

COVID-19: Enacting Community Protection Laws and Achieving Compliance

July 28, 2020

Berry Hykin, Woodward & Company

Michelle Ball, Public Prosecution Service of Canada

Ben Smith, RCMP

WOODWARD & COMPANY

LAWYERS LLP



Outline



Introduction



A note on financial impacts of COVID-19



Community Protection Laws: Current Legal Framework



Law-making Options, Process and Precedents



Implementation and Compliance



Enforcement Issues and Solutions

It's a Brave New World...

- Things are changing quickly and constantly.
- Be nimble and stay up to date as best you can.
- Naut'sa mawt Tribal Council COVID-19 Resource Page
 - <https://www.nautsamawt.org/covid19-nmtc>
- Managing the COVID-19 Pandemic: Information for First Nation Governments and Businesses
 - <https://www.woodwardandcompany.com/covid-19-bulletin/>

A note on financial impacts of COVID-19

The financial impacts of COVID-19 on First Nations and all of Canada are significant and far-reaching.

The First Nations Financial Management Board (FNFB) provides resources and guidance on best financial management practices.

At minimum, make sure to code expenditures properly as funding may become available in future that could provide retroactive reimbursement for COVID-related costs.

COVID-19 and your Financial Administration Law

- The First Nations Financial Management Board has released updated standards (in force May 21, 2020) to enable First Nations to amend their local revenue laws and enact annual tax rate and expenditure laws to mitigate economic and fiscal impacts of the COVID-19 pandemic:
 - http://sp.fng.ca/fngweb/covid-19_stds_web.pdf
- More information from FNFMB on best financial management practices to address pandemic-related needs available here:
 - https://fnfmb.com/sites/default/files/2020-04/2020-04-19_webinar_living_by_your_fal_during_covid-19.pdf

Community Protection Laws: Current Legal Framework



First Nations have inherent rights of self-governance, but these do not generally extend to capture the regulatory powers of a band council.



Band councils are statutorily-created entities analogous to municipal councils.



Canada has interpreted this to mean Council is limited to the regulatory authority *expressly granted* to them pursuant to their empowering statutes.

Indian Act, sections 81 (bylaws), 83 (money bylaws), 85.1 (intoxicants)

First Nations Land Management Act, section 22 (offences and punishment)



Council has inherent jurisdiction as public officials (duty to act in the public interest).

Community Protection

Existing inequities make First Nations communities particularly vulnerable to COVID-19



Risk to Elders and knowledge-keepers is an existential threat to culture and language



Many First Nations have taken steps to protect their communities, including:

Declarations of
Emergency

Community
Lockdowns

BCR's, Bylaws/Laws

Declarations of Emergency

A First Nation can declare a state of emergency by BCR or declaration

It does not have the same force of law as a provincial or federal state of emergency

- in most cases, not supported by legislation
- no special powers conferred on the First Nation

British Columbia recognizes these declarations and has advised it will support First Nations if they seek to impose travel restrictions.

More info: <https://news.gov.bc.ca/factsheets/first-nations-emergency-program-act-orders-for-covid-19-response>

In BC, supports come through Emergency Management BC and First Nations Health Authority

Community Protection- Bylaws/Laws

Band council lawmaking authority relevant to COVID-19 regulations is recognized under:

Indian Act Section 81(1)

Some aspects of Land Code
(First Nations Land Management Act)

Modern Treaties (Self-gov't)

Inherent jurisdiction

Why make a law?



Laws set out the social contract between members of a community and set expectations for how people should behave.



They provide rules for everyone to follow that can be enforced when people fail or refuse to comply.



A law is just one tool in the toolbox for achieving desired behavior in a community.



Laws are most effective when combined with other administrative actions (BCR's, policies, directives), comprehensive education and community engagement (getting "buy-in")

What do community protection laws do?

- COVID-19 Bylaws/Laws are typically aimed at regulating conduct, including
 - Restricting access to reserves;
 - Enforcing recommendations of public health officers (self-isolation, physical distancing, restrictions on gatherings, etc.);
 - Imposing curfews;
 - Restrictions or closures of public facilities and businesses.

What might restrictions look like?

- Some communities have imposed more restrictive measures than those required by the public health officer. For example:
 - Limiting gatherings to 10 people, 2 people or even altogether (with exceptions carved out for members of the same household).
 - Mandating physical distancing (as opposed to encouraging)
 - Imposing restrictions on businesses (type of business, hours of operation)
 - Travel restrictions:
 - Requiring people who have travelled outside of the First Nation's traditional territory or regional district to quarantine.
 - Restricting access to the reserve to certain classes of people

Law-Making Options

Indian Act

Section 81(1) sets out scope of most of council's bylaw-making authority

Section 81(1)(r) creates offences and penalties under bylaws:

Violation of a bylaw is punishable on summary conviction
(*Criminal Code*)

Penalties are max fine \$1,000, or 30 days in prison, or both

Sections 81(2) & (3) recognize *remedial powers* (still through conviction or court)

First Nations Lands Management Act

Codifies the *Framework Agreement* in law

Section 21 empowers First Nations to develop environmental protection regime and arguably provides authority for a broader scope of enforcement tools

Section 22 recognizes authority to create offences punishable on summary conviction and to adopt or referentially incorporate the summary conviction proceedings from the *Criminal Code* into First Nation laws.

Land Code: Law-making Powers and Process

FNLMA Powers:

- Regulation, control or prohibition of land use and development possession of reserve lands, including trespass, prohibited purposes and residency

Passing a Law

- Tabled before Council, notice to the community and may require community meetings
- Emergency power needed to abridge time
- Emergency laws time limited

Coming into Force

- Upon enactment and publication

Indian Act: Law-making Powers and Process

Section 81 Powers:

- Health, prevent spread of contagious disease
- Law and order
- Prevent disorderly conduct (including curfew)
- Trespass, prohibited purposes and residency

Passing a Bylaw

- Enacted by resolution of Council, no community consultation necessary
- No emergency power needed
- No ministerial approval required

Coming into Force

- Section 86 of Indian Act
- Have to publish the bylaw
- Comes into force the day it is published

Land Code or *Indian Act*?

- It may be better to enact a bylaw under section 81(1) of the *Indian Act* than to enact a law under Land Code.
- Land Code powers are restricted to matters that involve the administration of lands
 - *While these powers can be interpreted broadly to capture many aspects of COVID-19 regulations, they may not capture everything and, in particular, not individual conduct that cannot be connected to use and occupation of lands.*
- *Indian Act* powers include matters that involve regulation of conduct (including, specifically, health and safety matters)
- No need to invoke emergency/urgent law-making authority under *Indian Act*

Land Code or *Indian Act*: Enforcement Considerations

- RCMP will enforce *Indian Act* bylaws, not necessarily Land Code laws.
 - BC tripartite policing agreements expressly exclude Land Code laws.
- If requested and further to a protocol, Public Prosecution Service of Canada (PPSC) will consider prosecuting violators of COVID-19-related *Indian Act* bylaws

Precedent Laws

- Most First Nations that have enacted COVID-19 related bylaws or laws will have posted them on their websites.
 - Sample *Indian Act* Bylaw: Gwa'sala-'Nakwaxda'xw Nations
 - <https://partii-partiii.fng.ca/fng-gpn-II-III/pii/en/item/479678/index.do?q=Gwa%27sala>
 - Sample Land Code Law: Sts'ailes First Nation
 - <http://www.stsailes.com/lands-planning>
- You can search bylaws and laws on the First Nations Gazette:
 - <https://fng.ca/first-nations-gazette/>
- Lands Advisory Board can provide resources:
 - <https://landsadvisoryboard.ca/>

Implementation and Compliance

You have a bylaw/law. Now what?

The ultimate goal is to achieve cooperation and compliance.

- Set expectations – share broadly so everyone knows what is expected
- Follow Dr. Henry's example – kind communication, education and transparency generally work better to obtain compliance than do harsh punitive measures.
- Enforce prudently and proportionately – not all conduct requires prosecution and penalties; rely on education, encouragement and warnings as primary tools.

Introducing New Rules to the Community



Council can set out the social contract by BCRs, directives and effective communication with membership



Rely on Elders, traditional leadership and cultural protocols to support efforts at encouraging compliance with public health officer guidance

How do you get compliance?

- Keep in mind difference between *remedies* and *penalties*
- Effective law enforcement requires a holistic and proportional approach that focuses on cooperation and compliance first, and punishment last.
- Three pillars of enforcement:
 - The bylaw – to establish the rules, offences, remedies and penalties
 - The police – to investigate and evaluate the complaint (charging decision)
 - The prosecutor – to carry out the prosecution in court (charge approval)

Remedies vs. Penalties

The law contemplates two main kinds of law enforcement mechanisms: *remedies* and *penalties*.

Penalty = the intent or purpose is to *punish* the offender

Remedy = the intent or purpose is *compensatory* or *curative*

Bylaws / Land Code Laws are generally considered remedial.

Indian Act and *FNLMA* include broad *remedial* powers but significantly limit *penal* powers

Canada and Provinces have largely taken a *remedial* approach to COVID-19 laws, reserving *penalties* for only the most egregious contraventions.

When do the courts come in?

- There are many remedial steps a First Nation can take to achieve compliance without involving the courts:
 - Communication and dialogue
 - Warnings and orders
 - Restorative justice/alternative measures
- The *Indian Act* requires a summary conviction before a court can order a remedy or penalty.
 - Court-ordered remedies and penalties should be considered as a last resort

Summary Convictions

- Summary convictions are the *only means* by which a court can impose a penalty or order a remedy under an *Indian Act* bylaw, or under *FNLMA* Land Code laws (outside of the environmental protection regime.)
- Summary convictions are prosecuted under Part XXVII of the *Criminal Code*
 - Proceedings are initiated by the laying of an information following an investigation
 - Burden of proof = beyond a reasonable doubt
 - Conviction = criminal conviction (but may not result in criminal record)
 - Penalties are max fine of \$5,000, or two years in prison or both (except if an enactment says otherwise)
 - In this case, the *Indian Act* sets the fine at \$1,000 and prison time at 30 days.
- *Criminal Code* convictions carry procedural burdens and stigmas that can be disproportionate to the seriousness of offences under *Indian Act* bylaws or *FNLMA* Land Code laws.

Enforcement: Who is Responsible?

First Nation:

- First Nation passes a BCR or enacts a bylaw or law
- First Nation is responsible for inspection, education, encouragement and making orders
- First Nation is responsible for prosecution (unless there is a protocol with PPSC – *Indian Act* bylaws only)
- Subject to Charter and CHRA

RCMP:

- RCMP will generally not act on a BCR that has no underlying legal authority
- RCMP are specifically empowered to enforce *Indian Act* bylaws, but not Land Code laws
- Enforcement is generally limited to keeping the peace
- Subject to Charter and CHRA

What will the RCMP do?

- Investigate to confirm there has been a violation of a valid COVID-19 bylaw
- Encourage compliance through dialogue/restorative justice measures
- Consult with Council about whether they want to pursue a criminal prosecution
- Assessment:
 - Is complaint serious enough to be charged?
 - Is the evidence sufficient that there is a reasonable prospect of conviction??
 - Is a prosecution in the public interest?
- Refer the matter to the PPSC through a Report to Crown Counsel

Prosecution of Offences

- The PPSC may prosecute offences under validly enacted COVID-19 related bylaws.
- Interested First Nations must agree to a protocol between law enforcement, PPSC and the First Nation
 - Law enforcement conducts investigations and decides about charges
 - PPSC decides about and conducts prosecutions
 - Options to negotiate room for traditional or alternative justice measures

Questions? Need more information?

Please note that the content in this presentation has been provided for general information purposes only and does not constitute legal advice. If you have specific questions or require advice, or if you are wanting to learn more about Enacting COVID-19 Community Protection Laws and Achieving Compliance in your community, you may contact:

Valerie (Chemkwaat) Cross
Director of Advisory Services /
Governance Advisor
Naut'sa mawt Tribal Council
c: 604.329.6815
p: 604.943.6712
tf: 888.382.7711
f: 604-943-5367
valeriecb@nautsamawt.com

Berry Hykin
Woodward & Company
Lawyers LLP
[p: 250.3832356](tel:250.3832356)
[f: 250.380.6560](tel:250.380.6560)
berry@woodwardandcompany.com

Michelle S. Ball, Crown Counsel
Public Prosecution Service of Canada
900 - 840 Howe Street
Vancouver, BC V6Z 2S9
BCRegulatory@ppsc-sppc.gc.ca

Sgt. Benjamin M. Smith
Indigenous Policing Services Operations & Lower Mainland Advisory
NCO
RCMP 'E' Division
Box 101- 14200 Green Timbers Way
Surrey, BC, V3T 6P3
Desk: 778-290-4036



WOODWARDANDCOMPANY.COM

VICTORIA OFFICE

200 - 1022 Government
Street
Victoria, BC V8W 1X7
250 383 2356

WHITEHORSE OFFICE

201 - 3059 3rd Avenue
Whitehorse, YT Y1A 1E2
867 633 5940

TSARTLIP OFFICE

1166-d Stellys Cross
Road
Victoria, BC V8M 1H3
250 383 2356

WOODWARD & COMPANY

LAWYERS LLP