISC who we knew to be involved with *Indian Act* by-law work in the past, including the Director of Governance Policy and Implementation. ISC was initially unwilling to participate on the record or answer pre-determined questions but was willing to have an informal conversation. The main message conveyed was, especially since 2014, ISC has little information about current challenges in *Indian Act* by-law enforcement. Note that, after our interview phase, we learned that the by-law support services had been reinstated by ISC in 2019. It now provides some by-law review services upon request. However, this is not widely publicized and the unit's services are not mentioned on ISC's website.

Three employees from CIRNAC participated in interviews: Regional Director General ("RDG") in Yellowknife, NWT; Lands Manager for Yellowknife region; and Lands Officer in the Yukon region. The RDG began work in the early 2000s as a lands officer within INAC. In that department, the RDG said there was a push to assist First Nation communities with the development of by-laws, including education on how to draft them. However, since then, the RDG has had very little experience with *Indian Act* by-laws.

Public Prosecution Service of Canada

Two people from the Public Prosecution Service of Canada ("PPSC") participated in an interview together: Director General of Regulatory & Economic Prosecutions and Management Branch and Senior Counsel with Regulatory & Economic Prosecutions and Management Branch. The PPSC "is a national, independent and accountable prosecuting authority whose main objective is to prosecute federal offences and provides legal advice and assistance to law enforcement".²

Neither interviewee had a lot of experience with *Indian Act* by-laws. The Senior Counsel is the designated person at PPSC headquarters for by-law issues and has been approached by First Nation governments across the country, asking to clarify the PPSC's role in the prosecution of First Nation by-laws; PPSC is currently considering its position on that issue. It was explained that over the past ten years the only place in the country where by-laws were prosecuted was in Natuashish, Labrador where intoxicant by-laws were regularly prosecuted.

Public Safety Canada

We also interviewed the Manager of the Indigenous Treaty Management Unit with Public Safety Canada ("PSC"). Previously, that PSC employee worked with Indigenous Services Canada where she gained experience working with *Indian Act* by-laws. The role of this interviewee is to ensure PSC is represented at modern treaty negotiation tables. While those negotiation tables are led primarily by CIRNAC, the interviewee involvement is as the voice of PSC, addressing the enforcement of laws, policing and administration of justice.

² See: <https://www.ppsc-sppc.gc.ca/eng/bas/index.html>.

Royal Canadian Mounted Police (RCMP)

We interviewed an Inspector with the RCMP's Contract and Indigenous Policing in Ottawa. We also interviewed a member stationed in Nova Scotia responsible for the RCMP's Community, Indigenous and Diversity Policing Services, including its Indigenous Policing Unit.

1.1.2.2 Lawyers with *Indian Act* by-law experience

Through connections with the Canadian Bar Association, Aboriginal Law Section, and the Indigenous Bar Association we sent out mass emails to the mailing lists of these groups explaining our project and offering to interview lawyers with experiences with *Indian Act* by-laws. Based on this outreach, we conducted interviews with seven lawyers, all with considerable experience with *Indian Act* by-laws or other legislation or agreements recognizing First Nations jurisdiction, including the *First Nation Land Management* and self-government agreements. We spoke to two lawyers located in Quebec, four in Ontario and one in British Columbia. One interviewee had been a judge in a U.S. tribal court and is now acting as a prosecutor for the court in his community (Akwasasne) on the Canadian side.

1.1.2.3 First Nations organizations

First Nations Land Management Resource Centre

A Law-Making and Enforcement Officer with the First Nations Land Management Resource Centre ("FNL MRC") participated in an interview. The FNL MRC provides technical support and training to First Nations in relation to land management, environmental and resource management. The key thing the FNL MRC does is support the drafting and development of First Nation laws, as well as working with First Nations on the enforcement side of things. In its role, the FNL MRC is focused on laws enacted by First Nations pursuant to the *First Nations Land Management Act*, S.C. 1999, c. 24. Beginning in 1988, and up until beginning work with the FNL MRC in 2016, the interviewee worked with the federal government and had significant involvement with First Nation by-laws.

First Nations Tax Commission

We interviewed an employee with the First Nations Tax Commission ("FNTC"), which "is a shared-governance First Nation public institution that supports First Nation taxation under the *First Nations Fiscal Management Act* and under section 83 of the *Indian Act*".³ As of May 2019, the FNTC serves 170 First Nations that have taxation laws in place under the *First Nations Fiscal Management Act* ("*FNFMA*"). The FNTC website states that its objectives are to "create the legal, administrative and infrastructural framework necessary for markets to work on First Nation lands, creating a competitive First Nation investment climate, and using economic growth as the

³ See online at: <https://fntc.ca/en/home/>.

catalyst for greater First Nation self-reliance.”⁴ The interviewee explained that First Nations use of section 83 by-laws under the *Indian Act* has been greatly reduced in recent years, as communities’ transition to the FNFMA.

1.1.3 Literature review and additional research

In addition to the above-noted interviews, we conducted a literature review of case law, academic articles, and governmental and non-governmental reports (“grey literature”) to identify further barriers to First Nation governments’ successful development and enforcement of *Indian Act* by-laws. These sources identified several challenges concerning by-law development, the various methods utilized for by-law enforcement, and gaps and/or uncertainties in law and policy that contribute to the ineffectiveness of *Indian Act* by-laws. Some of these sources also identify recommendations for achieving consistent and efficient enforcement of by-laws enacted by First Nation governments. These will be noted throughout the Report.

1.2 Structure of the Report

Following the collection and summary of data from interviews and the literature review, we took these results and conducted an in-depth legal analysis of each stage related to *Indian Act* by-laws, from development to enforcement, prosecution, adjudication and sentencing. We recognized it was important to get to the bottom of the many questions around these issues, as this exercise appears to have never been undertaken in the past. On the issue of the enforcement of First Nations’ laws, Chief Robert Louie has been quoted as saying “[t]oo often the bureaucracy has stopped at questions without driving to answers.”⁵ The extensive confusion around *Indian Act* by-laws motivated us to seek answers. Thus, each stage has a dedicated chapter within this report (see Chapters 5 to 9), where we attempt to comprehensively address various issues that arise within each stage. Also, for the sake of comparison, we analyzed how by-law enforcement works in the municipal context (see Chapter 4).

Importantly, we thoroughly reviewed the evolving constitutional, legal and political context that now informs the approach to by-laws (see Chapter 2). We felt this to be crucial because, although the language of the *Indian Act* by-law provisions has changed very little over the years (the most significant amendment being the repeal of the disallowance power in 2014), this context mandates a dramatically different approach to by-laws than was the case, for example, in the 1980s and 1990s (when most of the main cases on by-laws were decided). This leads us to question the precedential value of many older decisions, as well as some of the statements

⁴ *Ibid.*

⁵ House of Commons Canada, Standing Committee on Indigenous and Northern Affairs, [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#) (June 2021) (Chair: Bob Bratina), at 18.

contained in a *By-Laws Manual* produced by the Department of Indigenous Services.⁶ We address these decisions and positions considering modern interpretive principles at various points in our report.

At several points, we include side notes discussing interesting examples and cases, explaining terminology, or highlighting particular information that we learned.

Our work has revealed several different options that First Nations may want to pursue in seeking to exercise greater jurisdiction over by-laws. While we do have some views respecting some of the options over others, which we comment on, we do not specifically recommend one avenue over another, preferring to let communities decide what options work best for their needs. We do, however, identify some areas where further research is recommended and flag this in several places as we are aware there may be further phases to this project.

⁶ Department of Indian and Northern Affairs Canada, *By-laws Manual*, prepared for Band Governance By-Law Workshop (“*By-Laws Manual*”). This Manual was produced by the By-Law Advisory Services Unit of the Band Governance Directorate of the Department of Indian Affairs. Dates of initial publication or updates are not noted on the document. The Manual is not published online. When initially drafting this report, the authors used a copy of the Manual received upon request from the By-Law Advisory Services Unit in May 2011 but has since received a “Revised September 2019” version, which discusses the effect of the 2014 amendment and makes some other minor cosmetic changes. However, a side-by-side comparison of the two versions revealed very few changes of substance to the *By-Laws Manual*. Nonetheless, further references to the Manual align with the 2019 version.

2 Constitutional, legal and political context

Before addressing the development and enforcement of *Indian Act* by-laws, readers must first appreciate several ‘*Indian Act* by-law 101 issues’ (e.g., their history, what these laws cover, their relationship to other laws and governments in Canada, etc.). It is also important for readers to understand these issues within the current constitutional, legal and political context. This is a complex picture that has changed a lot over the past 40 years and continues to evolve. It includes not only Canadian constitutional instruments and federal and provincial laws and policies, but international human rights instruments (including the *United Nations Declaration on the Rights of Indigenous Peoples*), court and tribunal decisions on Aboriginal rights and First Nations’ human rights, as well as findings and recommendations from numerous inquiries, commissions and reports that have discussed First Nations’ justice, policing and safety issues.⁷

We review this larger context in-depth because, although the challenges experienced by First Nations concerning *Indian Act* by-laws have remained mostly the same since the 1970s and 80s, this larger legal and political framework affects how courts, politicians and First Nations can respond to these challenges. For example, most of the cases interpreting *Indian Act* by-laws stem from the 1980s and 90s—a time when by-law powers were interpreted very narrowly (these decisions are reviewed in later chapters of this report). However, there have been several developments since those decades that call for different approaches recognizing greater space for First Nations to use by-laws in more innovative ways than before.

In addition, we are at a moment where there is growing awareness of long-standing federal and provincial neglect of First Nations issues and how this can constitute violations of Indigenous peoples’ human right to be free from discrimination. This also factors into the current picture of First Nation by-laws and the kinds of legal tools available to hold governments accountable.

2.1 Who has jurisdiction over First Nations law-making?

Jurisdiction is about which government has the power to make laws, and more generally act, in relation to a subject matter. Rules on jurisdiction can be explicitly set out in constitutions or laws and can also be based on interpretations of written laws or constitutions, common law, international laws, or unwritten constitutional principles.

Terminology note:

In this report, we use the terms “jurisdiction” and “law-making power” interchangeably.

⁷ These include: [The Royal Commission on the Donald Marshall, Jr., Prosecution Report](#) (1989); [The Royal Commission on Aboriginal Peoples Report](#) (1996); [An Evaluation of the Implementation and Efficacy of the Marshall Inquiry Recommendations in Nova Scotia](#) (2013); [The Final Report of the Truth and Reconciliation Commission](#) (2015); [The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls](#) (2019); and [The Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec](#) (2019).

First Nations peoples in Canada have long maintained they have inherent jurisdiction to govern themselves and their territories as their ancestors did for thousands of years prior to the arrival of Europeans on this continent. International law and the recognition and affirmation of the rights of the Aboriginal peoples of Canada in s. 35(1) of the *Constitution Act, 1982*, support this.⁸ The first two hundred years of interactions between the British and First Nations where the British continued to recognize First Nation sovereignty, including the signing of Peace and Friendship Treaties, also support this.⁹

On the other hand, section 91(24) of the *Constitution Act, 1867*, states that the federal government has exclusive jurisdiction over “Indians, and lands reserved for the Indians.” Although not the only way to interpret this power,¹⁰ since Confederation in 1867, Canadian courts and the federal government saw this law as giving the federal government nearly unlimited power over First Nations.¹¹ This approach generally accepts the federal and provincial governments (the two governments mentioned in the *Constitution Act, 1867*—often called ‘the Crown’) as having gained sovereignty over all lands and people in Canada simply by the British having ‘discovered’ Canada (known as the “doctrine of discovery”).

For well over a century, the federal government’s main vehicle for exercising this jurisdiction was the 1869 *Gradual Enfranchisement of Indians and Better Management of Indians Affairs Act*, which became the *Indian Act* in 1876. **These laws have also included recognition of jurisdiction to First Nations band councils and bands through by-law powers.** In 1869 this was a power to pass “rules and regulations” over seven subjects, later becoming “by-laws” in the *Indian Act* and the list of subjects was added incrementally over time.¹² While it has been amended a few times in the last couple of decades, the last time the *Indian Act* received a major overhaul was in 1951. In the last 20 years, the federal government, while not repealing the *Indian Act*, has passed other stand-alone laws recognizing the jurisdiction of First Nations in other specific areas.

⁸ The right to self-determination, which includes the right to self-government, is recognized in the *International Covenant on Civil and Political Rights*, ratified by Canada on May 19, 1976, as well as in the [UN Declaration on the Rights of Indigenous Peoples](#), as is recognized as customary international law: see Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation” (2010) 26 Nat’l J Const L 212 at 200-208. Although the Supreme Court of Canada has been resistant to an expansive interpretation on the right to self-government based in s. 35(1), as discussed further below, the recognition of Aboriginal rights is based on the pre-existing rights of Indigenous people, which must include the right to self-determination.

⁹ See *R. v Sioui*, [1990] 1 SCR 1025. See also Joshua Nichols, “Sui Generis Sovereignities: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Sovereignty” in Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett, eds, *Reflections on Canada’s Past, Present and Future in International Law* (Montreal & Kingston: McGill-Queen’s University Press, 2018).

¹⁰ See Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) McGill LJ 308; James Sákéj Youngblood Henderson, “Empowering Treaty Federalism,” (1994), 58 Sask. L. Rev. 241; and Brian Slattery, “The Aboriginal Constitution” (2015) 67 SCLR (3d) 319.

¹¹ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

¹² A detailed legislative history is provided by Kent McNeil in “Challenging Legislative Infringement of the Inherent Aboriginal Right of Self-Government” (2003) 22 Windsor YB Access Just 329 at 333-339, 350-351.

Beyond federal legislation recognizing Indigenous jurisdiction, in 1995, the federal government passed a policy recognizing the inherent right to self-government, but it requires that the implementation of self-government be through negotiated agreements.¹³ Canada has signed 25 self-government agreements across the country involving 43 Indigenous communities. To date, despite criticism, the federal government does not recognize an inherent right to self-government that can be implemented by First Nations unilaterally.¹⁴

For the first time, in 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families*, Canada framed the exercise of First Nation jurisdiction recognized under the act (in relation to child and family services) as an exercise of the inherent right of self-government.¹⁵ Up until this time, First Nation law-making powers in federal legislation, including the *Indian Act*, has been framed as powers granted or ‘delegated’ by the federal government to First Nation. We explain the significance of this in [Section 2.3](#).

2.2 A history of the (modest) evolution of the *Indian Act* by-law powers

Some version of by-laws existed in the earliest versions of the *Indian Act*. The powers band councils could exercise were very small at first but grew over time. There is little literature on how First Nations used by-law powers for the first hundred years of confederation. We only start to hear about First Nations’ use of by-laws in the 1960s. One reason why by-laws were probably used infrequently is because of the role of Indian agents, who often exercised significant control over matters on reserve on behalf of the government. The Indian agent role began to be phased out in the 1960s and was abolished in 1971.¹⁶

It appears that the 1970s and 80s were a period of increased use of by-law powers, and experimentation and innovation occurred. Bands passed laws based on broad interpretations of their powers, and some communities, such as Kahnawake, used their powers to create courts and tribal police. However, starting in the 1980s, Canadian courts began issuing decisions giving a narrow interpretation to the by-law powers. This is reviewed further in [Section 5.2](#).

There are three types of by-law powers in the *Indian Act*:

- (1) **Section 81(1) by-laws** – the provision gives a list of about 22 varied subjects over which bands can pass laws. Until December 2014, if a First Nation government sought to enact

¹³ Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (August 1995) (“Inherent Rights Policy” or “IRP”), [online](#). See also Naiomi Metallic, “Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning RCAP’s Aboriginal Nation Recognition and Government Act” in *Redefining Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) [Metallic, “Ending Piecemeal”].

¹⁴ Crown Indigenous Relations and Northern Affairs website, “Self-Government,” [online](#), last accessed on Oct. 4, 2019.

¹⁵ *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, ss 8 and 18(1).

¹⁶ Don Clairmont, *Aboriginal Policing in Canada: An Overview of Developments in First Nations Communities* (Commissioned by the Ipperwash Inquiry). Toronto (ON): Government of Ontario.

a s. 81(1) by-law, s. 82 of the *Indian Act* gave the department the final say over whether that by-law could take effect. This was known as the “disallowance power.”

- (2) **Section 83 ‘money by-laws’** – the provision gives a list of eight subjects that bands can pass laws over including taxation of interests in the reserve, licensing of business and trades, charging interest and spending and raising of money. These by-laws have to be approved by the minister.
- (3) **Section 85.1 ‘intoxication by-laws’** – the provision gives the band the powers to make laws prohibiting the sale, barter, supply, possession or consumption of intoxicants. This power was added to the *Indian Act* in 1985 as part of the Bill C-31 amendments.¹⁷ These by-laws do not need to be approved by the minister but have to be consented to by band members through a majority referendum vote.

In 1988, changes known as the ‘Kamloops Amendments’ were made to the *Indian Act* land surrender laws to make it easier to lease reserve land. Instead of having to surrender lands for leasing, a new category of ‘designated’ lands was created.¹⁸ This made it easier to lease and tax leasehold interests. To facilitate the taxation of leased reserve lands by several First Nations, the Indian Taxation Advisory Board (“ITAB”) was created to provide support, advice and model by-laws to Bands who wish to exercise their taxation power under the *Indian Act*. ITAB was renamed the First Nations Tax Commission (“FNTC”) in 2007.

Returning now to s. 81(1) by-laws, we generally saw a stagnation in the exercise of these powers in the 1990s, due to narrow definitions given to these by-law powers by the courts and INAC. INAC generally took the position that bands could not pass laws that overlapped with other federal or provincial laws and would disallow such by-laws.¹⁹ This position is questionable in light of modern constitutional and interpretation rules as will be discussed further below.

The year 1996 saw the release of the *Royal Commission on Aboriginal Peoples Report* (“RCAP”). RCAP identified the *Indian Act* as paternalistic and assimilative, and criticized the by-law powers as inadequate and presenting several challenges for enforcement.²⁰ RCAP called for the dismantling of the *Indian Act* and transforming the current Crown-Aboriginal relationship into a nation-to-nation relationship, marked by treaty renewal and negotiations and the exercise of the inherent rights of self-determination and self-government by Aboriginal people. Volume 2 of RCAP recommended a series of actions and legislative reforms that would need to occur both in the interim and long term to achieve this new relationship.²¹

¹⁷ *An Act to Amend the Indian Act*, RSC 1985, c 32 (1st Supp), s 16.

¹⁸ To read more about the Kamloops Amendments see *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 SCR 657.

¹⁹ See, for example, positions in the *By-Laws Manual*, *supra* note 6 at 3-2.

²⁰ Report of the Royal Commission of Aboriginal Peoples: Looking Forward, Looking Back, vol 1 (Ottawa: Supply and Services Canada, 1996), Chapter 9 – The Indian Act [RCAP] at 236-267.

²¹ See Metallic, “Ending Piecemeal,” *supra* note 13.).

Terminology note: *The meaning of self-determination and self-government*

Self-determination - the right of Indigenous peoples to choose their destinies, including the right to negotiate the terms of their relationship with Canada and choose a governmental structure that meets their needs.²² Self-determination includes the right to self-government.²³

Self-government - the ability of Indigenous peoples to enforce their own rules, resolve disputes, problem-solve, and establish their own governing institutions to carry out these tasks.²⁴

Unfortunately, the then-Liberal government of Jean Chrétien was less than enthusiastic about RCAP's proposals on self-government and a nation-to-nation relationship. In its response to the RCAP Report, entitled *Gathering Strength — Canada's Aboriginal Action Plan*, the government committed to providing Aboriginal communities with "the tools to guide their own destiny and to exercise their inherent right of self-government."²⁵ However, Canada remained unwilling to accept the unilateral exercise of inherent self-government by Indigenous peoples, even over matters internal to First Nations groups, and continued to define self-government as "well-defined, negotiated arrangements with rights and responsibilities that can be exercised in a coordinated way."²⁶ Instead of implementing the sweeping transformative change recommended by RCAP, the government committed to strengthening the governance provisions in the *Indian Act*, including by 'reorganizing and modernizing' the by-law powers.²⁷

In this regard, the government formed a Joint Ministerial Advisory Committee (JMAC) to advise it on changes to the *Indian Act*.²⁸ JMAC recognized that First Nations are stuck with the *Indian Act* until self-government agreements are negotiated and admitted it was an outmoded, archaic, and anachronistic statute, especially as it related to governance. The committee identified significant gaps in the *Indian Act*, both procedural and substantive. On by-law enforcement, the **JMAC commented that, overall, the existing framework is problematic**

²² RCAP, *supra* note 20, Vol. 2 at 161-165.

²³ *Ibid* at 166.

²⁴ See Stephen Cornell, Catherine Curtis and Miriam Jorgensen, "The Concept of Governance and its Implication for First Nations," (2004) [online](#).

²⁵ Address by the Honourable Jane Stewart, Minister of Indian Affairs and Northern Development on the Occasion of the Unveiling of *Gathering Strength — Canada's Aboriginal Action Plan*, Ottawa, Ontario (7 January 1998).

²⁶ Scott Serson, "Reconciliation: For First Nations This Must Include First Fairness" in *Aboriginal Healing Foundation et al, Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation, 2009) 147.

²⁷ See Library of Parliament Legislative Summaries, "Bill C-7: the First Nations Governance Act" (Ottawa: 10 October 2002, revised 18 December 2003); Frank Cassidy, F., "The First Nations Governance Act: A Legacy of Loss" Policy Options – The Public Forum for the Public Good, April 1, 2003; and John Provart, "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 *Indigenous LJ* 177.

²⁸ The Final Report of the Joint Minister Advisory Committee on Recommendation and Legislative Options to the Honourable Robert Nault, P.C., M.P., *Minister of Indian and Northern Affairs* [JMAC] dated March 8, 2002, [online](#).

because there are not enough enforcement officers and prosecutors, fines are too low to be a deterrent, there is no ticketing scheme, and penalties under the Indian Act are limited to fines and imprisonment.²⁹

Many of the recommendations by the JMAC Report worked their way into Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other acts* (the “First Nations Governance Act” or “FNGA”).³⁰

Interestingly, one recommendation the federal government did not adopt was the suggestion to amend the *Indian Act*, instead of introducing stand-alone legislation, which is what happened. Ultimately, the *FNGA* died on the order paper in 2002, as several First Nations leaders were not willing to accept small tinkering with the *Indian Act* as a substitute for RCAP’s recommendations. However, the comments by JMAC on the existing by-law powers and the enhancements sought to be added by the *FNGA* are instructive on the gaps in by-law powers and how to fill them and will be referenced in later chapters.

The next (and last) time changes to the by-law powers were attempted was in 2014 under Stephen Harper’s Conservative government. A private members’ bill, introduced by Rob Clarke, one of the few Aboriginal Members of Parliament in the government, called for the repeal of certain provisions in the *Indian Act* deemed to be antiquated or paternalistic.³¹ These changes included the repeal of the disallowance power for s. 81(1) by-laws and the requirement to send copies of intoxication by-laws to the minister, and some tweaking of the rules around publication and collection of fines.³² Beyond this, the by-law powers were left intact (including the requirement for ministerial approval of s. 83 money by-laws), and no additional by-law powers or enforcement procedures were added despite earlier attempts to address inadequacies in the by-law powers under the *FNGA*.

Although originating as a private members’ bill, the rest of the members of the Conservative Party eventually supported it and, in December 2014, the amendments came into effect. On first reading, Mr. Clarke introduced the proposed repeal of the disallowance power as “return[ing] control of the publication of by-laws to first nations’ governance bodies.”³³ On second reading, the Parliamentary Secretary to INAC described the object of the changes as “plac[ing] responsibility for these by-law-making powers squarely back in the hands of the First Nation, where it belongs...”³⁴ An INAC online article on the amendments at the time, described the result of repealing the disallowance power as follows, “[a]s a result [of the repeal], First Nations will have autonomy over the enactment and coming into force of by-laws and the day-

²⁹ JMAC is referenced frequently throughout this report. It is an online document with no page reference. There is no way to pinpoint it.

³⁰ 2nd sess, 37th Parl, 2002.

³¹ *An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement*, SC 2014, c 38, [online](#).

³² For a description of the changes, see Indigenous and Northern Affairs Canada, “Overview of Bill C-428 - Amendments to the *Indian Act*,” [online](#).

³³ House of Commons Debates, 41st Parl, 1st Sess, Vol 146, No 133 (4 June 2012) (Rob Clarke).

³⁴ House of Commons Debates, 41st Parl, 1st Sess, Vol 146, No 187 (28 November 2012) (Greg Rickford).

to-day governance of their communities.”³⁵ It has been argued that these changes give a lot more room for First Nations to pass by-laws in a wider range of areas than INAC had restricted them to in the past.³⁶ This is discussed further below in [Chapter 5](#).

Since these amendments to the *Indian Act* in 2014, as confirmed by ISC staff (see [Section 1.1.2.1](#)), ISC has had less involvement in by-laws. Sections 81(1) and 85.1 by-laws are no longer sent to the department for disallowance. After the amendments in 2014, ISC discontinued previously offered services including the development of resource materials and draft by-law templates, providing advice on by-laws and holding regular training sessions. We have been advised by ISC that these services were reinstated in 2019 and it will review s. 81(1) by-laws of First Nations upon request. However, this is not widely publicized, and the unit’s services are not mentioned on ISC’s website.³⁷

A 2021 Report of the House of Commons Standing Committee on Indigenous and Northern Affairs has said more has to be done at the federal level to support the development of First Nations laws and by-laws to ensure their effective enforcement and prosecution. It recommended the creation of a federal advisor to the government on First Nations laws and by-laws, the development of more educational tools and guides to support each step of by-law development, the creation of a working group on enforcement and prosecution issues, as well as the creation of a First Nation Centre of Excellence for Knowledge-Sharing on Enforcement and Justice issues.³⁸

2.3 The status of *Indian Act* by-laws: federal laws

As noted at the end of [Section 2.1](#), the *Indian Act* by-law powers are generally perceived as law-making powers *granted* or *delegated* to First Nations by the federal government, as opposed to an exercise of *inherent* powers.

Terminology note:

Delegated powers – assumes there is a hierarchy of power where the federal and provincial governments hold *primary* power based on the *Constitution Act, 1867*, and they can grant some of this power to *secondary* governments of their creation (called ‘subordinate’ governments),³⁹ as follows:

Provincial government → Municipal governments

Federal government → Territorial governments

³⁵ See “Overview of Bill C-428 - Amendments to the *Indian Act*,” *supra* note 32.

³⁶ Naomi Metallic, “Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later” (2016) 67 UNBLJ 211 [Metallic, “A Viable Means”].

³⁷ Accessed “By-law and enforcement” link through ISC [main page](#) (last accessed on February 2, 2021).

³⁸ [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#), *supra* note 5 at recommendations 1-3 and 10.

³⁹ The power of federal and provincial governments to delegate their powers is not expressly set out in the *Constitution Act, 1867*, but has long been recognized by the courts as an implied or ancillary power of these governments. For more, see Peter Hogg, *Constitutional Law of Canada*, 5th ed (loose-leaf), at c 14, “Delegation”.

Federal government → First Nations/*Indian Act* governments⁴⁰

Inherent powers – assumes that Indigenous governments have power on the same level as the federal and provincial governments because Indigenous nations existed here prior to the arrival of Europeans and never ceded or surrendered their right to sovereignty/self-determination and self-government. This right is also supported by international law principles.⁴¹

Several implications arise from the characterization of *Indian Act* by-law powers as *delegated* powers and subordinate laws. We divide these implications into two categories: (1) legal; and (2) public perception.

2.3.1 Legal implications

As an exercise of law-making powers delegated under federal legislation, ***Indian Act* by-laws fall under the designation of a federal “regulation” under s. 2(1) of the federal *Interpretation Act*.**⁴² By-laws thereby **also become “enactments”** under the *Interpretation Act*.⁴³ Section 34(2) of the *Interpretation Act* provides for a default rule that all non-indictable **offences set out in ‘enactments’ will be prosecuted through the summary conviction process in the *Criminal Code* unless some other process is set out in the law.**⁴⁴

Side note:

Indian Act band councils have also been found to be a “federal board” within the meaning of “federal board, commission or tribunal” as defined in *Federal Courts Act*.⁴⁵ This is relevant to what court can hear a judicial review from band council decisions under by-laws, as we discuss in [Section 8.2.2.1](#).

⁴⁰ Note that it is also possible for provincial and territorial governments to delegate jurisdiction to First Nations governments. For example, the Quebec legislation allows for both the delegation of policing and child welfare services to First Nations: see *Police Act*, CQLR c P-13.1, ss. 90-93 and *Youth Protection Act*, CQLR c P-34.1, s 37.5.

⁴¹ On the difference between ‘delegated’ and ‘inherent’ jurisdiction see Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments”, Research Paper for the National Center for First Nations Governance, Oct. 11, 2007, at 3. On the protection of the right self-determination and self-government in international law, see Centre for International Governance Special Report, *UNDRIP Implementing – Braiding International, Domestic and Indigenous Laws*, May 31, 2017, [online](#).

⁴² *Interpretation Act*, RSC 1985, c I-21, at s. 2(1): “**regulation** includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of a power conferred by or under the authority of an Act... .”

⁴³ *Ibid* at s. 2(1): “**enactment** means an Act or regulation or any portion of an Act or regulation.”

⁴⁴ *Ibid* at s. 34(2).

⁴⁵ *Federal Courts Act*, RSC 1985, c F-7, s. 2(1). See *Gabriel v. Canatouquin*, [1980] 2 F.C. 792; *Frank v. Bottle*, [1994] 2 CNLR 45; *Gamblin v. Norway House Cree Nation Band*, [2013] 2 CNLR 193.

In passing by-laws, as a delegated federal jurisdiction, **First Nations will generally be bound by many similar legal obligations that the federal government is bound to under the *Charter*, the *Canadian Human Rights Act*, common law administrative law duties and even s. 35 Aboriginal and treaty rights** (provinces and municipalities are also bound by similar obligations). However, there are some ways the application of these obligations might apply differently to First Nations governments (as opposed to other governments), but the law on this is at an early stage of development. This is discussed further below.

There are a few ways in which a First Nation government could be challenged for failure to meet the above-noted obligations:

- ✳ While prosecuting the by-law, the alleged offender may argue all or parts of the by-law are not a valid exercise of jurisdiction under the *Indian Act*, and so the charges should be dropped.
- ✳ Similarly, during a by-law prosecution, the alleged offender could argue that all or parts of the by-law violated their *Charter*, s. 35 rights, or their rights to procedural fairness and is therefore invalid, and the charges should be dropped.
- ✳ A band member or resident could challenge a decision made under a by-law by judicially reviewing it. Here there is no prosecution; the member or resident takes the First Nations government to court on the basis that a decision under the by-law lacked jurisdiction, or violated a *Charter*, s. 35 or procedural fairness.
- ✳ A Band member or resident could claim a decision under a by-law or the by-law itself results in discrimination under the *Canadian Human Rights Act*.

The adjudicative forums (court, tribunals, etc.) in which the above-noted disputes might be heard will be discussed further in [Chapter 8](#). There, we also discuss the possibility of First Nations justices of the peace and courts or tribunals hearing these matters.

Below we discuss key issues that can arise in relation to First Nations governments being subject to the legal instruments and obligations noted above.

2.3.1.1 The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* is a part of the *Constitution Act, 1982*. It sets out several guaranteed rights and freedoms, including democratic and mobility rights, freedoms of religion, conscience, expression, assembly and association, legal rights including protection from unreasonable search, seizure and detention, the right to equality, and several provisions assisting in the interpretation of these rights and balancing the right of governments to pursue collective goals.

The question of the application of the *Charter* to First Nations governments has been contentious, with First Nations people on both sides of the issue. A lot of the attention around this issue came after the passing of Bill C-31, re-admitting to Indian status thousands of First Nations women and their children who had lost their status on account of discriminatory

registration rules in the *Indian Act*, which was in part a response to the *Charter*. The Sawridge Band challenged Bill C-31 as a violation of Aboriginal rights, pitting s. 35 rights against equality rights under the *Charter*, and lost.⁴⁶ Other cases challenging Band resolution and policies excluding Bill C-31 women were brought to the Canadian Human Rights Tribunal around this time with the complainants generally being successful.⁴⁷

Although one noted Aboriginal law scholar argued early on that the *Charter* should not apply to *Indian Act* by-laws even as federal instruments,⁴⁸ there have been several cases since the mid-1990s that have held that the *Charter* applies to by-laws and other policies and decisions of First Nation governments that arise from the *Indian Act*. These involved arguments about freedom of expression (s. 2(b))⁴⁹, the right to be free from unreasonable search, seizure and arbitrary detention (ss. 8-9),⁵⁰ and the right to equality (s. 15).⁵¹

Whether the *Charter* applies to the exercise of self-government under self-government and comprehensive claim agreements and the inherent right is less clear. Often in negotiations, Canada insists that the *Charter* must apply to law-making powers under self-government agreements. However, a case about whether the *Charter* applies to a Yukon First Nation's self-government agreement that does not reference the *Charter* is heading to the Supreme Court of Canada in the winter of 2023.⁵² The case could have large implications not only for self-

⁴⁶ *Sawridge Band v. R.*, [1995] FCJ No 1013, [1995] 4 C.N.L.R. 121.

⁴⁷ *Courtois v. Canada (Department of Indian and Northern Affairs)*, 1990 CanLII 702; *Raphael v. Montagnais du Lac Saint-Jean Council*, 1995 CanLII 2748 (CHRT).

⁴⁸ See Kent McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2003) Vol. 7 *Citizenship Studies* 481.

⁴⁹ See *Horse Lake First Nation v Horseman*, 2003 ABQB 114 and 2003 ABQB 152, finding s. 2(b) applies to a decision of the First Nation government to ban protestors from band office. In *Siksika Nation v Crowchief*, 2016 ABQB 596, s. 2(b) not found to apply as Band acting in private and not governmental capacity. See also Lindsay McKay-Panos A-Blawg post, "The Application of the Charter to a Protest on the Siksika Nation", Nov. 22, 2016, [online](#).

⁵⁰ *R v. Kakepetum*, 1992 CarswellOnt 3482, 18 WCB (2d) 360 (Ont. Prov. Div.), regarding search under intoxication by-law. Search held to be reasonable. *Nakochee v. Linklater*, [1993] O.J. No. 979 (Ont. Gen. Div.), search under intoxication by-law found to be reasonable. *R. v. Hatchard*, [1993] 1 C.N.L.R. 96 (Ont. Gen. Div.), *Charter* likely applies to search on reserve by First Nations police. *R v. Winter*, 2008 CarswellOnt 7606, search under intoxication by-law subject to *Charter*, but no unreasonable search.

⁵¹ *Six Nations of the Grand River Band Council v. Henderson*, [1997] 1 CNLR 202 (Ont Ct J (Gen Div)), involving a "marry out, get out" residency by-law. Discrimination found justified on the basis of s. 1. In *Miller c. Mohawk Council of Kahnawà:ke*, 2018 QCCS 1784, the MCK conceded the *Charter* applied to a 'marry-out, get out' law. Discrimination found unjustified. There have been also number of cases involving the application of s. 15 of the *Charter* to membership and election codes: *Clifton v. Hartley Bay Indian Band*, 2005 FC 1030; *Grismer v. Squamish Indian Band*, 2006 FC 1088; *Thompson v. Leq'á:mel First Nation*, 2007 FC 77; *Cockerill v. Fort McMurray First Nation No. 468*, 2010 FC 337; *Joseph v. Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548, 2015 SCC 30; and *Clark v. Abegweit First Nation Band Council*, 2019 FC 721.

⁵² See *Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22, aff'd 2021 YKCA 22, accepted for leave to appeal to the SCC. Note that two cases involving the same intoxication by-law passed under the *Cree-Naskapi Act* (implementing the James Bay Agreement) also find that the *Charter* applies: *Band (Eeyouch) c. Napash*, 2014 QCCQ 10367 and *Cookish c. Cree Nation of Chisasibi*, 2018 QCCQ 11867. In these cases, it was debated whether the by-laws were exercises of inherent jurisdiction versus delegations of jurisdiction under the *Act respecting the land*

governing First Nations but also for the *Charter's* application to Indigenous governments more generally.⁵³ The case could provide a new framework to approach *Charter* applications to Indigenous governments in the future.⁵⁴

The RCAP report took the position that the *Charter* ought to apply to the exercise of First Nations self-government.⁵⁵ Similarly, the recent MMIWG report, in applying a human rights and Indigenous rights-based lens, strongly suggests the *Charter* ought to guide the governance of First Nations communities as well as other governments.⁵⁶ The MMIWG report addressed head-on the arguments that collective Indigenous rights and human rights conflict. The report suggests that the bridge to this conflict is tying individual rights protections to Indigenous legal orders:

If we accept that different cultures and nations can make the concept of human rights authentically their own by articulating them within their existing Indigenous rights systems, the two concepts of "Indigenous rights" and "human rights" complement each other and remain grounded in the lived experiences of those who experience injustice.⁵⁷

Although there have been several cases applying the *Charter* to *Indian Act* by-laws, there remain several questions about how the *Charter* might apply to First Nations laws in a way that respectfully balances individual and community needs, including Indigenous customs, laws and jurisdiction. David Milward's book *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* provides an in-depth examination with several examples of how the legal rights in the *Charter* could be applied in a culturally sensitive way to Aboriginal justice initiatives that reflect Indigenous laws.⁵⁸ Some recent court decisions are starting to reflect this approach in considering the justification of *Charter* violations in the Indigenous context.⁵⁹

A further relevant area that is underdeveloped is s. 25 of the *Charter*. The provision directs that the rights protected in the *Charter* "shall not be construed so as to abrogate or derogate from

regime in the James Bay and New Québec territories, CQLR c R-13.1, which Quebec passed to implement the James Bay Agreement. The Quebec Court was of the view that these were instances of delegated jurisdiction to which the *Charter* applied. See also *Linklater v. Thunderchild First Nation*, 2020 FC 1065, at para. 38-44, which suggests that, even if custom election laws and constitutions are exercises of inherent jurisdiction (as opposed to *Indian Act* delegations), the *Charter* may apply given the various "contact points" between Indigenous laws and Canadian law.⁵³ For a collection of articles discussing the potential implications of the case, see Vol 31.2 Centre for Constitutional Studies, Special Issue – *Dickson v Vuntut Gwitchin First Nation case (2022)*, [online](#).

⁵⁴ For a discussion on how courts ought to approach the *Charter* application to Indigenous governments, see Naomi Metallic, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments" in *Constitutional Forum* collection, *ibid* ([online](#)).

⁵⁵ RCAP, *supra* note 20, Vol. 2 at 160.

⁵⁶ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place – Executive Summary of the Final Report*, June 2019, [online](#), at 54 [MMIWG Report Executive Summary].

⁵⁷ *Ibid* at 16.

⁵⁸ David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*, (UBC Press: Vancouver, 2012) at Chapter 5.

⁵⁹ See *Dickson v. Vuntut Gwitchin* *supra* note 22 and *Linklater v Thunderchild First Nation*, *supra* note 22.

any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples... .”⁶⁰ There have only been two Supreme Court of Canada cases that have discussed s. 25.⁶¹ In his minority decision in *R v Kapp*, Bastarache J. recognized that s. 25 would act as a shield to protect the rights of Indigenous peoples from *Charter* complaints by non-Indigenous people and could apply broadly to statutory rights protections for First Nations,⁶² including *Indian Act* by-laws.⁶³ However, the majority in the case would have limited the interpretation of “other rights or freedoms” to rights of a ‘constitutional character’.⁶⁴ The majority did not expand on the meaning of this phrase, and this ambiguity has led to lower courts adopting different approaches to its meaning.⁶⁵ The upcoming Supreme Court of Canada case about whether the *Charter* applies to a Yukon First Nations’ self-government agreement, *Dickson v Vuntut Gwitchin*, is expected to provide greater clarity about the interpretation of s. 25.⁶⁶

Area for further research:

How by-laws and other First Nations laws will interact with *Charter* rights is an area that requires further scholarship and analysis, possibly looking to how other countries with pluralistic legal cultures respect the legal systems of minority communities.

It is likely that, as Mi’kmaq communities start to exercise greater jurisdiction, through by-laws or other means, individual rights protections conflicting with community aspiration will be a prominent source of tension. The growing movement within Canadian courts to show deference to Indigenous laws (discussed further below in [Section 2.9.6](#)) suggests that if First Nations go through the effort to work through how to properly balance individual and collective rights, based on their own history, legal principles and needs, judges will be inclined to respect where the communities decide to strike the balance. In a 2019 case involving a *Charter* challenge to a First Nations’ election law, the Federal Court suggested that evidence that the First Nation followed “a genuine process... to balance the interests of the two categories of members” would be an important factor in deciding a *Charter* violation.⁶⁷

Area for further research:

The Mi’kmaq of Nova Scotia may want to engage in a study of what their own legal principles on protecting individuals are and how these compare and contrast with the protection in the

⁶⁰ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 1, s. 25.

⁶¹ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 per L’Heureux-Dubé J. concurrence; and *R. v. Kapp*, [2008] 2 SCR 483, 2008 SCC 41 per Bastarache J.

⁶² *Kapp*, *ibid* at paras 101-107. Bastarache J. also suggested that s. 25 may only apply to shield claims by non-Indigenous *Charter* claims against First Nations government, not inter-group claims: see para. 99.

⁶³ *Ibid* at para. 100.

⁶⁴ *Ibid* per McLachlin CJ and Abella J at para. 63.

⁶⁵ In *Band (Eeyouch) c. Napash*, *supra* note 52, the Quebec Superior Court held that to be of ‘constitutional character’ a First Nations’ law would have to be based on an Aboriginal right as proven under the *Van der Peet* test (integral to a distinctive culture) adopted in *R. v. Pamajewon*, [1996] 2 SCR 821. This limit was questioned by both the YKSC and YKCA in *Dickson v. Vuntut Gwitchin First Nation*, *supra* note 52.

⁶⁶ *Dickson v. Vuntut Gwitchin First Nation*, *supra* note 52.

⁶⁷ *Awashish v. Conseil des Atikamekw d’Opitciwan*, 2019 FC 1131 at para. 27.

Charter. As suggested by the MMIWG report, Indigenous laws may well serve as the bridge between balancing individual and community rights.

2.3.1.2 The Canadian Human Rights Act

The *Canadian Human Rights Act* (“CHRA”) applies to decisions and laws of First Nations governments when they exercise delegated decision-making under by-laws. The CHRA is a law passed by the federal government in 1977 to provide individuals with access to human rights protection by allowing them to file complaints of discrimination in employment and the provision of services within federal jurisdiction on 11 protected grounds (e.g., race, religion, gender, sexual orientation, etc.).⁶⁸

Until 2011, section 67 of the CHRA shielded complaints of discrimination against First Nation governments arising directly out of the *Indian Act*.⁶⁹ This included *Indian Act* by-laws. Section 67 was inserted into the CHRA when the law was created and was supposed to be a temporary measure to permit First Nations and Canada time to negotiate how to make the *Indian Act* human rights compliant. This never happened and s. 67 stayed in place for over 30 years. Several years of lobbying by human rights and international advocates and the Native Women’s Association of Canada (“NWAC”) finally resulted in the repeal of s. 67. This now means that *Indian Act* by-laws can be subject to discrimination complaints under the CHRA.

Similar to the *Charter*, the CHRA presents the possibility of tensions between the protection of individuals from discrimination and collective rights. As a result of this, during the law amendment process of the CHRA to remove s. 67, Indigenous advocacy organizations like NWAC and the Assembly of First Nations (“AFN”) insisted that there be an interpretive clause included in the bill to ensure that the Canadian Human Rights Commission, Tribunal, and the courts strike a balance between collective and individual human rights and ensure the use of Indigenous legal traditions to address conflicts that could arise with repeal. In particular, the AFN stated:

This is of particular concern to First Nations given that the Human Rights Commission, Tribunal and the CHRA itself has evolved in context of protecting individual human rights, and has not been informed by the unique constitutional and cultural realities of First Nation peoples. Traditional knowledge and laws ought to be considered and accommodated by a human rights adjudicator when seeking a balance between competing individual and collective rights. This can be most readily achieved through an interpretive provision.⁷⁰

⁶⁸ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“CHRA”).

⁶⁹ *Ibid.* Section 67 read, “Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.”

⁷⁰ Assembly of First Nations, *First Nations Perspective on Bill C-44 (Repeal of Section 67 of Canadian Human Rights Act)* – A submission to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, March 29, 2007, at 9.

The AFN also recommended that a non-derogation clause be inserted in the Bill to ensure that established Aboriginal and Treaty rights would not be negatively impacted by the application of the *CHRA*. As a result of this, the final amendments to the *CHRA* included both an interpretive clause and non-derogation clause. These clauses read as follows:

Aboriginal rights

1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

Regard to legal traditions and customary laws

1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.⁷¹

Like with the *Charter*, the application of these provisions seeking to establish a balance between individual and collective rights remains fairly underdeveloped to date. To our knowledge, there is no decision from the Canadian Human Rights Tribunal (“CHRT”) to date interpreting the s. 1.1, the non-derogation clause. There has only been one CHRT case to date that has considered s. 1.2, the interpretive clause, and the ruling exhibited a lack of appreciation and deference to Indigenous custom.⁷²

Areas for further research:

How by-laws and other First Nations laws will interact with the *CHRA* is an area that could benefit from further scholarship and analysis.

⁷¹ *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30, ss 1.1 and 1.2.

⁷² In *Tanner v Gambler First Nation*, 2015 CHRT 19, the Tribunal refused to accept evidence that a long-standing hereditary descent rules in the First Nation was sufficient to establish a “custom”, treating the occurrence instead as simply coincidental: “Even if I could make a finding that all of the Nation’s past Chiefs were descendants of John (Falcon) Tanner, I do not find that this would be determinative of the existence of a “custom.” Of the Nation’s 256 members, only 4 or 5 are non-bloodline. In view of this, it would not be surprising that no non-blood descendant served as Chief. In other words, while there may be a practice of having Chiefs that are bloodline, this reality may simply exist due to the demographics of the Nation and does not lead to the conclusion that there is a broad consensus amongst the members of the Band that non-bloodline members are ineligible for this position” (at para. 100).

The Mi'kmaq of Nova Scotia may want to engage in a study of what their own legal principles on protecting individuals are and how these compare and contrast with the protection in the *CHRA*.

As noted at the outset of this section, to bring a complaint before the CHRT, a Band member or resident could claim a decision under a by-law or the by-law itself results in discrimination under the *CHRA*. In 2018, the Supreme Court of Canada decided that two complaints directed at the Indian status provision in s. 6 of the *Indian Act* could not proceed under the *CHRA* but had to be brought as *Charter* claims.⁷³ The rationale was that, as worded, the *CHRA* does not permit challenges to legislation *per se*, but instead has to be focused on government actions taken under legislation. A question arising in the aftermath of that case is whether similar reasoning would extend to *Indian Act* by-law provisions (or other First Nations laws) that are discriminatory on their face (as opposed to being applied in a discriminatory way by a First Nation).⁷⁴ This would mean that a complaint of discrimination against a by-law would have to proceed by way of a *Charter* claim instead of through the Canadian Human Rights Commission.

2.3.1.3 Section 35 of the Constitution Act

While liability for breaching Aboriginal and treaty rights normally lies with the federal and provincial governments, although these are collective rights, the Supreme Court of Canada noted in *Behn v Moulton Contracting Ltd.*, that these rights can have both “collective and individual aspects” and “in appropriate circumstances, individual members can assert Aboriginal or treaty rights.”⁷⁵ This raises the possibility that an individual community member could assert a violation of their individual or treaty rights against their First Nation government. To date, we have seen Aboriginal and treaty rights arguments made against First Nation governments in a couple of cases (though they were not decided on this basis).

In one case, a member of the Sipekneka'tik First Nation challenged the decision of her band not issuing her fishing quota under the band's commercial communal fishing license as a violation of her treaty rights.⁷⁶ The Federal Court addressed the case by applying administrative law principles and found it unnecessary to have to address the treaty rights argument.

In a 2018 case involving a challenge to a Band Council Resolution (“BCR”) to banish a band member for drug trafficking, the member alleged that the BCR breached his right to exercise Aboriginal and treaty rights on the reserve, as well as his right to procedural fairness and certain *Charter* rights.⁷⁷ The hearing was not heard on the merits but was on an application to

⁷³ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31.

⁷⁴ This possible implication of the case was raised by the First Nations Caring Society in its intervention before the Supreme Court of Canada in this case. However, the Court did not deal with this issue in its decision leaving uncertainty as to what will happen. See SCC intervener factum of the First Nation Caring Society in *Canadian Human Rights Commission v Canada*, court file no. 37280, [online](#).

⁷⁵ *Behn v. Moulton Contracting Ltd.*, SCC 26 at para. 33.

⁷⁶ See *Maloney v. Shubenacadie First Nation*, 2014 FC 129.

⁷⁷ *Solomon v. Garden River First Nation*, 2018 FC 1284.

stay enforcement of the BCR. While the judge held that the BCR might be invalid based on procedural fairness, the balance of convenience favoured the band and upholding the decision to banish the band member until trial. The argument on the BCR breaching Aboriginal and treaty rights was not decided.

2.3.1.4 Administrative law

As a delegated federal government, the decisions of First Nations governments have been subject to administrative law remedies when acting as a government. When acting more like a private individual (e.g., in some cases of contracting) administrative remedies may not apply.⁷⁸

Administrative law is primarily made up of judge-made rules to ensure a certain level of accountability on behalf of government actors. Generally, there are three types of administrative law challenges:

1. Challenges to a decision maker's jurisdiction

As a delegated lawmaker, the exercise of jurisdiction must be tied to the law granting the jurisdiction (often called the 'enabling legislation'). Here, this is the *Indian Act*, specifically its by-law provisions. This means that, while ISC no longer approves s. 81(1) or 85.1 by-laws, the courts can be called upon to assess the validity of a by-law (i.e., whether the First Nation had jurisdiction to pass it under the *Indian Act*). The court will decide whether a reasonable interpretation of the by-law provisions can support the exercise of by-law powers in a given case. We look at how far the by-law provisions can be interpreted in [Chapter 5](#).

2. Challenges to a decision maker's process (duty of procedural fairness)

Generally, all government decision-makers are expected to provide procedural fairness in their dealings with individuals and groups. This duty has been enforced against First Nations governments by Canadian courts on several occasions. In a 1993 case, the Federal Court suggested that First Nations' self-government aspirations do not change this fact:

I fully recognize that the political movement of Aboriginal people taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them.⁷⁹

⁷⁸ See *Attawapiskat First Nation v. Minister of Aboriginal Affairs and Northern Development*, 2012 FC 948 at para. 55-62; *Peace Hills Trust Co v. Moccasin*, 2005 FC 1364; *Cottrell v Chippewas of Rama Mnjikaning First Nation*; 2009 FC 261; *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2009 FC 812; *Luc des Roches v. Wasauksing First Nation*, 2014 FC 1126, aff'd 2015 FCA 234; *Siksika Nation v Crowchief*, 2016 ABQB 596.

⁷⁹ *Sparvier v. Cowesses Indian Band*, [1993] 3 FC 142 (election challenge), per Rothstein J.

That said, it should be noted that the duty of procedural fairness is flexible and is context-specific.⁸⁰ Depending on the context, it can take the shape of the band having to give notice to someone of an important band decision that will affect them. For example, there have been cases where the decision of a band to banish or evict someone under a by-law or BCR has been set aside because of a lack of procedural fairness.⁸¹ In some cases, in addition to notice, the duty may require that a person be given the right to make arguments, in writing or orally depending on the circumstances. For example, a Mi'kmaq band's failure to give notice and a chance to respond to a community member concerning a decision on communal fishing quota was set aside.⁸²

The procedural duty of fairness can also take the form of requiring the decision-maker to give reasons for a decision. In one case involving an eviction under a residency by-law, while the court held that the by-law was valid, and the band member in question had been given notice and a chance to respond, the decision was set aside because the band council failed to give reasons for their eviction decision.⁸³

The duty can also be used to allege bias or lack of impartiality by a decision-maker. This can apply to a tribunal or other decision-making body appointed by a First Nation government. However, the courts have emphasized the need to be sensitive to the context in such situations. For example, the Supreme Court in *Canadian Pacific Ltd v Matsqui Indian Band* held that the fact that the members of the community's tax assessment tribunal were band members was not a basis to find structural bias.⁸⁴ The Supreme Court had also held that administrative tribunals are not subject to the same requirement for independence as the courts.⁸⁵

Despite the guidance from the Supreme Court in the 1995 *Matsqui* decision that courts must be sensitive to the First Nation context in applying common law rules, the courts do not always respect this and there have been situations where the courts seem to apply strict common law rules without much or any appreciation of the unique First Nations context.⁸⁶ More recently, however, in response to a growing awareness of the need to respect Indigenous laws (discussed in [Section 2.9.6](#)), we are seeing more instances where judges are attempting to be respectful and defer to First Nations laws and processes. For example, in a recent case challenging the banishment of a community member for drug trafficking and possession under a BCR, the

⁸⁰ The leading case setting out the factors to consider in determining the level of procedural process to provide in giving circumstances is *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817.

⁸¹ See, for example, *Solomon*, *supra* note 77.

⁸² *Maloney v. Shubenacadie First Nation*, 2014 FC 129.

⁸³ *New Credit First Nations v Landry*, 2011 ONSC 1345.

⁸⁴ *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 (SCC).

⁸⁵ *Ocean Port Ltd v British Columbia*, 2001 SCC 52.

⁸⁶ See for example, *Louie v. Louie*, 2015 BCCA 247. The case applies strict fiduciary duty rules to First Nations bands in contrast to the lower court that showed greater appreciation of the First Nation context. The Court of Appeal's decision also demonstrate a shaky grasp of the relevant *Indian Act* provisions, seeming to erroneously interpret the s. 2(3) of the Act to *require* all spending decisions to be put to community vote.

judge, though admitting the BCR would probably fail on procedural fairness grounds, suggested the BCR might nonetheless be saved on the application of Anishinaabe law.⁸⁷

Finally, the Supreme Court has also held that a government can pass laws that deviate from the common law duty to procedural fairness⁸⁸. The courts are expected to respect such laws and give them priority over common law procedural fairness rules unless such laws are shown to be constitutionally invalid (e.g., violate *Charter* rights⁸⁹). This principle was applied in a recent case involving a First Nations' election code and the appeal process set out in the community's election regulations took precedence over the common law duty to procedural fairness.⁹⁰ **This presents the opportunity for First Nations governments to modify procedural fairness rights to respond to their community's legal principles and needs in their by-laws.**

Area for further research:

Similar to our recommendations with the *Charter* and the *CHRA*, the Mi'kmaq of Nova Scotia may want to engage in a study of what their own legal principles on fairness are and how these compare and contrast with the procedural fairness protections under Canadian common law. Such principles could be incorporated into the decision and law-making of the Mi'kmaq and should be entitled to respect and deference from the courts.

3. Challenges to the substance of a decision maker's decision

In addition to challenging decisions of governments that they breached *Charter* rights or Aboriginal and treaty rights, more generally, such decisions can also be challenged on the basis that they are 'unreasonable.'⁹¹ An example could include a decision made under a by-law that is inconsistent with the wording or purpose of the by-law, or inconsistent with a value that is proven important to the First Nation (set out in a policy or a fundamental value under Indigenous law).

Generally, challenges based on reasonableness are difficult to establish because the courts tend to show deference to the wisdom of the decision-maker. It is far more common for a government's decision to be set aside based on procedural fairness than reasonableness.

⁸⁷ *Solomon, supra* note 77 at para. 61. This was an interim decision for an injunction and not a decision on the merits, however.

⁸⁸ See *Ocean Port, supra* note 85 at para. 21-24.

⁸⁹ This includes rights protected under s. 7 of the *Charter*, which protects the right to life, liberty and security of the person from laws or policies that violate a principle of fundamental justice. This has constitutionalized some rules of procedural fairness and may require some stronger duties in cases where an individual's life, liberty and security of the person interests are at stake: see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

⁹⁰ See *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, at para. 53-55.

⁹¹ See *Baker, supra* note 80; *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.

In addition, Canadian courts are becoming increasingly aware of the need to display deference to the decisions of First Nations as a matter of respecting self-government. This is discussed in [Section 2.9.6](#) below.

2.3.1.5 Official Languages Obligations

While the government of Canada has statutory and constitutional obligations to draft and publish its laws in the official languages of English and French, these obligations do not extend to First Nations laws.

Canada's *Official Languages Act* requires that all acts of Parliament be enacted, printed and published in both official languages.⁹² While this also extends beyond acts to "instruments" made under federal laws, First Nations laws, by-laws and other instruments are exempt from this requirement.⁹³

Canada also has constitutional obligations to print and publish its laws in French and English under s. 133 of the *Constitution Act, 1867* and s. 18 of the *Constitution Act, 1982*.⁹⁴ In a case called *Blaikie v Quebec (1979) (#1)*, the Supreme Court of Canada held that the obligation to print and publish laws in both official languages included statutes as well as regulations.⁹⁵ However in a follow-up case, *Blaikie v. Quebec (1982) (#2)*, the court clarified that this does not extend to municipal and school board by-laws.⁹⁶

Relying on these two cases, the Quebec Provincial Court also held that Canada's obligations to pass bilingual laws did not extend to a by-law passed by the Waskaganish Band.⁹⁷ At issue was a public drunkenness by-law enacted under s. 45 of the *Cree-Naskapi (of Quebec) Act*.⁹⁸ The Court further found that by-laws issued under the *Cree-Naskapi (of Quebec) Act* did not constitute the type of delegated legislation coming within s. 133 of the *Constitution Act, 1867* because its preamble and provisions intended band councils to constitute an autonomous level of government when it exercised by-law-making powers. As long as the band council remained within the powers conferred to it under the *Act*, it represented a level of government independent from the Canadian Parliament and the Québec legislature. Although this case involved a band council under the *Cree-Naskapi (of Quebec) Act*, similar reasoning would apply to the powers of band councils to adopt by-laws under the *Indian Act*.

⁹² *Official Languages Act*, RSC 1985, c 31 (4th Supp), s. 6.

⁹³ *Ibid* at s. 7(3)(b) exempts "a by-law, law or other instruments of an Indian band or band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people."

⁹⁴ Section 133 of the *Constitution Act, 1867*, provides in part, "The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages." Section 18(1) of the *Constitution Act, 1982*, states: "The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative."

⁹⁵ *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 SCR 1016.

⁹⁶ *Attorney General of Quebec v. Blaikie et al.*, [1981] 1 SCR 312.

⁹⁷ *Waskaganish Band v. Blackned*, [1986] 3 CNLR 168 (Que. Prov. Ct.).

⁹⁸ *Cree-Naskapi (of Quebec) Act*, SC 1983-84.

2.3.2 Public perception implications

The status of *Indian Act* by-laws as delegated federal laws creates several perceptions by different groups of people, some of which are misperceptions. As a delegated law-maker, First Nations have often been **compared to municipalities**. **Such comparisons have both positive and negative implications**. Based on the comparison, there is **an assumption by some that First Nations possess equal resources and enforcement powers over by-laws as municipalities**. We examine municipalities' resources and powers for by-law enforcement in [Chapter 4](#). As will become apparent in Chapters 5 through 9, for reasons linked to state government neglect and discrimination, First Nations have lesser and unequal resources as compared to municipalities for enforcement of their laws.

First Nations generally dislike the comparison to municipalities as it denies Indigenous inherent jurisdiction, and also exclusively focuses questions of First Nations jurisdiction to reserves and distracts from larger Indigenous claims to land, resources and jurisdiction.⁹⁹

Sidebar: The line between delegated and inherent...

It has been pointed out that the line between delegated and inherent may not be as clear-cut as some perceive it to be.¹⁰⁰ For example, while it is often taken for granted that law-making powers under self-government agreements are an exercise of the inherent power, the British Columbia Court of Appeal has suggested that these are delegated powers.¹⁰¹ In response to this blurring, it has been argued that, from a practical perspective, the distinction between 'delegated' and 'inherent' jurisdiction may be less important than is the need to ensure that First Nations are exercising real decision-making power.¹⁰²

It has also been argued that the exercise of inherent and delegated powers is not mutually exclusive and can be combined. Indeed, there are examples of First Nations by-laws that assert in their preambles that the Nation's exercise of jurisdiction stems both from the *Indian Act* by-law powers and inherent powers.¹⁰³

In the past, particularly in the 1980s, **Canadian courts used to compare First Nations to municipalities to limit innovative interpretations of the *Indian Act* and by-law powers in**

⁹⁹ See Shalene Jobin and Emily Riddle, "The Rise of the First Nation Land Management Regime in Canada: A Critical Analysis," Special Feature for Yellowhead Institute, September 2019, [online](#).

¹⁰⁰ See Metallic, "A Viable Means," *supra* note 36 at 232.

¹⁰¹ See *Chief Mountain v British Columbia (Attorney General)*, 2011 BCSC 1394 at paras 203–288, *aff'd* 2013 BCCA 49, leave to appeal to the Supreme Court of Canada dismissed with costs. For a critique of this decision, see Joshua Nichols, "A Reconciliation without Recollection - Chief Mountain and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515.

¹⁰² See Metallic, "A Viable Means," *supra* note 36 at 232; and see Cornell et al. "The Concept of Governance and its Implication for First Nations," *supra* note 24 at 6.

¹⁰³ See Metallic, "A Viable Means," *ibid* at 232.

favour of broad First Nations jurisdiction.¹⁰⁴ This is because interpretation rules regarding municipalities' law-making powers, as delegated decision-makers, used to be quite strict and literal.¹⁰⁵

Sidebar: Comparison of First Nations to municipalities to further self-government...

In one case from 1994, the similarities between First Nations and municipalities were used positively to find that First Nations are “a community having and exercising the powers of self-government and providing the type of services customarily provided by such a body.” This was used to find that First Nations governments qualified as “municipalities” for the purposes of a tax exemption within s. 149 of the *Income Tax Act*.¹⁰⁶

Taking a narrow approach to the interpretation of municipal by-laws is no longer good law today. The Supreme Court of Canada now favours an approach that shows significant respect for the jurisdiction of other governments, even if they are technically ‘subordinate’ in the legal hierarchy. **Respect for multiple levels of government is mandated by our constitutional principle of federalism.**¹⁰⁷ This principle was used to affirm a broad interpretation of a municipal government’s by-law powers in a 2001 Supreme Court case called *Spraytech*.¹⁰⁸ The Supreme Court has also suggested that significant leeway must be afforded to a municipality’s interpretation of its by-law powers, and the courts will not interfere with such interpretations unless they are unreasonable. And consideration of what is reasonable must account for the broad social, economic and political issues municipal councillors must consider in enacting by-laws.¹⁰⁹ Such respect for delegated law-making should apply equally to First Nations by-laws.¹¹⁰

Some courts have also acknowledged that there are **limits to the comparison** between municipalities and First Nations governments. They have held that while municipalities are truly delegated decision-makers, the **law must be sensitive to the fact of the special nature of**

¹⁰⁴ See *R v Rice*, 1980 CarswellQue 346, [1981] 1 CNLR 71 (Que CA); *R v Stacey*, 1981 CarswellQue 245, 63 CCC (2d) 61 (Que CA); *Whitebear Band Council v. Carpenters Provincial Council Saskatchewan*, 1982 CanLII 2582 (SK CA), [1982] S.J. No. 312; *R v LaForme*, 1995 CarswellOnt 4181, 1 CNLR 193 (Ont Prov Div).

¹⁰⁵ An example of this is the rule that delegated laws cannot create different standards for different residents (i.e., it cannot ‘discriminate’ in a broad sense of the word), unless its enabling statute express or implied allows this. This rule was applied to a First Nations zoning law in *R v Rice*, *ibid*. The ‘discrimination’ rule of interpretation was expressly discarded by the Supreme Court of Canada in *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, 2012 SCC 2.

¹⁰⁶ *Otineka Development Corporation Limited and 72902 Manitoba Ltd. v Her Majesty the Queen*, 1994 CarswellNat 891 at para. 24.

¹⁰⁷ See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, 114957 Canada Ltée (*Spraytech*, *Société d’arrosage*) v *Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241; and discussion of these Metallic, “A Viable Means,” *supra* note 36 at 223-224.

¹⁰⁸ *Spraytech*, *ibid*. For an in-depth discussion of this case and how it implies significant respect for *Indian Act* by-laws, see Metallic, “A Viable Means,” *supra* note 36 at 223-224.

¹⁰⁹ *Catalyst Paper*, *supra* note 105.

¹¹⁰ The application of *Spraytech*, *supra* note 107, to First Nations by-laws was affirmed by the Ontario Court of Appeal in *R v Blackbird* (2005), 74 OR (3d) 241, 248 DLR (4th) 201 (Ont CA). See also Metallic, “A Viable Means,” *ibid* at 223-224.

First Nation governments as governments that pre-date the *Indian Act* and hold inherent powers.¹¹¹ The courts have said that this sensitivity means not applying the strict interpretation rules applicable to municipalities.¹¹² These cases support respect for and deference to First Nations by-laws as they intend to promote self-government.

Finally, it appears from our research and interviews, that there are people who think, as delegated “by-laws”, *Indian Act* by-laws have a lesser legal status as compared to other federal or provincial laws, and this somehow impacts individuals’ obligations to comply with them (or law enforcements’ obligations to enforce them). This is incorrect. **The technical status of by-laws as ‘subordinate legislation’ does not diminish its status as a binding federal law with legal consequences for those who do not follow them.** Indeed, because of this misperception, the JMAC Report mused with recommending changing the expression “by-laws” to “laws” (although they recognized this would not alter the legal nature of those laws). While it is understandable that members of the public and First Nations may be confused on this point (and this speaks to the need for public education); it is problematic for those in law enforcement or in the legal system to hold this view. We return to this issue in [Section 6.4.3](#).

2.4 An imperfect tool in an imperfect toolbox...

Our literature review and interviews make clear that the continued existence of the *Indian Act* as a statute is problematic and the governance and by-law provisions within it remain inadequate.¹¹³ Such critiques date back to the 1996 RCAP report and even further back.¹¹⁴ It is also clear that the federal government, particularly through the JMAC Report and its attempt to pass the *FNGA*, is aware of these inadequacies. Since 2014, First Nations now have a tool to pass certain laws without the oversight of ISC, but by-laws are nonetheless an imperfect tool.

¹¹¹ On the *sui generis* nature of First Nations governments, pre-dating the *Indian Act*, see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [2002] 1 FC 325, per Marceau J.A. at para. 29, and Desjardins J.A. at para. 44. See also *R v Ward*, 1988 CarswellNB 139, 45 CCC (3d) 280 (NBCA) at para. 9. Note also that the JMAC report, *supra* note 28, citing *Bone v. Sioux Valley Indian Band No. 290*, 107 F.T.R. 133, [1996] 3 C.N.L.R. 54 (F.C.T.D.), noted that law-making “is an inherent power of the Band; it is a power the Band has always had.”

¹¹² See *Matsqui*, *supra* note 84 at para. 43; and see generally *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation*, 2019 FC 813.

¹¹³ The BCAFN Governance Toolkit: A Guide to Nation Building, [online](#), notes that the *Indian Act* was never about First Nations self-governance. The administrative system in the *Act* was only expected to continue until First Nations people were fully assimilated into mainstream society. However, the Governance Toolkit explains that there are opportunities within the *Indian Act* regime in which First Nations can utilize to rebuild governance and jurisdiction.

¹¹⁴ On the overall unsuitability of the *Indian Act* to maintain a nation-to-nation relationship, see Canada, House of Commons, Report of the Special Committee on *Indian Self-Government in Canada*, First Session of the Thirty-Second Parliament, 1980-81-82-83 (“Penner Report”). For an earlier report on enforcement challenges in relation to the *Indian Act* by-laws, see *Section 107 of the Indian Act and Related Issues, 1979*: A report prepared by Robert Debassige (under contract) for the Policy, Research and Evaluation Group of the Department of Indian and Northern Affairs.

What we heard:

We asked the Nova Scotia Mi'kmaq interviewees whether their communities saw the use of *Indian Act* by-laws as a form of self-determination. We received mixed responses. One interviewee felt that law-making through the *Indian Act* strained the connection with customary or Mi'kmaq law. Another interviewee thought that the First Nation communities do consider by-laws as a form of self-determination, but that “having to do [by-laws] under the *Indian Act* leaves a sour taste in [community members'] mouths.”

One First Nation interviewee said she believes her community considers by-laws to be a form of self-determination because the community can provide input into the governance and laws. She explained that by-law development begins at the council level, and then there are focus groups; an Elder one, a youth and a “middle generation”. All are consulted on by-law processes, which contribute to a sense of self-determination being tied to by-laws. We believe this example shows that there are ways that communities can make the by-law process less colonial – to make them a real community process.

A few interviewees stated that no amount of funding, training or capacity building will fix the barriers currently facing First Nations, because the root of the problem is with the *Indian Act* itself.¹¹⁵ Although, it is important to note that First Nations operating under self-government agreements, administration of justice agreements and under other federal legislation, are facing similar barriers as those First Nations attempting to enforce their *Indian Act* by-laws.¹¹⁶ One interviewee felt that “by-laws are fictitious laws because they do not hold any weight in the judicial system”.

As per the FNTC interviewee, the *Indian Act* is inadequate to use as a vessel to advance the governance and administration of justice of First Nations. The Inspector with the RCMP is of the same opinion. From internal consultations within his RCMP division, the Inspector's understanding is that there needs to be a whole new regime put in place for the successful enforcement and prosecution of First Nation by-laws. Many interviewees described the *Indian Act*, specifically section 81, as being antiquated.

One lawyer from British Columbia said that the *Indian Act*, specifically section 81, was poorly drafted. That lawyer believes that the legislative drafters of the *Indian Act* thought that First Nations would not be sticking around, and that assimilation would succeed. As a result, nobody's mind was turned to the possibility of First Nations actually re-building their self-governance. One lawyer believes that a wholesale rewrite of the *Indian Act* is required, to remove jurisdictional and legislative uncertainty surrounding First Nation by-laws and to provide for clear rules regarding enforcement and prosecution.

A few interviewees cited the need for First Nations to get out from under the *Indian Act* regime all together and move towards self-government and/or administration of justice agreements

¹¹⁵ British Columbia lawyer; FNL MRC lawyer; FNTC employee.

¹¹⁶ As explained by the FNL MRC and department of Justice interviewees.

and other federal legislation such as the *First Nations Fiscal Management Act*, *First Nations Land Management Act* and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. The FNLRC interviewee recommends that instead of attempting to fix the inadequate *Indian Act* system, there needs to be respect for First Nations' self-governance; and that implementing self-government authority for First Nations is the way forward.

In the past five years, although there has been talk of replacing the *Indian Act* and transforming Indigenous-Crown relations by Justice Trudeau's Liberal government, this has yet to materialize into concrete action and changes to the *Indian Act*.¹¹⁷

The issue of opening up the *Indian Act* is complex. Some call for its immediate repeal.¹¹⁸ Others call for a careful dismantling of it¹¹⁹ and there are varying opinions on what's to replace it.¹²⁰ Still, others are distrustful of attempts by the federal government to change the *status quo*, fearing this will result in violations of Aboriginal and Treaty rights and assimilation.¹²¹ Although many would say the need to reform and/or repeal and replace the *Indian Act* is long overdue, the barriers to meaningfully addressing problems with the *Indian Act* seem to become more entrenched with each passing year. This complexity, in turn, seems to operate as a disincentive for most Canadian politicians to tackle problems with the *Indian Act*. Indeed, **considering this climate leaves us skeptical over whether making recommendations for the federal government to amend the *Indian Act* by-law powers (as some of our interviewees have suggested) would actually be taken up.**

Note: The inadequacies of the by-law provisions discussed in this report could be addressed through amendments to the *Indian Act*, or even the creation of new stand-alone legislation (although the unpopularity and failure of the *FNGA* make this unlikely). While these things are possible, we will not treat this as the only or even likely prospect but explore other options for strengthening First Nation by-laws powers and enforcement.

The federal government's reluctance to address problems with the *Indian Act*, we believe, is reflected in the number of stand-alone statutes relating to Indigenous matters (11 in total) that

¹¹⁷ See Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework, February 14, 2018, [online](#). See also CBC News, "Promised Indigenous rights recognition legislation won't be in place before next election," November 14, 2018, [online](#). See also Yellowhead Institute Special Report, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis*, June 2018, [online](#).

¹¹⁸ Michael Den Tandt, "Why Canada should abolish the Indian Act and reserve system," National Post, April 13, 2015; Green Party of Canada, "Repeal the Indian Act," Resolution dated November 30, 2018, [online](#).

¹¹⁹ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session", UN General Assembly, New York, May 9, 2016.

¹²⁰ See, for example, Metallic, "Ending Piecemeal," *supra* note 13.

¹²¹ See, for example, Pam Palmater, "Abolishing the Indian Act means eliminating First Nations' rights," MacLean's, Oct. 10, 2019; APTN National News, "The white paper 2.0 needs to be stopped say Indigenous leaders," May 27, 2019.

have been passed in the last 25 years.¹²² While the subject matter of many of these laws could have been incorporated into the *Indian Act*, like in the case of the *FNGA*, Parliament instead opted to go with a stand-alone law. We suspect that the incentive was at least partly to systematically avoid opening up the ‘*Indian Act* debate.’

The standalone federal statutes that have introduced First Nations law-making powers include:

(1) *First Nations Land Management Act*, SC 1999, c 24 (“*FNLMA*”)

- **Enables laws related to land, the environment and resources (except oil and gas, uranium and radioactive minerals, fisheries, endangered species and migratory birds).**¹²³
- Law-making power can only be exercised once a land code has been approved by a double-majority community vote.¹²⁴
- One of the Mi’kmaw communities in Nova Scotia has adopted a Land Code under the *FNLMA* and another has signed a Framework Agreement under the *FNLMA*.

(2) *First Nations Goods and Services Tax Act*, SC 2003, c 15 (“*FNGSTA*”)

- **Enables laws to tax goods and services on reserve.**¹²⁵
- Laws do not take effect until a copy is received by the minister and an administration agreement in respect of that law has come into effect.¹²⁶

(3) *First Nations Fiscal Management Act*, SC 2005, c 9 (“*FNFMA*”)

- **Enables laws on financial administration and laws on real property taxes.**
- A financial administration law must be approved by the First Nations Financial Management Board.¹²⁷
- Tax laws do not have any force or effect until approved by the FNTC.¹²⁸

(4) *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 (“*FHORMIRA*”)

- **Enables laws on the occupation and division of the family home on reserve upon relationship breakdown or death of a spouse.**

¹²² (1) *First Nations Land Management Act*, SC 1999, c 24; (2) *First Nations Goods and Services Tax Act*, SC 2003, c 15; (3) *First Nations Fiscal Management Act*, SC 2005, c 9; (4) *First Nations Oil and Gas and Moneys Management Act*, SC 2005, c 48; (5) *Specific Claims Tribunal Act*, SC 2008, c 22; (6) *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20; (7) *Safe Drinking Water for First Nations Act*, SC 2013, c 21; (8) *First Nations Financial Transparency Act*, SC 2013, c 7; (9) *First Nations Elections Act*, SC 2014, c 5; (10) *Indigenous Languages Act*, SC 2019, c 23; (11) *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

¹²³ Canada, 2012. “Frequently Asked Questions - First Nations Land Management Regime.”

¹²⁴ *First Nations Land Management Act*, *supra* note 122 at s 12(1).

¹²⁵ *First Nations Goods and Services Tax Act*, *supra* note 122 at s 4(1).

¹²⁶ *Ibid* at s 7.

¹²⁷ *First Nations Fiscal Management Act*, *supra* note 122 at s 4.

¹²⁸ *Ibid.* at s 5(2).

- Laws are subject to community approval demonstrated through 25% of eligible voters participating in the vote.¹²⁹
- Several First Nation communities in Nova Scotia have adopted their own Matrimonial Real Property Laws under *FHMIRA*.¹³⁰

(5) *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (“*FNIMCYF*”)

- **Enables laws over child and family services, administration, enforcement and adjudication.**
- To be recognized as a federal law and to potentially obtain funding and other coordination measures, the Indigenous governing body must attempt and give notice to the federal and provincial governments of its intent to negotiate a coordination agreement for one year.¹³¹
- The jurisdiction of Indigenous governing bodies is premised on their inherent jurisdiction, as opposed to delegated jurisdiction. It is currently the subject of a constitutional challenge by the Government of Quebec.¹³²

Except for the overlapping tax jurisdiction between s. 83 money by-laws and the *FNFMA*, these stand-alone statutes are commonly regarded as recognizing First Nations’ law-making powers in areas not covered by the *Indian Act* by-law provisions. However, a broad interpretation of the *Indian Act* by-law powers permits overlap. For example, there have been First Nations that have passed child welfare by-laws and environmental protections by-laws under s. 81(1). That said, **these laws are regarded as providing additional law-making tools for First Nations.**

Sidebar:

Beyond these formal law-making tools—and sometimes because these formal tools are ineffective due to enforcement problems—First Nations communities rely on other tools such as rental agreements (to enforce housing or residency rules), Band Council Resolution (“BCRs”), or withholding certain services or payments (treaty annuities, dividends, etc.), to compel people to abide by certain rules of conduct.

While such tools can be effective, they also have their limits. In one case, a court held that a BCR could not be a substitute for a proper by-law.¹³³ Another case held that a band had no authority to withhold a man’s social assistance payments to compel him to end his illegal occupation of the community’s elders’ facility.¹³⁴ This case illustrates constraints on a community in maintaining order and safety in their communities, which can exacerbate

¹²⁹ *Family Homes on Reserves and Matrimonial Interests or Rights Act*, *supra* note 122s. 9(1) and (2).

¹³⁰ A list of communities who have adopted laws under *FHMIRA* can be found [here](#).

¹³¹ *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, *supra* note 122ss 20-21.

¹³² See *Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 on appeal to the Supreme Court of Canada.

¹³³ *Gamblin v Norway House Cree Nation Band Council*, [2000] 198 FTR 242, FCJ No 2132.

¹³⁴ *Daoust v. Mohawk Council of Kanesatake*, 2018 FC 766.

a band's inability to enforce formal laws. The community, in that case, had been without a police force since 2005.

Some of these laws have clearer enforcement mechanisms than the *Indian Act*. For example, the *FNFMA* sets out detailed enforcement powers a First Nation may enact under its tax laws.¹³⁵ The *FNLMA* states that laws established in a land code “may provide for enforcement measures, consistent with federal laws, such as the power to inspect, search and seize and to order compulsory sampling, testing and the production of information.”¹³⁶ The *FNLMA* also provides that First Nations may retain their own prosecutors to prosecute laws and enter into an agreement with either the provincial or federal governments to use their prosecutors.¹³⁷

Sidebar: Some other statutes are silent on enforcement too...

The lack of specific mention of enforcement mechanisms within federal enabling/recognition legislation does not necessarily imply an enforcement vacuum (contrary to how some have interpreted the *Indian Act*). Neither the *FHORMIRA* nor the *FNIMCYF* specifically references enforcement powers. However, it is reasonable to assume that the substantive law-making powers recognized in these acts include procedural powers to provide for the enforcement of laws, and this should also be the case with the *Indian Act*.

Explicit enforcement provisions do not automatically result in easier enforcement, however. This is illustrated in a 2018 case involving the K'omoks First Nation, who had to resort to appearing before the British Columbia Provincial Court to go through the cumbersome process of laying an information.¹³⁸ The First Nation had sought to charge trespassers (over-holding tenants) who were violating the community's Land Code, but the local RCMP would not lay a charge and the First Nation had not signed an agreement for prosecution services and the federal and provincial prosecution services declined to help them. Because of this, the First Nation had to apply to the court to lay a charge just to begin the process of enforcing the Land Code. Thus, it appears that the lack of agreement by the federal and provincial governments to fund prosecutions (a common problem) was the real source of the enforcement problem in the K'omoks case.

What we heard:

As one of our interviewees noted, during the past few decades there has been a “tremendous void” in the enforcement of First Nation laws and by-laws, including those enacted under the *Indian Act*, self-government agreements and the *FNLMA*. One interviewee described enforcement of First Nation by-laws as “dotted”, and within the current justice system in Canada, we are forced to jump from dot to dot; and we will not be able to figure

¹³⁵ *FNFMA supra* note 122 at s 5(1)(e).

¹³⁶ *Ibid* at s 20(3).

¹³⁷ *Ibid* at s 22(3).

¹³⁸ *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114.

out all the barriers to enforcement of by-laws until we connect all the dots. This statement, which is supported by the data collected from other interviewees, appears to apply to all laws enacted by First Nations, as it is not only *Indian Act* by-laws that are not being enforced.

Like the *Indian Act*, these other laws allowing for the exercise of law-making jurisdiction have also been subject to criticism for being imperfect jurisdictional instruments. First, with the possible exception of laws passed under the *FNIMCYF*, which explicitly affirm that the exercise of jurisdiction under the *Act* is under the inherent right to self-government,¹³⁹ the other laws are generally regarded as being an exercise of federal *delegated* jurisdiction. Second, none of these laws simply enable a First Nation government to exercise law-making authority but instead subject the exercise of power to some ‘gatekeeping’ requirement, such as a community referendum, the approval of the FNTC or signing a coordination agreement.

While some have characterized the *FNLMA* as a near-complete alternative to the *Indian Act* under which a broad array of jurisdiction can be exercised, the Ontario Court of Appeal has held that powers granted by the *FNLMA* do not extend beyond the “ownership, management and use of First Nations land”, and as such do not constitute “a plenary power to legislate in relation to all manner of activities that take place on First Nations lands.”¹⁴⁰ The *FNLMA* has also been criticized as providing a model of self-governance that is too focused on economic development over reserve lands.¹⁴¹

Thus, these statutes, too, to lesser or greater extents are imperfect tools.

Overall, **this ‘toolbox’** that is made up of the *Indian Act* by-law powers and the other stand-alone laws recognizing law-making powers **is imperfect**. Common critiques include that:

- ✱ The ‘toolbox’ is inferior as being made of only delegated and not inherent powers.
- ✱ The tools in the ‘toolbox’ feed into “politics of distraction” in that they distract from having a larger, more robust conversation with the Crown regarding jurisdiction and management of lands and resources in Canada.¹⁴²
- ✱ The tools in the toolbox force First Nations to write and enforce their law-making in Euro-Canadian ways that may not reflect Indigenous ways.¹⁴³

¹³⁹ See *FNIMCYF*, *supra* note 122 at ss 8 and 18.

¹⁴⁰ *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814, at para 42.

¹⁴¹ Jobin and Riddle, *supra* note 99.

¹⁴² Jobin and Riddle *ibid* citing Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences Against Contemporary Colonialism” (2005) *Government and Opposition* 40.4.

¹⁴³ See Alan Hannah, “Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape” (2018) 51 *U.B.C. L. Rev.* 105 at 132: “... the strict provisions of the *Indian Act* force the band council to produce laws that are consistent with, and as a result replicating, the western legal system. This means drafting, passing, enacting, and attempting to enforce laws according to Canadian legal practices. Although a First Nation may be able to effectively incorporate some traditional rules and principles into the drafting of an *Indian Act* bylaw, the substantive and procedural outcome will be either a translation of Indigenous legal traditions into western law, or the creation of new western law *per se*.” See also Jobin and Riddle *ibid*.

- * The toolbox is not full, but rather has powers added to it on a piecemeal and arbitrary basis that does not reflect inherent rights and leaves gaps in jurisdiction.¹⁴⁴

This section does not set out to determine whether or not it is correct or acceptable for a community to use these tools. It is up to First Nations communities themselves, based on their needs and desires, to decide what use they wish to make of imperfect tools and an imperfect toolbox. A community may prefer an entirely different toolbox, such as that provided by a self-government agreement or exercising jurisdiction entirely based on inherent rights. That is a community's choice.

Sidebar: Alternative toolboxes may be imperfect as well...

Self-government agreements

There are currently 25 self-government agreements that have been negotiated across Canada involving 43 Indigenous communities. Many more communities are in active negotiations with Canada and the provinces over self-government. On the other hand, some communities, advocates and scholars have criticized the self-government process in Canada as taking long and being too top-down and coercive to truly reflect self-government.¹⁴⁵

For those communities that have negotiated self-government, many are still at the beginning stages of implementing jurisdiction and prioritizing certain key jurisdiction issues instead of implementing all their powers all at once. Common challenges for those with agreements are provincial and federal governments are not taking seriously their obligations under agreements, in particular, the need to adequately fund Indigenous self-government and disregarding Indigenous decision-making.¹⁴⁶ We have heard of self-governing communities experiencing roadblocks in implementing their justice-related jurisdiction under their agreements.¹⁴⁷

Inherent Jurisdiction / 'Just do it' approach

More and more communities are exercising jurisdiction based on their inherent rights without some formal agreement or legislative authorization or recognition from the federal or provincial governments. While this is happening with more frequency lately (and is consistent with the right to self-determination and there seems to be greater support for Indigenous laws and jurisdiction, see [Section 2.9.6](#) below), this approach can be risky. Public statements and policies in support of the inherent right of self-government, as well as

¹⁴⁴ Jobin and Riddle *ibid.*

¹⁴⁵ For an overview of the criticism with the current self-government process in Canada, see Metallic, "Ending Piecemeal" *supra* note 13 at 251-257.

¹⁴⁶ For examples of cases where Indigenous communities were forced to litigate these issues, see *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3 (Canada only funding based on *Indian Act* status instead of citizenship rules of the Nation) and *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (Yukon tried to circumvent joint co-management decision-making process in relation to watershed).

¹⁴⁷ Presentation by Chief Dana Tiza-Tramm, Vuntut Gwitchin First Nation (Yukon) at 31st Annual Indigenous Bar Association Meeting, November 2, 2019.

FNIMCYF, suggest the federal government’s position on the inherent right may be shifting. However, the Supreme Court of Canada’s decision giving a very narrow ambit to self-government is still law.¹⁴⁸ (But this law has been criticized extensively¹⁴⁹ and there have been calls for the court to revisit it.¹⁵⁰ A case that will be before the Supreme Court in December 2023 could result in major changes in this area.¹⁵¹) In the past, there have been situations where federal or provincial governments do not recognize such jurisdiction, leading to litigation where the First Nation has lost.¹⁵² In addition, recognition from other governments often comes with funding and other resources which, for many First Nations who lack significant own-source revenue, is vital.

Although the existing toolbox of federally recognized law-making powers is imperfect, this is not to say that things can never change. As will be reviewed further below, there are some more recent developments in Canadian law and society that present some new, additional tools that can be used to strengthen what’s in the existing toolbox.

2.5 Overlapping jurisdictions over First Nations issues: the provinces and municipalities

Although the *Constitution Act, 1867*, suggests that the federal power over “Indians” is “exclusive,” over the years, and consistent with their approach to other constitutional division of powers issues,¹⁵³ the courts have recognized the provinces as having extensive overlapping powers with the federal government in relation to First Nations. Provincial laws that are

¹⁴⁸ *R. v Pamajewon*, *supra* note 65.

¹⁴⁹ See B.W. Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*” (1997), 42 McGill LJ 1011; Vicaire, P.J., “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context” (2013), 58 McGill LJ 607 at 656-657; Dalton, J.E., “Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006), 21 No. 1 Can JL & Soc’y 11 at 19-20.

¹⁵⁰ See Brenda Gunn, “Beyond Van der Peet – Bringing Together International, Indigenous and Constitutional Law” in Centre for International Governance Special Report, *UNDRIP Implementing – Braiding International, Domestic and Indigenous Laws*, May 31, 2017, [online](#).

¹⁵¹ The Quebec Court of Appeal in *Renvoi*, *supra* note 132, suggested that the inherent right to self-government is generic right that all Indigenous peoples have, protected under s 35(1) of the *Constitution Act, 1982*. For further discussion on this, see Kent McNeil, “[The Inherent Indigenous Right of Self-Government](#),” (4 May 2022), *ABlawg*.

¹⁵² See for example, see *Acadia First Nation v Canada (National Revenue)*, 2007 FC 259, *aff’d* 2008 FCA 119; and *Mississaugas of Scugog Island First Nation v. National Automobile Aerospace Transportation and General Workers Union of Canada (Caw-Canada)*, 2006 CanLII 17944, *aff’d* 2007 ONCA 814.

¹⁵³ The Supreme Court of Canada favours an approach that permits extensive overlapping powers pursuant to what the court has called the principle of ‘co-operative federalism’: see *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras. 21-24. To this end, the Court relies on the ‘double aspect’ doctrine to uphold as valid provincial and federal laws on the same subject matter that may, for one purpose appear federal in nature and, for another purpose, appear provincial in nature (*Multiple Access Ltd v. McCutcheon*, [1982] 2 SCR 161). The Court also employs the ‘ancillary powers’ doctrine to uphold what would otherwise be a clearly invalid provision in an otherwise valid statute, so long as the incursion into the other government’s jurisdiction can be justified as necessary to the rest of the scheme in the case of serious incursions, or at the very least complementary to the rest of the scheme in the case of less serious incursions (*General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 and *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38).

general in nature that affect First Nations, but otherwise are within the province's jurisdiction, are not a problem *unless* they go to "the core of Indianness."¹⁵⁴ This core has been interpreted very narrowly. It does not include Aboriginal and Treaty rights¹⁵⁵ and may only include questions of Indian 'status' and some land matters on reserve.¹⁵⁶ Even provincial laws that specifically reference First Nations will generally be permitted, so long as this 'singling out' is done in a way that balances First Nations and non-First Nations rights.¹⁵⁷ These decisions have led one scholar to write on the subject: "the Supreme Court confined Parliament's exclusive jurisdiction over Indians to such a narrow compass that most aboriginal issues can now be said to have a double aspect."¹⁵⁸

The courts' approach to giving broad overlapping powers to the provinces in relation to First Nations has been criticized by some as failing to protect the special relationship between the federal Crown and First Nations people that was recognized in early treaty-making and sought to protect or insulate First Nations' inherent jurisdiction from encroachment by provincial laws.¹⁵⁹ **While we do not disagree with this critique, the extensive overlap does mean, however, that where legislative changes by a settler government would be beneficial to First Nations and the federal government is unwilling to legislate, in most cases, there will be no constitutional barrier to provincial legislation.**

The recent report of the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress* (called the "Viens Report" after its author, Judge Jacques Viens), is premised on the understanding that the provinces have broad overlapping powers with the federal government in relation to First Nations.¹⁶⁰ The Viens Report, therefore, makes several calls to action for numerous policy and legislative changes *by the province* to improve health and living conditions in First Nations and Inuit communities in Quebec. This includes the areas of Quebec's language laws, the *Police Act*, criminal prosecution, procedure and correctional laws, legal aid, health service laws and child protection law.¹⁶¹

¹⁵⁴ *Dick v. R.*, [1985] 2 SCR 309.

¹⁵⁵ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 116.

¹⁵⁶ On "Indian status", see *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 SCR 751. While laws in relation to reserve lands has been held to go to the "core of Indianness" in the past (see *Derrickson v. Derrickson*, [1986] 1 SCR 285) more recent decisions have also found overlapping powers. See Nigel Bankes and Jennifer Koshan, "The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands," *Ablawg*, October 28, 2014, [online](#).

¹⁵⁷ *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] SCJ No. 33.

¹⁵⁸ See Jean Leclair, "See "The Kitkatla Decision: Finding Jurisdictional Room to Justify Room to Justify Provincial Regulation of Aboriginal Matters" (2003) 20 SCLR (2d) 1 at 31-32.

¹⁵⁹ See John Borrows, "Canada's Colonial Constitution" in *The Right Relationship – Reimagining the Implementation of Historic Treaties*, ed. by John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017) at 31-32. See also Bruce McIvor & Kate Gunn, "Stepping into Canada's Shoes: Tsilhqot'in, Grassy Narrows and the Division of Powers," (2016) 67 UNBLJ 146 – 166.

¹⁶⁰ Hon. Jacques Viens, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, [online](#).

¹⁶¹ See, *ibid*, recommendations 12-13, 34, 38, 41, 48, 73, 44, 74, 117, 108-110.

Finally, the question of provincial jurisdiction also involves municipalities. Municipalities are purely creations of provincial governments. They are not given independent powers in the constitution, but rather the law sees municipalities as a responsibility of the provinces under s. 92(8), “Municipal Institutions in the Province” of the *Constitution Act, 1867*.

Municipalities’ law-making powers are delegated to them by the provincial government. In Nova Scotia, these are set out in the *Municipal Government Act*, SNS 1998, c 18. This legislation and similar laws in other provinces set out the by-law-making powers of municipalities.

Municipal by-laws will generally apply to urban First Nations peoples living within its boundaries. Whether municipal by-laws apply to reserve lands within city limits, depends on whether the subject of the by-laws affecting the reserve goes to the “core of Indianness.” The reasoning in such cases is not always consistent. Two cases involving the application of municipal zoning laws to reserve lands had different results, one finding the zoning laws went to the ‘core’ and the other not.¹⁶² It should be noted, however, in both cases, neither First Nation had passed their own zoning by-law. Had they done so, as we will discuss further in [Section 5.3](#), their by-laws would have superseded the municipal zoning by-law.

A point to take away from this section is that Canadian courts permit a lot of overlap between different jurisdictions. Instead of finding one government lacks jurisdiction over an area because another government has power in a similar area, the courts have developed rules to assist in deciding which government law would supersede or trump the other in a case of conflict. These are known as “paramountcy rules” and we look at these in the next section.

There are legitimate debates to be had on the question of whether the law should allow significant overlap of jurisdiction between governments versus reserving exclusive jurisdiction to one government, especially in the context of First Nations. On the one hand, some scholars forcefully argue that applying settler government laws to First Nations has caused them assimilation and harm and contributed to their overrepresentation in the criminal justice and child welfare systems.¹⁶³ On the other hand, some have argued that overlap avoids jurisdictional vacuums where a First Nation has yet to exercise jurisdiction in important areas

¹⁶² In *Surrey (District) v Peace Arch Enterprises Ltd.*, 1970 CarswellBC 168 (BCCA), the British Columbia Court of Appeal held that a municipality’s zoning laws, by-laws for building specifications, and by-laws for water services and sewage disposal cannot apply to reserve lands. While the *Surrey* decision has not been overturned, its reasoning was rejected in *Oka (Municipality) v Simon*, 1998 CarswellQue 4718 (Que CA). In *Oka*, the Quebec Court held that the municipality’s zoning by-law and building by-law apply to “lands reserved for the Indians”. Clarifying, the Court in *Oka* held that it is specifically First Nation possession of reserve land and First Nation land uses that lie at the core of Parliament’s jurisdiction over the reserve lands, not the use of reserve lands generally. Ultimately, the Court upheld the municipal by-laws in question because they were laws of general application that did not conflict with any First Nation by-law or Federal law.

¹⁶³ For a discussion on the arguments on this, see Naomi Metallic, “Rewrite of *NIL/TU, O Child and Family Services Society and Native Child*” in Kent McNeil & Naomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence*, (Special Collection of Canadian Native Law Reporter, Indigenous Law Center, Saskatchewan, 2021).

like the protection of vulnerable peoples like women, children and persons with a disability.¹⁶⁴ Thankfully, we are not called upon in this report to resolve this debate, though this is an area where further research and thinking are required.

One upside to the law's acceptance of jurisdictional overlap is that First Nations laws that overlap with provincial powers can no longer be used as a reason to deny First Nation by-law jurisdiction. This was a long-standing position that INAC took when it exercised the disallowance power before 2014. ISC's *By-Laws Manual* states that the s. 81(1)(a) power on health on reserve could not be used to make by-laws regarding social services because "[t]he *Constitution Act, 1867* gives provincial governments exclusive jurisdiction over social services."¹⁶⁵ This position is dubious. Peter Hogg explains that the s. 91(24) overlaps into areas normally perceived as provincial are permissible as an exercise of federal power so long as they are "rationally related to intelligible Indian policies."¹⁶⁶ The federal government has enacted laws in several areas on reserve that overlap with provincial powers (education, wills and estate, property, etc.), and has very recently passed a national law on child welfare relating to Indigenous peoples.¹⁶⁷

One big downside with overlap is that another government's laws will apply in the absence of a First Nation law. This puts the onus on First Nations governments to develop laws if they want to 'occupy the field.' Simply asserting that one's First Nation *has* jurisdiction over an area *without* exercising it, will not be enough to displace other laws. However, a major challenge for First Nations, which we heard over and over from interviewees and read about in the literature, is most First Nations lack the resources to hire experts or build internal expertise to develop their laws. For more on this, see [Section 5.5.2](#).

2.6 Dealing with overlapping and competing jurisdiction: paramountcy

As noted above, for First Nation governments, there are four jurisdictions whose laws may potentially compete for application on reserve land: federal, provincial, municipal and the First Nation's own laws.

In some cases, a statute will supply the rules that will be used to determine how to resolve a potential conflict with another jurisdiction's overlapping law. This is the case with *Indian Act*

¹⁶⁴ For example, there have been calls for the application of the *Charter* and human rights legislation by First Nations women, particular in view of the history of colonialism and patriarchy that has impacted First Nations governance and the absence of First Nations laws ensuring individual protections. The Supreme Court of Canada has also raised concerns about jurisdictional vacuums in *Canadian Western Bank*, *supra* note 153 at para. 44.

¹⁶⁵ *By-law Manual*, *supra* note 6 at 2.

¹⁶⁶ Peter W Hogg, *Constitutional Law of Canada*, 2014 Student Edition (Toronto: Thomson Reuters Canada Limited, 2014) at 28-4 to 28-5.

¹⁶⁷ See *An Act respecting First Nations, Inuit and Métis children, youth and families*, *supra* note 122. This law is currently the subject of a constitutional challenge by the province of Quebec as exceeding federal jurisdiction: see note 132, *supra*. For more discussion on the federal ability to pass laws over areas that would otherwise be considered provincial, see Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada," (2018) 28 *JL & Soc Pol'y* 132.

by-laws which set out several rules to address competing provincial laws and some competing federal laws. We review these further in [Section 5.3](#).

Where written laws are silent, the Supreme Court of Canada has established rules to resolve potential conflicts. This is the case when overlapping provincial and federal laws potentially conflict (since there are no conflict rules set out in the *Constitution Act, 1867*). The general rule is that, where there is a conflict, the federal law will supersede (or be ‘paramount’ to) the provincial law. However—and consistent with the goal of allowing a lot of overlap—the courts will try to allow two laws on similar subjects to co-exist as much as possible.¹⁶⁸ What constitutes a conflict will be read narrowly as situations where compliance with one law makes it impossible to comply with the other.¹⁶⁹ However, where it is clear that the purpose behind the provincial law is inconsistent with (or ‘frustrates’) the federal law, the federal law will be held to supersede the provincial law.¹⁷⁰ Where possible, courts will try to allow both laws to stand, unless it is very clear the federal government intended its law to be a ‘complete code’ and to supersede provincial law.¹⁷¹

In recent years, the courts have also extended these principles to situations where you have potentially conflicting laws between ‘delegated governments’ and their ‘enabling governments,’ e.g., conflicts between a municipal law and a provincial law, or conflicts between an *Indian Act* by-law and federal laws and regulations.

The older rule was that ‘subordinate legislation’ cannot conflict with its parent legislation, or with other laws of the ‘parent government’ unless the enabling law specifically allows it.¹⁷² (In the case of *Indian Act* by-laws, there are specific rules that allow by-laws to trump certain federal laws, which we will review in detail in [Section 5.3](#)). Generally, instead of rushing to the conclusion that the parent law trumps (or vice-versa if the enabling statute provides otherwise), the courts have recently emphasized that they will attempt to allow both the subordinate and parent laws to co-exist as much as possible before finding a conflict.

Examples:

In the 2001 case *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, the Supreme Court of Canada held that a municipal by-law on pesticide use should co-exist with overlapping federal and provincial laws and not be trumped by them.¹⁷³

The approach in *Spraytech* was applied in one *Indian Act* by-law case, *R v Blackbird*, where the Ontario Court of Appeal held that a band by-law on migratory bird hunting could co-exist

¹⁶⁸ *Multiple Access*, *supra* note 153, and *Canadian Western Bank*, *supra* note 153.

¹⁶⁹ *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5.

¹⁷⁰ See *Bank of Montreal v Hall*, [1990] 1 SCR 121 and *Alberta (Attorney General) v Maloney*, 2015 SCC 51.

¹⁷¹ See *Bank of Montreal v Hall*, *ibid* and *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13.

¹⁷² See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 50.

¹⁷³ *Spraytech*, *supra* note 107.

with the federal *Migratory Birds Convention Act* and its regulations, with any conflicts addressed through the narrow approach to conflicts described above.¹⁷⁴

The courts' approaches in both cases aim to show proper respect for the jurisdiction of other governments, even if they are technically 'subordinate' in the legal hierarchy. **Respect for multiple levels of government is mandated by our constitutional principle of federalism.**¹⁷⁵ In 2018, Canada specifically committed to this principle regarding Indigenous governments in its policy on *Principles respecting the Government of Canada's relationship with Indigenous peoples* ("10 Principles Policy"). In particular, principle #4 states that: "The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government."¹⁷⁶

2.7 Overlapping federal and provincial jurisdiction

The topic of *Indian Act* by-law enforcement raises numerous issues ranging from governance to justice, safety, policing and beyond (land issues, taxation, essential services, etc.). Building on the previous section, these are all areas where there is significant overlap between federal and provincial jurisdiction. We believe there is also significant room for First Nation jurisdiction to fill current gaps in by-law enforcement. However, this will be explored more in later chapters. This section will explain the overlap in jurisdiction between the federal and provincial governments when it comes to by-law issues on reserve.

Given that there have always been by-law powers within successive versions of the *Indian Act*, the federal government clearly sees the delegation of law-making powers to First Nations as within its s. 91(24) powers. In 2002-2003, the federal government attempted to pass a new *First Nations Governance Act* ("FNGA"), which, among other things, would have filled several gaps in the enforcement of *Indian Act* by-laws, and these legislative changes assumed the Minister of Indian Affairs to be acting within federal jurisdiction over Indians.¹⁷⁷ The bill was subject to significant First Nation criticism for failing to deliver on the recommendations of the RCAP Report on self-government and, accordingly, did not become law.

The recent laws to affect the split within the Department of Indigenous Affairs between Indigenous Services and Crown-Indigenous Relations provide greater clarity around Canada's

¹⁷⁴ *R. v. Blackbird*, *supra* note 110.

¹⁷⁵ See *Reference re Secession*, *supra* note 107; *Spraytech* *supra* note 107; and discussion of these in Metallic, "A Viable Means," *supra* note 36 at 223-224.

¹⁷⁶ Government of Canada, [Principles respecting the Government of Canada's relationship with Indigenous peoples](#) (2018) at principle #4 [10 Principles Policy].

¹⁷⁷ See Joint Minister Advisory Committee, Recommendations and Legislation Options to the Honourable Robert Nault, P.C., M.P., Minister of Indian Affairs and Northern Development, March 8, 2002; Bill C-7, An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amends to other Act, 2nd sess, 37th Parl, 2002 [FNGA]; see also Mary C Hurley, "Bill C-7: the First Nations Governance Act" (Ottawa: Library of Parliament Legislative Summaries, 2002-2003).

jurisdiction. The *Department of Indigenous Services Act*, SC 2019, c. 29, s 336 (“DISA”), specifically recognizes at s. 6(2)(h.1) that “governance” is a responsibility of the Minister of Indigenous Services. In this regard, the preamble of the proposed *First Nations Governance Act* referred to additional enforcement powers as supplying “effective governance tools [which] have not been historically available under the *Indian Act*... .” It has also been suggested that Canada’s jurisdiction over *Indian Act* by-laws may also be supported under Canada’s jurisdiction over criminal law (s. 91(27)).¹⁷⁸ The federal government also has the power under s. 101 of the *Constitution Act, 1867* to establish courts for “the better Administration of the Laws of Canada.”

Issues of enforcement, such as policing, prosecution and courts also fall within provincial jurisdiction, primarily under s. 92(14), “the Administration of Justice in the Province... .” A 1984 case from the Alberta Court of Appeal confirmed s. 92(14) powers could overlap with s. 91(24) powers on reserve. In *R. v Whiskeyjack*, the Alberta Court of Appeal held that the province had the constitutional power to appoint special constables under a provincial *Police Act* to enforce offences under the *Indian Act*.¹⁷⁹ This case points to a significant area of overlap in law enforcement on reserve concerning policing.

Indeed, several provinces have specific laws about First Nations in their policing statutes. Some provinces designate seats for Indigenous representatives on provincial or municipal police commissions and advisory boards (Man., Que.), or on a public complaints committee (Sask.).¹⁸⁰ Others empower the appointment of special constables or First Nations officers in Indigenous communities (Man., N.S., Ont., Que.).¹⁸¹ Nova Scotia’s *Police Act* allows the Minister to appoint an “aboriginal police officer” (“APO”) to work on reserve or some other appointed territory. The APO has all the power, authority and immunity and protection provided to a peace officer or police officer. Where the appointment is to a reserve, it requires the consent of “the reserve’s police governing authority.”¹⁸² In Manitoba and Ontario, the special constable/First Nations officers are specifically authorized to enforce First Nations by-laws.¹⁸³ (There is little current data about how the provincial laws recognizing powers for special or First Nations constables operate on the ground. We speculate that these might have been introduced to give band constables appointed under the (now cancelled) Band Constable Program powers akin to police officers. This program and the First Nations are discussed further below.)

¹⁷⁸ JMAC *supra* note 28.

¹⁷⁹ *R. v Whiskeyjack*, 1984 ABCA 336

¹⁸⁰ *The Police Services Act*, CCSM c P94.5, s. 9; *Police Act*, CQLR c P-13.1, s. 303.5; and *Police Act*, 1990, SS 1990-91, c P-15.01, s. 16(3) and (4).

¹⁸¹ *The Police Services Act*, CCSM c P94.5, Part 7.2; *Police Services Act*, RSO 1990, c P.15, s. 54; *Police Act*, CQLR c P-13.1, s. 107.

¹⁸² *Police Act*, SNS 2004, c 3, s. 87.

¹⁸³ *The Police Services Act*, CCSM c P94.5, s. 77.18; in the Ontario *Police Services Act*, *ibid* this is implied from s. 54.

2.7.1 In Focus: Policing in First Nations Communities

In general, the courts have held that policing is a provincial jurisdiction falling under the administration of justice power of the provinces.¹⁸⁴ At the same time, the courts have also confirmed the federal government's jurisdiction to establish a national police force (Royal Canadian Mounted Police (RCMP)) with authority to enforce federal laws across the country.¹⁸⁵

Despite these jurisdictional lines, the picture of policing in Canada is generally marked by overlap. While two provinces (Ontario and Quebec) have enacted laws to establish their own police forces, the rest of the provinces and territories contract the services from the RCMP. Under these contracts, the RCMP have to comply with the respective provincial police legislation, with exceptions for certain federal legislation (e.g., Canada Labour Code, complaints and discipline). Some municipalities establish their own police forces; while some contract the RCMP.

With respect to policing on reserve, for several decades following Confederation, Canada viewed policing in First Nations communities as its exclusive responsibility.¹⁸⁶ However, in the last 50+ years, Canada's position has shifted to seeing policing on reserve as a joint responsibility with the provinces.¹⁸⁷ In the 1960s, the RCMP announced its withdrawal from policing First Nations communities in Ontario and Quebec. Next, the late 1960s-70s saw the creation of the Band Constable Program under INAC. This allowed band councils to hire their own First Nation constables, funded by INAC, and usually directed by the band council with guidance from the RCMP or other provincial police services. Band constables' roles were limited to enforcing by-laws, but if such a constable was also appointed as a "special constable" (under certain provincial policing laws), they would also be able to deliver basic police services in support of the police of the local jurisdiction. During the 1970s-80s, some communities were experimenting with creating their own tribal police, primarily funded by the federal government. By 1981, five hundred officers were employed in First Nations communities, including 130 band constables.¹⁸⁸

A 1990 federal Indian Policing Policy Review Task Force Report noted that Canada had not exercised its s. 91(24) legislative authority to regulate First Nations policing, and seeing no indication from the federal government over any desire to enact national legislation, emphasized the provincial jurisdiction over policing through s. 92(14) and the application of

¹⁸⁴ See *Di Iorio v. Warden, Jail of Montreal and Brunet* (1976), 73 D.L.R. (3d) 491 (S.C.C.), per Dickson, J., at 528.

¹⁸⁵ *Attorney General of the Province of Quebec and Keable v. Attorney General of Canada et al.* [1979] 1 S.C.R. 218, per Pigeon, J., at p. 242).

¹⁸⁶ For more on this, see generally, Chapter 2, "Policing Indigenous Peoples: History and the Colonial Legacy" in Expert Panel on Indigenous Communities, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities* (Ottawa, Ontario: Canadian Council of Academies, April 2019) [online](#) [CCA Report].

¹⁸⁷ Don Clairmont, *Aboriginal Policing in Canada: An Overview of Developments in First Nations Communities* (Commissioned by the Ipperwash Inquiry). Toronto (ON): Government of Ontario.

¹⁸⁸ *Ibid* at 3-6.

provincial laws on reserve via s. 88 of the *Indian Act*.¹⁸⁹ At this time, the policing was transferred from INAC to the Solicitor General of Canada (later Public Safety). Following this came the creation of the First Nations Policing Program (FNPP) in 1991, wherein the federal government agreed to pay 52% of a First Nations' costs associated with the program, while the province pays 48%. The FNPP gradually replaced the Band Constable Program, which was officially cancelled in 2015.¹⁹⁰

The FNPP funds two different models of policing in First Nations communities. The first model is known as a Community Tripartite Agreement (“CTA”) where the program funds one or more positions for a dedicated police officer(s) from the local jurisdiction to a First Nations community. This model is premised on the general assumption that provinces or municipal police services (whether these are contracted RCMP services) already service First Nations communities. The provinces and Canada enter Framework Agreements that authorize Canada and the province to conclude a CTA with a First Nation.

The second model funded under FNPP is known as a Self-Administration Agreement (“SA”). SAs fund a local Indigenous police force that provides frontline police service supported by the provincial police force.

Approximately 66% of First Nations and Inuit are under the FNPP. The remaining 229 eligible Indigenous (geographical) communities are under the general policing provided in the region. Eligibility for the FNPP has been ‘closed’ for a long time, and the number of participating First Nations has decreased (particularly those in SAs) since the outset of the program.¹⁹¹

CTAs identify the number of dedicated officers assigned to the community and the facilities they will use, and commitments of the RCMP to assign members who are Aboriginal or familiar with the need and cultures of the band.¹⁹² CTAs are intended to be structured so that officers that are assigned to First Nations communities must spend 100% of their regular working hours on the policing needs of the community.¹⁹³

The CTAs also require the establishment of Community Consultative Groups (CCG), made up of a certain number of band members depending on the size of the community, who are to meet regularly. Their duties can include: 1) identifying policing issues and concerns of the band and bring these to the attention of the RCMP; 2) work with RCMP members to develop

¹⁸⁹ Indian Policing Policy Review Task Force Report (1990), at p. 9-11.

¹⁹⁰ See CCA Report, *supra* note 186, Chapter 5, “Current Realities for Policing in Indigenous Communities” at 85. Note that the name of the program was recently updated to First Nations and Inuit Policing Program (FNIPP) to reflect that some Inuit communities are serviced under it, however FNIPP will continue to be used throughout the report.

¹⁹¹ *Ibid* at 82-87.

¹⁹² However, the agreements relieves Canada and the Provinces of liability if they are not able to do so or even fill the CTA positions.

¹⁹³ *Illustrative Case Studies of First Nations Policing Program Models, Research Report: 2016-R014*, Public Safety Canada, by J. Kiedrowski et al, at 23-24.

objectives, priorities, goals and strategies for community policing; 3) participate in periodic evaluation of police services to address specific community issues; 4) identify desirable attributes for the RCMP deployed in community; and 5) complete the annual non-financial report where the CCG provides feedback on policing services in the community. CTAs require the negotiation of a Letter of Expectation (“LOE”) that formalizes, in writing, the community’s expectations of policing priorities regarding the types of service the community will receive and the type of working relationship and experience with the police officer(s) assigned to the community. These letters are provided to the detachment commander.

The CTAs we had access to include provisions about enforcement of *Indian Act* by-laws. Though we did not specifically examine a CTA from Nova Scotia, we believe these are standard provisions in these agreements. For example, the language in one of the CTAs we reviewed stated:

Enforcement of _____ Indian Band By-Laws

1. Where consistent with available resources and community priorities, and in addition to their regular duties and functions as outlined in subsection X.X of the Framework Agreement, the RCMP FNCPS Members(s) will enforce by-Laws enacted by the Council under the *Indian Act*, R.S.C. 1985, c. I-5 in accordance with the LOE.
2. Notwithstanding subsection 1, the RCMP Member(s) shall not be required to perform any duties or provide any services, which are not appropriate to the effective and efficient delivery of policing services.

SAs typically set out the number of officers or constables to be appointed to the community’s police services, whether a police services board must be incorporated, and stipulate the roles and duties of the chief of police and qualifications and standards of police officers employed by the police services (typically First Nation officers must meet standards set out in provincial policing legislation). These agreements also include significant details on funding received by the community, the facilities and equipment to be used and funded, and reporting requirements. As well, SAs often include statements about the need for the police chief and boards to be independent and the expectation that they will give mutual assistance and cooperate with other police forces in the local jurisdiction.¹⁹⁴

The SAs do not specifically mention by-laws but provide that First Nation constables shall conduct their activities in accordance with the provincial *Police Act* and any policies established by the chief of police designated by the First Nations Police Board, which we

¹⁹⁴ In making comments on this report, the Department of Justice Canada clarified that “Since an Indigenous police service is a local police force, it is important that they work with the provincial and federal police forces which also have jurisdiction in the territory. Together, all those police services are responsible for delivering police services to the community. Of course, it is the local police force that would be the more likely to enforce band by-laws when relevant to their function. However, this doesn’t mean that other police of jurisdiction would not enforce them.”

assume could include a directive to enforce band by-laws.¹⁹⁵ This is consistent with the purpose of SAs to give First Nations more flexibility and control over their own police services.

In recent years, the FNPP program—and the state of Indigenous policing in First Nations communities more generally—have come under significant criticism for failing to meet the safety, security and self-determination needs of First Nations communities. Some of the problems that have been identified include:

- ✱ Police services in First Nations are under-resourced and there is a lack of adequate support for capital, facilities and other resources, which leads to high turnover of officers;
- ✱ Despite the objective of the FNPP to permit a more “culturally appropriate” police force reflective of the First Nation population, there has been a significant decrease in the number of Indigenous officers employed through CTAs and SAs, from 90% in 1996 to 26.7% in 2014. Broken down by agreements, this translates to:
 - SA – 86% to 59%
 - CTA – 94% to 25%
- ✱ The FNPP lacks a legislative framework that would render it an essential service and the policy/funding agreement nature of the FNPP makes it unreliable and precarious. Agreements have to be renewed frequently and this creates uncertainty.¹⁹⁶

In 2014, the Auditor General of Canada found that the FNPP is not designed to adequately deliver policing services on reserve in a manner consistent with the Policing Principles, and Public Safety Canada needs to work with First Nations communities, provinces, and policing service providers on the future of the FNPP.¹⁹⁷

In the Spring of 2019, an Expert Panel on Policing in Indigenous Communities wrote that the FNPP does not provide First Nations communities with meaningful choices over their policing models, governance, or funding arrangements and the future of First Nations policing must move in a direction that embraces self-determination, a new funding framework and a new and renewed relationship.¹⁹⁸

¹⁹⁵ On this point, Department of Justice Canada added the point that any such directive would have to consider the principle of police operational discretion as governments may not direct the operations of police (see *R. v. Beaudry*, 2007 SCC 5) although it might be possible to give a more general directive. It could not direct when, if or how enforcement could take place.

¹⁹⁶ See CCA Report, *supra* note 186, Chapter 5, “Current Realities for Policing in Indigenous Communities.”

¹⁹⁷ 2014 Spring Report of the Auditor General of Canada: Chapter 5 – First Nations Policing Program – Public Safety Canada.

¹⁹⁸ See CCA Report, *ibid*, Chapter 7, “Towards Change.”

In the summer of 2019, Call to Justice 5.4 from the MMIWG Final Report recommended sweeping changes to Indigenous policing in Canada:

We call upon all governments to immediately and dramatically transform Indigenous policing from its current state as a mere delegation to an exercise in self-governance and self-determination over policing. To do this, the federal government's First Nations Policing Program must be replaced with a new legislative and funding framework, consistent with international and domestic policing best practices and standards, that must be developed by the federal, provincial and territorial governments in partnership with Indigenous Peoples. This legislative and funding framework must, at a minimum, meet the following considerations:

- i. Indigenous police services must be funded to a level that is equitable with all other non-Indigenous police services in this country. Substantive equality requires that more resources or funding be provided to close the gap in existing resources, and that required staffing, training, and equipment are in place to ensure that Indigenous police services are culturally appropriate and effective police services.
- ii. There must be civilian oversight bodies with jurisdiction to audit Indigenous police services and to investigate claims of police misconduct, including incidents of rape and other sexual assaults, within those services. These oversight bodies must report publicly at least annually.¹⁹⁹

Canada has recently announced that it will be introducing legislation on First Nations policing, recognizing it as an essential service while expanding the number of communities served and supporting community safety and well-being projects.²⁰⁰ Participating in the co-drafting process could be an opportunity for Mi'kmaq of Nova Scotia to influence changes to the current law enforcement that occurs in their communities.

2.8 Neglect by federal and provincial governments of responsibilities

Both in the past and up to the present, Canada and the provinces have used the issue of overlapping jurisdiction as an excuse for inaction, neglect and doing less for First Nations than for other citizens. This is because overlap creates uncertainty about which government is responsible to provide services to First Nations and both the federal and provincial governments have used this to their advantage. Generally, both claim the other is responsible for First Nations. This denial of responsibility by both levels of government is unique to s. 91(24), as observed by Kent McNeil:

¹⁹⁹ MMIWG Report Executive Summary, *supra* note 56 at 69.

²⁰⁰ See Olivia Stefanovic, "Trudeau says legislation to make First Nations policing an essential service coming soon," CBC News [online](#), December 8, 2020.

In other division of powers situations, the federal government and the provinces usually fight one another for jurisdiction, each trying to amass as much authority as possible. But when it comes to jurisdiction in relation to Aboriginal peoples, exactly the opposite phenomenon occurs.²⁰¹

See also Colleen Sheppard, who notes:

Whereas we often witness governments seeking greater jurisdictional responsibility in constitutional disputes about the division of governmental powers, with respect to jurisdictional responsibilities and in particular financial responsibilities towards Indigenous peoples, governments often retreat.²⁰²

As will be examined in greater detail in later chapters, it does appear that **this phenomenon specifically occurs in the context of enforcement of by-laws** (and other laws on reserve²⁰³). Although both the federal and provincial governments do share responsibility over policing services on reserve, as detailed above, this is not meeting the safety and security needs of First Nations people. Further, as will be seen in later chapters, **federal and provincial governments suggest the other is responsible for the prosecution of by-laws and the appointment of justices of the peace to adjudicate by-law offences**. In turn, local police forces say they will not enforce by-laws in First Nations communities if there is no one to prosecute them. In these examples, we have denial or neglect of responsibilities by Canadian authorities (possibly willfully or at least willfully blind) in the face of important First Nations needs, if not legal and human rights entitlements.

Sidebar: Provincial responsibility

The recent Viens Final Report picks up on the possibility of provinces (in that case, Quebec,) being knowingly blind in refusing essential services to First Nations due to alleged jurisdictional uncertainty:

[E]very effort must be made to guarantee access to services to members of First Nation. **Refusing to consider the needs of this segment of the population on the pretext that communities ... fall under federal jurisdiction would, in my opinion, be tantamount to consciously turning a blind eye.** Since interactions with the rest of the health and social services network under provincial jurisdiction are so frequent, we cannot simply ignore the needs and realities of this segment of the population.²⁰⁴

²⁰¹ Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples," *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 309.

²⁰² Colleen Sheppard, "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 26:4 *Constitutional Forum constitutionnel* 3 at 6.

²⁰³ Jurisdictional disputes over whether the British Columbia or federal government would fund prosecution on K'omox land code under the *First Nations Land Management Act* appears to what forced the band to have to bring a private prosecution in order to charge overholding tenants under a land law: see *K'omoks*, *supra* note 138

²⁰⁴ Viens Report, *supra* note 160 at 65.

It has been difficult for First Nations to challenge such neglect up to this point. There are several reasons for this. The services that First Nations receive tend to be provided pursuant to policies as opposed to laws. The lack of enforceable legal obligations and standards in law makes it difficult to bring legal challenges against governments.²⁰⁵ Government funding agreements tend to also limit avenues of dispute resolution.²⁰⁶ Governments also tend to aggressively litigate challenges and outmatch First Nations in terms of financing litigation.²⁰⁷ There are also well-founded fears of potential retaliation for challenging the government.²⁰⁸

Furthermore, neither section 35(1) of the *Constitution Act, 1982*, the fiduciary duty nor the Honour of the Crown, have been particularly helpful legal doctrines to date for First Nations in holding Canadian governments accountable in the areas of essential services, safety and justice. To date, the interpretation of Aboriginal and treaty rights has been limited to lands and natural resource issues. Consequently, the duty to consult and accommodate has generally been limited to land and resources issues, not government decisions regarding essential services or justice services. A broader interpretation of what are Aboriginal and treaty rights, informed by the fundamental human rights in the *United Nations Declaration on the Rights of Indigenous Peoples* (discussed further below), would likely lead to the doctrines of fiduciary duty, honour of the Crown and the duty to consult having greater application in the context of First Nations justice issues.

Sidebar: Treaty rights and justice services

The 2014 case of *R v Cyr* argued for First Nations rights in the criminal justice system based on treaty. The court rejected the argument that Treaty 4 entitled the First Nation accused man in that case of a right to a mixed jury of Aboriginal and non-Aboriginal offenders. However, the **Saskatchewan Queen’s Bench commented that the mutual aid and assistance clause in the treaty “should at the very least, be interpreted as imposing an obligation on the Crown to work with the native signatories on criminal justice issues” and “not to shut the First Nations out of the criminal justice process.”**²⁰⁹

²⁰⁵ See Janna Promislow & Naomi Metallic, “Realizing Administrative Aboriginal Law” in Colleen M. Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed., Chap. 3 (Emond Publishing: Toronto, 2017) at 101-103.

²⁰⁶ *Ibid* at 104-108.

²⁰⁷ See Naomi Metallic, “A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the Caring Society Case,” (2019) *Journal of Law and Social Policy*, Volume 28:2, article 4 at 18-19 [Metallic, “Implications”].

²⁰⁸ See Cindy Blackstock, “The Complainant: The Canadian Human Rights Case on First Nations Child Welfare,” (2016) 62 *McGill LJ* 285. The litigation directive includes 20 principles intended to guide the DOJ in the discharge of its civil litigation duties in a way that assists in the constructive, expeditious and effective resolution of matters: see Department of Justice Canada, “The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples,” [online](#) (last accessed on February 18, 2021).

²⁰⁹ *R v Cyr*, 2014 SKQB 61 at para. 98.

There may be room for similar arguments in relation to the Peace and Friendship Treaties. A similar mutual assistance clause found in the Treaty of 1752 provides that should the Mi'kmaq be at war with another tribe, "they shall upon Application have such aid and Assistance from the Government for their Defence, as the case may require."

Further, there are at least three subject matters relating to the administration of justice that are prominent in the Peace and Friendship Treaties: 1) land use and colonial settlement; 2) civil and criminal jurisdiction, and; 3) sovereignty and friendship. For civil and criminal matters, these fell within a system of shared and exclusive jurisdiction; where matters internal to the British were dealt with by the British and matters internal to the Mi'kmaq would be dealt with by the Mi'kmaq.²¹⁰ Members of the Grand Council describe this as a "two-legged" justice system:

One important element of the 1752 treaty had to do with the matter of justice. We knew that something had to be done to regulate relations between our citizens and settlers, but we also knew that the traditional Mi'kmaq justice system had to play a continued role in our own internal affairs. This called for a "two-legged" justice system based on the concept of co-habitation.

For incidents involving Mi'kmaq citizens on Mi'kmaq territory, the traditional Mi'kmaq justice system would apply. For situations involving settlers, the English justice system would be used. And finally, for matters that involve both Mi'kmaq citizens and settlers, the English civil-justice system, with input from the Mi'kmaq, would come into play.

The Mi'kmaq refused to be administered under the political authority of the local settlers or under criminal law in connection with the administration of justice. Instead, the Civil Law of England – the fundamental principles of contract, property, and torts – was understood to be the appropriate basis on which to measure the conduct between the Mi'kmaq and the British people in Nova Scotia. This understanding is reflected in the relevant section of the 1752 compact and in the accession treaties that were ratified by the various districts of Mi'kmakik.²¹¹

As this quote illustrates, the Mi'kmaq have always understood the treaties as meaning the Mi'kmaq retained their own governance, including legal systems.²¹²

²¹⁰ Robert Hamilton, "Indigenous Legal Traditions and Histories of International and Transnational Law in the Pre-Confederation Maritime Provinces," in *International Law at 150 and Beyond*, Paper No. 4. Centre for International Governance Innovation, Waterloo: ON, p. 8-9.

²¹¹ Grand Chief Donald Marshall, Sr., Grand Captain Alexander Denny, Putus Simon Marshall, of the Executive of the Grand Council of the Mi'kmaw Nation, "The Covenant Chain," in *Drum Beat – Anger and Renewal in Indian Country*, ed. Boyce Richardson (Summerhill Press – The Assembly of First Nations: Toronto, 1989) 73-104 at 95.

²¹² James (Sákéj) Henderson, "Alexander Denny and the Treaty Imperative" in Marie Battise, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) at 102.

The extent to which the Mi'kmaq treaties commit settler governments to respect Mi'kmaq justice initiatives and involve them in justice reform is an area that would benefit from greater study.²¹³

Although the Supreme Court of Canada has said that the relationship between First Nations and the Crown is fiduciary in nature, in practice the court has mostly limited its application to misconduct in relation to the taking of reserve lands.²¹⁴ Similarly, although the Honour of the Crown has been said to require the Crown to act honourably in all its dealings with Aboriginal people,²¹⁵ it has been interpreted to give rise to actionable duties on the part of governments in only a small number of circumstances.²¹⁶

Sidebar: Challenges to the FNPP based on the fiduciary duty and honour of the Crown

The Pekuakamiulnuatsh First Nation, a Quebec First Nation that had a self-administration agreement under the FNPP but was forced to close its police station on account of it being chronically underfunded, brought a challenge in the Quebec courts alleging that both Canada and Quebec breached the honour of the Crown and their fiduciary duties to properly fund and maintain policing services on reserve. Canada and Quebec's attempt to strike the case for lack of a cause of action was denied,²¹⁷ but the claim was later dismissed by the Quebec Superior Court.²¹⁸ However, the Quebec Court of Appeal recently overturned this ruling, finding Canada and Quebec breached the honour of the Crown by knowingly underfunding policing services in the community when the FNPP Policy recognized First Nations are entitled to services comparable to other communities. The honour of the Crown was at play because the FNPP Policy explicitly sought to advance a protected s 35 right, namely the right to self-government in policing. The court decided it was unnecessary to rule on fiduciary duty and also said it's applicability based on precedent was uncertain.²¹⁹

The First Nation also won a human rights complaint against Canada for its underfunding of the SA (which Canada is judicially reviewing), discussed further below.²²⁰

The 2015 Truth and Reconciliation Commission Report criticized the current approach to s. 35(1) as “not being implemented with sufficient strength and vigour” and failing to live up to

²¹³ There has been limited work in this area to date. Some discussion can be found in Chapter 4 of the CCA Report, *supra* note 186, as well as Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case*, at Chapter 5 (Montreal & Kingston: McGill-Queen's University Press, 2019).

²¹⁴ See *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623.

²¹⁵ See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para. 17.

²¹⁶ See *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765, 2018 SCC 40.

²¹⁷ *Pekuakamiulnuatsh Takuhikan c. Procureure générale du Canada*, 2017 QCCS 4787.

²¹⁸ *Pekuakamiulnuatsh Takuhikan c. Procureure générale du Canada*, 2019 QCCS 5699.

²¹⁹ *Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699. It is probable Canada and Quebec will seek leave to appeal this decision to the Supreme Court of Canada.

²²⁰ *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4.

the vision of reconciliation.²²¹ Three of the most significant Calls to Action made by the TRC, which could serve to counter-act the current limits in Canadian law that have impeded reconciliation, include:

- * #42 calling upon federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems...
- * #43 calling upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
- * #47 calling upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.
- * #50 calling upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

Twenty-six years earlier, in 1989, somewhat similar recommendations for a Native Criminal court and Justice Institute were included in the *Royal Commission on the Donald Marshall, Jr., Prosecution*:

20. We recommend that a community-controlled Native Criminal Court be established in Nova Scotia, initially for a five-year pilot project, incorporating the following elements:

(a) a Native Justice of the Peace appointed under Section 107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offences committed on a reserve;

...

21. We recommend that a Native Justice Institute be established with Provincial and Federal Government funding to do, among other things, the following:

(a) channel and coordinate community needs and concerns into the Native Criminal Court;

(b) undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people;

(c) train court workers and other personnel employed by the Native Criminal courts and regular courts;

²²¹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Winnipeg: The Commission, 2015) at 203.

- (d) consult with Government on Native justice issues;
- (e) work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information needs of Native People;
- (f) monitor the existence of discriminatory treatment against Native people in the criminal justice system.²²²

While a Mi'kmaq Justice Institute in response to the Marshall Inquiry Recommendation #21 was created in the mid-1990s, it was short-lived, closing in 1998. The 2013 *Evaluation of the Marshall Inquiry Implementation* describes its challenges as insufficient funding, “challenges to its identity from the mainstream system, an overwhelming caseload, and community demands that it act beyond its capacity in criminal matters, as well as fight for treaty and Aboriginal rights in all forums.”²²³ The Mi'kmaq Legal Support Network, which delivers a number of justice programs, such as Mi'kmaq translation services, court workers and Gladue reports, came to replace the Institute, however, it is not resourced in order to provide the same expanse of services as had been intended under the Native Justice Institute.

Recommendation #20 to have Native Criminal Court with justices of the peace appointed under Section 107 of the *Indian Act* who could hear summary offences under the *Indian Act* (which includes by-law offences) was never implemented.²²⁴

2.9 Positive developments and tools to hold governments accountable

Despite the lack of adequate recourse for First Nations to challenge inadequate services or neglect by federal or provincial governments, there have been several **developments in law and society during the past five years that can be leveraged by First Nations to hold federal and provincial governments better accountable.**

2.9.1 Key Human Rights Tribunal Decisions: *Caring Society* (2016) and *Dominique* (2022)

The watershed Canadian Human Rights Tribunal decision in *Caring Society* found that ISC had been discriminating against First Nations children and families for chronically underfunding child welfare services for over a decade.²²⁵ It has several important findings relevant to government underfunding of essential services to First Nations peoples. We highlight two that are particularly important for government accountability and relevant to this report.²²⁶

First, the Tribunal rejected Canada's argument that it had no responsibility to First Nations for delivery of child welfare under s. 91(24) of the *Constitution Act*, 1867 as this was a provincial

²²² *Royal Commission on the Donald Marshall, Jr., Prosecution – Digest of Findings and Recommendation*, December 1989, [online](#), at 28.

²²³ Jane McMillan, *Evaluation of the Marshall Inquiry Implementation – Full Report*, (2013) at 13 [Marshall Evaluation].

²²⁴ *Ibid* at 34.

²²⁵ *Caring Society*, *supra* note 227.

²²⁶ The arguments are canvassed for fully in Metallic, “Implications,” *supra* note 207.

responsibility. The Tribunal ultimately concluded that Canada had primary jurisdiction under s. 91(24) and responsibility under human rights law to First Nations in relation to child welfare programming because, at the end of the day, it is Canada that “has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves... .”²²⁷ Similar arguments could be made concerning the federal role in relation to other services on reserve, including governance and justice.

A second key finding from this case is that First Nations children and families are entitled to **substantive equality** in relation to child welfare. The Tribunal emphasized that this means that First Nations children and families living on reserve are entitled to services that meet their needs and circumstances, including their cultural, historical and geographical needs and circumstances.²²⁸ The Tribunal was speaking both in terms of funding and program standards. While mirroring provincial legislation and standards can be a useful reference for assessing the adequacy of funding and services on reserve, it cannot be *the* sole, or driving, reference point.²²⁹ This sets a very important standard in terms of what First Nations are entitled to, and it is reasonable to assume that this finding extends beyond child welfare and includes all basic services received by First Nations to ensure their well-being, safety and security. **This means that when it comes to key services, First Nations are not only entitled to services on par with citizens of the provinces, but to services that meet their circumstances (which may possibly exceed provincial services).**

Focus: *Dominique v Public Service Canada* - underfunding of FNPP constitutes discrimination

As noted earlier, in 2022, the Canadian Human Rights Tribunal affirmed the Pekuakamiulnuatsh First Nation’s complaint of discrimination against Canada for the chronic underfunding of its self-administered policing in *Dominique v Public Service Canada*. The Tribunal found the discrimination was very similar to that found in the *Caring Society* case. It rejected Canada’s arguments that policing was a provincial matter and that the federal government had no jurisdiction (or obligation to fund adequately). It found that the FNPP was a federal program and that Canada could not deliver the program in a discriminatory manner. Canada could not simply rely on the fact that the FNPP program was intended to accommodate First Nations’ policing needs without delving deeper into whether the Program was actually meeting Pekuakamiulnuatsh’s needs. Substantive equality requires that the social, political, economic and historical contexts of First Nations be taken into account in policing.²³⁰

²²⁷ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Caring Society*] at para. 85.

²²⁸ *Ibid* at para. 465.

²²⁹ *Ibid* at para. 462.

²³⁰ *Dominique v Public Safety Canada*, *supra* note 220 at 325.

The First Nation successfully proved that its SA policing was chronically underfunded and the First Nation found itself going into deficit year after year, eventually forcing the community to close its police station. On this, the Tribunal found that Canada had neglected to fund the program adequately: “the evidence shows that the FNPP is largely dependent on a funding envelope. ... And this funding envelope has been neglected by the federal government for years, culminating in a forced cap on funding. Small increases have subsequently been provided, yet the evidence shows that the need is still great.”²³¹ It further found that:

the structure of the FNPP necessarily results in a denial of service, as it is impossible for the Complainant to receive basic policing services, as basic services are effectively ruled out under the funding formula. The funding becomes arbitrary and inadequate. This situation reinforces First Nations’ dependency on the Crown, the federal government.²³²

This case is important to the conclusions in this report, as it demonstrates that chronic underfunding and neglect of First Nations needs by state governments in the areas of police services can constitute actionable discrimination. Substantive equality is the standard governments must meet.

Note that Canada is currently seeking judicial review of this decision.

2.9.2 *R v Turtle (2020) – denial of justice services is discrimination and ignores treaty relationship*

Adverse effects discrimination occurs where a law or policy, while neutral on its face, has a disproportionate and negative impact on members of a group identified by a prohibited ground. In a recent case, *R v Turtle*, the Ontario Superior Court found that the failure of the province to provide justice services, namely the ability for First Nations peoples to serve intermittent services within their community, was unjustified discrimination.²³³ The case is an important precedent for recognizing that the denial of justice services by governments can constitute adverse effects discrimination.

R v Turtle involved six women from Pikangikum First Nation, a fly-in, Treaty #5 community located in Northwestern Ontario, 225 kilometers northeast of Kenora. The women, all mothers residing on reserve with their young children, pled guilty to drinking and driving offences that carried mandatory minimum jail sentences of not more than 90 days. Under the *Criminal Code*, the women could request to serve their sentences intermittently, likely on weekends. However, because of the reserve’s remote location, with the nearest jail located in Kenora, the women

²³¹ *Ibid* at para 340.

²³² *Ibid* at para 328.

²³³ *R. v. Turtle*, 2020 ONCJ 429.

argued that it would be financially and logistically prohibitive for them to travel to and from the jail to serve their sentences intermittently.

Justice Gibson found that intermittent sentencing options were unavailable to the women on account of their residency on reserve, an analogous ground of discrimination, constituting a violation of s. 15(1) of the *Charter*. The reasons imply that the denial of such services arose from interjurisdictional neglect by both the provincial and federal governments and was especially problematic in the face of the serious social problems of substance abuse and suicides faced by the community. In this regard, the judge notes that neither the Ontario Provincial Police (“OPP”) nor the provincial or federal Crowns appeared willing to enforce or prosecute the community’s intoxication by-law:

89. According to Sgt. Norlock’s testimony, the Pikangikum OPP are aware of the community band by-law that prohibits the purchase, sale and consumption of alcohol but he, himself, has not read it and it is not enforced. The position of the provincial Crown Attorney is that the prosecution of band laws is a matter for the Federal Crown prosecution service, and they would not prosecute those matters even if such charges were laid by someone other than the OPP. The Federal Crown, historically, does not attend in Pikangikum and, despite being properly served with the *Charter* materials in this Application, has not responded or chosen to participate in these proceedings.

The reasons also suggest that this neglect of justice needs in the community is particularly problematic given the treaty relationship between the Crown and the First Nation:

97. A treaty between peoples creates an enduring relationship based on solemn promises. Where, as here, there is a power imbalance between the parties, without due care and attention, the relationship is in constant danger of becoming badly distorted to the detriment of the more vulnerable party. In the case of Pikangikum and the Queen, an agreement for mutual assistance has become an exercise in the crudest form of colonization, with devastating consequences for the people of Pikangikum.

98. There can be no doubt that the ability to serve a mandatory jail sentence intermittently would be of great benefit to these defendants and their families and yet the record before me indicates that counsel have been unable to identify a single case, anywhere, at any time, where an on-reserve resident of Treaty #5 has been granted an intermittent sentence.

99. In these circumstances, where the Pikangikum people’s traditional lifestyle has been disrupted by over-harvesting, the systematic separation of children from their parents in residential schools, upsetting delicate family structures and ancient oral traditions, causing widespread dependency, substance abuse, violence and an epidemic of youth suicides, while the government refuses to fulfil its solemn treaty promise to assist, any legal regime of that government that has the effect of extending the damaging effects of colonialization, will be wrongfully discriminatory.

100. In a community where 75 per cent of the population is under the age of 25, removing mothers from their children for extended periods of time will undoubtedly exacerbate existing problems in this vulnerable and destabilized First Nation. In this case the issue is not overincarceration, per se, but rather the direct extension of the corrosive effects of colonialization.

In addition to being a precedent that denial of justice services in First Nations communities can constitute discrimination, the case is also a ground-breaking example of a court utilizing the sacred treaty relationship to inform the Crown's treaty obligations to First Nations in the area of justice. As discussed in [Section 2.8](#), the Mi'kmaq treaties could similarly be argued to support such an approach.

2.9.3 Jordan's Principle

Jordan's Principle is named in memory of Jordan River Anderson, a First Nations boy from Norway Cree House located in Manitoba. He was born in 1999 with multiple different disabilities. As a result of his condition, Jordan stayed in the hospital after his birth for some time. He died at the age of five, without ever being able to live outside of the hospital, in a family home, because both Canada and Manitoba denied they were responsible for paying for his care once he was discharged from hospital.

Following Jordan's death, the Federal House of Commons unanimously passed a motion affirming Canada adopt a child-first principle to ensure no gaps or delays in services to First Nations children.²³⁴ This requires that the first government approached by a First Nations community *pay* for the requested services for a First Nations child, and that any jurisdictional disputes be resolved afterwards.

In *Pictou Landing Band Council v. Canada (Attorney General)*, the federal government's adoption of Jordan's Principle was used to overturn a decision of ISC to refuse home care services to a severely disabled Mi'kmaq youth and his mother.²³⁵ In the *Caring Society* case, the Canadian Human Rights Tribunal found that ISC and Health Canada had been interpreting Jordan's Principle too narrowly as only relating to inter-jurisdictional disputes, not inter-departmental disputes, and as only related to First Nations children with multiple disabilities. **The Tribunal in *Caring Society* found that Jordan's Principle must be interpreted broadly as applying to a jurisdictional dispute arising between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, and it applies in numerous situations, including filling gaps between health, social services and**

²³⁴ Private Members Motion 296, tabled by Jean Crowder, MP Cowichan-Nanaimo for (NDP) the motion reads: "in the opinion of the House, the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children".

²³⁵ *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342.

child welfare services.²³⁶ A number of further non-compliance orders against Canada in *Caring Society* confirm a broad interpretation of Jordan’s Principle.²³⁷

There have been several calls to expand Jordan’s Principle beyond requests for services for First Nations children to First Nations adults and further to First Nations communities. The Viens Report calls for Quebec to “[i]nitiate discussions with the federal government to extend the Jordan Principle to adults” and to work “with the federal government, develop an overall approach for applying the Jordan Principle, coupled with budget forecasts for all First Nations and Inuit.”²³⁸ Further, the 2019 Tsilhqot’in Report on 2017 Wildfires, *The Fires Awakened Us*, identifies Jordan’s Principle as the appropriate basis for guiding funding for emergency management in First Nations communities and that Canada and British Columbia take a “community-first approach.” The argument for the extension of Jordan’s Principle to communities was as follows:

Just as jurisdictional ambiguity and complexity exacerbate the vulnerability of First Nations children in need of social services, jurisdictional ambiguity and complexity operate to enhance the vulnerability of First Nations communities to threats such as wildfire. Jurisdictional complexity interfered with the ability of Tsilhqot’in communities to respond immediately to the perceived wildfire threat. Jurisdictional complexity caused significant delays in reimbursement of emergency management expenses further threatening the ability of communities to run their governments for the remainder of the year.....²³⁹

Others have similarly argued that Jordan’s Principle mandates a community-first approach in the negotiation of funding in relation to Indigenous child welfare services.²⁴⁰

Although Jordan’s Principle emanates from a government resolution, we agree with Colleen Sheppard that **Jordan’s Principle has now emerged as a broader legal principle about equitable treatment of First Nations, which contains both a *jurisdictional* dimension and *rights* dimension.**²⁴¹ Because Indigenous peoples uniquely experience jurisdictional neglect due to the ambiguities in the law relating to which level of government is responsible for providing them with services, and because this neglect leaves Indigenous peoples vulnerable and can cause harm to Indigenous children, adults, families and communities, human rights laws and the principle of equality enshrined in s. 15(1) of the *Charter* ought to provide a

²³⁶ *Caring Society supra* note 219 at paras. 352-382.

²³⁷ 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 14; 2017 CHRT 35; 2018 CHRT 4; 2019 CHRT 7; 2019 CHRT 39; 2020 CHRT 20 and 2020 CHRT 36. For a summary of these orders, see *Caring Society of Canada Information Sheet, “Summary of Orders from the Canadian Human Rights Tribunal”* [online](#).

²³⁸ Viens Report, Executive Summary, *supra* note 160, [online](#), at Calls to Justice 104 and 104.

²³⁹ Tsilhqot’in Nation, NAGWEDÍŽK’AN GWANEŠ GANGU CH’INIDŽED GANEXWILAGH Tsilhqot’in Report- 2017 Wildfires, 2019 [online](#).

²⁴⁰ Naomi Metallic, Hadley Friedland and Sarah Morales, “The Promise and Pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families,” Special Feature for Yellowhead Institute, July 4, 2019, [online](#).

²⁴¹ Colleen Sheppard *supra* note 202 at 4.

remedy.²⁴² This should be the case whether the funding is for services for one child, one adult or an entire community.

Although not specifically framed as a Jordan's Principle case per se, a recent and important case applying 'Jordan's Principle reasoning' is the Manitoba Human Rights Adjudication Panel decision in *Pruden v. Manitoba* (2020).²⁴³ In this case, the Panel agreed that the province discriminated against a young First Nations man with multiple disabilities and his mother for delay, and often denial, of health care and related services based on their First Nations status and the fact they lived on reserve. The Panel found that the delays and denials were caused by the policies and practices arising from the exercise of concurrent jurisdiction between the province and federal government, and this amounted to adverse effects discrimination:

[22] No government or other official intended to treat the complainants differently by reason of their ancestry as Anishinaabe people. However, that was **the very effect of the whole of the assorted policies, practices, and even laws that try to carve out the concurrent jurisdiction of the federal and provincial governments** in respect of healthcare and related services for First Nations people living in First Nations communities. **Those intergovernmental arrangements caused health care and related services to be denied, delayed, or intermittently interrupted for the complainants.** The same problems did not afflict neighbouring non-First Nations communities, and those residents enjoyed health care and related services without denial, delay, or interruption.

[23] As a result, the complainants suffered treatment that was **obviously adverse**. ...

Importantly, the Panel also found that the province could not rely on jurisdictional arguments to justify the discrimination:

[25] ... [Manitoba] submits ... that any discrimination was reasonably justified, because the Canadian constitutional framework precludes the respondent from providing services that are within the exclusive scope of the federal government. [Manitoba] notes that s. 91(24) of the *Constitution Act* empowers the federal Parliament to make laws in relation to "Indians, and Lands reserved for the Indians". However, the division of powers does not constitutionally oust the respondent. In fact, s. 92 of the *Constitution Act, 1867*, gives provincial legislatures with a "broad and extensive" power over significant aspects of health care and related services... Indeed, there was evidence during the hearing of the instant complaint that the respondent does provide some health care and related services in a few First Nation communities. The jurisdiction of the federal government is not therefore exclusive; at most, it is concurrent with the

²⁴² It should not matter whether the federal government or provinces intend to neglect First Nations issues. Human rights and equality law focuses on impacts (harm and vulnerability) of claimants, not on the intention of respondents.

²⁴³ *Pruden v Manitoba*, 2020 MBHR 6. The case is currently on appeal.

provinces. **The Canadian constitutional framework does not amount to a reasonable justification for the discriminatory treatment of the complainants.**²⁴⁴

2.9.4 The new Department of Indigenous Services Act

On July 15, 2019, the *Department of Indigenous Services Act*, SC 2019, c 29, s 336 (“*DISA*”) came into effect, replacing the old *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6 (the “*DIAND Act*”). *DISA* introduced some important standards and accountability mechanisms that were absent from the *DIAND Act*.²⁴⁵ As noted in [Section 2.5](#), *DISA* actually provides a list of services the department of Indigenous Services Canada (“ISC”) is responsible for, including governance, which includes by-law-making powers.

Beyond this, the preamble of *DISA* sets commitments made by Canada, as well as duties ISC should carry out in its work. Preambles are relevant to the interpretation of laws. They are considered an integral part of a statute.²⁴⁶ Statutes must be interpreted to not just consider the particular section of the law in question, but the rest of the text of the law, including the preamble, the context and the purpose the government had in enacting the law.²⁴⁷ This approach to interpretation means that **preambles will generally receive serious attention from the courts and act as a source of legislative values that are assumed to guide the conduct of the ISC.**²⁴⁸ To put it another way, the inclusion of these commitments and duties in the preamble of *DISA* means that ISC should act consistently with these. The failure of ISC to follow these commitments and duties can be considered by the courts when judicially reviewing the conduct of ISC on administrative law grounds (see [Section 2.3.1.4](#) for an overview of these grounds).

The commitments in *DISA* that are relevant to ISC’s exercise of responsibility concerning *Indian Act* by-laws include:

(1) “[A]chieving reconciliation with First Nations ... through renewed nation-to-nation, government-to-government ... relationships based on affirmation and implementation of rights, respect, cooperation and partnership... .”

This commits ISC to respect First Nations governments as *governments* and deal with them accordingly. For *Indian Act* by-laws, treating First Nations as *governments* ought to include recognizing and supporting First Nations to implement their jurisdiction in a generous and meaningful way, including appropriately funding communities’ by-law support needs. Such an approach to respecting First Nations as *governments* is also consistent with the principle of

²⁴⁴ Manitoba filed an appeal on September 16, 2020, of the Panel’s decision (File No. CI20-01-28403).

²⁴⁵ This subsection summarize key points raised in Naomi Metallic, “Making the Most Out of Canada’s New Department of Indigenous Services Act,” Policy Brief for Yellowhead Institute, August 12, 2019, [online](#).

²⁴⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham: LexisNexis, 2008) at 382.

²⁴⁷ See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.

²⁴⁸ Sullivan *supra* note 246 at 382-387.

federalism, which ISC staff ought to comply with as a fundamental principle of law and as one of Canada's commitments in the 10 Principles Policy.²⁴⁹

(2) “[I]mplementing the United Nations Declaration on the Rights of Indigenous Peoples...”

Canada's commitments to the *UN Declaration* and its general status in Canadian law are discussed further in the next section. However, its specific reference in the preamble of DISA should be used to argue that the *UN Declaration* can and should be used as an interpretive guide for the actions of ISC. Again, this modern law of statutory interpretation requires that the entire text of a law, including its preamble, as well as its purpose and context, be considered when interpreting it.

(3) “[E]nsur[ing] that Indigenous individuals have access — in accordance with transparent service standards and the needs of each Indigenous group, community or people — to services for which those individuals are eligible... .”

This requires that ISC's services should be (1) transparent and (2) focus on the needs of the Indigenous group (e.g., be 'needs-based'). The commitment to providing needs-based services is very important as ISC, in the past, often did not strive to provide need-based services, but instead was focused on providing services at levels similar to the provinces (though it often does not meet such standards).²⁵⁰ The needs-based commitment strengthens the arguments based on substantive equality arising from *Caring Society* and *Dominique*—that First Nations are entitled to programs, services and funding that meet their needs and circumstances.

(4) “[T]ak[ing] into account socio-economic gaps that persist between Indigenous individuals and other Canadians with respect to a range of matters as well as social factors having an impact on health and well-being... .”

This requires ISC to (1) take into account the socio-economic gaps and negative social factors impacting Indigenous individuals in doing its work, and (2) be concerned with Indigenous individuals' health and well-being. This commitment is important because it prioritizes Indigenous well-being, particularly ensuring Indigenous socio-economic well-being, over other possible objectives ISC might have in carrying out its work.

(5) “[R]ecognizes and promotes Indigenous ways of knowing, being and doing...”

This commitment tells us that Indigenous ways of being and doing—which may be different from Euro-Canadian ways of being and doing—have to be respected and supported by ISC. This commitment bolsters the principle of substantive equality from *Caring Society* and *Dominique*

²⁴⁹ [10 Principles Policy](#), *supra* note 176 at #4: “The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.”

²⁵⁰ See Metallic, “Implications,” *supra* note 207 at 11-12.

as well as the ‘needs-based services’ commitment above—that First Nations peoples have the right to be different and have services that reflect those differences. In the context of *Indian Act* by-laws, this commitment empowers First Nations to include traditional values and approaches within their laws—not simply mirror Canadian laws.

(6) “[C]ollaborat[ing] and cooperat[ing] with Indigenous peoples and with the provinces and territories... .”

In the past, INAC was resistant to any claims that it had a legal obligation to collaborate and cooperate with First Nations when it comes to essential services. However, ISC has now committed in the preamble of *DISA* to collaboration and cooperation. In addition, at **s. 7(a)**, *DISA* specifically commits the minister to “provide Indigenous organizations with an opportunity to collaborate in the development, provision, assessment and improvement of the services referred to in subsection 6(2).” “Indigenous organization” here would not just include National or Provincial Indigenous organizations like the AFN or provincial affiliates, but *DISA* defines “Indigenous governing bodies” broadly as “a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.”

There is now, therefore, a legal commitment in *DISA* for ISC to engage with First Nations when it creates, changes or assesses its services. This report (and several reports before this) make clear that there are deficiencies in the by-law regime set out in the *Indian Act*. It seems that ISC has largely been taking a hands-off approach since 2014 to by-laws. Given the various legal obligations and commitments Canada and ISC have made, it would seem incumbent on the government to take steps to support First Nations to develop governance and justice systems that meet their needs. In so doing, they are now legally required to engage Indigenous groups in this work.

(7) “[I]mplement[ing] the gradual transfer of departmental responsibilities to Indigenous organizations... .”

This commitment in the preamble tells us that ISC must strive for the gradual transfer of its responsibilities to Indigenous organizations. As a clear priority, in relation to by-laws, at the very least, this should mean that ISC supports a generous interpretation of by-law powers and will take active steps to support First Nations to implement these powers.

2.9.5 The United Nations Declaration on the Rights of Indigenous Peoples

Both the executive and Parliament of the Canadian government have committed to implementing the *UN Declaration*, and the instrument has legal effect in Canadian law, meaning that domestic law (whether federal or provincial) must be interpreted to be consistent with the

UN Declaration.²⁵¹ Parliament has also now committed ISC to implement the Declaration while carrying out its responsibilities identified in *DISA* (which includes governance services).

The chart below identifies articles within the Declaration that support First Nations’ right to an effective and adequately-funded justice system, which includes respect of their jurisdictional powers (including their by-law powers) and effective enforcement (this is not a complete list).

Provisions in the Declaration	Meaning
<p>Preambular para. 2 - <i>Affirming</i> that Indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such</p>	<p>Affirms the right of First Nations to be treated equally, but also affirms their right to be different. Supports Indigenous peoples’ rights to substantive equality.</p>
<p>Preambular para. 4 - <i>Affirming further</i> that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,</p>	<p>Disavows racist doctrines like the doctrine of discovery, that continue to underlie s. 35 interpretation, and used to deny inherent sovereignty rights as unjust</p>
<p>Preambular para. 16 - <i>Acknowledging</i> that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,</p>	<p>Links the right of self-determination back to other UN instruments, including conventions and treaties that Canada has ratified</p>
<p>Article 2 - Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity.</p>	<p>Affirms the right to non-discrimination, which we would argue, in Canada, applies to the significant problem of jurisdictional neglect</p>
<p>Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.</p>	<p>Affirms right to self-determination</p>
<p>Article 4 - Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-</p>	<p>Affirms self-government over internal and local affairs (which would include</p>

²⁵¹ For a full discussion, see Naomi Metallic “Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act” (September 28, 2022), [online](#). [Metallic, “Breathing Life”] at 6-22, 33-36.

<p>government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.</p>	<p>justice and safety within communities);</p> <p>Affirms Canada's and provinces' obligations to fund the exercise of self-government</p>
<p>Article 5 - Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.</p>	<p>Affirms right to Indigenous legal orders and political systems and to have Indigenous ways of being and knowing inform political and legal systems</p>
<p>Article 8.1 - Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.</p>	<p>This supports the Indigenous right to self-determination and to not have other governments' laws imposed on them.</p>
<p>Article 18 - Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.</p>	<p>Promotes the right of First Nations participation in decisions that affect them</p>
<p>Article 19 - States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.</p>	<p>Sets the standard of First Nation participation in decisions on legislation and settler government policies and decisions, requiring consultation and cooperation to obtain free, prior and informed consent</p>
<p>Article 34 - Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.</p>	<p>Affirms the right of First Nations to revitalize, develop and maintain their own legal and justice systems, while respecting international human rights standards.</p>
<p>Article 35 - Indigenous peoples have the right to determine the responsibilities of individuals to their communities.</p>	<p>Affirms the right of First Nations to balance individual and collective rights</p>
<p>Article 39 - Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration</p>	<p>Affirms the right of First Nations for support from the State (federal and provincial governments) for the implementation of their rights</p>

<p>Article 40 - Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights.</p>	<p>Entitles First Nations to just, fair and timely dispute resolution mechanisms against the State (federal and provincial governments) and other third parties</p> <p>Affirms the right of Indigenous peoples to consideration of their legal orders in resolving such disputes</p>
<p>Article 46.2 - In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.</p>	<p>Imposes limits on the exercise of rights in the Declaration, but these are limited to non-discrimination (respect for human rights and fundamental freedoms), and strictly necessary.</p>

In June 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, which

- (1) Affirms the *UN Declaration* as a universal human rights instrument with application in Canadian law, meaning that courts must use it to interpret Canadian law, both federal and provincial;²⁵² and
- (2) Commits the federal government to implement the *UN Declaration*, including developing a national plan, in consultation and cooperation with Indigenous peoples, and to report on its efforts.²⁵³ Committing to the *UN Declaration* requires the federal government to “take all measures necessary” to ensure that its laws are consistent with the Declaration.²⁵⁴ The provisions of the *UN Declaration Act* further stipulate specific content that will need to be in Canada’s action plan, including measures to address the injustices, violence, racism and discrimination Indigenous peoples have faced within Canadian society, promote mutual respect and understanding, as well as specific measures relating to monitoring, oversight and recourse or remedy or other accountability measures for the implementation of the Declaration.²⁵⁵

²⁵² *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2021 S.C. c 14, at preambular clauses 18, 19, s 4(a) [“*UN Declaration Act*”]. For a discussion, see Metallic, “Breathing Life,” *ibid* at 15-22, 33-36.

²⁵³ *UN Declaration Act*, *ibid* at s 4(b).

²⁵⁴ *Ibid* at s 5.

²⁵⁵ *Ibid* at s 6.

Note that the *Act* does not require provinces to develop an action plan for implementation of the *UN Declaration*, or to review their existing laws and policies for compliance with the Declaration; provinces must pass their own legislation to do this.²⁵⁶ British Columbia passed such legislation in 2019.²⁵⁷ Manitoba passed legislation in 2016 that commits the province to reconciliation guided by the TRC Report and the Declaration.²⁵⁸ Some Ontario legislation now references the Declaration in their preambles.²⁵⁹ The Northwest Territories has announced it will also be passing similar implementation legislation.²⁶⁰ The Viens Report called on the Government of Quebec to draft and enact legislation guaranteeing that the provisions of the Declaration “will be taken into account in the body of legislation under its jurisdiction.”²⁶¹ The Report underscores that the significance of such action would be to “raise the dialogue between Indigenous peoples and governments” on issues such as self-determination, participation in the development of laws and policies, and funding for responsive programs and services “to a new level.”²⁶²

To date, there has been little if any discussion about the Province of Nova Scotia taking steps to formally commit to implementing the Declaration or passing implementation legislation. Given the significant overlap between the federal and provincial governments in justice areas (discussed in [Section 2.7](#)), and for similar reasons as recognized in the Viens Report, we believe it would be both an important symbolic and practical step for Nova Scotia to commit to the *UN Declaration* through legislation. This would also be consistent with TRC Call to Action 43 which calls on provinces and territories to fully adopt and implement the Declaration.

2.9.6 The MMIWG Final Report

Pushed for by Indigenous women’s advocates for years, and specifically called for by TRC Call to Action #41, the National Inquiry into Missing and Murdered Indigenous Women and Girls issued its final report in June 2019. Although it does not specifically reference *Indian Act* by-laws, the MMIWG Report touches on issues that are relevant to First Nations well-being, safety and justice. These findings can be used to put pressure on governments to make changes, and they can also be considered by the courts in deciding legal questions.²⁶³

²⁵⁶ See Robert Hamilton, “The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation” (2021) 53:4 UBC L Rev 1097.

²⁵⁷ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

²⁵⁸ *The Path to Reconciliation Act*, C.C.S.M. c. R30.5.

²⁵⁹ See *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1 and *Indigenous Institutes Act*, 2017, SO 2017, c 34, Sch 2.

²⁶⁰ CBC News, “What does implementing UNDRIP actually mean?” November 2, 2019.

²⁶¹ Viens Report *supra* note 160 at Call to Action 3.

²⁶² *Ibid* at 18.

²⁶³ The findings and recommendations from inquiries and commissions, while not directly binding on governments, can and have been used by the courts in deciding legal questions. See David Stack, “The First Decade of RCAP’s Influence on Aboriginal Law” (2007) 70 Sask L Rev 123 at 140.

The report applies a relationship-based and Indigenous and human rights-based lens to look at the epidemic of missing and murdered Indigenous women in Canada. The epidemic of MMIWG is framed as a violation of Indigenous women and girls' rights to culture, health, security and justice. This framing is done to highlight the fact that the epidemic of MMIWG arises from a denial of fundamental rights by Canadian governments, institutions and laws, as opposed to simply being a matter of unfilled needs on the part of Indigenous women and girls.²⁶⁴ Like the TRC Report, the MMIWG report emphasizes the right to self-determination, and that the four fundamental rights identified are rooted in self-determination and the need for Indigenous-led solutions.

Chapter 7, on the Right to Security, discusses at length the role that inadequate services play in increasing the vulnerability of Indigenous women and girls.²⁶⁵ Interjurisdictional neglect by the federal and provincial governments of the need for basic services by First Nations and other Indigenous people is identified as a key problem. **The report argues that even though Canada has a complex jurisdictional landscape, this “doesn’t mean that rights can simply be ignored.”²⁶⁶ The report goes on to assert that interjurisdictional neglect constitutes a violation of s. 7 of the *Charter*:**

Interjurisdictional neglect represents a breach of relationship and responsibility, as well as of a constitutionally protected section 7 *Charter* right to life, liberty, and security of the person. Denials of protection and the failure of Canada to uphold these rights – specifically, the right to life for Indigenous women, girls, and 2SLGBTQQIA people – are a breach of fundamental justice. These deficits, then, are about much more than the organization of services, or the specifics of their delivery: they are about the foundational right to life, liberty, and security of every Indigenous woman, girl, and 2SLGBTQQIA person.²⁶⁷

In support of the MMIWG Report’s argument on s. 7 here, there are Supreme Court of Canada cases on how arbitrary denials of, and state-caused delays in, services can constitute breaches of fundamental justice.²⁶⁸ **The MMIWG Report’s s. 7 argument can be used to bolster the human right and s. 15 *Charter* arguments in favour of a community-first approach to Jordan’s Principle. This is yet another tool in the toolbox to address interjurisdictional neglect.**

The relevant Call to Justice in relation to this discussion is #3.6:

²⁶⁴ MMIWG Report Executive Summary *supra* note 56 at 55.

²⁶⁵ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, June 2019, [online](#), Vol 1a at 561-573 [“MMIWG Report Vol 1A”].

²⁶⁶ *Ibid* at 562.

²⁶⁷ *Ibid* at 652.

²⁶⁸ On arbitrary denials: see *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras. 129-132 and 136; and *Canada (Attorney General) v Bedford*, 2013 SCC 72. On state-caused delays, see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, and *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.

We call upon all governments to ensure substantive equality in the funding of services for Indigenous women, girls, and 2SLGBTQQIA people, as well as substantive equality for Indigenous-run health services. Further, **governments must ensure that jurisdictional disputes do not result in the denial of rights and services**. This includes mandated permanent funding of health services for Indigenous women, girls, and 2SLGBTQQIA people on a continual basis, regardless of jurisdictional lines, geographical location, and Status affiliation or lack thereof.²⁶⁹

The MMIWG Report also includes important discussions around the right to justice, stressing that justice is a broader concept than simply the administration of the courts or the conduct of police.²⁷⁰ The MMIWG Report advocates for a human-rights based approach to justice.²⁷¹ Overall, the Inquiry found that Indigenous Peoples have little reason to be confident that the justice system is working for them.²⁷² It found that the failures of the justice system are not restricted to the case of missing and murdered Indigenous women and girls; rather, **“the absence of justice, the fight for justice, and the misuse of justice in interactions between the justice system and Indigenous people routinely compromises their rights and allows violence to continue unchecked.”**²⁷³

The MMIWG Report’s chapter on justice goes into a deep dive on the need to reform law enforcement to increase Indigenous safety.²⁷⁴ Overall, the National Inquiry found that the Canadian justice system and its version of policing are at odds with Indigenous ideas about justice.²⁷⁵ Further to this, the report finds the historic role of the RCMP as the defender of colonial interests has not changed and that the RCMP still enforces present-day discriminatory and oppressive legislation and policies.²⁷⁶ This, in particular, has caused Indigenous people and communities to lose trust and confidence in the Canadian justice system, the RCMP and police services in general.²⁷⁷ Overall, the report finds that the Criminal justice system fails to provide justice for Indigenous people, especially missing and murdered Indigenous women, girls, and gender-diverse peoples. We summarize the most relevant calls for justice from the report below:

5.4 - All governments to immediately and dramatically transform Indigenous policing from a mere delegation to an exercise in self-governance and self-determination. The FNPP must be replaced with a new legislative and funding framework, developed by federal, provincial and territorial governments in partnership with Indigenous Peoples.

²⁶⁹ MMIWG Report Executive Summary *supra* note 56 at 67.

²⁷⁰ MMIWG Report Vol 1A *supra* note 265 at 623-624.

²⁷¹ *Ibid* at 624.

²⁷² *Ibid* at 625.

²⁷³ *Ibid* at 626.

²⁷⁴ *Ibid* at 679.

²⁷⁵ *Ibid* at 694.

²⁷⁶ *Ibid* at 722.

²⁷⁷ *Ibid* at 717.

Minimum requirements of this framework include equitable funding meeting substantive equality; culturally appropriate and effective services; civilian oversight bodies to audit Indigenous police services and investigate claims of police misconduct; and annual public reporting.²⁷⁸

5.7 - All governments to establish robust and well-funded Indigenous civilian police oversight bodies (or build on well-established ones) to observe and oversee investigations in relation to police negligence or misconduct and cases involving Indigenous people, and publicly report on findings.²⁷⁹

5.10 - All governments to recruit and retain Indigenous justices of the peace and to expand their jurisdictions to match that of Nunavut's justices of the peace services.²⁸⁰

5.11 - All governments to expand restorative justice programs and Indigenous peoples' courts.²⁸¹

9.3 - All governments to fund the following initiatives within police services: (i) achieving representation of Indigenous people within all police services, including Indigenous women, girls and gender diverse, through intensive recruiting; (ii) ensure mandatory Indigenous language capacity within police services; (iii) ensure screening of recruits includes testing for racism/sexism, etc.; (iv) including the Indigenous community in the recruitment process; (v) culturally competent/anti-racism training of recruits; (vi) focus on retention through employment supports and incentives and ensure overall health and wellness; (vii) end the practice of limited duration posts in all police services.

9.8 - All police services to establish and engage with a civilian Indigenous advisory committee for each police service or police division and to advise local detachments

2.9.7 Self-determination and self-government and the Indigenous law movement

Our discussion in [Sections 2.2](#) and [2.4](#) show that First Nations have encountered significant challenges in having their inherent right to self-government respected by other governments and the courts. While that certainly seems to have been the case in the 1990s, with both the Chrétien government's unwillingness to implement RCAP, as well as the Supreme Court of Canada's narrow approach to self-government in *Pamajewon*, there is now evidence of a change in attitude happening, albeit slowly. A significant impetus for change in this regard appears to be the TRC Report. In fact, in the case of *Daniels v. Canada (Indian Affairs and*

²⁷⁸ MMIWG Report Executive Summary *supra* note 56 at 69.

²⁷⁹ *Ibid* at 70.

²⁸⁰ *Ibid* at 71.

²⁸¹ *Ibid*.

Northern Development) (2016), the Supreme Court cited the TRC as evidence of a general intention on the part of the Canadian Parliament to achieve reconciliation. The Court stated:

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.²⁸²

This observation by the Supreme Court can be used to argue that legislation relating to First Nations has to be interpreted keeping in mind that reconciliation is Parliament's goal (the 'reconciliation principle').²⁸³

In a number of ways, the TRC's report emphasized the importance of self-determination and the revitalization of Indigenous laws. The report emphasized that racist doctrines like *terra nullius* and the doctrine of discovery, which deny Indigenous land rights and sovereignty, must be discarded. It said that the *United Nations Declaration on the Rights of Indigenous Peoples* must form the foundation of reconciliation in Canada, and it is clear that the right of self-determination (which includes the right to self-government) is the cornerstone of the *Declaration*. The TRC also issued call to action #42, which calls for governments to "commit to the recognition and implementation of Aboriginal justice systems...".²⁸⁴

The TRC also underscored the vital role that the revitalization of Indigenous law must play in reconciliation. Although the report does not specifically say so, the right of self-determination and Indigenous laws are inextricably linked. The TRC worked closely with the *Indigenous Law Research Institute* ("ILRU") at the University of Victoria and supported seven Indigenous communities across Canada to embark on pilot projects to revitalize their laws. Based on the results of this, the TRC issued call to action #50, which calls on "the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada."²⁸⁵ In Budget 2019, the Government of Canada responded to Call to Action 50 by proposing to invest \$10 million over five years in support of Indigenous law initiatives across Canada.²⁸⁶ The ILRU has also received significant funding from the federal and British Columbia governments, and the Law Foundation of BC to build a National Centre for Indigenous Laws.²⁸⁷

²⁸² *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99, 2016 SCC 12 at para. 37.

²⁸³ For an example of such an argument, see SCC intervener factum of the First Nation Caring Society in *Canadian Human Rights Commission v Canada*, court file no. 37280, [online](#), at paras 29-30.

²⁸⁴ TRC, *supra* note 221, Call to Action #42.

²⁸⁵ TRC, *ibid*, Call to Action #50.

²⁸⁶ For more information, see Department of Justice Canada website, "Revitalizing Indigenous Laws #CTA50," [online](#).

²⁸⁷ University of Victoria News Release, "UVic Law to build a National Centre for Indigenous Laws," September 3, 2020, [online](#).

The work around the revitalization of Indigenous law, which started with the important work of Indigenous scholars at the University of Victoria, has begun to receive significant recognition. Several scholars are writing and presenting about different methodologies that can be used to revitalize Indigenous laws and incorporate these into the law-making practices of communities. Such methodologies include drawing out law from Indigenous communities' stories,²⁸⁸ languages,²⁸⁹ land-based knowledge,²⁹⁰ ceremonies²⁹¹ and from conversations with communities,²⁹² to name a few.

Several laws schools are now teaching about these methodologies and about Indigenous legal traditions more broadly. Judges are now writing about the importance of learning about and respecting Indigenous laws.²⁹³

There are several recent cases that speak about the need of the courts to respect Indigenous law as well as Indigenous exercises of self-government. These cases can be leveraged by First Nations to advocate for greater respect of their laws before the courts. Examples are provided below.

In ***Canada Pacific Ltd v Matsqui Indian Act (1995)***, the Supreme Court of Canada recognized that the purpose of the taxing power in s. 83 of the *Indian Act* was the facilitation of self-government.²⁹⁴ The Court found evidence of this in statements made by federal officials at the time of the 1988 *Kamloops* amendments, which sought to facilitate the use of taxation powers (discussed earlier in [Section 2.2](#)). The Court held that the objective of self-government must be taken into account when interpreting the by-law powers under section 83. This included showing respect for the appeal bodies and assessment appeal processes that had been set up

²⁸⁸ See, for example, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); Hadley Friedland and Val Napoleon, "Gathering The Threads: Developing A Methodology For Researching And Rebuilding Indigenous Legal Traditions", (2015) 1:1 *Lakehead Law Journal*.

²⁸⁹ See, for example, Matthew L.M. Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence", 13 *Mich. J. Race & L.* 57 (2007); Tuma Young. "A Foundational Worldview for a L'nuwey Justice System" (2016) 13:1 *Indigenous LJ* 75; Naomi Metallic, "Five Linguistic Methods for Revitalizing Indigenous Laws," forthcoming in Volume 68 *McGill LJ* (2022), [online](#).

²⁹⁰ John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33:1 *Windsor YB Access Just* 1; Sarah Morales. "Stl'nup:Legal Landscapes of the Hul'qumi'num Mustimuhw" (2016) 33:1 *Windsor YB Access Just* 103; Nancy Sandy. "Stsqey'ulecw RE St' ecelcemc Laws from the Land)" (2016) 33:1 *Windsor YB Access Just* 187.

²⁹¹ John Borrows, "Seven Gifts: Revitalizing Living Laws through Indigenous Legal Practice" (2016) 2 *Lakehead LJ*; Miyo Nêhiyâwiwin (Beautiful Creeness) Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy (2018) 16/17 *Indigenous Law Journal* 51.

²⁹² See, for example, Val Napoleon, "Thinking about Indigenous Legal Orders" (2007), Research Paper for the National Center for First Nations Governance; Nancy Sandy. "Stsqey'ulecw RE St' ecelcemc Laws from the Land)" (2016) 33:1 *Windsor YB Access Just* 187.

²⁹³ Chief Justice Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," paper prepared for Continuing Legal Education Society of British Columbia, November 2012.

²⁹⁴ *Matsqui*, *supra* note 84.

by the bands under their taxation by-laws. In that case, companies who had been issued tax assessments could not jump over the bands' appeal processes and go directly to the Federal Court to challenge their assessments. On this, the Court said: "since the scheme is part of the policy of promoting Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions."²⁹⁵ The majority of the Court was not convinced that the bands' appeal bodies presented any structural or institutional bias that raised impartiality concerns under administrative law.

Pastion v. Dene Tha' First Nation (2018) involved a challenge to the decision of an appeal board set up under the band's custom election law.²⁹⁶ The Federal Court held that the band's election law (as well as by-laws) is a form of Indigenous law, making the following findings with respect to Indigenous law:

- "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."²⁹⁷
- "Despite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was, for a long period, one of denial and suppression..."²⁹⁸
- "Indigenous peoples are fully entitled to use the written form to express their laws, and that does not make those laws any less Indigenous..."²⁹⁹
- "... the manner in which various sources of law are blended is a matter for each First Nation to decide and this Court should respect that choice."³⁰⁰

As an Indigenous law, the Federal Court held that the election law is an exercise of self-government and that the court should exercise deference towards the First Nation and appeal body it has chosen. This means the courts should not lightly overturn the process and decisions reached under Indigenous laws. Some key comments made by the court on this include:

- "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue. They are also sensitive to Indigenous experience generally and to the conditions of the particular nation or community involved in the decision. They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue..."³⁰¹

²⁹⁵ *Ibid* at para. 44.

²⁹⁶ *Pastion v. Dene Tha' First Nation*, [2018] 4 FCR 467, 2018 FC 648.

²⁹⁷ *Ibid* at para. 8.

²⁹⁸ *Ibid* at para. 9.

²⁹⁹ *Ibid* at para. 13.

³⁰⁰ *Ibid* at para. 14.

³⁰¹ *Ibid* at para. 22.

- “The enactment of Indigenous election legislation ... is an exercise of self-government. The application of laws is a component of self-government. It is desirable that laws be applied by the same people who made them. Therefore, where Indigenous laws ascribe jurisdiction to an Indigenous decision-maker, deference towards that decision-maker is a consequence of the principle of self-government.”³⁰²
- “When deciding whether Indigenous decision-makers have made an unreasonable decision, reviewing courts should read their reasons generously, supplementing any apparent omission by looking to the record... .”³⁰³

Applying these principles in this case, the Federal Court found that the decision of the First Nations’ appeal board upholding the fairness of an election were reasonable in the circumstances.³⁰⁴

In the case of ***Solomon v. Garden River First Nation (2018)*** involving banishment for drug use, the Federal Court suggested that Anishinaabe law might save what would otherwise be considered a breach of procedural fairness.³⁰⁵

In ***Restoule v. Canada (Attorney General) (2018)***, the Ontario Superior Court considered Anishinaabe law in interpreting the Robinson Huron Treaty.³⁰⁶ This consideration informed the Court’s finding that the Crown has a mandatory and reviewable obligation to increase the Treaties’ annuities when the economic circumstances warrant.

In ***Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation (2019)***, the Federal Court once again emphasized the need of the courts to show deference to decisions made under First Nations’ laws.³⁰⁷ (Here, this involved the scheme for First Nations tax laws under the *First Nations Fiscal Management Act* (“FNFMA.”)) The case involved a challenge to a decision of the First Nation Tax Commission (“FNTC”) to approve a law of the First Nation to impose a fee for sewer and wastewater treatment for a casino operated by the Ontario Lottery and Gaming Corporation on reserve. Drawing on the *Matsqui* decision and drawing on what the court called the “self-government principle,”³⁰⁸ the Federal Court found that the FNTC’s approval of the law was reasonable in the circumstances. The Court rejected

³⁰² *Ibid* at para. 23.

³⁰³ *Ibid* at para. 24.

³⁰⁴ In 2019, the Supreme Court of Canada revised their approach on the standard of review in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. It does not appear that this revised approach has impacted the approach in *Pastion* and it has been applied and cited with approval in many cases since: see, for example, *Taykwa Tagamou Nation v. Linklater*, 2020 FC 220 at paras. 38-40; *Tourangeau v. Smith’s Landing First Nation*, 2020 FC 184 at para. 25; *Blois v. Onion Lake Cree Nation*, 2020 FC 953 at paras. 20-23; and *McKenzie v. Mikisew Cree First Nation*, 2020 FC 1184 at para. 27.

³⁰⁵ *Solomon*, *supra* note 77 at para. 61. Note that, on the merits of the case, the banishment process was found to be procedurally unfair, and it does not appear that the First Nation advanced Anishinaabe legal principles to justify their actions: see 2019 FC 1505.

³⁰⁶ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras. 13 and 372.

³⁰⁷ *Ontario Lottery*, *supra* note 112.

³⁰⁸ *Ibid* at paras. 45-46, see heading.

the argument that the FNTC was required to undertake a detailed review of the wastewater treatment plant and proposed fee as a municipal utility body might, but only to ensure the law followed the *FNFMA* and standards adopted under it. In reaching this decision, the Federal Court made the following important findings and comments:

- **The federal government explicitly embraced self-government in the preamble of the *FNFMA* and this “entails a narrow interpretation of substantive limits on the powers of the self-governing entity.”³⁰⁹**
- “... in the context of self-government, where a power is recognized under certain substantive conditions, it is mainly for the self-governing entity to implement those conditions and to determine what they entail in a specific case. Unless explicitly granted, outside bodies do not have the power to impose their interpretation of those conditions on First Nations.”³¹⁰ **This statement recognizes that First Nations must be given a lot of leeway in interpreting their law-making powers under statutes recognizing these powers.**
- “... almost 25 years ago, Chief Justice Antonio Lamer of the Supreme Court of Canada said, in *Matsqui* at paragraph 44, “since the scheme is part of the policy of promoting Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions.” **Developments in administrative and Indigenous law since then have only strengthened the need to respect the policy choices made by First Nations. ...**³¹¹

In *Whalen v. Fort McMurray No. 468 First Nation (2019)*, the Federal Court continued to promote a broad definition of “Indigenous law,” as not just having to be a matter of “custom”, rooted in the practices or historical traditions of the community.³¹² While there can be laws based on tradition, Indigenous laws can also include “deliberative” and “positivistic” sources of law.³¹³ This case also contemplates that by-laws are a form of Indigenous law and states that while by-laws were narrowly interpreted in the past, such an approach is not consistent with the broader view taken by the Supreme Court of Canada in *Matsqui*.³¹⁴

³⁰⁹ *Ibid* at para. 49.

³¹⁰ *Ibid* at para. 50.

³¹¹ *Ibid* at para. 51.

³¹² *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732 at para. 32.

³¹³ *Ibid* at 34.

³¹⁴ *Ibid* at 69.

3 Community context and their by-laws

There are 13 Mi'kmaq on-reserve communities in Nova Scotia, with eight on the mainland and five in Cape Breton. A number of these First Nation bands possess multiple reserves. Some communities have a significant off-reserve population living within the province. Below we describe the current picture of by-law usage within Mi'kmaq communities in Nova Scotia, as well as the current picture of enforcement within communities.

3.1 Snapshot of existing by-laws

Below we provide a list of by-laws by subject-matter, showing the number of communities who have adopted such laws. The list comes from the by-laws we found online and those provided to us by interviewees. We were unable to locate any by-laws for three Nova Scotia Mi'kmaq communities (Bear River First Nation, We'koqma'q First Nation or Paqtnkek Mi'kmaq Nation). At [Appendix B](#) there is a more detailed summary of the content of these by-laws and their enforcement mechanisms and penalties.

By-law (# of communities with)	Communities and year (if available)
Advertising Signs (1)	Millbrook (2000)
All-Terrain-Vehicles (1)	Pictou Landing (1999)
Animal / Dog Control (8)	Potlotek (1999); Eskasoni (2002); Glooscap (2015); Membertou (2010); Millbrook (2008); Pictou Landing (1999); Wagmatcook (1998); Sipekne'katik
Band Administration (2)	Eskasoni (1979); Sipekne'katik
Building (4)	Eskasoni (1981); Membertou* (1969); Millbrook (1991); Wagmatcook (1981)
Business Hours (2)	Eskasoni (1963); Millbrook (1999)
Curfew (3)	Eskasoni (1963); Millbrook*; Wagmatcook (1963)
Emergency Measures (1)	Pictou Landing (2000)
Fish Preservation (1)	Potlotek (1973)
Financial Administration (2)	Glooscap (2017); Pictou Landing (1999)
Housing and Development (1)	Potlotek (2007)
Game Preservation (1)	Wagmatcook (1973)
Intoxicants (2)	Annapolis Valley (1985); Millbrook* (1985)
Land Management (1)	Acadia (2000)
Law and Order / Disorderly Conduct and Nuisance (3)	Membertou* (1969); Millbrook (1992); Pictou Landing (1999)
Property Taxes & Assessments (3)	Eskasoni (1998); Millbrook (1996); Wagmatcook
Residency (5)	Glooscap (1992); Millbrook (2002); Pictou Landing (1999); Acadia (1999); Sipekne'katik
School Property (1)	Eskasoni (1979)
Smoking (3)	Membertou (2006); Millbrook* (2005); Acadia (2007)
Solvent Abuse (1)	Sipekne'katik

Swimming Pool (1)	Membertou (2015)
Traffic (5)	Potlotek (1997); Eskasoni (1981); Membertou (1997); Millbrook* (1970); Pictou Landing (1999)
Trespass (3)	Millbrook (2014); Wagmatcook (1996); Sipekne'katik
Water Supply (4)	Eskasoni (1981); Millbrook*; Wagmatcook (1981); Sipekne'katik
Zoning (3)	Eskasoni (1964); Millbrook (1992); Pictou Landing (1999)

*Repealed or no longer in effect (there may be more by-laws in the above list that have been repealed or are no longer in effect. Those identified * are the by-laws we were able to confirm as repealed / not in effect by speaking with the interviewees and/or by a search of the First Nations Gazette)

As can be seen from the above chart, the most common type of First Nation by-laws includes animal/dog control, residency by-laws (who can live on the reserve) and traffic by-laws.

Note that our review of community by-laws occurred before the onset of COVID-19. Anecdotally, we are aware that several First Nations in Nova Scotia have passed COVID-19-related by-laws under s. 81(1)(a) of the *Indian Act*.

3.2 Wish-lists for future by-laws

A couple of interviewees expressed an interest in their communities developing by-laws related to residency with the possibility of removal or banishment of drug dealers on reserve. The interviewees described these kinds of by-laws as potentially coming with political and/or human rights considerations. One of these communities noted some success on section 30 of the *Indian Act* to eject trespassing non-band members, noting that sometimes simply asking the trespassing individual to leave often results in success, without having to resort to any formal enforcement action.

One First Nation has had a draft by-law developed to address the growing use of cannabis on reserve, however, the band is unsure who will enforce that by-law if it is enacted. Another First Nation is in the process of developing all new by-laws to replace what the interviewee described as outdated by-laws that are currently in place.

In addition to wanting to create new by-laws, all interviewees recognize that they need to amend some of their existing by-laws, to ensure enforcement of them is possible.

3.3 Policing Services

Eight of the 13 communities in Nova Scotia receive funding under policing agreements through the Public Safety Canada's First Nation Policing Program ("FNPP") (for an overview of this program, see [Section 2.7.1](#)). Eskasoni, Wagmatcook, Waycobah, Potlotek, Pictou Landing,

Millbrook and Sipekne'ka'tik are under Community Tripartite Agreement (“CTAs”) through the FNPP. Membertou has a Community Quadripartite Agreement with the province, Canada and the Cape Breton Regional Police Service under the FNPP. Paqtnkek, Acadia, Bear River, Annapolis Valley and Glooscap First Nations are not in the FNPP.³¹⁵ At this time, there are no self-administered policing services in Nova Scotia. There was once a self-administered police force in Cape Breton, the Unama'ki Police Force, that existed for a short period from 1994 until 2001. The 2013 *Evaluation of the Marshall Inquiry Implementation* identified under-funding and the associated problems of understaffing, low staff morale and inadequate service provision, as among the reasons for the police force's closure.³¹⁶

Community forums held as part of the 2013 *Evaluation of the Marshall Inquiry Implementation*, identified the need for community policing as a significant priority. Participants expressed dissatisfaction and concern with the current policing arrangements.³¹⁷ A research project studying policing needs of Mi'kmaq of Nova Scotia was published in August 2020.³¹⁸ It would be important for advisors to Mi'kmaq leadership to review that report's finding and consider the options presented in this report.

All First Nation communities that participated in the interviews are policed by the RCMP, except for Membertou First Nation. Membertou is policed by the Cape Breton Regional Police. All First Nation communities who spoke to us, except for Glooscap First Nation, have CTAs in place that address policing services for their communities.³¹⁹ While Glooscap First Nation does not currently have a CTA, they do have a cost-sharing arrangement with Annapolis Valley First Nation, for the designation of a RCMP officer in their communities.

3.4 Lack of By-Law Enforcement

But for a few exceptions, **First Nation by-laws are not being enforced in Nova Scotia**. The exceptions are animal control, smoking and residency/land use by-laws. Three of the six First Nations we interviewed have contracted with the SPCA³²⁰ for animal control services. Another two of the six have their own internal enforcement officers. In one of these communities, the enforcement officer is more of a land management officer, and any enforcement of by-laws is limited to land use/residential type issues. The enforcement officer in the other community enforces their animal control by-law and serves eviction notices on members pursuant to the community's housing by-law.³²¹ One of the First Nations has no enforcement officer whatsoever.

³¹⁵ See CCA Report, *supra* note 186.

³¹⁶ Marshall Evaluation, *supra* note 223 at 30.

³¹⁷ *Ibid* at 82-86.

³¹⁸ L. Jane McMillan with Pam Glode-Desrochers, Paula Marshall, *Examining Police Policies and Practices in Mi'kma'ki – Pathways to Positive Policing Relationships*, August 2020, [online](#).

³¹⁹ The interviewee with Potlotek First Nation thought Potlotek currently has a CTA.

³²⁰ Society for the Prevention of Cruelty to Animals.

³²¹ Pursuant to the authorizing BCR, the enforcement officer in Millbrook First Nation is not a peace officer, which means that more serious matters such as nuisance or disorderly conduct are referred to the police.

The reasons behind the lack of enforcement of Mi'kmaq communities' by-laws that were heard were numerous and will be explored in detail in the chapters that follow, drawing also on our literature review and other interviews. Generally, however, the reasons behind the lack of enforcement include lack of internal capacity (i.e., no funding, no enforcement officers, inability to draft or update by-laws); uncertainty surrounding the validity of by-laws; police not willing to enforce, and band councils knowing that even if a by-law were enforced by an enforcement officer or police, ultimately it will not be prosecuted in court.

4 The municipal by-law context

First Nations have long resisted suggestions or policy efforts to liken them to municipalities. Concerns are related to seeing First Nations as having only limited governance powers that are delegated to them by other governments, without any recognition of their inherent governance powers that cover a wide range of subjects. As noted in [Section 2.3.2](#), the courts have said that the principle of federalism mandates respect for different governments. This mandates a broad approach to the governance powers of both municipalities and First Nations. Further, more recently, the courts have recognized that First Nations are different from municipalities in important ways related to their inherent rights.

While First Nations do not wish to be analogized to provincial municipalities, there is value in understanding how the municipal by-law system works. Knowing the legal and administrative systems that are in place can inform our assessment of how the *Indian Act* by-law system is working. For this chapter, we researched municipal law in Nova Scotia and interviewed two lawyers with the Halifax Regional Municipality (“HRM”) and a lawyer who works for another municipality in Nova Scotia (the “Rural Municipality”).

4.1 Municipal by-law making powers

In Nova Scotia, the *Municipal Government Act*³²² (“MGA”) grants authority to many municipalities to enact by-laws; except for the HRM, which derives its by-law making powers from the *Halifax Regional Municipality Charter*³²³ (“HRM Act”). The two statutes are virtually the same. The purpose of the MGA and HRM Act is provided for in section 2 of each Act:

2. The purpose of this Act is to

(a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;

(b) enhance the ability of the Council to respond to present and future issues in the Municipality; and

(c) recognize that the functions of the Municipality are to

(i) provide good government,

(ii) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality, and

³²² *Municipal Government Act*, S.N.S. 1998, c. 18 [MGA].

³²³ *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 [HRM Act].

(iii) develop and maintain safe and viable communities. [Emphasis Added]

In addition to section 2, both statutes provide a lengthy list of subjects and purposes for which the respective Councils may make by-laws.³²⁴ In addition to the *MGA* and the *HRM Act*, there are other provincial statutes that grant municipalities by-law making authority; the *Motor Vehicle Act*, for example, provides that a municipality may make by-laws prohibiting or restricting the parking of vehicles by signs or parking meters.³²⁵

The interviewees from the municipalities explained that, if a municipality wants to enact a by-law, the Council of the municipality must follow the adoption procedure as set out in the legislation. The procedures set out in the *MGA* and the *HRM Act* are the same; a by-law must be read twice and at least 14 days before the second reading a notice of the Council's intent to consider the by-law must be published in a local newspaper.³²⁶ The interviewee from the Rural Municipality explained that, as a first step, a proposed by-law is initially discussed within the Council. Once discussed by Council, the drafting of the by-law is then done internally by the Rural Municipality by-law division. The same applies to the HRM, which has a full-time legal staff person for drafting HRM by-laws.³²⁷

A municipal by-law has the force of law after it has been passed by Council, approved by the relevant Minister (if required), and notice has been published in a newspaper that circulates in the municipality.³²⁸ Unless provided for in legislation, ministerial approval is not required for the enactment of municipal by-laws.³²⁹ An example of when ministerial approval is required is found in the *Public Highways Act*. Under that Act, the Council of a municipality may make a by-law regulating advertisements upon any part of a highway located within the municipality, but the Minister of Transportation and Communications must approve the by-law.³³⁰

4.2 Municipal by-law enforcement

In Nova Scotia, every municipality is responsible for providing adequate policing services and the maintenance of law and order in the municipality.³³¹ Enforcement of municipal by-laws is performed by municipal by-law enforcement officers and/or the police. **Under the *Police Act* a police officer in the province, whether with the RCMP or a municipal police force, has province-wide "...power and authority to enforce and to act under every enactment of the**

³²⁴ See ss 172-175 of the *MGA*, *supra* note 322 for example, and s.188 of the *HRM Act*, *ibid*.

³²⁵ *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, s. 153. Section 305 is another example, which permits a municipality to make by-laws regulating bicycle and taxi use.

³²⁶ *MGA*, *supra* note 322 at s. 168; *HRM Act*, *supra* note 323 at s. 183.

³²⁷ As explained by the interviewees.

³²⁸ *MGA*, *supra* note 322 s. 169; *HRM Act*, *supra* note 323 at s. 184.

³²⁹ *MGA*, *ibid* at s. 186; *HRM Act*, *ibid* s. 204.

³³⁰ *Public Highway Act*, R.S.N.S. 1989, c. 371, s. 49A.

³³¹ See *Police Act*, S.N.S. 2004, c. 31, section 35(1), which states: "Every municipality is responsible for the policing of and maintenance of law and order in the municipality and for providing and maintaining an adequate, efficient and effective police department at its expense in accordance with its needs."

Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality...”³³² For example, a Halifax Regional Police officer has the power to enforce all legislation within Nova Scotia; which means a Halifax Regional Police officer can enforce a Town of Sydney by-law if they happen to be in Sydney.³³³

Under the *MGA*, each municipality has the power to make by-laws in relation to enforcement of by-laws as follows:

- 172(1) ... (l) the enforcement of by-laws made under the authority of a statute including
- (i) procedures to determine if by-laws are being complied with, including entering upon or into private property for the purposes of inspection, maintenance and enforcement,
 - (ii) remedies for the contravention of by-laws, including undertaking or directing the remedying of a contravention, apprehending, removing, impounding or disposing, including the sale or destruction, of plants, animals, vehicles, improvements or other things and charging and collecting the costs thereof as a first lien on the property affected,
 - (iii) the creation of offences,
 - (iv) for each offence, imposing a fine not exceeding ten thousand dollars or imprisonment for not more than one year or both, including the imposition of a minimum fine,
 - (v) providing for the imposition of a penalty for an offence that is in addition to a fine or imprisonment if the penalty relates to a fee, cost, rate, toll or charge that is associated with the conduct that gives rise to the offence,
 - (vi) providing for imprisonment, for not more than one year, for non-payment of a fine or penalty,
 - (vii) providing that a person who contravenes a by-law may pay an amount established by by-law and if the amount is paid the person will not be prosecuted for the contravention,
 - (viii) providing, with respect to a by-law, that in a prosecution for violation of the by-law, evidence that one person is disturbed or offended is prima facie evidence that the public, or the neighbourhood, is disturbed or offended.

Whether a by-law is enforced by an enforcement officer or the police depends on which by-law is at issue and when the enforcement is required. In the Rural Municipality enforcement officers are sworn in and given authority over certain activities, they do not have the authority to enforce all of the municipal by-laws.³³⁴ For example, the authority of the enforcement officers does not extend to noise by-law complaints; the local police are required to enforce those by-laws. Also, at the Rural Municipality, there are only a few by-law enforcement officers,

³³² See *Police Act*, *ibid* at s. 42(1)(b).

³³³ An example given by the interviewees with the HRM.

³³⁴ The same applies to the by-law enforcement officers in the HRM. Pursuant to the *Police Act*, *supra* note 331, by-law enforcement officers must be granted specific authority for each piece of legislation they enforce, see s.89-90.

and all of them work until 4:30 pm, Monday to Friday. Therefore, any by-law infractions occurring outside of an enforcement officer's working hours may result in the police having to respond. However, the interviewee from the Rural Municipality explained that the police do not like enforcing municipal by-laws as the enforcement of municipal by-laws is low on the police priority list.

Unlike the Rural Municipality, the working hours of HRM by-law enforcement officers are not limited to regular business hours, they also work evenings and weekends. However, like the Rural Municipality, whether it's an enforcement officer or the police enforcing depends on which by-law is at issue. For both municipalities, the by-laws are enforced using Summary Offence Tickets ("SOTs") under the *Summary Proceedings Act*.³³⁵ (In [Section 6.3.3](#), we describe the municipal process of SOTs and compare it to the process for charging under the *Indian Act* and other federal laws.)

The Rural Municipality and the HRM pay the salaries of their own by-law enforcement officers.³³⁶

4.3 Prosecution of municipal by-laws

The Rural Municipality hires a lawyer from a private law firm to prosecute its by-laws. The interviewee from the Rural Municipality explained that it would be possible for the municipality to prosecute the by-laws itself; however, the capacity of the municipality to do so is limited, as it currently only has one in-house lawyer. Similarly, the HRM outsources the prosecution of all its by-law matters heard in the Provincial Night Court. The HRM contracts with prosecutors employed with the Nova Scotia Public Prosecution Service, in their individual capacity, not on behalf of the Nova Scotia Public Prosecution Service.

4.4 Adjudication of municipal by-laws

In the Rural Municipality by-law matters used to be adjudicated during the day in Provincial Court. However, to streamline the process the Government of Nova Scotia established a Night Court for summary offence matters.³³⁷ Now, all Rural Municipality by-law charges are heard in the Provincial Night Court, which operates like Small Claims Court.³³⁸ A similar process has played out in the HRM; there is a Provincial Night Court where it's mostly liquor control and *Motor Vehicle Act* type of offences that are heard. However, unlike the Rural Municipality, in the HRM, by-laws are also prosecuted in regular day-time Provincial Court. In the HRM everything except for liquor control, *Motor Vehicle Act* and a few other by-law offences are prosecuted in regular Provincial Court.³³⁹ Night Court matters are heard by Presiding Justices of

³³⁵ *Summary Proceedings Act*, RSNS 1989, c 450.

³³⁶ As explained by the interviewees.

³³⁷ See the *Night Courts Act*, RSNS 1989, c. 310.

³³⁸ As explained by the Rural Municipality interviewee.

³³⁹ HRM interviewees; it was explained that any appeal goes to the Nova Scotia Supreme Court Trial Division

the Peace. The province operates and pays for Night Court pursuant to the *Night Courts Act*, RSN 1989, c 310.

4.5 Sentences of municipal by-law offences

For both the Rural Municipality and the HRM, any fines imposed under their by-laws are paid to the court. The fine is then sent to the municipality and forms part of their general revenue. Provincial legislation also adds court costs and the victim fine surcharge to every summary offence ticket matter, even if the ticket is paid before going to court. The court costs and the victim fine surcharge are remitted to the province. For example, a \$237.50 unlicensed dog ticket includes a \$100.00 fine, a victim fine surcharge of \$15.00 (15% of the fine) and court costs of \$122.50.³⁴⁰

4.6 Barriers to enforcement and prosecution of municipal by-laws

The interviewee from the Rural Municipality told us that many of their existing by-laws were drafted by non-lawyers, which sometimes creates difficulties in enforcing the by-law due to the language contained in the relevant by-law provision. An example is a snow by-law that prohibited the dumping of snow in a certain manner in a particular area. A charge was laid for a violation of that municipal by-law, however, when it came time to prosecute it was realized that the by-law prohibited the dumping of snow in a manner that makes a particular route impassible by vehicles. Therefore, the prosecutor had to prove the act of dumping snow and prove that vehicles could not pass through the area. This created an evidentiary burden that could not be met by the prosecution.³⁴¹

It was explained that for land-use by-laws, the HRM used to hire retired police officers as by-law officers because of their knowledge and experience in investigating and handling files. The HRM no longer does this, and as a result, the interviewees with the HRM stated that **adequate and ongoing training of enforcement officers is vital to ensuring the successful enforcement of their municipal by-laws.**

In addition to problematic by-law drafting which sometimes creates barriers to enforcement and/or prosecution, the cost of enforcement itself may be a barrier. The interviewee from the Rural Municipality discussed the smoking by-laws that have been recently enacted in some municipalities as an example. The interviewee explained that to ensure consistent enforcement of the smoking by-law there will need to be numerous enforcement officers throughout the municipality. Otherwise, if a municipality gets a call that someone is violating the by-law, by the time an enforcement officer gets to the scene of the incident the by-law violator could be long gone. To ensure consistent enforcement there would need to be more officers, and it would cost much more money to hire the enforcement officers needed.

³⁴⁰ *MGA*, *supra* note 322 s. 183; *HRM Act*, *supra* note 323 at s. 201.

³⁴¹ The interviewees with the HRM described a similar barrier to prosecution they encountered in the past when attempting to prosecute a HRM by-law that had problematic language.

The interviewees with the HRM discussed the capacity of the courts as sometimes being a barrier to prosecution. It was explained that municipal, provincial and federal prosecutors are always struggling to schedule time before the overburdened courts. This is particularly true because some criminal matters that are vying for time involve incarcerated individuals.³⁴²

4.7 Funding of municipal governments

In understanding how municipalities work and comparing them to First Nation governments, it is important to appreciate how municipalities are funded. While municipalities do receive funding grants from the federal government and transfer payments from the provincial government, the vast majority of the revenue of municipal governments comes from property taxes, as well as other taxes such as goods and services and investment income and other own-source revenue.³⁴³

Sidenote: Funding of First Nations governments

In contrast to municipalities that finance most of their services through property and other tax revenue, the vast majority of the income of First Nations for community services comes from transfer payments from the federal government. Some communities also receive revenue from sales tax and own-source revenue through economic development or payments under Impact and Benefit Agreements (“IBAs”). Communities may also collect sums of money from revenues of third-party land interests in the reserve.³⁴⁴ Some treaty nations may receive annuities under their treaties (which to-date have been insignificant, but this could change if the decision in *Restoule v. Canada (Attorney General)* is upheld on appeal³⁴⁵).

The nature of collective landholding on reserve makes it impossible for First Nations to charge property taxes to the same extent and manner as municipalities.³⁴⁶ The location of many First Nations communities also makes it challenging for many to engage in economic development. Further, the economic marginalization of many communities throughout the past century has resulted in significant poverty and few on-reserve businesses, thus the charging for GST/HST for those communities generally only raises modest revenue.

³⁴² This notion of by-laws being low in priority may relate back to what was discussed earlier in this section; the interviewee from the Rural Municipality explained that the police do not like enforcing municipal by-laws as the enforcement of municipal by-laws is low on the police priority list.

³⁴³ See Statistics Canada, “Local general government revenue and expenditures, by province and territory.”

³⁴⁴ Brian A. Crane, Martin W. Mason, & Robert Mainville, *First Nations Governance* (Markham Ont: LexisNexis Butterworths, 2006), p 89-94, 112-115; and Jack Woodward, *Native Law*, (Toronto: Carswell, 2016), Chapter 7, First Nation Governments (Extracts) at para. 1800.

³⁴⁵ *Restoule*, *supra* note 306.

³⁴⁶ Section 18(1) of the *Indian Act*, RSC 1982 c I-5, creates a collective interest in reserve land. Although there is a quasi-private property regime created between members of a community, lands can be transferred or sold to non-band members. Further, section 87(1) of the *Indian Act*, *ibid*, exempts the real and personal property of First Nations people on reserve from taxation.

Consequently, the history and reality of many First Nation communities are that, unlike municipalities, they have a greater reliance on government transfer payments.

5 Making by-laws

A history of the evolution of the *Indian Act* by-law, including the elimination of the disallowance power for s. 81(1) by-laws is provided in [Section 2.2](#) of this report. In this chapter, we undertake a deeper look at the law-making powers as they currently stand, their interpretation, how they interact with similar laws passed by other governments, the process for creating and amending by-laws, and challenges that can arise for First Nations in creating their own by-laws.

5.1 The by-law making powers

Here we set out the law-making powers listed for each of the three by-law sections in the *Indian Act*.

5.1.1 Section 81(1) by-laws

There are 22 listed powers:

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
- (b) the regulation of traffic;
- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances;
- (e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;
- (f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
- (g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;
- (h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;
- (i) the survey and allotment of reserve lands among the members of the band and 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 therefor has been granted under section 60;

- (j) the destruction and control of noxious weeds;
- (k) the regulation of bee-keeping and poultry raising;
- (l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;
- (m) the control or prohibition of public games, sports, races, athletic contests and other amusements;
- (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;
- (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
- (p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
- (p.1) the residence of band members and other persons on the reserve;
- (p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;
- (p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;
- (p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;
- (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and
- (r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

Note that the proposed Bill C-7 *First Nations Governance Act* (which did not become law) largely kept the s. 81(1) by-laws powers intact, only proposing a couple of new powers. These included powers by the band to pass laws in relation to:

- ✳ the provision of services by or on behalf of the band and the charging of fees for those services (s. 16(1)(d));
- ✳ residential tenancies, including grounds for and powers of eviction (s. 16(1)(i)); and
- ✳ the preservation of culture and language of the band (s. 17(1)(c)).

While this would have added additional clarity, we believe it is possible to interpret these powers from the existing provisions in s. 81(1), as discussed further below.

5.1.2 Section 83(1) ‘money by-laws’

There are 9 listed powers:

- (s) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
- (a.1) the licensing of businesses, callings, trades and occupations;
- (t) the appropriation and expenditure of moneys of the band to defray band expenses;
- (u) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);
- (v) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);
- (w) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;
- (e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;
- (x) the raising of money from band members to support band projects; and
- (y) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

If monies are raised using these by-law powers, subsection 83(2) states that the authority to spend that money must be set out in a by-law. Also, specifically with respect to taxation by-laws passed under s. 83(1)(a), subsection 83(3) requires that the by-law must provide for an appeal procedure for assessments made under the tax by-law.

The First Nations Tax Commission (“FNTC”) has a “s. 83 Toolkit” on its [website](#), which explains the expanse of each power under s. 83(1), FNTC policies on each power and sample by-laws. Section 83 by-laws proposed by First Nations require ministerial approval, on the advice of the FNTC. Since s. 83 are subject to a very specific process, guided by the FNTC, we focus primarily on s. 81(1) and 85.1 in this chapter.

5.1.3 Section 85.1 'intoxication by-laws'

There are four listed powers:

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

5.2 Interpretation of the by-law powers

This section attempts to answer the following questions. What is the scope of the by-law powers? Can there be overlap with federal or provincial laws? Must community by-laws be restricted to applying on reserve?

Sidebar: The role of the courts and terminology

While the minister of ISC no longer plays any role in approving s. 81(1) and 85.1 by-laws, the courts continue to play a role in the oversight of *Indian Act* by-laws, as they have in the past.

Challenges can be brought in the courts against a First Nation's by-law for **lacking jurisdiction**, meaning the band lacks the power to pass the law. This is also called a challenge to the by-law's **validity**. This happens where the law cannot be linked back to a reasonable interpretation of the by-law powers in the *Indian Act*. Challenges to validity can be focused on the whole by-law or only focused on a part of the by-law.

(Where a by-law cannot be linked to the *Indian Act* (in whole or in part) the band might try to save it by arguing it the band's jurisdiction for the law comes from the inherent right to self-government. In that case, a band might face the challenges related to proving a right to self-government under the current s. 35 case law, which we discussed in [Section 2.4.](#))

A by-law can also be challenged if it conflicts with a law of another government and the rules on **paramountcy** require that the other government's law **supersedes** the by-law. Sometimes paramountcy rules provide that it is the by-law that **supersedes** the other government's laws. These are called challenges to the by-laws' **operability** because the law that is superseded is not invalid but cannot operate in light of the competing law.

5.2.1 Narrow vs. broad interpretation of by-law powers

In the past, particularly in the 1980s-90s, the courts and ISC (while it still had the disallowance power over s. 81(1) by-laws), read the by-law powers quite narrowly. Examples of this include:

- (1) The courts treating First Nation by-laws like municipal by-laws, which used to be read narrowly.³⁴⁷
- (2) ISC taking the position that First Nations could not pass by-laws over matters that are generally viewed as being under provincial jurisdiction, such as essential services. ISC's *By-Laws Manual* also suggests that by-laws could not impose specific rules of behaviour like the *Criminal Code* but was inconsistent on this point.³⁴⁸
- (3) Courts finding that a by-law could only include powers that the drafters of the *Indian Act* would have had in mind at the time the by-law power was included in the *Indian Act* (in some cases this was in the 1800s!). This is known as the 'original meaning' rule.³⁴⁹

None of these interpretive approaches stand up as good law today, for the following reasons:

- (1) **Taking a narrow approach to the interpretation of municipal by-laws is no longer good law today.** The Supreme Court of Canada now favours an approach that shows significant respect for the jurisdiction of other governments, even if they are technically 'subordinate' in the legal hierarchy. Respect for multiple levels of government is mandated by our constitutional principle of federalism.

This approach comes from the Supreme Court of Canada's 2001 decision in *Spraytech*. In this decision, the Court reaffirmed that **municipal bodies are not strictly confined to**

³⁴⁷ *R v Stacey*, *supra* note 104 at para 30 ["Stacey"].

³⁴⁸ In discussing the extent of the law and order power, s. 81(1)l, ISC's *By-Laws Manual*, *supra* note 6, states, "it appears to relate more to the administration and enforcement of law and order than to the making to impose specific rules of behaviour. A court may not see it as extending to Band Councils the power to regulate matters already covered in other laws applying on reserves, for example, matters dealt with in the *Criminal Code* as aspects of criminal law" (at 3-4). However, somewhat to the contrary, in speaking about the s. 81(d) power over disorderly conduct and nuisance, the *By-Laws Manual* states, "The *Criminal Code* also prohibits certain conduct that creates a disturbance or that amounts to a public nuisance, and it is extremely difficult to differentiate between the scope of paragraph (d) and those in the *Criminal Code* provisions. The fact that the *Criminal Code* also deals with such matters does not prevent a Band Council from exercising authority under paragraph (d), as long as the by-law do not come into conflict with the *Criminal Code*" (at 3-5). The issue of whether the *Criminal Code* is paramount to by-laws is discussed further below. The *By-Laws Manual* is incorrect and inconsistent to suggest there cannot be laws under s. 81(1)(c) that possibility overlap with the *Criminal Code*, rather the correct position is that there can be overlap and conflict address through paramourty, as suggested in their discussion of s. 81(1)(d).

³⁴⁹ See *St Mary's Indian Band*, 1995 CanLII 3525 (FCC) aff'd in very short reasons (1996 CanLII 12434 (FCA)), and *R v Gottfriedson*, [1995] BCJ No 1791 (BC Prov Ct). Both cases are about whether the s. 81(1)(m) over "public gaming ... and other amusements" includes a power to regulate gambling on reserve. The interpretation in *Gottfriedson* (which was obiter) was based primarily on the *eiusdem generis* (of the same kind) interpretive rule and did not consider others, which may the ruling vulnerable to challenge today.

powers expressly conferred by their enabling statute but may also pass laws necessarily or implied by the express power.³⁵⁰

In *Spraytech*, a municipality interpreted their powers to pass by-laws “to secure peace, order, good government, health and general welfare in the territory of the municipality...” as allowing them to pass a by-law banning pesticides. (The language of the enabling provisions in *Spraytech* has been compared to being similar to language of s. 81(1)(a), (c) and (d) of the *Indian Act*, read cumulatively.³⁵¹) The Supreme Court of Canada found that this open-ended power was intended by the Legislature to give municipalities leeway to pass laws that responded expeditiously to new challenges they face and avoid having to seek amendment of the provincial enabling legislation each time a new challenge arose.³⁵²

The by-law was valid so long as it was for a municipal purpose and not for an ulterior objective.³⁵³ The Court found that the pesticide ban responded to many residents’ concerns about the use of pesticides and requests for the city to take action, and it was further in line with international law calling for precautionary measures to be taken on environmental protection.³⁵⁴ **Similarly, First Nations can rely on community consultation showing need and support for a by-law, as well as provisions in the *UN Declaration on the Rights of Indigenous Peoples* to support Indigenous peoples’ right to control matters internal to their community, to support the scope of their by-laws.**³⁵⁵

In several cases since *Spraytech*, the courts have reaffirmed the need to take a broad approach to the interpretation of municipal governments’ by-law making power. Their powers are not just confined to express powers, but necessarily or fairly implied powers. In one case, this meant that the power to prohibit smoking included the ability to require restaurants and bars to adopt and implement non-smoking policies.³⁵⁶ In another case, a municipality’s power to regulate and licence businesses was held to include the power to require restaurants to post the results of their food inspections. In so finding, the Ontario Court of Appeal stated:

[T]he narrow approach to jurisdiction advocated by [the Restaurant Association] has been rejected in favour of a broad and purposive approach. **The modern approach presumes that municipal by-laws are validly enacted absent “clear demonstration” that the by-law was beyond the municipality’s powers.**³⁵⁷

³⁵⁰ *Spraytech*, *supra* note 107 at para. 18 citing *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668.

³⁵¹ *Metallic*, “A Viable Means” *supra* note 36 at 227.

³⁵² *Spraytech* *supra* note 107 at para. 19.

³⁵³ *Ibid* at para. 20.

³⁵⁴ *Ibid* para. 6 and 31-32.

³⁵⁵ For more on this, see “A Viable Mea”s,” *supra* note 36 at 227-228 and 233.

³⁵⁶ *Horton v. Greater Sudbury (City)*, 2004 CanLII 14158 (ON CA).

³⁵⁷ *Ontario Restaurant Hotel & Motel Association v. Toronto (City)*, 2005 CanLII 36152 (ON CA) at para. 3.

In another case, the Manitoba Court of Queen's Bench described the proper approach to court's reviewing municipal by-laws as follows:

Thus, a court should attempt to interpret a municipal enactment so its purposes are consistent with those of the municipality. **Only where it is clearly demonstrated that a municipal decision is beyond the legislative power granted should the decision be found to be invalid. If powers are not expressly conferred, courts should adopt what has been described as a "benevolent construction" and confer powers by reasonable implication** [see *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342 (S.C.C.)]. As a consequence, and in addition to a careful consideration of "purpose" care must be taken not to usurp the legitimate role of elected community representatives.³⁵⁸

Where municipalities rely on open-ended powers like health, safety, good governance, a broad interpretation will be permitted so long as it is exercised for a valid municipal purpose.³⁵⁹ The situations where municipalities have not been successful in relying on such powers is where there is little to no evidence to show that the by-law was made for a genuinely municipal purpose.³⁶⁰

Such respect for delegated law-making by municipalities as discussed in the above cases should apply equally to First Nations by-laws.

- (2) As discussed in [Section 2.5](#), Canadian courts permit a lot of overlap between different jurisdictions. There is significant overlap between the federal (and First Nations as their delegates) and provincial jurisdiction. We have seen this to be the case already in areas of justice and policing (see [Section 2.7](#)) and child welfare ([Section 2.9.1](#)). Supreme Court of Canada case law, as well as legal scholars, support that the federal government (and First Nations as their delegates) have the power to pass laws that may seem provincial in nature so long as these laws are specifically passed to address First Nations' needs.³⁶¹

³⁵⁸ *4500911 Manitoba Ltd. v. Stuartburn (Municipality)*, 2002 MBQB 266 at para. 10.

³⁵⁹ See *Croplife Canada v. Toronto (City)*, 2003 CanLII 24713 (ON SC) where a municipal by-law to ban pesticides was upheld on health and safety. See also *Duffield v. City of Prince Albert*, 2014 SKQB 203, where a by-law precluding taxicabs from being driven through a drive-thru liquor outlet was upheld. While the by-law arguably had speculative incidental effect on regulation of liquor (a provincial power), it was focused on taxi-driver and vehicle safety.

³⁶⁰ See *Eng v. Toronto (City)*, 2012 ONSC 6818 (CanLII), where a ban on shark-fins was found invalid as it could not be linked to the municipal purposes of environment, health, safety, etc. That case also cites the Shell decision which similar struck down a by-law that banned the use of Shell oil in a municipality on the grounds that it was connected to larger motives than municipal purposes.

³⁶¹ See *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 SCR 751. See also Peter W Hogg, *Constitutional Law of Canada*, 2014 Student Edition, *supra* note 166 at 28-2, who states, "It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would be ordinarily outside federal competence. See also Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada," *supra* note 67.

The courts have also recognized overlap in relation to rules that prohibit or regulate human behaviour between the *Criminal Code* and provincial laws. In such cases, the provincial laws that appear similar to provisions in the *Criminal Code* are held to be valid so long as they can be linked to valid provincial purposes (and conflicts dealt with through paramountcy).³⁶² A similar approach should be taken with respect to by-laws on law and order (s. 81(1)(c)) and disorderly conduct and nuisance (s. 81(1)(d)) that overlap with other governments' laws (federal, provincial and municipal).³⁶³ A term that ISC has used for such by-laws (see [Section 6.2.1](#)) which we will borrow, is "quasi-criminal" by-laws.

Side note: Quasi-criminal by-laws

ISC's *By-Laws Manual* is inconsistent on the extent of jurisdiction First Nations have in relation to s. 81(c) and (d). On the one hand, the *By-Laws Manual* describes some types of by-laws as 'quasi-criminal' (criminal-like) and identified this as including by-laws dealing with "prohibition of intoxicants, disorderly conduct, traffic and, at times, animal control."³⁶⁴ On the other hand, the *By-Laws Manual* also states that,

There are severe jurisdictional limits upon the use of this [s. 81(1)(c)]; it appears to relate more to the administration and enforcement of law and order than to the making of laws to impose specific rules of behaviour. A court may not see [by-law powers] as extending to Band Council the power to regulate matters already covered in other laws applying on reserves, for example, matters dealt with in the *Criminal Code* as an aspect of criminal law."³⁶⁵

Neither the source of the assertion that s. 81(1)(c) is subject to severe limits, or an analysis of why there could be no overlap with the *Criminal Code* is provided in the *By-Laws Manual*. The assertions are questionable.

First, there are sound policy reasons why a First Nation may prefer to address conduct like theft, break and enter, etc., in a by-law instead of charging under the *Criminal Code*. These are relatively common offences in communities (often exacerbated by poverty within communities) and laying by-law charges is a way to respond that does not give rise to a criminal record for community members. By-law offences also generally carry a lesser

³⁶² See *Nova Scotia Board of Censors v. McNeil*, [1978] 2 SCR 662; *Dupond v. City of Montreal et al.*, [1978] 2 SCR 770; *Westendorp v. the Queen*, [1983] 1 SCR 43; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59; *R. v. Morgentaler*, [1993] 3 SCR 463; and *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19.

³⁶³ A broad approach to the law and order and nuisance powers, recognizing First Nations powers to address social and behavioural problems within their communities, would be consistent with the recognition within many treaties that justice issues internal to the tribe/nation would be left to the laws and dispute resolutions of the tribe/nation, not settler courts. We briefly touched on this in [Section 2.8](#) and suggested further research in this area.

³⁶⁴ *By-Laws Manual*, *supra* note 6 at 8-2.

³⁶⁵ *By-Laws Manual*, *ibid* at 3-4.

penalty (fine and/or imprisonment) and the community may also seek to divert by-law charges into some alternative or restorative process (see [Chapter 9](#)).

There is no provision within the *Indian Act* or a regulation that *specifically* precludes First Nations from applying laws that overlap with the *Criminal Code*. To the contrary, the by-law powers over law and order and disorderly conduct strongly suggest the power to pass laws that may be quasi-criminal.

The only reference in the *Indian Act* to the *Criminal Code* is at s. 107(b). This permits the federal government to appoint justices of the peace with powers in relation to “any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.” We believe it would be a stretch to interpret this as meaning First Nations cannot pass by-laws under s. 81(1)(c) and (d) that may overlap with the *Criminal Code*. Even in relation to the four specific offences listed in s. 107(b) (cruelty to animals, common assault, breaking and entering and vagrancy), at most, all this seems to recognize is that a JP could enforce the *Criminal Code* versions or a similar offence arising out of a by-law, which is consistent with the principle of federalism that allows for the existence of overlapping laws. It does not signal any clear legislative intent to prevent by-laws in these areas.³⁶⁶

Questions of overlap with other governments’ powers are separate from questions of *validity* of by-laws, which asks whether jurisdiction is reasonably supported based on the wording of enabling legislation. Overlap should be considered on the separate doctrine of *operability/paramountcy*. This is the approach taken with respect to municipal by-laws that overlap with provincial and federal laws.³⁶⁷ In *Spraytech*, the Court clarified that **“the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter.”**³⁶⁸

- (3) There are several reasons why the original meaning rule should not inform the interpretation of *Indian Act* by-law powers. Original meaning interpretations prevent the meanings of laws from evolving, a principle which is enshrined in s. 10 of the federal *Interpretation Act*.³⁶⁹ Original meaning interpretations are inconsistent with several other interpretive rules, including the rule that legislation relating to Aboriginal people should

³⁶⁶ It also does not appear that there would be any obvious conflict between s. 107(b) and by-laws in relation to cruelty to animals, common assault, breaking and entering and vagrancy (see explanation of paramountcy at [Sections 2.6](#) and [5.3](#)). Section 107(b) merely gives the government the discretionary power to appoint JPs who can adjudicate those *Criminal Code* offences.

³⁶⁷ *Spraytech*, *supra* at note 107 and *Croplife Canada v. Toronto (City)*, *supra* at note 359.

³⁶⁸ *Spraytech* *ibid* at para. 39.

³⁶⁹ *Interpretation Act*, *supra* note 42 at s 10: “The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.”

receive a large, liberal and purposive interpretation, with ambiguities resolved in favour of Aboriginal people.³⁷⁰

It has also been argued that the by-law provisions in the *Indian Act* since they are about the foundational exercise of governance powers are capable of characterization as “quasi-constitutional” in nature.³⁷¹ Such a characterization means that such a statute should be interpreted as being adaptive to changing social conditions and evolving conceptions of foundational rights, and not tethered to understandings of society and rights at the time the law was first enacted.³⁷²

An original meaning interpretation would also be inconsistent with the ‘self-government principle’ that emerges from *Canada Pacific Ltd v Matsqui Indian Band* (1995) and several more recent decisions from the Federal Court reviewed in [Section 2.9.7](#).³⁷³ It is clear from these decisions that by-laws are a form of Indigenous law and an exercise of self-government (see *Pastion* and *Whalen*).³⁷⁴ In taking this position, First Nations can also rely on the fact that representatives of the Canadian government, in making the latest amendments to the by-law powers and removing the disallowance power, stated the changes were intended to give greater control and autonomy back to First Nations (see [Section 2.2](#)). Further, the *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation* (2019) decision highlight that, in the context of self-government, First Nations should be given significant leeway in interpreting their powers:

... in the context of self-government, where a power is recognized under certain substantive conditions, it is mainly for the self-governing entity to implement those conditions and to determine what they entail in a specific case. Unless explicitly granted, outside bodies do not have the power to impose their interpretation of those conditions on First Nations.³⁷⁵

The ‘reconciliation principle’ from *Daniels* (also discussed in [Section 2.9.7](#)) can also be employed here. The principle presumes reconciliation is always Parliament’s goal. This can supply a particular lens to the 2014 *Indian Act* amendments, which were described by the ISC as providing First Nations’ “autonomy over the enactment and coming into force of by-laws and the day-to-day governance of their communities.”³⁷⁶ Applying a reconciliation lens to this, we might interpret the amendment as signaling an intention to break with previous approaches to the interpretation of the by-law powers.

³⁷⁰ See Metallic, “A Viable Means,” *supra* note 36 at 225-226.

³⁷¹ For the full argument, see Metallic *ibid* at 226.

³⁷² See Sullivan, *supra* note 246 at 497.

³⁷³ *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3.

³⁷⁴ *Pastion v. Dene 'ha' First Nation*, 2018 FC 648 (F.C.); *Whalen v. Fort McMurray No. 468 First Nation*, 2029 FC 732.

³⁷⁵ *Ontario Lottery* *supra* note 112 at para. 50.

³⁷⁶ See “Overview of Bill C-4–8 - Amendments to the *Indian Act*,” *supra* note 177. This was discussed in [Section 2.2](#).

Thus, while the approach in the 1980s-90s was a narrow one, several changes in the law since this time support that a broad interpretation should be given to *Indian Act* by-law powers today.

Further, First Nations can, and frequently do, reference two or more by-law powers, usually in *preambles* or *recitals*, to support the validity of their by-laws. The use of s. 81(1)(a), (c) and (d) – health on reserve, law and order and the preservation of disorderly conduct – were used in the 1980s to justify a band by-law on child welfare, which was not disallowed by Canada and has been applied in the courts.³⁷⁷ Such an argument resting on the powers of health, among other by-law powers, embraces a broad definition of “health” as including not only the physical health of an individual but the physical, mental, social and economic well-being of the community more broadly. It has been argued that this combination of powers can be used to support First Nations by-laws on a variety of essential services, including social assistance and assisted living,³⁷⁸ housing and residential tenancies (the above-listed provisions as well as s. 81(1)(h), use of buildings).³⁷⁹ There is case law supporting that the by-law powers extend to policing, and there are communities that have such by-laws.³⁸⁰ Since all First Nations languages and cultures have been negatively affected by colonialism, a First Nation could also credibly justify by-laws protecting and promoting language and culture based on s. 81(1)(a), (c), (d) and (q).

In [Appendix C](#), we set out a list of potential subject matters under each by-law provision that First Nations may make laws on. This list builds on the list set out in the *ISC By-Laws Manual* and supplements it to reflect possible additional jurisdictions First Nations may have in light of the broad interpretation that should be given to by-laws.

5.2.2 *By-law-making power includes substantive and procedural powers*

Terminology note:

Substantive law – laws that define the rights and obligations of people. Examples include a law that says a person is not allowed to steal, or a law that says a person is entitled to assistance when their income is below a certain point (e.g., welfare).

Procedural law – laws that set out processes for making, administering and enforcing substantive laws. These could be laws that set out how someone is to be charged, who does

³⁷⁷ The Spallumcheen by-law has never been declared ultra vires the Band, although the British Columbia Court of Appeal, in a 1995 case, suggested, without deciding, this was a possibility: *Alexander v. Maxime* (1995), 56 B.C.A.C. 97 at para. 11. However, in subsequent cases, the validity of the by-law was taken for granted: *S. (E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318.

³⁷⁸ See Metallic, “A Viable Means,” *supra* note 36.

³⁷⁹ There are communities that have rental and residential tenancy by-laws. See [Serpent River Rental Housing By-Law 1989](#), and the [Red Rock Indian Band Residential Housing By-Law, 1989](#).

³⁸⁰ *Ross v. Mohawk Council of Kanesatake*, [2003] F.C.J. No. 683, suggest suggested that the *Indian Act* by-law powers provided jurisdiction over policing on reserve. Many of the existing band policing by-laws come from the 1970s-90s, for example, the [Horse Lake First Nation Policing By-law](#) (1994).

the charging, what court a complaint must be taken to and the steps to be taken to get to court, etc.

As will be discussed more in the following chapters, the *Indian Act* by-law powers are deficient in spelling out the procedural powers of First Nations in exercising their law-making powers. In response to these deficiencies, some of the stand-alone federal laws that have been passed to supplement law-making powers in the *Indian Act* (reviewed in [Section 2.4](#)),³⁸¹ as well as the proposed *Bill C-7*, the *First Nations Governance Act* (discussed in [Section 2.2](#)), have included more specific procedural powers.

While greater clarity in law can be helpful, it is our view that a broad interpretation of the *Indian Act* by-law powers permits First Nations to pass by-laws that include *both* substantive and procedural laws. For example, laws on substantive topics (e.g., trespass on reserve) can, and often inevitably do, include provisions around how prohibitions around trespass will be communicated, charged, decided, etc. These are all procedural rules.

Further, there are federal statutes recognizing Indigenous law-making jurisdiction that simply recognize a broad power of law-making, without enumerating all the substantive and procedural minutiae this might capture. This includes the *First Nation Family Homes on Reserve Act* and *First Nations, Inuit and Métis Children, Youth and Families Act*,³⁸² as well as the jurisdiction of First Nations to select their leadership through band custom recognized in the *Indian Act*.³⁸³ It is reasonable to assume that the substantive law-making powers recognized in these acts include procedural powers to provide for the enforcement of laws, and this should also be the case with the *Indian Act*. Similarly, Peter Hogg observes that each head of federal power includes a power of enforcement because enforcement has a “rational, functional connection” with the substantive content of each head of power.³⁸⁴ Hogg also refers to a “general rule that the power to make a law ... includes the power to enforce that law.”³⁸⁵

ISC’s *By-Laws Manual* recognizes that the by-law powers include the right to make procedural laws. For example, the *By-Laws Manual* recognizes that the s. 81(1)(c) law and order power “gives a Band Council authority to appoint by-law enforcement officers and confers authority on other officers to enforce band by-laws.”³⁸⁶ Appointing by-law enforcement officers is a procedural matter. The *By-Laws Manual* also recognizes that the s. 81(1)(p.1) power on residency can involve the power to make “procedures for reviewing applications for residency.”

³⁸¹ For example, s. 20(3) of the *FNLMA*, *supra* note 122 states that laws established in a land code “may provide for enforcement measures, consistent with federal laws, such as the power to inspect, search and seize and to order compulsory sampling, testing and the production of information.”

³⁸² For a review of these laws and what they cover, see [Section 2.4](#).

³⁸³ *Indian Act*, *supra* note 346 at s. 2(1) definition of “council of the band.”

³⁸⁴ See Hogg, *Constitution Law of Canada*, 5th ed., *supra* note 39 at 19.5(f).

³⁸⁵ *Ibid* at 19.6.

³⁸⁶ *By-law Manual*, *supra* note 6 at Chap. 3, p. 4.

Furthermore, sections 81(1) and 83(1) both contain a specific ancillary power, which further supports a First Nations' ability to pass procedural laws in relation to substantive subject matters. Section 81(1)(q) states that a First Nation can pass laws "with respect to any matter arising out of or ancillary to the exercise of powers under this section." The *ISC By-Laws Manual* states on s. 81(1)(q) that:

This provision may cover matters such as appointing by-law enforcement officers, establishing user fees and providing for hearings and appeals in residency and zoning by-laws. Every section 81 by-law should include a statement that paragraph (q) is part of the authority for the by-law.

It is also noteworthy that municipalities in Nova Scotia under their enabling legislation are given by-law-making powers over procedures (see [Section 4.2](#)). The municipalities' procedural powers are much more specific, but on the other hand, they don't have a general 'ancillary' power as in the *Indian Act*. Nonetheless, this is evidence that delegated governments require procedural powers to operate.

It is our view—especially given the need to give a broad interpretation to the *Indian Act* by-law powers—that First Nations already can pass procedural laws to facilitate the enforcement of their by-laws. While having the federal government clarify the *Indian Act* by-law procedural powers might be helpful (although unlikely, as we suggest in [Section 2.4](#)), our point here is that this is not necessary. First Nations address the gaps in procedural enforcement provisions within their own laws.

5.2.3 Territorial expanse of by-laws

Terminology note:

Territorial jurisdiction – a government's authority over its territory

Personal jurisdiction – a government's authority over its citizens³⁸⁷

As a matter of territorial jurisdiction, when a by-law is passed, it applies to everyone present on a reserve, whether or not an individual is a band member or First Nation.

The by-laws section of the *Indian Act* does not state in a general or overarching way that all by-laws thereunder are *limited* to application on reserve. Rather, specific sections specify that the power is in relation to reserve land. These include: s. 81(1)(a) health; (g) zoning; (i) land survey; (n) hawkers and peddlers; (o) wildlife; (p) removal of trespassers; (p.1.) residence; (p.2) rights of children; s. 83(1)(a) taxation of interest in land; and with respect to all the subsections of s. 85.1 on by-laws on intoxication. **This raises the question of whether the other by-law provisions that do not specify they are in relation to reserve land could extend beyond reserve boundaries.**

³⁸⁷ McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments," *supra* note 41 at 19-20.

In *R v. Lewis* (1996), the Supreme Court of Canada interpreted the s. 81(1)(o), wildlife power, to be confined to reserve and not to extend to waters adjacent to the reserve.³⁸⁸ The case involved a by-law regulating fishing within the community. Section 81(1)(o) specifically references its application to the reserve only. While the Supreme Court did not need to go further than that in deciding the case, the Court went on to suggest (in *obiter*) that all the by-law powers in s. 81(1) of the *Indian Act* were confined to the reserve:

If Parliament had intended to grant regulatory powers to Indian Band Councils beyond the limits of their reserves, it would have specifically provided for such powers. The interpretation proposed by the appellants would create numerous and difficult uncertainties which would not, in my view, have been the intention of Parliament. For example, in the present appeal, could Parliament's intention have been to allow one Band to manage and control one part of the river and yet to permit the fishery in the remainder of the river to be managed and controlled by the ordinary regulations made under the *Fisheries Act*? Such a division of management powers is so replete with difficulties that most likely Parliament did not contemplate it.

An expansive interpretation of the by-law-making power would also create the problem of determining the "off reserve" reach of a by-law. For example, whose by-law is to govern when Band Councils on opposite sides of a river both pass by-laws? In addition to fish, s. 81(1)(o) deals with fur-bearing animals and other game which would also be affected by an expansive interpretation of the term "on the reserve".

Based on the above analysis, I conclude that the phrase "on the reserve" in the context of s. 81(1)(o) should receive its ordinary and common sense meaning and be interpreted as "within the reserve" or "inside the reserve" or "located upon or within the boundaries of the reserve". I believe it is clear that Parliament's intention in enacting s. 81(1) as a whole and in particular para. (o) was to provide a mechanism by which Band Councils could assume management over certain activities within the territorial limits of their constituencies.³⁸⁹

The Court raised practical challenges in applying by-laws off-reserve, but the examples provided were solely over challenges to extending broader reach to the regulation of fishing and hunting under s. 81(1)(o). (It should be noted that five years later in *Osoyoos Indian Band v. Oliver Town* (2001), a majority of the Court gave a more generous definition to "reserve," on an interpretation informed by Canada's fiduciary duty, so that a First Nation could benefit from a s. 83(1)(a) taxation by-law relating to an irrigation canal running through the reserve.³⁹⁰)

³⁸⁸ *R. v. Lewis*, [1996] 1 SCR 921. Under common-law principles, only the shores (and not the middle) of the river within reserve boundaries.

³⁸⁹ *Ibid* at paras. 78-80.

³⁹⁰ *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

While some might assume that to be in relation to local/internal matters, band by-laws would necessarily have to be limited to reserve boundaries, this overlooks the fact that many First Nation members live off-reserve, sometimes as a matter of choice, and sometimes not.³⁹¹ Housing shortages and underfunding can result in community members living adjacent to the reserve in neighbouring non-First Nation communities. Arguments that by-laws must necessarily be limited to reserve boundaries, as seems to have been the assumption of the Court in *Lewis*, overlook the fact that jurisdiction can be either territorial or personal in nature. While in some situations, it might be impractical for a band to extend or enforce a by-law against a person outside the territory, in some cases there would be strong arguments why First Nations would want to exercise jurisdiction over members living off-reserve, for example, in order to be able to provide them certain services.³⁹² Thus, **extra-territorial application of by-laws may be reasonable in some circumstances and several provisions within ss. 81(1) and 83(1) are not expressly limited in their application to reserve land.**

Although *R v. Lewis* appears to have ruled that all s. 81(1) by-laws are limited to reserve, there may be grounds to challenge this now in 2022, at least with respect to by-law powers within s. 81(1) that do not explicitly limit application to the reserve. While a binding precedent on the expanse of s 81(1)(o), the statements in *Lewis* regarding the jurisdictional boundaries beyond s. 81(1)(o) are *obiter* and dated (from 1996). Considering the cases on modern municipal by-law interpretation (which recognize both express and implied powers), and additionally informed by the self-government principle regarding First Nations, today the case seems to unnecessarily narrow the scope of s. 81(1) by-laws in cases where the language of the by-law power does not require this.

Area for further research

This section argues that some extra-territorial application of by-laws may be possible, with communities exercising personal jurisdiction over band members in certain cases. This raises further practical questions about how such laws would be implemented, such as how members would receive notice of them and how would they be enforced. These are issues that require further study.

5.3 Paramouncy: the rules for when by-laws compete with other laws

In [Sections 2.5](#) and [2.6](#), we introduced the concept of overlapping jurisdictional powers, the Supreme Court of Canada's tolerance for extensive overlap between different governments (including 'subordinate' governments like municipalities), and the fact that conflicts that arise because of such overlaps are addressed through special rules (often called 'paramouncy

³⁹¹ On this see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

³⁹² It has been noted that the child welfare by-law passed by the Spallumcheen (Splatshin) First Nation, which has been upheld in the courts, provides that "the Band has responsibility for the welfare of Band children and exclusive jurisdiction over any child custody proceedings involving a Band child regardless of the child's residence": see Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30 Windsor Y B Access Just 137 at 143.

rules'). Here we delve more deeply into the specific paramountcy rules around *Indian Act* by-laws.

5.3.1 Conflicts between by-laws and provincial or municipal laws

The rule on conflicts between *Indian Act* by-laws and provincial or municipal laws is clear: **valid *Indian Act* by-laws will supersede provincial or municipal law in the case of a real conflict.**

This is the implication of s. 88 of the *Indian Act*. Section 88 sets out the rule that provincial rules of general application are applicable in respect of First Nations “except to the extent that those laws are inconsistent with ... any order, rule, regulation or law of a band” made under the *Indian Act* or the *First Nations Fiscal Management Act*.

Section 88 only sets out the rule that applies to provincial/municipal laws of *general application*, meaning laws that do not specifically touch on issues relating to First Nations. (As discussed in [Section 2.5](#), recent Supreme Court of Canada decisions now allow provinces to specifically legislate in respect of First Nations in a wide number of areas if they choose to do so.)³⁹³

A case that confirms that a First Nation by-law supersedes provincial laws according to s. 88 and federal paramountcy is *R v Meechance*.³⁹⁴ In that case, the Saskatchewan Superior Court was prepared to accept that a band’s hunting by-law passed under s. 81(1)(o) would have displaced a provincial hunting law (however, the by-law had not been in force at the time the offence occurred).

Sidenote: What is a real conflict?

As discussed in [Section 2.6](#), the courts generally apply a narrow interpretation of what is a conflict between two laws. Such an approach is consistent with the general modern trend of courts allowing overlapping laws to co-exist as much as possible. The narrow rule requires showing that compliance with one law makes it impossible to comply with the other law, which is a high standard.³⁹⁵

In *R v Blackbird*, involving a potential conflict between the federal *Migratory Birds Convention Act* (MBCA) and a band s. 81(1)(o) wildlife by-law, the Ontario Court of Appeal applied this

³⁹³ It has been noted that s. 88 also may only apply to Indians and therefore not provide a specific conflict rule where a by-law applies to a non-Indian on reserve (see Manitoba Justice Inquiry, Chapter 7). In such cases, we believe the paramountcy rule that federal laws (include subordinate laws like by-laws) will supersede provincial/municipal laws in the case of conflict would apply and the by-law would nonetheless supersede provincial law.

³⁹⁴ *R v Meechance*, 2000 CarswellSask 206, 2000 SKQB 156 (Sask QB).

³⁹⁵ *Ross v. Registrar of Motor Vehicles*, *supra* note 169; *Multiple Access*, *supra* note 153 at para. 42 citing Professor Peter Hogg.

narrow definition of conflict to find that there was no real conflict between the two laws.³⁹⁶ In that case, the by-law had similar offences as the *MBCA* (they were incorporated by reference), the only difference being that the fines were lower in the by-law. The courts have held that where overlapping laws are similar, this is not a conflict as duplication is “the ultimate in harmony.”³⁹⁷

There is, however, a second conflict rule that allows federal laws to supersede provincial laws where it can be shown that allowing the provincial law to also apply would frustrate the purpose of the federal law.³⁹⁸ In such cases, the courts have said they need evidence that the federal law-maker intended that their law would be a ‘complete code’ to displace provincial law.³⁹⁹

There has yet to be a case that applies this broader conflict rule in the context of First Nations by-laws. However, **First Nations will have to keep these rules in mind and be careful in their drafting of by-laws if they want to ensure that their laws will supersede other governments’ laws on similar subject matters.**

5.3.2 Conflicts between by-laws and federal laws

How by-laws interact with other federal laws is an area of some confusion. **Some older cases, as well as some statements by ISC, appear to be outdated and not reflective of the current state of the law.** For example:

1. *R v Gladue* (1986), held that a by-law regulating gambling on reserve was not supported by the s. 81(1)(m) power over public games and that furthermore, the *Criminal Code* provisions on gambling were automatically paramount over any such by-laws.⁴⁰⁰ As noted in the last section, ISC’s *By-Laws Manual* sent mixed messages on whether by-laws could overlap with provisions in the *Criminal Code*.⁴⁰¹ Currently, the ISC website states that “a by-law may not be contrary to and/or conflict with other federal laws, such as the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*.”⁴⁰² This suggests that all federal laws will supersede *Indian Act* by-laws.
2. Another early case on gambling, *St. Mary’s Indian Band v Canada* (1995), held, first, that an ‘original meaning’ interpretation of s. 81(1)(m) did not support a power to regulate gambling, and second, on a question of conflict, applied the interpretive principle

³⁹⁶ *R v Blackbird*, *supra* note 110.

³⁹⁷ See *Multiple Access Ltd*, *supra* note 153.

³⁹⁸ *Bank of Montreal v Hall*, [1990] 1 SCR 121; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13; and *Alberta (Attorney General) v Moloney*, 2015 SCC 51.

³⁹⁹ *Bank of Montreal v Hall*, *ibid* and *Alberta (AG) v Moloney*, *ibid* at paras. 40 and 75.

⁴⁰⁰ *R v Gladue*, 1986 CarswellAlta 688, [1987] 4 CNLR 92 (Alta Prov Ct).

⁴⁰¹ See discussion on this at note 348.

⁴⁰² Indigenous Services Canada, “Changes to By-laws” [online](#) (accessed on November 8, 2019).

generalia specialibus non derogant in favour of the *Criminal Code*.⁴⁰³ This principle holds that when two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be avoided by applying the specific provisions to the exclusion of the more general one.⁴⁰⁴

It is to be noted that the *generalia specialibus non derogant* principle applied in *St. Mary's Indian Band v Canada* (1995) is a rule that applies when the conflicting laws in question are coming from the *same* government. The concern in this scenario is to give effect to that government's intentions in the face of its own potentially conflicting laws and regulations. The goal here is to have an internally consistent statute book. However, in the context of conflict between *Indian Act* by-laws and other federal laws, similar to the context of conflict between municipal by-laws and other provincial laws, the situation is different.⁴⁰⁵ The courts have recognized both First Nations and municipalities as third orders of government whose laws are entitled to respect in accordance with the constitutional principle of federalism (see [Section 2.3.2](#)). The modern approach permits overlapping powers and addresses conflicts of laws through strict conflict rules. Ruth Sullivan, in *Sullivan on the Construction of Statutes*, confirms that it would be inappropriate in the context of conflicts between different governments to import conflict principles that are only meant for situations of inconsistent laws passed by one government.⁴⁰⁶

As discussed in [Section 2.3](#), *Indian Act* by-laws are generally regarded as a delegated form of federal law-making. This means that First Nations by-laws are technically 'subordinate' to other federal laws in this context. (The language of 'parent' legislation is sometimes used to refer to federal legislation in relation to other subordinate laws, although in the current context, this also carries some problematic paternalistic connotations.)

The general rules for addressing conflicts of laws between 'subordinate' and 'parent' legislation was summarized by the Supreme Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) as follows:

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation ..., so too it cannot conflict with other Acts of Parliament ..., unless a statute so authorizes Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a

⁴⁰³ *St. Mary's Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 3 FC 461, 1995 CanLII 3525 (FC), aff'd 1996 CanLII 12434 (FCA).

⁴⁰⁴ See Sullivan, *supra* note 246 Chapter 10, at 343.

⁴⁰⁵ On this see Sullivan, *ibid* at 328-329.

⁴⁰⁶ *Ibid*: "In a number of recent cases the courts have recognized municipalities as a third level of government with ever increasing responsibilities and have applied the "operational conflict" test to federal-municipal and provincial-municipal overlaps. However, in the context of a single statute book, the concerns are somewhat different. ... When overlapping provisions come from the same legislature, federalism values do not arise in the only concern is to give effect to the legislatures intentions and so far as these can be known. ..."

matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two.⁴⁰⁷

The rule, therefore, is that parent legislation will supersede subordinate legislation (although conflicts will be read narrowly) unless the parent legislation says otherwise. In the case of the *Indian Act*, both s. 81(1) and 83(1) say otherwise:

- The opening of s. 81(1) states: “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...”

- For s. 83(1) by-laws, ss. 83(5) and (6) state:

(5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

(6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

These provisions introduce specific conflict of law rules for by-laws under s. 81(1) and 83(1) that dictate that by-laws that are inconsistent with provisions in the *Indian Act* and regulations passed under the *Indian Act* will be inoperable. (There are no specific conflict provisions in s. 85.1, thus it is likely the case that the general rule stated in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) applies and that intoxication by-laws will be superseded by any conflicting federal laws.)

The explicit conflict rules in the *Indian Act* provide that Parliament can pass regulations under the *Indian Act* to limit First Nation s. 81(1) and 83(1) by-law powers. The federal government’s regulation powers stem mainly from s. 73 of the *Indian Act*, which includes specific regulation-making powers as well as a catch-all power at subsection s. 73(3).⁴⁰⁸ An analysis of by-law powers versus regulation passed by Canada under the *Indian Act* as part of the JMAC Report (and reproduced as [Appendix D](#)), reveals that the Governor-in-Council has not exercised its regulatory powers in many areas contemplated by section 73 of the *Indian Act*.⁴⁰⁹ The only obvious area in which competing regulations exist is the *Indian Reserve Traffic Regulations*.⁴¹⁰

Side note: *Indian Reserve Traffic Regulations*

⁴⁰⁷ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [reference omitted].

⁴⁰⁸ Subsection 73(3) states, “The Governor in Council may make orders and regulations to carry out the purposes and provisions of this Act.”

⁴⁰⁹ JMAC, *supra* note 28. Note, however, that Canada exercised its regulation powers in 2020 for the first time in many years responding to the need for Band Councils to delay elections in light of COVID-19: see *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84.

⁴¹⁰ *Indian Reserve Traffic Regulations*, CRC, c 959.

Section 6 of the *Indian Reserve Traffic Regulations* specifically incorporates provincial traffic laws on reserve. Because a by-law cannot be “inconsistent with ... any regulation...”, if a conflict were to arise between a First Nation traffic by-law and the provincial traffic law, the regulations incorporating the provincial law would supersede the First Nation by-law.⁴¹¹

Recall, however, that under the modern approach to federalism, conflicts will be read narrowly. For example, a provincial law that sets a speed limit of a maximum of 50km and a band by-law that sets a maximum limit of 30km in a school zone would not be in conflict. This is because it is possible to comply with both (driving 30 km does not breach the 50km provincial limit), and both are intended to protect safety.

Beyond regulations under the *Indian Act*, **neither s. 81(1) or s. 83 state that other federal laws beyond the *Indian Act* and regulations under it will supersede valid *Indian Act* by-laws.**

Applying the ‘implied exclusion’ interpretive rule, the failure of Parliament to specify that by-laws are subject to other federal laws implies a legislative intent to exclude this possibility.⁴¹² In other words, **the implication is that valid s. 81(1) or 83(1) by-laws will supersede other federal laws.**⁴¹³ This means it is in error to assume, as was done by courts and ISC in the past, that the provisions of the *Criminal Code* and other federal laws are paramount to s. 81(1) and 83(1) by-laws.

This analysis has been followed in two decisions from appellate courts involving conflicts between regulations under the federal *Fisheries Act* and by-laws regulating fishing on reserve passed under s. 81(1)(o). In *R v Jimmy*, the British Columbia Court of Appeal rejected the argument that the conflict rule in the opening phrase of s. 81(1) meant that a by-law cannot be

⁴¹¹ *Ibid* at s. 6: “The driver of any vehicle shall comply with all laws and regulations relating to motor vehicles, which are in force from time to time in the province in which the Indian reserve is situated, except such laws or regulations as are inconsistent with these Regulations.”

⁴¹² See *Sullivan*, *supra* note 246 at 243-246. See in particular at 244: “An implied exclusion and implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to the thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, “legislative exclusion can be implied when an express reference is expected but absent” [*University Health Network v Ontario (Minister of Finance)*, [2001] OJ No. 4485 at para. 31 (Ont. CA)]. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.”

⁴¹³ The federal legislative approach to conflict rules in relation to conflicts between First Nation and federal laws varies from statute to statute. Section 17(3) of the *Kanesatake Interim Land Base Governance Act*, SC 2001, c 8, provides that federal law is paramount. However, the *First Nation Land Management Act*, *supra* note 122, limits the situation of federal paramountcy to situations involving federal environmental law. *An Act respecting First Nations, Inuit and Métis children, youth and families*, *supra* note 122, provides that First Nations laws will supersede other federal laws except the *Canadian Human Rights Act*. As a matter of rule of law, courts should avoid ‘reading in’ limits to First Nation jurisdiction that are not explicitly in the law. This is consistent with the *Nowegijick* interpretative principles that “statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”: *R v. Nowegijick*, [1983] 1 SCR 29 at 36.

inconsistent with any other federal legislation or regulation. Instead, the Court of Appeal held that the language in s. 81(1) is in reference only to the *Indian Act* and any regulations made under the *Indian Act*. Based on this interpretation, the Court of Appeal held that a fishing by-law was paramount to conflicting provisions in the federal *British Columbia Sport Fishing Regulations*, SOR/82-645.⁴¹⁴ The Court of Appeal also rejected the argument to employ the *generalia specialibus non derogant* principle in the circumstances.⁴¹⁵ The following year, the analysis in *R v Jimmy* was followed in the New Brunswick Court of Appeal in *R v Ward* to find that provisions of a band fisheries by-law superseded conflicting provisions in the federal *New Brunswick Fisheries Regulations*.⁴¹⁶

The analysis in these cases is consistent with the language of the *Indian Act* and modern interpretation rules, and there does not seem to be any obvious or principled basis to differentiate between types of federal laws in this context (e.g., the *Criminal Code* vs. the *Fisheries Act* and its regulations). Although never clearly stated, one might infer that the position of some courts in the past and ISC, when they state that all federal laws supersede First Nation by-laws, is based in part on floodgate concerns that First Nations may attempt to regulate all manner of criminal matters. However, this overlooks the fact that any by-law must first be based on a valid First Nation purpose like in the case of municipalities. There are cases where municipalities tried to regulate broader national issues (such as banning shark fins and oil company boycotts) and the courts have struck these down as not supported by evidence of a valid purpose. By analogy, it would likely be difficult for a First Nation to show how a by-law regulating abortion or terrorism, for example, is related to a specific community purpose, unlike addressing behaviour that may present more regularly (such as theft or assaults) and where the community wants to address the issue in a particular way.

Second, Parliament retains the power to address situations of overlap by exercising its regulatory power under the *Indian Act*. Of course, it also remains open to Parliament to amend the *Indian Act* by-law powers. Thus, there are reasonable responses to floodgate concerns and these should not operate as unspoken barriers to applying the correct interpretation of *Indian Act* by-law powers.

The above-discussed paramountcy rules relating to the *Indian Act* by-laws can be summarized as follows:

- Valid *Indian Act* by-laws will supersede provincial or municipal law in the case of a real conflict.
- Conflict rules designed to address internal inconsistencies between laws of one government (such as *generalia specialibus non derogant*) do not apply in the context of conflicts of laws between different levels of government (including federal laws vs. First Nation by-laws).

⁴¹⁴ *R v Jimmy*, 1987 CarswellBC 186, [1987] 3 C.N.L.R. 77 (BCCA) at para. 27.

⁴¹⁵ *Ibid* at para. 28.

⁴¹⁶ *R v Ward*, 1988 CarswellNB 139, 45 CCC (3d) 280 (NBCA).

- Sections 81(1) and 83(1) by-laws will be superseded by provisions in the *Indian Act* and regulations passed under it. At present, there are very few regulations that conflict with these by-law powers.
- Beyond the *Indian Act* and regulations thereunder, interpretation principles require that ss. 81(1) and 83(1) by-laws supersede other federal laws and regulations in cases of conflict.
- Concerns about overlap can be addressed by Parliament by passing regulations under the *Indian Act* (or amending the *Indian Act*).
- All federal laws will supersede s. 85.1 in cases of conflict.
- Consistent with the principle of federalism, conflicts are to be interpreted narrowly and overlapping laws are allowed to co-exist whenever possible unless it is clear that the First Nation intended its by-law to ‘occupy the field’ in the area.

5.4 Process for creating and amending by-laws

5.4.1 Steps for creating and passing by-laws

For all three types of by-laws (ss. 81(1), 83(1) and 85.1), the *Indian Act* provides that the **“council of a band” makes the by-law**. With respect to the exercise of power conferred on a band or council, s. 2(3)(b) of the *Indian Act* states:

a power conferred on 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.⁴¹⁷

This means that a **by-law is validly passed if a majority of the band council approves the by-law at a band meeting. For s. 83(1) money by-laws and s. 85.1 intoxication by-laws, the *Indian Act* puts additional approval requirements in place.** Money by-laws must be approved by the Minister. Before passing an intoxication by-law, the band council must put the approval of the by-law to a community vote at a special meeting of the band called for the purpose and the majority of the voters must approve the by-law.⁴¹⁸ **Since the repeal of the disallowance power in 2014, there is no longer any requirement for the band to have their s. 81(1) by-laws reviewed or vetted by ISC or any other body.**⁴¹⁹

Beyond these technical requirements, the *Indian Act* is silent in respect of the procedures for developing and adopting by-laws. Nonetheless, a band council may want to add or include additional steps in their by-law making process.

⁴¹⁷ *Indian Act*, *supra* note 346 at s. 2.3.

⁴¹⁸ *Ibid* at s 85.1(2).

⁴¹⁹ Note that for s. 81(1)(p.4) on membership, the band council must follow the requirements in s. 10, which does require a community vote.

What we heard: the importance of consulting over by-laws

In our interviews, we heard repeatedly that consultations over proposed by-laws are important. We heard consensus from Nova Scotia interviewees on the importance for community members to have their voices and concerns included in the by-law making process, because it's the by-laws that will ultimately govern aspects of their lives on reserve. Community member inclusion in the by-law making process can be in the form of community meetings that permit members the opportunity to provide input and ask questions regarding draft by-laws. An interviewee explained that First Nation communities cannot have draconian laws, and if the community is not supportive of the by-law then members will likely not adhere to it.

Another explained that if community members are included in the by-law making process, they are more likely to adhere to the by-law without the need for actual on the ground enforcement. Similarly, an interviewee detailed the importance of relationship-building between the council and the community and explained that if there is sufficient engagement, the members are more likely to respect the government and any rules that are enacted by the band council.

A few interviewees stated that if there is a consensus amongst community members that the rules, policies and the by-laws in place are reflective of the norms and values of the community, there will be more compliance. One interviewee gave an example of a best practice in one First Nation community that prioritizes its own First Nation laws. Each law of that First Nation goes through detailed community consultation and ratification. The laws that are enacted reflect the norms and values of the community, which was explained as being the first line of ensuring compliance.

If rules, policies or by-laws are based on Indigenous law, then members are going to be more likely to adhere to them. In this regard, one of the lawyers that works with First Nations recommends that for each by-law a First Nation wants to develop, the starting point should be to ask: "what has the community historically done to address the particular matter?" This reflection, the interviewee suggests, generally begins by those drafting the law to speak with chief and council, then the chief and council (or lawyers) engage with the community to get feedback on the proposed law.

A few interviewees stressed the importance of Elders having a prominent role in community engagement processes directed at developing or reviewing by-laws, rules or policies. Including Elders as a central focus of community engagement on by-laws can act as a form of deterrence for community members. In some First Nation communities, the disapproval or sanction by an Elders groups/committee is going to have more sway than a by-law enforcement officer.

With respect to community engagement in developing/drafting by-laws, the representatives from the RCMP we interviewed suggest that all relevant people be involved during the by-law development process, including police, judges and prosecutors.

We heard that the inclusion of a community's own legal tradition within its by-laws is important. As noted in [Section 2.9.7](#), there are several Indigenous law revitalization methodologies that are being developed and used to assist First Nations, and work is underway to train more law students, lawyers and others about these methods. As the Mi'kmaq of Nova Scotia consider exercising greater law-making powers, they may want to learn more about these methodologies.

An example of how Indigenous legal principles can be incorporated into First Nations laws can be seen in the *Lobster Law* recently passed by the Listuguj Mi'gmaq First Nation. The law sets out several Mi'kmaq principles through which the lobster law must be interpreted and implemented.

PART III GUIDING PRINCIPLES

6. This Law will be interpreted and implemented in accordance with the following guiding principles:

- a) *Ango'tmu'q*: "Taking care of something in a careful manner." *Ango'tmu'q* also suggests "acknowledgement" and "responsibility" when using the resources of the territory, e.g., "I take care of it." As Mi'gmaq, we acknowledge our territory, our lands, waters, and all life forms that have sustained our nation for generations;
- b) *Apajignmuen*: "Sharing" and "giving back" to one's community, thereby strengthening relations. Mi'gmaq customary practices, ceremonies, and feasts, as well as information sessions and meetings, are ways of giving back. *Apajignmuen* also implies having gratitude, being aware, and being grateful for what has been given to you;
- c) *Gepmite'tmnej*: "Respect." In caring for the lobster, we need to respect that everybody brings knowledge and has a role to play in fishery management. We need to recognize and incorporate both Indigenous and scientific knowledge into decision-making processes; and
- d) *Welte'tmeg*: "We agree in thought." This is a form of consensus-building to reach a shared agreement. Elders emphasize that, as Mi'gmaq, we need to work together to come to an agreement about how best to take care of the lobster. We can achieve *welte'tmeg* through building awareness, education, sharing, and exchange of views. *Welte'tmeg* requires that we be open to other views, experiences, and possibilities.

This approach of incorporating Indigenous values within legislation has also been followed in Nunavut, where several laws include reference to “Inuit Qaujimagatuqangit” (Inuit traditional knowledge).⁴²⁰

First Nations may want to work with other communities in the drafting of laws. Such an approach was taken in Nova Scotia with regard to the drafting of band laws under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.⁴²¹ Further, while by-laws are passed on a band-by-band basis, there is nothing preventing groupings of bands, by Indigenous Nation or region for example, from seeking to adopt identical by-laws simultaneously to provide for uniform law applying on all reserves in a geographic region.⁴²²

Sidebar: additional considerations

There are a number of other considerations that First Nations have to take into account when developing by-laws, including ensuring that such laws conform with the *Charter*, the *Canadian Human Rights Act* and other constitutional and administrative law obligations as discussed in [Section 2.3.1](#).

There are also considerations relating to the time period the by-law applies to and how the by-law might affect rights acquired before the by-law came into force. There is a general presumption against by-laws being retroactive and taking away rights people had before the law came into effect.⁴²³

5.4.2 Delegation

There is a general legal principle that a body exercising delegated authority may not further sub-delegate it.⁴²⁴ This means that the holder of a delegated power cannot:

(1) Give its law-making powers to a third-party.

This means that the band council could not give a specific official or a committee the power, in a by-law, to enact laws based on the by-law powers. However, it is acceptable for a band council to delegate the task of drafting a by-law to a person or group of people, so long as the band council has the final say. The *Indian Act* requires that the band council be the body to enact by-laws.

⁴²⁰ See for example: *Education Act*, SNU 2008, c 15; *Official Languages Act*, SNU 2008, c 10; *Legislative Assembly and Executive Council Act*, SNU 2002, c 5; *Wildlife Act*, SNU 2003, c 26; and *Inuit Language Protection Act*, SNU 2008, c 17.

⁴²¹ For more on this, see Confederacy of Mainland Mi'kmaq, “Mi'kmaq Matrimonial Real Property: A guide for Bear River, Millbrook, Paqtnkek, Pictou Landing, and Sipekne'katik,” March 2017, [online](#).

⁴²² See Metallic, “A Viable Means,” *supra* note 36 at 233.

⁴²³ For more on this, see Sullivan, *supra* note 236 at Chapter 24, “Temporal Considerations.”

⁴²⁴ See *By-Laws Manual*, *supra* note 6 at 4-4.

Similarly, consulting with community members and getting feedback, including putting the by-law to a community vote even where it is not technically required (under ss. 81(1) and 83(1)),⁴²⁵ is permissible so long as a band council vote occurs *after* such consultations. Band council members can take the community feedback into account when exercising their vote, but they are not automatically bound by it.⁴²⁶

(2) Give to itself the law-making power to be exercised in another way.

This means that the band council could not pass a by-law giving it the power to circumvent passing other by-laws through such things as a band council resolution.

Although a band council cannot sub-delegate its law-making power, it is able to delegate administrative duties to officials, committees or to itself under a by-law.⁴²⁷ An example would be giving a residency committee the power to decide whether a person meets the criteria for residency in the community as set out in a residency by-law. In delegating power to a person, committee or the band council to make a type of decision under a by-law, the by-law should set out clear criteria upon which this exercise of discretion should be exercised.

5.4.3 Publication

The *Statutory Instruments Act* applies to all subordinate federal laws, generally providing that such instruments must be published in the Canada Gazette.⁴²⁸ However, *Indian Act* by-laws are exempted from this requirement under the *Statutory Instruments Regulations*.⁴²⁹

Prior to amendments to the *Indian Act* in 2014 that removed the disallowance power for s. 81(1) by-laws, there was no specific provision within the *Indian Act* that dealt with the publication of by-laws. Copies of by-laws were held by ISC, and a certified true copy of the by-law by the superintendent (regional supervisor of ISC) was proof that it was duly made and approved by the minister.⁴³⁰

⁴²⁵ There is precedent for First Nations putting their s. 81(1) by-laws to a community vote. This was done in the case of the Spallumcheen child-welfare by-law. This could add to a by-laws political legitimacy as well. See Metallic, Metallic, "A Viable Means," *supra* note 36 at 219 and 233.

⁴²⁶ Like municipalities, Band Councils can be subject to claims of illegal sub-delegation or fettering of discretion if they treat feedback as binding. However, if they weigh feedback and don't seem themselves as automatically bound by such feedback, there is no sub-delegation or fettering. See, for example, *Guzar v. The Corporation of the Township of Puslinch*, 2019 ONSC 3511.

⁴²⁷ *By-Laws Manual*, *supra* note 6 at 4-4.

⁴²⁸ *Statutory Instruments Act*, RSC 1985, c S-22.

⁴²⁹ *Statutory Instruments Regulations*, CRC, c 1509, s. 7(l).

⁴³⁰ See previous version of s. 86 of the *Indian Act*, *supra* note 346, amended by 2014, c. 38, s. 9. The old version of s. 86 stated: "A copy of a by-law made by the council of a band under this Act, if it is certified to be a true copy by the superintendent, is evidence that the by-law was duly made by the council and approved by the Minister, without proof of the signature or official character of the superintendent, and no such by-law is invalid by reason of any defect in form."

In 1997, the *First Nations Gazette* was officially launched in response to the growing need to provide public notice of First Nation legislation as First Nations increasingly exercise and expand their legislative jurisdictions. Provincial and federal governments publish their laws, regulations and other notices through their *Gazettes*. The *First Nations Gazette* responds to a similar need for such a service for First Nations.⁴³¹ Some federal laws recognizing Indigenous law-making power, such as the *First Nations Fiscal Management Act*, require the publication of First Nations laws in the *First Nation Gazette*.⁴³² The *First Nations Gazette* is now an exclusive electronic publication. It is made up of three parts:

Part I is the Public Notification Service. First Nation governments and others may post notices in the *First Nations Gazette* using [this service](#).

Part II is the register of First Nation legislation. The legislation contained in Part II includes laws required by federal statute to be published in the *Gazette*, and other laws, by-laws and enactments submitted to the *Gazette* for publication by First Nations. **This part includes a large collection of *Indian Act* by-laws.**⁴³³ The legislation published in Part II can be accessed and downloaded individually through a [searchable database](#).

Part III contains documents related to First Nation law-making, such as standards, policies, procedures and sample laws and by-laws. These include *First Nations Fiscal Management Act* sample laws, sample section 83 *Indian Act* by-laws, standards and procedures established under *the First Nations Fiscal Management Act* and policies of First Nations and First Nation institutions. The documents in Part III can be accessed and downloaded through a [searchable database](#).⁴³⁴

The *First Nations Gazette* also provides a [Style Guide](#) that provides general guidelines for the preparation and drafting of First Nation laws and by-laws to be published in the *Gazette*. All sample laws and by-laws, policies, procedures and standards established by the First Nations Tax Commission are formatted in accordance with the *Style Guide* prior to publication in the *Gazette*. The *Gazette* encourages First Nations to consult the *Style Guide* for information on all aspects of editorial style to ensure consistency and clarity in the drafting of First Nation laws and by-laws.⁴³⁵

⁴³¹ First Nations Gazette website, "About Us," [online](#) (last accessed Nov. 12, 2019).

⁴³² *First Nations Fiscal Management Act*, *supra* note 122 at s. 34.

⁴³³ The *Gazette* contains a large number of s. 81 and 85.1 by-laws. The project to digitize by-laws occurred between 2015 and 2016. All s. 81 and 85.1 by-laws that were currently in force at the time were uploaded to the database. It did not include by-laws that had been repealed. However, when by-laws are repealed, they are not removed from the *First Nations Gazette*, so any laws that have been repealed since the digitization are available in Part II. All section 83 by-laws have been published in the *First Nations Gazette* since 1989. Email correspondence with Editor of *First Nations Gazette*, November 28, 2019.

⁴³⁴ First Nations Gazette website, "About Us," [online](#) (last accessed February 20, 2021).

⁴³⁵ *Ibid.*

Since the amendments to the *Indian Act* in 2014, band councils are now required to publish their by-laws either (1) on an Internet site, (2) in the *First Nations Gazette* or (3) in a newspaper that has general circulation on the reserve of the band, whichever the council considers appropriate in the circumstances.⁴³⁶ A by-law that is published in one of these ways takes effect on the day that it is published.⁴³⁷ Bands who choose to publish by-laws on their own Internet site must ensure their by-laws are always accessible through the site.⁴³⁸ In addition to this, band councils must also make a copy of their by-laws available upon request to “any person who requests [a copy].”⁴³⁹ Band by-laws in force before December 16, 2014, remain in effect until they are amended or repealed, whether or not the by-laws are or have been published.⁴⁴⁰

What we heard: publication

It appears that some of the members of the Nova Scotia Mi’kmaq communities we interviewed may not be aware of all by-laws that have been enacted by their band councils. A few First Nation government by-laws, such as smoking regulation signs and notices that pitbulls (dogs) are banned, are posted in public spaces. One First Nation mailed a physical copy of their dog control by-law to all community members.

Outside of these specific examples of notice to community members, the First Nation representatives we interviewed explained that they could not say with certainty whether community members are aware of all existing by-laws. This is partly because some of the current band managers we interviewed are unsure if all the by-laws that have been enacted are on file at the band office. For example, one interviewee referenced the ministerial disallowance power that used to exist under the *Indian Act* and explained that by the time ISC sent the by-law back to the band council (whether approved or not), new employees and/or council had taken over at the band office. The results in incoming employees and/or council not always being aware of the by-law work performed by their predecessors.

The majority of those interviewed did express the desire to have all of their community by-laws posted on their website so that community members could access them.

To ensure maximum accessibility, publishing a community’s laws both on the First Nation’s website as well as within the *First Nations Gazette* would be a wise practice.

One government representative suggested that having Canada make the publication of First Nations laws in the *First Nations Gazette* or some other public repository mandatory might be a welcome reform to ensure one central repository of laws.

⁴³⁶ See s. 86(1) of the *Indian Act*, *supra* note 346, amended by 2014, c. 38, s. 9.

⁴³⁷ *Ibid* at s. 86(4).

⁴³⁸ *Ibid* at s. 86(5).

⁴³⁹ *Ibid* at ss. 86(2) and (3).

⁴⁴⁰ Indigenous Services Canada, “Changes to By-laws” [online](#) (accessed on November 8, 2019).

5.4.4 Amendment and repeal

The *Indian Act* does not contain any procedure in respect of amendments to by-laws. Examples of by-laws in the *First Nations Gazette* show different practices. A band could issue a new by-law to add to or amend an old by-law, which resembles how Canadian legislation is often amended. Another approach is passing an updated by-law with the changes and repealing the previous version of the by-law. Stand-alone by-laws can be passed to repeal a by-law. The *First Nations Gazette Style Guide* provides suggestions on how amendment and appeal provisions should be worded.⁴⁴¹

5.5 Challenges to by-law development

5.5.1 Awareness and Education

Our interviews and the literature review shows there is a general lack of awareness of First Nations law-making powers, and by-laws, more particularly, among several important stakeholders, from community members, to police to government.

5.5.1.1 Community members and residents

One interviewee explained that their First Nation community members simply think they are being “picked on” by band council via by-laws. However, that interviewee believed that through education and ongoing communication between council and the community, the community members' perception of self-determination and by-laws would likely change.

Participants in the 2013 *Evaluation of the Marshall Inquiry Implementation* had many questions about the powers of band councils and band council resolutions and potential conflicts with the *Indian Act* and federal and provincial laws.⁴⁴²

5.5.1.2 Legal system actors

Several interviewees cited a lack of awareness by police, lawyers, judges, public prosecutors and others involved in the justice system, regarding by-laws and the enforcement and prosecution tools that currently exist.

The interviewees with the Aboriginal Legal Services (“DOJ Canada”) stressed the importance of Calls to Action #27 and 28 from the Truth and Reconciliation Commission of Canada Report and said these are critical to successfully facilitating First Nation by-law enforcement. All law students need to become familiar with First Nation laws on reserve because a lawyer never knows when they will be in a situation where they are developing or applying that law. Further, all lawyers must be properly educated to ensure laws that are developed are not simply ‘cut and paste’

⁴⁴¹ First Nation Gazette Style Guide [online](#) (last accessed on November 12, 2019).

⁴⁴² Marshall Evaluation, *supra* note 223 at 18.

because First Nation by-laws must be developed in a manner that is actually responsive to the needs of the First Nation community.

In addition to lawyers, the interviewees cited the need for all those involved in First Nation by-laws to receive the appropriate training and education, including police agencies, judges, public prosecution services, First Nation governments and employees. One way to address this is by creating a “toolkit” that addresses by-law drafting, training, education, enforcement and prosecution. A toolkit should provide education to ensure there is no confusion as to which by-laws the police are responsible for enforcing, a standard form for reporting by-law offences. A toolkit should outline the prosecution process. In this vein, the BC Assembly of First Nations has developed a Governance Toolkit, which is a comprehensive guide intended to assist their Nations in rebuilding governance and navigating their way out from under the *Indian Act* at their own pace, based on their own priorities.⁴⁴³

5.5.2 Funding & Capacity

The literature review highlighted capacity issues in relation to *Indian Act* by-laws such as lack of resources for by-law development (i.e., to obtain legal advice at the by-law drafting stage to ensure by-laws are valid and do not conflict with other laws) and lack of resources to conduct training and education efforts for community members regarding by-laws.

What we heard: capacity & funding needs

In our interviews with representatives from Nova Scotia Mi'kmaq communities, we heard that the main barrier preventing the amendment of by-laws, or the development of them in the first place, is a lack of internal capacity within the First Nation governments. One interviewee said that everyone is just too busy, and they do not have the internal employee capacity required to draft or amend by-laws properly. A lack of internal capacity was a barrier echoed by other interviewees. On a related note, an interviewee referenced the pre-2014 process whereby First Nations had to submit their by-laws to the minister for approval and said that it was almost as if First Nations were getting a form of free legal advice as INAC would often send feedback on the by-laws submitted to them. However, one First Nation government interviewee saw the previous ministerial involvement as burdensome and paternalistic, which ultimately caused that First Nation to walk away from previous by-laws they had in development.

The interviewees cited a lack of funding as a barrier to by-law development and enforcement in their communities. Five of the six First Nations we interviewed in Nova Scotia explained that if First Nations had more funding to direct towards the education, training and development of by-laws, that would provide a step towards actual enforcement. None of the First Nations interviewed receive federal funding for by-law development or enforcement, which means that any by-law development is funded through the First Nation's own source

⁴⁴³ The Toolkit can be found online at: <https://bcfn.ca/about/governance-toolkit/>.

revenues. One interviewee explained that, like most other First Nations, their First Nation is supported by federal funding which is in the form of program specific funding, and First Nations must abide by the rules and terms of the funding received.

It was also explained that a lack of funding is the biggest barrier to enforcement, as funding is required to carry out the initial community consultations and by-law drafting process. Similarly, an interviewee explained that educating community members and enforcement officers, and building relationships with local police, all requires funding. A different interviewee suggested that the Professional and Institutional Development Program funding available through Crown-Indigenous Relations and Northern Affairs Canada (“CIRNA”) may be a worthy avenue to pursue.⁴⁴⁴ Although the interviewee did say that such funding is likely limited to by-law drafting and development, and not for the actual enforcement of by-laws. Like the others interviewed, that interviewee said First Nations would need specific project funding to address their by-law concerns.⁴⁴⁵

An interviewee emphasized the cost of by-law enforcement, explaining that First Nations need a complete regime for enforcement, which includes ensuring the by-laws are validly enacted (which requires drafting knowledge and experience), compliance monitoring, enforcement officers and prosecution of violations. All of these cost money. Comments made during another interview support this position; an interviewee explained that the more by-laws a community has, the bigger the need for enforcement becomes, and as the level of enforcement increases so do the associated financial costs.

Only one interviewee said funding is not a barrier to by-law enforcement. That interviewee explained that while funding is not a barrier for that First Nation, there are numerous other justice-related issues that pose a barrier to by-law enforcement, including the police applying provincial laws instead of the First Nation by-laws. Another issue flagged by that interviewee is that the council of the First Nation is of the understanding that if they attempted to prosecute a by-law infraction, the First Nation would have to pay for a lawyer to prosecute the matter.

Interviewees from outside the Nova Scotia Mi’kmaq communities also identified funding needs for First Nations to develop by-laws which include consultation with communities and the enforcement and prosecution of those by-laws.

A private law firm lawyer explained that if adequate funding is not available, a First Nation is faced with proceeding to enact a by-law that does not reflect the will of the community or not bother to pass their own laws at all. Instead of developing by-laws that are reflective of their own needs and circumstances, First Nations are forced into adopting a ‘cut and paste’

⁴⁴⁴ The following is the link to the funding program: <https://www.aadnc-aandc.gc.ca/eng/1100100013815/1100100013816>.

⁴⁴⁵ An interviewee also referenced capacity funding that is available through “block funding arrangement” with CIRNA but was unsure of the details.

type of by-law which is not going to be effective. This interviewee emphasized that if you under-invest in First Nations, the result will be a series of failures.

As the interview from FNLNRC pointed out, deficiencies in by-laws should not be interpreted as simply the fault of First Nations. Most First Nations do not have adequate funding to consult with lawyers and/or to develop the in-house capacity required to draft appropriate and effective language in their laws.

An interviewee with CIRNAC also addressed the issue of funding. In addition to the lack of funding for First Nations, he said his federal government department is also faced with a lack of funding, which prevents them from providing the appropriate services/engagement to First Nations on these very issues.

One government interviewee stated that core federal funding to First Nations should include funding for the internal development and hiring of enforcement officers, as this would operate to remove pressure from local police services. Similarly, two other interviewees identified that a core problem is that First Nations are unable to enforce their laws themselves due to a lack of funding.

Lawyers working with First Nations told us that providing First Nations with the opportunity to contribute adequate time and resources to focus on their by-laws is essential; capacity funding is required for First Nation governments to prioritize by-laws on their agendas, which will contribute to ensuring by-laws are drafted properly.

One lawyer said that making a policy pitch to the federal government is needed, essentially explaining to the government how the funding of by-law enforcement and prosecution will ensure more efficient operation of the judicial system, and ultimately result in cost savings for the federal government. If such a political lobbying approach were taken, First Nations should provide financial data/details outlining the cost savings for federal government under such an approach.

There is a strong consensus on a need for funding of services for by-law development of First Nations (there is a similar need for support for by-law enforcement and prosecution services, but this will be dealt with in the next chapters). **As discussed in [Section 2.2](#), after a 5-year hiatus, ISC resumed providing some by-law support to First Nations, but these appear to be limited to reviewing by-laws on request and this service is not publicized. Given the needs discussed above, we find this to be insufficient.** Canada provides support for s. 83 and *FNFMA* laws through its funding of the FNTC. Canada also provides funding to First Nations who have opted into a land code regime under the *FNLMA* in the form of (i) funding for developing a land code, and; (ii) on-going operational funding for managing land, natural resources and the environment. From 2014 to March 2021, First Nations wishing to pass matrimonial property

laws under *FHOMIRA* also had the support of the Centre of Excellence for Matrimonial Real Property and bands could request funding for the implementation of *FHOMIRA*.⁴⁴⁶

In light of all this, ISC ought to be doing much more to address First Nation by-law needs, including providing greater support and regular funding for *Indian Act* by-laws development and capacity building. The fact that ISC provides such services should also be clear on ISC's website. This is especially so now given the *Department of Indigenous Services Act* ("*DISA*") recognizes that it has a responsibility to provide services in the area of governance, which the GMAC report recognized as including by-laws, and that it is committed under *DISA* to further nation to nation relations, to respect the *UN Declaration*, and to provide needs-based services (see [Section 2.9.4](#)). All of those things militate towards ISC meaningfully supporting the development of by-laws as an exercise of self-governance. **Consistent with *DISA*, UNDRIP, and nation-to-nation relationships, ISC should provide far more robust support services to First Nations for s. 81(1) and 85 by-law development.**

There are different perspectives on how this support should be delivered. A CIRNAC interviewee suggested that additional funding could be given to the department, which could then hire an expert to go into First Nation communities and assist with by-law education and capacity building. Others thought that increasing First Nations funding with specific dollars earmarked for by-law development would be preferable, including holding community consultations. The 2002 JMAC Report suggested, in light of the recommendation to get rid of disallowance power, the creation of an independent Institution could assist bands with advice on these and other matters related to the enactment of laws. Similarly, the 2021 House of Commons Report on First Nation law enforcement recommended the creation of a First Nation Centre of Excellence for Knowledge-sharing on Enforcement and Justice issues.⁴⁴⁷

It may well be that a combination of such suggestions would provide the best overall support. We agree it would be helpful if there was a central source from which First Nations could request and receive expert advice and resources on by-law development. First Nations will also require funds to hold community consultations, support drafting and legal review. **ISC support for by-law development should reflect the fact that First Nations may benefit from having a central source from which they could request and receive expert advice on, and resources for by-law development, as well as receiving funds for expenses related to individual by-law development such as consultations, drafting and legal review.**

⁴⁴⁶ See National Aboriginal Land Managers Association website, Matrimonial Real Property, [online](#).

⁴⁴⁷ [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#), *supra* note 5 at recommendation 10.

6 Enforcement of by-laws

For laws to be meaningful, and achieve their intended purposes, there must be a mechanism for enforcement. Without enforcement, laws may lose their ability to regulate and shape the conduct of governments and individuals. When discussing the enforcement of by-laws, we are typically referring to the process of seeking and ensuring compliance with a First Nation government's by-laws. The literature is generally unanimous that enforcing by-laws is a challenge for First Nations governments across Canada.

Here we are looking at who enforces and oversees compliance and how violations of by-laws are formally brought forward (e.g., through charging or ticketing). Prosecution, adjudication and penalties relating to by-law offences are addressed in subsequent chapters.

6.1 The By-Law Enforcement Powers in the *Indian Act*

The *Indian Act* does not specify who enforces by-laws or how they are to be enforced. As discussed in [Section 2.2](#), the 2002 JMAC Report recognized significant deficiencies in the *Indian Act* by-law enforcement framework and the *First Nations Governance Act* ("FNGA") proposed provisions that attempted to remedy some of these problems. On the 'who' and the 'how', the FNGA would have included the following provision:

23. (1) The council of a band may employ any qualified person as a band enforcement officer for the purpose of conducting inspections and searches on reserve lands of the band, and shall furnish each officer with a certificate specifying the provisions of band laws made under sections 16 and 17 in respect of which the officer may conduct them.

(2) When conducting an inspection or search of a place, a band enforcement officer shall, on request, produce the certificate to the person appearing to be in charge of the place.

The FNGA did not become law and the 2014 amendment did not attempt to address any of the enforcement deficiencies in the *Indian Act* in any significant way.⁴⁴⁸ Despite the silence on the face of the *Indian Act*, some relevant laws and practices have emerged over the years that provide guidance. There remain several challenges, however.

6.2 Who enforces by-laws?

It is widely accepted that by-laws may be enforced by the RCMP, a provincial police force, a band police force or a band by-law enforcement officer.⁴⁴⁹ However, the number of potential

⁴⁴⁸ ISC, *Changes to By-Laws*, [online](#): "The Act does not affect the enforcement of band by-laws enacted under section 81 and 85.1. Law enforcement, policing bodies or other enforcement officers remain responsible for policing the reserve and ensuring the enforcement of by-laws [...]."

⁴⁴⁹ Bradford Morse, "By-law Enforcement Options: A Brief Survey" [1980] 2 CNLR 61-71.

actors creates room for confusion and inaction. The situation regarding enforcement of by-laws was summarized by the RCAP in 1996:

...except for those reserves that have appointed by-law enforcement officers and band constables under delegated federal authority, most bands have no internal means of enforcing their by-laws...they must rely for the most part on provincial police...Unfortunately police and prosecutors have a heavy workload and usually intervene only in the case of criminal and serious statutory offences.⁴⁵⁰

Little has changed since that time. First Nation government by-laws are rarely enforced by police. The enforcement burden is then placed on community-based by-law enforcement officers. However, many First Nations governments lack the funding to hire by-law enforcement officers, which leaves virtually no enforcement mechanism.

The *ISC By-Laws Manual* emphasizes the obligation for enforcement by First Nations, stating “It is the obligation of the band councils to enforce their own by-laws. The Department of Indian Affairs does not take responsibility for doing so.” However, despite sending this message, the *Manual* suggests there is a role for local police in by-law enforcement too in enforcing “quasi-criminal” by-laws. In this regard, the *Manual* encourages bands to enter into agreement with police forces for such enforcement.⁴⁵¹

6.2.1 Different enforcement roles based on different kinds of by-laws

The *ISC By-Laws Manual* puts by-laws into two different categories for enforcement purposes:

- 1) Those that are administrative in nature, such as a building code or a zoning by-law, or civil in nature, such as taxation, housing or residency; and
- 2) Those that are quasi-criminal in nature, dealing with law and order, such as prohibition of intoxicants, disorderly conduct, traffic and, at times, animal control.⁴⁵²

ISC suggests that civil and administrative by-laws would be enforced by by-law officers, and quasi-criminal by-laws should be enforced by police officers. Regarding enforcement of quasi-criminal by-laws, the *Manual* states:

The Band Council may require police enforcement of certain by-laws. ... Generally, the Royal Canadian Mounted Police (RCMP) and provincial police forces will enforce band by-laws enacted under paragraphs 81(1)(b) [traffic], (c) [law and order], (d) [disorderly conduct], (n) [hawkers and peddlers], (o) [wildlife] and (p) [trespassing] and section 85.1 [intoxication], which create “quasi-criminal” offences. Provincial police forces and band

⁴⁵⁰ RCAP, *supra* note 20, Vol 1, Chapter 9 “*The Indian Act*,” at 267.

⁴⁵¹ *By-Laws Manual*, *supra* note 6 at 4-8.

⁴⁵² *Ibid*, Chap. 8, at 2 and 4. Note that the *Manual* varies between using “administrative” and “civil” at various points, sometimes using both, without little explanation.

constables who are peace officers pursuant to an agreement with the provincial policing authority will also enforce these by-laws.⁴⁵³

This categorization is somewhat vague. The Nova Scotia Mi'kmaq First Nations have not followed this distinction in their by-laws. Rather, many band by-laws define an "officer" as either a police officer or a band-enforcement officer appointed by the band, allowing for dual enforcement.⁴⁵⁴ It also does not appear that police in the province appreciate the distinction; we heard in our interviews that police generally do not see by-law enforcement as part of their role whatsoever.

While the *By-laws Manual* is not explicit about the purpose of this distinction, it could be related to limitations on by-law officers' enforcement powers. The assumption might be that by-laws that involve risk or danger in their execution are better suited to enforcement by police officers who have a broader basket of enforcement powers (we discuss these powers below in [Section 6.3](#)). The distinction could also relate to seeing by-law enforcers and police serving different functions, police potentially having more of a 'crime-control' function versus by-law officers applying a more restorative approach in responding to by-law non-compliance. Further, many by-laws are more civil or regulatory in nature, therefore it may not be necessary to have the full force of peace officer powers (i.e., charging, arrest, use of force) in all circumstances.

Comments we received from the Department of Justice Canada ("DOJC") suggested that police would not likely see it as their role to enforce things like animal control or residency by-laws, and ongoing public commentary around the proper role of police suggests that they are not best suited to such tasks. DOJC also noted that the RCMP have the power as peace officers to enforce all federal laws, but generally only enforce those linked to their law enforcement mandate (and subject to the principle of police operational discretion, which is also incorporated into FNPP agreements). For example, the RCMP do not enforce Fisheries or Customs Act violations (they are carried out by fisheries officers or customs officers).

This discussion suggests that it may not necessarily be practical or even ideal to have by-laws enforced by only one type of enforcement officer (e.g., police) and, depending on the types of by-laws a community has, there could be different types of enforcement positions, with different powers and different approaches. Determinations of which types of by-laws are more appropriate for by-law officers versus police officers should be determined in discussions between the First Nation and the local police services.

⁴⁵³ *Ibid*, Chap. 8 at 3-4.

⁴⁵⁴ See Potlotek Traffic By-Law 1997 - The by-law defines an Enforcement Officer as being a member of the [former] Unamaki Tribal Police or a member of the RCMP. Glooscap Animal Control - "Animal Control Officer" means any by-law enforcement officer, a police officer, or person or SPCA member employed by the Council. The by-law then states that the Council may appoint an Animal Control Officer to enforce the by-law. See Glooscap Residency (1992) - "Officer" means any police officer, police constable or any person appointed by the Council as by-law enforcement officer.

6.2.2 Band by-law enforcement officers / constables

First Nation governments can appoint by-law enforcement officers under their by-laws pursuant to ss. 81(1)(c)(q) by-law powers. The JMAC Report elaborated that enforcement officers can take the form of by-law officers, conservation officers and peacekeepers.⁴⁵⁵ In Nova Scotia, we also see animal control officers.⁴⁵⁶ The different enforcers referenced in Nova Scotia Mi'kmaq by-laws include animal control officers, as well as "officers" designated to include both police officers and by-law enforcement officers appointed by the band. The *By-Laws Manual* suggests that when creating such positions, the by-law should provide for:

- a) the appointment of the officer;
- b) the functions of the officer;
- c) the administrative task the band Council wishes to delegate to the officer;
- d) criteria for the exercise of discretion where the council gives discretionary decision-making authority to a by-law enforcement officer...;
- e) authorize that the officer be paid;
- f) specify the term of his or her appointment, unless the appointment is to be on an indefinite basis; and
- g) provide that the officer should be accountable to the band council, and specify how that accountability is to be expressed.⁴⁵⁷

The *FNGA* would have added the following regarding the employment of enforcement officers by bands:

Designation of band enforcement officers

23. (1) The council of a band may employ any qualified person as a band enforcement officer for the purpose of conducting inspections and searches on reserve lands of the band, and shall furnish each officer with a certificate specifying the provisions of band laws made under sections 16 and 17 in respect of which the officer may conduct them.

Production of certificate

(2) When conducting an inspection or search of a place, a band enforcement officer shall, on request, produce the certificate to the person appearing to be in charge of the place.

Both the JMAC Report and *By-Laws Manual* emphasize that by-law officers are not peace officers or police officers and, as such, can only enforce band council by-laws, not other federal or provincial laws. Further, the duties of by-law enforcement officers, according to these sources, are limited to monitoring compliance with by-laws, providing information to the band

⁴⁵⁵ JMAC *supra* note 28.

⁴⁵⁶ For example, Potlotek Dog Control (1999) - In the by-law "Animal Control Officers" means any police officer or any other person charged with the duty to preserve the public peace and includes any person appointed by the Council to enforce its by-laws.

⁴⁵⁷ *By-Laws Manual*, *supra* note 6 at 4-8 and 4-9.

council and laying charges under by-laws.⁴⁵⁸ The *By-Laws Manual* emphasizes that by-law officers do not have powers of arrest or search or seizure. However, as will be seen further below, the enforcement powers that would have been introduced under the *FNGA* applied to both enforcement officers and peace officers equally.

There is case law supporting the finding that *Indian Act* by-law officers are not peace officers within the definition of the *Criminal Code*. In *R v. Hatchard* (1991), the Ontario General Division Court characterized the status of by-law officers as follows:

They are not sworn police officers and they are not trained by any provincial or federal police agency for the purposes of carrying out law enforcement duties. Band constables are residents of the First Nations Territories, appointed by their respective Chiefs and Councils for purposes which include assisting 'special constables' on those Reserves where special constables are present. In Reserves which do not have a 'special constable', band constables are the only form of resident "policing" that the Reserve has. Band constables have not had any special status as peace officers conferred upon them by federal or provincial government appointment. They are appointed, and paid, by their own Band Council. They are employees of the Band and take their directions from the Band Council. They are not issued guns. They do not have the power to arrest or the power to search beyond that of an ordinary citizen.⁴⁵⁹

As noted in [Section 2.7.1](#), for a period of time starting in the 1960-70s, ISC ran a Band Constable Program. This allowed band councils to hire their own First Nation constables, funded by ISC, and usually directed by the band council with guidance from the RCMP or other provincial police services. Band constables' roles were limited to enforcing by-laws, but if such a constable was also appointed as a "special constable" (under certain provincial policing laws), they would also be able to deliver basic police services in support of the police of the local jurisdiction.

6.2.3 Special constables and similar provincial appointments

A "special constable" is a designation that can be extended to First Nation by-law officers under provincial police legislation which seeks to extend peace officer protection and powers to the officer. In *R. v. Whiskeyjack*, the Alberta Court of Appeal found that provincial recognition of band constables as "special constables" under the province's *Police Act* gave these constables the powers and protection of a "peace officer" for the limited purpose of carrying out their by-law enforcement duties.⁴⁶⁰

Several provinces have provisions in their *Police Acts* permitting the appointment of special constables.⁴⁶¹ In Manitoba, First Nations Safety Officers are appointed and have the status of

⁴⁵⁸ JMAC *supra* note 28; *By-Laws Manual*, *supra* note 6 at 8-4.

⁴⁵⁹ *R v Hatchard*, [1993] 1 C.N.L.R. 96 at para. 16.

⁴⁶⁰ *R. v. Whiskeyjack*, *supra* note 179 at paras. 57-58.

⁴⁶¹ See *Police Services Act*, RSO 1990, c P.15, s. 54; *Police Act*, CQLR c P-13.1, s. 107.

peace officers for the enforcement of provincial legislation. However, they are not authorized to enforce the *Criminal Code*.⁴⁶²

In Focus: Aboriginal Police Officers under Nova Scotia's *Police Act*

Nova Scotia's *Police Act* allows the Minister to appoint an "aboriginal police officer" ("APO") to work on reserve or some other appointed territory. Under the *Police Act*, an APO has all the power, authority and immunity and protection provided to a peace officer or police officer when enforcing any law that the APO is responsible for enforcing. In the context of a by-law officer on reserve, this would not serve to enlarge the jurisdiction of the officer over provincial laws or criminal laws but would provide them with the powers and protections of a peace officer in carrying out their functions. Where the appointment is to a reserve, it requires the consent of "the reserve's police governing authority."⁴⁶³ **This is an option for providing greater procedural powers and protections to band by-law officers.** This seems to be Nova Scotia's version of a 'special constable.'

We inquired from the Nova Scotia Department of Justice on how often the APO provisions had been used to appoint an "Aboriginal police officer" and whether there had been any recent appointments. We were advised that there are no current appointments under the APO provisions. Justice officials referenced the fact that Aboriginal policing is supported through the FNPP and that eight Mi'kmaq communities in NS fall under FNPP.⁴⁶⁴

6.2.4 Band police forces

There were a number of bands who used their by-law powers in the 1970s and 1980s to establish their own tribal police forces and ISC did not initially disallow these.⁴⁶⁵ However, by

⁴⁶² See *The Police Services Act*, CCSM c P94.5, Part 7.2. See also Danielle Magnifico, "Bill 5: *The Police Services Amendment Act (First Nation Safety Officers)* (2017), 40:2 Man LJ 87.

⁴⁶³ *Police Act*, *supra* note 331 at s. 87. The 2004 Act replaced the earlier *Police Act*, RSNS 1989, c 348 and the provisions relating to APOs appear to have been included in that act by amendment in 1992.

⁴⁶⁴ Email correspondence with Department of Justice NS, Legal Services Division, October 21, 2019.

⁴⁶⁵ One of the more recent police by-laws we found was from 1994 and was a collection of identical by-laws that created the Lesser Slave Lake Regional Police Service by eight First Nations from Alberta. Each community bound themselves to a set of 'Police Regulations' through a by-law. The regulations established a police commission and its duties, a Chief of Police, a complaints process, eligibility requirements for officers and the Chief of Police, and made officers 'peace officers.' Their duties are to carry out the functions of peace officer, assist the community in preventing crime, encourage cooperative relationships between the Police Service and the Member Bands, apprehend persons which may be lawfully taken into custody, execute all warrants and perform all related duties and services, and foster a sense of public and personal security in the community. No mention is made in the law to enforcement of federal or provincial law. In the late 1970s, the Mohawk of Kahnawa:ke created their own Mohawk only police force. This appears to have been done as exercise of inherent right, not a s. 81(1) by-law. See Martin Papillon, *Federalism from below? The emergence of Aboriginal multilevel governance in Canada: A comparison of the James Bay Crees and Kahnawá:ke Mohawks* (Doctor of Philosophy Thesis, University of Toronto, 2008); see also Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like: Kahnawa:ke's Community Decision Making Process" (2013), 18:11 Rev Const Stud 111.

the 1990s, the position of ISC came to be that bands did not possess the power to appoint peace officers or create their own police force.

Police forces created under band jurisdiction came to be replaced by Self-Administered (“SA”) policing under the First Nation Policing Program (“FNPP”) in the 1990s. These agreements typically require band police officers to have the same training and credentials as federal and provincial officers, and they are authorized to enforce the *Criminal Code* and other federal and provincial laws. The SA agreements do not specifically mention by-laws but provide that First Nation constables shall conduct their activities in accordance with the provincial *Police Act* and any policies established by the Chief of Police designated by the First Nations Police Board, which we assume could include a directive to enforce band by-laws.

As discussed in [Section 2.7.1](#), however, only a limited number of First Nations were given the opportunity to have SA policing (primarily in Quebec and Ontario), some SA police forces were decommissioned as a result of resource issues (including the Unama’ki Police force in Cape Breton, NS – see [Section 3.3](#)), and no new First Nations have been permitted to join the FNPP and create a SA police force since the creation of FNPP. Therefore, at least under the current framework, Mi’kmaq First Nations in Nova Scotia do not and are not able to have their own SA police force.⁴⁶⁶ We heard in our interviews that even with some SA police forces, it is nonetheless challenging to get officers to enforce band by-laws.⁴⁶⁷

Canada has recently announced that it will be introducing legislation on First Nations policing, recognizing it as an essential service while expanding the number of communities served and supporting community safety and well-being projects.⁴⁶⁸ This law is being co-developed along with the Assembly of First Nations.⁴⁶⁹ The Mi’kmaq of Nova Scotia may want to become involved in this work.

⁴⁶⁶ In commenting on this Report, Nova Scotia suggests this might not be accurate: “Any community in NS that has a FNPP can choose a SA upon the renegotiation of a new CTA/QTA. Currently, Bands have elected to enter into FNPPs.” However, this statement is not supported by our research. On this, the CCA Report, *supra* note 186, at 86 notes that the FNPP funding was frozen since 2007 and new funding announced in 2018 was only intended to support policing services in communities currently participating in the program. At 91-93, the Report discusses research on how the numbers of SAs has only gone down since 1992, suggesting there have not been opportunities for CTA FNs (or other First Nations) to opt into SAs. Finally, at 158, the Report discusses research findings of engagement sessions in 2016 with First Nations where participants said the FNPP did not provide First Nations communities with meaningful choice over their policing models, governance or funding arrangements.

⁴⁶⁷ During our interviews, we heard of a Self-Administered First Nation police force in Ontario is refusing to enforce their First Nations by-laws because they say there’s nothing that says “you shall” or “you can” enforce.

⁴⁶⁸ See Olivia Stefanovic, “Trudeau says legislation to make First Nations policing an essential service coming soon,” CBC News [online](#), December 8, 2020.

⁴⁶⁹ Toronto Start, “Enforcement of laws in First Nations occupies leaders around multiple negotiation tables,” by Shani Narine, February 8, 2021, [online](#).

6.2.5 Provincial and federal police forces

Outside of SA police forces, First Nations communities generally receive policing services from provincial police forces. In all provinces except Québec and Ontario, the provincial government contracts with the RCMP to have RCMP officers act as the provincial police force. In Nova Scotia, 12 of the 13 Mi'kmaq communities are policed by the RCMP and one community (Membertou) receives services from a municipal police force. As noted in [Section 3.3](#), eight of the 13 Mi'kmaq communities have agreements under FNPP and the remaining five do not receive the supplemental services that are intended as part of the FNPP. As noted in [Section 2.7.1](#), the FNPP program has come under significant criticism in the last 5 years for not providing policing services to First Nations that meet their needs for safety, security and self-determination. If the FNPP is not sufficient to meet those communities' safety and security needs, it is reasonable to assume that those First Nations who receive no services under FNPP whatsoever are not having their needs met.

The RCMP's responsibility for enforcing First Nations by-laws arises from:

1. The RCMP's responsibility to enforce the *Criminal Code* (R.S.C. 1985, c. C-46) and other federal and provincial laws. This includes *Indian Act* by-laws because these are federal "regulations" under the *Interpretation Act* (see [Section 2.3.1](#)).⁴⁷⁰ The RCMP's responsibility to enforce *Indian Act* by-laws as a matter of law was recognized by the Auditor General of Canada in a 2014 Report.⁴⁷¹
2. For those first Nations communities under CTAs, as noted in [Section 2.7.1](#), the CTA agreements specifically commit the RCMP members designated to provide services under the agreement to enforce band by-laws.

The RCMP has discretion in the exercise of these obligations, however. CTA agreements also incorporate such discretion, noting that enforcement of by-laws is limited to where doing so is "consistent with available resources and community priorities." Furthermore, the agreement provides that RCMP members "shall not be required to perform any duties or provide any services, which are not appropriate to the effective and efficient delivery of policing services." On review of this report, the Department of Justice Canada pointed out that such discretion is tied to police independence, but it has to be exercised in good faith as required by the Supreme Court in *R v. Beaudry*.⁴⁷² A further nuance to add is that made earlier in [Section 6.2.1](#), that some types of by-laws (e.g., quasi-criminal) may be more appropriate for police offers to enforce than others (e.g., civil and administrative by-laws).

⁴⁷⁰ The BCAFN Governance Toolkit: A Guide to Nation Building, [online](#), Section 3.2 at 8.

⁴⁷¹ 2014 Spring Report of the Auditor General of Canada: Chapter 5 – First Nations Policing Program – Public Safety Canada, [online](#).

⁴⁷² *R. v. Beaudry*, *supra* note 195.

The 2002 JMAC Report noted that provincial police and the RCMP often express serious reservations about enforcing any band by-laws. These reservations arise from a variety of factors, including:

- the wording of a by-law may be vague and unenforceable;
- police see the enforcement of local by-laws as a band responsibility;
- there is no ticketing scheme (because there is no authority to enact them under the *Indian Act*);
- police are unfamiliar with the *Act* and the by-laws; or
- it is felt that a by-law is beyond what the policing agreement covers.⁴⁷³

It is noteworthy that, even though the JMAC Report (a report written for the Minister of INAC) identified a general unwillingness to enforce First Nations by-laws by the police, neither the federal government nor the RCMP took measures to rectify this identified problem at the time (2002).

What we heard on police enforcement of by-laws:

(a) Nova Scotia Mi'kmaq communities

Our Nova Scotia interviewees explained that police do not enforce First Nation by-laws in Nova Scotia.⁴⁷⁴ Several interviewees expressed the view that the police do not enforce First Nation by-laws because of several uncertainties. One interviewee expressed the problem as follows: why enforce (from police perspective) if you do not think you can prove the by-law exists, is valid, or that the court has jurisdiction to hear the matter?⁴⁷⁵ Despite the lack of enforcement, the interviewees view the relationship between their communities and the police as generally being positive and think that police enforcement of their First Nation by-laws is a real possibility in the near future.

In 1997, Membertou First Nation had an arrangement with the courts and the Cape Breton Regional Police (“CBRP”) regarding education on the community’s by-laws. However, it appears the arrangement did not result in positive change as the CBRP is currently applying provincial laws instead of the First Nations by-laws. More recently, there has not been as much collaboration between Membertou First Nation and the CBRP regarding Membertou’s by-laws as there should be, simply because individuals on both sides get so busy that it has not been a priority. However, the interviewee has spoken to the sergeant with CBRP regarding various by-law related issues and the two parties are now trying to arrange a meeting with the Crown to discuss prosecution and related by-law enforcement barriers.

⁴⁷³ JMAC Report, *supra* note 28 at 123-124.

⁴⁷⁴ This statement refers only to those First Nations that participated in interviews. Also, it should be noted that Glooscap First Nation only has one by-law, an animal control one, so there has not been a real need for police enforcement of that First Nation communities laws.

⁴⁷⁵ With the 2014 amendment, Parliament repealed the old section 86, part of which facilitated proof of by-laws in legal proceedings. The current s. 86 deals with the requirement of a Band Council to publish by-laws but does not deal with the issue of formal proof in legal proceedings. We address this issue in [Section 7.2.5](#).

Ultimately, it was explained that the CBRP appear to be willing to enforce the First Nation's by-laws but are unsure of the logistics around doing so with respect to any charges and subsequent prosecution.

Similar to the Membertou First Nation context, the interviewee from Millbrook First Nation explained that while the RCMP does not enforce Millbrook's by-laws, the RCMP has shown an interest in doing so. The interviewee referenced First Nation CTAs and explained that CTAs were originally created to provide *enhanced* police services in First Nation communities; but over time, CTAs have been reduced to addressing how *core* policing services are delivered on reserve.⁴⁷⁶ The interviewee went on to detail how there is a high demand on existing police services, due to a high level of crime in the areas surrounding the First Nation. Further, community members in Millbrook are more likely to call the RCMP if they have an issue, without the community members being aware of a community by-law that may apply to the situation, which likely contributes to provincial laws being considered instead of the First Nations by-laws.

Millbrook First Nation Council has never met with the local RCMP detachment to inform the RCMP of all the First Nations by-laws. However, we understand there is cultural awareness/sensitivity type training those local RCMP officers can take. One component of that training is a presentation on First Nation by-laws; although that aspect of the presentation simply explains that First Nation by-laws may be in place and that the officer should inquire into whether the RCMP has jurisdiction to enforce.

We heard there is also a good working relationship between the Pictou Landing First Nation, Potlotek First Nation, Sipekne'katik First Nation governments and each of their respective RCMP detachments near their communities. One interviewee believes that when this First Nation gets their new by-laws drafted and enacted that the RCMP will enforce those. Recently, the RCMP has requested training from that First Nation regarding the community's by-laws. That First Nation also expects its CTA renewal process to include community meetings with the RCMP, and those meetings should address the need to have by-laws enforced.

We heard that the RCMP detachment near the Sipekne'katik First Nation community is not consulted on any of the community's by-laws. The RCMP has said they are not willing to get involved in the enforcement of by-laws in Sipekne'katik First Nation community at this time. One interviewee believes that if there was consultation between the two parties the RCMP would be more likely to enforce their First Nation by-laws. While the local RCMP are not updated or consulted on that First Nation's by-laws, there is an ongoing working relationship between the band council and the RCMP. There is regular correspondence between the two, but because the priority of both parties is on drug-related crimes, neither has been focusing on the validity of, or enforcement, of the First Nations by-laws.

⁴⁷⁶ This explanation aligns with what we found in our review of previous literature that explores CTAs.

Similarly, Potlotek First Nation Council does not consult with the local RCMP about the community's by-laws, and the RCMP receives no cultural training or education from the First Nation on the topic. The interviewee from that First Nation explained that while the relationship between the First Nation community and the RCMP is good overall, frequent transfers of officers, as per the RCMP policy, contributes to lack of by-law enforcement. It takes time and effort for officers to learn about a community's by-laws. The high amount of tasks/learning associated with any new posting (including becoming involved in the community) as well as regular law enforcement duties could render by-laws a challenge/lower priority for regular members in the time they have available.

As for Glooscap First Nation, which only has one by-law (dog control), that is enforced by the SPCA, lack of RCMP enforcement was not a topic discussed in detail during the interview. Although, that interviewee feels there is uncertainty around what will happen when their draft cannabis by-law is passed. It was suggested that perhaps the First Nation could negotiate the enforcement of that by-law into their agreement with the RCMP. Either way, the First Nation intends to consult with the RMCP if and when the First Nation plans on passing the cannabis by-law.

(b) Other Interviewees

One set of interviewees told us about RCMP assisting a Saskatchewan First Nation in the enforcement of the First Nation's by-laws, but in the last few years that has fallen off. The First Nation received information from the RCMP explaining that because the Crown prosecution services have refused to prosecute First Nation by-laws the RCMP will no longer be enforcing them.

One RCMP inspector we spoke with explained that unlike other federal laws or regulations within the RCMP, there is uncertainty regarding First Nation by-laws made pursuant to the *Indian Act*. He continued by explaining that within provinces the RCMP typically operate in "provincial justice systems" with the RCMP applying provincial legislation (or widely known federal statutes such as the *Criminal Code*). The inspector explained that the RCMP approach to enforcing First Nation by-laws differs depending on the province. In some provinces, it is provincial legislation that is applied, without consideration of First Nation by-laws. While some other provinces have arrangements in place whereby the police investigate by-law complaints and then report back to the band council; if prosecution is then desired the band council would have to hire their own lawyer to prosecute the matter. The inspector clarified, saying that even when the RCMP is involved with enforcement, the responsibility to prosecute is left to the band councils. Ultimately, the inspector's position is that it does not make sense to enforce a by-law when you know there is no mechanism to prosecute.

The inspector said that police officers need to be sure they are enforcing laws that were appropriately developed and are "legal". He suggested that the development of First Nation by-laws should be a collaborative process involving those from the First Nation side, courts and the police. He continued in his explanation by suggesting that it would be beneficial to have provincial / First Nations / federal working groups to explore enforcement and

prosecutorial mechanisms, as well as to look into ways of ensuring that by-laws support First Nation self-determination.

A staff sergeant from the RCMP that we interviewed outlined similar concerns to those detailed by the inspector. While he had no firsthand experience with First Nation by-laws, he has heard concerns from within the RCMP as to whether *Indian Act* by-laws are enforceable and if particular ones adhere to the *Charter*.⁴⁷⁷ This aligns with concerns raised by lawyers we interviewed; in one Ontario lawyer's experience the position of police is: (1) by-law enforcement does not fall under their jurisdiction; (2) they do not want to try and enforce because the police officers do not want to get sued, and; (3) there's no point of enforcing if there is nobody to prosecute.

The RCMP investigator we interviewed recalled that, in 1999, while assigned to a Northern British Columbia RCMP detachment, he attended a by-law workshop delivered by the British Columbia Department of Justice. However, he explained how that workshop was limited in scope, as it only touched on what *Indian Act* by-laws are, not how and why they could be enforced on the front lines by RCMP officers. Reflecting back on his time with the RCMP in British Columbia, the inspector could not recall ever laying a charge under a by-law; he only remembers applying provincial legislation or the *Criminal Code*. If a First Nation by-law existed, the inspector explained that he would essentially look to the provincially equivalent law and lay a charge under that.

One interviewee from government pointed to the high level of police discretion in law enforcement and the likelihood that, where there are limited policing resources, the police will prioritize their enforcement. Whether due to such discretion or not, provincial police forces and the RCMP are not enforcing First Nation by-laws; they are opting to enforce the *Criminal Code* instead. The same may even apply in cases where a First Nation has its own police force. We heard from one lawyer that a First Nation in Ontario wanted its section 81 trespass by-law enforced; however, their police force said they would not enforce the by-law without a court order because they lack the jurisdiction to do so.

One interviewee recommended that there should be statements from the provincial and federal Attorneys General that police can enforce by-laws and public prosecution services can prosecute. This may require having a policy discussion with government as to why First Nation by-laws should be enforced and prosecuted.

Since March 2020, the Ontario Provincial Police ("OPP") has adopted a "First Nation By-Law Enforcement Decision-Making Tool" regarding the enforcement of by-laws.⁴⁷⁸ The Tool identifies that *Indian Act* by-laws are federal laws that the police are required to enforce, listing

⁴⁷⁷ The interviewee with Public Safety Canada also raised this issue in the context of search & seizures occurring under by-law enforcement. She raised concerns of search provisions in by-laws violating the *Charter*.

⁴⁷⁸ Ontario Provincial Police – Indigenous Policing Bureau, "First nations By-Law Enforcement Decision Tool," March 6, 2020.

the types of by-laws more ‘criminal’ in nature that an officer might be expected to enforce.⁴⁷⁹ The Decision-Making Tool further identifies the obligation of the OPP “to provide adequate and effective police services in the Province of Ontario and to support our First Nation policing partners where required.”⁴⁸⁰ The Tool also sets out a decision-making tree to guide an officer through what to do when the OPP receives a request to enforce a First Nation by-law and what questions to ask. Some questions, such as “Does the Band have the required Authority to create this specific by-law?” and “Does the By-Law Breach the Canadian *Charter of Rights and Freedoms*?” direct the officer to consult legal services when the officer thinks there could be legal issues with the by-law. It also instructs officers not to pursue enforcement where there is no prosecutorial or judicial mechanism available to the community.⁴⁸¹

The Decision-Making Tool is an important step forward from the OPP previously not enforcing First Nations by-laws whatsoever. But it continues to treat First Nation by-laws differently than other governments’ laws, since the legal validity, *Charter* compliance and subsequent prosecution and adjudication, are not questioned in the case of other governments’ laws. The legality and subsequent enforcement of other laws are taken for granted. We probe these double standards further below in [Section 6.4.3](#).

6.3 Comparison of enforcement powers

In addressing First Nations’ enforcement challenges, it is helpful to understand the investigative powers commonly available to law enforcement and compare them with the powers of by-law enforcement officers under the *Indian Act*. This helps reveal gaps in the *Indian Act* regime and to consider solutions to fill such gaps. In this comparison, we are primarily looking at the framework of investigative powers set out under the *Criminal Code* for peace officers. Note, however, that other federal and provincial laws can provide additional enforcement powers.

“Peace officer” is defined in the *Criminal Code* to include “a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process.”⁴⁸² It is used throughout the *Criminal Code* to reference the powers and duties of law enforcement officials. The term is defined broadly and has even been found to include a provincially appointed wildlife officer as a peace officer.⁴⁸³ However, **as noted in [Section 6.2.3](#), to date the courts have not found by-law enforcement officers under the *Indian Act* to be peace officers except when they have been designated under provincial laws a special constable or similar designations. Not being a ‘peace officer,’ by-law officers will not have the same basket of investigative powers as a peace officer.** Civilians are given some powers under the *Criminal Code*, for example, they can arrest people in certain circumstances, but these powers are much more limited. Beyond this, any other powers that by-law officers might have must be set out in the *Indian Act* or some

⁴⁷⁹ *Ibid* at 2.

⁴⁸⁰ *Ibid* at 5.

⁴⁸¹ *Ibid* at 1.

⁴⁸² *Criminal Code*, R.S.C., 1985, c. C-46, s. 2.

⁴⁸³ Tim Quigley, *Procedure in Canadian Criminal Law* (Toronto: Thomson Reuters Canada) (loose-leaf) at 5-25.

other law. (This comparison looks only at the powers set out in existing law; not the potential powers First Nations could create for their officers using the ‘ancillary power’ under s. 81(1)(q)—we return to this possibility further below.)

6.3.1 Investigation, including search and seizure

In determining whether there has been a breach of the law, it can be helpful for law enforcement to have powers to search and enter premises. The law generally requires peace officers to obtain a search warrant to enter premises to conduct a search.⁴⁸⁴ The *Criminal Code* provides peace officers with considerable powers of search and seizure, as does other federal legislation, and many other provincial statutes. In addition to this, over the years, the Supreme Court of Canada has identified that peace officers can exercise a number of warrantless search powers under the common law “ancillary powers doctrine.”⁴⁸⁵ Such powers are not available to by-law officers.

There are some limited search powers provided in the *Indian Act* in relation to contravention of ss. 81(1) or 85.1(1) by-laws.⁴⁸⁶ Section 103(4) permits a justice to issue a search warrant for the search of a building, receptacle or place to look for goods and chattels in relation to an offence under ss. 81(1) and 85.1 (as well as s. 90-93) when there are reasonable grounds to believe that such goods or chattels are in that building or place. Interestingly, the provision says that the judge may issue a warrant authorizing “a person named therein or a peace officer ... to search...” This suggests that a search warrant may be issued to someone other than a peace officer, possibly a by-law enforcement officer.⁴⁸⁷ There is no case law interpreting the provision.⁴⁸⁸

The *FNGA* would have introduced the following investigation and search powers:

Laws re inspection

17.1 A band law made under section 16 or 17 for the regulation of an activity on reserve lands may provide for the inspection by a band enforcement officer of any place on reserve lands in which that activity is carried on.

Notice of inspection

⁴⁸⁴ *Ibid* at 5-31.

⁴⁸⁵ *Ibid* at 5-35.

⁴⁸⁶ *Indian Act*, *supra* note 346, s 103. Note that s. 103 was amended with the 2014 amendment to add s. 81(1) by-laws.

⁴⁸⁷ This could arguably include a by-law enforcement officer. Note that s. 103(1), which is about seizure, not search, limits seizure of such goods and chattels, and reserves the right of seizure to “a peace officer, a superintendent or a person authorized by the Minister.” It could be argued that “a person named” in the warrant foreseen in s. 103(4) is the same group listed in s. 103(1) (i.e., the person authorized by the Minister). However, a contrary argument arises that if the same group was intended, why not use the same language and not apparently broader language.

⁴⁸⁸ Note that the *ISC By-Laws Manual*, *supra* note 6 at 8-6 stressed that “Section 103(1) does not give search and seizure powers to by-law enforcement officers appointed by the Band.” The Manual assumes similarly in relation to s. 103(4) but does not address the broader language in that provision.

25. Where a band law for the regulation of an activity provides for the inspection of a place on reserve lands, a band enforcement officer may conduct an inspection of the place in accordance with the band law after advising the person appearing to be in charge of the place of the purpose of the inspection.

Search with a warrant

26. (1) Subject to section 27, a search for the purpose of enforcing a band law may be conducted only in accordance with a warrant issued under subsection (2).

(2) A justice of the peace may issue a warrant authorizing a band enforcement officer or peace officer to conduct a search of a place on reserve lands, subject to any conditions that may be specified in the warrant, where on ex parte application the justice is satisfied by information on oath that there are reasonable grounds to believe that there is in the place

(a) any thing on or in respect of which an offence under a band law is being or has been committed; or

(b) any thing that will afford evidence with respect to the commission of an offence under a band law.

Search without a warrant

27. (1) Subject to subsection (2), a band enforcement officer or peace officer may conduct a search without a warrant for the purpose of enforcing a band law made under paragraph 16(1)(a), (l) or (n) [health, wild or domestic animals, and intoxicants] or 17(1)(a) or (b) [protection of resources and animals] if the conditions for obtaining a warrant exist but the delay necessary to obtain a warrant would likely

(a) entail a risk of imminent bodily harm or death to any person; or

(b) cause the imminent loss or destruction of evidence relating to an offence under a band law.

(2) No search of a dwelling may be conducted without a warrant.

Operation of equipment

29. A band enforcement officer may, where authorized by a band law providing for inspections or by a warrant issued for a search,

(a) use any computer system at that place; and

(b) use any copying or printing equipment at that place to copy or print any electronic data, books, records or other documents, and remove the copy or printout for examination.⁴⁸⁹

⁴⁸⁹ On review, Department of Justice Canada suggested that this draft provision could now run afoul of more recent Supreme Court of Canada decision on police search powers in relations to computers, such as *R. v. Cole*, 2012 SCC 53, *R. v. Spencer*, 2014 SCC 43 and *R. v. Reeves*, 2018 SCC 56. We have not done further research into these cases. This underscores the point, however, either in legislative reforms to the *Indian Act*, or having First Nations supplement their own powers through by-laws (see [Section 6.4.1.3](#) below), that counsel will have to consider current *Charter* law when drafting.

Duty to assist with inspection or search

29.1 The owner of—or any person who is in possession or control of—a place that is inspected or searched shall give the band enforcement officer or peace officer any assistance or information required to enable the officer to conduct the inspection or search.

6.3.2 Laying charges

When there is sufficient evidence to justify a charge, there is a need to compel the accused to appear in court. Part XVI of the *Criminal Code* sets out the rules around laying charges to prosecute summary conviction offences.⁴⁹⁰ As noted in [Section 2.3](#), because by-laws are a “regulation” under the federal *Interpretation Act*, the charging process under the *Criminal Code* applies to laying charges under *Indian Act* by-laws.⁴⁹¹ By-law offences are considered a summary conviction offence.

Alternative approach:

As an alternative to prosecuting by-laws, s. 81(3) of the *Indian Act* allows bands to seek relief by way of injunction. The provision states:

(3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by court action at the instance of the band council.

Under this provision, a court is authorized “to restrain” a contravention of a by-law. A court would do so by enjoining a person who is violating a by-law to stop their conduct. If they fail to do so, they can be found in contempt of court and face jail or a fine. There are no cited cases considering s. 81(3).

While not a case about by-laws under the *Indian Act* (instead about a land code under the *FNLMA* where a First Nation brought a private prosecution), the judge noted that, “I recognize the band may be entitled to pursue injunctive or other relief in another arena, instead of using the very blunt instrument of the Criminal Code to solve [their problem].”⁴⁹²

The charge against a person is in the form of a sworn document called an information. The information is sworn by an informant, usually a police officer, who must either have personal

⁴⁹⁰ As Quigley, *Procedure in Canadian Criminal Law* *supra* note 483 notes at 9-3, Part XVI frequently refers to indictable offences. This might suggest that summary conviction offences are subject to different rules. However, s. 795 expressly adopts Part XVI to summary conviction matters and therefore Part XVI applies to all criminal charges. And, as noted in [Section 2.3.1](#), it also applies to the prosecution of federal enactments, including *Indian Act* by-laws.

⁴⁹¹ *Interpretation Act*, *supra* note 42 at s 34(2).

⁴⁹² *K'omoks*, *supra* note 138 at para. 24.

knowledge or reasonable and probable grounds for believing that the accused has committed the offence. It is sworn before a judge of the provincial court or justice of the peace (“JP”). The *Criminal Code* imposes a time limit of six months from the time that the alleged offence was committed for an information to be sworn.⁴⁹³

The *Criminal Code* provides peace officers with several different ways to compel an accused person to appear in court to answer the charge. This includes:

- Issuing an appearance notice to the accused – this is simply a document issued by the police officer which requires the accused to attend court at a specified time and place.⁴⁹⁴ An appearance notice has to be confirmed after the fact by a judge or JP upon having the peace officer lay an information before the judge/JP.⁴⁹⁵ Once confirmed, the accused can face legal penalties for not appearing.
- If a person has been arrested, the peace officer may release them from custody on a promise to appear or recognizance. An appearance notice has to be confirmed after the fact by a judge or JP upon having the peace officer lay an information before the judge/JP.⁴⁹⁶
- Filing an information and getting a judge or JP to issue a summons or an arrest warrant.⁴⁹⁷

In confirming appearance notices, promises to appear/recognizances, or issuing summons or an arrest warrant, the judge/JP must make a sufficient inquiry to be satisfied that there is merit to the charge. In most instances, it is sufficient if the informant outlines what evidence the investigation has accumulated against the accused.⁴⁹⁸ This process is held *in camera* (in the absence of the public) and *ex parte* (without notice to the accused).

Laying an information is the only option available under the *Criminal Code* to start the prosecution process for individuals who are not peace officers (although peace officers may lay an information in this way as well).⁴⁹⁹ (Peace officers can also start the process through the other means of charging noted above.) **Thus, by-law officers (who are also not peace officers) and other First Nation representatives seeking to prosecute by-laws must lay an**

⁴⁹³ *Criminal Code*, *supra* note 482 at s. 786(2), but there is an exception if both the Crown and the defence consent to its swearing outside of that timeframe.

⁴⁹⁴ Quigley, *Procedure in Canadian Criminal Law*, *supra* note 483 at 9-6.

⁴⁹⁵ *Criminal Code* *supra* note 482 at s. 508(1).

⁴⁹⁶ *Ibid* at s. 508(1).

⁴⁹⁷ *Ibid* at s. 507(1).

⁴⁹⁸ Quigley, *Procedure in Canadian Criminal Law*, *supra* note 483 at 9-12.

⁴⁹⁹ *Criminal Code*, *supra* note 482 at s. 507(1).

information to get the prosecution process started so that a summons can be served on the accused. Form 2 of the *Criminal Code* is what is used to lay the information.⁵⁰⁰

A summons issued by a judge/JP must be directed to the accused, set out the events in brief terms, and indicate the time and place for their court appearance. The peace officer must serve it personally on the person or, if they cannot be located, leave it with someone over the age of 16 at the person's residence.⁵⁰¹

6.3.3 Ticketing powers

Both the literature and the people we interviewed indicate that the summary conviction charging process under the *Criminal Code* is cumbersome and a significant barrier to by-law enforcement. It is long, complicated and costly. Faced with having to go this route, an officer might opt not to enforce the by-law, only give a warning, or if the officer can proceed with offences for which a summary process is available (for example, under the *Criminal Code* or provincial laws) they will opt to enforce those laws instead. We heard interest from some interviewees about the possibility of First Nations having the ability to issue Summary Offence Tickets ("SOTs") for by-law offences.⁵⁰²

SOTs are a common method for enforcing regulatory and municipal by-law offences across Canada for offences such as speeding, operating an off-highway vehicle without a permit, parking on the street during a snowstorm, littering on a beach or in a public park, being intoxicated in a public place, constructing a building without a permit or having open liquor in a vehicle. The purpose of SOTs is to provide an alternative to a long-form information for laying a charge for an offence.⁵⁰³ A SOT is an easily administered document that tells you what offence you have been ticketed for and provides a brief report and record of the facts and information relating to the offence.⁵⁰⁴ Instead of having to appear in court, when issued a SOT, the individual can simply pay the fine stated on the ticket and then the matter is closed. Typically, in setting the fines for tickets, governments will charge a fine that is *below* the maximum amount that can be charged for the offence under the act/regulation/by-law in issue.⁵⁰⁵ This is to give an incentive to the person charged to pay the fine rather than challenge the charge in court and risk potentially having to pay a higher amount. When tickets are not challenged and fines are paid, the matter is over and there is no further need to prosecute the individual. An effective SOT system in a First Nation community could alleviate some of the pressure and problems regarding the prosecution of *Indian Act* by-laws, which we discuss in [Chapter 7](#).

⁵⁰⁰ *Ibid* at s. 788(1). Other formalities of the information are set out at s. 789.

⁵⁰¹ *Ibid* at s. 509.

⁵⁰² *Contraventions Act*, S.C. 1992, c. 47.

⁵⁰³ Nova Scotia Summary Offence Ticket Booklet, [online](#).

⁵⁰⁴ See Form A – Summary Offence Ticket [online](#).

⁵⁰⁵ See the Contraventions Act Evaluation, Final report, [online](#), at 6.

The *Indian Act* does not contain any provisions on a ticketing system. This gap in the *Indian Act* was noted in the 2002 JMAC Report and, consequently, the *FNGA* proposed a ticketing system:

Notices of Violations

21. (1) A peace officer or a band enforcement officer designated under section 23 who believes on reasonable grounds that an offence against a band law has been committed may issue to the accused a notice of violation requiring the accused to pay, at the offices of the band, a fine in an amount set out in the notice.

(2) A notice of violation issued under subsection (1) shall specify:

- (a) the charge against the accused;
- (b) the period within which and the manner by which payment may be made;
- (c) the address of the offices of the band at which payment may be made; and
- (d) the consequences of payment and of not making payment, including the issuance of a summons or other process.

(3) On payment of a fine within the period and in the manner set out in a notice of violation, no further action may be taken against the accused in respect of the offence.

(4) A band may enter into an agreement with a competent authority of the province in which the band's reserve is located regarding the use, for the purposes of this section, of a notice of violation referred to in subsection (1) or of any ticket or other writ or process for originating a proceeding established by or under the laws of the province, in which case the procedures applicable to proceeding by way of such a ticket, writ or process shall apply.

These provisions would have allowed First Nations to have a simple ticket system, with subsection (2) specifying what needed to be set out in the ticket and (3) specifying that if a person paid the fine, no further action would be taken in respect of the offence. Alternatively, subsection (4) would have permitted the First Nation enter into an agreement with the provincial government to use their SOT system.

There is both federal and provincial legislation on SOT systems. We will review these systems and whether First Nations can use these systems to enforce their by-laws.

6.3.3.1 The Federal Contraventions Act

Regarding the enforcement of offences under federal regulations, it was long recognized that criminal offences, such as theft or assault, are different from regulatory type offences such as hunting without a required permit; and that the different offences should be treated differently.⁵⁰⁶ Therefore, in 1992 Parliament adopted the *Contraventions Act* to establish a

⁵⁰⁶ See *ibid* at 3.

ticketing system that could be used to enforce certain federal statutory offences, designated as contraventions.⁵⁰⁷

The *Contraventions Act* permits federal statutory offences to be processed using a ticketing system, instead of the summary conviction process provided for in the *Criminal Code*.⁵⁰⁸ Only a small portion of the *Contraventions Act* is in force, however. In essence, the parts of the *Act* in effect are:

- (1) The section giving the Governor in Council the authority to determine which offences are to be designated as contraventions (ticketable) offences under the *Act*.⁵⁰⁹ This is done by amending the list of schedules to the *Contraventions Regulations*. To date, neither the *Indian Act* nor by-laws made pursuant to the *Indian Act* are included as a Schedule to the *Contraventions Regulations*.
- (2) The sections giving the federal government the ability to use provincial SOTs systems, so long as an agreement is entered with the province.⁵¹⁰

The remaining parts of the *Act* which seek to establish a federal SOT system have never been brought into force. **This means that instead of establishing its own SOT system, the federal government contracts with the province to use its system.** The agreements with the provinces set out a cost-sharing scheme for the revenue from fines, ensuring that the provinces are reimbursed for any additional expenses incurred by federal officials using the provincial system. Agreements to use the province's SOT system currently exist in all provinces except in Alberta and Saskatchewan.⁵¹¹

6.3.3.2 The provincial Summary Proceedings Act

In Nova Scotia, SOTs are issued pursuant to the provincial *Summary Proceedings Act*.⁵¹² An offence under a law, regulation or by-law can be enforced in Nova Scotia under the SOT system if it is listed either in the schedule to the provincial *Summary Offence Tickets Regulation* or as a schedule to the federal *Contraventions Regulations*.⁵¹³ Section 8(3) of the *Summary Proceedings Act* provides the Attorney General and Minister of Justice with the authority to make regulations to add offences to the schedules in the *Summary Offence Tickets Regulation*. These offences can be "offences under provisions of Acts or regulations or municipal by-

⁵⁰⁷ *Contraventions Act*, *supra* note 502.

⁵⁰⁸ See the *Contraventions Act* Evaluation, *supra* note 505 at 5.

⁵⁰⁹ *Contraventions Act*, *supra* note 502 at s. 8(1).

⁵¹⁰ See *ibid* at s 65.2(1): "The Minister may enter into an agreement with the government of a province respecting the administration and enforcement of this Act generally." Sections 65.2(1) and 65.3(1) provide further details of the agreements the Minister can enter with the province or with municipal or local authorities.

⁵¹¹ See Wikipedia, "Contraventions Act," [online](#), last accessed on August 17, 2019.

⁵¹² *Summary Proceedings Act*, RSNS, 1989, c. 450.

⁵¹³ *Summary Offence Tickets Regulations*, NS Reg 281/2011 and *Contraventions Regulations*, SOR/96-313.

laws.”⁵¹⁴ To date, no by-laws of any Mi’kmaq First Nations in the province have been added to the *SOT Regulations*.

We summarize the steps in a provincial SOT proceeding as follows:

- 1) A by-law officer or peace officer with reasonable grounds to believe someone has violated a law under the *SOT Regulations* would fill out the ticket and deliver it to the person (or in the case of a traffic violation affix the ticket conspicuously to the vehicle).⁵¹⁵
- 2) A person can pay the fine by the due date indicated on the ticket (options include paying online, mailing to the provincial court or paying at the courthouse in person).⁵¹⁶
- 3) If a person wishes to contest the ticket, they file a Notice of Intention to Appear in Court at the provincial courthouse.⁵¹⁷
- 4) After this, a court clerk gives notice to the person and the prosecutor of the time and place of trial.⁵¹⁸
- 5) Once the person contests the ticket, the matters revert to summary proceeding procedures in the *Criminal Code*.⁵¹⁹ At the hearing, an information will have to be put before the provincial court judge or JP.⁵²⁰
- 6) If a person doesn’t contest but also doesn’t pay their fine, they are convicted by default and will receive a notice of conviction by mail showing the fine amount that must be paid and date on which the fine must be paid.⁵²¹
- 7) If the person does not pay within the time required, the person’s file is sent to the collections department of the government. If the person was convicted of any motor vehicle-related offence, the Registry of Motor Vehicles may refuse to renew their driver’s license or vehicle permit, or to provide another service, until the fine is paid.⁵²²

⁵¹⁴ *Summary Proceedings Act*, *supra* note 512 at ss. 8(3)(b). There is little case law interpreting this section. However, in *R v Spurr*, 2003 NSSC 124, the Court did find that a liberal interpretation of the section is necessary.

⁵¹⁵ *Summary Proceedings Act*, *supra* note 512 at ss. (8(8) and 8A(2)).

⁵¹⁶ NS Department of Justice website, “Paying Your Ticket,” [online](#).

⁵¹⁷ NS Department of Justice website, “Filing a Notice of Intent,” [online](#).

⁵¹⁸ *Summary Proceedings Act*, *supra* note 512 at ss. 8(13B).

⁵¹⁹ Section 800(1) of the *Criminal Code*, *supra* note 482, states “Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.

⁵²⁰ Section 801(1) of the *Criminal Code*, *ibid*, provides that where the defendant appears for trial, the substance of the information laid against him shall be stated to him and he pleads or shows cause why order should not be made.

⁵²¹ NS Department of Justice website, “Frequently Asked Questions,” [online](#).

⁵²² *Ibid*.

6.3.3.3 First Nations' use of other governments' SOT systems

In our interviews, we heard recommendations that either Canada should amend its *Contraventions Regulations* to add *Indian Act* by-laws to its list of Schedules, or Nova Scotia should amend its *Summary Offence Tickets Regulation* to do similarly. However, we do not think regulatory amendments are necessary to enable First Nations to use another government's SOT system.

First, Canada does not have its own SOT system to offer, thus only the provincial SOT system is available to use. More importantly, this is not a situation of the federal or provincial government wanting to *impose* their SOT system on First Nations, but rather of First Nations wanting to *adopt/incorporate* another government's enforcement process into their law. It is like Canada's adoption of provincial SOT systems through its own federal legislation. Note that the Nova Scotia *Summary Proceedings Act* or regulations do not reference the federal laws for which Canada has chosen the SOT system. Rather, Canada determines which of its offences will be under the SOT system under its own law (e.g., the *Contravention Act* and the *Contraventions Regulations*).⁵²³

Sidebar: incorporation by reference

Incorporation by reference is a legal drafting technique where one document includes reference to another document within it for the purpose of making the second document a part of the main document. This happens frequently in the drafting of laws as well as contracts and wills.

It is common enough to see incorporation by reference of provincial laws in federal laws and vice-versa. Section 88 of the *Indian Act*, which makes provincial laws of general application applicable to "Indians in the province," is an example of incorporation by reference. There is no rule preventing other governments, such as municipalities and First Nations from using this drafting technique in their law-making.

First Nations and the federal government wanting to use the provincial SOT system are situations of governments sharing administrative processes, not one government legislating over another (which would likely attract possible division of powers problems⁵²⁴). **Thus, what would be needed for a First Nation by-law to use the NS SOT system is not an amendment of the *SOT Regulations*, but rather including a reference in a First Nations by-law (or several by-laws) to incorporate the provincial SOT system.** There are already examples of this in Nova

⁵²³ Having the province determine this in its regulations for the federal government seems highly inappropriate and logically unfeasible. This is because this would involve setting out the (1) the act/regulation/by-law in issue; (2) the section # of the act/regulation/by-law that is an offence and a brief description of the offence; and (3) the amount of the fine that can appear on the ticket. A similar problem would present itself for First Nations by-laws.

⁵²⁴ We questioned the legality of the province adding federal laws or regulations (including by-laws), especially in light of the language of s. 8(3) of the *Summary Proceedings Act*, *supra* note 512, which gives the Minister the power to add, "offences under provisions of Acts or regulations or municipal by-laws."

Scotia Mi'kmaq by-laws. For example, Eskasoni's *Dog By-law* (2002) provides that Nova Scotia's *Summary Proceeding Act* also applies to prosecutions under the by-law:

15. In addition to the summary convictions procedures set out in the *Criminal Code* (Canada) proceedings under this code may also be conducted according to the provisions of the *Summary Proceedings Act*, Revised Statutes of Nova Scotia, 1989, Chapter 450, any Regulations enacted pursuant to that Act and any amendments to that Act or Regulations.⁵²⁵

Provisions like this would not be sufficient on their own to use the province's SOT system, however. Although adopting another government's law by incorporation by reference does not normally require the permission of the other government, where the 'borrowing government' also wants to use the administrative processes of the other government (which incur costs), then agreement of the other government is needed. Like in the case of Canada's adoption of Nova Scotia's SOT system, an agreement will need to be reached between First Nations and the province to use the provincial SOT system.⁵²⁶ The province may want to be reimbursed for any additional expenses incurred for processing and enforcing tickets belonging to a First Nation. A portion of the fines collected could be used to defray these costs. Negotiations might also involve Canada paying part or all of these costs, as well as the province assuming some of the costs as part of its commitment to reconciliation and addressing First Nations' justice needs.

Although the *FNGA* would have made explicit the ability of First Nations to enter into agreements to use provincial SOTS,⁵²⁷ we do not believe such a power needs to be explicit (or granted to First Nations); it is a power they already possess as a government. While at times legislation does recognize a government's power to enter agreements with others, agreements are frequently made without any explicit authorization in law. Often referred to as 'executive' or 'cooperative' federalism, governments frequently reach inter-governmental arrangements between themselves on a multitude of issues (funding, cooperation, assistance, etc.) without any express grants of such powers in constitutional or statutory law.⁵²⁸ A relevant example is a recently announced 'Law Enforcement Agreement' signed between the Government of Saskatchewan and Muskoday First Nation governments. The Memorandum of Understanding between the parties sets out the province and the band's agreement to collaborate with respect to the investigation, laying charges, prosecution and adjudication of First Nations' laws, and the enforcement of fines, penalties and other orders.⁵²⁹

⁵²⁵ A very similar provision in 1997 Potlotek Traffic Bylaw (s. 85).

⁵²⁶ As we did not interview Eskasoni or Potlotek (as they left Tripartite) we were not able to inquire whether any agreements were reached with the province regarding the band's use of its SOT system.

⁵²⁷ Section 21(4) of the *FNGA*, *supra* note 177.

⁵²⁸ See Peter W Hogg, *Constitutional Law of Canada*, 2014 Student Edition, *supra* note 166 at 5.8, "Cooperative Federalism."

⁵²⁹ Nigel Maxwell, "Muskoday band signs 'law enforcement' agreement," PA Now, October 18, 2019, [online](#).

Although this is one way for communities to proceed towards obtaining a SOT system, we believe that First Nations can also develop their own SOT systems (which would not require an agreement with the province), and this is discussed further below at [Section 6.4.1.3](#).

6.3.3.4 Access to related provincial fine collection processes

While legislative amendments would not be required for First Nations to access the provincial SOT system, some related amendments to provincial legislation would be helpful to allow First Nations to enforce orders using provincial processes. For example, the ability of First Nations to use the drivers' licence and plate renewal suspension process to enforce unpaid by-law fines. This may require amendment of the *Motor Vehicle Act*.⁵³⁰ There may be other fine collection processes that are used for provincial and municipal fines. The Mi'kmaq of Nova Scotia may want to explore this further in discussions with the province.

6.3.4 Powers of arrest

In many cases, it should be unnecessary to arrest a person to compel them to court, especially in the context of *Indian Act* by-laws. The *Criminal Code* is structured to encourage peace officers to avoid arresting accused and taking them into custody to compel them to court.⁵³¹ The *Criminal Code* also encourages arrests to be done under warrant, however, there are warrantless arrest powers.

For by-law officers, as citizens who are not peace officers, there would be a power to arrest without a warrant where:

- (1) A person is found committing an indictable offence;
- (2) There are reasonable and probable grounds to believe that a person has committed a criminal offence (any breach of the *Criminal Code* or other federal law⁵³²) and is being freshly pursued while escaping; or
- (3) A person is a property owner or in possession of property and they find another person committing a criminal offence on or in relation to the property.⁵³³

⁵³⁰ *Motor Vehicle Act*, *supra* note 325 at s. 269. Note that s. 269(1)(c) of the *Act* permits for the default of fine process to extent to "an offence under a Federal enactment where the offence involves the operation of a motor vehicle." Since by-laws are federal enactments, there is a credible argument that this language encompasses fines under by-laws that involve a vehicle. This is worth potentially worth exploring further in negotiations with the province.

⁵³¹ Quigley, *Procedure in Canadian Criminal Law*, *supra* note 483 at 9-4.

⁵³² *Ibid* at 5-24.

⁵³³ *Ibid* at Chap. at 9-3. The law is not clear on whether citizens who arrest other citizens are required to comply with s. 10(a) and (b) of the *Charter* (see *ibid* at 5-30.6).

In all likelihood, a by-law officer's power would likely be limited to #2 — arresting someone who is caught in the act of breaching a by-law (which is a federal law). Peace officers have wider powers of arrest, including:

- (1) If a person has committed an indictable offence or the peace officer believes on reasonable grounds that the person has committed or is about to commit such an offence;
- (2) If the peace officer finds a person committing a criminal offence; and
- (3) If the peace officer has reasonable grounds to believe that an arrest or committal warrant is in effect for the person.⁵³⁴

In carrying out warrantless arrests, peace officers must comply with ss. 9, 10(a) and (b) of the *Charter*. These are the rights not to be detained arbitrarily, and on arrest be informed of the reasons for arrest and right to counsel.

The *FNGA* did not propose any arrest powers for band by-law enforcement officers.

6.3.5 Use of force

The *Criminal Code* also authorizes the use of force by police and sometimes by citizens when exercising their powers. Section 25 of the Code is a general authorization of force for anyone engaged in the enforcement of the law to use as much force as necessary, provided that there are reasonable grounds for so acting.⁵³⁵ Peace officers, however, are permitted to use more deadly force in some circumstances.⁵³⁶

The *FNGA* would have introduced the following provisions regarding the use of force:

Use of Force

28. (1) A band enforcement officer shall not use force in conducting an inspection or search.
- (2) A peace officer may use force in conducting a search under a warrant if the use of force is specifically authorized in the warrant.

6.3.6 Forfeiture (seizure of assets and proceeds of crime)

Forfeiture refers to procedural rules in relation to goods seized during an investigation as evidence as the goods would have been used in the commission of an offence, or are otherwise related to the offence (e.g., a weapon, stolen cash or other goods, drugs, etc.). As these goods were owned or possessed by the person committing the offence, while the offender potentially

⁵³⁴ *Ibid* at 9-4.

⁵³⁵ Section 25(1) of the *Criminal Code*, *supra* note 482, includes private persons and anyone administering or enforcing the law by virtue of their office.

⁵³⁶ *Ibid* at ss. 25(4) and (5).

has a property interest in the good, the government also has an interest in (1) holding the good as evidence; and (2) after a conviction, selling the good (if it has value) to defray costs of prosecuting the individual. If a government is investigating offences and potentially seizing goods as evidence, then there is a need for rules to set out how to deal with such goods. The federal government has rules on forfeiture set out in the *Criminal Code* and provinces also have their own forfeiture rules.⁵³⁷

Section 103(1) of the *Indian Act* gives “a peace officer, a superintendent or a person authorized by the Minister” the right to seize goods when there are reasonable grounds to believe they have been used in relation to ss. 81(1) or 85.1 offences. The goods can be held for up to three months unless proceedings to prosecute the offence have been taken, in which case they may be retained until the proceedings are concluded.⁵³⁸ If a person is convicted of the offence, the judge may rule that the goods, in addition to any other penalty imposed, be forfeited to the Crown and disposed of as the minister directs.⁵³⁹ This provision does not specifically indicate that a by-law enforcement officer can seize goods that have been used in relation to a by-law offence, however, the provision leaves open the possibility that a by-law officer could be “a person authorized by the Minister.” There is no case law referencing s. 103(1)-(3).

There is, however, the *Disposal of Forfeited Goods and Chattels Regulations* passed under the *Indian Act*.⁵⁴⁰ This provides that goods forfeited to the Crown under s. 103(2) shall be sold at public auction following advertisement in local papers (unless circumstances make it appear to the minister that they should be disposed of otherwise). A person who claims an interest in the goods can apply to the minister within 30 days, and if the minister determines the person was innocent of complicity in the offence and took all reasonable care to ensure they would not be used contrary to the provisions of the *Indian Act*, may return them.

Sidenote: restriction on seizure in the *Indian Act*

Section 89(1) of the *Indian Act* protects the real and personal property of “an Indian” or band situated on reserve from “charge, pledge, mortgage, attachment, levy, seizure, distress or execution.” This could potentially present a problem for seizure and forfeiture in relation to enforcement of by-laws, however, the protection is only against “any person other than an Indian or band.” In other words, where the person seeking to seize a band members’ goods is another First Nation person or the band itself (and presumably an employee working on behalf of the band), there is no such protection.

The FNGA would have introduced the following provisions regarding forfeiture:

⁵³⁷ Generally, consistent with federalism, the Supreme Court allows both sets of rules to co-exist, even in relation to similar offences, and interprets conflicts narrowly: see *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19.

⁵³⁸ *Indian Act supra* note 346 at s. 103(2).

⁵³⁹ *Ibid* at s. 103(3).

⁵⁴⁰ *Disposal of Forfeited Goods and Chattels Regulations*, C.R.C., c. 948.

Seizure during inspection or search

29.2 (1) A band enforcement officer or peace officer may seize any thing found in the course of an inspection or search that the officer believes on reasonable grounds will afford evidence of the commission of an offence under the band law in respect of which the inspection or search is being conducted, and must provide a receipt for any thing seized to the owner or the person who is in possession of it.

- (31) Sections 462.32 to 462.46 and 489.1 to 490.1 [the sections on forfeiture] of the *Criminal Code* apply, with any modifications that are necessary, in respect of a thing seized under subsection (1).

The *FNGA* would have given a by-law officer or peace officer the power to seize goods used in reference to an offence (and provide a receipt to the person who owned or possessed), and then incorporated by reference the forfeiture provisions under the *Criminal Code*.

6.4 Discussion on enforcement issues and possible solutions

From the above subsections, we have identified the problems in First Nation by-law enforcement to include the following:

- (1) Serious gaps in the enforcement powers available to band by-law enforcement officers to effectively provide services.
- (2) No funding is provided by the federal or provincial governments to support band by-law enforcement (all enforcement support is subsumed under the FNPP) and so little to no by-law implementation is occurring.
- (3) Because of (1) and (2), all law enforcement obligations in Nova Scotia Mi'kmaq communities are placed on local police (mainly RCMP) and local police are not enforcing by-laws.

In what follows, we discuss these issues and potential solutions that First Nations may want to pursue.

6.4.1 Gaps in by-law enforcement powers

6.4.1.1 Seek federal amendments or a new law

One possible solution to the gaps in the enforcement provisions regarding by-laws is to seek to have Parliament amend the *Indian Act* or pass new legislation akin to the *FNGA*. For the reasons discussed in [Section 2.4](#), it is unlikely Canada would be willing to attempt—and First Nations willing to accept—small tinkering with the *Indian Act* (or stand-alone legislation like the *FNGA*) at this point in time. Indigenous communities are wanting to see much greater

transformative change that is consistent with their right to self-determination and self-government.

6.4.1.2 Negotiate with the province for the appointment of an APO

As noted in [Section 6.2.4](#), under the province's *Police Act*, the Minister of Justice could designate a by-law officer an "aboriginal police officer" ("APO"), which would give the by-law officers the procedural powers of a peace officer in carrying out the enforcement of by-laws. Effectively, this would be like having a 'special constable' in their community (see discussion of these at [Section 2.7.1](#)).

There are no APOs currently appointed (and it is not clear if there have ever been any in the past). APOs may be an avenue to addressing some of the current challenges in policing faced by communities. Consideration should be given to negotiating for the appointing of APOs with the province.

Sidenote: Alberta's Special Constable Program

Note that Alberta has developed an accredited special constable program. This program recruits and trains support officers to work alongside RCMP or FN police forces to provide by-law and community support services. These special constables are uniformed civilian officers with their own vehicles and provided a permanent presence in the community and valuable support function to the police forces.⁵⁴¹ Something similar could be created in Nova Scotia using the APO provision in the *Police Act*.

As discussed in [Section 6.3.3](#), First Nations could also negotiate with the province for the use of their SOT system, as well as their inclusion in fine and other enforcement processes that apply to provincial and municipal fines (see [Section 6.3.4](#)).

Having the province play a more active role in First Nations law enforcement is consistent with the trend to recognize a broad overlapping jurisdiction over First Nations issues (discussed in [Sections 2.5](#) and [2.7](#)). Recall that there have been calls for more provinces to commit to Indigenous issues and reconciliation more directly by implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (see [Section 2.9.5](#)). This growing trend could be leveraged to encourage Nova Scotia to be doing more in the enforcement of laws on reserve.

6.4.1.3 First Nations-led solutions

As discussed in [Section 5.2.2](#), we believe that the broad approach to interpreting the *Indian Act* by-law powers that is mandated by several interpretive principles necessitates an interpretation of the by-law powers to include a wide range of procedural powers. The s.

⁵⁴¹ A Renewed Approach to Policing in Indigenous Communities – Public Safety Canada, October 14, 2016.

81(1)(q) ‘ancillary power’ further supports that communities may pass procedural rules in relation to their substantive powers.⁵⁴² Thus, it is not necessary for the *Indian Act* to have to specify every procedural right a band might include under their by-laws. The failure of the *FNGA* to become law does not mean that the procedural powers contemplated therein cannot be exercised through some other means.

Today both federalism and the ‘self-government principle’ mandate that by-laws should be read broadly. Further, questions of by-law validity have to be kept analytically distinct from questions of potential conflicts with other governments’ laws (ISC often conflated these in the past⁵⁴³). As discussed in [Section 5.3](#), the conflicting laws that will supersede valid by-law provisions are those within the *Indian Act* and its regulations; otherwise, by-laws will supersede provincial and federal laws.

We propose that First Nations can remedy the gaps in by-law enforcement powers on their own through their by-law making power. A starting point could be with the powers that would have been created by *FNGA* incorporated into a by-law on procedure. There are also communities who have passed procedural by-laws. For example, the Tsuu T’ina Nation has an “Offences Procedure Bylaw” that addresses a number of procedural issues.⁵⁴⁴

Sidenote: Contents of Tsuu T’ina Offences Procedure Bylaw (1998)

- | | |
|--|------------------------------------|
| - Limitation for bringing by-law Prosecution | - Ownership of Money Received |
| - Failure to attend court Proceedings | - Report of Conviction |
| - Witnesses | - No Seal Required on Documents |
| - Penalties | - Transcripts of Evidence |
| - Compensation for Property Damage | - Appeals |
| - Terms of Imprisonment | - Judicial Notice |
| - Absolute Liability Offence | - Address for Service |
| - Time for Payment | - Service of Summons |
| - Orders Relating to Payment | - Summons Violation Tickets |
| - Civil Recovery | - Offence Notice Violation Tickets |

While there is a search warrant power for goods used in relation to an offence in the *Indian Act*, this does not cover all search powers that a band by-law officer might need and there is significant leeway to supplement search powers through by-laws so long as these are not in a clear conflict with s. 103(4) of the *Indian Act*. **Drafters of such by-laws will have to ensure that**

⁵⁴² Section 81(1) of the *Indian Act*, *supra* note 346, says that First Nations have the power to make by-laws “with respect to any matter arising out of or ancillary to the exercise of powers under this section.” Section 83(1) also includes an ancillary power.

⁵⁴³ For example, in discussing the extent of the law and order power under s. 81(1)(c) of the *Indian Act*, *ibid*, ISC’s *By-Laws Manual*, *supra* note 6 states at 3-4, “A court may not see it as extending to Band Councils the power to regulate matters already covered in other laws applying on reserves, for example, matters dealt with in the *Criminal Code* as aspects of criminal law.” On search powers, the *By-laws Manual*, *ibid* also stated at 4-14: “A Band Council by-law cannot regulate search or seizure as an aspect of the process of gathering evidence to be used in a prosecution under the by-law. Evidence gathering is a procedural matter to which the summary conviction provisions of the *Criminal Code* apply.”

⁵⁴⁴ Tsuu T’ina Offences Procedure Bylaw, [online](#).

such powers take into account the *Charter* (though there is room for (and a need for further research on) the *Charter* applying differently in a First Nations context – see discussion at Section [2.3.1.2](#)).

Sidenote: The *Charter* and regulatory offences

There is a recognized difference in the case law between the *Charter* protections available to individuals charged in a regulatory vs. a criminal context. A regulatory context is one where the government is regulating an activity or industry (hunting, fishing, zoning, buildings, businesses, etc.). The line starts to blur, however, when the penalty for violating rules includes the possibility of imprisonment. Thus, depending on what they are about and what penalties are included, some First Nation by-laws may be characterized as regulatory and others more criminal in nature.⁵⁴⁵

The individual protections and requirements of governments can be less strict in the regulatory context. For example, it is acceptable for regulatory laws to include provisions requiring people to cooperate with investigations or risk facing a fine. However, in the criminal context, such obligations would be in tension with the right against self-incrimination in the *Charter*.⁵⁴⁶

For First Nations who want to actively exercise law-making over procedural matters, it will be important to understand how these different levels of protections apply to their by-law powers. This is an area where we recommend further research.

For ticketing, the *FNGA* suggested incorporating a simple ticketing system into a band by-law. Such a by-law would be administered internally, and the band would not have access to enforcement mechanisms that come with the provincial system (e.g., the provincial fine collection department, tracking of tickets at the Registry of Motor Vehicles and refusal of certain MVA services as a result). Bands would have to come up with other possible mechanisms to incentivize payment, such as withholding certain goods or services provided by the First Nation until a fine is paid. For example, a First Nation might withhold or deduct fines from annual community annuities that are paid out to members. Drafters would have to be mindful of not withholding a service that is considered essential.⁵⁴⁷ Also, if an annuity or benefit that is withheld is related to a Treaty right, community members might also allege breach of treaty rights, but like *Charter* rights, these rights can be reasonably infringed (see [Section 2.3.1.3](#)).

⁵⁴⁵ This distinction is similar to the categories of administrative/civil by-laws vs. quasi-criminal by-laws discussed at Section 6.2.1.

⁵⁴⁶ Daniel Coles, “Regulatory Offences: The Duty to Cooperate, and the Right to Silence,” in *SLAW*, November 20, 2017, [online](#).

⁵⁴⁷ See on this *Daoust v. Mohawk Council of Kanestatake*, *supra* note 134 where it was held that a Band had no authority to withhold a man’s social assistance payments in order to compel him to end his illegal occupation of the community’s elders/ facility.

What we heard: First Nations with their own ticketing regime

We spoke with two lawyers who had clients who had developed their own ticketing regime. In one case, the client was issuing tickets and fines, mostly for nominal amounts, and have not been challenged yet by any community member or government. Another lawyer had developed a ticketing system for the client, but the community experienced challenges in implementing the system due to an inability to find a dedicated prosecutor.

The Tsuu Ti'na Procedure By-law contains a ticket system as well.

The forfeiture (seizure of assets and proceeds of crime) rules present a possible situation of conflict where the *Indian Act* could potentially supersede band by-laws. As reviewed in [Section 6.3.6](#), there is ss. 103(1)-(3) of the *Indian Act* and the *Disposal of Forfeited Goods and Chattels Regulations* to contend with. However, as discussed in that section, the minister can authorize someone other than a peace officer or an ISC superintendent to seize goods. An agreement could be reached with the department to have a community's by-law officer authorized under ss. 103(1)-(3).

Alternatively, similar to what was proposed by the *FNGA*, a First Nation could pass a by-law incorporating by reference the forfeiture provisions in the *Criminal Code* adapted as necessary. These rules provided similar, but more comprehensive rules on forfeiture than the *Indian Act*. Having similar protections does not raise any real conflict issue. The courts have held that where overlapping laws are similar, this is not a conflict as duplication is “the ultimate in harmony.”⁵⁴⁸

The kinds of procedural powers that First Nations will want to provide to their by-law officers will depend on community needs. This discussion, of course, raises the question of whether a First Nation could create its own police force under by-law powers. We noted earlier in [Section 6.2.3](#), while several bands passed policing by-laws in the 1970s and 80s, by the 1990s, the position of ISC came to be that bands did not possess the power to appoint peace officers or create their own police force. The reasoning behind this appears to be an assumption that only the provinces have jurisdiction to appoint police officers.⁵⁴⁹ From a modern constitutional perspective this position is doubtful; as discussed in [Section 2.7](#) and [2.7.1.](#), while provincial governments have jurisdiction over policing under s. 92(14), the federal government also has jurisdiction to create and manage the RCMP, and there is also significant overlap in policing on reserve (which was specifically recognized in the Alberta Court of Appeal decision in *R. v Whiskeyjack*⁵⁵⁰). If the federal government has jurisdiction over policing on reserve, then First Nations may be delegated this power.

⁵⁴⁸ See *Multiple Access Ltd*, *supra* note 153.

⁵⁴⁹ *By-laws Manual supra* note 6 at 8-4: “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. A police officer appointment would only be considered after the provincial authority, usually the Atty. Gen., is satisfied that the candidate has received sufficient training to understand his/her responsibilities and powers and is able to perform all police duties.”

⁵⁵⁰ *R. v Whiskeyjack*, *supra* note 179.

The only question is whether the by-law powers can be interpreted to allow for this. In this regard, there has been at least one case that recognized this as a possibility,⁵⁵¹ and it would seem that a broad interpretation of s. 81(1)(a), (c), (d) and (q) could support such a law.

Side note: law enforcement jurisdiction under self-government agreements/laws

The *Cree-Naskapi Act*, implementing the 1978 James Bay Agreement, places the band under the jurisdiction of the Quebec *Police Act* and empowers the band to enter into an agreement with Quebec to provide its own policing services.⁵⁵²

Chapter 12 of the 1999 Nisga'a Final Agreement is on the administration of justice and empowers the Nisga'a to provide policing services on its lands by creating its own Police Board.⁵⁵³ The chapter stipulates that several aspects of such policing services would have to be in substantial conformity with provincial legislation on policing, such as minimum standards for certification of police service, use of force, dismissal and discipline, code of conduct, etc.

The 2013 Sioux Valley Dakota Nation Governance Agreement recognizes the jurisdiction of the Sioux Valley Dakota Nation to have a police service on the nation's lands but stipulates aspects of the policing services that must be provided for and provides that Canada and Manitoba establish the police service within the meaning of Manitoba *Police Services Act*.⁵⁵⁴

The eleven self-government agreements signed under the 1993 Umbrella Final Agreement between Canada, the Council for Yukon Indians, and the Yukon, set out the legislative authority of each Self-Governing Yukon First Nation at chapter 13.0. This includes the power to enact laws of a local or private nature on Settlement Land in relation to "the administration of justice."⁵⁵⁵

Some agreements do not contain any specific provisions on policing as such, but recognize the Indigenous jurisdiction over peace, order or security, or otherwise recognize an enforcement power of the nation over its laws. For example, the 1996 *Sechelt Indian Band Self-Government Act* empowers Sechelt Band Council to make laws related to public order and safety, to regulate traffic, control intoxicants and adopt any law of British Columbia as its own if authorized do so under its constitution.⁵⁵⁶ The 2003 *Westbank First Nation Self-Government Agreement* recognizes the jurisdiction of the Westbank First Nation in relation to public order, peace, safety, or a danger to public health on Westbank Lands.⁵⁵⁷ The 2005

⁵⁵¹ *Ross v. Mohawk Council of Kanesatake*, 2003 FCT 531 at para. 89, suggested the authority to pass a policing by-law arises from s. 81(1)(c) and (d).

⁵⁵² *Naskapi and the Cree-Naskapi Commission Act*, SC 1984, c 18 at s. 195.

⁵⁵³ Nisga'a Final Agreement 1999, [online](#).

⁵⁵⁴ Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement (2013), art. 52 [online](#).

⁵⁵⁵ See, for example, the Carcross/Tagish First Nation Self-Government Agreement, October 22, 2005, at c 13.3.17, [online](#).

⁵⁵⁶ *Sechelt Indian Band Self-Government Act*, SC 1986, c 27, at s. 14.

⁵⁵⁷ *Westbank First Nation Self-Government Agreement*, [online](#), at art. 217.

Labrador Inuit Agreement recognizes the jurisdiction of the Nunatsiavut government to make laws for the enforcement of Inuit laws, including the powers to make laws for the establishment, organization, maintenance, administration and regulation of an Inuit law enforcement agency to enforce Inuit laws, appoint officers to enforce Inuit laws and devise training and accountability standards for its officers.⁵⁵⁸

While we do think there is a case to be made for First Nations to create their own police under by-law powers, absent agreement with other governments, First Nations would lack the ability to authorize their police forces to enforce federal or provincial laws and their officers would not have the enforcement powers provided for in the *Criminal Code* and other federal and provincial laws. Such police could only enforce rules and exercise enforcement powers set out in the First Nations' by-laws. However, a broad interpretation of s. 81(1) by-law powers would permit communities to craft rules and processes to allow communities to respond to a wide variety of matters.

Different models of enforcement:

The First Nation community of Kwanlin Dun in the Yukon has four **Community Safety Officers** ("CSOs") who do not exercise any enforcement powers, but rather patrol the community and work with the two RCMP officers stationed in the community, alerting them to incidents, helping to diffuse conflict situations and supporting and advocating for community members. They are trained in everything from conflict resolution, intergenerational trauma and mental health issues to critical incident stress management and by-law interpretation. Members of the community comment that because the CSOs have no guns or powers to charge or arrest people, this builds trust and a relationship with community members. The model is being studied and lauded as a great innovation in community policing.⁵⁵⁹

6.4.2 No funding for by-law enforcement

Our interviews and literature review highlighted that for many First Nation governments, the hiring and maintaining of a by-law enforcement officer position is resource and cost-prohibitive. Currently, no funding is being provided for bands to train, hire or maintain by-law officers.

What we heard: funding needs

In addition to training, retaining band staff and enforcement officers, and for community engagement, funding is required to facilitate the development of digital record management systems and electronic ticketing systems. If a First Nation wants to enforce their by-laws, then they should have adequate record management systems in place so that when/if a matter goes

⁵⁵⁸ *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, [online](#) at art. 17.29.

⁵⁵⁹ Genesee Keevil, "Four officers, no weapons, no charges: A Yukon First Nation's solution for keeping the peace," *Globe and Mail*, June 23, 2019.

to court they can provide the information in support of the prosecution. Also, funding is required to permit First Nations to purchase and maintain electronic ticketing machines, similar to those used by municipal by-law enforcement officers. In the opinion of the interviewee, the federal government does not understand these types of needs that First Nations are facing.

The 2002 JMAC Report recognized that lack of funding is a part of the overall problem with by-law enforcement:

There are serious issues with the drafting of by-laws, enforcement by police, prosecutions in court and the recovery of fines. **Part of the solution is to provide more funding in respect of by-laws and to train enforcement officers.** It may be more cost-effective for some communities to use the same enforcement officers and prosecutors. The solution to this problem requires discussion with other federal departments (Department of Justice and [Public Safety]). The enforcement and prosecution of laws have financial implications that should be addressed.⁵⁶⁰

We have no information that the suggestion for Canada to provide more funding in respect of by-laws and to train enforcement officers was ever acted upon.

The challenge of lack of funding was touched on already in [Section 5.5.2](#) with respect to the need for community support for by-law development and maintenance, and the fact that ISC, after a 5-year hiatus, provides limited by-law development support to First Nations. Concerning the actual enforcement of by-laws, it does not appear that ISC has funded such services in a very long time. The discontinued Band Constable program would be an example of an ISC program supporting enforcement. The only other program funded by Canada that potentially addresses First Nations-specific enforcement needs is the FNPP, which is funded by Public Safety Canada. The FNPP only serves two-thirds of First Nations and Inuit communities in Canada.

In cases of CTAs (8 First Nations in NS are CTA and there are no SAs), the FNPP program is intended to provide for ‘enhanced policing services’; it assumes that communities are already receiving enforcement services from local provincial/territorial police forces and the FNPP supplements and strengthens those services. However, there is evidence that this assumption may not reflect reality. Recent reports suggest that the FNPP may not supplement, but may be the *sole* source of funds to support Indigenous policing in many communities, and there is little clear data available to show that the funds are being used to fulfill the goal of improving community safety and well-being through culturally appropriate police services.⁵⁶¹

⁵⁶⁰ JMAC Report *supra* note 28.

⁵⁶¹ CCA Report, *supra* note 186 Section 5.3.4, at 99-100.

The point here is, whether served under the FNPP or not, First Nations communities' law enforcement needs are currently not being met. As noted in Section 2.7.1, reports such as the 2019 Expert Panel on Indigenous Communities, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities* and 2019 Final Report of MMIWG National Inquiry both call for a drastic overhaul of Indigenous policing in Canada that must include a new funding framework. **Based on these recommendations, and other similar calls for reform, Canada and the provinces should be consulting and negotiating now with First Nations to reform policing in Indigenous communities.** With the recent announcement of potential Indigenous policing legislation, this work may be starting to happen.

In considering such a new framework, Canada and the provinces can no longer simply assume that increasing funding for provincial/RCMP law enforcement is in itself sufficient to meet community needs. Both the Expert Panel and MMIWG Reports stressed Indigenous communities' rights to self-determination to decide for themselves what arrangements will address their safety and security needs. Our analysis of the by-law powers in [Section 6.4.1.3](#) and elsewhere in this report, highlights that First Nations already possess significant power to address enforcement gaps on their own. However, such powers are meaningless without adequate funding to support the exercise of such powers.

Side note: provincial funding for First Nation by-law enforcement and justice initiatives

The Indigenous Justice Division of the Ministry of the Attorney General, Ontario, has been funding by-law enforcement and Indigenous-related projects in First Nations communities in the province. One example includes a community that has received funding to hire and train a by-law enforcement officer to enforce the band's by-laws. The officer will also provide information to the community on existing by-laws, assist with the development of new by-laws, and provide annual presentations to elementary and secondary schools.⁵⁶²

In March 2020, British Columbia and First Nations in the province signed a partnership agreement, the BC First Nations Justice Strategy. The strategy has two tracks, first to reform the justice system to be safer and more responsive to Indigenous peoples. Second, the restoration of First Nations Justice systems, legal traditions and structures.⁵⁶³

We believe that there is potential legal exposure on both the part of the federal and provincial governments who are not adequately funding First Nation law enforcement initiatives, including by-law enforcement, if this is what a community wants.

Failure by governments to provide law enforcement that adequately meets the safety, security and self-determination needs of First Nations potentially triggers the following legal protections:

⁵⁶² Information from Ministry of the Attorney General, Ontario, August 2017.

⁵⁶³ For more information, see the BC First Nations Justice Strategy website, [online](#).

- The right to substantive equality under either s. 15(1) of the *Canadian Charter of Rights and Freedoms* or human rights legislation

The right to substantive equality is protected both under s. 15(1) of the *Charter* and human rights law. We saw in both *Caring Society* and *Dominique* that substantive equality requires that First Nations receive services that meet their needs and circumstances, including their cultural, historical and geographical needs and circumstances (see [Section 2.9.1](#)). We saw in *Dominique* and *R v. Turtle* that the denial of adequate policing and justice services can constitute adverse effects discrimination (see [Section 2.9.2](#)). While the federal and provincial governments are providing some law enforcement services to First Nations, there is much evidence to suggest that this is inadequate (discussed in this section and in [Section 2.7.1](#)).

Comparing First Nations to municipalities in considering the discrimination here is like comparing apples and oranges. Municipalities also rely on transfer payments, but they have significantly more own-source revenue to finance law enforcement. However, First Nations should not be somehow blamed for not having similar levels of own-source revenue and not being able to self-finance enforcement in their communities. The operation of law (the collective nature of reserve land), impacts of colonialism, geography and remoteness, as well as other factors, explain why First Nations are more dependent on government transfer payments in relation to services in their communities (see [Section 4.7](#) for this discussion).

The Supreme Court of Canada has cautioned against searching for a perfectly corresponding comparator group to establish discrimination, and trying to do so can lead to unfairness.⁵⁶⁴ As noted by the Court: “finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison.”⁵⁶⁵ Rather, the unique needs and circumstances of First Nations has to be fully considered in determining whether the government’s conduct either perpetuates disadvantage or creates negative stereotypes about that group.

Caring Society, *Dominique*, *R v. Turtle*, *Pictou Landing Band Council v. Canada (Attorney General)* and *Sumner-Pruden v. Manitoba* are all supportive of a finding that underfunded and underserved services, including justice services, for First Nations can constitute discrimination (see [Sections 2.9.1](#), [2.9.2](#) and [2.9.3](#)).

- The s. 7 *Charter* right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

⁵⁶⁴ See *Withler v. Canada (Attorney General)*, 2011 SCC 12, at paras. 55-60.

⁵⁶⁵ *Ibid* at para. 60.

The MMWIG MMIWG report contains numerous examples of how inadequate law enforcement increases the vulnerability of, and risk of harm to Indigenous women and girls. The Expert Panel Report similarly chronicles how inadequate policing services is not meeting the safety and security needs of Indigenous communities. While neither report was developed to study by-law issues, both speak to the need for greater control by Indigenous peoples over justice services (which by-law development and enforcement are clearly related to) as well as the need for adequate resourcing of such services (which is a clear need in the by-law context). There is significant evidence available in these two reports alone (and there are others too such as the Auditor General Reports and the Viens Report) that can be used to support violations of the security of First Nations people in relation to services. Inadequate enforcement of laws can contribute to a whole host of social problems within communities putting individuals at risk of violence and harm.⁵⁶⁶

For a government to be held accountable for such violations of s. 7 *Charter* rights, it is not necessary to show a direct causal connection, but only “sufficient causal connection.” This means that the impugned government action does not have to be the direct or dominant cause of the harm suffered; but that it is more likely than not (a balance of probabilities) that the government action contributed to the harm.⁵⁶⁷ **Having governments offer a program (FNPP) that is not available to a third of First Nations communities and not meeting the enforcement needs of those within the program, while otherwise providing *nothing* else to respond to First Nations’ enforcement needs, reasonably contributes to the violence and harm individuals in communities might experience from not having laws enforced.**

Finally, to succeed in claiming a breach of s. 7, it must be shown that the government violates rights in a way that breaches a principle of fundamental justice (“PFJ”). A PFJ that appears to be engaged here (and there could be others) is the fundamental rule that governments will not act in an arbitrary way. Arbitrariness occurs when there is no connection between the impacts that are being alleged and the purpose of the program. In other words, there is no rational connection between the purpose of the program and the harmful effects it is alleged to cause. There is a strong argument for arbitrariness here since the FNPP is designed to provide community safety and well-being through culturally appropriate police services, yet there is much evidence that it is failing to do so in a significant way that is exposing Indigenous people to potential harm by not having access to adequate enforcement of laws.

The finding of the MMIWG National Inquiry that interjurisdictional neglect by the federal and provincial governments is a s. 7 violation (see [Section 2.9.6](#)) further supports this analysis.

⁵⁶⁶ Security of the person was found to protect individuals from risks of violence in *Canada (Attorney General) v. Bedford*, *supra* note 268 at paras. 18-19 and 57-72.

⁵⁶⁷ *Bedford*, *ibid* at paras. 74-78.

- The United Nations Declaration on the Rights of Indigenous Peoples

There are several rights and principles in the *UN Declaration* (summarized at [Section 2.9.5](#)) that are possibly engaged by the failure of Canada and provinces to adequately meet the law enforcement needs of First Nations, including the right of non-discrimination (preambular para. 2; art. 2 and 8.1); and the right to self-determination (preambular paras. 4 and 16, arts. 3-5, 18-19 and 34-35). The *UN Declaration* emphasizes the state's roles in financing the exercise of Indigenous autonomy (art. 4) and providing financial and technical assistance for the enjoyment of rights protected by the *UN Declaration* (art. 39).

Although breaches of the *UN Declaration* cannot be vindicated on their own, the presumption of conformity with international law dictates that these provisions should inform the analysis of domestic law, including the claims proposed above. Thus, the *UN Declaration* should inform the determination of the s. 15 and s. 7 *Charter* claims against state governments. There have already been cases where the *UN Declaration* has informed equality claims.⁵⁶⁸

As suggested above, we believe both the federal and provincial governments have exposure here.⁵⁶⁹ Indeed, it is difficult to determine with precision which government would be more responsible for the alleged rights violations. There is a significant overlap in jurisdiction over First Nations policing, and funding for the FNPP program is split between the federal and provincial governments 52% to 48%, respectively. The provinces generally have jurisdiction over policing in the province, but the federal government played a significant role in First Nation policing in the past, and, further, the issue of by-law enforcement has been recognized as a matter of First Nation 'governance' (see [Section 2.7](#)) and 'governance' is a service area over which ISC has responsibility for under the new *Department of Indigenous Services Act* (see [Section 2.9.4](#)).

First Nations should not be forced to prove the exact apportionment of responsibility between the federal and provincial governments for the rights violations alleged above. Instead, we advocate for a broad Jordan's Principle approach as a 'community-first principle' supported by

⁵⁶⁸ *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 aff'd 2013 FCA 75; *Caring Society*, supra note 227 and 2018 CHRT 4; and *Catholic Children's Aid Society of Hamilton v. H. (G.)*, 2016 ONSC 6287.

⁵⁶⁹ Shortly before finalizing this report, the Supreme Court of Canada released its 5:4 split decision in *R. v. Sharma*, 2022 SCC 39, which overturned the Ontario Court of Appeal's finding that amendments to the *Criminal Code* that eliminated conditional sentences for some types of offences violating Indigenous peoples' s. 15 and s. 7 *Charter* rights. The majority decision appears to require greater evidence of adverse effects decision than in previous recent decisions of the Court, something strongly criticized by the dissent. We have reviewed the full decision and do not feel it would prevent or necessarily weaken the arguments we lay out herein. That said, until the Supreme Court revisits the decision (which could happen sooner than later given recent changes in the composition of the court), strategically, it may be wiser to pursue recourse within the human rights system, given the more flexible evidentiary approach taken in that forum.

s. 15 and s. 7 (see [Section 2.9.3](#)). As a community-first principle of equality, Jordan's Principle would require the government of first contact to fund the service and leave apportionment to governments and their departments to dispute among themselves.

6.4.3 Police unwillingness to enforce by-laws

Our literature search and interviews (summarized in [Section 6.2.4](#)) revealed that police are not enforcing by-laws. If there is a by-law in effect, police will opt to enforce a federal or provincial law instead. Some of the main reasons for not enforcing by-laws that we heard include:

- (1) By-laws are beyond what the policing agreement covers and are the responsibility of the band;
- (2) officers are unfamiliar with the *Indian Act* and the by-laws;
- (3) any obligation to enforce is discretionary, therefore not required;
- (4) officers question the validity and *Charter* compliance of by-laws and therefore will not enforce them for fear of being personally liable;⁵⁷⁰ and
- (5) there is no point in enforcing a by-law if there is no one to prosecute it.

We believe that these reasons are problematic and do not hold up to scrutiny.

First, it is plainly wrong for the police to assert that they have no obligation to enforce by-laws. In [Section 6.2.5](#), we saw that police generally have an obligation to enforce by-laws as a matter of law and that, further, that CTA contracts specifically include provisions that require police to enforce by-laws. Unfamiliarity with by-laws strikes us as a poor excuse since police officers are professionals who receive training and continuing professional development. Police should be taught about by-laws in a meaningful way.

While First Nations may have a role to play in providing copies of their by-laws to police officers on request and answering questions about them, the onus should not be on First Nations to educate police about by-laws; this should be part of police officers' professional formation. As discussed in [Section 5.5.1](#), there needs to be greater education and awareness of by-laws generally by the police, as well as knowledge of specific First Nations by-laws for those police officers who are working in the community. Training has to be happening regularly, especially because police officers are only stationed within a community for a limited time.

Next, the fact that the police exercise discretion in deciding whether to enforce a by-law is NOT a licence to ignore them completely. While discretion is a necessary part of police powers, as underlined by the Supreme Court in *R v Beaudry*, "discretion is not absolute. Far from having *carte blanche*, police officers must justify their decisions rationally."⁵⁷¹ The Court goes on to establish a two-step test for determining whether discretion was exercised rationally, namely

⁵⁷⁰ Similar concerns were heard before the Committee who wrote [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#), *supra* note 5 at 14.

⁵⁷¹ *R v Beaudry*, *supra* note 195 at para 37.

establishing that the exercise of discretion is both subjectively and objectively justified. To be justified subjectively, the officer must show that the discretion was exercised honestly and transparently, and on the basis of valid and reasonable grounds. A decision “based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion.”⁵⁷² To be objectively justified, a judge must be satisfied that the justification offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest.⁵⁷³

The case of *Ochapowace First Nation v Canada* provides an example of police exercising discretion not to enforce a First Nation by-law being held as an exercise of good faith discretion.⁵⁷⁴ The background to the case involved complex negotiations between the province, the federal government and First Nations regarding flooding of non-reserve lands over which the bands had an interest. The negotiations had become stymied, and the First Nations sought the assistance of the RCMP to stop continued flooding by charging the staff of the agencies with violations of a trespass by-law passed by the First Nations. While initially entertaining the possibility, the RCMP ultimately exercised its discretion not to enforce the by-laws after receiving legal advice from the Department of Justice. The lawyer had raised concerns that the by-law exceeded the jurisdiction under the *Indian Act*. Section 81(1)(p) permits bands to pass by-laws for “the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes.” The lawyer concluded the by-law went beyond this power, because it purported to apply to non-reserve lands, and capture trespass not just by people, but by water. Both the Federal Court and the Federal Court of Appeal held that the RCMP’s decision not to enforce the by-law after receiving this advice was a good-faith exercise of discretion.

Ochapowace does not stand for the proposition that any and all denials of discretion to enforce by-laws by police will be viewed as an exercise of good faith. The circumstances in the case were unique, noted as involving sensitive issues, and did not involve a generalized police position on the status of by-laws, but rather a particularized determination about a specific by-law in specific circumstances. The test for what constitutes the good faith exercise of discretion in *Beaudry* would not justify a police officer refusing to enforce a by-law on a general suspicion that by-laws are invalid or violate *Charter* rights. Without a more specific analysis of the issue, we believe such a generalized view would be found to amount to a decision based on “cultural, social or racial stereotypes” – namely that First Nations by-laws are not ‘real laws’ or that First Nations are prone to discriminate.⁵⁷⁵ A refusal to enforce by-laws based on stereotypical assumptions would also not be objectively justifiable.

In addition to the requirement to exercise discretion in good faith, where an administrative body has the power to exercise discretion and instead adopts a general policy that serves to

⁵⁷² *Ibid* at 38.

⁵⁷³ *Ibid* at 40.

⁵⁷⁴ *Ochapowace First Nation v Canada*, 2007 FC 920 aff’d 2009 FCA 124.

⁵⁷⁵ For a discussion of the existence of such stereotypes, see Metallic, “Checking our Attachment to the Charter,” *supra* note 54 at 4-9.

eliminate the exercise of such discretion, this is known as “fettering discretion” and not permitted under administrative law principles. The rule has been described in case law as follows:

The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. V. Canada*, [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. ... And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy...⁵⁷⁶

If the general position of the RCMP is that it will not enforce by-laws, which our research and interviews seem to confirm, this is an improper fettering of discretion. Thus, if a request was made to a police detachment to enforce the band’s by-law in a situation where it appears an existing by-law has been recently violated and it is the sort of quasi-criminal by-law that police ought to enforce, but the request is rejected out of hand on the basis that the RCMP does not enforce by-laws, the First Nation may have a basis to judicially review the rejection based on fettering of discretion.⁵⁷⁷

Next, we find the reason that police will not enforce *Indian Act* by-laws due to doubts about their validity or *Charter* compliance to be a troubling double-standard. Fears of personal liability for enforcing by-laws are unfounded. Police have an obligation to enforce the law. It is not their role to question it. We are not aware of any precedent where the police have ever questioned the validity of any federal, provincial or municipal law before enforcing it and have declined to exercise enforcement. Said differently, the exercise of discretion is normally in relation to the application of particular facts to the law in particular case, not based solely on doubts about the validity of a government’s laws. In this regard, it has long been held that public officials will not be held liable for damages for enforcing a law that is subsequently held by the courts to be invalid. The law was summarized by the Supreme Court in *Mackin v. New Brunswick (Minister of Finance)* (2002):

According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as

⁵⁷⁶ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] BCCA 47 at para. 62. See also *Beaudry*, *supra* note 195 at para 45.

⁵⁷⁷ While we believe police officers have a duty to enforce by-laws as part of their general duty to enforce federal and provincial laws, strategically, it might be best to test such a claim using a community that has a CTA that also includes language that commits the police force to apply by-laws. Another strategic point to consider is bringing a judicial review claim based on lack of good faith or fettering versus a similar human rights complaint for a denial of service (discussed further below). Often, courts can be deferential to the government (here the police) in situation of judicial review. In *Ochapowace*, *supra* note 574 at para 29, the Federal Court of Appeal emphasized that the threshold to show a bad faith exercise of discretion is high. In judicial review, there can also be limits in terms of what can come in as evidence, and a claim like this would need to establish a systemic pattern of denials. The rules around evidence in human rights complaints are more flexible. For that reason, it may be preferable to frame the case as a human rights case.

a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional In other words “[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action” In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid.

...

Thus, the government and its representatives are required to exercise their powers in good faith and to respect the “established and indisputable” laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded ...).⁵⁷⁸

The threshold for this immunity to be lost—conduct that is clearly wrong, in bad faith or abuse of power—is high. The evidence has to be clear; a police officer simply cannot speculate that the by-law might be invalid based on little to no evidence. *Mackin* was not considered in *Ochapowace* in relation to the RCMP and DOJ’s second-guessing of the First Nation’s by-laws, and it is possible the outcome might have been different had this argument been raised. In any event, it is likely that the by-law there met the exception of “conduct that is clearly wrong” since the by-law was inconsistent with the clear wording of s 81(1)(p), making it obviously invalid. But situations like this would be uncommon. Invalidity will rarely be so obvious. As discussed in [Sections 2.9.7](#) and [5.2.1](#), by-law powers are entitled to broad interpretation based on current interpretive principles. Furthermore, as discussed in [Section 2.3.1.2](#), *Charter* issues must be considered in the specific First Nation context and may apply differently than in other contexts. Such questions should not be the subject of speculation by the RCMP and other members of the executive but be left to the courts as we do in the case of other laws.

Second-guessing by-laws raises concerns that such scrutiny is based on stereotypes that First Nations’ peoples’ laws are inferior and illegitimate, and that First Nations are prone to violating human rights. In addition, while First Nations are generally under-resourced in developing their laws, this fact alone cannot be the justification for assuming by-laws are faulty and should not be enforced. Both the federal and provincial governments have substantially contributed to this state of affairs by neglecting First Nations justice and by-law needs over several decades (see [Section 2.8](#)). The just solution in the circumstances is for governments to ensure First Nations receive meaningful support and resources to develop their by-laws, not continuing to marginalize First Nations laws and legal orders by treating them as suspect.

⁵⁷⁸ *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 SCR 405, 2002 SCC 13 at paras. 78-79 (emphasis added and citations omitted).

Finally, the excuse for non-enforcement based on the belief that a by-law will not be prosecuted is also dubious. In other non-First Nation contexts where prosecution is not available, this has not been a barrier to charging. An example of this is where charges and tickets have been issued in cases where the offender has diplomatic immunity. In Ottawa, city police continue to charge and issue tickets to diplomats for traffic violations and the city has found creative ways to compel diplomats to pay their fines even though prosecution is not an option.⁵⁷⁹ As this example illustrates, laying charges or issuing tickets may still serve a purpose of deterring unwanted behaviour, even if the charge does not result in prosecution. Further, enforcement of by-laws does not necessarily have to include charging; in some cases, a warning might suffice. Also, if a First Nation develops its own ticketing system, this will diminish the need for prosecution (as discussed in [Section 6.4.1.3](#)), as police could still issue tickets. Thus, to use the belief that no prosecution will occur as a general reason for non-enforcement is problematic.⁵⁸⁰ Perhaps most importantly, this feeds into the systemic denial (along with the federal and provincial governments' refusal to prosecute by-laws – we examine this in the next chapter) of First Nations' rights to control justice in their community with by-laws.

From our interviews and the literature, it does seem like the RCMP have a general policy, or at the very least an established practice of, not enforcing First Nations by-laws. Should this conduct persist, we believe First Nations may well have grounds for a human rights complaint. The police policy/practice of denying any obligation for enforcement may well constitute a denial of a public service based on a prohibited ground (ethnicity/Aboriginal origin) contrary to human rights legislation.⁵⁸¹ **Therefore, there is potential legal exposure on the part of the RCMP to a human rights complaint.**

Further, as noted in [Section 6.2.5](#), the unwillingness of the provincial police and the RCMP to enforce *Indian Act* by-laws was noted in the 2002 JMAC Report, yet, except for the recent steps taken by Ontario and the OPP mentioned earlier, neither the federal government nor other provincial governments have taken steps to address this problem in any meaningful way. This reluctance on the part of the police is an important part of the narrative supporting the potential ss. 7 and 15 claims against the federal and provincial governments for failing to provide First Nations with policing services that meet their safety, security and self-determination needs (discussed in [Section 6.4.2](#)). Thus, in addition to being the basis for a claim against the RCMP and other police forces, this is also evidence of these governments' neglect of known problems in law enforcement in First Nations communities.

⁵⁷⁹ National Post, "Diplomatic Immunity: In Ottawa there are as many as 6,000 residents who are effectively above the law," December 12, 2014.

⁵⁸⁰ In responding to this point, the Department of Justice Canada noted that there are prosecution screening regimes in most jurisdictions to avoid exactly this from being done and violating the rights of citizens. The problem is that such a response does not address the larger systemic issues that are at play.

⁵⁸¹ A service, even if intended exclusive for that segment of the public who are status Indians, is nonetheless a "service" within the meaning of s. 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6: see *Beattie and Louie v. Indian and Northern Affairs Canada*, 2011 CHRT 2, at paras. 44-49.

7 Prosecution of by-laws

Control over the process passes from enforcement officers to prosecutors and the courts after a charge has been laid and a person accused of contravening a by-law has been summoned to court (see [Section 6.3.2](#)). We address the issue of courts in the next chapter. Here, we unpack various issues relating to by-law prosecution.

Prosecution of by-laws is a crucial aspect of enforcement. As we heard in Chapter 6, lack of prosecution is often used as an excuse by law enforcement for not carrying out their role. That said, there are several ways that charges can be diverted to lessen the pressure on the prosecution, such as through ticketing ([Section 6.3.3](#)), as well as having alternative dispute resolution processes (see [Section 8.3.4](#)). Nonetheless, prosecuting by-laws is an important tool in the enforcement toolbox, since there are situations where other measures to ensure laws are followed or certain behaviours are addressed, simply won't work.

7.1 Challenges with *Indian Act* by-law prosecution: a prosecution gap

The *Indian Act* is silent on the prosecution of by-laws. It does not specify who has the responsibility to prosecute by-laws, nor does it identify who is responsible for funding the prosecution of by-laws.

For its part, the *ISC By-Laws Manual* makes one vague reference to prosecution, suggesting First Nations may be responsible for prosecuting civil and administrative by-laws, but not clearly identifying who is responsible for quasi-criminal by-laws (on the meaning of these categories, see [Section 6.2.1](#)):

It should be remembered that costs to the band may be involved in prosecuting a charge, particularly if it is contrary to a civil or administrative type by-law. At this time, there is no consistent policy across Canada concerning the prosecution of quasi-criminal type by-law offences (those that are normally enforced by a police officer or by-law enforcement officer). This varies from region to region.⁵⁸²

Sidebar: the *FNLMA* and prosecution

Unlike the *Indian Act*, the *First Nations Land Management Act* has specific provisions for prosecution. Section 22(3) of the *Act* gives First Nations the option of retaining their own prosecutor or entering into an agreement with the federal and provincial government for the use of provincial prosecutors, or entering into an agreement with the federal government only for the use of federal prosecutorial services.⁵⁸³

⁵⁸² *ISC By-laws Manual*, *supra* note 6, Chapter 8 at 7.

⁵⁸³ *First Nations Land Management Act*, *supra* note 122 at s.22(3).

On the surface, this is a positive development in law, explicitly addressing prosecution and giving First Nations a choice. However, it appears that the same problems that arise with *Indian Act* by-laws also arise with the *FNLMA*. As we heard from the interview with Public Safety Canada, First Nation communities operating under the *FNLMA* are also facing barriers to prosecution, and many have no funding or means to privately prosecute. **The appearance of choice within the *FNLMA* is illusory: there is no real choice, as neither the federal nor provincial governments appear willing to enter an agreement for prosecutorial services.** This forces First Nations to prosecute their laws under the *FNLMA* themselves or forego prosecution because they lack adequate funding.

This is illustrated by the case involving the K'omoks First Nation, a First Nation with a Land Code under the *FNLMA*. K'omoks was forced to prosecute a violation of their Land Code within British Columbia's Provincial Court because it had not been able to negotiate an agreement for prosecution services and the federal and provincial prosecution services declined to help them.⁵⁸⁴ (Even after this decision, it appears the RCMP remain unwilling to enforce K'omoks' laws.⁵⁸⁵)

The 2002 JMAC Report highlighted prosecution as a significant barrier to by-law enforcement, noting two particular problems:

Even if police officers are willing to lay charges, bands continue to face a jurisdictional debate between federal and provincial prosecutors, with one or both refusing to prosecute by-laws because they believe such activities do not fall within their area of responsibility. Prosecutors are also concerned that the vague and unclear nature of some by-laws would generate prolonged legal debate with little chance of winning the case and the low penalties make the benefits of prosecution not worth their time and effort and do not cover the costs of prosecuting offenders.⁵⁸⁶

The latter point touches on the need for First Nations to have resources and support for the development of their by-laws as we discuss in [Section 5.5.2](#). It also touches on the theme of the lack of priority given to First Nations' laws and justice needs by other actors in the Canadian justice system (e.g., prosecution is not worth the time and money), of which there were echoes of in the last chapter. The first point touches on **the theme we encountered repeatedly in the literature review, interviews and ISC's *By-Laws Manual*: namely, jurisdictional uncertainty as to who is responsible for the prosecution of *Indian Act* by-laws.** The JMAC Report recommended that the current lack of clarity over responsibility for prosecuting by-laws be addressed either through provisions in legislation or through negotiated agreements that

⁵⁸⁴ K'omoks, *supra* note 138.

⁵⁸⁵ [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#), *supra* note 5 at 20, a witness for K'omoks told the Committee: "With the court decision..., the question of enforcement should be a non-issue and the RCMP should be there to enforce the matter. However, we've been told by the RCMP lawyer that they have not been granted that direction from higher-ups within the RCMP."

⁵⁸⁶ JMAC *supra* note 28.

address the costs required for prosecution. No provisions to respond to this recommendation were included in the proposed *FNGA*.

What we heard about the prosecution of *Indian Act* by-laws

The literature suggests that federal and provincial prosecutors are declining to prosecute by-law offences, leaving First Nations governments with little to no avenues to pursue, except for hiring their own lawyers to prosecute by-law offences if they can afford to.

None of the participating Nova Scotia First Nation communities have had their by-laws prosecuted. Further, if their by-laws were to be enforced, whether through a by-law officer or the RCMP, those interviewed believe the band councils would have to hire their own lawyer to prosecute the matter. In Membertou First Nation, council does not want to attempt to enforce a by-law only to find themselves in a situation where the community member charged can essentially ignore enforcement due to the inability to prosecute.

While some communities might want federal and provincial prosecutors to prosecute their by-laws, others may wish to prosecute by-laws with adequate funding to make this a reality. For example, the Millbrook First Nation expressed a preference in having their own lawyers prosecute by-law offences, with the federal or provincial governments covering the cost of prosecution. We also heard concerns from some interviewees that many Crown prosecutors lack cultural competency about First Nations communities to do an adequate job of enforcing community by-laws.

Public Prosecution Services Canada's ("PPSC") website identifies that there are over 250 federal statutes that contain offences that fall under the PPSC's jurisdiction to prosecute.⁵⁸⁷ However, the PPSC website also notes that it only regularly prosecutes offences for approximately 40 of those statutes.⁵⁸⁸ The *Indian Act* isn't one of the acts listed.

The interviewee from the PPSC advised that they have been approached by First Nation governments across the country, asking to clarify the PPSC's role in the prosecution of First Nation by-laws. The PPSC advised us that it is currently considering its position on that issue. The PPSC explained to us that over the past 10 years, the only place in the country where by-laws were prosecuted was in Natuashish, Labrador where intoxicant by-laws were regularly prosecuted.

We heard from representatives of Justice Canada's Aboriginal Law Centre ("ALC") who related a situation an agreement between the federal government and a province whereby the province would be responsible for the prosecution of First Nation by-laws. However, the ALC thinks the provinces in general stopped prosecuting due to a lack of funding agreements. It has been the position of the federal government over the last 11 years that it's the First Nations' own responsibility to enforce and prosecute their own by-

⁵⁸⁷ Public Prosecution Services Canada website, "About us" under "Areas of Prosecution," [online](#).

⁵⁸⁸ *Ibid.*

laws. Neither the ALC nor CIRNA interviewees we spoke with were sure about the rationale behind this.

As the above demonstrates, we did hear of a few instances of the federal or provincial Crowns prosecuting by-laws: a federal prosecution in a community in Labrador, provincial prosecution in an urban First Nation with a peacemaker court program, and provincial prosecution in some remote northern fly-in communities.⁵⁸⁹ Overall, these are one-offs, and it was difficult to determine what criteria or conditions resulted in the Crowns agreeing to prosecute in these situations and not others.

There has been an important development since the onset of the COVID-19 pandemic. In the Spring of 2020, PPSC developed a draft protocol agreement to work with police and First Nations to prosecute by-laws adopted by First Nation communities pursuant to s. 81 and 85.1 of the *Indian Act* to respond to the COVID-19 pandemic.⁵⁹⁰ The protocol agreement ran from March 15, 2020, to March 31, 2021 (though with a possibility of renewal). The protocol only contemplates the enforcement of formal COVID-19 by-laws (it does not appear to include pre-COVID by-laws that could be used to address pandemic-related problems, such as trespass by-laws). A pre-condition for enforcement is the cooperation of the local law enforcement agency in the process.⁵⁹¹ The draft protocol agreement also recognizes PPSC's prosecutorial discretion to conduct a prosecution, stay it, or withdraw charges. It also states that "this protocol is an administrative agreement between the parties and is not intended to be legally binding or enforceable before the courts."⁵⁹² While this is a positive development, it does not address the larger problem of lack of prosecution of by-laws, though it may signal the start of a change in position at PPSC.

The literature review highlighted capacity issues in relation to *Indian Act* by-laws due to financial constraints which preclude private prosecutions of by-law offences from being feasible. If First Nations are forced to privately prosecute their own by-laws, this greatly increases the cost of enforcement.⁵⁹³ And if First Nations are forced to do so, then the question is: who should be paying for the private prosecutor?⁵⁹⁴ None of the interviewees from government departments could answer this question. However, non-government interviewees stated that government, provincial or federal, does not want to pay for the prosecution of by-laws.

⁵⁸⁹ See also the Ontario case of *R v LaForme*, 1995 CarswellOnt 4181, involving an intoxication by-law prosecution for the New Credit First Nation. It is clear that the offence under a band's intoxication by-law was prosecuted by a Crown lawyer (which government is not clear).

⁵⁹⁰ PPSC, draft "Protocol relating to the Enforcement and Prosecution of By-Laws(s) adopted pursuant to s. 81 and 85.1 of the *Indian Act*," (2020). The protocol is not accessible online and the authors received a draft version through a colleague.

⁵⁹¹ *Ibid* at cl. 2-3. While not specific in the draft protocol agreement, the authors have heard that this requires a Memorandum of Understanding be entered into between the federal Crown and the police service in question.

⁵⁹² *Ibid* at cl. 11.

⁵⁹³ Public Safety Canada interviewee.

⁵⁹⁴ Public Prosecution Service of Canada interviewee.

The total picture from the literature review and interviews reveals a major gap in prosecution services marked by uncertainties about which government is to provide and pay for these services. To determine how to address this prosecution gap, we must first understand how the prosecution of *Indian Act* by-laws works and who can be involved in the prosecution of by-laws. We address this before turning to how the prosecution gap can be fixed.

7.2 Overview of the prosecution process

Here we review the general process for prosecution of summary conviction offences set out in the *Criminal Code*, addressing particular questions that may come up in the context of prosecuting *Indian Act* by-laws.⁵⁹⁵ As noted in [Section 2.3.1](#), this process generally applies to the prosecution of *Indian Act* by-laws unless some other charging process is set out in the law.

7.2.1 Public or private prosecution?

As noted in [Section 6.3.2](#), prosecutions are generally initiated once an information is laid with a justice of the peace or the Provincial Court (though peace officers have additional options). There are two types of prosecutions contemplated by the *Criminal Code*: public prosecution and private prosecutions. Public prosecutions are those where the information is received from “a peace officer, a public officer, the Attorney General or the Attorney General’s agent.”⁵⁹⁶ Private prosecutions are those where an information is laid by someone other than those people just listed.⁵⁹⁷ This means that a private individual can start a criminal prosecution against someone. But to avoid private individuals potentially abusing this provision (e.g., bringing private prosecutions against everyone), the *Criminal Code* places some oversight and control over private prosecutions in the hands of the Attorney General.⁵⁹⁸

This raises the question of whether prosecutions of *Indian Act* by-laws would be considered public or private prosecutions. The question is whether a representative acting on behalf of the First Nation to prosecute a band by-law would be considered a “public officer” under s. 507(1) of the *Criminal Code*.⁵⁹⁹ Although no case has yet considered this question in the context of prosecution of *Indian Act* by-laws, several cases have found that municipal officials seeking to

⁵⁹⁵ This section is based on summarizing excerpts from Quigley, *supra* note 483, Chapter 10, “Arraignments and Appearances.” The chapter details how the process might be different depending on whether the offence is indictable or a summary conviction offence. Since by-laws are summary conviction offences, we will only be relating the process that relates to summary conviction offences.

⁵⁹⁶ *Criminal Code supra* note 482 at s. 507(1).

⁵⁹⁷ *Ibid* at s. 507.1(1).

⁵⁹⁸ Under s. 507.1(1) of the *Criminal Code*, *ibid*, the justice of the peace receiving the information must refer the matter to either a provincial court judge or justice designated for this purpose. Next, the relevant Attorney General (whichever is prosecuting the charge) is to receive a copy of the information, notice of the hearing, and an opportunity to be heard at the hearing. The Attorney General has the ability to either take over the prosecution or enter a stay to halt it. Unlike in the case of an information hearing brought by a peace officer, the judge must actually hear the evidence of witnesses as well as the allegation of the informant.

⁵⁹⁹ This is because First Nations would not be the Attorney General or the Attorney General’s agent.

prosecute municipal by-laws⁶⁰⁰ and officials working for federal and provincial agencies seeking to prosecute offences under their enabling legislation and regulations⁶⁰¹ are “public officers.”

In the recent decision of *Pervez v Alberta Health Services* (2017), the Alberta Queen’s Bench held that the executive officer of Alberta Health Services could prosecute offences under the provincial *Public Health Act*.⁶⁰² The Court found that the definition of “public officer” in s. 2 of the *Criminal Code* is not exhaustive and should be interpreted broadly,⁶⁰³ and there was no useful policy reason to subject the health services prosecution to the extra screening imposed on private prosecutions given the executive officer was clearly exercising public functions on behalf of the province.⁶⁰⁴

Based on these cases, a representative acting on behalf of a First Nation seeking to prosecute a by-law should be found to be a “public officer” under s. 507(1) of the *Criminal Code*. The band’s prosecutor should not be required to go through the additional screening required under s. 507.1(1). The fact that by-laws have been recognized by the courts as an exercise of self-government bolsters this conclusion (see [Section 2.9.7](#)) since bands are acting as a public government regulating their communities. It is also noteworthy that it does not appear, in the prosecution initiated by the K’omoks First Nation for an offence under a land code passed under the *First Nations Land Management Act*, that the First Nation was required to go through the extra screening requirements of s. 507.1(1) of the *Criminal Code*.⁶⁰⁵

Sidenote: prosecution before a justice of the peace

An important implication of finding that band prosecutions would be considered public (and not private) prosecutions is that such prosecutions can be heard by a justice of the peace (which is relevant to our discussion in [Chapter 8](#)). A private prosecution *must* be heard before a provincial court judge.

7.2.2 Appearance in court and who can represent the accused

The accused’s first appearance in court is known as the *arraignment*. This happens *after* the accused has been compelled to appear in court by some mechanism (arrest, appearance notice, promise to appear/recognizance, summons or arrest warrant). This first appearance can be before a justice of the peace but often it is before a provincial court judge. If a prosecutor does

⁶⁰⁰ *R v Cartier; R v Libert* (1978), 1978 CanLII 2339 (QC CS), 43 CCC (2d) 553, [1978] JQ, involving a municipally appointed agricultural inspector. (Cited in *Pervez v Alberta Health Services* (2017) *infra* note 602.)

⁶⁰¹ *R v Rutt*, 1981 CanLII 2083 (SK CA), [1981] 4 WWR 273, [1981] SJ No 1340 (CA) involving a provincial wildlife officer; *Ashkenazi v Director Of Cowansville Penitentiary* (1979), 9 CR (3d) 256, [1979] QJ No 237 (SC) involving a clerk of the court; and *R v Labelle*, [1971] Que CA 641, 1971 CarswellQue 263, involving a public health inspector appointed by resolution of municipal council.

⁶⁰² *Pervez v Alberta Health Services*, 2017 ABQB 446.

⁶⁰³ *Ibid* at para. 47.

⁶⁰⁴ *Ibid* at paras. 44-45.

⁶⁰⁵ *K’omoks*, *supra* note 138. The charge came before the court via s. 508 of the *Criminal Code*, *supra* note 482, meaning an appearance notice was laid by a peace officer in that case.

not appear and the accused does, the judge may either dismiss the information or adjourn the trial to another date.⁶⁰⁶

The purpose of the first appearance is to formally present the accused with the allegations against him or her. For summary conviction offences, the accused does not have to be present but can be represented by an agent or counsel.

Sidenote: Who can represent an accused person in by-law prosecutions?

Under subsection 800(2) of the *Criminal Code*, it is permissible for an accused charged with a summary conviction offence to appear personally or by agent or counsel. “Counsel” is defined in s. 2 of the *Criminal Code* as referring to a lawyer licenced to practice in that province. “Agent” is not defined for these purposes. **This means that non-lawyers can act as agents,⁶⁰⁷ which presents the possibility of having community members act as agents in by-law prosecutions.**

Note that s. 802.1 restricts the ability of an agent to appear or to examine or cross-examine witnesses if the offence carries a maximum penalty no greater than 6 months’ imprisonment.⁶⁰⁸ However, since the maximum amount of imprisonment possible under s. 81(1) by-laws are no more than 30 days, no more than six months for the sale of intoxicants and three months for possession of intoxicants in the case of s. 85.1 by-laws (see [Section 9.1](#)), **s. 802.1 is not a barrier to non-lawyers acting in *Indian Act* by-law matters.**

The accused, their agent or lawyer will be called forward, the charge will be read to them, and they will be asked whether they understand it. If the accused does not appear, the judge will usually issue a warrant for their arrest, known as a bench warrant. Where the accused is unrepresented, the proceedings may be adjourned so that they may seek counsel. In some cases, people may have a right to a state-funded lawyer.

Sidenote: Do the accused have a right to a state-funded lawyer for by-law offences prosecutions?

Under s. 10(b) of the *Charter*, a person has a right to speak with counsel upon detention or arrest. As discussed in [Section 6.3.4](#), in most cases, it is unlikely that a person would need to

⁶⁰⁶ *Ibid* at s. 799.

⁶⁰⁷ This is a matter of statutory interpretation: “agent” must necessarily mean something different than “counsel”, which is defined as a practicing lawyer. Note that there is a conflict of law in this situation given that the *Criminal Code* allows a non-lawyer to represent someone in a legal proceeding, while the provincial law, include Nova Scotia’s *Legal Profession Act*, SNS 2004, c 28 s. 5, generally limits the practice of law to lawyers and articling clerks. Although on a narrow interpretation of conflicts it is possible to comply with both (e.g., a person could hire a lawyer to represent them and there would be no conflict), such an approach would frustrate the intention of the federal government here to allow person’s accused of summary conviction a less costly option for representation with further access to justice. This was the holding of the Supreme Court of Canada in *Law Society of British Columbia v. Mangat*, 2001 SCC 67, a case involving a similar conflict between provincial law and federal immigration law.

⁶⁰⁸ If the penalty is over 6 months, agent must be authorized to do so under a program approved by the lieutenant governor in council of a province: *Criminal Code*, *supra* note 482 at s. 802.1.

be arrested or detained to be charged under a by-law. Even where s. 10(b) may be engaged, the Supreme Court has not gone so far as to say that s. 10(b) *requires* governments to ensure that duty counsel or legal aid is available to all detainees to provide free and immediate preliminary advice – just that the detainee be provided a reasonable opportunity to consult with counsel.⁶⁰⁹

That said, there can be situations where s. 7 of the *Charter* entitles a person to state-funded counsel in situations where someone’s life, liberty and security might be affected. For example, parents whose children were the subject of child welfare apprehension proceedings were found to have a right to state-funded counsel.⁶¹⁰ Section 7 rights are also engaged when someone faces imprisonment because their right to liberty is at stake. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal.⁶¹¹

Legal aid plans throughout Canada reflect this law and provide representation to people under a certain income threshold who are facing court proceedings involving imprisonment or child welfare apprehensions. Some may even go further than this. Many, however, do not provide representation in areas involving regulatory offences (e.g., offences that don’t involve imprisonment—see “The *Charter* and regulatory offences” discussion at [Section 6.4.1.3](#)). For example, Nova Scotia Legal Aid’s website specifically states that it “will not normally provide representation in cases involving the *Motor Vehicle Act*, *Liquor Control Act*, *Wildlife Act*, etc.”⁶¹²

Thus, the answer to the above question depends. Most by-laws will likely be of a regulatory nature. However, if the by-law looks more quasi-criminal and there is a possibility of imprisonment as a penalty, the accused person could argue their s. 7 right to liberty is engaged and they should have state-funded counsel.

In such situations, it is possible the local Legal Aid services may represent the person. A band might provide the accused with some representation (whether this has to be a trained lawyer is an open question given the discussion above that defendants may be represented by non-lawyers for by-law infractions). As to who would pay for this (the First Nations vs. other governments), the issues here are like those discussed in [Section 6.4.2](#). There are compelling arguments regarding why the federal and provincial governments should shoulder these costs relating to justice and enforcement of First Nations’ laws.

The next issue that may arise if a person is in custody is bail (although this will generally be unlikely with by-law infractions). The criteria to justify holding someone in pre-trial custody are

⁶⁰⁹ See *R. v. Prosper*, [1994] 3 S.C.R. 236.

⁶¹⁰ See *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

⁶¹¹ See *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para 25.

⁶¹² Nova Scotia Legal Aid website, “Legal Aid Services Provided,” [online](#) (last accessed on November 20, 2019).

generally related to serious criminal conduct and, in most cases, would likely not apply to the by-law context.⁶¹³

Next, a plea will be taken. If the plea is not guilty, the matter will be adjourned to another day for trial. Following this, comes the actual prosecution of the offence.

7.2.3 The conduct of a prosecution

Prosecution involves the prosecutor leading evidence, including direct examination of witnesses to prove the offence. Both the prosecutor and the accused may examine and cross-examine witnesses.⁶¹⁴ The accused is entitled to full answer and defence.⁶¹⁵ The burden of proof is on the prosecution.

The availability of certain defences to the accused will depend on which type of offence they are charged with.⁶¹⁶ Offences can be truly 'criminal' in nature (known as '*mens rea*' offences), or they can be more 'regulatory' in nature.⁶¹⁷ While there can be exceptions, by-laws will generally fall into the 'regulatory' offences category.⁶¹⁸ For such offences, the prosecutor only has to prove that the accused committed the charged act beyond a reasonable doubt (and not that the accused *intended* to commit the act). The accused can defend by showing he or she exercised reasonable care (due diligence) to avoid committing the offence or committed the offence based on officially induced error.⁶¹⁹

There are no specific time limits in the *Criminal Code* in which the offence must be prosecuted after charges are laid (recall, there are six months to lay charges⁶²⁰). However, s. 11(b) of the

⁶¹³ See Quigley *supra* note 483 at c 11.3. The criteria are at s. 515(10) of the *Criminal Code*, *supra* note 482, and require the person be a flight risk, a risk to public safety (victims, witnesses, or persons under 18 years of age), or given the gravity of the offence.

⁶¹⁴ *Ibid.*

⁶¹⁵ This is provided for at s. 802(1) of the *Criminal Code*, *ibid*, but is also protected by the *Charter*. It includes several things, including the right to counsel, the right to examine witnesses and the right to full disclosure by the Crown (*R. v. Stinchcombe*, [1991] 3 SCR 326).

⁶¹⁶ See generally on this: *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299; and *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013] 3 SCR 756.

⁶¹⁷ See *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, for more on the difference. A "true crime" is one that is "inherently wrongful conduct" worthy of punishment. A regulatory offence, on the other hand, is designed to establish standards of conduct for activity that could be harmful to others; but it does not imply moral blameworthiness and it attracts less social stigma.

⁶¹⁸ Whether an offence is criminal nature requires a case-by-case assessment looking at a number of factors such as whether the process involves the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record, among other factors. For deeper discussion of this see *Charterpedia*, "Section 11 – General: legal rights apply to those "charged with an offence" [online](#) (last accessed on November 20, 2019).

⁶¹⁹ There can be regulatory offences where these defences are not available, where the state explicitly takes away such defences (known as 'absolute liability offences). These have been held to violate s. 7 of the *Charter* where they involve the possibility of imprisonment as opposed to just a fine. For more on this see: *R. v. Sault Ste. Marie*, *supra* note 616 and *R v. Pontes*, [1995] 2 SCR 44.

⁶²⁰ See *Criminal Code*, *supra* note 482 at s. 786(2).

Charter guarantees that any person charged with an offence has the right to be tried within a reasonable time. In *R v Jordan* (2016), the Supreme Court set a presumptive ceiling of 18 months for cases tried in provincial court unless exceptional circumstances justify otherwise.⁶²¹ The protection of s. 11(b), however, is limited to cases involving offences of a criminal nature. This is to be contrasted with “[p]roceedings of an administrative nature...[which] are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity.”⁶²² As noted above, while there can be exceptions, by-law offences will likely fall in the administrative sphere. Delays in administrative proceedings can also result in *Charter* violations in the context of s. 7 if they rise to the level of being a deprivation of life, liberty and security of the person, however, presumptive ceilings have not been applied in such context to date.⁶²³

Sidenote: A cautionary tale?

We interviewed a lawyer who had prosecuted intoxication by-laws for a First Nation. They felt the prosecution process was long relative to the fine in issue (\$100) and delays in prosecution often occurred because witnesses or police would not show up for court. It was the lawyer’s view that issues of substance abuse were better addressed through a therapeutic process.⁶²⁴ The lawyer’s story does raise questions about the appropriateness of by-law prosecutions in some circumstances, as well as the need for possible off-ramps to restorative justice processes, which we discuss more in [Chapter 9](#).

7.2.4 Who may act as a prosecutor?

The definition of “prosecutor” for the purpose of summary conviction offences (including by-laws) includes “the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them.”⁶²⁵ This indicates that a number of actors (indeed, four categories of people) can prosecute a summary conviction offence, which includes an *Indian Act* by-law.

7.2.4.1 The Crown

The majority of criminal cases are prosecuted by the Crown, almost always the provincial Crown for *Criminal Code* offences and sometimes the federal Crown for other federal enactments.⁶²⁶ In this regard, the definition of “Attorney General” in s. 2 of the *Criminal Code* tells us in subsection (a) that “Attorney General” means “with respect to proceedings to which this Act applies, ... the Attorney General ... of the province in which those proceedings are taken... .” Subsection (b) defines “Attorney General” to mean

⁶²¹ *R v Jordan*, 2016 SCC 27.

⁶²² *Guindon v. Canada*, 2015 SCC 41 at para. 45.

⁶²³ See *Blencoe v. British Columbia (Human Rights Commission)*, *supra* note 268.

⁶²⁴ Interview with private practice lawyer, December 12, 2018.

⁶²⁵ *Criminal Code*, *supra* note 482 at s. 785(1).

⁶²⁶ Quigley, *supra* note 483 at 10-10.

with respect to proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of ... any Act of Parliament other than this Act or any regulation made under such an Act, means the Attorney General of Canada...

At a surface level, this reads as suggesting that the provincial Crown prosecutes *Criminal Code* offences and the federal Crown prosecutes all other offences under federal laws, which would include by-laws under the *Indian Act*. In what follows, we address two questions that arise from this definition of “Attorney General”:

- (1) Does it mean that *only* the federal Crown can prosecute contraventions under other federal laws?
- (2) What does it mean for a proceeding to be “commenced at the instance of the Government of Canada” for it to be prosecuted by the federal Crown?

7.2.4.1.1. Provincial Crowns can prosecute federal offences

A surface-level reading of s. 2 of the *Criminal Code* may leave the impression that only the federal government can prosecute non-*Criminal Code* offences under other federal statutes and regulations. Further, the Nova Scotia Public Prosecution Service (“NSPPS”) website appears to reinforce this impression. NSPPS describes its jurisdiction as prosecuting charges laid under the *Criminal Code* and Nova Scotia statutes.⁶²⁷ **This impression does not provide the whole story, however.**

As it relates to jurisdiction and the division of powers in the *Constitution Act, 1982*, Peter Hogg explains that **jurisdiction over the prosecution of federal offences is a concurrent power, meaning both the federal and provincial governments have jurisdiction to legislate over who prosecutes and both may prosecute federal offences.**⁶²⁸ For the provincial governments, this power arises from s. 92(14), which is the provincial jurisdiction over, “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.”⁶²⁹ Hogg explains that this gives the province jurisdiction over enforcement and prosecution of all laws (provincial and federal) and is not limited solely to the enforcement and prosecution of *Criminal Code* offences.⁶³⁰ At the same time, the Supreme Court has found that

⁶²⁷ Nova Scotia Public Prosecution Services website, “Role of the Prosecution Service” [online](#).

⁶²⁸ Peter Hogg, *Constitution Law of Canada*, 5th ed., *supra* note 39 at Chapter 19, section 19.6, “Prosecution.”

⁶²⁹ *Constitution Act, 1867*, s. 92(14).

⁶³⁰ Peter Hogg, *Constitution Law of Canada*, 5th ed., *supra* note 39 at 19.6, footnote 84: “The administration of justice in the province includes civil as well as criminal jurisdiction, and the Constitution’s underlying rationale of sensitive local enforcement of nation-wide laws is not applicable only to “criminal” laws: MacPhersons, “Developments” (1980) 1 Supreme Court L.R. 77, 97-103. I conclude that the distinction between criminal and non-criminal laws has no basis in s. 92(14)”. See also at 19.6 “... in my opinion... the federal power is concurrent with provincial prosecutorial authority derived from the administration of justice in the province. ... And

the federal government also has jurisdiction in relation to the prosecution of both criminal and non-criminal federal offences, based on the general rule that the power to make a law includes the power to enforce the law.⁶³¹

Hogg suggests that the *Criminal Code* definition of “Attorney General” in s. 2 has to be informed by this constitutional reality. He notes that the definition was only included in the *Criminal Code* in 1969 and before then “the division of functions between provincial prosecutors and federal prosecutors rested on informal agreement between the federal and provincial governments, and the matter was uncontroversial.”⁶³² He further explains that the definition of “Attorney General” in subsection (b) has been interpreted by the courts to accommodate the potential exercise of provincial jurisdiction over the prosecution of federal offences in laws outside the *Criminal Code*. He explains the effect of these decisions as follows:

The definition [of “Attorney General” in subsection (b)] substitutes the federal Attorney General for the provincial Attorney General only when proceedings have been commenced at the instance of the government of Canada and conducted by or on behalf of that Government.” In that event, the federal Attorney General is given exclusive jurisdiction. If the information is not laid by or on behalf of the Government of Canada, or, even if it is, if counsel for the Government of Canada does not appear to conduct the prosecution, then the provincial Attorney General has the right to conduct the prosecution.⁶³³

Sidenote: leading cases on which Crowns can prosecute federal laws

R v Sacobie and Paul (1979)

The issue in this case was whether a provincial Crown could prosecute an offence against two Wolostogiyik (Maliseet) men under the federal *New Brunswick Fisheries Regulations*. It was held that, since the federal Crown had not instituted or sought to prosecute these men, it was open for the provincial Crown to do so. The case stands for the proposition that section 2 of the *Criminal Code* is not to be interpreted as meaning that the exclusive power to prosecute violations of federal laws is vested in the Attorney General of Canada.⁶³⁴

R v Crosby (1980)

The case involved a charge of trespass on the Tyendinaga reserve under s. 30 of the *Indian Act*. A local provincial prosecutor prosecuted the case in Provincial Court. It was argued that the

concurrency accords more happily with the long history of provincial prosecution of Criminal Code offences”. Hogg goes on to further discuss how the case law has now rejected this distinction: see *ibid*. See also *Bradley v R* (1975), 9 O.R. (2d) 161, 1975 CarswellOnt 59 (ON CA) at para. 17.

⁶³¹ See *ibid*. Hogg, *ibid*, specifically discussed the cases of *The Queen v. Hauser* [1979], 1 SCR 984; *Attorney General Canada v. C.N. Transportation* [1983] 2 SCR 206; and *R v Wetmore* [1983] 2 SCR 284.

⁶³² *Ibid*. He elaborates further on this at note 80: “So long as there was no legislation defining the role of the federal AG, the role could have been rationalized as analogous to a private prosecutor, who would be subject to the ultimate control of the Attorney General of the province.”

⁶³³ *Ibid* at 511, note 79.

⁶³⁴ *R v Sacobie and Paul*, 1979 CarswellNB 86 (NBCA) aff'd [1983] 1 SCR 241.

provincial Crown had no authority to conduct the prosecution, only the federal Crown. Relying on *Sacobie and Paul*, the Court of Appeal held that a provincial Attorney General has the authority to prosecute a summary conviction offence against regulations passed under a federal act. The court directed the matter back to the provincial court judge to proceed with the trial.⁶³⁵

Thus, the state of the law with respect to jurisdiction over the prosecution of federal laws is that both the federal and provincial prosecutors can prosecute offences under federal law, which includes offences under *Indian Act* by-laws (see [Section 2.3](#)). The definition of “Attorney General” in the *Criminal Code* means that if the federal Crown is not pursuing prosecution, then the provincial Crown is free to do so.

It appears that some provinces have not recognized their power to prosecute federal offences beyond the *Criminal Code*. (We have not conducted an exhaustive review of every province.) As suggested above, Nova Scotia’s *Public Prosecutions Act* limits the provincial Crown’s prosecution of federal laws to the *Criminal Code*.⁶³⁶ Alberta’s law appears to do the same.⁶³⁷ On the other hand, Ontario’s law recognizes the power of Crown Attorneys such that they may prosecute proceedings “in respect of any provincial offence or offence punishable on summary conviction.”⁶³⁸ Such a broad definition would include offences under federal laws since federal laws are punishable by summary conviction. Ontario’s *Crown Prosecution Manual* also specifically recognizes its power over all regulatory offences and does not distinguish between federal and provincial offences.⁶³⁹

The fact that a province has not explicitly recognized their jurisdiction to prosecute federal offences beyond the *Criminal Code* in their laws may not be a barrier to the exercise of such jurisdiction in a given case. It does not appear that there was any provincial legislation enabling the provincial Crown to prosecute a federal offence in *R v Sacobie and Paul*, yet the New Brunswick Court of Appeal and Supreme Court still found this exercise of jurisdiction to be valid.⁶⁴⁰ Furthermore, there is no question the province has the constitutional jurisdiction to prosecute *Indian Act* by-laws, but the effect of its law is to deny these prosecution services to First Nations in the province. The province provides prosecutions services to non-Indigenous peoples living off-reserve. It should extend such benefits to First Nations to provide them with substantively equal protection of the law. Legislation or policies that are under-inclusive and result in a denial of or adverse impact in receiving a government service of a group based on an

⁶³⁵ *R v Crosby* (1980), [1982] 1 CNLR 102, 1980 CarswellOnt 1268 (ONCA). See also *Whiskeyjack*, *supra* note 179. In deciding whether the province could appoint special band constables under its *Police Act*, the Alberta Court of Appeal reasoned that since provinces have the power under s.92(14) of the *Constitution Act, 1867* to prosecute federal law as per *Sacobie and Paul*, *ibid*, and other cases, this extended the power to appoint enforcement officers.

⁶³⁶ See *Public Prosecutions Act*, SNS 1990, c 21, s. 4(c).

⁶³⁷ See Alberta Crown Prosecution Services website, “Overview” [online](#);

⁶³⁸ *Crown Attorneys Act*, RSO 1990, c C.49, s. 11(e).

⁶³⁹ Ontario, *Crown Prosecution Manual* [online](#), see preamble.

⁶⁴⁰ *R v Sacobie and Paul*, *supra* note 634.

enumerated or analogous ground may violate s. 15(1) of the *Charter*.⁶⁴¹ In some cases, the courts have ‘read in’ the excluded group to cure the constitutional violation.⁶⁴² As a proactive way of addressing this problem, the province should consider amending the *Public Prosecutions Act* to clarify that it can prosecute *Indian Act* by-laws.

7.2.4.1.2. Federal Crowns can prosecute offences under federal law whether or not they lay an information

The definition of “Attorney General” at s. 2(b) of the *Criminal Code* recognizing the (non-exclusive) federal power to prosecute federal acts includes the phrase “at the instance of the Government of Canada.” Could this phrase be used to argue that, if an information was laid by a First Nations police or by-law officer without consultation or involvement of the federal Crown, the federal Crown would be prevented from prosecuting the charge? There is one lower court case that suggests this, but it has been questioned and its persuasiveness and relevance in the circumstances are debatable.

The case of *R. v Knetchel* involved a municipal police officer laying an information charging Knetchel with drug charges under non-*Criminal Code* federal legislation.⁶⁴³ The police officer had not consulted with or received instructions or guidance from any federal prosecutor before doing so. Although the charges were later prosecuted by a federal prosecutor, the judge held that these were not a “proceeding instituted at the instance of the Government of Canada” because the federal prosecutor had no involvement in the laying of the information and dismissed the charges against Knetchel.⁶⁴⁴

However, *R. v Thomas* (1977) questioned the correctness of *Knetchel*. Here was another information laid by a municipal police officer for drug charges under non-*Criminal Code* federal legislation.⁶⁴⁵ The officer did not consult with the federal Attorney General before laying the charge. However, the trial was prosecuted by the federal Attorney General’s office. The accused attempted to have the charges dismissed based on *Knetchel*. However, interpreting the definition of “Attorney General” at s. 2(b) of the *Criminal Code* alongside several other provisions in the *Criminal Code* including the definitions of “informant” and “prosecutor” under the summary conviction rules, the court held that the identity or occupation of the informant is not a deciding factor in determining whether the Attorney General for Canada or Attorney

⁶⁴¹ See case law discussion at [Section 2.9.1](#), [2.9.2](#) and [2.9.3](#), and see also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, *Vriend v. Alberta*, [1998] 1 SCR 493; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17; and *Fraser v. Canada (Attorney General)*, 2020 SCC 28.

⁶⁴² *Vriend v. Alberta*, *ibid*.

⁶⁴³ *R. v. Knetchel* (1976), 23 C.C.C. (2d) 545 (BCSC).

⁶⁴⁴ The case cited *R. v. Pelletier* (1974), 4 O.R. (2d) 677 (ONCA) as authority. There, a municipal police officer swore the information for a drug offence. The ONCA found it was “initiated at the instance of the Government of Canada” because it was drafted by Canada Crown lawyer, who conducted all proceedings after the swearing of the information.

⁶⁴⁵ *R. v. Thomas* (1977), 38 C.C.C. (2d) 344.

General for the province conducts the prosecution. Further, the court found that the federal Crown has an inherent right to prosecute offences under federal statutes:

14 In *R. v Dunn*, [1977] 5 W.W.R. 454, ... Woods J.A. said at p. 386:

The Crown in the right of Canada has an inherent right to prosecute offences under federal statutes and neither the provisions of s. 92(14) [of the B.N.A. Act, 1867] nor s. 2 of the *Criminal Code* is inconsistent with this right.

The court also noted that by enacting such legislation, the Government of Canada invited and impliedly authorized police officers to initiate proceedings to enforce the legislation. Furthermore, the court noted that where an information is laid and agents for the federal Crown assume the conduct of the prosecution, it is reasonable to conclude that the Attorney General for Canada ratified and approved the institution of proceedings.⁶⁴⁶

The reasoning in *R v Thomas*, based on the more modern approach to statutory interpretation (looking at the act as a whole⁶⁴⁷), as well as a more practical understanding of operations between different levels of government, is more persuasive than *Knetchel*.

Further, in *R v King*, the Ontario Court of Appeal distinguished *Knetchel*, where, although a municipal police officer laid drug charges without consulting with the federal Crown, the court found clear evidence of Canada accepting responsibility for prosecuting such offences within the municipality.⁶⁴⁸ The court noted that s. 2 required that proceedings “be instituted at the instance of the Government of Canada” and not a more exacting requirement that the information be sworn by an officer thereof.”⁶⁴⁹ The court noted that the two levels of government had worked out a system or general procedure whereby the “Metropolitan Toronto Police Force were authorized by the Government of Canada to institute on its behalf proceedings for violations of the *Narcotic Control Act*.”⁶⁵⁰ In that context, Canada did not need to be specifically consulted before the municipal police officer laid charges.

What *R v King* suggests is that the federal Crown would not be prohibited under the definition of “Attorney General” in the *Criminal Code* to prosecute *Indian Act* by-law offences if it took responsibility for prosecuting such by-laws, for example taking steps to coordinate with First Nations and their enforcement officers over the enforcement of *Indian Act* by-laws (as it does with municipal police services over drug offences). ***Knetchel* therefore cannot be used as an excuse or justification for the lack of enforcement of *Indian Act* by-laws by PPSC.**

⁶⁴⁶ *Ibid* at para. 15.

⁶⁴⁷ See *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra* note 247.

⁶⁴⁸ *R v. King*, (1987) 24 OAC 76 (ONCA).

⁶⁴⁹ *Ibid* at para. 16.

⁶⁵⁰ *Ibid* at 18.

7.2.4.2 Peace officers and by-law officers

The word “informant” in the definition of “prosecutor” for summary conviction offences has been interpreted to include a peace officer who investigated the offence and swore the information.⁶⁵¹ Police officers can also be included within the meaning of “agent” in the definition of prosecutors: ““agent” in the s. 785 definition allows the prosecutorial role to be filled by persons who are not barristers or solicitors with legal training, and on a plain reading could include persons such as police officers.”⁶⁵²

7.2.4.3 Lawyers

The definition of “prosecutor” for summary conviction proceedings in the *Criminal Code* includes “counsel.” “Counsel” is defined in s. 2 of the *Criminal Code* as referring to a lawyer licenced to practice in that province. Since there can be private prosecution, this means that prosecuting lawyers could either be connected with the office of the Attorney General (or Public Prosecutions), or they could be lawyers representing private parties prosecuting by-law offences.

7.2.4.4 Non-lawyers

As noted above, “agent” is not defined by the *Criminal Code* and can include non-lawyers. This was recently affirmed in the case of *Hearing Office Bail Hearings (Re)* (2017): “I find that Parliament’s intention in crafting s 785 was to allow non-legally trained persons to act as prosecutors for summary conviction offences.”⁶⁵³ **This means that a First Nation, prosecuting a by-law on its own does not have to use a legally trained individual; the peace officer or by-law officer who swore the information could prosecute the case or it could also be someone else trained to handle by-law prosecutions.**

7.2.5 Proving by-laws in court

In prosecuting by-laws, prosecutors will be required to prove the community’s by-law in court. Most other federal laws do not have to be proven as courts are entitled to take ‘judicial notice’ of these under the *Statutory Instruments Act*.⁶⁵⁴ This is because most other federal laws have to be published and registered in the *Canada Gazette* and this guarantees their reliability.

⁶⁵¹ Quigley, *supra* note 483 at 10-8, cites *R v. MacDonald* (1978) 6 CR (3d) 24 (PEI SC *in banco*) as support for the finding that police officers may prosecute a case. In support of the finding that having police officers prosecute summary conviction offences does not violate the *Charter*, Quigley also cites *R v Blundon* (1987), 63 Nfld & PEIR 253 (Nfld TD), *aff’d* (1988), 71 Nfld & PEIR 152 (Nfld CA); *R v Hart* (1986), 26 CCC (3d) 438 (Nfld CA); *R v White* (1988), 41 CCC (3d) 236 (Nfld CA).

⁶⁵² *Hearing Office Bail Hearings (Re)*, 2017 ABQB 74 at paras. 82.

⁶⁵³ *Ibid* at para 83.

⁶⁵⁴ *Statutory Instruments Act*, RSC 1985, c S-22 at s. 16.

However, because by-laws made under the *Indian Act* are exempt from registration and publication within the *Canadian Gazette*,⁶⁵⁵ they are ineligible to receive judicial notice.

Before the 2014 amendments, all by-laws had to be sent to ISC s. 81(1) for potential disallowance; s. 83(1) for approval and s. 85.1 as a copy. Receipt by the minister (and approval or non-disallowance) was part of the formal process of bringing the by-laws into force. The minister would also hold the original by-law. Now, following the 2014 amendments and the elimination of the s. 81(1) disallowance power, the formal process of bringing by-laws into force is publication of the by-law on an Internet site, in the *First Nations Gazette* (which is now an exclusively electronic publication — see [Section 5.4.3](#)) or in a local newspaper.

Before the 2014 amendments, s. 86 of the *Indian Act* provided that a certified true copy signed by the superintendent (the regional director of ISC), was evidence “that the by-law was duly made by the council and approved by the Minister, without proof of the signature or official character of the superintendent.” This made sense when the minister retained the original by-laws. However, where by-laws are now formalized through publication and neither s. 81(1) nor s. 85.1 by-laws are sent to the minister, certified copies from the superintendent are a thing of the past. The old s. 86 was therefore replaced with the 2014 amendments, but there was no provision on how to prove by-laws that replaced it. In our interviews, we heard concerns about how by-laws would now be proven.

The answer is that both the *Canada Evidence Act* and *Nova Scotia Evidence Act* contain similar rules on proving both paper documents and electronic documents.⁶⁵⁶ Where a First Nation possesses an original version of the by-law, a staff of the band who maintains the documents of the band can certify a true copy of the document.⁶⁵⁷ This is a similar process to proving a municipal by-law.⁶⁵⁸ Where an original copy is not accessible, but a copy exists on an online site, such as a band website or within the *First Nations Gazette*, there is a process within both acts to prove electronic documents.⁶⁵⁹ This can require an affidavit from an individual who maintains the website to attest that the site was operating properly to show there is no reason to doubt the integrity of the electronic document system.

⁶⁵⁵ *Statutory Instruments Regulations*, CRC, c 1509 at s. 7(1)(l). See also *R. v. Bear* (1982), 35 N.B.R. (2nd) 181 (N.B. Q.B.).

⁶⁵⁶ *Canada Evidence Act*, RSC 1985, c C-5 and *Evidence Act*, RSNS 1989, c 154. The provincial *Evidence Act* applies in most civil matters in the courts; however, the *Canada Evidence Act* applies in civil matters where the federal government has jurisdiction. How this plays out with by-laws is challenge. Our best guess is that where the federal Crown or the First Nation (as a delegated federal entity) prosecutes the by-law offence, the *Canada Evidence Act* applies; and where the province prosecutes the offence, the *Nova Scotia Evidence Act* would apply.

⁶⁵⁷ *Canada Evidence Act*, *ibid* at s. 25 and *Evidence Act*, *ibid* at s. 16.

⁶⁵⁸ *Municipal Government Act*, *supra* note 322 at s.188.

⁶⁵⁹ *Canada Evidence Act*, *supra* note 656 at ss. 31.1 to 31.8 and *Evidence Act*, *supra* note 656 at ss. 23A to 23F.

7.3 Discussion: Addressing the Prosecution Gap

What becomes clear from our overview of the prosecution process for summary conviction offences is that the field of who can act as a prosecutor for by-law offences is broad. Both the federal and provincial Crowns, lawyers, police officers, by-law officers or others can prosecute a by-law for a First Nation. This presents opportunities for some innovation, particularly for those First Nations who are interested in experimenting with First Nations-led solutions (which we also discussed in [Section 6.4.1.3](#)).

In focus: non-lawyers as prosecutors and options for innovation

Bands have known for some time that they can hire their own lawyer to prosecute offences, but this has often been viewed as cost-prohibitive given the lack of funding from governments. While fines collected from by-law prosecutions now go directly to First Nations (see [Section 9.4](#)), interviewees were doubtful that revenue raised from fines would be sufficient to cover the hiring of a prosecutor.

The possibility that non-lawyers, including by-law officers and others representing the First Nation, can act as prosecutors for the band presents opportunities for innovation. One could imagine the creation of a program to train community members to conduct by-law prosecutions (something akin to a very focused paralegal course), perhaps in partnership with First Nations and a local community college or university.

First Nation prosecutors could also handle prosecutions from more than one community to share resources and reduce costs. In our interviews, we heard that many communities would not necessarily need their own full-time dedicated prosecutor and could share such a position with other communities.

Another possible innovation, particularly for Nova Scotia, given the number of Mi'kmaq lawyers who graduate from Dalhousie University, would be to create a pool of capable Mi'kmaq prosecutors that are available to serve the needs of First Nations communities who wish to pass and enforce by-laws in their communities.

Such innovations will require resources and most First Nations lack own-source revenue to undertake such innovations without support from the federal and provincial governments. (We address this more directly below.)

While we have determined that both the federal and provincial Crowns can prosecute First Nation by-laws (see [Section 7.2.4.1](#)), **in the past, neither level of government has assumed prosecution of *Indian Act* by-laws as their responsibility. Both levels of government appear reluctant to prosecute and to assume the costs of providing such services.** Granted that PPSC has now started to prosecute some COVID-19 by-laws, this is a limited and temporary measure.

To address the prosecution gap, both provincial and federal governments must act. They must be prepared to prosecute by-law offences on behalf of First Nations (and undergo training to make them culturally competent to do so), or if First Nations prefer to prosecute their own laws, by either hiring their own lawyers or innovating in the ways suggested above, the federal and provincial governments must fund these services.⁶⁶⁰ These governments pay to ensure rule of law and provide safety and security services for other Canadian citizens; it should be no different for First Nations in their communities. Even if safety and security may look different in First Nations than other communities, as noted in *Caring Society* and *Dominique* (see [Section 2.9.1](#)), substantive equality means respecting such differences. As a first step, the Mi'kmaq should be reaching out to both the federal and provincial governments to discuss collaboration to address gaps in the enforcement of by-laws.

Any justification based on prosecutorial discretion to justify federal or provincial denial of services here raises similar problems as those discussed in [Section 6.4.3](#). Discretion is not without its limits. It must be exercised in good faith and cannot be fettered. If what we see here approximates a general policy not to prosecute *Indian Act* by-laws (which appears to be the case), there seems to be an improper fettering of discretion, as well as a failure to exercise discretion in good faith. Therefore, decisions by either government's prosecution services to reject requests from First Nations to prosecute a by-law infraction, if based on a general position not to enforce these, could be challenged on judicial review.⁶⁶¹ Another avenue by which to challenge this problem, which may be preferable to judicial review, similar to the situation of police that we discussed in [Section 6.4.3](#), is to **bring a human rights complaint or Charter challenge to the denials of service by either or both governments**. Such an avenue could be pursued where governments are not open to pursuing collaboration to address gaps in by-law enforcement.

We believe that Canada and Nova Scotia are equally responsible to provide prosecution services for First Nations by-laws, or providing funding to allow First Nations to provide such services. Denial of essential services, including justice services, on the grounds of First Nations/on-reserve status, is discriminatory considering the case law reviewed in [Section 2.9](#), including *Caring Society*, *Dominique*, *R v Turtle*, *Sumner-Pruden* and other cases. As noted in *Sumner-Pruden*, jurisdictional squabbling over who has responsibility for such services is not a reasonable justification for such discrimination.

⁶⁶⁰ Should this become the preferred route for some First Nations, one further issue that will need to be addressed is protecting the independence of First Nation prosecutors. Crown prosecutors generally have the authority to stay prosecutions as representatives of either the federal or provincial Attorney General. Agreements should be entered into to make it clear that First Nation prosecutors cannot be overruled by Crown prosecutors.

⁶⁶¹ Note that in *R. v. Anderson*, [2014] 2 SCR 167, 2014 SCC 41, the Supreme Court emphasized that exercises of prosecutorial discretion are entitled to considerable deference in a given case. As a denial might involve individual facts that may distract from larger systemic claims, strategically it might better to proceed by way of a human rights complaint. Parties have more flexibility in presenting their case and evidence before human rights tribunals, and there would not be a presumption of deference in favour of the government as there would be in an administrative proceeding. See also similar discussion at note 577.

Joint responsibility also flows from Jordan's Principle (reviewed in [Section 2.9.3](#)). This principle holds that both Canada and Nova Scotia are responsible for extending services that are available to non-Indigenous Canadians to First Nations people without delay. Any funding disputes between Canada and Nova Scotia are to be dealt with afterwards and in a way that does not delay the provision of the service.

Finally, the arguments canvassed in [Section 6.4.2](#) are equally applicable here, thus we will not repeat them in detail. Suffice it to say that the same claims under s. 7 and s. 15(1) of the *Charter* are possible. First Nations have a substantive equality right to services that meet their needs. It is highly unlikely that underfunded, if not non-existent, by-law enforcement and prosecution services meet that standard. Further, inadequate law enforcement and prosecution certainly deprive First Nations individuals of safety and security in the sense protected by s. 7 of the *Charter*. Moreover, when both governments provide these services to *other* citizens, the denials of such services to First Nations are both discriminatory (s. 15) and arbitrary (s. 7).

8 Adjudication of by-laws

Adjudication generally refers to the process of someone making a formal judgment or decision about a problem or disputed matter. The decision-maker is normally someone independent from the parties involved in the dispute. Adjudication is a key part of the enforcement process. When a First Nation alleges that someone violated a rule set out in a by-law, or a person says a First Nation government's by-law, or decision under a by-law, is unfair or violates their rights, and the two sides cannot agree, adjudication is needed for resolution.

The *Indian Act* does not address in any clear way how by-law offences are to be adjudicated. The *ISC By-Laws Manual* indicates that by-laws will be heard in court,⁶⁶² but does not say much more about this. There is no mention of which court hears by-law prosecutions, how justices of the peace may be involved or anything else. There are, however, several laws and legal principles that inform how by-laws are adjudicated and we address these in this chapter.

8.1 Types of decisions and disputes in the First Nations context

It is helpful in a discussion about options for adjudication to break down the different kinds of decisions and disputes that arise in First Nations governance.

First Nation government decisions — these are decisions the First Nation has to make as part of day-to-day governance. Examples include decisions over housing, residency and membership, social assistance, benefits, etc. Criteria for eligibility may be set out in band policies or also in a by-law.

Government decisions are not the type of decisions that are decided by courts or some other decision-maker who is arms-length from the government. Instead, they are decided by the government itself, or a **person, committee or board authorized to make decisions on the government's behalf** following criteria and rules set out by the government in policies or by-laws. This is already happening in First Nation communities, for example, social development administrators decide who will receive welfare assistance under the social assistance policy the band follows. Some bands appoint committees that make housing decisions under a band policy or give advice to the band on education decisions. This can also happen under by-laws.

As noted in [Section 5.4.2](#), bands can **delegate** administrative duties to individuals or committees, including advising on or making decisions on behalf of the Band based on criteria developed by the Band. An example would be giving a Residency Committee the power to decide whether a person meets the criteria for residency in the community set out in a Residency By-Law. Such a committee was the subject of *Mississaugas of the New Credit First Nations v Landry* (2011). The Court did not question the appropriateness of the band delegating a committee to make the decision. But the decision was set aside as it did not

⁶⁶² *By-laws Manual*, *supra* note 6, Chapter 8 at 8.

adhere to the rule of procedural fairness to give reasons for the decision.⁶⁶³ This highlights that bands and the bodies they delegate must adhere to similar obligations that Canadian governments must follow, though these obligations might look different in a First Nations context (see discussion at [Section 2.3.1](#)).

Quasi-criminal/regulatory offences – these are disputes about whether someone has committed an offence under a First Nation by-law or law. We call these ‘quasi-criminal’ or ‘regulatory’ offences. This is the most common type of dispute we think of when talking about by-law enforcement, but it is not the only kind. There are different options for hearing such disputes that are reviewed below.

Disputes between individuals and their governments – these are disputes between individuals and First Nations governments (or their delegated decision-makers) over actions that the individual feels were unfair. This includes complaints over decisions under by-laws or specific provisions in by-laws. Examples include a person who was denied a permit or evicted from their home by the band’s housing committee deciding under a by-law. This could also include complaints of violations of the person’s *Charter* rights, human rights, Aboriginal and treaty rights, or administrative law protections, as well as other fundamental rights protected under a First Nation’s legal order, as discussed in [Section 2.3.1](#). The different options for resolving such disputes are reviewed below.

Disputes between individuals – these can include dispute between community members over property or failure by someone to do something agreed to do, etc. Generally, they are not related to by-laws, so we will not be reviewing the different forums available for redress under the Canadian legal system. However, creating opportunities under First Nation jurisdiction to address by-law disputes may also open up forums for dealing with other disputes, like those between individuals.

Appeals — as a matter of fairness, there is usually some way that a first decision/ruling on a dispute can be subject to oversight. This is often called an ‘appeal’, but in some contexts where we are dealing with administrative decision-makers at first instance, this is instead called a ‘judicial review.’ In appeals/judicial reviews, reviewing courts are often limited by either common law rules or statutory rules in how far they can go in their review.⁶⁶⁴ We will discuss the types of appeal oversight available for each dispute forum in the sections below.

⁶⁶³ *Mississaugas of the New Credit First Nations v Landry*, *supra* note 83.

⁶⁶⁴ Generally, reviewing courts are not allowed to substitute their views entirely with that of the decision-maker below. For example, reviewing courts are often limited in reviewing how the decision-maker below considered and interpreted facts; only if the finding was demonstrably wrong (patently unreasonable), can they replace the decision-maker’s interpretation of the facts with their own. Ultimately, what determines the degree of review depends on the common law and written laws at play for a particular dispute forum.

8.2 Options within the Canadian legal system

8.2.1 Quasi-criminal and regulatory offences

8.2.1.1 Provincial Court

To prosecute by-laws under Canadian law, **the default rule is that the summary conviction process in the *Criminal Code* applies** (because of the federal *Interpretation Act* — see [Section 2.3.1](#)). This has been confirmed by the courts.⁶⁶⁵ The *Indian Act* also suggests that offences under ss. 81(1) and 85.1 by-laws are treated as summary conviction offences.⁶⁶⁶ Also consistent with this, the laws for provincial courts in each province recognize that provincial court judges can have jurisdiction conferred or imposed upon them by federal legislation.⁶⁶⁷

In focus: Provincial courts hearing offences under delegated First Nation laws

In one case, the British Columbia Provincial Court opined that it could not have been the province's intention, in having a provision in its enabling statute to hear federal laws, to give the provincial court jurisdiction to hear prosecutions of *Indian Act* by-laws or other laws passed by a First Nation under self-government legislation.⁶⁶⁸ However, this analysis was overturned by the British Columbia Supreme Court, which confirmed that by operation of the federal *Interpretation Act*, *Indian Act* by-laws and laws passed by the Westbank First Nation are considered subordinate federal legislation and are an “enactment of Canada” within the provincial court act.⁶⁶⁹

The *Criminal Code* states that “[e]very summary conviction court has jurisdiction to try, determine and adjudge proceedings” to which the summary conviction rules apply.⁶⁷⁰ Since the *Indian Act* is silent on who hears by-law offences, subsection (b) of the definition of “summary conviction court” in the *Criminal Code* tells us who can hear prosecutions of by-laws:

summary conviction court means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

⁶⁶⁵ See *R v Rice*, *supra* note 104, where the Quebec Court of Appeal held that by-laws are enforced in the ordinary courts of the province and not in the Federal Court. See also *R v Crosby*, *supra* note 635, which confirms that in relation to offences under the *Indian Act*, it is the federal *Interpretation Act* (see [Section 2.3](#)) that makes applicable all the provisions of the *Criminal Code* relating to summary convictions applicable. Section 106 of the *Indian Act*, *supra* note 346, does not grant jurisdiction to the provincial court, but only addresses the territorial jurisdiction in relation to *Indian Act* offences.

⁶⁶⁶ *Indian Act*, *ibid* at ss. 81(1)(1) and 85.1(4).

⁶⁶⁷ For example, see *Provincial Court Act*, RSN 1989, c 238, s. 7(b) which states that each provincial court judge shall “have and exercise all the powers and perform all the duties conferred or imposed upon a judge by or under any Act of the Legislature or of the Parliament of Canada.”

⁶⁶⁸ There, it the *Westbank First Nation Self Government Act*, SC 2004, c 17: see *Waterslide Campground v. Goulet*, 2006 BCPC 297 (BCPC) at para. 28-29.

⁶⁶⁹ See *Waterslide Campground v. Goulet*, 2008 BCSC 532.

⁶⁷⁰ *Criminal Code*, *supra* note 482 at s. 798.

...

(b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, ...

This means that a presiding justice of the peace (“PJP”) or a provincial court judge can hear by-law offences.⁶⁷¹ This provision also tells us that it has to be a PJP/judge who has jurisdiction in the judicial territory who hears the process.⁶⁷² The rules a PJP/judge must follow in adjudicating a by-law prosecution are those for summary conviction proceedings set out in the *Criminal Code*.⁶⁷³

Several interviewees mentioned that many provincial court judges are not necessarily well versed in First Nation laws or culture and that First Nations courts are a means of addressing that (we consider First Nations-led adjudication options in [Section 8.3](#)).

Side note: Provincial Courts in First Nation Communities

Recommendation 25 of the *Marshall Inquiry Report* called on the Chief Judge of the Provincial Court to take steps to establish regular sittings of the provincial courts on Nova Scotia reserves.⁶⁷⁴ This recommendation has been partially fulfilled. A provincial court began sitting in **Eskasoni First Nation** in 1996, as per recommendation #25. This was the only community with regular sittings of the provincial court until the **Wagmatcook First Nation** courthouse was opened in 2018. The Supreme Court of Nova Scotia (Family Division) also holds hearings in the Wagmatcook courthouse.⁶⁷⁵ **We have no knowledge of by-laws being prosecuted in either of these courts but see no legal impediment to their being heard in such courts or in any other provincial court.**

⁶⁷¹ The definition of “justice” at s. 2 of the *Criminal Code*, *ibid*, means “a justice of the peace.” In comments on this report, the province suggested that the Federal Court of Canada would have exclusive jurisdiction over by-laws that could be characterized as being more administrative or civil in nature (versus more quasi-criminal). We do not think this distinction makes a difference in the case of prosecution of an offence under a by-law. The reserve of exclusive jurisdiction to the Federal Court in ss18-18.1 of the *Federal Courts Act*, *supra* note 45, contemplates proceedings in the nature of judicial review against the Crown or a “federal board, commission or other tribunal.” A by-law prosecution involves the proving of an offence by a prosecutor against an individual or corporation. These are separate proceedings entirely distinct from administrative law/judicial review hearings and these are not caught by the *Federal Courts Act*, *supra* note 45.

⁶⁷² Section 106 of the *Indian Act*, *supra* note 346 also touches on the territorial jurisdiction of the provincial court, stating: “A provincial court judge has, with respect to matters arising under this Act, jurisdiction over the whole county, union of counties or judicial district in which the city, town or other place for which he is appointed or in which he has jurisdiction under provincial laws is situated.” It is not obvious whether this has the effect of expanding the jurisdiction of the provincial court beyond its existing territorial jurisdiction. In *R v Crosby*, *supra* note 635, the Ontario Court of Appeal suggested that this was the effect of s. 106. However, at the time s. 106 did not refer to provincial court judges, but instead to a “police magistrate or a stipendiary magistrate” who may have had narrow territorial jurisdiction.

⁶⁷³ See, in particular, *Criminal Code*, *supra* note 482 at ss. 804-809.

⁶⁷⁴ Marshall Report, *supra* note 222 at 29.

⁶⁷⁵ See Courts of Nova Scotia website, “Courthouse in Wagmatcook First Nation”, [online](#).

Aside from established courts within the community, there is flexibility to have the provincial court sit in places outside courthouses. The *Provincial Court Act* provides for the use of town halls in cities, towns and municipalities.⁶⁷⁶ A generous interpretation of these locations should include First Nations. Another option is the availability of night court (we heard that municipalities frequently use these courts to hear by-law prosecutions in [Section 4.4](#)). The *Night Court Act* allows the provincial government to set up night courts in different parts of the province to hear matters that can be presided over by provincial court judges and PJPs.⁶⁷⁷ Currently, two night courts operate in Halifax and Cape Breton Regional Municipality.⁶⁷⁸

Call to Justice 5.11 of the MMIWG National Inquiry Report called upon all governments to increase accessibility to meaningful and culturally appropriate justice practices by expanding restorative justice programs and Indigenous courts.⁶⁷⁹

As noted by Jonathon Rudin, there is no national strategy for the development of Indigenous courts within the provincial or territorial court system. Individual initiatives have arisen in different provinces at different times.⁶⁸⁰ In addition to Nova Scotia, Rudin describes initiatives in New Brunswick, Ontario, Saskatchewan, Alberta and British Columbia.⁶⁸¹ Most are *Gladue* or healing-to-wellness courts and Rudin does not track whether any of these courts hear *Indian Act* by-law offences. However, the Tsuu T'ina Court (part of the Alberta provincial court) does hear by-law offences through an arrangement with the local Crown prosecutors.⁶⁸²

The Tsuu T'ina court, located on the Tsuu T'ina First Nation near Calgary, opened in 1999 and has a distinctly designed courtroom reflecting Indigenous culture. Most of the court staff are Indigenous, as was the first judge who sat regularly in the court. From the outset the court was seen as part of a justice continuum that included more restorative justice practices rooted in Indigenous traditions. This aspect of the court is called the Peacemaking Initiative. The peacemaking circles, which are an integral part of the process, take place without the judge or counsel present, following which the circle delivers their recommendations to the Tsuu T'ina Court. The prosecutor then decides if charges can be dropped in favour of the circle's recommendations, and if charges cannot be dropped then the circle's findings will be considered during the sentencing stage. Once the offender has completed the tasks set out by the circle, a final circle is held to celebrate the success of the offender.⁶⁸³

⁶⁷⁶ *Provincial Court Act*, *supra* note 667 at s. 12.

⁶⁷⁷ *Night Courts Act*, *supra* note 337.

⁶⁷⁸ The Courts of Nova Scotia website, "Summary Offence Tickets and Night Court" [online](#).

⁶⁷⁹ MMIWG Report Executive Summary, *supra* note 56 at 71.

⁶⁸⁰ Jonathan Rudin, *Indigenous Peoples and the Criminal Justice System: A Practitioner's Handbook* (Edmond Publishing: 2018), Chapter 8, "Indigenous Courts" at 240.

⁶⁸¹ *Ibid* at 241 to 249. See also Angelique EagleWoman, "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations," (2019) 56:3 Alberta LR 669, 678-680.

⁶⁸² See Provincial Court of Alberta Website "Special Courts" [online](#): "The Tsuu T'ina Court has jurisdiction over criminal, youth, and bylaw offences committee on the Tsuu T'ina reserve."

⁶⁸³ Described in *Rudin supra* note 680 at 246-247.

The rules for appeal from decisions of a judge or JP on a by-law prosecution are also provided in the *Criminal Code*.⁶⁸⁴ In the provinces, appeals are heard by superior courts, thus in Nova Scotia, this would be the Nova Scotia Supreme Court.⁶⁸⁵ The rules permit the defendant to appeal a conviction or sentence if convicted under a by-law, and the First Nation could appeal the dismissal of the case, charge or sentence.⁶⁸⁶

8.2.1.2 Justices of the Peace

As noted above, under the default rules in the *Criminal Code*, a “summary conviction court” can be a justice of the peace (“JP”). All the same procedural rules discussed above, including those regarding appeals, would apply to a justice of the peace.

What makes the JP option compelling to First Nations is that there is more flexibility around it. JPs are not judges and, most often, lawyers are selected to be JPs. In Nova Scotia, several Mi’kmaq lawyers could be appointed as JPs. Furthermore, in principle, JPs do not necessarily have to be lawyers, though different governments may require JPs to be lawyers in their legislation (note that Nova Scotia requires this for ‘presiding JPs’, but Nunavut does not (there is room for Nova Scotia to create a new category of JP, as discussed below)). Having Mi’kmaq lawyers or community members act as JPs can go a long way to addressing the cultural competency concerns that we heard regarding provincial court judges. First Nations JPs hearing by-law prosecutions are far more likely to have awareness of First Nations history and contemporary issues, including by-laws. JPs can also be more mobile than provincial court judges, possibly stationed within a community, and able to hear matters within the community.

8.2.1.2.1 Federal appointment of JPs

The *Indian Act* gives the federal government the power to appoint JPs. This is set out at s. 107:

107. Appointment of justices

The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to

(a) any offence under this Act; and

(b) any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

⁶⁸⁴ See *Criminal Code*, *supra* note 482 at ss. 812 to 815.

⁶⁸⁵ *Ibid* at s. 812(1)(c).

⁶⁸⁶ *Ibid* at s. 813. Note that either the informant or Attorney General or his agent can bring appeals. This does not preclude a First Nation from bringing an appeal, since the First Nation or its agent would be the “informant,” as the one who laid the charge.

This section permits the federal government to appoint JPs who can hear offences under the *Indian Act*, including by-law offences, as well as certain *Criminal Code* offences, namely cruelty to animals, common assault, breaking and entering and vagrancy.⁶⁸⁷ As for the territorial jurisdiction of s. 107 JPs, this was explained in the Manitoba Justice Inquiry report as follows:

Section 107 does not refer directly to any territorial limitations upon the justices appointed. The long-standing tradition is that they carried a national appointment so that the Indian agents would not have to be reappointed every time they were transferred to another reserve. In addition, some agents were responsible for more than one band at a time. Therefore, the individuals received general appointments in their personal capacity after 1894, empowering them to serve as justices of the peace anywhere in the country. While the Act no longer explicitly states that these justices may conduct trials outside reserves, it also does not in any way restrict the location of the court.⁶⁸⁸

Interviewees recommended that the federal government appoint more section 107 justices of the peace, which would prevent First Nations from having to go through the burdens of the provincial court system. The recent House of Commons Report on First Nations laws was also enthusiastic about Canada exploring the possibility of making JP appointments under s. 107.⁶⁸⁹

Side note: Section 107 and the *Marshall Report*

As noted in [Section 2.8](#), Recommendation #20 of the *Marshall Inquiry Report* called for a Native Criminal Court in each Mi'kmaq community with justices of the peace appointed under Section 107. This was never implemented.

According to the 2002 JMAC Report which provides some history on the provision, the Office of Justices of the Peace was first provided for in 1881 when the *Indian Act* provided that all Indian commissioners, superintendents, inspectors and agents were *ex officio* justices of the peace to enforce the Act.⁶⁹⁰ For much of its history, s. 107 was used to give JP powers to Indian agents.⁶⁹¹ In 1951, the Act was changed to permit anyone to be appointed by the Governor-in-Council as a justice of the peace.⁶⁹² Rudin notes, however, that the section fell into disuse as the federal government ceased relying on Indian agents.⁶⁹³

⁶⁸⁷ The latter is currently not an offence under the Code, while the others are not linked to specific sections of the *Criminal Code* under s. 107 of the *Indian Act*, *supra* note 346.

⁶⁸⁸ Report of the Aboriginal Justice Inquiry of Manitoba (1999), Chapter 7, "Aboriginal Justice Systems," [online](#).

⁶⁸⁹ [Collaborative Approaches to Enforcement of Laws in Indigenous Communities](#), *supra* note 5 at 2, 7, 25.

⁶⁹⁰ In regard to the fact that only Indian agents and INAC staff were appointed as JPs, Jonathon Rudin remarks, "[Section 107] was never intended to allow Indigenous peoples to exercise control over justice matters; it was designed to allow non-Indigenous peoples to maintain control over Aboriginal Peoples": see Rudin, *supra* note 680 at 237.

⁶⁹¹ Rudin *ibid*.

⁶⁹² JMAC, *supra* note 28.

⁶⁹³ Rudin *supra* note 680.

With the rekindling of interest by First Nations in using the *Indian Act* to advance jurisdiction and control that came in the 1970s and 80s, there was renewed interest in s. 107. In 1972, the Governor-General in Council appointed the first Indigenous s. 107 JP, who then presided over both s. 107 courts at the Akwesasne and Kahnawake Reserves.⁶⁹⁴ The Pointe Bleu Reserve near Saguenay, Quebec also established a s. 107 court around this time.⁶⁹⁵ During this period, ISC considered expanding the use of s. 107 courts. In 1978 and 1979, the department conducted two studies on the potential of s. 107 courts to address Indigenous justice issues.⁶⁹⁶ In 1979, the ISC invited bands to submit Band Council Resolutions (“BCRs”) to the minister for individuals to serve as s. 107 JPs in their community, on the understanding that the minister would recommend such individuals to Cabinet for appointment.⁶⁹⁷ From 1973 to 1999, there were approximately 12 JPs appointed in at least three First Nation communities.⁶⁹⁸

Side note: Section 107 and the Mohawk of Kahnawà:ake

The Mohawks of Kahnawà:ake developed a ‘s. 107 court’ on their territory in 1979 (it was one of three ‘s. 107 courts’ created in the late 1970s). As recounted by Rudin, the Kahnawà:ake Court extended its jurisdiction beyond those offences listed in subsection 107(b) and heard any *Criminal Code* offences punishable by summary conviction, including hybrid offences where the Crown elected to proceed summarily. The most common summary conviction matters heard by the court included assault, mischief, theft, and breach of probation and peace bonds. The Court also prosecuted contested parking tickets.⁶⁹⁹ The Court did not receive provincial or federal funding and sustained itself through fines from ticket and fine revenue.⁷⁰⁰ The lack of government funding did, however, prevent the court’s expansion.⁷⁰¹ In 2015, Kahnawà:ake Court transitioned from the s. 107 *Indian Act* JP model into an inherent rights court by passing the *Kahnawà:ake Justice Act*.⁷⁰²

It appears that in the early 1980s, ISC reversed its earlier position on s. 107 courts and declined to create new courts and only appointed new justices to replace existing justices who had died, resigned or become incapacitated.⁷⁰³ The stated reason for this from the

⁶⁹⁴ Bradford Morse, “A Unique Court: S. 107 Indian Act Justices of the Peace,” (1982) 5:2-3 Can Leg Aid Bull 131 at 143.

⁶⁹⁵ Aboriginal Justice Inquiry of Manitoba, *supra* note 688 at Chapter 7.

⁶⁹⁶ Morse, *supra* note 694 at 139, n 53. These reports are Gary Youngman, “S. 107 and Other Alternative Justice Systems for Indian Reserves in B.C.” (unpublished, Dec. 1978, available from Pacific Region, DIAND), and Robert H. Debassige, “Section 107 of the Indian Act and Related Issues,” (Ottawa: Policy, Research and Evaluation Group, DIAND, 1979). We could not obtain copies of either of these reports.

⁶⁹⁷ *Section 107 of the Indian Act and Related Issues, 1979: A report prepared by Robert Debassige* (under contract) for the Policy, Research and Evaluation Group of the Department of Indian and Northern Affairs.

⁶⁹⁸ EagleWoman, *supra* note 681 at 699.

⁶⁹⁹ Rudin *supra* note 680 at 238.

⁷⁰⁰ Morse, *supra* note 694 at 150.

⁷⁰¹ Winona Diabo & Joyce King Mitchell, “Court of Kahnawake” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Issues* (Ottawa: Canada Communications Group, 1993) 402 at 403.

⁷⁰² EagleWoman, *supra* note 681 at 699; Rudin *supra* note 680 at 240.

⁷⁰³ Aboriginal Justice Inquiry of Manitoba, *supra* note 688 at Chapter 7.

government was that it was reviewing the whole *Indian Act* and did not want to prejudice this reform process.⁷⁰⁴ The Manitoba Justice Inquiry questioned this explanation since other major changes were instituted without halting the application of other *Indian Act* provisions.⁷⁰⁵ Writing in 2002, the JMAC Report indicated that only a handful of persons were appointed as JPs under s. 107. Appointments were made only where, for geographic reasons, it was ineffective to rely on the regular court systems.⁷⁰⁶

The 2002 JMAC Report identified limits on the jurisdiction of s. 107 JPs. These include:

- * They are limited to hearing offences “committed by an Indian or relate to the person or property of an Indian.”⁷⁰⁷ This suggests that perhaps some offences committed by non-First Nations on reserve would not be covered. Note, however, that this limitation relates *only* to subsection (b) which is in relation to the JP hearing four types of *Criminal Code* offences (cruelty to animals, common assault, breaking and entering and vagrancy). This same limit is not tied to subsection (a) which gives jurisdiction over any offences in the *Indian Act*, including by-laws.⁷⁰⁸
- * Their powers are limited when compared with provincial or territorial JPs whose powers vary but often include: performing wedding ceremonies, hearing highway traffic violations, hearing child and family welfare cases, trying young offenders, conducting preliminary criminal proceedings, trying summary *Criminal Code* offences, hearing violations of federal laws, hearing violations of provincial laws and sentencing offenders who have either entered guilty pleas or have been found guilty of summary offences.⁷⁰⁹
- * Section 107 is silent respecting tenure, salary and other benefits, taking of an oath of office, training, complaints and discipline, territorial jurisdiction and administrative support.⁷¹⁰

Based on these concerns, most federal JP appointments under s. 107 were made only where the person was already a justice of the peace under provincial laws (which would address these

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ *Ibid.*

⁷⁰⁷ JMAC Report *supra* note 28.

⁷⁰⁸ On this, there is case law from Quebec courts of non-First Nations having to appear in the Kahnawake court (a s. 107 court) to respond to traffic tickets. Generally, accused were required to appear, but given tensions relating to the Oka crisis, hearings were moved to courthouse in the municipality of Oka based on a s. 7 *Charter* argument: see *Favreau v Cour de Kahnawake*, [1993] RJQ 1450 aff'd [1995] RJQ 2348 (Que CA). However, after several years had passed and tensions lessened, the Quebec Superior Court held that the Kahnawake court could once again hear traffic matters involving non-residents: see *R v Duval*, [1996] RJQ 1634. See also discussion on this in Rudin, *supra* note 680 at 238-239.

⁷⁰⁹ JMAC Report *supra* note 28.

⁷¹⁰ *Ibid.*

gaps and limits in s. 107).⁷¹¹ Such cross-appointments ensure that a s. 107 JP, in addition to hearing *Indian Act* offences and by-laws, has the broader jurisdiction of a provincial JP.

Side note: Other First Nations perspectives on s. 107

The 1991 Manitoba Justice Inquiry Report and the RCAP Report were lukewarm on s. 107 because they saw it as an inadequate foundation for an Aboriginal justice system. The Manitoba Justice Inquiry Report suggested s. 107 was a vestige of a colonial past and was “unlikely to satisfy current demands from First Nations to establish their own justice system” and “[a]t most offers a short-term interim measure and indication that a separate court system can function readily in Indian reserves without causing grave concerns within the rest of society or the legal community.”⁷¹²

It appears that the federal government put a full moratorium on appointing s. 107 JPs sometime in 2003, ceasing even to replace existing JPs who had died, retired or became incapacitated.⁷¹³ This has affected the remaining s. 107 courts, as their last appointments date from in the 1990s. As a result of this, Akwesasne pushed on with creating its own court based on its inherent right (discussed further [Section 8.3](#)).

Jonathan Rudin and Angelique EagleWoman have suggested the federal government’s decision to cease s. 107 appointments related to the Supreme Court of Canada decision in *Ell v Alberta* (2003).⁷¹⁴ The case involved the Government of Alberta amending its *Justice of the Peace* legislation to require that all JPs who exercise judicial functions to have the minimum qualification of being a lawyer and 5 years’ related experience. Current JPs who lacked these criteria were removed from office and offered non-presiding JP positions.

Current JPs who were not lawyers challenged their removal as a breach of their security of tenure and independence. The Supreme Court disagreed, finding that the addition of the minimum requirement of being a lawyer did not compromise their tenure and independence, but in fact, enhanced it.⁷¹⁵ The removal of those JPs that did not have 5 years as a lawyer did not violate security of tenure. The Court held that removals were reasonably intended to further the interests that underlie the principle of judicial independence—public confidence and maintaining a strong and independent judiciary. The decision does not mandate, however, that JPs must have at least 5 years of legal training.

⁷¹¹ *Ibid.*

⁷¹² Aboriginal Justice Inquiry of Manitoba vol 1 at 305, quoted in Rudin *supra* note 680 at 239-240.

⁷¹³ EagleWoman *supra* note 681 at 700.

⁷¹⁴ Rudin *supra* note 680 at 240; EagleWoman *ibid* at 700, see note 230; *Ell v Alberta*, 2003 SCC 35.

⁷¹⁵ As part of its ruling, the Court held that JPs are subject to the principle of judicial independence as a result of their exercise of judicial functions directly related to the enforcement of law in the court system and the fact that they perform numerous judicial functions that significantly affect the rights and liberties of individuals.

It is not obvious what from this decision compelled the federal government to abandon s. 107 JP appointments altogether. We have two possible guesses but there are sound counter-arguments to both:

- (1) Early on in the decision, the Supreme Court acknowledged that the appointment and regulation of JPs fall to the province under s92(14).⁷¹⁶ While this is true, it does not necessarily follow (nor did the Supreme Court say) that this jurisdiction is exclusive and there can't be overlapping jurisdiction with respect to a federal power (this would be an area of double aspect – see [Section 2.5](#)). Canada has been appointing JPs in relation to First Nations justice on reserve for over a century. It would be reasonable to find that appointment of JPs on reserve is part of the federal power in relation to Indians (s. 91(24)). Federal exercise of jurisdiction over what would normally be regarded as a provincial matter is valid when that exercise of jurisdiction is “rationally related to intelligible Indian policies.”⁷¹⁷ **Thus, this case does not stand for the proposition that the appointment of JPs is an exclusive provincial jurisdiction.**

- (2) The decision affirms that the principle of judicial independence applies to JPs. It is clear from the 2002 JMAC Report that there was a concern in the government then that s. 107 would not be found to guarantee sufficient judicial independence of JPs since the *Indian Act* provisions do not specifically provide for the security of tenure and financial security of JPs.⁷¹⁸ **These concerns, paired with the Court's affirmation of JPs' duty to be independent, may be what led the government to abandon s. 107.** However, the state of the law is more nuanced than this position admits. **Considering the specific circumstances of *Indian Act* JPs, the Supreme Court could very well conclude that s. 107 judges do not raise s. 11(d) *Charter* concerns which were at issue in *Ell*** (the right to be tried by public hearing by an independent and impartial tribunal).

The Court in *Ell* noted that s. 11(d) *Charter* protection is of limited application. It applies to courts and tribunals that determine the guilt of those charged with criminal offences.⁷¹⁹ Section 107 JPs have an extremely limited criminal law reach (they are limited to crimes in four areas: cruelty to animals, common assault, breaking and entering and vagrancy). The bulk of what they will adjudicate are offences under the *Indian Act* and by-laws (which, as discussed in several sections of this report, are more in a 'regulatory' nature). In this regard, JPs resemble more administrative tribunals hearing regulatory offences than courts. With respect to administrative tribunals, the Supreme Court has held that they are not subject to the same requirements of

⁷¹⁶ *Ell v Alberta*, *supra* note 714 at para. 4.

⁷¹⁷ See also Peter W Hogg, *Constitutional Law of Canada*, 2014 Student Edition, *supra* note 166 at 28-4 to 28-5.

⁷¹⁸ JMAC, *supra* note 38: “Since the adoption of the *Canadian Charter of Rights and Freedoms*, the power of Justices of the Peace appointed under provincial legislation to conduct trials has come under scrutiny. Justices of the Peace who adjudicate offences which could lead to a sentence of a term of imprisonment, must meet the requirements of an impartial and independent tribunal, as provided in section 11(d) of the *Charter*. ... Section 107 as presently drafted would likely not sustain the scrutiny of the courts under section 11(d) of the *Charter*.”

⁷¹⁹ *Ell v Alberta* *supra* note 714 at para. 18.

independence as courts because there is no *Charter* guarantee of administrative tribunal independence.⁷²⁰ Administrative tribunals are generally expected to adhere to a degree of independence demanded by common law natural justice principles, however, these can be ousted by express statutory language or by necessary implication. **Therefore, the degree of independence required by a s. 107 JP is likely different than that exacted of a provincial JP.**

Second, the JMAC Report confirms that INAC's standard practice was to cross-appoint provincial JPs under s. 107. The **cross-appointment virtually guarantees that the JP possesses the requisite level of independence for s. 11(d) of the *Charter***, since most provincial JP statutes address security of tenure and compensation for provincial JPs.⁷²¹

Finally, if lack of security of tenure and financial security were real concerns, **ISC could have also addressed this through amendments to the *Indian Act* or via regulations under the *Act*.**⁷²²

ISC's abandonment of s. 107 JPs would thus seem unnecessary and unfortunate because it was allowing some communities to exercise more meaningful control over justice in their community. Although perhaps not a long-term or ideal response to Indigenous justice needs, it was some recognition that First Nations have a role to play in the administration of justice in their communities.

Like in the case of the RCMP and other police forces adopting a policy to not enforce by-laws, and the PPSC's policy not to prosecute by-laws, **we believe ISC and the federal government are open to some legal exposure for adopting a blanket policy of not making any s. 107 appointments.** While s. 107 is framed in discretionary terms ("the Governor in Council may appoint..."), as discussed in earlier sections, an active policy decision not to exercise this power whatsoever **may well constitute both a fettering of discretion and potential denial of services under the *Canadian Human Rights Act*** (see [Sections 6.4.3](#) and [7.3](#)).

8.2.1.2.2 Provincial appointments of JPs

We are of the view that provincially appointed JPs can hear *Indian Act* by-law offences.

Section 107 does not purport to give exclusive jurisdiction to the federal government to appoint JPs to hear First Nations by-laws. The province has overlapping—and, in fact, plenary—jurisdiction in the area of administration of justice under s. 92(14) of the *Constitution Act, 1867*. **We believe a provincial JP can hear by-law matters and does not require a cross-appointment as a s. 107 JP.**

⁷²⁰ *Ocean Port*, , *supra* note 85.

⁷²¹ See for examples, *Justices of the Peace Act*, RSNS 1989, c 244, s. 11B and 11C.

⁷²² While there is no specific regulation relating to justice of the pieces, subsection 73(3) of the *Indian Act*, *supra* note 346, provides a catch-all power, "The Governor in Council may make orders and regulations to carry out the purposes and provisions of this Act."

As a constitutional matter, the s. 92(14) power over “administration of justice” expressly includes “the constitution, maintenance and organization of provincial courts, both civil and criminal jurisdiction” and “procedure in civil matters in those courts.” Peter Hogg explains that, as a result of this power, provincial courts are not confined to deciding cases arising under provincial laws. The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over a full range of cases, whether the applicable law is federal or provincial or constitutional.⁷²³ **The point here is that provincial courts have the jurisdiction to adjudicate federal laws; this does not have to be specifically granted by the federal government.**⁷²⁴

Furthermore, **the provincial grant of jurisdiction to its courts does not have to specifically reference the power to adjudicate a federal law. Recognition within the statute (either expressly or implied) that a provincial court or tribunal has the power to decide questions of law will suffice to provide them with the power to apply all applicable laws, whether provincial, federal or constitutional.**⁷²⁵ Applying such principles, in *Ontario (Attorney General) v Pembina Exploration Canada Ltd.* (1989), the Supreme Court ruled that a provision in the province’s *Small Claims Court Act* granting the court jurisdiction in “any action where the amount claimed does not exceed \$1,000 exclusive of interest,” should be interpreted to include federal matters (in that case, admiralty law).⁷²⁶ Further, in *Paul v British Columbia (Forest Appeals Commission)* (2003), the Supreme Court held that a provincial forestry tribunal’s express or implied ability to consider questions of law granted it the jurisdiction to decide constitutional issues in relation to s. 35 of the *Constitution Act, 1982*. The Court emphasized that this result was clear and that even practical considerations could not rebut this.⁷²⁷

In focus: Ontario’s Indigenous Justice of the Peace Program

Ontario’s JP legislation provides that the Chief Justice of the Ontario Court of Justice can assign justices of the peace to hear matters under the *Provincial Offences Act*, other Ontario acts, and federal acts (which would include *Indian Act* by-laws).⁷²⁸ The province has recognized that there is a real need for First Nations communities to have access to JPs.

⁷²³ See Hogg, *Canadian Constitutional Law*, 5th ed., *supra* note 39 at Chap. 7, 7-1 to 7-3.

⁷²⁴ Hogg *ibid* at 7.15, “The general jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide “federal” questions. Nor does the power to decide federal questions have to be specifically granted to the provincial courts by the federal Parliament. On the contrary, if a federal law calls for the adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts.”

⁷²⁵ Hogg *ibid* at 7-3 at note 6.

⁷²⁶ *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 SCR 206. Of course, the Court noted that the federal government could displace this by its s. 101 constitutional power to grant exclusive jurisdiction to a court established under s. 101, such as the Federal Court. However, consistent with federalism principle, the grant of jurisdiction to Federal Court to hear admiralty matters was interpreted as being concurrent and not exclusive.

⁷²⁷ *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para. 39: “Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.”

⁷²⁸ *Justices of the Peace Act*, RSO 1990, c J.4, s 15(2).

Starting in the 1980s, Ontario began to develop an Indigenous justice of the peace program. The program includes a senior Indigenous justice of the peace⁷²⁹ who sits on the Ontario Court of Justices Advisory Committee on Education and is involved in developing education programs designed specifically for Indigenous justices of the peace.⁷³⁰ As of 2006, approximately 6% of Ontario justices of the peace were Indigenous.⁷³¹

A lawyer we interviewed from Quebec explained that in that province there is a requirement that a lawyer be a member of the Bar Society for at least 10 years before that person can be appointed a justice of the peace, which poses a problem as it greatly limits those who can be appointed as JPs from First Nations communities.

In focus: Nunavut’s Justice of the Peace Program

Call to Justice 5.10 of the Missing and Murdered Indigenous Women’s Inquiry Report called upon all governments to recruit and retain more Indigenous JPs, and to expand their jurisdiction to match that of the Nunavut justice of the peace.⁷³² Indeed, Nunavut provides an example of an innovative JP model that ensures that JPs will have knowledge of Inuit culture and language.

In Nunavut, lawyers and members of the RCMP are disqualified from acting as JPs.⁷³³ A person is eligible to become appointed if they are 19 years old, have been a resident of Nunavut for 1 year and are recommended by a JP Appointment and Remuneration Committee.⁷³⁴ The committee is composed of a judge of the Nunavut Court of Justice, a JP and three representatives, two of whom must not be employees of the Government of Nunavut.⁷³⁵ In appointing JPs, the committee must consider the candidates’ knowledge of Inuit societal values, knowledge of the Inuit language and knowledge of the community in which the candidate would serve if appointed.⁷³⁶ There are currently two full-time JPs in Nunavut.

Nova Scotia does not currently have a dedicated JP program related to Mi’kmaq communities. The *Justices of the Peace Act* gives the Governor in Council the authority to appoint provincial JPs.⁷³⁷ There are three categories of justices of the peace in Nova Scotia:

⁷²⁹ Ontario Court of Justice website, “Structure of the Court” [online](#).

⁷³⁰ Ontario Court of Justice website, “Justice of the Peace Education Plan,” [online](#).

⁷³¹ Paul Hong, “A Second Look at Justice of the Peace Reform in Ontario,” (2006) 38 CR (6th) 22 at 73.

⁷³² MMIWG Report Executive Summary at 71.

⁷³³ *Justices of the Peace Act*, SNWT (Nu) 1998, c 34 s 2(3)-(4).

⁷³⁴ *Ibid* at s 2(2).

⁷³⁵ *Ibid* at s 2.1.

⁷³⁶ *Ibid* at s. 2.2(2).

⁷³⁷ *Justices of the Peace Act*, *supra* note 721.

(a) Administrative Justice of the Peace

These are private citizens who have been appointed by the Minister of Justice. Administrative JPs are not required to have a law degree and are not employed by the Department of Justice. The sole role of an administrative JP is to perform civil weddings in and for the province of Nova Scotia.

(b) Presiding Justice of the Peace (“PJPs”)

PJPs must be practicing, or formerly practicing, lawyers who have a minimum of five years of practice experience. These people may be appointed on a full-time or part-time basis. They are authorized to perform duties related to some criminal law matters. These include issuing warrants, and conducting arraignments and trials for some types of cases.

(c) Staff Justice of the Peace

These people are employed by the Court Services Division of the Department of Justice and work primarily in Justice Centres. Staff JPs have many of the same powers as PJPs with some qualifications and exceptions. Some Staff JPs are also authorized to perform civil weddings.⁷³⁸

Side note: Mi’kmaq JPs in Nova Scotia

The Nova Scotia Department of Justice does not keep demographic statistics on their JPs. Anecdotally, we are aware of at least two Mi’kmaq administrative JPs who perform marriage ceremonies. On inquiry to the department on whether any of the current presiding JPs are Mi’kmaq or Indigenous, we were told, to Court Service’s knowledge, none of the current 12 PJPs self-identify as Indigenous.⁷³⁹

Note that the *Justices of the Peace Regulations*, sets out the various duties of the different JPs.⁷⁴⁰ Section 7(a) provides that a PJP has the authority to “deal with all matters prescribed to a justice of the peace in the *Criminal Code* and the *Summary Proceedings Act*.”⁷⁴¹ Although this language is not as specific as Ontario’s reference to JP jurisdiction over federal law, in our view, this impliedly recognizes that provincial PJPs can hear by-law prosecution hearings. The summary conviction process in the *Criminal Code* applies to the prosecution of by-laws (by virtue of the federal *Interpretation Act*) and provides that a “justice or provincial court judge” may hear the matter.⁷⁴² A “justice” is defined in the *Criminal Code* as “a justice of the peace.”⁷⁴³ The *Code* does not specify who appoints the justice of the peace; thus, a justice could be a provincially appointed justice of the peace. In addition, based on the constitutional

⁷³⁸ Summary from the Nova Scotia Justice website, “Justice of the Peace,” [online](#).

⁷³⁹ Email correspondence with Director of Nova Scotia Court Services, October 7, 2019.

⁷⁴⁰ *Justices of the Peace Regulations*, NS Reg 51/2002 (emphasis added).

⁷⁴¹ *Ibid* at s. 7(a).

⁷⁴² *Criminal Code*, *supra* note 482 at s. 785, definition of “summary conviction court.”

⁷⁴³ *Criminal Code*, *ibid* at s. 2, definition of “justice”.

principles discussed above, the implied power of PJPs to apply the law within the exercise of their duties includes federal law, which includes *Indian Act* by-laws.

PJPs in Nova Scotia currently have no role in adjudicating *Indian Act* by-laws. However, PJPs are designated to hear issues related to Emergency Protection Orders under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.⁷⁴⁴ They also hear matters under other federal statutes such as the *Cannabis Act* and the *Controlled Drugs and Substances Act*.⁷⁴⁵ This practice is consistent with our findings on constitutional principles discussed above – that despite no specific reference within their enabling law, provincial court judges and PJPs can and do apply federal law. **In principle, there is, therefore, no legal impediment to PJPs in Nova Scotia hearing *Indian Act* by-law prosecutions.**

Appointment of Indigenous PJPs to hear by-law offences

The appointment of provincial PJPs to hear *Indian Act* by-law offences would address a major challenge in *Indian Act* by-law adjudication. Such JPs could also hear other summary conviction offences in communities. The *Justice of the Peace Act* and *Regulations* do not specifically state whether JPs must sit in designated courthouses, or whether they can hear matters within the community. Note, however, that the *Provincial Court Act* permits the use of town halls in cities, towns and municipalities and a broad interpretation of these locations should include First Nations.⁷⁴⁶ A similar approach should govern with respect to PJPs and would provide further access to justice.

Nova Scotia is well-placed to undertake such an initiative. Due in large part to the IB&M Initiative at Dalhousie University's law school there is a large pool of Mi'kmaq lawyers who could act as PJPs serving Mi'kmaq communities. As of 2018-2019, there were 64 practising members of the Nova Scotia Barrister Society that self-identify as Mi'kmaq or Aboriginal, many of whom have more than five years at the bar.⁷⁴⁷ There would not likely be demand (at least at first) for one JP per community, but such a JP could be shared among certain communities. Note that under the *Justices of the Peace Regulations*, JPs have jurisdiction throughout Nova Scotia.⁷⁴⁸ A few interviewees said there needs to be an Indigenous court or a circuit court created to facilitate the prosecution of First Nation by-laws.

The government of Nova Scotia has the power to establish new categories and classes of justices of the peace, fix their powers and functions and their compensation by regulation.⁷⁴⁹

⁷⁴⁴ Email correspondence with Managing Lawyer, Legal Services Division, Nova Scotia Department of Justice, November 24, 2019. *Family Homes on Reserves and Matrimonial Interests or Rights Act*, *supra* note 122 at ss. 16-19.

⁷⁴⁵ *Cannabis Act*, SC 2018, c 16 and *Controlled Drugs and Substances Act*, SC 1996, c 19.

⁷⁴⁶ *Provincial Court Act*, *supra* note 667 at s. 12.

⁷⁴⁷ See Naomi Metallic, "Celebrating 30 Years of the Indigenous Blacks & Mi'kmaq Initiative: How the Creation of a Critical Mass of Black and Aboriginal Lawyers is Making a Difference in Nova Scotia" (June 27, 2019), Canadian Race Relations Foundation's *Directions Journal*.

⁷⁴⁸ *Justices of the Peace Regulations*, NS Reg 51/2002, s. 3.

⁷⁴⁹ *Justices of the Peace Act*, *supra* note 721 at s. 12(b), (c) and (f).

Accordingly, to solidify its commitment to Mi'kmaq justice issues in the province, the province could establish a new category of JP with the specific function of providing justice services to Mi'kmaq communities, including hearing *Indian Act* by-law offences. The qualifications and other possible duties of the JPs, such as adjudicating other disputes within the community, could be negotiated between the Mi'kmaq and the province.

Such an initiative would respond to the spirit of Recommendation #20 of the *Marshall Inquiry Report* calling for JPs who could hear summary offences under the *Indian Act* in Mi'kmaq communities.⁷⁵⁰ It would also be important for such an initiative to involve training and education opportunities for JPs on Indigenous matters, as in Ontario.

On the matter of funding, both governments have the authority to provide adjudication services to First Nations communities, which are justice services that other citizens take for granted, but neither has been fulfilling. Therefore, this is a human right and *Charter* issue. Application of Jordan's Principle dictates that First Nations should not be deprived of services they need because of jurisdictional wrangling. (For the relevant law on this, see [Section 2.9](#).)

Even apart from the prospect of the province appointing specific Indigenous JPs, existing PJPs could be hearing *Indian Act* by-laws now.

8.2.1.3 Injunction and other orders in the Superior Courts

There are instances where First Nations seeking to enforce provisions under their by-laws would go to the province's superior court. In Nova Scotia, this would be the Nova Scotia Supreme Court. As courts of 'inherent jurisdiction,' superior courts have the power to issue certain civil legal remedies.

One example of such a remedy is an order for an injunction. An injunction is an order of the court for someone to stop doing something on pain of later being found in contempt of court and facing a fine or jail time if they continue the enjoined conduct. As noted in [Section 6.3.2](#), s. 81(3) of the *Indian Act* allows bands to seek injunctive relief when someone fails to follow a by-law. There are no cited cases considering s. 81(3).⁷⁵¹ (Provincial court judges and PJPs can also issue injunctions in hearing by-law prosecutions under s. 81(2) of the *Indian Act* – see [Section 9.1](#))

A second example is where a decision or order has been made under a by-law and the person who is the subject of the order is not complying. In *Mississaugas of the New Credit First*

⁷⁵⁰ Marshall Report, *supra* note 222 at 28.

⁷⁵¹ While not a case about by-laws under the *Indian Act* (instead about a land code under the FNLMA where a First Nation brought a private prosecution), the judge noted that, "I recognize the Band may be entitled to pursue injunctive or other relief in another arena, instead of using the very blunt instrument of the Criminal Code to solve [their problem]." See *K'omoks*, *supra* note 138at para. 24.

Nations v Landry,⁷⁵² the First Nation made an application to the provincial superior court for a court order enforcing an eviction order that had been issued by the First Nation pursuant to one of its by-laws. The court did not question its ability to make such an order. However, the application was unsuccessful because the person evicted raised issues of procedural fairness with the decision to evict, with which the court agreed.⁷⁵³ In *Conseil des Atikamekw d'Opitciwan c Weizineau*, a band council successfully sought an order to remove a member who had violated their by-law seeking to banish persons convicted of drug trafficking in the community.⁷⁵⁴

8.2.2 Disputes between individuals and their governments

8.2.2.1 Judicial review in Federal Court

A person who is the subject of a decision under a by-law, such as a decision to evict or banish them, for example, can seek what is known as 'judicial review.' This is more limited than an appeal, but courts can review a decision to ensure that it complies with administrative law principles (jurisdiction, procedural fairness and substantive reasonableness) as well as the *Charter*. The result of judicial review, if a by-law is found to violate these legal protections, is normally to quash the decision. This is related to the fact that by-laws are regarded as delegated federal legislation (see [Section 2.3.1](#)).

Indian Act band councils have been found to be a "federal board" within the meaning of "federal board, commission or tribunal" as defined in the *Federal Courts Act*.⁷⁵⁵ Because of this, judicial review of decisions made under by-laws must occur in the Federal Court. There are several examples of judicial review proceedings in the Federal Court involving decisions to evict people under by-laws.⁷⁵⁶ Decisions of the Federal Court are appealed to the Federal Court of Canada, which can be appealed to the Supreme Court of Canada with leave.

8.2.2.2 Declarations in Superior Court

Another form of legal recourse a band member or resident might take if they think a by-law violates their *Charter* rights is to seek a declaration that their *Charter* rights have been violated. It is also possible to seek compensation for a violation of one's *Charter* rights, but the courts only award this sparingly.⁷⁵⁷ There are several examples of cases where people have sought a

⁷⁵² *Mississaugas of the New Credit First Nations v Landry*, *supra* note 83.

⁷⁵³ The Court found that the First Nation failed to give reasons for ordering Ms. Landry's removal, a denial of natural justice, and therefore refused to grant the requested enforcement order.

⁷⁵⁴ *Conseil des Atikamekw d'Opitciwan c. Weizineau*, *supra* note 67.

⁷⁵⁵ *Federal Courts Act*, *supra* note 67 at s. 2(1). See *Gabriel v. Canatonquin*, [1980] 2 F.C. 792; *Frankv. Bottle*, [1994] 2 CNLR 45; *Gamblin v. Norway House Cree Nation Band*, [2013] 2 CNLR 193.

⁷⁵⁶ Examples include *Solomon*, *supra* note 77; *Edgar v Kitasso Band Council*, 2003 FCT 166; and *Gamblin v Norway House Cree Nation Band Council*, [2000] 198 FTR 242.

⁷⁵⁷ See *Vancouver (City) v. Ward*, 2010 SCC 27; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed., (Tomson Reuters Canada Ltd.: Toronto, 2019), loose-leaf, Chapter 11, "Damages and Costs."

declaration of violation of *Charter* rights against by-laws in the superior courts.⁷⁵⁸ Decisions from provincial superior courts are appealed to provincial appellate courts. The Supreme Court of Canada can grant leave to appeal from decisions of the provincial appellate courts.

8.2.2.3 Human rights complaints

As an alternative to bringing a s. 15 equality claim in the courts (either through judicial review or seeking a declaration), a person who believes that a decision made by a First Nation government under a by-law discriminates against them concerning a service, good or employment, can make a complaint to the federal Canadian Human Rights Commission. We are not aware of any reported decisions from the Canadian Human Rights Tribunal to date relating to by-laws (these types of complaints were barred under s. 67 of the *Canadian Human Rights Act* until 2011).⁷⁵⁹

There is no right to appeal from a decision from the Canadian Human Rights Tribunal, however, decisions of the Tribunal can be judicially reviewed by the Federal Court of Canada. Decisions of the Federal Court are appealed to the Federal Court of Appeals. The Supreme Court of Canada can hear appeals from the Federal Court of Appeals.

8.3 First Nations-led options

Do First Nations have the jurisdiction under their by-law powers to appoint adjudicators (be they called JPs, courts or some other name) to hear by-law offences and other disputes that arise in relation to by-laws? While there is some older precedent that holds otherwise, and no explicit provisions on this in the *Indian Act*, we believe that recent developments in the law support the argument that the appointment of adjudicative decision-makers to hear by-law disputes is an ancillary procedural power (s. 81(1)(q)) to the s. 81(1)(c) power over observance of law and order, possibly also supported by s. 81(1)(a) health of the community (conceived broadly), and s. 81(1)(d) prevention of disorderly conduct).

8.3.1 Addressing older precedents

In *R v Stacey* (1981), two Mohawk men charged with assault under the *Criminal Code* argued that the Quebec courts did not have jurisdiction to act where an alleged offence occurred on-reserve by reserve residents against reserve residents. They argued that the s. 81(1)(c), (d) and (q) by-law powers gave the First Nation an exclusive power to maintain peace and order on reserve,

⁷⁵⁸ *Miller c. Mohawk Council of Kahnawà:ke, supra* note 51, marry-out and get-out rule in residency by-law found to violate s. 15 right to equality in the *Charter*; *R v. Winter*, 2008 CarswellOnt 7606 (Ont. Sup. Ct. J.), search provisions in an intoxication by-law alleged to violate s. 8 right to protection from unreasonable search and seizure. Search found reasonable.

⁷⁵⁹ There have been, however, cases where bands passed policies that could have been by-laws that have been held to violate the *Canadian Human Rights Act*: see *Jacobs vs. Mohawk Council of Kahnawake*, (1998) Canadian Human Rights Tribunal; *Courtois & Raphael v. Department of Indian Affairs & Northern Development*, (1990) Canadian Human Rights Tribunal; *Raphael et al. v. Montagnais Du Lac Jean Council*, (1995) Can. H.R. Tribunal.

including judicial jurisdiction. They also made arguments based on treaty and inherent sovereignty. The Quebec Court of Appeal rejected these arguments.⁷⁶⁰

The Court of Appeal found that federal law, including the *Criminal Code*, applied to the accused. On the arguments relating to *Indian Act* by-law powers, the Court of Appeal advanced two grounds for rejecting the argument:

30 ... The powers conferred by s. 81 are first of all, powers to regulate, and to regulate only “administrative statutes”. In other words, a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation. The power to give effect to regulations cannot extend beyond these administrative statutes; they are accessory and nothing more.

31 Moreover, the conclusions the appellants draw from this argument as to the exclusive judicial jurisdiction of the band council over offences committed by Indians is irreconcilable with s. 107 of the *Indian Act* which enables the Governor-General in Council to appoint the persons to the post of Justice of the Peace, with powers and competence of two Justices of the Peace, *inter alia*, for contravention of the *Criminal Code*, cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or is related to the person or property of an Indian.

The other relevant precedent is *Connolly v Conseil des Montagnais* (1990), involving a federally-appointed JP under s. 107. The First Nation of Lac St. Jean had a by-law that permitted tenancy disputes with the band to be heard by a ‘local tribunal.’ Under this provision, the JP heard a lease dispute between the band and tenant and invalidated the lease and ordered the individual to pay the band \$4,000.

The Federal Court of Appeal held that the s. 107 JP lacked jurisdiction to hear the dispute. It held that the wording of s. 107 did not grant the JP the power to render the decision being challenged, which in no way involved the prosecution of an offence under the *Indian Act* or *Criminal Code*.⁷⁶¹ Effectively, the JP was adjudicating a civil matter (as opposed to the prosecution of a quasi-criminal or criminal matter). The Court also noted that the by-law did not specifically grant jurisdiction to s. 107 JPs to act as “the local tribunal.”⁷⁶² Finally, the Court noted that nothing in the *Indian Act* authorized the council to adopt a by-law like this one granting a JP civil jurisdiction that is not granted to the s. 107 JP by the *Indian Act*.

The decisions suggest First Nations can have no ancillary s. 81(1) jurisdiction to appoint adjudicators because (1) this conflicts with s. 107, and (2) *Indian Act* by-laws are only administrative statutes.

⁷⁶⁰ *R v Stacey*, *supra* note 104.

⁷⁶¹ *Connolly v Conseil des Montagnais*, 1990 CarswellNat 181, 26 ACWS (3d) 162 (Fed CA) at para. 6.

⁷⁶² *Ibid* at para. 7.

We deal first with the *Stacey* court’s position that interpretation of by-laws are limited because, like municipal statutes, they are merely ‘administrative’ in nature. As discussed at [Sections 5.2.1](#), this view has changed significantly over the years following the Supreme Court’s *Spraytech* decision. In addition, in the First Nations context, there are self-government and reconciliation principles, as well as other interpretive principles, that now support a broader and possibly different approach from municipalities. The United Nations Declaration on the Rights of Indigenous People also calls for a different interpretive approach (see [Section 2.9.5](#)). Particularly relevant is art. 34, affirming the right of First Nations to revitalize, develop and maintain their own legal and justice systems, and art. 40 recognizing the right of First Nations to just, fair and timely dispute resolution mechanisms. This latter article is particularly relevant in light of the fact that, as noted throughout this report, the current approach to justice by both the federal and provincial governments (including FNPP, lack of enforcement, prosecution and adjudication of Band by-laws, and of lack adequate funding for these initiatives by both levels of government) is not meeting the safety, security and self-determination needs of First Nations.

Next, on the argument from both courts that any power of First Nations to appoint their own adjudicators under by-laws conflicts with s. 107 of the *Indian Act*, such arguments are no longer in line with the current law. Although not framed in the language of paramountcy, it does seem that the Court of Appeal in *Connolly* applied reasoning along the lines that s. 107 operated as a ‘complete code’ with respect to the appointment of JPs. However, under modern paramountcy law, the intention to create a ‘complete code’ ought to be clear in order to preclude the application of overlapping laws.⁷⁶³ The permissive language of s. 107 does not evidence a clear intention. Thus, the modern approach in division of powers cases (see [Section 2.6](#)) permits overlapping provincial or First Nations laws to co-exist with s. 107.

As can be seen from the above points, there is certainly a very different legal framework than existed at the time of *Stacey* and *Connolly*. According to the Supreme Court in *Bedford v Canada* (2013), binding precedent may be revised where new legal issues are raised as a consequence of significant developments in the law or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.⁷⁶⁴

8.3.2 ‘Borrowing’ other governments’ adjudicators

There is one remaining argument from *Connolly* to be unpacked. This is whether a First Nation can pass a by-law that contemplates the use or ‘borrowing’ of a JP appointed by the federal government under s. 107. The First Nations wanted the s. 107 JP to hear a tenancy dispute between the band and a tenant under its by-law, and the Federal Court of Appeal suggested the JP was only able to adjudicate offences under the *Criminal Code* and *Indian Act* according to the language of s. 107.

⁷⁶³ See *Bank of Montreal v Hall*, [1990] 1 SCR 121, *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, and *Alberta (Attorney General) v Maloney*, 2015 SCC 51. See generally [Section 2.6](#).

⁷⁶⁴ *Canada (Attorney General) v. Bedford*, *supra* note 268 at paras. 38-47.

A similar issue arose in a recent ruling by a Saskatchewan JP involving the One Arrow First Nation.⁷⁶⁵ Under its custom election code (the jurisdiction for which arises from different sources than the by-law powers⁷⁶⁶), One Arrow had provided that election appeals would be carried out by a justice of the peace. When the need for an election appeal arose in 2017, the First Nation approached the Saskatchewan Provincial Court to request the appointment of a JP for this purpose. JP Wallace denied the application, reasoning that provincial JPs were not authorized under their enabling legislation, the *Justice of the Peace Act*, to hear First Nation election appeals. Because election codes were primarily based on band's inherent jurisdiction, these did not fall within the grant of jurisdiction to JPs to hear matters dealing "with an Act of the Parliament of Canada, in any regulation made pursuant to an Act of the Parliament of Canada or at law."⁷⁶⁷

Both cases raise the issue of whether bands may incorporate other governments' adjudicators into legal processes developed in their by-laws when these adjudicators are not already legally entitled to act in the matter under their own laws. As discussed in [Section 8.2.1](#), federal JPs, and provincial courts and JPs are already empowered under law to hear by-law offences.⁷⁶⁸ The question *Conolly* and *One Arrow* pose is whether First Nations could legislate to use these adjudicators to hear other First Nation disputes. Hence, our use of the language of 'borrowing.'

Similar to the situation of First Nations using/borrowing provincial summary offence ticket ("SOTs") infrastructure (discussed in [Section 6.3.3](#)), this would likely have to be negotiated with the province, as it contemplates using paid employees of the province that do not otherwise have an obligation to act. The province ought to be receptive to such negotiations as part of reconciliation and addressing the justice needs of First Nations in the province. Canada could also be involved in discussions of cost-sharing.

Finally, while the functions of PJPs in Nova Scotia, set out in the regulations, are primarily focused on summary criminal matters at this time, we do not believe this necessarily prevents

⁷⁶⁵ *Application to Appoint a Justice of the Peace to Administer an Election Appeal for One Arrow First Nation*, November 10, 2017 per M.C. Wallace, S.J.P. (SK PC) [*One Arrow*].

⁷⁶⁶ The power for custom election arises from an interpretation of ss 2(1) and 74 of the *Indian Act*, *supra* note 346, as well as inherent powers: see *Gamblin v Norway House Cree Nation and Band and Attorney General of Canada*, 2012 FC 1536.

⁷⁶⁷ *Justice of the Peace Act 1988*, SS 1988-89, c J-5.1 at s. 6(4).

⁷⁶⁸ Note that we believe this is a distinct issue from the question of whether federal and provincial JP (as well as provincial courts) having the ability to hear by-law offences. Our conclusion, based on our analysis in [Section 8.2.1](#), is that federal JPs, under s 107, and provincial courts and JPs, under the combination of provisions in the *Indian Act*, *supra* note 346, the federal *Interpretation Act*, *supra* note 42 and the *Criminal Code*, *supra* note 482 as well as pursuant to s. 92(14) of the *Constitution Act, 1867*, have the jurisdiction to hear *Indian Act* by-law offences. In *One Arrow*, *supra* note 765, M.C. Wallace, S.J.P. suggests in *obiter* comments that prosecution of by-law offences would also not be within the jurisdiction of Saskatchewan JPs because these are also not federal laws or regulation, nor are *Indian Act* by-laws mentioned in their enabling statute's section on the prosecution of municipal by-laws. We believe the analysis is faulty as by-laws are clearly contemplated as federal regulation under the federal *Interpretation Act*. This, and other arguments we canvass in [Section 8.2.1](#) are not addressed in the decision, thus there are reasons to question their correctness.

Nova Scotia JPs from adjudicating disputes that appear more administrative or civil disputes in the First Nations context. Administrative JPs preside over civil marriages. As noted in [Section 8.2.1.2.2](#), the government of Nova Scotia has the latitude to amend its regulations to provide for both new categories of JPs, as well as their exercise of new functions.

8.3.3 Developments in the federal position on First Nations adjudicative bodies

Apart from the *Indian Act*, over the last 30 years, Canada has passed other federal statutes and self-government agreements that specifically contemplate First Nations' powers to appoint justices of the peace, courts and other adjudicative bodies.⁷⁶⁹ This includes the ability of First Nations to appoint justices of the peace to hear contraventions of laws passed under the *First Nation Land Management Act* (1999);⁷⁷⁰ the government of the Mohawks of Kanesatake to appoint justices of the peace to adjudicate offences of contraventions of their laws over their lands under the *Kanesatake Interim Land Base Governance Act* (2001);⁷⁷¹ the establishment of a Nisga'a court with the power to review administrative decisions of the Nisga'a government and public bodies, adjudicate prosecutions of Nisga'a laws and hear disputes arising under Nisga'a laws between Nisga'a citizens on Nisga'a lands under the *Nisga'a Final Agreement* (1999);⁷⁷² the creation of an Inuit court to adjudicate Inuit laws and by-laws under the *Nunatsiavut Agreement* (2005);⁷⁷³ and the creation of the Sioux Valley Dakota Nation Court which can prosecute Sioux Valley Dakota Nation laws and hear civil disputes under the *Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement* (2013).⁷⁷⁴

These examples show that the federal government has and continues to recognize First Nations' powers over adjudicative matters. **But it also raises the question: how could the power to appoint adjudicators be implied in s 81(1) when Canada has otherwise sought to be explicit?** In answering this, we note, first, that this practice has not always been consistent.

One area where the courts have long recognized First Nations' ability to pass laws and develop their own adjudicative mechanisms is in the context of custom election laws.⁷⁷⁵ Section 2(1) of the *Indian Act* recognizes that band councils can be selected by custom. **No further substantive rules of procedures are prescribed around this power. From this, communities have developed a variety of laws (some written and unwritten) on leadership selection, including creating their own dispute resolution bodies to hear election disputes and appeals.** The

⁷⁶⁹ Note, however, that both the 2002 JMAC Report, *supra* note 28, and the proposed *First Nations Governance Act* (FNGA), *supra* note 177, were silent on the ability of First Nations to appoint their own JPs. The *Naskapi and the Cree-Naskapi Commission Act* (1984), *Sechelt Indian Band Self-Government Act* (1986), and the *Westbank First Nation Self-Government Agreement* and the *Westbank First Nation Self Government Act* (2000) are also all silent on the recognition of powers to create courts by the Indigenous signatories to those agreements.

⁷⁷⁰ *First Nations Land Management Act*, *supra* note 122 at s. 24(1).

⁷⁷¹ *Kanesatake Interim Land Base Governance Act*, SC 2001, c 8, s. 16.

⁷⁷² Nisga'a Final Agreement 1999, [online, at Chapter 12, "Administration of Justice."](#)

⁷⁷³ Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada, [online](#) at art. 17.31.

⁷⁷⁴ *Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement* (2013), art. 53 [online](#).

⁷⁷⁵ *Jock v. Canada* (1991), 41 F.T.R. 189.

courts have recognized broad powers of First Nations in this area, noting that questions of the validity of these laws and tribunals rest more on political questions than legal ones—that is, whether there is broad community consensus supporting their existence.⁷⁷⁶ ISC’s policy on custom election codes also encourages communities to develop their own appeals system.⁷⁷⁷

With respect to the explicit recognition of adjudicative powers, we note that some statutes and agreements require approval by Canada (or both Canada and the relevant province) to ensure the design of adjudicative bodies meets specific conditions.⁷⁷⁸ For other bodies, all that is specified is that the law creating the body address particular matters (e.g., tenure and remuneration), not that these be approved by external governments.⁷⁷⁹ While not entirely consistent, the trend appears to be for more recent acts and agreements (the latest being from 2013) to not require external approval, but only set out some expected conditions of the adjudicative body. Canada also has not challenged Akwesasne’s inherent right court.

Canada and provinces coexisting with a First Nations inherent right court

The territory of the Mohawk of Akwesasne spans New York State, Ontario and Quebec. In the mid-1960s, s. 107 JPs were appointed to the community which from that point forward operated as a court for the community. The last appointment of a JP occurred in 1990 and with the moratorium in place since 2004 (see [Section 8.1.2.1](#)). On asking Canada how it would replace retiring JPs, the advice given to the community was to seek to have JPs cross-appointed to the community by the governments of Ontario and Quebec. This seemed like an unusually burdensome solution, so the council chose instead to assert inherent rights and establish a new court instead.⁷⁸⁰

The Akwesasne Court was formalized and entered into force in August 2016. *EagleWoman* explains that its judges received and underwent extensive training from a Montreal law firm on topics such as criminal and civil procedure, ethics, due process and judicial fairness. The Akwesasne Justice System is informed by four common themes: societal order, standards of conduct, protection of members and provision of stability and certainty. There are also Mohawk law principles that inform the operation of justice services, such as the kinship or clan system; collective rights; principles of peace, strength and the good mind; non-adversarial interactions and restoration of or removal of individuals.⁷⁸¹ Thus, traditional

⁷⁷⁶ *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D.) *Bone v. Sioux Valley Indian Band No. 290 Council* (1996), 107 F.T.R. 133 *Lac des Milles Lacs First Nation v. Chapman*, 1998 CanLII 8004 (F.C.) *McLeod Lake Indian Band v. Chingee*, 1998 CanLII 8267 (F.C.) *Salt River First Nation 195 (Council) v. Salt River First Nation 195*, 2003 FCT 670 (CanLII) *Francis v. Mohawk of Kanesatake (Council)*, 2003 FCT 115 (CanLII) *Catholique v. Band Council of Lutsel K’E First Nation*, 2005 FC 1430 (F.C.) *Goodtrack v. Lecaine*, 2008 FC 771 *Pahtayken v. Oakes*, 2009 FC 134 (CanLII), aff’d 2010 FCA 169.

⁷⁷⁷ Indigenous Services Canada website, “Conversion to Community Election System Policy,” online: <https://www.sac-isc.gc.ca/eng/1433166668652/1565371688997>.

⁷⁷⁸ See *Kanesatake Interim Land Base Governance Act*, *supra* note 771; Nisga’a Final Agreement 1999, *supra* note 771; and Land Claims Agreement Between the Inuit of Labrador and Her Majesty, *supra* note 773.

⁷⁷⁹ See *First Nations Land Management Act*, *supra* note 122 s. 24(1); and *Sioux Valley Dakota Nation Governance Agreement*, *supra* note 774 art. 53.

⁷⁸⁰ *EagleWoman supra* note 681 at 700.

⁷⁸¹ *Ibid* at 700-701.

restorative justice principles inform the development of laws and the orientation of the court.⁷⁸² The community also developed a legislative commission that develops the legislation of the community that includes extensive community consultation and results finally with a community referendum on their laws.⁷⁸³

While the federal and provincial governments have not fully embraced the Akwesasne Court’s jurisdiction through any formal recognition, nor have they actively sought to deter the activities of the court.⁷⁸⁴ In May 2019, the Akwesasne Court was showcased as a model in First Nation jurisdiction hosted by the Department of Justice Canada.⁷⁸⁵ There are also cross-jurisdictional issues that remain outstanding, such as the need for a mechanism for recognition of Akwesasne Court orders in Ontario and Quebec courts for such things as parking ticket convictions.⁷⁸⁶ Adequate funding of the court remains a challenge.⁷⁸⁷

Even more recently, it appears Canada has come to see the power over adjudication and other enforcement procedures as implied within substantive jurisdiction over an area, without the requirement of approval by external governments or even prescribing conditions the adjudicative body must meet.

This can be seen in the recent *Act respecting First Nations, Inuit and Métis children, youth and families* (2019) (“*FNIMCYF*”). Section 18 of the *Act* affirms the inherent right of Indigenous people to self-govern over child and family services, recognizing it includes the authority to administer and enforce such laws, which includes the authority to provide for dispute resolution:

Affirmation

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

Dispute resolution mechanisms

⁷⁸² For further information about the Court, see Mohawk Council of Akwesasne website, “Justice” [online](#).

⁷⁸³ Interview with Prosecutor for the Akwesasne Court, June 11, 2010.

⁷⁸⁴ *Ibid* at 701.

⁷⁸⁵ Justice Canada, *Exploring Indigenous Justice Systems in Canada and Around the World*, Gatineau, Quebec, May 14-15, 2019. Joyce King, Justice of the Peace and Director of the Akwesasne Justice Department, spoke on a panel entitled “Indigenous Courts in Canada: Experience and Lessons Learned.”

⁷⁸⁶ EagleWoman *supra* note 681 at 701; interview with Prosecutor for the Akwesasne Court, June 11, 2010.

⁷⁸⁷ Table dialogue with Joyce King at *Exploring Indigenous Justice Systems in Canada and Around the World*, Gatineau, Quebec, May 14, 2019.

(2) For greater certainty and for the purposes of subsection (1), the authority to administer and enforce laws includes the authority to provide for dispute resolution mechanisms.⁷⁸⁸

We note that s. 18(2) effectively recognizes that grants of substantive jurisdiction necessarily imply/include procedural rights to administer and enforce laws, which includes adjudication of such laws.⁷⁸⁹ This is consistent with Peter Hogg’s observation that jurisdiction on a substantive area must include a power of enforcement because enforcement is rationally and functionally connected to the substantive power.⁷⁹⁰

It might be that we have turned an important corner with *FNIMCYF*, where **the federal government has both recognized inherent jurisdiction⁷⁹¹ and the fact that jurisdiction over a subject matter necessarily includes procedural and adjudicative jurisdiction. This context should inform our understanding of Parliament’s intentions and goals with respect to interpreting other federal laws recognizing First Nation jurisdiction, including the *Indian Act*.** Such an approach would be in keeping with recognizing the by-law provisions as ‘quasi-constitutional’ legislation that should be interpreted as capable of changing in light of social circumstances and an evolving understanding of Indigenous jurisdiction (see [Section 5.2.1](#)). Such an approach would also be in keeping with the ‘reconciliation’ and self-government principles (see [Section 2.9.7](#)).

It should also be recalled that the absence of conditions stipulated in law or in agreement for such matters as tenure, remunerations, independence, etc., does not mean that such issues will not be addressed in a First Nations by-law creating adjudicative bodies to address disputes arising under by-laws. As discussed in [Section 2.3.1](#), the obligation to respect *Charter* and administrative law principles applies to First Nations by-law powers, though their application must be sensitive to the First Nations context. Thus, communities drafting such by-laws, should address issues such as the adjudicator’s independence from the First Nation government,

⁷⁸⁸ *An Act respecting First Nations, Inuit and Métis children, youth and families*, *supra* note 122 at s. 18. Note that the *Act*’s recognition of self-governance is currently being challenged by Quebec and will be heard by the Supreme Court of Canada in December 2022.

⁷⁸⁹ *Ibid* s 20. For most Indigenous groups on most areas of jurisdiction, including adjudication of their laws, there will be a practical need for such agreements, particular since many lack own own-source revenue to finance development, enforcement and adjudication of their laws. We have also discussed how the federal and provincial may have legal obligations to provide such funding in Sections [6.4.2](#) and [7.3](#).

⁷⁹⁰ See Hogg, *Constitution Law of Canada*, 5th ed., *supra* note 39 at 19.5(f).

⁷⁹¹ As noted earlier at note 788, Quebec has brought a constitutional challenge to this law. Its Court of Appeal held the *Act* to be largely constitutional, and confirmed that inherent right to self-government, at least in respect of child and family services, is a generic, inherent right affirmed by s 35 of the *Constitution Act, 1982*. On appeal to the Supreme Court, the government of Canada takes the position that there is a generic right to self-government not only in relation to child and family services but extends to all matter that “are internal to a community and necessary to ensure its survival and development as a distinctive Aboriginal community” (Canada’s *factum* at paragraph 89.)

including security of tenure and remuneration,⁷⁹² qualifications, duties and powers, and appeals.

8.3.4 Considerations for developing First Nation adjudication bodies

We have concluded that there are reasonable arguments for an implied power of First Nations to legislate using their by-law powers (ss. 81(1)(a), (c), (d) and (q)) to create adjudicative mechanisms (e.g., courts, JPs, tribunals, etc. – there is no magic in the name) to address disputes under by-laws, including the adjudication of offences and hearing disputes between individuals and First Nations relating to by-laws. On a broad interpretation of the by-law powers, it is also possible for First Nations to address legal issues and disputes between individuals and provide for their adjudication.⁷⁹³

Consistent with our earlier conclusion that both governments are responsible to provide adjudication services to First Nations communities, we recommend that this is a function that one or both levels should fund. Further, Jordan’s Principle dictates that the government of first contact would pay, avoiding delay in First Nation access to the service and leaving discussions of the percentage of contribution to be resolved between the federal and provincial governments at a later date.

In focus: Ontario funding of First Nation By-Law Adjudication Process

In Ontario, the Indigenous Justice Division of the Ministry of the Attorney General, has been funding by-law enforcement and Indigenous-related projects in First Nations communities in the province. One project on First Nation dispute adjudication involved a two-year pilot project to establish an Elders Tribunal comprised of one mediator/arbitrator and a roster of five to seven Elders. The tribunal has the authority to enforce Band by-laws and to arbitrate civil disputes between band members.

In contrast to Canada, the United States has long recognized American tribes’ jurisdiction over justice and tribal courts, and view these powers as being within tribes’ inherent jurisdiction. As noted by EagleWoman, “tribunal courts have been instrumental in providing culturally appropriate issues such as child welfare and for criminal conduct occurring on reservations.”⁷⁹⁴ As argued by EagleWoman, Indigenous peoples, state governments and courts

⁷⁹² As discussed in Section [8.2.1.1.2.1](#), in relation to *Ell v Alberta*, *supra* note 714, adjudicative bodies who do not focused on criminal law offences are not bound by s 11(d) *Charter* requirements of independence, but only common law natural justice principles and these can be ousted by express statutory language or by necessary implication.

⁷⁹³ Another option is using the *Arbitration Act*, RSNS 1989, c 19. This provincial law allows private parties to use a decision-maker of their choosing and give the decision force of provincial law. A decision made pursuant to a valid arbitration/submission agreement has the same effect in all respects as if it had been made as an order of the Nova Scotia Supreme Court. To use private arbitration, parties sign an agreement to submit their dispute to arbitration. The agreement to arbitrate is irrevocable unless a judge of the Supreme Court rules otherwise. Private arbitration gives parties to a dispute much freedom to design their own processes for dispute resolution, including choosing the decision-making.

⁷⁹⁴ EagleWoman, *supra* note 681 at 672.

in Canada can look to the experiences in the US to learn wise practices and approaches to support the development of Indigenous peoples' adjudicative jurisdiction in Canada.⁷⁹⁵

In designing their own adjudication processes for by-law offences and other disputes, there is flexibility available to First Nations to develop processes that reflect their needs and culture. While First Nations have to account for *Charter* rights and administrative law principles in the development of their systems, this does not mean having to mirror the Canadian system. As has been noted several times in this report, there is flexibility in translating how these legal principles apply in a First Nations context (see [Section 2.3.1](#)).

Many Indigenous nations' legal systems include values that promote the restoration of relationships and healing. On account of this, a First Nation may wish to have alternative measures available to resolve disputes as opposed to those that look more adversarial.

Option for an inquisitorial model of dispute resolution

There are already some Indigenous groups that have passed laws under the *Act respecting First Nations, Inuit and Métis children, youth and families* (2019), including some that have developed innovative adjudicative models. Notably, the Cowessess First Nation has created a tribunal to review and adjudicate child welfare cases pertaining to its citizens, which adopts an inquisitorial approach to dispute resolution, as opposed to an adversarial model.⁷⁹⁶

In an inquisitorial system, the court/adjudicator actively participates in the fact-finding process by questioning defense lawyers, prosecutors and witnesses, and examining evidence. This is different from the adversarial system, where the adjudicator plays a more passive role of impartial referee between the prosecution and the defense. It is believed the more hands-on role of the adjudicator in the process can limit the amount of procedural wrangling that often affects adversarial hearings.

First Nations can design their adjudication/court system to include restorative justice elements. (It is also possible to have a pre or post-charge restorative process operating around the default summary conviction process for by-laws. We discuss this further in relation to sentencing circles in [Section 9.2](#) and the community's powers to supplement the process in [Section 9.3](#).)

As noted in [Section 8.2.1.1.1](#), the Tsuu T'ina Court in Alberta has a Peacemaking Initiative as part of the provincial court process. Peacemaking circles take place without the judge or counsel present and then deliver their recommendations to the Tsuu T'ina Court. The prosecutor then decides if charges can be dropped in favour of the circle's recommendations, and if charges cannot be dropped, the circle's findings will be considered during the sentencing stage.

⁷⁹⁵ See especially, *ibid* at 689-690.

⁷⁹⁶ For more on this, see [Eagle Woman Tribunal Brochure](#).

The *Kahnawà:ake Justice Act* provides for a dispute resolution alternative to going through the Kahnawà:ake Court. The *Act* provides that to maintain balance and harmony, the alternative dispute process is the entry point for the Kahnawà:ake justice system, provided the parties are in agreement that restorative justice is appropriate. As a general rule, the parties' legal counsel should not participate in the restorative process.⁷⁹⁷

Several of the US tribal courts have alternative dispute resolution available as an option instead of adversarial proceedings, including the Navajo and Ottawa Nations. The Navajo Nation has an extensive *Guide to the Peacemaking Program of the Navajo Nation*.⁷⁹⁸ A brochure of the process describes it as the traditional Diné (Navajo) method for solving problems. Peacemaking emphasizes that Diné people solve their own problems by talking it out and finding justice, rather than depending on the courts. It can be used for most issues and can be done in the home or at a court facility. Peacemakers are persons known in their community for fairness, wisdom, respect and planning ability. Peace is restored through talking it out and using traditional values, thinking about the impacts of the events on everyone involved, seeking forgiveness, and focus on the wellbeing of families, clans and the Diné community.⁷⁹⁹

The Little River Band of Ottawa's Peacemaker Program explores the issues and possible causes of the dispute and helps direct the participants to understand and develop a new relationship, start healing and define a new balance in their lives. The participants are family members, married couples, employees, community members, school students, committees and governmental departments. Peacemakers help address the problem and guide all those involved to reach an understanding and solve their problems. The Little River Band of Ottawa offers an Advanced Peace Training program.⁸⁰⁰

Mi'kmaq lawyer and professor, Tuma Young, has written about developing a Mi'kmaq dispute resolution process based on a Mi'kmaw kinship model.⁸⁰¹ Such a proposal could inform the design of alternative dispute processes in Mi'kma'ki, including Nova Scotia.

8.3.5 Appeals from First Nations adjudicative bodies and involvement of Canadian courts

Should First Nations decide to exercise their own jurisdiction over adjudication, one issue that arises is whether an appeal body also needs to be created. People tend to expect a right of appeal, and the summary conviction appeal procedure for by-law prosecutions includes a right of appeal (see [Section 8.2.1.1.1](#)).

Under Canadian law, appeals in the courts and from different administrative tribunals are fairly common, but there is no strict requirement for appeals in law. Governments can decide not to

⁷⁹⁷ *Kahnawà:ake Justice Act* (2015), [online](#), s. 6.

⁷⁹⁸ See *A Guide to the Peacemaking Program of the Navajo Nation*, September 2004, [online](#).

⁷⁹⁹ "Peacemaking Program of the Navajo Nation," [online](#).

⁸⁰⁰ Little River Band of Ottawa Indians website, "Peacemaking and Probation," [online](#).

⁸⁰¹ Tuma Young, "L'nuwita'simk: A foundational worldview for a L'nuwey Justice System," (2016) 13:1 Indigenous LJ 75 at 98.

include a right of appeal from a tribunal. The Supreme Court has held that the principles of fundamental justice in the *Charter* do not generally include a right of appeal whether in the criminal⁸⁰² or quasi-criminal/regulatory contexts.⁸⁰³

Although there is no guaranteed right of appeal, the provincial superior court and the Federal Court (for federal boards and tribunals, including First Nations acting under the *Indian Act*) have inherent jurisdiction to review all governance and administrative decision-making of all governments.⁸⁰⁴ This means that an aggrieved individual could seek judicial review of a decision of a First Nation adjudicative body to a Canadian court on the grounds discussed in [Section 8.2.2.1](#). However, the principle of self-government ([Section 2.9.7](#)) should be applied by the courts to give significant deference to the First Nations decision-maker.

Apart from judicial review, individuals aggrieved by a decision of a First Nations adjudicative body could try to start a new proceeding on the same issue before a Canadian court. Generally, Canadian courts will try to avoid re-hearing a matter heard in another proceeding, out of respect for the authority of the government that created the body, unless it can be shown that the proceeding failed to protect procedural or *Charter* rights in a major way. The re-hearing of the matter in Canadian courts could be blocked by the opposing party seeking a stay of proceedings using legal doctrines such as *res judicata/issue estoppel*, collateral attack and abuse of process.⁸⁰⁵ For example, in *Lafferty v Tlicho Government*, an action involving a challenge to the validity of a law passed by the Tlicho Government brought by a community member was struck based on issue estoppel and abuse of process because there was an existing forum for him to challenge the validity of the law set out in the Tlicho Constitution of which he did not take advantage.⁸⁰⁶

As noted in [Section 8.2.2.3](#), aggrieved individuals can bring a human rights complaint about a decision of a First Nation under a by-law. If the First Nation has its own adjudicative process that can consider human rights concerns of individuals, then the Canadian Human Rights Commission can exercise its discretion not to hear the complaint under s. 41(1)(a) of the *Canadian Human Rights Act*. The Commission may decline to hear a complaint where the alleged victim has not exhausted grievance mechanisms or review procedures that are

⁸⁰² *R. v. Meltzer*, [1989] 1 S.C.R. 1764 at 1774-75.

⁸⁰³ *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at 69-70; *Huynh v. Canada*, [1996] 2 F.C. 976 (C.A.), at paras 14-20 (leave to appeal to SCC refused); *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 136.

⁸⁰⁴ See Colleen M Flood and Jennifer Dolling, "A Historical for Administrative Law: There Be Dragons," in in Colleen M. Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed., Chap. 3 (Emond Publishing: Toronto, 2017) at 21-22.

⁸⁰⁵ *Res judicata/issue estoppel* prevents a matter from being re-litigated if it involves 1) a final judgment; 2) the same parties; and 3) the same issue argued: see *Roberge v. Bolduc*, [1991] 1 SCR 374. Abuse of process can be invoked where a party to a dispute had an opportunity to resolve a dispute in another forum and squandered it: see *Behn v. Moulton Contracting Ltd.*, [2013] 2 SCR 227 at paras. 37-42. Collateral attack can be invoked when one party to a dispute tries to use one forum to attack another law or decision when they had a more direct way to address the law or decision and did not take advantage of it: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706.

⁸⁰⁶ *Lafferty v. Tlicho Government*, 2009 NWTSC 35 (CanLII), [2009] 3 C.N.L.R. 151.

reasonably available to him or her.⁸⁰⁷ Details of what the Commission looks for in a First Nation's adjudicative process to decline jurisdiction are set out in its *Handbook for First Nations on Human Rights*.⁸⁰⁸

⁸⁰⁷ *Canadian Human Rights Act*, RSC 1985, c H-6, s. 41(1)(a).

⁸⁰⁸ Canadian Human Rights Commission, "Human Rights Handbook for First Nations" (2011) [online](#): at 35-57.

9 Penalties for by-law infractions

This chapter considers the kinds of penalties that can be imposed for those who have been found to have violated an *Indian Act* by-law, as well as related issues such as revenue from fines and alternatives to fines and imprisonment.

9.1 Penalties under the *Indian Act*

A by-law under section 81(1) can impose, on summary conviction, a fine not exceeding \$1,000 or imprisonment for a term not exceeding 30 days, or both. This is provided at s. 81(1)(r):

81 (1) The council of a band may make by-laws ... for any or all of the following purposes, namely,

...

(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.

There is also an injunction power at s. 81(2), that permits the provincial court or a JP hearing a prosecution to order a person to stop doing something which is a violation of the by-law (on pain of contempt of court). As discussed in Section [8.2.1.3](#), First Nations can also seek an injunction for a by-law violation in the superior courts under s. 81(3).

Under s. 83(1)(e), money by-laws can provide for the enforcement of payment of amounts that are payable including arrears and interest.

For intoxication by-laws under s. 85.1, there are different penalties for different types of offences. For sale, barter, supply or manufacture of intoxicants under s. 85.1(a), the *Indian Act* imposes a fine of up to \$1,000, or imprisonment for up to six months or both.⁸⁰⁹ The penalty for being intoxicated under s. 85.1(b) or possessing intoxicants under s. 85.1(c) is a fine of up to \$1,000, or imprisonment for up to three months or both.⁸¹⁰ Unlike the penalties for s. 81(1) by-laws, the penalties for s. 81.5 intoxicant by-laws are automatically set by the *Indian Act*. Thus, the band councils don't have to include penalty provisions in their intoxicant by-laws for this reason.⁸¹¹

A question that arises is whether, for by-law violations that could be said to be continuing,⁸¹² a separate fine could be laid for each consecutive day the violation continues as a way to increase

⁸⁰⁹ See *Indian Act*, *supra* note 346 at s. 85.1(4)(a).

⁸¹⁰ *Ibid* at s. 85.1(4)(b).

⁸¹¹ *By-Laws Manual*, *supra* note 6 at 4-6.

⁸¹² On what is continuing offence, see McIntyre J. in *Bell v R*, [1983] 2 SCR 471: "A continuing offence is not simply an offence which takes or may take a long time to commit. It may be described as an offence where the conjunction of the actus reus and the *mens rea*, which makes the offence complete, does not, as well, terminate

the size of the fine. The *Indian Act* does not recognize the ability of First Nations to fine more than once for a continuing offence. On the other hand, some municipal laws recognize such a possibility. For example, the *Halifax Regional Municipality Charter*, SNS 2008, c. 39 states:

369(1) - A person who

a) violates a provision of this Act or of an order, regulation or bylaw in force in accordance with this Act;

...

is guilty of an offence.

...

(3) Every day during which an offence pursuant to subsection (1) continues is a separate offence.

Historically, ISC took the position that the *Indian Act* by-law powers do not allow multiple fines for continuing offences.⁸¹³ This would appear to reflect the state of the law for municipal governments where their enabling legislation does not recognize such a power. The maximum fine authorized by the enabling legislation cannot be exceeded directly or indirectly by dividing one act of wrongdoing into separate and consecutive or continuous offences and imposing a fine for each violation, unless the statute permits.⁸¹⁴

However, where a s. 81 by-law offence is of a continuing nature, the *Indian Act* recognizes the power of a judge, beyond any penalty or remedy imposed in the by-law, to “make an order prohibiting the continuation or repetition of the offence by the person convicted.”⁸¹⁵ **Thus, the court’s injunction power can be used to address ongoing/continuing by-law violations.**

Side note: What we heard about the penalties powers

Only one of the six participating First Nation councils has ever issued fines under a by-law. In the past, Membertou First Nation has collected fines for infractions under their traffic by-law.

the offence. The conjunction of the two essential elements for the commission of the offence continues and the accused remains in what might be described as a state of criminality while the offence continues. Murder is not a continuing offence. When the requisite intent to kill is present the crime is complete when the killing is effected. Conspiracy to commit murder could be a continuing offence. The *actus reus* and *mens rea* are present when the unlawful agreement is made and continue until the killing occurs or the conspiracy is abandoned. Whatever the length of time involved, the conspirators remain in the act of commission of a truly continuing offence. Theft is not a continuing offence. It is terminated when the wrongful taking has occurred with the requisite intention. On the other hand, possession of goods knowing them to have been obtained by the commission of theft is a continuing offence. The offence of kidnapping would not be a continuing offence, but that of wrongful detention of the victim following the kidnapping would be.”

⁸¹³ Discussed during First Nations Land Management Resource Center webinar on the Federal Contravention Act, June 19, 2020.

⁸¹⁴ See *Law of Canadian Municipal Corporations* (Thomson Reuters Canada: Toronto, 2012), Chapter 9, “By-Laws General.”

⁸¹⁵ *Indian Act*, *supra* note 346 at s. 81(2).

However, that traffic by-law is not currently being enforced, as the local police are applying provincial traffic laws instead.

One interviewee raised concerns about certain community members' ability to pay fines. In response to our inquiry into whether their First Nation council has ever collected monies from fines, she asked, "How do you issue a fine to someone who is on social assistance?" It is clear that traffic fines can present challenges for First Nations community members. A pilot project in Sipekne'katik First Nation called the Driver Education and Licensing Project ("DELP") with 88 community members and found that 48 community members reported having unpaid traffic fines, which were forgiven under the project. The total amount of accumulated fines came to \$239,520, and this affected the ability of many to renew their licences.⁸¹⁶ **This points to the need for flexibility in options for bands in dealing with fines.**

In our interviews we heard that in one Nova Scotia First Nation, if required, the enforcement officer will send a letter/notice to a community member that they are in contravention of a by-law; for example, explaining that in accordance with the by-law, council will be having someone mow the member's lawn or remove unsightly items from the lawn/driveway. In the letter it will state that the cost of the mowing or removal service will be deducted from the member's Treaty annuity. Council in that First Nation has had to deduct from Treaty annuities before, but for the most part, the initial letter to the member is usually enough motivation for the member to comply with the by-law. An interviewee with another Nova Scotia First Nation also suggested the deduction of monies from paycheques as another possible alternative to fines, if the individual is a band employee. A community may not necessarily have access to treaty annuities/dividends from which to deduct fines, or the person in violation of the by-law may not be a band employee. Again, this points to the need for bands to have different options available for dealing with fines.

Interviewees were asked if there are other ways to encourage community members to follow by-laws, other than through issuing fines. They stressed in their responses the need to ensure education of the community, which requires explaining to community members that the council is not implementing or enforcing laws, rules and policies just because they can. If the community members understand the purpose behind the laws, they will be more apt to comply. They also stressed the importance of inclusion of community in the development of by-laws and how community buy-in/ownership of laws also promotes compliance (which we discussed earlier in [Section 5.5.1.1](#)).

Restorative justice was mentioned by one interviewee as a potential way to encourage the community to adhere to by-laws. It was suggested that restorative justice, perhaps in the form of talking circles, could be a way to ensure people comply with by-laws. Restorative justice was also cited by both members of the RCMP we spoke with who saw this as a viable alternative to by-law enforcement and prosecution. One RCMP member cited the restorative justice program in place through Mi'kmaw Legal Support Network in Nova Scotia, as being

⁸¹⁶ Email correspondence with Dr. Fred Wien, September 22, 2019.

successful in both the pre and post-charge contexts. They described the restorative justice program as a very beneficial alternative to by-law enforcement and prosecution that can be utilized to get community members to follow by-laws, rules and policies. We agree that a restorative justice approach is a preferred approach for many offenders and First Nation communities; and restorative approaches may indeed result in offenders, and others involved in the restorative process, respecting and complying with rules and policies moving forward.

9.2 Sentencing principles and options under Canadian law

As noted in [Section 2.3.1](#), the summary conviction procedures in the *Criminal Code* apply to the prosecution of offences under federal enactments, including by-laws. This includes the rules in the *Criminal Code* on sentencing. As noted in [Section 8.1.1](#) and [8.1.2](#), either a judge or a JP can apply these rules. A judge/JP is bound to respect the maximum fine and imprisonment amounts in a by-law and could not issue a sentence that *exceeds* these. Beyond this, however, the judge/JP has a lot of discretion in fixing a sentence.

The Criminal Code includes principles on sentencing. Section 718 sets values that should inform a sentencing judge's sentence, including (a) denunciation; (b) deterrence; (c) separation; (d) rehabilitation; (e) providing reparations; and (f) responsibility for harm. Section 718.1 requires that any sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Finally, s. 718.2 sets out additional sentencing principles, including a specific one for Aboriginal offenders at subsection (e), which states:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Because s. 718.2(e) applies to all summary conviction offences under the *Criminal Code*, *Gladue* principles apply to the sentencing of individuals convicted of by-law offences.⁸¹⁷ In addition to these principles, there are several sentencing tools available in the *Criminal Code*. Those included are reviewed below.⁸¹⁸ A judge/JP's decision on sentencing can be appealed to the superior court. Courts on appeal should only depart from a judge/JP's ruling on sentencing where the sentence is "demonstrably unfit."⁸¹⁹

⁸¹⁷ See, for example, *R. v. Joseph*, 2013 BCPC 199. This was a sentencing of an Indigenous man for regulatory charges under the BC *Wildlife Act* and *Regulations*. *Gladue* principles were applied.

⁸¹⁸ Adapted from Department of Justice Canada website, "How sentences are imposed" [online](#).

⁸¹⁹ *R. v. Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089.

Absolute or Conditional Discharge

A court can order that an accused be discharged of an offence after a finding of guilt, and no conviction will be registered. Conditional or absolute discharges may only be ordered for less serious offences. A conditional discharge adds specific conditions, or rules, to address the accused's conduct that led to the offence. The accused must agree to the conditions for a specified time through a probation order and will be discharged when the conditions are met. The conditions may include such things as not drinking alcohol or using drugs; not going to specific places or buildings and going to specific treatment or counselling programs. An absolute discharge is a discharge that has no conditions.⁸²⁰

Suspended Sentence and Probation

A court may choose to put off or suspend imposing a sentence and release the offender on probation for a specified length of time. A court may also include a fine or conditional discharge with the probation order. A person on probation remains out of custody but is supervised by a probation officer and must follow any conditions included in the probation order.⁸²¹

Fine

A fine is a set amount of money that the offender pays to the court as a penalty for committing an offence. A court cannot impose a fine that is higher than the maximum fine amount set out in the law. There is, however, court discretion to order a lower amount. A fine may be combined with another penalty, such as imprisonment or probation. Failing to pay the fine may lead to a civil judgment against the accused. There are several ways to enforce the payment of fines. For instance, an offender may pay it by participating in a fine option program.

Side note: Fine Option Program in Nova Scotia

The Province of Nova Scotia established a Fine Option Program effective February 1, 1990, which is administered by Correctional Services Division. The Fine Option Program allows an individual to satisfy a fine by performing work for volunteer or not-for-profit community-based organizations, as approved by the Department of Justice. The number of hours or work required of an individual is determined by dividing the amount of the fine by the current provincial minimum wage. The Fine Option Program is a voluntary program available to any adult person who has been ordered to pay a fine under the *Criminal Code* or provincial law, except where the fine is for a municipal by-law, or an offence related to the operation or parking of a motor vehicle.⁸²²

We did not find any information about a federal fine option program. We do not believe that persons ordered to pay fines under an *Indian Act* by-law would be eligible to participate in

⁸²⁰ *Criminal Code*, *supra* note 482 at s. 730.

⁸²¹ *Ibid* at s. 731.

⁸²² Nova Scotia Department of Justice, "Fine Option Program" [online](#).

the NS Fine Option Program unless the First Nation and province reached an agreement on this. This would be another option of ‘borrowing’ aspects of the provincial system (see [Section 6.3.3.3](#) and [8.3.2](#)) But as discussed further below, First Nations communities have the power to develop their own fine-option programs.

If the offender is in default of a fine, the provincial or federal government may refuse to issue, renew, or may suspend, a license or a permit until the fine is paid in full. As a last resort, a term of imprisonment may be imposed for defaulting on the payment of a fine.

Conditional Sentence

Where a person is convicted of an offence and the court can impose imprisonment, the court may order that the sentence be served in the community, with certain conditions, instead of jail. The court must be confident that if the offender serves the sentence in the community, they will not endanger the safety of the public.⁸²³

Imprisonment

Imprisonment is the most serious sentence under our legal system because it deprives a person of their freedom. The court may sentence a person convicted of an offence to jail. An offender who is sentenced to fewer than two years serves the sentence in a provincial correctional institution.

Generally, sentences of incarceration are uncommon for regulatory offences. This is because fines tend to be sufficient to achieve the deterrence required. However, judges nonetheless have the discretion to order incarceration where this would be appropriate in light of sentencing principles.⁸²⁴

Intermittent Sentence

Where the court imposes a sentence of 90 days or fewer, the court may order that the sentence be served intermittently, or in blocks of time, such as on weekends. This allows the offender to be released into the community for a specific purpose such as going to work or school or caring for a child or for health concerns. An intermittent sentence must be accompanied by a probation order, which governs the offender's conduct while he or she is not in jail.⁸²⁵

⁸²³ *Criminal Code*, *supra* note 482 at s. 742 to 742.7.

⁸²⁴ *Ontario (Labour) v. New Mex Canada Inc.*, 2019 ONCA 30 at pars. 84-89.

⁸²⁵ *Ibid* at s. 732.

Victim Surcharge

A victim surcharge must be ordered at sentencing. The amount of the victim surcharge is 30% of any fine that is imposed on an offender. If no fine is imposed, \$100 is charged for a summary conviction offence or \$200 for an indictable offence. The victim surcharge is paid into provincial and territorial assistance funds to develop and provide programs, services and assistance for victims of crime. In cases where offenders are unable to pay the surcharge, they may be able to participate in a provincial fine option program, where such programs exist.⁸²⁶ The surcharge can be waived if it would cause undue hardship to the offender.⁸²⁷

Should the prosecution of *Indian Act* by-laws become common with fines frequently issued (by judges or JPs), the Mi'kmaq of Nova Scotia may want to enter discussions with the province about how the victim surcharge fines from by-law offences might be used to address the needs of Mi'kmaq victims.

Restitution

Restitution is the money the court may order an offender to pay the victim for money that the victim lost as a result of the offender's crime. The court is required to decide whether to issue a restitution order for all offences. These may include money to repair or replace damaged property. Under Canadian law, the court can order restitution as a separate, or "stand-alone", order along with another sentence; as one of the conditions of a conditional sentence; or as one of the conditions of probation.⁸²⁸

Sentencing circles

While there are no specific provisions within the *Criminal Code* on the use of sentencing circles, there are processes that have been used to assist judges to arrive at appropriate sentences for Indigenous offenders for over three decades.⁸²⁹ These can involve the offender and their family, supports, services providers with knowledge of the offender's history, the victim and their supports (when relevant, counsel and the judge). When possible, an Indigenous Elder or knowledge keeper is involved, and the person is often responsible for the circle process.⁸³⁰

Rudin notes that these can be time-consuming for courts and that the alternative to this is holding circles without the involvement of the judge and counsel; to have a circle outside the court that can provide information on sentencing options and supports to be later considered

⁸²⁶ Department of Justice Canada website, "Court discretion on federal victim surcharges" [online](#).

⁸²⁷ *Criminal Code*, *supra* note 482 at s. 737. Undue hardship relates to the financial inability to pay the surcharge for reasons such as unemployment, homelessness and significant financial obligations to dependants.

⁸²⁸ *Ibid* at s. 737 to 741.2.

⁸²⁹ See Rudin, *supra* note 680, Chapter 7, "Sentencing Circles."

⁸³⁰ *Ibid* at 226.

by the judge. Generally, for such a process to go forward, the agreement of the Crown is required.⁸³¹

If a First Nation is prosecuting by-laws itself (see [Section 7.2.4](#) and [7.3.1](#)), it will have more control over the degree to which such restorative processes could be used. Possibly, arrangements could be made with the Mi'kmaq Legal Support Network to provide restorative or sentencing circles for by-law offences.

9.3 First Nations' powers to provide additional penalties

Despite the broad basket of sentencing tools already available under the *Criminal Code* summary conviction process, this section considers whether band councils have jurisdiction to supplement the penalties provided for in the *Indian Act*.

We note that the jurisdiction over penalties in the *FNLMA* is broader than s. 81(1)(r) of the *Indian Act* and provides that, for a land code, a First Nation “may create offences punishable on summary conviction and provide for the imposition of fines, imprisonment, restitution, community services and any other means of achieving compliance.”⁸³²

The proposed *FNGA* would have given First Nations the power to impose higher fines and prison sentences.⁸³³ In this regard, the \$1,000 cap on fines in the *Indian Act* has been criticized as being too low and not allowing the revenue from fines to be used to finance by-law enforcement or other band services. By contract, as noted in [Section 4.7](#), municipalities utilize revenues generated from fines and property and other taxes to finance over 80% of their operations.

The *ISC By-Laws Manual* suggests bands can't pass by-laws allowing for any other penalties other than the fines and imprisonment time set out in the *Indian Act*.⁸³⁴ However, given the modern approach to interpretation and federalism, this position is doubtful. A broad interpretive approach to by-laws entails ancillary procedural powers (see [Section 5.2.1](#)), and this is also consistent with the specific ancillary power provided for at s. 81(1)(q). Thus, additional penalties and sanctions would be part of a First Nations by-law powers over the subjects in s. 81(1).

Limits on this supplemental power are dictated by the conflict of law rules discussed in [Section 5.3.1](#): the by-law powers cannot conflict with provisions within the *Indian Act* or its regulations. Recall, that conflicts are read narrowly, and simply because there is a federal provision on the same subject does not completely oust the jurisdiction of the First Nation. In our view, the wording of s. 81(1) setting maximum amounts of fines and imprisonment limits the jurisdiction

⁸³¹ *Ibid* at 230-231.

⁸³² First Nations Land Management Act, *supra* note 122 at s.22(1).

⁸³³ *Ibid* at s. 20.

⁸³⁴ *By-Laws Manual*, *supra* note 6 at 4-6: “The *Indian Act* does not give a Band Council the power to set any penalty other than a fine or imprisonment, or both, for the violation of a by-law.”

of a First Nation to setting fines *beyond* these amounts. Thus, to increase the maximum amount of fines, as some feel is necessary (while others question the appropriateness of fines), there would need to be an amendment to the *Indian Act*.⁸³⁵ However, beyond fines and imprisonment, s. 81(1) is not worded in a way to suggest that no other types of penalties or sanctions can exist.⁸³⁶ Therefore, **we think that First Nations can include *other forms of penalties in their by-laws beyond fines and imprisonment.***

Further, we know that there are by-laws that already include other forms of penalties (some of which were approved by INAC prior to the repeal of the disallowance power), such as eviction, banishment, loss of privileges, etc.⁸³⁷ Some of these other remedies have already been enforced through the courts.⁸³⁸ As suggested in the last section, we believe a First Nation's by-law powers could include the power to develop their own fine-option program.

Side note: can a First Nation pass a by-law that supplements or alters the summary conviction proceeding process for prosecution of by-laws?

In *Waterslide Campground v Goulet* (2008), the British Columbia Supreme Court commented on the question of whether a First Nation, as a subordinate government, could, through its by-laws or other laws, impose duties on the provincial court who have to adjudicate offences under those by-laws. (The case was about having the court recognize an order of an arbitrator appointed under Westbank First Nation laws passed under their self-government legislation.) On this, the court opined, "A general power to make by-laws would likely not suffice having regard for the requirement that the words of a statute be read harmoniously with the scheme of an Act, the object of the Act, and the intention of Parliament."⁸³⁹

We question the correctness of this opinion, as it is in *obiter* and not supported by much analysis. It also does not consider the principle of federalism and the need for courts to respect the exercise of Indigenous self-government and Indigenous laws (see [Section 5.2.1](#) and [2.9.7](#)). The question should be reoriented not to focus on the 'subordinate' nature of a First Nation, but on whether the provincial court is required to interpret and apply the First Nation's laws in the context of a prosecution they otherwise have jurisdiction over.

⁸³⁵ This conclusion is based on the clear language of s. 81(1)[®] when it comes to the maximum amount for fines or imprisonment.

⁸³⁶ Section 102 of the *Indian Act*, *supra* note 346, provides a general penalty where the Act or regulation is silent as to the consequences of committing an offence (\$200, three months prison or both). This could be argued to suggest a 'complete code' with respect to penalties under the *Indian Act* and regulations, but it does not mention penalties under the by-law powers. So, it does not suggest a 'complete code' in regard to by-laws.

⁸³⁷ Note that bands should ensure that a penalty of removal of a privilege is a discretionary privilege. If the band denies a privilege for an essential service that is mandated by federal policy, such as welfare, a court may find the community had no jurisdiction to discontinue to service: see *Daoust v. Mohawk Council of Kanesatake*, *supra* note 134.

⁸³⁸ *Conseil des Atikamekw d'Opitciwan c. Weizineau*, *supra* note 67 (banishment for drug conviction); *Mississaugas of the New Credit First Nations v Landry*, *supra* note 83 (eviction based on residency by-law – court was prepared to evict, but found the Committee failed to give reasons).

⁸³⁹ *Waterslide Campground v. Goulet*, *supra* note 669 at para. 36.

Both the federal and provincial government have the latitude to vary the default summary conviction process in their own laws. In relation to the federal government, the default rule that applies the *Criminal Code* summary conviction proceedings to the prosecution of offences under federal enactments is subject to the exception: “to the extent that the enactment otherwise provides.”⁸⁴⁰ (Provinces likewise adopt a similar default rule and a similar exception.⁸⁴¹) Therefore, since *Indian Act* by-laws are a federal enactment, if they provide otherwise on how the process for prosecution of by-laws should unfold, this appears permissible under the *Interpretation Act*.

As noted earlier, our interviews revealed an interest in incorporating restorative justice into by-law prosecutions. Restorative justice in sentencing has been used in the provincial courts without specific provisions in the *Criminal Code*, thus it may not be necessary for by-laws to specifically provide for this to use such processes. It appears that there is wide room to use such processes, in particular, if First Nations are in control of the prosecution of by-law offences. Further collaboration and discussion with the Mi’kmaq Legal Support Network on this should be pursued.

Side note: Innovative projects using restorative justice in Ontario

In Ontario, the Law Foundation of Ontario approved grants to two First Nations to develop an innovative means of enforcing community by-laws to reduce the use of intoxicants. The project proposed a restorative justice approach to divert people who breached the intoxicant by-law to treatment and other community-based programs.

One of those First Nations proposed to hire a by-law enforcement officer to enforce the intoxicant by-law and divert people to the community-based justice program. Where someone who breached the by-law did not participate meaningfully in the community-based project, provincial Crowns were asked to prosecute (this happened infrequently).

The Indigenous Justice Division of the Ministry of the Attorney General, Ontario, has also been funding by-law enforcement and Indigenous-related projects in First Nations communities in the province. One project involved a First Nation community being allocated funding for the creation of a Justice Circle and a Restorative Justice Enforcement Officer. The Justice Circle is responsible for forming a restorative justice program in the following areas: by-law enforcement; criminal justice; natural resource harvesting; housing services; membership; health services and education services. This project also explores the development of enforcement mechanisms including fine collections through similar agreements between provincial courts and municipalities.

⁸⁴⁰ *Interpretation Act*, *supra* note 42 at s. 34(2).

⁸⁴¹ *Summary Proceedings Act*, *supra* note 512 at s. 7(1).

Another project is in the Chippewas of the Thames First Nation. The community received funding for a two-year restorative justice pilot program. The community hired a by-law enforcement officer and created a Community-led Justice Committee to ensure that the enforcement process was based on community values. The Committee can make recommendations, inclusive of an individual's circumstances and participation, that are fair, culturally sensitive and decision-making is based on agreement. Individuals have access to the other justice programs: Community Service Hours Program, Violence Prevention Program, and/or the Youth Justice Cultural Program. The program is overseen by the First Nation's Justice Director.⁸⁴²

9.4 Revenue from fines

Subsections 104(1) and (2) of the *Indian Act* provide those fines, penalties and property forfeited under the *Act* belong to the federal Crown, who could direct that such monies and property could be used to pay a provincial or municipal government for use of their enforcement procedures for enforcing offences under the *Indian Act*:

Disposition of fines

104 (1) Subject to subsection (2), every fine, penalty or forfeiture imposed under this Act belongs to Her Majesty for the benefit of the band, or of one or more members of the band, with respect to which the offence was committed or to which the offender, if an Indian, belongs.

Exception

(2) The Governor in Council may from time to time direct that a fine, penalty or forfeiture described in subsection (1) shall be paid to a provincial, municipal or local authority that bears in whole or in part the expense of administering the law under which the fine, penalty or forfeiture is imposed, or that the fine, penalty or forfeiture shall be applied in the manner that he considers will best promote the purposes of the law under which the fine, penalty or forfeiture is imposed, or the administration of that law.

This once included offences under by-laws. However, s. 104(3) was added to the *Indian Act* by the 2014 amendments.⁸⁴³ Section 104(3) provides that if a fine is imposed under a by-law made by a First Nation government, that money is payable to, and belongs to the First Nation.

Disposition of fines imposed under by-laws

(3) If a fine is imposed under a by-law made by the council of a band under this Act, it belongs to the band and subsections (1) and (2) do not apply.

⁸⁴² Information from Indigenous Services Division, Ministry of the Attorney General, Ontario, August 21, 2017.

⁸⁴³ Section 103(4) of the *Indian Act*, *supra* note 346, does not specifically address forfeited property. For a discussion on this, see [Section 6.3.6](#).

10 Summary of Findings and Recommendations

Chapter 2 – Constitutional, legal and political context

- In 2014, the *Indian Act* was amended so that First Nations no longer had to submit s. 81(1) by-laws to the Department of Indigenous Services (“INAC/ISC”) for approval. Section 81(1) lists about 22 subjects that bands can pass laws on. This includes areas like health, regulation of traffic, law and order, disorderly conduct and nuisance, local works, zoning, buildings, public games, wildlife, removal of trespassers, residency, ancillary powers and more. The section holds out promises to be used to address gaps in the enforcement powers in the *Indian Act* as well as be used to address several substantive matters facing First Nations (see [Appendix C](#) for a list of recognized and potential areas First Nations can pass by-laws on).
- By-laws are viewed as a form of delegated law, meaning they are viewed as law-making powers granted by the federal government and not inherent. But the status of being ‘delegated’ does not mean that by-laws are any less binding. By-laws have equal force to other federal laws and regulations.
- Because the *Indian Act* by-laws are federal laws, they can be assessed against *Charter*, human rights and administrative law obligations. However, these requirements should be applied in ways that respect First Nations’ differences in worldview when it comes to balancing collective and individual rights. This is an opportunity to infuse *Indian Act* by-law making with Mi’kmaq law principles.
- ❖ **We recommend that Mi’kmaq engage in a study of their own legal principles that protect individual rights and how they are balanced with collective rights. These research findings could be used by those developing by-laws for communities.**
- ❖ **We recommend there be further research into how the Mi’kmaq Peace and Friendship Treaties inform a “two-legged” justice system be undertaken to further support respect for Mi’kmaq jurisdiction.**
- There is a large overlap between the federal and the provincial governments in terms of issues of enforcement, such as policing, prosecution and courts in First Nations communities. This overlap has created confusion when it comes to government responsibilities for the enforcement of *Indian Act* by-laws.
- Both in the past and up to the present, Canada and the provinces have used the issue of overlapping jurisdiction as an excuse for inaction, neglect and doing less for First Nations than for other citizens. Our interviews and research show that this phenomenon specifically occurs in the context of enforcement of by-laws (and other laws on reserve). Although both the federal and provincial governments do share responsibility over policing services on reserve through the First Nations Policing Program (“FNPP”), this is not meeting the safety and security needs of First Nations people.
- The exercise of by-law powers today has to be considered in light of several developments that require governments and courts to give more respect to First Nations’ rights to self-

determination and self-government and their human rights to receive services that meet their needs and circumstances.

- The need to give due respect to First Nations' rights to justice, safety and security (including their rights to exercise control in such areas) is further informed by several crucial reports: the *Marshall Inquiry Report*, the *Royal Commission on Aboriginal Peoples*, the *Truth and Reconciliation Commission Final Report* and the *Missing and Murdered Indigenous Women and Girls Final Report*, as well as the *United Nations Declaration on the Rights of Indigenous Peoples*. These and other reports, and recent court and tribunal decisions, suggest that Indigenous peoples' safety, security and self-determination needs and rights are not being met by governments in Canada and this can violate human rights and the *Charter*.
- ❖ **We recommend, as both an important symbolic and practical step, that Nova Scotia commit to the *UN Declaration* through legislation. Mi'kmaq and their allies should be advocating for this.**
- In the past 8 years, there have been landmark human rights and *Charter* rulings on First Nations peoples' substantive equality right to services that meet their cultural, historical and geographical needs and circumstances. This includes specific cases finding that the federal and provincial governments have failed to meet the security, safety and justice needs of First Nations.
- When both governments have concurrent jurisdiction and First Nations are entitled to a service, under the human rights principle, "Jordan's Principle," there should be no delay or denial based on jurisdictional wrangling and the government of first contact should provide the service. After that, the two levels of government can work out how the costs should be shared between themselves.
- As noted by the Manitoba Human Rights Adjudication Panel, in relation to providing services to First Nation in cases of concurrent jurisdiction: "The Canadian constitutional framework does not amount to a reasonable justification for ... discriminatory treatment ...".

Chapter 3 – Community context and their by-laws

- Ten out of the 13 Mi'kmaq communities have by-laws.
- None of these by-laws are being enforced by police services in the communities, even though eight of the communities have policing services under the First Nations Policing Program ("FNPP").
- Only a handful of by-laws are being enforced through other means.

Chapter 4 – The municipal by-law context

- Enforcement of municipal by-laws is performed by both municipal by-law enforcement officers and the police, depending on the by-law.

- Municipalities hire lawyers to prosecute by-law offences.
- By-law offences are prosecuted in the Provincial Court or before the justice of the peace in night court.
- Though they received some funding from the federal and provincial governments, municipalities derive 80% of their revenue from property taxes and other goods and services taxes.
- By contrast, many First Nation communities significantly rely on federal transfer payments for a majority of revenue in no small part due to displacement and colonialism.
- For this reason, comparing First Nations and municipalities when it comes to their ability to finance by-law services independently is like comparing apples and oranges.

Chapter 5 – Making By-Laws

- After a 5-year hiatus from 2014-2019, the Department of Indigenous Services (“ISC”) resumed providing some by-law support to First Nations, but these appear to be limited to reviewing by-laws on request and this service is not publicized. We find this to be insufficient. Canada has statutory, human rights and other commitments to provide meaningful needs-based governance services within First Nations communities.
- ❖ **We recommend that ISC ought to be doing much more to address First Nation by-law needs, including providing greater support and regular funding for *Indian Act* by-laws development and capacity building.**
- ❖ **ISC support for by-law development should reflect the fact that First Nations may benefit from having a central source where First Nations could request and receive expert advice on, and resources for by-law development (e.g., a Centre of Excellence), as well as receiving funds for expenses related to individual by-law development such as consultations, drafting and legal review.**
- There are significant gaps on the face of the *Indian Act* as it relates to by-law powers. However, applying modern interpretive principles, the s. 81(1) powers can be read to cover a broad array of subjects, including the power to pass procedural laws dealing with enforcement.
- Although there were court decisions in the 1990s that read the by-law powers narrowly, there are several grounds for revisiting and overturning these.
- When it comes to by-laws interacting with other laws, principles regarding overlapping jurisdiction dictate that by-laws should be interpreted as able to co-exist with laws passed by other governments.
- In cases of conflicts with other government laws, *Indian Act* by-laws supersede provincial laws as well as many federal laws, except rules in the *Indian Act* or regulations under the *Indian Act*.

- Courts are required to show deference to the exercise of self-government and Indigenous laws, including in First Nations' interpretation of their by-law powers.
- ❖ **We recommend that First Nations use their by-laws to make up for the gaps in the enforcement powers in the *Indian Act*.**
- We heard that consultation with community and other invested stakeholders is an important part of the by-law development process.
- Making by-laws easily accessible (posted on the community's website) was emphasized as an important practice by those we interviewed.
- There is a general lack of awareness of First Nations law-making powers, and by-laws more particularly, among several important stakeholders, from police agencies to judges and justices of the peace, federal and provincial public prosecution services, First Nation governments and employees, community members and policy-makers within both levels of the provincial and federal government.
- ❖ **We recommend that the Mi'kmaq of Nova Scotia, with their provincial and federal partners on the Tripartite Committee, create a plan to develop training materials on *Indian Act* by-laws and their enforcement, and prioritize key stakeholders needing education.**
- In some cases, direct training, discussions and meetings will be necessary. In other cases, written materials, such as a "toolkit" that addresses by-law drafting, training, education, enforcement and prosecution, could be an effective educational tool.

Chapter 6 – Enforcement of by-laws

- By-laws can be enforced by the RCMP, a provincial police force, a band police force or a band by-law enforcement officer. However, the number of potential actors creates room for confusion and inaction.
- Police in Nova Scotia are not enforcing band by-laws, and this appears to be a blanket policy/practice of non-enforcement, as opposed to the case-by-case exercise of discretion.
- ❖ **We find that a blanket policy not to enforce *Indian Act* by-laws is not an exercise of discretion in good faith, but a fettering of discretion, and inconsistent with human rights and substantive equality principles.**
- We find that the various reasons provided for why police are not enforcing *Indian Act* by-laws, including doubts about their validity and *Charter* compliance, do not hold up to scrutiny and are based on problematic assumptions and double standards.
- While First Nations are generally under-resourced in developing their laws, this fact alone cannot be the justification for assuming by-laws are faulty and should not be enforced. The just solution in the circumstances, after decades of neglect by governments of First Nations' safety, security and justice needs, is for governments to ensure First Nations receive

meaningful support and resources to develop their by-laws, not continuing to marginalize First Nations laws and legal orders by treating them as suspect.

- ❖ **We find that local police/RMCP can and should be enforcing by-laws, in particular those dealing with law and order, such as the prohibition of intoxicants, disorderly conduct and traffic offences, for example.**
- Determinations of which types of by-laws are more appropriate for by-law officers versus police officers should be determined in discussions between the First Nation and the local police services.
- Instead of, or in addition to, having local police involved in the enforcement of by-laws, First Nations have the power to appoint by-law officers or other enforcement officers (including police or some alternative enforcement officer) to enforce their by-laws. Such officers will be limited to enforcement of First Nations laws (not the *Criminal Code* or provincial laws).
- Since the *Indian Act* is largely silent on the investigative, search and other enforcement powers of by-law officers/police, we recommend First Nations set these out in a by-law.
- ❖ **Under its *Police Act*, the province can designate First Nation by-law officers as “Aboriginal police officers” under the *Police Act*. This would give First Nations’ by-law officers the procedural powers of a peace officer in carrying out the enforcement of by-laws. Effectively, this would be like having a ‘special constable’ in their community, who would be able to enforce by-laws, but also be able to deliver basic police services in support of the police of the local jurisdiction.** The province has yet to do so, despite this being a legal option for several years.
- Currently, no funding is being provided for bands to train, hire or maintain by-law officers. No other supports are provided to First Nations for enforcement of laws in their communities aside from FNPP, even though only 8 of 13 communities receive FNPP services (and RCMP officers under the CTAs are not providing by-law enforcement).
- ❖ **Both the provincial government and the federal government are responsible for law enforcement in First Nations communities. We find that both levels of government are failing to provide effective law enforcement in communities, including the enforcement of First Nations by-laws, and this raises potential human rights and *Charter* violations by failing to meet the security, safety and justice needs of First Nations communities in Nova Scotia.**
- ❖ **We find that Canada and the province are equally responsible to fund the appointment of by-law enforcement officers in First Nation communities.**
- ❖ **We recommend that both levels of government enter negotiations with First Nations to address their needs for greater by-law enforcement services in their communities.**
- To reduce the number of by-law charges that must be prosecuted, we find that First Nations have the jurisdiction under the by-law powers to create summary ticketing processes. There are precedents for other First Nations developing their own ticketing systems that can be drawn on.

- Instead of this, First Nations and the province can enter an agreement (like the province and Canada do) to allow First Nations to use the province’s summary ticketing system.
- ❖ **We recommend negotiations with the province regarding the use of fine enforcement mechanisms in the *Motor Vehicle Act* to assist in enforcing *Indian Act* by-laws.**

Chapter 7 – Prosecution of by-laws

- The *Indian Act* is silent on the prosecution of by-laws and there is significant uncertainty around who is obligated to prosecute band by-laws.
- The federal and provincial governments both generally refuse to prosecute for reasons that such activities do not fall within their areas of responsibility.
- ❖ **Canada, through Public Prosecution Services Canada, can and should be prosecuting First Nation by-law offences.** It has done so sporadically over the years, and has been prosecuting COVID-19 by-laws temporarily, but could and should be doing this on a general basis as it does with other federal laws.
- Nova Scotia, through its Public Prosecution Services, can prosecute federal laws, including *Indian Act* by-laws.
- ❖ **Nova Scotia also can and should prosecute First Nations by-laws.** It has yet to do so.
- ❖ **We conclude that Nova Scotia can prosecute *Indian Act* by-laws and that the absence of explicit recognition of such in the *Prosecution Act* is not a barrier to the province acting (there is precedent on this). Nonetheless, as it stands, the *Prosecution Act* is underinclusive, potentially raising a *Charter* issue. Accordingly, the province should consider clarifying the *Public Prosecutions Act* to expressly provide that it can prosecute *Indian Act* by-laws.**
- We heard that some First Nations may not necessarily want government prosecutors prosecuting their by-laws given their lack of knowledge about the communities.
- First Nations, through their by-law powers, also have the jurisdiction to appoint prosecutors to prosecute by-law offences.
- While these prosecutors could be Mi’kmaq lawyers, it is not a requirement that prosecutors have legal training, so this could be a community member who receives targeted training.
- Community members could equally be trained to act to defend people who are charged with by-law offences.
- Many First Nations lack own-source revenue to fund the prosecution of by-law offences.
- ❖ **We find that Canada and Nova Scotia are equally liable to provide prosecution services for First Nations by-laws, or provide funding to allow First Nations to provide such services.**
- ❖ **We recommend that both levels of government should immediately initiate discussions with First Nations regarding arrangements for the provision of prosecution services, whether through direct prosecution through the government or funding the community to undertake prosecution on its own.**

Chapter 8 – Adjudication of by-laws

- ❖ Provincial courts can hear the prosecution of *Indian Act* by-law offences. This certainly includes the two provincial courts that are located in Mi'kmaq communities (Eskasoni and Wagmatcook), but this can happen in all other provincial courts as well.
- ❖ Provincial courts could sit at locations outside provincial courthouses to hear *Indian Act* by-law offences, including in communities.
- ❖ Provincial Presiding Justice of the Peace (“PJPs”) can hear the prosecution of *Indian Act* by-law offences. PJPs could hear matters within First Nation communities.
- ❖ **Nova Scotia, through its Department of Justice, should appoint Presiding Justice of the Peace, particularly Mi'kmaq lawyers, to hear the prosecution of *Indian Act* by-law offences. There are currently no Mi'kmaq PJPs.**
- ❖ **Alternatively, to solidify its commitment to Mi'kmaq justice issues in the province, the province could establish a new category of JP with the specific function of providing justice services to Mi'kmaq communities, including hearing *Indian Act* by-law offences.** The qualifications and other possible duties of the JPs, such as adjudicating other disputes within the community, could be negotiated between the Mi'kmaq and the province.
- ❖ **Canada, through the Department of Justice, could and should appoint JPs under s. 107 of the *Indian Act* to hear by-laws in First Nations.** Canada used to make such appointments but discontinued this in 2003 without any clear reason.
- If First Nations wanted to expand the powers of federal or provincially appointed JPs to hear disputes other than by-law offences, such as disputes between First Nations and individuals arising out of by-laws, this would need to be negotiated with the appointing government since this contemplates using their paid employee to provide a service they are not otherwise required to do.
- ❖ **We conclude there are reasonable arguments for an implied power of First Nations to legislate using their by-law powers (ss. 81(1)(a), (c), (d) and (q)) to create adjudicative mechanisms (e.g., courts, JPs, tribunals, etc. – there is no magic in the name) to address disputes under by-laws, including the adjudication of offences and hearing disputes between individuals and First Nations relating to by-laws.**
- In designing their own adjudication processes for by-law offences and other disputes, there is flexibility available to First Nations to develop processes that reflect their needs and culture.
- While First Nations have to account for *Charter* rights and administrative law principles in the development of their systems, this does not mean having to mirror the Canadian system. There is flexibility in translating how these legal principles apply in a First Nations context.
- ❖ **We find that both Canada and the province have the responsibility to fund adjudicative services within First Nations for the hearing of by-law offences and disputes and the failure to do so raises potential human rights and *Charter* issues.**

- ❖ **We recommend that both levels of government should immediately initiate discussions with First Nations to collaborate on how the governments can support the options for adjudication of by-laws that best suit their needs.**

Chapter 9 – Penalties for by-law infractions

- The maximum penalties for s. 81(1) by-law violations are \$1,000 and/or 30-day imprisonment.
- We heard that for community members on a limited income, fines might be challenging, and there is a need for flexibility in the design of penalties. We also heard interest in opportunities to resolve disputes through restorative processes.
- ❖ **We find that First Nations have jurisdiction under their by-law powers to supplement the penalties provided for in the *Indian Act*. The only limit would be imposing fines or jail sentences above those in the *Indian Act*.**
- ❖ **We recommend that Canada amend the maximum amount of fines that can be issued under by-laws, as well as the ability to lay separate charges for each day of a continuing offence.**
- Default sentencing processes under the summary conviction process in the *Criminal Code* give the presiding judge or JP wide discretion in fixing a sentence including ordering an absolute or conditional discharge, providing a suspended sentence or probation, an intermittent jail sentence or ordering restitution, and using sentencing circles.
- If a First Nation is prosecuting by-laws itself, it will have more control over the degree to which sentencing circles and other restorative processes are used.
- The Mi'kmaq of Nova Scotia may want to consider making arrangements with the Mi'kmaq Legal Support Network to provide restorative or sentencing circles for by-law offences.
- Mi'kmaq may want to develop their own fine-option programs, or negotiate with the province to use theirs.

11 Appendix A – Questions for First Nations Communities

Questions for Band Administrators on by-law enforcement in Nova Scotia

Interviewee:

Community Organization:

By-laws

1. What by-laws does the community currently have?
2. Are people in your community aware of your by-laws? Are they accessible, either online or somewhere else?
3. Are there any other laws (e.g., developed *First Nations Land Management Act*) that the community enforces?
4. Are there by-laws the community is currently developing or wants to develop?
5. Does the community have a by-law enforcement officer (dog catcher, inspector, or anyone who otherwise enforces community laws / policies / BCRs)?
6. If so, what type(s) of training do they have?
7. Of your existing by-laws, are there parts of them that are not enforced? Why?
8. Of your existing by-laws, are there parts that should be amended? If so, are there any barriers to amendment?
9. Has the community ever had by-laws prosecuted? If so, what was the process (e.g., Who laid the charge? Was it by way of summary offence ticket, or information? Who served the charge? Who prosecuted the matter? Did the matter go to court? If so, which level of court (Provincial Court, Supreme Court, Federal Court or Indigenous court))?
10. If one or more of your by-laws was prosecuted, were there any appeals? If so, what was the process? What were the grounds of appeal? What was the outcome?
11. Has the Band ever collected any fines for by-law infractions? If so, how were those fines used?
12. If by-laws have not been enforced/prosecuted, why is this?
13. What funds are available to your community for by-law development or enforcement?

14. Is lack of funding a barrier to by-law development or enforcement?
15. Are there any other barriers to by-law development or enforcement in your community?
16. Does your community consider your by-laws as a form of self-determination?
17. Does your community see a connection between by-laws and customary or Mi'kmaw law?
18. Do you see any potential connection between by-law making and enforcement and developing community capacity and participation in governance?
19. Are there alternative ways beyond by-law enforcement/prosecution that your community uses to get people to follow Band rules, policies, etc.? If so, please give some examples.
20. Can you think of other ways to encourage people in the community to follow by-laws (other than fines)?
21. Is there anyone else you think we should be speaking to about your community's by-laws, or by-law enforcement generally?

Policing

22. Who polices your community (RCMP, municipal police, etc.)?
23. Does your community have a Community Tripartite Agreement (CTA) on policing or other arrangement under the federal First Nations Policing Program?
24. Do the police who serve your community enforce Band by-laws?
25. Do the police who serve your community receive training regarding Band by-laws?
26. Are the police who serve your community consulted about proposed Band by-laws?
27. Is there a way for Band Council or other community leaders to discuss bylaw enforcement issues with the police who serve your community (e.g., through regularly schedule meetings)?
28. More generally, is there a way for Band Council or other community leaders to discuss community safety or crime concerns with those who police your community? For example, does your community have a 'Community Consultative Group' under a CTA?

Questions for Individuals with By-law Experience

Interviewee:

Organization:

Date:

Consent to be interviewed: I sent you the consent form. Have you had a chance to review? Any questions? Do you consent to be interviewed and us using your information?

Please describe the organizations and/or communities you serve:

1. What has been your experience with *Indian Act* by-laws?
2. Have you observed any barriers to the successful development or enforcement of *Indian Act* by-laws? If so, what have those been (e.g., lack of funding, training, capacity, clear rules around enforcement, etc.)?
3. In your view, what needs to happen in order to facilitate First Nation development and enforcement of by-laws?
4. Do you see any potential connection between by-law making and enforcement and developing community capacity and participation in governance?
5. Do you see a connection between by-laws and customary or Indigenous law?
6. Are you aware of any alternative ways beyond by-law enforcement/prosecution that First Nation communities uses to get people to follow Band rules, policies, etc.? If so, please give some examples.
7. Is there anyone else you think we should be speaking to about your *Indian Act* by-law enforcement?
8. Are there any additional comments about *Indian Act* by-laws that you would like to offer?

12 Appendix B – Chart of By-laws for the Mi'kmaq Communities of Nova Scotia

ANNAPOLIS VALLEY FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
By-Laws for Intoxicants (1985)	Selling, possessing, bartering, supplying or manufacturing intoxicants; being intoxicated outside of your home or in a home to which you have been invited.	No enforcement provision. Summary conviction and penalties as set out in the <i>Indian Act</i> .	http://sp.fng.ca/fngweb/020_intoxicants_by-law_1985.pdf	

CHAPEL ISLAND (POTLOTEK) FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
Housing and Development By-law (2007)	Falsifying a housing application; contravening the occupancy agreement; neglecting the home; refusal to pay service charges; abandoning the house; criminal activity in the house; repeated noise complaints; failing to vacate once served with an eviction notice.	The council may appoint an employee of the First Nation as an enforcement officer to administer the by-law on behalf of council. Violations of this law could result in a fine of no more than \$1000 or imprisonment for no more than 30 days, or both (same as ss.81(1)(r) of <i>Indian Act</i>). Eviction is also a possibility.	http://sp.fng.ca/fngweb/022_buildings_by-law_2007-1.pdf	
Land-use By-law (in development)			Chief Executive Officer	Council wanted to determine which land in the community could be used to develop new housing, because they are running out of land. There has been some community consultation on the issue. In the ATR process now for new land bought

CHAPEL ISLAND (POTLOTEK) FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
				for proposed housing. Consulted with INAC.
Dog Control By-law (1999)	No more than 2 dogs; must be immunized and wear tags; cannot train an attack dog in specified areas; dogs who chase or attack a person without causing bodily harm must be tied up; second offences result in the dog being killed; cannot allow a dog to destroy property; dogs must be tied up; dogs are not allowed to bark or cause a nuisance; cannot neglect the dog; no dogs near schools; cannot impede emergency access; there are special and more stringent provisions for fierce or dangerous animals.	<p>In the by-law “Animal Control Officers” means any police officer or any other person charged with the duty to preserve the public peace and includes any person appointed by the council to enforce its by-laws.</p> <p>Penalty is, upon summary conviction, a fine ranging from \$78 to \$307 or imprisonment for no more than 5 days. Other penalties may include: seizure of the dog; disposal of the dog; confinement of the dog.</p> <p>Section 25 the by-law states that in addition to the summary conviction procedures set out in the <i>Criminal Code</i>, proceedings under the by-law may also be conducted according to the provisions of the NS <i>Summary Proceedings Act</i>.</p>	http://sp.fng.ca/fngweb/022_dogs_by-law_1999.01.pdf	Still in effect.
Fish Preservation By-law (1973)	No trespassing on oyster leases.	Council will be responsible for the punishment and removal of those trespassing on the oyster leases.	http://sp.fng.ca/fngweb/022_fish_preservation_by-law_1973.pdf	Still in effect.
Traffic By-law (also	No driving without a licence, a registration and insurance.	The by-law defines an enforcement officer as	http://sp.fng.ca/fngweb/022	Still in effect.

CHAPEL ISLAND (POTLOTEK) FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
<p>known as the Chapel Island Band Traffic Code) (1997)</p>	<p>Or with a suspended licence; no speeding; must obey traffic control device; no turning left unless the turn can be done safely; must signal if stopping; no backing up unless it can be done safely; no parking unless there is room to pass for a distance of 60 meters in either direction along the road; no parking where it is posted "no parking"; no operating vehicles which are heavier than allowed; no driving carelessly or with disregard for other drivers; no driver may drive on the wrong side of the road unless passing; no passing on the right; no following too closely; no u-turns unless safe; no driving with liquor unless the liquor is in his luggage and closed; cannot leave the scene of an accident; cannot pass a school bus if lights flashing; cannot operate a vehicle that is not road safe; children must be in car seats or seatbelts; drivers must wear seatbelts; passengers over 15 must wear seatbelts; if a child is between 6 and 16 they must have a seatbelt on; cannot remove seatbelt; cannot deface traffic control devices; cannot drive if windshield is obscured; cannot drive if steering wheel or brake pedal is impeded; cannot switch drivers if the car is in motion; cannot be</p>	<p>being a member of the [former] Unamaki Tribal Police or a member of the RCMP.</p> <p>The penalty is a fine not exceeding \$1000, imprisonment of up to 30 days, or both. Depending on the violation, penalty may also include the impounding of a vehicle, suspension of driver's license, and offenders may be liable to an order of restitution imposed at the discretion of the court for damages caused by the offence.</p> <p>The by-law states that in addition to the summary conviction procedures set out in the <i>Criminal Code</i>, proceedings under the by-law may also be conducted according to the provisions of the <i>NS Summary Proceedings Act</i>.</p>	<p>traffic by-law 1997-1.pdf</p>	

CHAPEL ISLAND (POTLOTEK) FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	inside a trailer while it is being moved; cannot ride on the outside of a MV; do not open a door unless it is safe to do so; no littering or throwing things from your vehicle; do not drive in a way that makes excessive noise.			

ESKASONI FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Eskasoni Annual Expenditure By-law (2017)	None	None	http://sp.fng.ca/fngweb/023_expend_by-law_2017.pdf	The by-law authorizes the expenditures provided for in the annual budget.
Property Tax Rates By-law, for years: 2000, 2001, 2013, 2015, 2014, 2016, 2017	None	None	http://sp.fng.ca/fngweb/023_prop_tax_rates_by-law_2017.pdf	The by-law sets out the tax rates for the year.
Animal Control By-law (2002)	No more than 2 dogs unless dogs are younger than 8 months; dogs must be tethered or penned; dogs must be kept reasonably quiet; female dogs in heat should not be in public; failure to clean up feces; biting another animal; property damage; neglecting the dog; other kinds of abuse; if near water used for recreational swimming, the dog must be under effective physical restraint; training	<p>“Animal Control officers” means an official appointed by Council. Provides Animal Control Officer with authority to enforce the by-law.</p> <p>Summary conviction of a fine not exceeding \$1000 or 30 days’ imprisonment, or both. Penalty may also include seizure and</p>	http://sp.fng.ca/fngweb/023_animal_control_by-law_2002.pdf	

ESKASONI FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	<p>attack dogs outside of specified areas; must wear a tag; must post a sign warning about dangerous dogs; must muzzle a dangerous dog and restrain it if at large.</p>	<p>impoundment of dangerous dogs (destroy the dog if animal control officer is unable to seize /capture the dog).</p> <p>In addition to the summary conviction procedures set out in the <i>Criminal Code</i>, proceedings under the by-law/Code may also be conducted according to the provisions of the <i>NS Summary Proceedings Act</i>.</p>		
<p>Building By-law (1981)</p>	<p>Cannot sell any materials purchased to build a band-funded dwelling.</p>	<p>Required to replace the materials sold, and suspension of funding for new building materials and labour until the restitution has been made in full.</p> <p>No enforcement provision per se, however, council has authority to approve / suspend.</p>	<p>http://sp.fng.ca/fngweb/023/buildings by-law 1981-06.pdf</p>	
<p>Property Assessment and Taxation By-law (1998)</p>	<p>Not paying property taxes</p>	<p>Council may appoint a "Tax Administrator" to administer and enforce the by-law</p> <p>If taxes not paid the Tax Administrator may file a lien / encumbrance on the interest of the user in the <i>Indian Act</i> Reserve Land Registry. The Tax Administrator may also, with authorization from</p>	<p>http://sp.fng.ca/fngweb/023/assessmt tax by-law 1998.pdf</p>	

ESKASONI FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
		<p>council, commence enforcement proceedings in court.</p> <p>With the authorization from Council, the Tax Administrator may also impose the following penalties: seizure of goods (which may eventually be sold auction); cancellation of interest held by the taxpayer; discontinuance of services (i.e., sewer, water, garbage disposal etc.) to the property.</p>		
Traffic By-law (1981)	Driving vehicle in a specific direction on a specific roadway on reserve.	<p>No enforcement provision.</p> <p>Summary conviction, a fine no greater than \$100 or imprisonment for a term not exceeding 30 days, or both.</p>	http://sp.fng.ca/fngweb/023_traffic_by-law_1981-05.pdf	
Protection of Water Supply By-law (1981)	Cannot add or remove material from the designated area.	<p>No enforcement provision. However, council or its agent may create barriers to prevent offences.</p> <p>Summary conviction; no fine greater than \$100 or imprisonment for a term not exceeding 30 days, or both.</p>	http://sp.fng.ca/fngweb/023_water_supplies_by-law_1981-07.pdf	
Band Administration (1979)	None	None	http://sp.fng.ca/fngweb/023_administration_by-law_1979-03.pdf	By-law created band staff positions.

ESKASONI FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
School Property (1979)	No one can be on school grounds unless there on specific legal business or activity between one hour before sunrise and one hour after sunset.	No enforcement provision. Summary conviction, a fine not greater than \$100 or imprisonment for a term not exceeding 30 days, or both.	http://sp.fng.ca/fngweb/023lawandorderby-law1979-04.pdf	
Zoning By-law (1964)	No cutting wood on the Eskasoni Indian reserve #3A.	No enforcement provision. However, the by-law does state that council has “adequate powers” to exercise power under the by-law. Summary conviction, a fine not greater than \$100 or imprisonment for a term not exceeding 30 days, or both.	http://sp.fng.ca/fngweb/023zoningby-law1964-03.pdf	
Curfew By-law (1963)	Outlines a curfew policy for children under or apparently under age 16; have to be inside by 8 p.m. from September to June. From June until September curfew is 9:30 p.m.	The child may be warned and brought home by a police officer. Parents “shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding \$5.00 or imprisonment for a term not exceeding seven days, or both”	http://sp.fng.ca/fngweb/023curfewby-law1963-01.pdf	
Business Hours (1963)	Closes down businesses after 10 p.m.	No enforcement provision. Summary conviction, \$50 fine or 15 days in prison, or both.	http://sp.fng.ca/fngweb/023nuisanceby-law1963-02.pdf	

GLOOSCAP FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Animal Control By-law (2015)	<p>Must take care of animals you own on the reserve; no dog shall be un-spayed, in heat and not be confined inside a dog-proof enclosure. Describes proper enclosures for keeping dogs outside, standards for transporting animals; you cannot transport an animal in your trunk or outside the passenger compartment; can't leave an animal in an unsafe container. No more than 3 domestic animals in any dwelling unless under 4 months old; cannot keep pets who have not been immunized; there are some designated areas prohibited to animals; cannot own venomous snakes; cannot allow your dog to run at large; dogs must not make excessive noise; must make it clear and obvious that your dog is vicious.</p>	<p>“Animal Control Officer” means any by-law enforcement officer, a police officer, or person or SPCA member employed by the council.</p> <p>The by-law then states that the council may appoint an Animal Control Officer to enforce the by-law.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment not exceeding 30 days, or both; your car window may be broken; and your dog may be killed or impounded if vicious or aggressive.</p>	<p>http://sp.fng.ca/fngweb/030_animal_control_by-law_2015.pdf</p>	
Residency By-law	<p>Residing on reserve without required permission; refusing to leave housing after ordered to do so.</p>	<p>“Officer” means any police officer, police constable or any person appointed by the council as by-law enforcement officer. An officer may order a person in violation to leave.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment for no more than 30 days, or both. May also be evicted.</p>	<p>http://sp.fng.ca/fngweb/030_residency_by-law_1992.001.pdf</p>	

GLOOSCAP FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Financial Administration By-law	None	None	http://sp.fng.ca/fngweb/30_fin_admin_law_2017_fng.pdf	

MEMBERTOU FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Swimming Pool By-law (2015)	Filling a swimming pool without a fence erected around it is an offence.	<p>“Enforcement Officer: means an officer of the Cape Breton regional Police.</p> <p>Summary conviction to a fine no more than \$1000; 30 days imprisonment, or both.</p>	Trevor Bernard	<p>"Enforcement Officer" means an officer of the Cape Breton Regional Police.</p> <p>In effect.</p>
Buildings (Swimming Pool) By-law (2014)	Swimming pools must be enclosed; removable access to pools must be removed when not in use; cannot fill a pool with water if not enclosed properly.	None identified.	http://sp.fng.ca/fngweb/026_buildings_by-law_2014.pdf	Either repealed or no longer in enforced.
Buildings By-law (1969)	No person shall allow a structure they own to be party, demolished, decayed, or deteriorated, so as to be dangerous, or unsightly, offensive or unhealthful; or allow a collection of garbage or rubbish to remain on their land.	Fine of no more than \$50 or, if in default of payment, prison of no more than 30 days.	http://sp.fng.ca/fngweb/026_buildings_by-law_1969.pdf	Either repealed or no longer in enforced.
Animal Control By-law (2010)	No more than 2 dogs per dwelling unless less than 8 months old; dogs must not disturb other people or be allowed to roam at large; dogs cannot inflict unprovoked bites on people or destroy another person's property; must clean up after your dog; no pit bulls;	<p>“Animal Control Officer” means a CBRP officer or an Animal Control Officer appointed by Council. Both may enforce.</p> <p>Summary conviction, a fine of no more than</p>	http://sp.fng.ca/fngweb/026_animal_control_by-law_2010.pdf	In effect.

MEMBERTOU FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	villainous dogs must be identified and muzzled and controlled.	<p>\$1000 or imprisonment of no more than 30 days, or both.</p> <p>Dogs may also be seized and impounded or killed.</p>		
Smoking By-law (2006)	No smoking in indoor places used for public assembly or enclosed gaming facilities.	<p>No enforcement provision.</p> <p>Summary conviction, a fine of no more than \$500 or imprisonment of 30 days, or both.</p>	http://sp.fng.ca/fngweb/026_smoking_by-law_2006.pdf	In effect.
Traffic Code (1997)	<p>No operating a MV without a license; must have your license, insurance, and registration with you while driving; no driving if suspended; cannot drive a MV for which you have no license; no speeding; must obey signage; no backing up if it is unsafe; you can only park on the road if there is still room to pass; must obey a Membertou law enforcement officer who is directing traffic; there are a number of prohibitions surrounding how to pass someone; you have to stay at the scene of an accident if you are involved; cannot leave your car unattended; be careful around school busses; cannot operate a MV if it is unsafe to others; you have to wear a seatbelt; there are a list of rules regarding when someone must be in a car seat or wearing a seatbelt; no operating a vehicle if the</p>	<p>“Enforcement Officer” means a member of the RCMP or a member of the [former] Unamaki Tribal Police.</p> <p>A fine of no more than \$1000 or imprisonment of no more than 30 days or both. There may also be some restitution/ damages certain offences. Your license can be taken away and your car impounded.</p>	http://sp.fng.ca/fngweb/026_traffic_code_1997.pdf	In effect, but not enforced. INAC wanted a number of changes made to it so the band decided not to pursue the process.

MEMBERTOU FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	<p>seatbelt system has been removed; no defacing signs; no driving a car of which the windshield is somehow obscured; no driving with someone in the front seat which prevents the driver from seeing the road or unobstructed access to the pedals and steering wheel; no riding in the vehicle in a way which prevents the driver from seeing or driving safely; no exchanging places with another passenger if the vehicle is in motion; no person shall occupy a house trailer while it is being pulled; no holding on to a vehicle while on a bicycle or skateboard; if you clean up a wrecked car you must clean up all of the glass as well; no littering; no interfering with another person's car; no leaving your door open unless it is safe; no opening your door unless it is safe; must wear helmet to ride a bike; there are several laws around driving and riding snowmobiles and motorcycles, i.e. helmets, where it is legal, when to turn lights on.</p>			
<p>Traffic By-law (1997)</p>	<p>Very much the same as the Traffic Code, immediately above.</p>	<p>“Enforcement Officer” means a member of the RCMP or a member of the [former] Unamaki Tribal Police.</p> <p>The by-law provides full enforcement authority to Enforcement Officers.</p>		<p>In effect.</p>

MEMBERTOU FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
		A fine of no more than \$1000 or imprisonment of no more than 30 days or both. There may also be for restitution/ damages certain offences. Your license can be taken away and your car impounded.		
Law and Order By-law (1961, 1968, 1969)	<p>1961:Curfew for children younger or appearing younger than 15;</p> <p>1968: Updated curfew for children under 13 with a special allowance for 14-15 year olds to stay out later and 16 year olds even later than that.</p> <p>1969: No disturbing the peace/disorderly conduct in public or from your dwelling.</p>	<p>1961: \$5 or imprisonment for a week or both.</p> <p>1968: children will be brought home.</p> <p>1969: \$100 fine or imprisonment for no more than 30 days.</p>		Either repealed or no longer enforced.

MILLBROOK FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
Trespass By-law (2014)	Prohibits non-Indian and non-residents from hunting, fishing, trapping, selling services or goods, loitering, soliciting financial assistance, selling illegal substances, or breaking federal or provincial law.	<p>Provides for enforcement by RCMP (or other police force that may in future become responsible for policing Millbrook lands). RCMP may take reasonable measures necessary to remove trespasser from the reserve.</p> <p>Summary conviction, a fine of no more than</p>	http://sp.fng.ca/fngweb/027_trespass_by-law_2014.pdf	In effect.

MILLBROOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
		<p>\$1000 or imprisonment for no more than 30 days, or both.</p>		
<p>Smoking By-law (2005)</p>	<p>No smoking: in a retail shop, in medical services building, at service counters and service lines, places of employment, places of public assembly, licensed gaming locations, skating arena, council chambers.</p> <p>Anyone who controls one of these areas must put up signs indicating where smoking may occur and where it cannot.</p>	<p>Fine of no more than \$500 or imprisonment for no more than 30 days or both.</p>	<p>http://sp.fng.ca/fngweb/027_smoking_by-law_No.2005.pdf</p>	<p>No longer in force.</p>
<p>Dog By-law (2008)</p>	<p>Dogs must be registered and wearing a collar with tags on it; dogs must be immunized; owners of dogs must report how many dogs they own; a dog exposed to rabies must be quarantined for 14 days; any dog which has bitten someone must be held in quarantine for 14 days; if a dog is infected with rabies it must be killed; no more than three dogs per dwelling; any dog running at large, not wearing a tag, not registered, that is fierce or dangerous, or persistently disturbs people can be impounded; no dog should be vicious or aggressive or trained for fighting unless it is a trained guard dog protecting property or if the victim was tormenting it; dogs must be kept safely tethered or penned in unless someone is</p>	<p>Enforced by dog control officer.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment for no more than 30 days, or both. Dog may also be destroyed if unable to capture.</p>	<p>http://sp.fng.ca/fngweb/027_dog_by-law_2008.pdf</p>	<p>In effect.</p>

MILLBROOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	<p>holding the leash, it is hunting with someone, it is herding animals, or assisting a visually impaired person; no female dog in heat shall remain accessible to other dogs; no dog should destroy property of another person; must take care of your dog;</p>			
<p>Residency By-law (2002)</p>	<p>Residing on reserve when you are no longer entitled to do so or assisting someone to do the same.</p> <p>Failing to comply with an order made under the act is an offence explicitly.</p>	<p>“Officer” means any police officer or other person appointed by council to enforce the by-law.</p> <p>Person in violation of the by-law may be removed by enforcement officer, at request of council.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days, or both. Each day of excessive stay counts as an individual count.</p>	<p>http://sp.fng.ca/fngweb/027_residency_by-law_No.1995.pdf</p> <p>Amended:</p> <p>http://sp.fng.ca/fngweb/027_residency_by-law_2002.pdf</p>	<p>This law was amended to explicitly include contraventions of direct orders as an offence.</p> <p>In effect.</p>
<p>Advertising Signs (2000)</p>	<p>By-law applies to lands on reserve that are adjacent to Highway 102.</p> <p>It is an offence to erect a sign that does not adhere to the locations specifically designated, size and colour of signage as set out in the by-law.</p>	<p>Council will appoint and authorize and enforcement officer to monitor and enforce compliance with this by-law (s.6)</p> <p>Enforcement officer to notify business of non-compliance. If non-compliant, then council will seek summary offence conviction in Provincial Court.</p>	<p>http://sp.fng.ca/fngweb/027_advertising_signs_by-law_2000.pdf</p>	

MILLBROOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
		<p>Summary conviction, a fine of no more than \$500 or imprisonment for no more than 30 days, or both.</p>		
<p>Regulating the Operation of Businesses on Reserve (1999)</p>	<p>Businesses can be open to the public for 24hrs a day and 7 days a week. They must observe statutory holidays mandated by the Government of Canada.</p> <p>No specific prohibitions listed. Just empowers council to make rules.</p>	<p>Council will appoint and authorize and enforcement officer to monitor and enforce compliance with this by-law</p> <p>Enforcement officer to notify business of non-compliance. If non-compliant, then council will seek summary offence conviction in Provincial Court.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days, or both.</p>	<p>http://sp.fng.ca/fr/bib/027_business_operations_by-law.pdf</p>	
<p>Zoning By-law (1992)</p>	<p>Using land in a non-permitted way without an exemption or causing or permitting land to be used in such a way.</p> <p>Interfering with or obstructing the zoning administration from enforcing such laws.</p>	<p>“Zoning Administrator” means the person appointed by the council to administer and enforce the by-law.</p> <p>Zoning administrator may, during reasonable hours, enter and inspect any land/building to determine compliance.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days, or both. Each day of excessive stay counts as an individual count.</p>	<p>Legal counsel for the community</p>	<p>In effect.</p>

MILLBROOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Building By-law (1991)	No construction or demolition without a permit; no occupying of a building without a permit; failing to comply with any provision in this by-law; submits false or misleading information; interferes with or obstructs a building inspector acting in the administration or enforcement of this by-law.	<p>“Building inspector” means a person appointed by council to enforce the by-law. Authorized to enter into and inspect buildings during business hours, and may order compliance with by-law.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days or both.</p>	<p>http://sp.fng.ca/fngweb/027buildings_by-law_No.1991.pdf</p>	In effect.
Disorderly Conduct and Nuisance By-law (1992)	Creating a nuisance or participating in disorderly conduct; doing either of those things while intoxicated; being intoxicated and interfering with commercial, administrative, educational, recreation, health care, religious activities; Intoxicated people who put their children at risk; by disorderly conduct interfering with commercial, administrative, educational, recreational, health care, religious activities; someone outside causing a nuisance to someone by swearing impeding molesting or threatening.	<p>“Officer” means any police officer, police constable or other person charged with the duty to preserve and maintain public peace.</p> <p>An officer may order any person to cease disorderly conduct/nuisance. If person doesn’t comply, officer may take reasonable steps necessary to stop the conduct.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days, or both.</p>	<p>http://sp.fng.ca/fngweb/027nuisance_by-law_No.1991.pdf</p> <p>Amended:</p> <p>http://sp.fng.ca/fngweb/027nuisance_by-law_1992.pdf</p>	In effect.
Land Tax By-law	Not paying your taxes	A Tax Administrator may be appointed by council to be responsible for administration and enforcement of the by-law.	<p>http://sp.fng.ca/fngweb/027land_tax_by-law_1996.pdf</p>	

MILLBROOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
		<p>If taxes not paid the Tax Administrator may file a lien/encumbrance on the interest of the user in the <i>Indian Act</i> Reserve Land Registry. The Tax Administrator may also, with authorization from council, commence enforcement proceedings in court.</p> <p>With the authorization from council, the Tax Administrator may also impose the following penalties: seizure of goods (which may eventually be sold auction); cancellation of interest held by the taxpayer; discontinuance of services (i.e., sewer, water, garbage disposal etc.) to the property.</p> <p>Seizure of goods; cancellation of interest held by the taxpayer; discontinuance of services (i.e., sewer, water, garbage disposal etc.) to the property.</p>		
<p>Repealed Laws:</p> <ul style="list-style-type: none"> • traffic by-law from 1970 • curfew by-law 				<p>This could indicate an unwillingness or incapacity to enforce those laws. Or perhaps they felt the by-laws were no longer necessary</p>

MILLBROOK FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
<ul style="list-style-type: none"> • water Supplies by-law • Intoxicants by-law from 1985. 				

PICTOU LANDING FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
Emergency Measure By-law (2000)	None	None	http://sp.fng.ca/fngweb/024_emergency_measures_by-law_2000.pdf	Chief and council may establish an emergency measures organization. It repeals all former emergency measure by-laws.
ATV By-law (1999)	No riding an ATV faster than 25km/h; no power turning; no doing a u-turn in an intersection between two roads; no riding without due care and attention for others and property; no riding between 10 p.m. and 6 a.m. unless returning from hunting or leaving to hunt; no more than one passenger; only towing with a rigid drawbar no more than a meter long; must be or appear to be older than 16 years old; all of these offences are excusable with a legal justification;	No enforcement provision. Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days or both.	http://sp.fng.ca/fngweb/024_ATV_by-law_1999.pdf	
Animal Control By-law (1999)	Dogs must be registered and immunized; no more than 3 animals per dwelling unless they are less than 4 months old; dogs must be penned up or tethered at all times	“Animal control officer” is any person appointed pursuant to the by-law, or any by-law enforcement officer or police officers or a	http://sp.fng.ca/fngweb/024_animal_control_by-law_1990-10.pdf	

PICTOU LANDING FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	<p>unless someone is holding the leash, they are hunting, herding animals, or assisting an impaired person; no female dog in heat should be accessible to other dogs; dogs cannot damage the property of another person; must clean up after your dog; must take care of your dog; cannot punish or abuse your dog in an unnecessary way; no dog should disturb people; vicious dogs must be identified and muzzled; dogs should not be at large; dogs should not bite another dog or people unprovoked;</p>	<p>person employed by the band council.</p> <p>Animal control officer provided specific authority to seize, hold, and even put down a dog if required.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days or both.</p>		
Financial Administration By-law	None	None	http://sp.fng.ca/fngweb/024_fin_admin_by-law_1999-13.pdf	Simply a budgetary law, not tied to a tax act like in Millbrook.
Nuisance By-law (1999)	<p>Creating a nuisance or participating in disorderly conduct; where nuisance can mean abandoning cars or appliances or furniture, dumping or storage of tires or garbage, burning tires, grass, leaves, or garbage, discharging any substance into the air or water; noise; where disorderly conduct can mean fighting, using abusive language; being drunk; loitering; making unreasonable noise; exposing, firing, or threatening a firearm or other weapon; interfering with the typical practices of the reserve in such a way as</p>	<p>“Officer” means any police officer, police constable or other person appointed by the band council for the purpose of maintaining law and order on reserve.</p> <p>Officers provided authority to take reasonable measures necessary to stop disorderly conduct/nuisance</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment</p>	http://sp.fng.ca/fngweb/024_nuisance_by-law_1999-12.pdf	

PICTOU LANDING FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	to cause a public inconvenience, annoyance, or alarm.	of no longer than 30 days, or both.		
Residency By-law (1999)	Residing on reserve when you are no longer entitled to do so or assisting someone to do the same; failing to comply with an order made under the act is an offense explicitly.	<p>“Officer” means any police officer, police constable, by-law enforcement officer or other person appointed by band council for maintaining law and order.</p> <p>An Officer may order person to leave. Not authorized to physically enforce.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30 days, or both. Each day of excessive stay counts as an individual count.</p>	http://sp.fng.ca/fngweb/024-residency-by-law-1999-11.pdf	
Traffic By-law (1999)	No operating a MV without a license; must have your license, insurance, and registration with you while driving; no driving if suspended; cannot drive a MV for which you have no license; no speeding; must obey signage; no backing up if it is unsafe; you can only park on the road if there is still room to pass; be careful around school busses; cannot operate a MV if it is unsafe to others; you have to wear a seatbelt; there are a list of rules regarding when	<p>“Officer” means any police officer, police constable, by-law enforcement officer or other person appointed by band council for maintaining law and order on reserve. Officers can stop vehicles, require driver information, seize vehicles etc.</p> <p>Summary Conviction, a fine of no more than \$1000 or imprisonment of no longer than 30</p>	http://sp.fng.ca/fngweb/024-traffic-by-law-1999-14.pdf	

PICTOU LANDING FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
	<p>someone must be in a car seat or wearing a seatbelt; no operating a vehicle if the seatbelt system has been removed; no defacing signs; no driving a car of which the windshield is somehow obscured; do not park where it says not to; do not operate a vehicle which is too heavy for the posted road; do not follow too closely;</p>	<p>days or both.</p> <p>Vehicles may also be impounded.</p>		
<p>Zoning By-law with respect to Forest Management (1999)</p>	<p>Using land in a non-permitted way without an exemption or causing or permitting land to be used in such a way; interfering with or obstructing the zoning administration and /or peace officers from enforcing such laws.</p>	<p>By-law enforcement officers have duty of “monitoring and reporting” on the by-law.</p> <p>“Peace Officer” is as defined in section 2 of <i>Criminal Code</i>, and responsible for enforcement of the by-law.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment of no longer than 30, days or both. Each day of contravention is its own contravention.</p> <p>Peace officer may seize equipment, including vehicles, and remove offenders from the designated area.</p>	<p>http://sp.fng.ca/fngweb/024_zoning_by-law_1999.pdf</p>	

WAGMATCOOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
Animal Control By-law (1998)	Two dogs per dwelling: must be immunized; if suspected of being rabid then quarantined or destroyed; can't train attack dogs within a certain area; no unprovoked dog attacks; or dogs destroying someone's property; no dogs allowed to roam at large; no boarding facilities without authorization from the band council; dogs must be tied up; can't neglect your dogs; dogs should not be tied up in such a way that emergency services cannot access the house; cannot punish your dog or abuse them unnecessarily; fierce or dangerous dogs must be identified and restrained.	<p>“Officer” means any police officer, constable, or other person appointed by band council to enforce band by-laws.</p> <p>Officers have authority to enforce, including seizing and impounding animals.</p> <p>Summary conviction, a fine of no more than \$100 or imprisonment for a term no longer than 5 days.</p>	http://sp.fng.ca/fngweb/028_dogs_by-law_1998-01.pdf	
Trespass By-law (1996)	Prohibits non-Indian and non-residents from hunting, fishing, trapping, selling services or goods, loitering, soliciting financial assistance, selling illegal substances, or breaking federal or provincial law on reserve.	<p>“Officer” means any police officer, constable, or other person appointed by band council to maintain law and order on reserve.</p> <p>Officers can order trespassers to leave and take reasonable measures to remove those who refuse.</p> <p>Summary conviction, a fine of no more than \$1000 or imprisonment for no more than 30 days, or both.</p>	http://sp.fng.ca/fngweb/028_trespass_by-law_1996-01.pdf	

Buildings By-law (1981)	Cannot sell any materials purchased to build a band-funded dwelling.	Band members are required to enter into an agreement stating they will adhere to the by-law.	http://sp.fng.ca/fngweb/028/buildings_by-law_1981-01.pdf	
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WAGMATCOOK FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
		Must replace the materials sold and suspension of funding and labour until such restitution has been made in full.		
Water Supplies By-law (1981)	No removing earthen material, rock, or gravel; no garbage at water source stations.	Council or someone appointed by council may erect barriers to prevent the specified acts. Summary conviction, a fine not exceeding \$100 or 30 days imprisonment, or both.	http://sp.fng.ca/fngweb/028/water_supplies_by-law_1981-02.pdf	
Game Preservation By-law (1973)	None	No enforcement provision. No penalty provision.	http://sp.fng.ca/fngweb/028/oyster_fisheries_by-law_1973-02.pdf	Requires residents to use SCUBA equipment for the preservation, protection and management of oyster fisheries along the river.
Curfew By-law (1964)	Curfew for children under or apparently under age 16. Similar (if not identical) to Eskasoni's curfew law.	Police officers can issue warnings and/or escort children home. Summary conviction, a fine not exceeding \$5 or a week in prison, or both (for the parents).	http://sp.fng.ca/fngweb/028/nuisance_by-law_1965-01.pdf	

ACADIA FIRST NATION

By-law	Offenses	Enforcement and Penalties	Source	Notes
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Residency By-law (1998)	Living on reserve without permission to do so.	"Officer" means any police officer, police constable or other person charged with the	http://acadiafirstnation.ca/files/121/Band%20by-laws.pdf	
		<p>duty to preserve and maintain the public peace, and any by-law enforcement officer or other person appointed by the council for the purpose of maintaining the law and order on the reserve"</p> <p>Officers may order non-residents off reserve.</p> <p>Summary conviction, a fine not exceeding \$1000 or a term in prison not exceeding 30 days, or both.</p> <p>Contravention of the by-law is also an offense under s. 31 of <i>Indian Act</i>.</p>		
Taxation By-law	Failing to pay, being late, remitting false reports, failing to provide relevant documents	<p>A "Tax Administrator" may be appointed by council to administer and enforce the by-law.</p> <p>Must pay the back taxes; business licences/permits may be suspended; if business does not comply, the Tax Administrator may, with authorization from council, proceed by way of distress/seizure of the debtors goods and/or initiate court proceedings.</p>		Applies to all corporations and businesses owned or controlled by Acadia First Nation, except non-profit associations.

Land / Forest Management By-law (2000)	The land at issue must be used in conformity with the law. Cannot prevent or interfere with an officer attempting to enforce this law	By-law officers authorized to monitor and report on the by-law. "Peace Officer" is as defined in s.2 of <i>Criminal Code</i> .		Council may appoint a Tax Administrator to administer and enforce the by-law.
		Summary conviction, a fine not exceeding \$1000 or imprisonment for 30 days, or both. Any breach of the by-law will also result in seizure of any equipment/property and will be disposed of, as per direction of the court		
Smoking By-law (2007)	None	None		Provides the band council the ability to designate smoking areas
Election By-law (2004)	Violating any of the election provisions	Suspension from council and loss of honorarium for a period of less than 90 days. "Any person who knowingly and willfully commits a violation against the provisions of these by-laws shall be prosecuted accordingly if appropriate under the Criminal Code of Canada."		

SIPEKNE'KATIK FIRST NATION				
By-law	Offenses	Enforcement and Penalties	Source	Notes
Residency By-law	Individuals have to apply for residency on reserve		Legal counsel for the	

			community	
Trespass By-law			Legal counsel	
Solvent (glue) By-law	Prohibiting the sniffing of glue		Legal counsel	
Animal Control By-law			Legal counsel	
Water Supply By-law			Legal counsel	
Band Employee By-law			Legal counsel	Prevents incoming council from arbitrarily terminating existing band employees.

No internet accessible by-laws for the following communities:

Bear River First Nation
 We'koqma'q First Nation

Paqtnkek Mi'kmaw Nation

13 Appendix C – Scope of By-Law Making Powers

This list builds on a list first included in ISC’s *By-Laws Manual*. Where no sources are indicated for a subject matter under a by-law provision, this indicates that it comes from the *ISC By-Laws Manual*. This list addresses the by-law making provisions in ss. 81(1) and 85.1. **This is not intended as an exhaustive list.**

The entire database of the First Nations Gazette (where all by-laws had to be posed until 2014) can be searched [here](#).

(The First Nations Tax Commission (“FNTC”) has a “s. 83 Toolkit” on its [website](#), which explains the expanse of each power under s. 83(1), FNTC policies on each power and sample by-laws. Since FNTC determines how s. 83(1) applies and what by-laws are accepted, we focus primarily on s. 81(1) and 85.1 here.)

Section 81(1)(a) – Health

- pest and animal control
- 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 licenses
- impounding of and the procedure to claim animals
- destruction of animals after notice to the owner when not claimed
- destruction of animals for humane reasons without notice to the owner, e.g., diseased animal, rabies
- solvent abuse
- garbage disposal (subject to the *Indian Reserve Waste Disposal Regulations*, C.R.C. 1978, c 955)
- health hazards, immunization and quarantine
- contamination of water works or watercourses originating on the reserve as they relate to contagious and infectious diseases
- administration of health services and programs
- smoking in buildings
- use of cannabis (in combination with (c), (d) and (q))⁸⁴⁴
- services for children and youth (including child welfare services) (in combination with (c), (d) and (q))⁸⁴⁵

⁸⁴⁴ Since the passage of the *Cannabis Act*, SC 2018 c. 16, some First Nations have been regulating cannabis use in their communities. See [Atikametsksheng Anishnawbek Cannabis By-Law \(2018\)](#); [Listuguj Mi’gmaq Government Cannabis By-Law \(2018\)](#); [Chippewas of Georgina Island Cannabis By-law \(2018\)](#).

⁸⁴⁵ Splantsin (Spallumcheen) First Nation created such a by-law in 1980 and it was not disallowed by Canada. While the validity of the bill was raised in one case, it was never decided (*Alexander v Maxime* 1995 CarswellBC 190, 4 BCLR (3d) 294 (BC CA)). Since this time, the courts have taken its validity for granted (see *S. (E.G.) v Spallumcheen Band Council*, 1998 CarswellBC 2633, [1998] BCJ No 2778 (BC SC)).

- services to elders and disabled⁸⁴⁶
- social assistance⁸⁴⁷
- housing services⁸⁴⁸
- environmental protection⁸⁴⁹
- protection of language and culture⁸⁵⁰

Section 81(1)(b) – Regulation⁸⁵¹ of Traffic⁸⁵²

- use of all-terrain vehicles
- use of motor vehicles
- use of snowmobiles
- weight restrictions on vehicles
- parking
- rules of the road
- riding bicycles on roads
- traffic control devices and equipment
- speed limits
- ticketing system or traffic violations (in combination with (q))⁸⁵³

Section 81(c) – Law and Order

- appoint enforcement officers
- confer authority on other officers to enforce by-laws
- curfew rules⁸⁵⁴
- fire controls
- regulation of public meetings, gatherings and demonstrations
- agreements with surrounding municipalities for fire protection

⁸⁴⁶ [Splatsin First Nation](#) Elder By-law (1997).

⁸⁴⁷ Proposed in Naomi Metallic, “Indian Act By-Laws: A Viable means for First Nations to (Re)Assert Control over Local Matters Now and Not Later” (2016) 67 UNBLJ 211.

⁸⁴⁸ Housing and residential tenancies could arguably be justified on the basis of s. 81(1)(a), (c), (h), use of buildings, and (q).

⁸⁴⁹ Several of communities have creatively used the health and law and order powers to pass by-laws to deal with environmental pollution on the reserve. Such an approach would seem to be consistent with the decision on a similar municipal power in *Spraytech*. See, for example, Mohawk Council of Kahnawake's *Quarry Environmental Control Act* (1980). See also Theresa A. McClenaghan, “Why Should Aboriginal Peoples Exercise Governance over Environmental Issues” (2002) 51 UNBLJ 211. See also Sakimay First Nation [Environmental Standards Bylaw](#) (2017).

⁸⁵⁰ Since all First Nations languages and cultures have been negatively affected by colonialism, a First Nation could also credibly justify by-laws protecting and promoting language and culture on the basis of s. 81(1)(a), (c), (d) and (q).

⁸⁵¹ In the case of by-law provisions that use the term “regulate”, note that the Supreme Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485 took judicial notice of the meaning of the word “regulate” and held that the word includes the power to impose restrictions. In other words, the power to regulate necessarily implies the power to prohibit when conditions are not met.

⁸⁵² See discussion at Section [5.3.2](#) on the traffic by-laws and traffic regulations.

⁸⁵³ See discussion at [Section 6.4.1.3](#).

⁸⁵⁴ *Eastmain Band v Gilpin*, 1988 CarswellQue 772, [1988] 3 CNLR 15 (Que Prov Ct).

- firearms Safety by-law⁸⁵⁵
- laws to impose specific rules of behaviour⁸⁵⁶
- appointing a First Nation justice of the peace⁸⁵⁷
- creating First Nation court system⁸⁵⁸
- policing⁸⁵⁹
- banishment (in combination with (a), (d), (q) and (r))⁸⁶⁰

Section 81(d) – Disorderly Conduct and Nuisance

- regulation of burning (grass fires, tires, garbage)
- prohibition of the obstruction of passages
- regulation of the use of dangerous materials
- regulation of noise
- abandonment of cars
- environment / air and water pollution (can be in combination with (a))
- other conduct that creates a disturbance or amounts to a public nuisance
- community standards by-Law⁸⁶¹

Section 81(1)(d) - Trespass of Cattle

- regulation of the behaviour of dogs
- regulation and control of straight cattle, horses, sheep
- fencing requirements and obligations
- impounding of cattle

Section 81(1)(f) – Local Works

- public water and sewer services
- sanitation services
- type and height of fences and boundary fences
- illumination of streets and lands
- electrical power system, its financing, the area to which it is to apply, the levying of the fee for its use
- road and bridge construction and maintenance
- drainage

⁸⁵⁵ See Sakimay First Nation [Fire Arms Safety By-law](#) (1972).

⁸⁵⁶ See discussion at [Section 5.2.1](#).

⁸⁵⁷ See discussion at Section [8.3](#).

⁸⁵⁸ See *ibid*.

⁸⁵⁹ The Federal Court suggested a policing by-law was possible pursuant to such provisions: *Ross v. Mohawk Council of Kanesatake*, 2003 FCT 531. Several communities have passed Policing by-laws. Many of these are from the 1970s and 1980s, but there are more recent ones as well. See also discussion at Section 6.4.1.3.

⁸⁶⁰ See *Solomon v. Garden River First Nation*, 2018 FC 1284; *Edgar v Kitasso Band Council*, 2003 FCT 166 and *Gamblin v Norway House Cree Nation Band Council*, [2000] 198 FTR 242.

⁸⁶¹ Sakimay First Nation [Community Standards By-Law](#) (2017)

Section 81(1)(g) – Zoning

- land use control
- determination of campsites, including setting fees for campsites commercial, residential, industrial, situational and conservation zones
- cottage sites
- protection of forests

Section 81(1)(h) – Buildings

- proper maintenance standards
- occupancy standards
- obligation to keep houses in good repair
- pest prevention (cockroaches, ants, termites, etc.)
- Fire resistance standards
- thermal insulation
- building standards, including for cottages
- requirement for smoke detectors
- residential tenancies (in combination with (a), (c) and (q))⁸⁶²

Section 81(1)(i) – Land Survey

- allotment of lands for community centre, churches, schools, store
- allotment of lands to band members

Section 81(1)(j) – Noxious Weeds

- 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 noxious weeds
- authorize searches for noxious weeds by by-law enforcement officers (using in tandem with (q))
- notice to the occupiers of land to destroy noxious weeds
- provide for the cleaning of any vehicle or machine used to process noxious weeds in order to prevent their spreading

Section 81(1)(k) - Bees and Poultry

- regulate beekeeping and poultry raising
- prohibits certain practices that person is in the business of beekeeping and poultry raising might engage in, if those practices are considered to be improper to jeopardize the interest of the band or the residence of the reserve

Section 81(1)(l) – Water Supplies

⁸⁶² Housing and residential tenancies could arguably be justified on the basis of s. 81(1)(a), (c), (h), use of buildings, and (q).

- location of public wells, cisterns and reservoirs
- building standards
- supply of water
- regulation of the use of water for domestic, industrial, and commercial basis
- establishment of user fees

Section 81(1)(m) – Public Games

- regulation of hours of business, safety standards, etc., for pool rooms, dance halls, electronic arcades
- prohibition of concerts, musical exhibitions or other gatherings
- bingos and gambling?⁸⁶³

Section 81(1)(n) – Hawkers and Peddlers

- submission of an application to the council in order to obtain a permit
- establishment of a fee
- hours and days of business
- type of kiosks
- type of advertisement
- prohibition of buying selling or otherwise dealing in wares and merchandise

Section 81(1)(o) – Wildlife

- provide for a nature preservation area
- provide for hunting or fishing seasons
- regulate, protect and manage the environment as it relates to habitat for wildlife
- issuance of permits
- provide for fees and the criteria for such fees
- fish cultivation on a small scale
- safe hunting⁸⁶⁴
- safe fishing⁸⁶⁵

⁸⁶³ There are older cases holding that First Nations could not pass by-laws regulating gambling because the wording/original intent of s. 81(1)(m) did not intend regulation of gambling. Some other cases on gambling held that by-laws on gambling could not stand as this was provided for in the *Criminal Code*. As discussed in Chapter 5, the reasoning may need to be revisited considering modern approach to interpretation of by-laws as well as modern conflict of law approaches. See *St. Mary's Indian Band v Canada (Minister of Indian Affairs & Northern Development)*, 1996 CarswellNat 1003, 136 DLR (4th) 767 (Fed CA); *R v Gottfriedson*, 1995 Carswell BC 2570, [1995] BCJ No 1791 (BC Prov Ct); and *R v Gladue*, 1986 CarswellAlta 688, [1987] 4 CNLR 92 (Alta Prov Ct).

⁸⁶⁴ See *R v Meechance*, 2000 CarswellSask 206, 2000 SKQB 156 (Sask QB) and *R v Blackbird*, 2005 CarswellOnt 265, 248 DLR (4th) 201 (ON CA).

⁸⁶⁵ This power has been interpreted to permit the regulations of fishing, including sale, on reserve: *R v Baker*, 1983 CarswellBC 758, [1983] 4 CNLR 73 (BC Co Ct); *R v Jimmy*, 1987 CarswellBC 186, [1987] BCJ No 1516 (BC CA); *R v Ward*, 1988 CarswellNB 139, 45 CCC (3d) 280 (NB CA). However, transactions occurring off-reserve are outside the Band's jurisdiction: *R v Alfred*, 1993 CarswellBC 903, [1993] BCJ No 2277 (BC SC). The Supreme Court has adopted a narrow interpretation of 'reserve' as including most adjacent rivers: *R v Lewis*, [1996] 1 SCR 921; *R v Nikal*, [1996] SCJ No 47. For a discussion on this, see [Section 5.2.3](#).

Section 81(1)(p) – Removal of Trespassers

- removes for trespass someone who fails or refuses to leave the reserve for an order to do so, or when a person resister interviews with an officer who is lawfully removing someone from the reserve
- banishment (often paired with (p.1), (q) and (r))⁸⁶⁶

Section 81(1)(p.1) – Residency

- establish a scheme whereby an individual seeking to reside on reserve will be required to apply for, and obtain, residency permits
- the issuance of temporary or permanent residency permits in accordance with criteria stipulated in the by-law
- procedures for reviewing applications for residency
- criteria for the renewal or revocation apartments
- appeal mechanisms and permits are denied or revoked

Section 81(1)(p.2) – Rights of Spouses and Children

- residency
- dissipation in the political life of the band, (e.g. giving the non-member spouses of band- members the right to participate in meetings)

Section 81(1)(P.3) – Capital and Revenue Monies

- must apply to all members
- general by-law is objective criteria establishing the amount payable

Section 81(1)(q) - Ancillary Powers

- appointing by-law enforcement officers
- establishing user fees and providing for hearings and appeals in residency and zoning by-laws
- powers for search and seizure to facilitate by-law enforcement⁸⁶⁷

⁸⁶⁶ Such by-laws control of who may live or frequent the community and provide for the removal of non-members and members for periods for engaging in undesirable behaviour. See *Conseil des Atikamekw d'Opitciwan c. Weizineau*, 2018 QCCS 4170 (member found guilty of drug trafficking was expelled for period of time). Such laws have also been referred to as 'banishment' by-laws. Such banishment laws that are based on curbing substance use have also been linked to s. 85.1 by-laws: *Gamblin v Norway House Cree Nation Band Council*, 2000 CarswellNat 3117, [2000] FCJ No 2132 (Fed TD); affirmed *Gamblin v Norway House Cree Nation Band Council*, 2002 CarswellNat 3837, [2002] FCJ No 1411 (Fed CA). Some communities use residency by-laws to enforce membership rules. In *Six Nations of the Grand River Band v Henderson*, 1996 CarswellOnt 2140, [1997] 1 CNLR 202 (Ont Gen Div), a court upheld a residency code that prohibited members who marry non-band members from residing with their spouses on reserve. While there are cases recognizing the validity of such laws, there may nonetheless be administrative, human rights or Charter issues raised in relation to their application. For example, see *Mississaugas of the New Credit First Nations v Landry*, 2011 CarswellOnt 2196, 2011 ONSC 1345 (Ont SCJ).

⁸⁶⁷ See discussion at [Section 5.2.2](#).

- providing for ticketing systems⁸⁶⁸
- penalties beyond those provided by s. 81(1)(r) (e.g., non-monetary)⁸⁶⁹

Section 81(1)(r) – Penalty Provisions

- imposition on summary conviction of a fine not exceeding \$1000 or imprisonment for a term not exceeding 30 days or both

Section 85.1(1) – Intoxicant By-Laws

- a) prohibition against the sale, barter, supplier or manufacturer of intoxicant
- b) prohibition against being intoxicated
- c) prohibition against the possession of intoxicants
 - exceptions to prohibition set out in paragraph (b) and (c) - examples of appropriate exceptions would be medicinal use or use for domestic, business, commercial or other purpose⁸⁷⁰
 - in the past tended to be limited to alcohol, but some First Nations have extended it to other substances act⁸⁷¹

⁸⁶⁸ See discussion at [Section 6.4.1.3](#).

⁸⁶⁹ See discussion at [Section 9.3](#).

⁸⁷⁰ In *R v LaForme*, 1995 CarswellOnt 4181, [1996] 1 CNLR 193 (Ont Prov Div), the Ontario Court of Justice held that an exception within an intoxication by-law allowing for personal consumption within a home or private dwelling was not a proper exception to s. 85.1(1)(b). The analysis in *LaForme* may be overly narrow given the modern rules on giving First Nations by-laws broad interpretation.

⁸⁷¹ ISC historically defined 'intoxicants' as relating only to alcohol, however, leading definition on this term in *R v Campbell*, [1996] 113 Man R (2d) 288 suggests it is not solely limited to alcohol (see para. 27). Some communities have passed by-laws regarding gas and solvent sniffing under this power. Brokenhead Ojibway Nation recently passed an *Illegal Drug* by-law. Search and seizure powers in such laws may be subject to *Charter* scrutiny: see *Cookish c. Cree Nation of Chisasibi*, 2018 QCCQ 11867.

14 Appendix D – Comparison of by-law powers and regulations powers

Reproduced from the *Final Report of the Joint Minister Advisory Committee on Recommendation and Legislative Options to the Honourable Robert Nault, P.C., M.P., Minister of Indian and Northern Affairs* dated March 8, 2002.

REGULATION-MAKING POWERS	BY-LAW MAKING POWERS	REGULATIONS NAME
(Note: s. 39(1)(b)(iii) of the <i>Indian Act</i> refers to "a referendum provided in the regulations" but there is no regulation making power in s.39)	none	Indian Referendum Regulations
42 providing that a deceased Indian who at the time of his death was in possession of land in a reserve, shall in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land	none	Indian Estates Regulations
57(a) authorizing the Minister to grant licences to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;	none	Indian Timber Regulations
57(b) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (a)	none	same as above
57 (c) providing for the disposition of surrendered mines and minerals underlying lands in a reserve	none	Indian Mining Regulations
57(d) prescribing the punishment, not exceeding one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of any regulation made under this section	none	Indian Timber Regulations Indian Mining Regulations

57(e) providing for the seizure and forfeiture of any timber or minerals taken in contravention of any regulation made under this section	none	Indian Timber Regulations Indian Mining Regulations
64.1(3) prescribing the manner of determining interest for the purpose of subsections (1) and (2) (Note: refers to per capita distribution from capital account)	none	Calculation of Interest Regulation
69(2) to give effect to subsection (1) (Note: refers to orders permitting bands to control revenue moneys) and may declare therein the extent to which this Act and the Financial Administration Act shall not apply to a band to which an order made under subsection (1) applies.	None	Indian Bands Revenue Moneys Regulations
70(2) to give effect to subsection (1) (Note: refers to advance made on moneys held in the Consolidated Revenue Funds to make loans to purchase equipment and carry out cooperative projects)	none	none
73(1)(a) for the protection and preservation of fur-bearing animals, fish and other game on reserves	81(1)(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve	none
73(1)(b) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves	81(1)(j) the destruction and control of noxious weeds	none
73(1)(c) for the control of the speed, operation and parking of vehicles on roads within reserves	81(1)(b) the regulation of traffic	Indian Reserve Traffic Regulations

73(1)(d) for the taxation, control and destruction of dogs and for the protection of sheep on reserves	some limited powers in 81(1)(e) 81(1)(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision of fees and charges for their services	none
73(1)(e) for the operation, supervision and control of pool rooms, dance halls and other places of amusement on reserves	81(1)(m) the control or prohibition of public games, sports, races, athletic contests and other amusements	none
73(1)(f) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable	81(1)(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases	none
73(1)(g) to provide medical treatment and health services for Indians	see 81(1)(a)	none
73(1)(h) to provide compulsory hospitalization and treatment for infectious diseases among Indians	see 81(1)(a)	none
73(1)(i) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof	81(1)(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band	none
73(1)(j) to prevent overcrowding of premises on reserves used as dwellings	none	none
73(1)(k) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves	none	none
73(1)(l) for the construction and maintenance of boundary fences	81(1)(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works	none

<p>73(1)(m) for empowering and authorizing the council of a band to borrow money for band projects or housing purposes and providing for the making of loans out of moneys so borrowed to members of the band for housing purposes</p>	<p>none</p>	<p>Indian Band Council Borrowing Regulations</p>
<p>73(3) to carry out the purposes and provisions of this Act</p>	<p>none</p>	<p>Indian Reserve Waste Disposal Regulations</p> <p>Disposal of Forfeited Goods and Chattels Regulations</p> <p>Indian Referendum Regulations</p>
<p>4(3) to provide</p> <p>(a) that the chief of a band shall be elected by (i) a majority of the votes of the electors of the band, or (ii) a majority of the votes of the elected councillors of the band from among themselves but the chief so elected shall remain a councillor; and</p> <p>(b) that the councillors of a band shall be elected by (i) a majority of the votes of the electors of the band, or (ii) the majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band</p>	<p>none</p>	<p>Indian Bands Council Method of Election Regulations</p>
<p>74(4) to provide for the division of the reserve for voting purposes into not more than six electoral sections containing as nearly as may be an equal number of Indians eligible to</p>	<p>none</p>	<p>same as above</p>

vote and to provide for the manner in which electoral sections so established are to be distinguished or identified		
<p>76(1) with respect to band elections and, without restricting the generality of the foregoing, may make regulations with respect to</p> <p>(a) meetings to nominate candidates</p> <p>(b) the appointment and duties of electoral officers</p> <p>(c) the manner in which voting is to be carried out</p> <p>(d) election appeals and</p> <p>(e) the definition of residence for the purpose of determining the eligibility of voters</p>	none	Indian Band Election Regulations
<p>80 with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to</p> <p>(a) presiding officers at such meetings</p> <p>(b) notice of such meetings</p> <p>((c)) the duties of any representative of the Minister at such meetings; and</p> <p>(d) the number of persons required at such meetings to constitute a quorum</p>	none	Indian Band Council Procedure Regulations
	81(1)(c) the observance of law and order	

	81(1)(d) the prevention of disorderly conduct and nuisances	
	81(1)(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision of fees and charges for their services	
	81(1)(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying of any class of business, trade or calling in any zone	
(Note: see s.19 of the Indian Act "the Minister may a) authorize surveys of reserves and the preparation of plan and reports with respect thereto b) divide the whole or any portion of a reserve into lots or other subdivision and c) determine the location and direct the construction of roads in a reserve")	81(1)(l) the survey and allotment of reserve lands among the members of the band and 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 therefore has been granted under section 60	
	81(1)(k) the regulation of bee-keeping and poultry raising	
	81(1)(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies	
	81(1)(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 merchandises	

	81(1)(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes	
	81(1)(p.1) the residence of band members and other persons on the reserve	
	81(1)(p.2) to provide for the rights of spouses and common law partner and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band	
	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)(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band	
	81(1)(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section	
	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	
83(5) respecting the exercise of the by-law making powers of bands under this section (Note: refers to s.83 by-laws - taxation, licensing, remuneration of chief and council or officials...)	83(1)(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve	None
same as above	83(1)(a.1) the licensing of businesses, callings, trades and occupations	None

same as above	83(1)(b) the appropriation and expenditure of moneys of the band to defray band expenses	None
same as above	83(1)(c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a)	None
same as above	83(1)(d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a)	None
same as above	83(1)(e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest	None
same as above	83(1)(e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest	None
same as above	83(1)(f) the raising of money from band members to support band projects and	None
same as above	83(1)(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section	None
	85.1 (a) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band	
	85.1(b) prohibiting any person from being intoxicated on the reserve	
	85.1(c) prohibiting any person from having intoxicants in his possession on the reserve	

	85.1(d) providing for exceptions to any of the prohibitions established pursuant to paragraph (b) or (c)	
115 with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools (Note: this is a ministerial regulation making power as opposed to the governor in council)	none	None