



**Emergency Measures Law Enforcement under the  
*Framework Agreement on First Nation Land Management***

**FREQUENTLY ASKED QUESTIONS ON  
LAND CODES & COVID 19** **APRIL 14, 2020**

## WHAT POWERS DO WE HAVE TO MAKE LAWS DEALING WITH THE COVID-19 PANDEMIC?

It is up to individual operational First Nations to decide whether to enact COVID-19 related laws. First Nations can use Indian Act by-laws as well as First Nation laws under the Framework Agreement if they wish.

The Framework Agreement recognizes First Nations' authority to make laws regarding lands, environment, and natural resources. Some examples of specific law-making powers are listed in the Framework Agreement, but these are just examples and do not restrict the general nature of these powers. Some First Nations have chosen to enact laws imposing COVID-19 restrictions as First Nation laws under the Framework Agreement. These laws include matters such as restrictions on the maximum number of occupants of homes on reserve, preventing public gatherings without permission of Council, and closing access on reserve to areas such as schools, arenas, and playgrounds.

Most First Nation land codes include an emergency law-making power, typically permitting temporary laws that last 120 days. Land codes usually include provisions to allow those laws to be made rapidly by Chief and Council without going through the regular process to engage Lands Advisory Committees and/or community members. Some First Nations have indeed used these emergency law-making powers to enact COVID-19 laws.

The land code authority to make emergency laws under land codes will last as long as the emergency lasts. It is also possible to enact a new emergency law to replace a temporary law in the future to address the evolution of this pandemic. Even at a future date, if the pandemic subsides, a First Nation might adopt a new emergency law. For example, a future replacement law might lift many restrictions but still protect nursing homes or medical facilities.



### **SECTION 18 OF THE *FRAMEWORK AGREEMENT* PROVIDES FOR LAW MAKING POWERS FOR FIRST NATIONS WITH A LAND CODE IN FORCE!**

**18.1** The council of a First Nation with a land code in force will have the power to make laws, in accordance with its land code, respecting the development, conservation, protection, management, use and possession of First Nation land and interests or land rights and licences in relation to that land. This includes laws on any matter necessary or ancillary to the making of laws in relation to First Nation land.

The by-law power under the *Indian Act* provides for maximum \$1,000 fines whereas the *Framework Agreement* provides for maximums within the limits for summary conviction offences, currently \$10,000 fines.

## WHAT FEDERAL OR PROVINCIAL LAWS DEALING WITH COVID-19 APPLY ON RESERVE?

Canada has taken many steps to deal with the COVID-19 pandemic, but so far has not made great use of its law-making powers. Canada has not declared a national emergency under the Emergencies Act. However, Canada has made an order under the federal Quarantine Act (see <https://orders-in-council.canada.ca/attachment.php?attach=38989&lang=en>) which imposes a fourteen-day quarantine period on persons entering Canada.

This quarantine requirement may be relevant to First Nation governments if members or non-members return from foreign travel to homes on reserve. The federal Quarantine Act imposes a general fourteen-day quarantine period, but this could extend longer in some cases, and there are some exemptions, for example, for persons providing essential services.

Provinces have also taken steps to limit the spread of COVID-19, and provincial laws to protect the health of all residents will likely apply on reserve. However, the courts have held that provincial laws cannot apply on reserve to the extent those laws deal with the “use of land.” While the courts may be sympathetic to upholding laws that prevent the spread of this deadly disease, provincial laws dictating such matters as the maximum number of occupants of buildings might not apply if they are characterized as laws regarding the “use of land.” The courts could ultimately decide that all or just parts of provincial laws apply, or instead that all or parts of those laws do not apply.

One reason for First Nation governments to consider making by-laws under the *Indian Act* and/or First Nation laws under the Framework Agreement is to avoid any unnecessary debate over sensible measures to control COVID-19 risks. If First Nations enact laws similar to provincial laws dealing with matters such as the maximum number of occupants of buildings, it would be difficult for any individual to argue that they are somehow exempt from both First Nation and provincial laws.

## IS IT REALLY NECESSARY FOR LAND CODE FIRST NATION TO MAKE COVID-19 LAWS?

It is entirely up to individual First Nations to decide what is best. Every First Nation faces different circumstances and different risks from the COVID-19 pandemic. Many First Nations have chosen to post signs, erect gates at entrances, and even close traffic into their communities without enacting laws. Those measures might be sufficient in some communities to minimize risks from the pandemic.

Other First Nations may feel it necessary to adopt laws in addition to closing entrances, posting signs, and educating residents. First Nations with large populations, along transportation corridors, or those close to

other communities might be most interested in establishing laws. One factor which merits consideration is the potential that there may be gaps in the application of provincial health laws that deal with COVID-19, where those laws control the use of lands (see the above question on the application of federal and provincial laws).

### **WHY WOULD FIRST NATIONS MAKE ANY LAWS IF IT IS DIFFICULT TO ENFORCE THOSE LAWS, PARTICULARLY DURING THE COVID-19 PANDEMIC?**

Enforcement of First Nation by-laws and First Nation laws under the Framework Agreement has posed challenges and during the height of this pandemic, even the courts are largely closed except to the most urgent cases. Again, it is up to each individual First Nation to consider what is best but there are several possible reasons why enacting a law may have merit:

- Only a small fraction of cases under the laws of any government result in full enforcement and prosecution – laws can serve in part to signal what leadership and community members expect to help control this pandemic;
- By-laws and First Nation laws can create clarity – setting precise requirements for social distancing for example – which public health staff and enforcement officers can then explain to members and non-members;
- Full enforcement may be warranted in the most serious cases even after the urgent phase of this pandemic subsides – where for example some persons deliberately spread the disease or if a tragic outbreak should ever occur in a nursing home or elder’s facility on reserve. Some First Nations may want to ensure that there will be a legally enforceable remedy in future. It would be unfortunate if a tragedy were to strike and the offenders then tried to argue that gaps in provincial law and the lack of any First Nation law exempt them from any prosecution.