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UTILIZING *INDIAN ACT* BY-LAWS AS A TOOL OF SELF-GOVERNMENT

By John W. Gailus

INTRODUCTION

First Nations have an inherent Aboriginal right to self-government; a right that is recognized and affirmed by s. 35 of the *Constitution Act, 1982*. In a challenge to the self-government provisions of the Nisga'a Treaty, Williamson J. explained:

> In summary, these authorities mandate that any consideration of the continued existence, after the assertion of sovereignty by the Crown, of some right to aboriginal self-government must take into account that: (1) the indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did not extinguish aboriginal powers and rights; (3) among the powers retained by aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with aboriginal peoples was to be "minimal".[1]

Sections 81 to 86 of the *Indian Act*, (the "Act") provides band councils with the legislative authority to pass by-laws for a number of purposes set out in the Act that "are not inconsistent with the Act, or with any regulation made by the Governor in Council for the Minister." These sections, in particular section 81, are often under-utilized but have the potential to be a powerful tool for self-government.

By-laws are strictly local laws; they have no effect outside of reserve boundaries. However, they apply to everyone on reserve, including non-Indians and non-residents. In order to be valid, a by-law must be properly enacted; otherwise, it cannot be enforced by the courts. Properly enacted by-laws are effectively federal laws that are enforceable by local policing agencies and by-law enforcement officers. Contravention of a by-law is a summary conviction offence that can result in a court imposing fines and penal sanctions.

1. THE LEGISLATIVE LANDSCAPE

The essential starting point for any discussion relating to reserve lands and by-laws is the Constitution. Section 91(24) of the *Constitution Act, 1867* provides that "Indians and Lands Reserved for Indians" are a federal responsibility. As a result, the federal government has enacted the Act to carry out its constitutional responsibilities. The Department of Indian Affairs and Northern Development (also known as Indian and Northern Affairs Canada, or "INAC") administers the Act.

The Act provides the following definition of "reserve":

> "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band…

The starting point is section 88 of the *Indian Act*, which provides:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nation Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Recently, the Supreme Court of Canada explained the purpose of section 88:

> Section 88 reflects Parliament's intention to avoid the effects of immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law. [2]

The application of provincial laws to reserve land is severely limited. However, reserves are not federal enclaves completely beyond the reach of provincial law. To be found inapplicable, the provincial law must be found to affect "Indianness", and to "regulate Indians as Indians" or "Indians in relation to core values of their society".[3] Provincial laws that do not affect Indians in this way, such as traffic laws, will apply subject to any inconsistency with federal law.

Unfortunately, the analysis does not end here. Section 88 of the Act also provides that, subject to the Act and any treaty, federal statute or First Nation by-law, all laws of general application from time to time in force in a province are applicable to Indians. However, section 88 does not say that provincial laws of general application are applicable to <u>lands reserved for Indians</u>.

In *Derrickson*[4], the Supreme Court of Canada held that although provincial laws of general application may apply to Indians, they cannot apply to the right of possession of reserve lands. Adding another level of complexity, if both provincial and federal laws could validly apply to reserve lands, the doctrine of federal paramountcy applies, giving priority to the federal legislation.[5]

Given all of the above, the provisions of statutes and local by-laws normally applying to land in the province such as the *Land Title Act*, the *Strata Property Act, Residential Tenancy Act* and *Manufactured Home Tenancy Act* do not apply on reserve land. Municipal zoning and land use

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[1] *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 at para. 95.
[2] *R. v. Morris*, [2006] 2 S.C.R. 915 at 935.
[3] See for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309.
[4] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.
[5] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23.

controls will not apply either. To the extent that these laws regulate the use of reserve lands contrary to those principles, they will not apply to those lands. In addition if there is a conflict between a provincial law of general application, the band by-law will usually prevail. One exception to this rule is found in the *First Nations Commercial and Industrial Development Act* ("FNCIDA"), which allows a First Nation to enact regulations that harmonize its approval processes with the local authority.

2. OVERVIEW OF BY-LAW SECTIONS

a. Section 81 By-laws

Section 81 sets out a number of purposes for which a First Nation may enact by-laws including, *inter alia*, the regulation of traffic, law and order, prevention of disorderly conduct and nuisances, construction of infrastructure and housing, residency of band members, zoning, trespass, control of animals, fish and game, and so on. The section is reproduced below for reference:

> 81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (*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.

(2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

(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.

82. (1) A copy of every by-law made under section 81 shall be forwarded by mail by the chief or a member of the council of the band to the Minister within four days after it is made.

(2) A by-law made under section 81 comes into force forty days after a copy thereof is forwarded to the Minister pursuant to subsection (1), unless it is disallowed by the Minister within that period, but the Minister may declare the by-law to be in force at any time before the expiration of that period.

Thus, the process to enact a by-law under section 81 is relatively straightforward. The Council passes the by-law at a duly-convened Council meeting and the by-law is then forwarded by the Chief or a Councillor to the Minister within four days. The Minister then has 40 days to disallow

the by-law. If the by-law is not disallowed within that time-frame, it comes into force and is a law of the First Nation.

Upon summary conviction, by-law infractions can be met with a fine not exceeding $1,000 or imprisonment for up to thirty days, or both. In addition, the Act also provides for the availability of injunctive relief to restrain a person from violating the by-law.

First Nations operating under the *First Nations Land Management Act* have powers under section 20 to enact laws in accordance with the First Nation's Land Code in areas including licensing, development, conservation, protection, and the management, use and possession of reserve lands.

b. Section 83 (Money) By-laws

The process for enacting by-laws under section 83 of the *Indian Act* is more complicated. Section 83 allows First Nations to enact, *inter alia*, taxation by-laws:

> 83.(1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (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;...

Although the process appears to be straightforward, in British Columbia, a First Nation that wishes to enact a property taxation by-law must first provide notice to the province of its intention to do so.

The initial step for a First Nation intending to implement property taxation is to provide notice to the Minister of Aboriginal Relations and Reconciliation pursuant to the *Indian Self Government Enabling Act* that the First Nation intends to assume taxation jurisdiction over its reserves. If the notice complies with section 9, the Minister will then issue a certificate under section 10 of the *Indian Self Government Enabling Act* to the First Nation.

The First Nation is then required to submit a draft taxation by-law to the First Nations Tax Commission ("FNTC"). In addition, the FNTC will require copies of the First Nation's notice of intent to assume taxing jurisdiction, a copy of the certificate from the Ministry of Aboriginal Relations and Reconciliation, a list of proposed ratepayers, copies of correspondence to ratepayers, notices of meetings with ratepayers, and letters to MPs and MLAs. Consultation with ratepayers and local elected officials is not required under either the Act or the *Indian Self Government Enabling Act*.

Once the FNTC is satisfied with the draft taxation by-law and that any practical or political issues raised by the First Nation taking on taxation jurisdiction have been addressed, they will make a recommendation to the Minister for by-law approval. Once the Minister has approved the by-law, it becomes a First Nation law. All taxation by-laws must include an appeal mechanism.

It is important to note that this process ousts the jurisdiction of the province, regional districts or municipalities to tax third parties occupying the First Nation's reserves. However, if the First Nation wishes to start taxing these third parties, it must annually pass a tax rates by-law (which is also reviewed by the FNTC and approved by the Minister). Thus, the enactment of the taxation by-law does not require the First Nation to tax.

In addition to property taxation, section 83 also allows council to pass by-laws addressing expenditures of band moneys, taxation and business licencing. Money by-laws must be approved by the Minister.

Local revenue laws may also be levied under the *First Nations Fiscal and Statistical Management Act* ("FNFSMA"). The FNFSMA provides a codified framework by which First Nations can use their right to levy taxes on their reserves to access capital markets for equity to make infrastructure improvements. Although it is a delegated model, the FNFSMA is a powerful tool for self-government, similar to the way that municipalities operate by pooling large sums of money for infrastructure development. The FNFSMA integrates property taxation, fiscal management, borrowing power and the ability to access equity financing, and statistical information management, into a complete code.

The FNFSMA is voluntary. The First Nation must request by way of Band Council Resolution to be added to the Schedule. Under the FNFSMA, the Minister's approval is not required for the bylaw. Instead, approval is obtained from the FNTC. The FNFSMA regime contains a number of advantages over the *Indian Act* system. The approval process is typically faster than seeking the Minister's approval under Section 83 and the FNFSMA provides a clearer statutory authority for on reserve taxes, which enhances certainty with respect to enforcement.

Furthermore, the FNFSMA can provide access to a debt financing system which allows First Nations to leverage their tax revenue to finance infrastructure projects. First Nations who participate in the FNFSMA are able to obtain significant loans to pay for housing needs, water and sewage systems, roads, power systems and other major infrastructure needs that otherwise are paid (or not paid) by INAC through capital funding. The FNFSMA represents a practical, realistic mechanism for effective self-government, notwithstanding that it is federal legislation.

c. Section 85 (Intoxicant) By-laws

Unlike section 81 and 83 by-laws, the consent of the membership of the First Nation is required for an intoxicant by-law.

Section 85.1 provides:

> 85.1(1) Subject to subsection (2), the council of a band may make by-laws
>
> (a) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;
> (b) prohibiting any person from being intoxicated on the reserve;
> (c) prohibiting any person from having intoxicants in his possession on the reserve; and

(d) providing for any exceptions to any of the prohibitions established pursuant to paragraph (b) or (c).

(2) A by-law may not be made under this section unless it is first assented to by a majority of the electors of the band who voted at a special meeting of the band called by the council of the band for the purpose of considering the by-law.

Thus, before an intoxicant by-law can be enacted by the band council, it must first be voted on by the majority of the electorate of the band who are present at a special meeting. Once the by-law has been assented to by the majority of the electors of the band who voted at that special meeting, the council should then enact the by-law immediately after the vote has been taken. However, a quorum of council must be present in order to pass the intoxicant by-law after the vote by the electorate.

INAC will also require an Affidavit signed by the Chief, and witnessed by a Commissioner for Oaths, stating the process followed to enact the by-law. The following exhibits should be attached to the Affidavit:

1. A letter from the council to each of the electorate notifying them of the time, date, place and purpose of a special meeting and enclosing a copy of the draft intoxicant by-law that will be considered at the special meeting. If possible, this letter should be sent to each of the electorate on the reserve at least fourteen (14) days prior to the date that the special meeting is to be held for the consideration of the by-law.

2. A copy of the Notice of Meeting that was posted throughout the reserve at least fourteen (14) days before the date of the special meeting.

3. A draft of the intoxicant by-law that was considered at the special meeting.

The Affidavit and the enacted intoxicant by-law must be forwarded, by mail, to INAC for registration within four (4) days after it has been passed by the council. A request should be made at the time the by-law is sent to have a true copy of the by-law certified for court purposes pursuant to section 86 of the *Indian Act*. Once the council receives the certified copy of the by-law, it should be forwarded to the local Royal Canadian Mounted Police detachment for enforcement. The council also should request that the police provide the local Crown Counsel with the certified document. Contravention of section 85 by-laws is a summary offence subject to fines of up to $1,000 depending on the nature of the offence.

3. WHAT HAS NOT BEEN SUCCESSFUL - THE FISHING BY-LAW CASES

Very few section 81 by-law cases have been considered by the appellate courts. However, two Supreme Court of Canada cases have considered the scope of Council's by-law making authority under section 81(1)(o). *Nikal* and its companion case, *Lewis* considered whether a band's by-law making power to regulate a 'fishery' extended into a river that ran through the band's reserve.[6]

[6] *R. v. Nikal,* [1996] 1 S.C.R. 1013; *R. v. Lewis,* [1996] 1 S.C.R. 921.

Both cases were regulatory offences under the *Fisheries Act* and its regulations. In both cases, the bands had enacted fishing by-laws which, if applicable, would constitute a defence to the fisheries charges. The court held that the by-laws did not apply. The Court held that the *ad medium filium acquae* rule, by which ownership of the bed of a non-tidal river or streams belongs in equal halves to the owners of the riparian land, did not apply as the rivers were considered to be navigable. As a result, the by-laws were found not to apply as the rivers were not 'on the reserve'.[7] The problem with these decisions is that they have effectively struck any effective application of section 81(1)(o) except perhaps in instances where a First Nation has a fish bearing lake entirely within the bounds of the reserve.

4. WHAT HAS BEEN SUCCESSFUL - THE TAX CASES

Property taxation is one area where the courts have considered the scope of a band's by-law making power. The tax cases have explicitly recognized that the power to tax is an exercise in self government.[8]

The *Osoyoos* case once again considered the phrase 'in the reserve' in the context of the band's ability to tax.[9] The band purported to impose property taxes on an irrigation canal that bisected its reserve. The lands were subject to an Order in Council under section 35 of the *Indian Act*, which consented to the transfer of administration and control of the lands to the province for irrigation canal purposes. The Town of Oliver objected to the assessment, claiming the lands were not taxable as they were no longer part of the reserve.

The Supreme Court of Canada narrowly held that the nature of the interest conveyed by the Order in Council was ambiguous, and therefore the land remained part of the reserve. The court articulated the principle of "minimal impairment" – that once it is determined that an expropriation of reserve lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest in order to fulfill that public purpose, while preserving the interest in the land to the greatest extent practicable. As a result, the majority of the court held that only an easement was granted.

There were several other principles the court articulated that are significant:

1. In seeking to expropriate land under section 35, the province may only take or use land that it was empowered to take under an Act of the provincial legislature;

2. The language of the provincial legislation is not determinative of, nor does it establish, a presumption regarding the federal government's intention when granting an interest in reserve land;

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[7] One exception to this rule is the Qualicum River which, as a result of a settlement agreement, is part of the Qualicum First Nation Reserve.

[8] *Canadian Pacific Ltd. v. Matsqui Indian Band,* [2000] 1 F.C. 325 (F.C.A.).

[9] *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 S.C.R. 746, 2001 SCC 85.

3. The Governor in Council cannot grant more than the province is empowered to take under its enabling legislation, but based on the principle of minimal impairment, may grant a lesser interest;

4. In order to extinguish the Aboriginal interest in reserve land, the Crown's intention must be clear and plain;

5. Where there is more than one interpretation of an order in council, preference should be given to the interpretation that impairs the aboriginal interest as little as possible;

6. Due to the *sui generis* nature of the aboriginal interest in reserve land, the transfer of such interests cannot be treated as a regular commercial transaction; a non-technical approach to interpretation of the order is to be preferred.

The *Seabird Island* case considered an Order in Council where the Governor in Council authorized the taking of lands for road purposes.[10] The issue in *Seabird Island* was whether a fibre optic cable within the road right-of-way was taxable. Relying on *Osoyoos*, the Federal Court of Appeal held that the Crown had not shown a clear and plain intention to extinguish the reserve interest and the interests of BC Tel were taxable. The result of these decisions is that railways, canals, telephone and other rights-of-way which were once thought to be non-taxable, as being outside of the reserve, are taxable and a potential source of income for First Nations.[11]

5. ANOTHER SUCCESS - SPALLUMCHEEN CHILD WELFARE BY-LAW

In 1980, the Spallumcheen Indian Band enacted its own child welfare by-law pursuant to *inter alia,* the law and order powers in section 81 of the *Indian Act*. Although the band works cooperatively with the provincial Ministry of Children and Family Development and INAC, the by-law is paramount to and effectively ousts the jurisdiction of the provincial *Child, Family and Community Service Act* (the "CFCS Act") pursuant to section 88 of the Act.

Although Southin, J.A., cast some doubt on the validity of the by-law, the Spallumcheen by-law has been applied by the courts of British Columbia.[12] Subsequent attempts by First Nations to pass similar by-laws have repeatedly been disallowed by the Minister. The alternative has been that various First Nations and First Nations' organizations have taken on delegated child welfare services from the province. Those First Nations are subject to the CFCS Act, its policy and procedures.[13] In *NIL/TU,O*, the Supreme Court of Canada left it for another day to be decided whether First Nations have an inherent right to enact their own child welfare legislation.

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[10] *BC Tel v. Seabird Island,* 2002 FCA 288.

[11] Provincial interests, such as roads and hydro are not taxable, see *Westbank First Nation v. BC Hydro,* [1999] 3 S.C.R. 134. However, public utilities such as BC Hydro provide grants in lieu of taxes.

[12] *S. (E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318 (BCSC); see also *Alexander v. Maxime*, [1996] 1 C.N.L.R. 1 (BCCA).

[13] See *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696.

6. OPPORTUNITIES TO EXPAND JURISDICTION

First Nations have myriad opportunities to expand their jurisdiction simply by enacting by-laws under section 81 of the Act. Unfortunately, when seeking advice from INAC they are often advised that "the Minister will disallow that by-law" and that is the end of it. The law and order power is a potentially powerful tool for First Nations to implement self government 'on the ground'.

So long as a First Nation does not tread into the federal criminal law realm, there is the potential to greatly expand First Nation authority over the activities on the reserve. This authority potentially goes well beyond what might be exercised by a municipality into areas of provincial jurisdiction. Some First Nations are making incremental changes to make life better on the reserve by enacting, for example, nuisance by-laws, intoxicant by-laws and dog by-laws. One example, which may seem minor on its face, has implications for First Nations' self government. The author assisted a First Nation to enact a dog by-law to ban pit bulls from the reserve. There is no federal or provincial law in place. However, the First Nation adopted many of the provisions of an Ontario statute as their own to effectively ban pit bulls from the reserve.

One issue that keeps recurring is the matter of dealing with non-members or members who are involved in criminal activities on the reserve. Some First Nations are attempting to use a combination of residency, trespass and law and order authority in section 81 to banish individuals from the reserve. INAC's position has been that they will disallow these by-laws.

However, one example where a First Nation attempted to banish an individual from the reserve merits discussion. In *Gamblin v. Norway House*, the band council attempted to deal with illegal drug use and bootlegging on their reserve.[14] The council passed a Band Council Resolution ("BCR") to implement a policy to deal with those involved in such activity. The Federal Court held that the band could not implement its policy through BCR and ought to have enacted a by-law. Importantly, the court endorsed banishment as an available sanction.[15]

While dog by-laws may slip by INAC without disallowance, First Nations that attempt to adopt provincial-style by-law regimes will likely be met with significant resistance from INAC. First Nations must be willing to challenge such disallowance and should consider seeking judicial review of such Ministerial disallowance, particularly if INAC cannot point to a legal impediment to the First Nation enacting the law. As stated above, in the event of a conflict, a by-law passed by a First Nation would trump a provincial statute on the same matter.

One final consideration for First Nations considering enacting by-laws is that they may provide evidence that the First Nation is a "public body performing the function of government." Section 149(1)(c) of *Income Tax Act* provides that any income earned by the 'public body' is exempt from taxation. Although it is beyond the scope of this paper to review in detail, the presence of by-laws has been held to be a significant factor in determining whether a First Nation can take advantage of this exemption.[16]

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[14] *Gamblin v. Norway House Cree Nation Band,* [2001] 2 C.N.L.R. 57 (F.C.).
[15] *Gamblin,* at para. 58.
[16] *Otineka Development Corp. v. Canada,* [1994] 1 C.T.C. 2424 (T.C.C.).

7. IF YOU ENACT IT, YOU'D BETTER ENFORCE IT

Many First Nations have by-laws of which they unaware that may have been enacted decades previous and are gathering dust on a shelf. These by-laws should be reviewed to determine whether they are still relevant for the First Nation or in need of updating. More importantly, there may be obligations placed on the First Nation to do certain things under the by-law, e.g. inspection of homes pursuant to a construction by-law. A First Nation may be liable in negligence if it does not enforce its by-laws.[17] Issues may also arise when a First Nation selectively enforces its by-laws which can lead to civil or human rights complaints.

If the First Nation does not intend to enforce its by-laws they should be revoked or the First Nation should not enact by-laws in the first place. Enforcement of by-laws requires the First Nation to hire a by-law enforcement officer. In addition, there may be court costs relating to enforcement. Costs of enforcement should be a relevant consideration for any First Nation wishing to take advantage of its by-law making power.

Finally, although membership consent is only required for an intoxicant by-law, as a matter of good governance, council should consult membership prior to enacting any section 81 or section 83 by-laws. If the membership is involved, it will likely be easier in the long term to obtain compliance and limit enforcement costs.

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[17] *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).