

INDIAN ACT BY-LAWS – POLICE ENFORCEMENT

COVID-19 and PANDEMIC CONCERNS

First Nations in British Columbia have asked the Royal Canadian Mounted Police and the municipal police agencies for assistance in protecting their Indigenous communities from the threat of COVID-19. This document provides guidance to First Nations and the police for a mutual understanding of what the police can do, may do and are unable to do in relation to enforcement of *Indian Act* by-laws and Band Council Resolutions (BCR's) that establish blockades, information checkpoints and curfews. It also discusses the federal *Quarantine Act* and the provincial *Public Health Act*.

Laws on Indian reserves

Federal laws apply on Indian reserves. This means that the *Criminal Code*, the *Controlled Drugs and Substances Act* (CDSA), the *Indian Act* (including Band by-laws), and the *Quarantine Act* are legal authorities for police enforcement action. BCR's are not a legal authority by themselves for police enforcement action.

Provincial "laws of general application" apply on reserves, where they do not conflict with *Indian Act* by-laws. The provincial laws include the *Motor Vehicle Act* (on public highways through reserve lands, but not private roads), the *Liquor Control and Licensing Act*, the *Mental Health Act*, and the *Public Health Act*.

Public health orders: federal and provincial

Orders under the *Quarantine Act* (Canada) apply on Indian reserves and to Band members returning to Canada after international travel. Orders under the *Public Health Act* (BC) by the Provincial Health Officer of British Columbia (PHO) apply throughout British Columbia, including Indian reserves.

Indian Act by-laws

The *Indian Act*, section 81, provides First Nation Band Councils with the authority to pass by-laws. Paragraphs (a) to (d) of section 81(1) are relevant here:

"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;...."**

In 2020, several Band Councils in British Columbia have passed by-laws and BCR's in relation to COVID-19 and health security on Indian reserves. These by-laws and BCR's have established road closures, information checkpoints, entry and exit restrictions, curfews, and social distancing. Some Bands have requested police enforcement of these restrictions.

Band Councils (including self-governing treaty nations), should take first responsibility for the enforcement and administration of their by-laws including those related to COVID-19. Police may be requested to assist, including standing-by to keep the peace, while Band by-law enforcement officials perform their required duties. Police may assist on a discretionary basis and determine if any other federal or provincial statute applies. Police cannot enforce restrictive measures that violate the *Canadian Charter of Rights and Freedoms*, unless those violations can be justified under the *Charter*. These rights and freedoms include:

- the fundamental freedoms of peaceful assembly, association, "thought, belief, opinion and expression" (section 2);
- mobility rights (section 6);
- life, liberty and security of the person (section 7);
- no unreasonable search or seizure (section 8); and,
- no arbitrary detention or imprisonment (section 9)

The RCMP and other police agencies are governed by the *Canadian Charter of Rights and Freedoms* in everything they do. Police cannot enforce by-laws that could reasonably be expected to violate these essential rights and freedoms. This also applies to laws passed by First Nations that have self-government agreements.

Examples of what police can do, may do, and are unable to do:

- **blockades:** police cannot maintain or assist an illegal blockade of a public highway. Blockades and information checkpoints established under a valid *Indian Act* by-law or provincial order will allow police to stand-by to keep the peace and take enforcement action where required, in the discretion of police.
- **curfews and social distancing:** as a general principle, police can enforce an *Indian Act* by-law related to the protection of the community from COVID-19 (*Indian Act*, section 81(1)(a)) on an Indian reserve. This police enforcement must be consistent with the *Canadian Charter of Rights and Freedoms*. Police will not enforce curfews and social distancing rules, as those are the primary responsibility of First Nations. However, police will work cooperatively with First Nations on health security and community safety matters.
- **health orders:** police can assist the PHO, Environmental Health Officers (EHO) and Quarantine Officers on an Indian reserve, if those officials request police assistance in relation to federal and provincial health orders.
- **evictions:** police can stand-by during evictions from residences, where the Band Council owns the house and the occupants have no legal right to be in the house in an occupancy agreement. On reserves, the *Residential Tenancy Act* (BC) does not apply.

Prosecution of *Indian Act* by-laws

Where a Band Council wishes to prosecute a violation of an *Indian Act* by-law, police may investigate the incident and report to the Band Council, using a document like a Report to Crown Counsel (RTCC) or a Prosecutor's Information Sheet (PIS). Prosecution is an option for Bands with their own lawyers, at those Bands' expense. This matter is under review in some Canadian jurisdictions, and so Bands may wish to consult their local federal and provincial Crown Counsels for the latest information. Bands may consult the local Provincial Court Registry to discuss the processes for these summary conviction proceedings.

Most enforcement of *Indian Act* by-laws involves an educational conversation between the Band's enforcement officers or other Band members, the suspected violator and sometimes the police. The number of by-law violations that proceed to a prosecution in Provincial Courts across Canada is very low.

Police and the measured approach: discretionary enforcement

Police officers have considerable discretion in how they enforce the law, for laws at the First Nations, federal, provincial, and municipal levels. Police will follow the measured approach in their application and enforcement of laws relating to COVID-19 and quarantines:

Education: police may speak with First Nations members and visitors to explain the importance of voluntary compliance and the potential health and legal consequences of non-compliance. Police may remind these members and visitors of their civic duty to protect family, friends and their community from a potentially deadly virus. The initial focus of law enforcement is on education, persuasion and cooperation from a health perspective.

Encouragement: police may speak with First Nations members and visitors to give an official warning to ensure compliance with federal and provincial orders.

Isolation: where a *Quarantine Act* (Canada) order (section 58) or a *Public Health Act* (provincial) order requires isolation, police may work with the Canada Border Services Agency (CBSA), the Public Health Agency of Canada (PHAC) and provincial Public Health officials to isolate persons.

Enforcement: police may issue an Appearance Notice with a Court date for a breach of the *Quarantine Act* or issue a summons to Court. For orders under the *Public Health Act* (provincial), the PHO and EHO may request police assistance in their enforcement duties. Police in British Columbia currently do not have legal authority to issue \$245.00 violation tickets under the *Public Health Act*.

Arrest: where necessary, police may arrest persons who refuse to comply with orders under the *Quarantine Act*. Police will release those persons if possible by the least intrusive means or by way of undertaking with restrictive release conditions. Police may arrest persons if necessary to assist the PHO and EHO, if the PHO and/or EHO require police assistance in their enforcement of the *Public Health Act*. Police do not arrest persons under *Indian Act* by-laws, except for the purpose of determining the identity of a suspected violator.

Exceptional circumstances: where a person shows willful and continued non-compliance with an order under the *Quarantine Act* or an order under the *Public Health Act* where police assistance has been requested by the Quarantine Officer, the PHO or the EHO, police may arrest and hold the person for a bail hearing.