Law Making Guide: *Framework Agreement* First Nations

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INTRODUCTION

The purpose of this workshop is to provide some guidance to First Nations in developing and drafting laws. The power to make laws is limited to governmental authorities and, in general, the overall approach to the development of laws is similar in all forms of democratic government whether First Nation, provincial, federal or municipal.

The workshop is divided in four parts: Part 1 begins with an outline of the legal system in Canada, followed by a discussion in Part 2 of the authority of governments to make laws with particular emphasis on First Nation government law-making authorities. Part 3 discusses the need for laws, alternatives to laws, the factors to be considered in developing laws and the limits to making a law. Finally, Part 4 of the workshop is concerned with some of the technical aspects of organizing and writing laws. Participants will also develop and draft an outline of a short law during the course of the workshop based on these materials.

What is a Law?

Legislation or statutes are laws made by governments. A law is a rule or rules of conduct which are approved and enforced by governments over a certain territory. Laws are administered by the government and the courts interpret and apply these laws. In addition, courts have developed the “common law”, which consist of rules of conduct based on precedents developed over many centuries by the courts. For example, the law of contracts and negligence are rooted in the common law. Similarly the legal nature of aboriginal and treaty rights is of common law origin.

PART 1: OUTLINE OF THE CANADIAN LEGAL SYSTEM

"If we desire respect for the law, we must first make the law respectable."
– Louis D. Brandeis

Canada is governed by a constitution which is composed of many documents and laws – the Royal Proclamation of 1763 for example. Generally, the structure and authority of government in Canada is found in the *Constitution Act, 1867.* The *Act* distributes the legislative powers of Canada between the Parliament of Canada and the legislatures of the provinces (Part VI, sections 91 to 95). The legislatures of the territories exercise legislative authority through delegation from the Parliament of Canada.

Canada's system of responsible parliamentary government is based on the rule of law. This means that laws must be made in conformity with the Constitution. The Crown retains very few regulatory powers that are not subject to the legislative or law-making process. For example, regulations governing the issuance of passports or medals and honours are still made under the royal prerogative.

Law-making authority in Canada is subject to a number of constraints. Firstly, Parliament and the provincial legislatures are limited by the constitutional distribution of powers under the *Constitution Act, 1867*. Section 91 of the *Act* identifies specific areas over which the federal government has exclusive legislative power (i.e. criminal law and procedure, trade and commerce, copyrights, and national defence etc.). It also provides for federal responsibility over any other areas not exclusively given to the provinces. Section 92 of the *Act* identifies specific areas over which the provincial governments in Canada have legislative power (i.e. property and civil rights, administration of justice, education, health, and welfare, etc.).

These governments are also constrained in their law-making powers by the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and by certain other constitutional provisions. Particularly important to Aboriginal peoples is subsection 91(24) of the *Constitution Act, 1867*, which gave the federal government jurisdiction over "Indians, and Lands reserved for the Indians". The federal government used this authority in the early years of Confederation to conclude a series of numbered treaties in western Canada. This continued the British policy, set out in the Royal Proclamation of 1763, of making treaties with the Indians occupying the land which settlers wished to develop.

Lastly, governmental law making powers can be limited by the *Canadian Charter of Rights and Freedoms* (the Charter). The constitution has been amended several times, most recently by the *Constitution Act, 1982*. Section 25 of the Charter guarantees that its rights and freedoms shall "not be construed so as to abrogate or derogate from any

Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada".

The 1982 amendment also included section 35 which recognizes and affirms "existing Aboriginal and treaty rights". The Supreme Court of Canada has interpreted "existing" as meaning "existing in 1982".

A. A law must conform to the Charter & the Bill of Rights and must not be inconsistent with the Principles of Natural Justice

All legislation in Canada, whether federal, provincial or local, and whether statute, regulation or by-law, must conform to the *Canadian Charter of Rights and Freedoms (The Charter*). In addition, all federal legislation enacted after 1971 must conform to the *Canadian Bill Of Rights (*the *Bill of Rights*). Thus, First Nation Council laws must also conform to both the *Charter* and the *Bill of Rights.*

When considering laws, it is useful to be aware of the following rights created by the *Charter* and the *Bill of Rights*.

B. It is unlawful for a law to authorize discriminatory treatment of any individual, particularly on grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The *Charter* and the *Bill of Rights* limit the authority of all legislatures, including First Nation Councils, to prescribe special treatment for particular groups unless there is a strong justification for doing so.

Section 15 of the *Charter* provides that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination. In particular, it states that there must not be discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A law cannot, on the grounds set out in the *Charter*, or on "analogous" grounds that relate to the "personal characteristics" of an individual, impose a burden, obligation or disadvantage on one individual or group that is not imposed on others. Nor can it withhold from a particular group or individual access to opportunities, benefits or advantages that are available to others.

With respect to infringements of section 15 of the *Charter*, a First Nations Council may enact a law that imposes a limitation of rights so long as it meets certain requirements. A Council may draw distinctions among various situations or groups of people (virtually all laws do), but not where that would amount to "discrimination". Even where discrimination occurs, a Council may sometimes be able to justify it under section 1 of the *Charter* as a reasonable limitation prescribed by law in a free and democratic society. Any such limitation should be set out in the law as clearly as possible and the

Charter right should be limited only as much as is necessary to accomplish the objectives of the law.

For example, a Council may extend broader rights to band members than to visitors or other residents who are not band members to reside, hunt or fish on a reserve. If this were contested in a court, a prosecutor would submit that the different treatment is based on aboriginal or treaty rights; or, based on constitutional and legislative policy rooted firmly in Canadian history to set aside reserves for the benefit of Indian Bands and their members. As such, the prosecutor would argue, it does not "discriminate" or, alternatively, it is reasonably justified under section 1 of the *Charter*.

On the other hand, it is inappropriate in many other instances to draft laws which distinguish between band members and those who are not members. For example, laws made for the observance of law and order or for the prevention of disorderly conduct and nuisances should treat band members and all others on reserve in a similar manner.

The Bill of Rights

The *Bill of Rights* also recognizes the right of an individual to equality before the law and to the protection of the law without discrimination. This legislation provides a more limited equality protection than does the *Charter*; it identifies only the following grounds of prohibited discrimination: race, national origin, colour, religion and sex. Moreover, it applies only to federal legislation made after 1971 - the date the *Bill of Rights* was passed.

C. A law must respect a person's freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly, and association

These fundamental freedoms are guaranteed by section 2 of the *Charter* and section 1 of the *Bill of Rights*. Courts have clarified the nature of some of these freedoms, while others still require clarification.

As with the equality rights discussed above, these fundamental freedoms are subject to the reasonable limitations of section 1 of the *Charter*.

i. Religion, Thought and Belief

The essence of the concept of freedom of religion is the right for a person:

- to entertain chosen religious beliefs;
- to declare them openly; and

- to demonstrate religious belief by worship and practice or by teaching and dissemination.

If either the purpose or effect of a law is to limit this freedom unreasonably, a court could declare the law null and void.

Laws regulating the sale of wares and merchandise or other commercial activities or prohibiting games or amusements on Sundays could give rise to infringements of the freedom of religion of those who recognize another day as their day of worship.

ii. Expression

Freedom of expression extends to all forms of expression. It includes "political expression", in other words, the right to express one's opinion on public issues. It also includes "commercial expression", such as the right of vendors to advertise their wares.

Restricting access to public institutions, such as band government meetings or administrative hearings, or restricting access to certain gatherings on a reserve, are examples of regulatory action by a First Nation Council in which freedom of expression could become an issue if it were to inhibit comment on the band political process. Laws excluding from the reserve as trespassers, persons who represent a particular point of view on a political issue, or prohibiting as disorderly conduct the making of speeches on political issues, could potentially give rise to infringements of freedom of expression.

Laws controlling how hawkers and peddlers communicate information, or prohibiting certain forms of artistic expression in public games and amusements, may also give rise to infringements of freedom of expression.

Depending on the wording and impact of the provision, courts might consider such laws to unreasonably limit the freedom to communicate thoughts and opinions.

iii. Peaceful Assembly and Association

Freedom of peaceful assembly and freedom of association are related concepts. They permit individuals to join together in a collective purpose, whether it be attendance at a political meeting, or an agreement to belong to and to participate in a political organization or a business or social relationship. Subject to reasonable limits, groups of individuals are free to join together in the pursuit of objectives and activities that any individual may lawfully pursue alone.

First Nation Councils must take these freedoms into consideration when making laws for:

- the observance of law and order;
- preventing disorderly conduct;

- controlling and prohibiting games and public amusements; and
- regulating commercial activities.

Courts could require councils to justify as reasonable any restrictions in their laws that are placed on individuals joining together. Justifications may include public health or safety, public order or some other important public interest.

D. A law must respect people's rights to life, liberty and security of the person, and their rights to the enjoyment of property, and may only deprive people of these in accordance with the Principles of Fundamental Justice

Both section 7 of the *Charter* and section 1 of the *Bill of Rights* protect the right to life, liberty and security of the person. Only the *Bill of Rights* protects the right to enjoyment of property.

i. Life, Liberty and Security of the Person

The protection in section 7 of the *Charter* goes beyond the protection of liberty and security from physical restraint. It can extend to health or even economic interests, as long as the restriction involves a threat to physical or mental integrity.

For example, an affected individual could challenge a zoning or building restriction that has the effect of preventing individuals from adequately securing their own safety or that of their children. In this regard, one court has struck down the manner in which a municipal by-law regulated the height of fences. Similarly, a court might view a by-law that authorizes the use of a dangerous chemical to control noxious weeds as infringing upon a section 7 right.

ii. Property

Although the *Charter* does not protect property interests, section 1(a) of the *Bill of Rights* does. Therefore, it is suggested that a law giving authority to use, confiscate, detain or destroy private property in order to protect the band from a contagious or infectious disease should contain a provision requiring payment of adequate compensation to an affected person for depriving that person of the enjoyment of the property that he or she was lawfully using at the time.

iii. Natural Justice

Finally, laws cannot abolish the **procedural** protections that the law extends to ensure that any decisions depriving people of life, liberty or security of the person, or of property rights, are made in accordance with fundamental justice. The main rules of natural justice to be followed are:

- to act fairly;

- to act in good faith;
- to act without bias;
- to objectively review all facts and circumstances (to use sound judgment);
- to give all parties opportunities to adequately state their cases;
- right to receive notice;
- right to know case against the party; and
- right to be represented by counsel.

Normally, a law should only give a band official the power to refuse or revoke a commercial licence or destroy or damage someone's property (for example, in order to eradicate disease or noxious weeds) if the person affected is given a reasonable opportunity to object, either orally or in writing, before the decision is carried out.

This principle, sometimes referred to as the right to "fundamental justice", "natural justice", or "due process", also requires that the circumstances of a decision must not give rise to a "reasonable apprehension of bias", such as the appearance of conflict of interest. For example, a law should not authorize a person with a financial stake in the matter, or with a family tie to one of the parties, to decide a zoning application or appeal.

Courts will apply these principles even where a law is silent as to procedure. Nevertheless, First Nation Councils should strive as much as possible to make procedural safeguards explicit in their laws for the guidance of those subject to them as well as those who apply or enforce them.

E. A First Nation Council must respect people's rights to be secure against unreasonable search or seizure

When making laws, First Nation Councils must be cautious about matters such as authorizing searches of premises or vehicles, requiring the mandatory inspection or production of documents and authorizing the seizure or removal of any form of property or documentation. This is because section 8 of the Charter gives everyone "the right to be secure against unreasonable search or seizure."

Generally speaking, an entry onto the private property of an individual in order to conduct a search or seizure requires greater procedural protection than when merely demanding that a person produce business records. A warrant issued by a justice of the peace or judge is almost always required. Only in exceptional circumstances, such as for the urgent protection of health or public safety, would an intrusion into a private home be lawful without a warrant.

A First Nation Council law can, to some extent, regulate search or seizure as an aspect of the process of gathering evidence to be used in a prosecution under the law. Evidence gathering is a procedural matter to which the summary conviction provisions of the *Criminal Code* apply exclusively. Under those provisions, an enforcement officer requires a search warrant. There are a few exceptions to this rule, but before any by-law enforcement officer seizes goods or evidence they should check with the First Nation

legal advisor to determine the legality of their actions and to minimize their personal liability for wrongful seizure or detention.

F. A law must respect people's rights not to be arbitrarily detained or imprisoned

Section 9 of the *Charter* protects individuals from arbitrary detention and imprisonment. Detentions for specific reasons, for example, to check drivers' licences, driver sobriety or the mechanical fitness of a vehicle, are not arbitrary detentions as long as persons are not detained for questioning on unrelated matters.

While courts have decided that random checks of motor vehicles infringe upon section 9 rights, courts have also said that they are justified under section 1 of the *Charter* as reasonable measures to achieve safety on highways.

Importance of these legal principles

Respect for the preceding principles becomes particularly important if a law is challenged in court. A law that does not conform to these rules may be vulnerable to such a challenge and may be struck down. This being the case, First Nation Councils will want to keep in mind all of the principles discussed in this session when drafting laws, the subject of the next session.

PART 2: FIRST NATION LAW-MAKING AUTHORITY

"Common sense often makes good law."
- William O. Douglas

As previously mentioned, Section 91 of the Constitution Act identifies specific areas over which the federal government has exclusive legislative power. Under its constitutional authority in section 91(24) of the *Constitution Act, 1867*, the federal government enacted the first *Indian Act* in 1876. It has been revised a number of times since then.

A. Indian Act

Today, the *Indian Act* is the main legislation dealing with the federal government's responsibility to, and jurisdiction over, Indians and lands reserved for Indians. It contains many provisions which are specific to Indians, including:

- a scheme for the holding of land on reserves;
- a Band membership system;
- a succession law system (wills and estates);
- an electoral system for Band Councils;
- an outline of the authority of these councils, including the right to make by-laws in certain areas;
- provisions regarding schools for Indians; and
- many other matters.

Regulations

In addition, the Governor in Council (the federal Cabinet) may make regulations concerning a number of subjects. The primary source of authority for these regulations is found in section 73 of the *Indian Act*.

Examples of regulations you may be familiar with are the *Indian Reserve Traffic Regulations*, the *Indian Band Election Regulations*, the *Indian Reserve Waste Disposal Regulations*, the *Indian Band Council Procedure Regulations* and the *Indian Estates Regulations*.

B. Framework Agreement on First Nation Land Management

The *Framework Agreement on First Nation Land Management* was signed by the Minister of Indian Affairs and Northern Development and 13 First Nations on February 12, 1996. The *Framework Agreement* sets out the principal components of this new land management process, but it is not a treaty and does not affect treaty or other constitutional rights of the First Nations. The Agreement has been ratified and

implemented by Canada in the *First Nations Land Management Act*, assented to June 17, 1999.

The *Framework Agreement* provides that First Nations who are listed in the Schedule to the federal Act have the option to manage their reserve lands outside the *Indian Act*. The option to regain control of their land can only be taken with the consent of the community. Federal administration of its reserve lands cease under the *Indian Act* when each of these First Nations takes control of its lands and resources under the Agreement by community approval of a land code.

A First Nation signatory to the *Framework Agreement* exercises its land management option by creating its own Land Code, drafting a community ratification process and entering into a further Individual Transfer Agreement with Canada. The specific steps are set out in the *Framework Agreement* and include the following:

The Land Code

A Land Code, drafted by the community, is the basic land law of the First Nation and replaces the land management provisions of the *Indian Act*. The Minister of Indian Affairs and Northern Development will no longer be involved in the management of the First Nation's reserve lands. The Land Code does not have to be approved by the Minister.

The Land Code is drafted by each First Nation and provides for following matters:

- identifies the reserve lands to be managed by the First Nation (called "First Nation land");
- sets out the general rules and procedures for the use and occupation of these lands by First Nation members and others;
- provides financial accountability for revenues from the lands (except oil and gas revenues, which continue under federal law);
- provides the procedures for making and publishing First Nation land laws,
- provides conflict of interest rules;
- provides a community process to develop rules and procedures applicable to land on the breakdown of a marriage;
- identifies a dispute resolution process;
- sets out procedures by which the First Nation can grant interests in land or acquire lands for community purposes;
- allows the delegation of land management responsibilities; and
- sets out the procedure for amending the Land Code.

<u>The Land Code is the main document that must be referred to before developing and drafting a First Nation land law, as it provides for the authority and procedure to make the law.</u>

Individual Transfer Agreement

An Individual Transfer Agreement between each community and the Minister will be negotiated to deal with such matters as:

- the reserve lands to be managed by the First Nation;
- the specifics of the transfer of the administration of land from Canada to the First Nation; and
- the operational funding to be provided by Canada to the First Nation for land management.

Community Ratification Process

In order for the First Nation to assume control over its lands, the Land Code and the Individual Transfer Agreement must be ratified by the adult members of the First Nation. All members of the First Nation who are at least 18 years of age, whether living off-reserve or on-reserve, have the right to vote on the Land Code and the Individual Transfer Agreement. The procedure for the community ratification process is developed by the community in accordance with the *Framework Agreement*.

A Brief Note on How Provincial Laws May Apply to Reserve Lands

Recall, as well that Section 92 of the *Constitution Act, 1867* identifies specific areas over which the provincial governments in Canada have legislative power. The extent to which provincial laws apply on reserves is also the subject of much legal and judicial debate. The following attempts to summarize the present state of the law, but is not intended to be a complete or conclusive statement.

General Rule

Generally speaking, a provincial law will apply on reserve if the province had the constitutional authority to pass it and if the law is otherwise valid and applicable throughout the province. Examples of provincial constitutional authority are child welfare, labour relations, insurance, contracts, corporations, most aspects of family law and the regulation of professions and trades.

At one time, some judges thought that provincial laws did not apply on reserves. In 1974, the Supreme Court of Canada, in the *Cardinal v. A.G. Alberta* case, changed this view. It declared that, while a province may not legislate on a subject matter given **exclusively** to the federal government, provincial legislation enacted under a heading of section 92 of the *Constitution Act, 1867* does not become invalid just because it affects something which is subject to federal legislation.

In 1986, the Supreme Court of Canada, in the case *Dick v. R.*, stated that provincial laws of general application apply to Indians if they do not affect or touch on their "Indianness". Traffic and family laws are examples of provincial laws which do not touch on "Indianness" in their application.

Extension of the General Rule – Section 88

Even where a provincial law may single out Indians, affect their status or capacity as Indians, or directly affect matters that are "inherently Indian" or "closely related to the Indian way of life", that law may apply on reserve. *Dick v. R.* held that such provincial laws may apply because of section 88 of the *Indian Act*.

Section 88 provides that these provincial laws apply except to the extent that they are inconsistent with the *Indian Act* or any order, rule, regulation or Band by-law made under the authority of the Act and subject to the terms of any treaty and any other Act of Parliament.

Exceptions to the General Rule and its Extensions

(a) Indian Lands:

While *Dick v. R.* held that provincial laws may apply to **Indians on reserves**, it confirmed that they cannot apply to **"*lands* reserved for Indians"**. Thus, courts will not recognize a provincial law which directly affects Aboriginal title, or the use, disposition or manner of holding Indian lands.

Examples of provincial laws of general application that do not touch on Indianness, but that affect reserve lands are landlord and tenant laws, laws regarding the registration of lands and provisions of family laws relating to the possession or sale of the matrimonial home. These laws <u>do not</u> apply on reserve.

(b) S. 35(1) of the *Constitution Act, 1982*:

A provincial (or federal) law may, through the operation of section 35(1) of the *Constitution Act, 1982*, be of no force and effect to the extent that it interferes, without justification, with an existing Aboriginal or treaty right.

The scope of this constitutional protection is still being defined by the courts.

Overlap of Provincial and Federal Jurisdiction

Because many provincial laws apply on reserve, there will be situations where both federal and provincial laws might apply to the same set of circumstances. These laws are said to "co-exist". A good example of this type of overlap is in the regulation of highway traffic.

PART 3: DECIDING IF A LAW IS REQUIRED

"In law, nothing is certain but the expense."
– Samuel Butler

Making a new law is just one of several ways of achieving governmental policy objectives. Alternatives include agreements and guidelines, policies and directives or, more generally, programs for providing services, benefits, or information. In addition, a law may include many different kinds of provisions, ranging from simple prohibitions through a wide variety of regulatory requirements such as licensing or compliance monitoring. Law should be used only when it is the most appropriate. It is up to the First Nation to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

The decision to address a matter through a bill or regulation is made by the First Nation Council on the basis of information usually developed by First Nation officials. The information must be accurate, timely and complete. As a beginning point to determine if a law is required or if another option is available and appropriate, it is important to:

- analyze the matter and its alternative solutions;
- analyze the land code to determine the authorities and processes which permit the First nation to make the law;
- engage in consultation with those who have an interest in the matter, including other First Nation departments, programs or services that may be affected by the proposed solution;
- analyze the impact of the proposed solution; and
- analyze the resources, both human and financial, that the proposed solution would require, including those needed to implement or enforce it.

Related Matters should be in One Bill

When a legislative initiative is being considered, and where it is appropriate and consistent with legislative drafting principles, related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows legislators to make the most effective and efficient use of their time for discussion and study by the Council, a First Nation Land Committee and community members and other stakeholders.

Review and Expiration Clauses

Finally, caution should be taken when considering whether to include a "sunset" or expiration provision in a law, or a provision for mandatory review of the Law within a particular time or by a particular committee such as the Lands Committee or Board.

Alternatives to these provisions should be fully explored before proposing to include them in a bill.

Choose the Right Tools to Meet the Policy Objectives

Law should be used only when it is most appropriate. When a legislative proposal is made, it is up to the sponsor – be it Council, a Land Committee or Board, a member or stakeholder, to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

This discussion provides guidance on meeting this requirement by providing an analytical framework that covers:

- the range of instruments (techniques) available for accomplishing policy objectives;
- how to determine which ones are the most appropriate; and
- how to decide whether a First Nation land law is required.

First Nations are encouraged to adopt a comprehensive approach to developing proposals to accomplish policy objectives. They should focus on achieving a desired outcome, rather than assuming that a particular instrument, particularly a Law or regulation, will be effective. In this discussion some of the factors to consider in law development are reviewed.

Overview

- Instrument-choice should be considered early in the policy development process.
- First Nation governments cannot deal with every situation. Its involvement must be assessed in light of its responsibilities, its resources and the likely effectiveness of its involvement relative to the involvement of other governments or the private sector.
- The range of possible instruments available to accomplish policy objectives is very broad, allowing the First Nation to choose the type and degree of its intervention, if any.
- A law should only be chosen after assessing the full range of possible instruments.
- Instrument-choice has wide-ranging effects and is an important element of many governmental activities.
- Consultation on instrument-choice, both within and outside the First Nation, is essential to making good choices.

Assessment

If a situation may require the First Nation's attention, it should be assessed to determine what, if anything, should be done to address it. This involves determining the

objectives in addressing it and how these objectives can best be accomplished. This determination should be done as early as possible in the policy development process.

The following questions may help you do this:

- What is the situation?
- What are the objectives in addressing the situation and what particular results are desired?
- Is there a role for the First Nation or Council?
- What instruments are available to accomplish the desired results?
- What is involved in putting the instruments in place?
- What effect would the instruments have?
- How will their success be measured?
- Which (if any) instrument(s) should be chosen?

The assessment process does not necessarily follow the order of these questions. Answers reached at one point in the process may have to be re-evaluated in light of answers to other questions.

In order to obtain sound answers, it is also important to conduct appropriate consultations with those affected.

A. Examine the Situation

This step involves defining the key features of a situation that may require the First Nation Council's attention. A situation may present itself in the form of a problem, in which case you should try to get to its source and not define it in terms of its symptoms.

The situation may also be an opportunity for the First Nation Council to do something creative or positive, for example celebrating a First Nation event – Aboriginal Day or a treaty, as opposed to responding to a problem.

A description of the situation is often framed in terms of how people are behaving or how they may behave in future. Their behaviour may be active (doing something) or passive (not doing something). A behavioural approach involves identifying the following elements:

- the behaviour that is, or may be, creating or contributing to the situation;
- who is engaging in the behaviour;
- who is affected by the behaviour and what these effects are;
- whether some behaviour, or behaviour by some persons, is more serious than others;
- what external factors are influencing the behaviour;
- what behavioural changes are desired to address the situation.

B. What Are the Objectives and Desired Results?

This question is intended to help define the objectives as concretely as possible in terms of particular results to be achieved. Objectives and the desired results go hand in hand, but they are not quite the same.

For example, an objective might be to make a particular activity safer – build fences around swimming pools to protect children from drowning in backyard swimming pools, while the desired result might be a 30 percent reduction in the rate of drowning.

Another example is an objective of reducing graffiti on public buildings in the First Nation by the prohibition of the defacing of First Nation public buildings, here again the desired result might be 25 percent reduction in graffiti.

C. The Role of the First Nation

Consider whether the First Nation can or should do something. The *Constitution*, the *Framework Agreement* and the First Nation Land Code limit the authority of the Council through:

- the legislative powers of the First Nation
- limits on the exercise of legislative powers, for example the Canadian Charter of Rights and Freedoms;
- obligations relating to such things as the provision of services to all residents, not only members; or to all members whether resident on or off First Nation lands.

Practical considerations should be addressed as well. Governments have limited resources and they can't deal with every situation: perhaps others are better placed to achieve a desired outcome.

Finally, if the First Nation does become involved, what role should it play? Possible roles include taking the lead, acting in partnership with others or stimulating or facilitating action.

D. Instruments Available to Accomplish the Desired Result

This question looks at the full range of available policy instruments, which can be grouped into five categories:

- information;
- capacity building;
- economic instruments, including taxes, fees and public expenditure;
- rules; and
- organizational structure.

i. Information

Information can be a powerful tool. People act on the basis of the information available to them. By giving them specific information, it may be possible to influence their behaviour. Some examples are:

- consumer information about the quality or safety of products;
- occupational health and safety information;
- anti-drinking and driving advertising and education campaigns;
- "buy-Canadian" promotional campaigns;
- environmental awareness programs (e.g. littering; hazardous substances);
- information about how programs are operated or about administrative practices;
- symbolic gestures (e.g. an apology).

ii. Capacity Building

Capacity-building increases the ability of people or organizations to do things that advance policy objectives. It goes beyond providing information to include transferring to them the means for developing their ability. Some examples are:

- employment skills training programs;
- programs to support scientific research and public education about the results of the research;
- information gathering through consultation or monitoring; and
- working with industry or business to help them develop voluntary codes governing their practices.

iii. Economic Instruments

Many instruments have a mainly economic focus. They affect how people behave in the marketplace or in other economic transactions. These instruments include taxes, fees and First Nation expenditure, which are considered separately below. They also include the creation of exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold. Insurance requirements are another example of economic instruments because they can, for example, force businesses to assess and reduce risks and ensure that their products are priced to cover the costs of insurance or preventive measures.

a) Taxes and Fees

The basic purpose of taxes and fees is to raise revenue. However, they are also capable of influencing how people make choices about the activities to which the taxes or fees apply. In this sense, they can be powerful tools for accomplishing policy objectives. Examples include:

- taxes on income, property or sales;
- fees or charges for licences or services; and
- tax exemptions, reductions, credits or remissions.

b) First Nation Expenditure

The First Nation can act by transferring or spending money in a particular area in order to accomplish policy objectives involving those who receive the money. This makes it a potentially effective instrument for encouraging particular activities that support the policy objectives. Some examples of public expenditure are:

- monetary benefits, grants or subsidies;
- loans or loan guarantees;
- vouchers redeemable for goods or services;
- transfers to other governments or agencies for education or health programs.

iv. Rules

Rules, in the broadest sense, guide behaviour by telling people how things are to be done. However, there are many different types of rules. For example, they differ in terms of how they influence behaviour:

- laws, regulations or directives tend to apply to groups of people and have legal force in that they can be enforced by the courts;
- contracts or agreements also have legal force, but they generally apply only to those who are parties to them; and
- guidelines, voluntary codes or standards and self-imposed rules usually apply to groups of people, but they do not have legal force, relying instead on their persuasive or moral value.

Rules having legal force are generally cast in terms of requirements, prohibitions or rights. A combination of these elements can be seen in rules that create:

- rights that entitle people to do things on an equal footing, such as obtaining goods, services or employment, and corresponding requirements to provide these things to those entitled to them; and
- prohibitions against doing something without a licence that confers a right to do it, for example, exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold.

Rules may also be formulated in different levels of detail, for example:

- as precise requirements that tell people exactly what to do; or
- as performance standards that set objectives that people are responsible for meeting.

Incorporation by Reference

Finally, it is worth noting the drafting technique of incorporation by reference. Rules of one type (for example, Laws or regulations) can sometimes be drafted so that they incorporate rules of the same or another type (for example, other Laws or regulations as well as industry codes or standards) simply by referring to them, rather than restating them. This avoids duplication of the incorporated rules and can be a way of harmonizing the laws of several jurisdictions if they each incorporate the same set of rules.

v. Organizational Structure

Organizational structure is often critical in accomplishing policy objectives. It generally supports the use of other instruments by providing for their administration. Examples of organizational instruments include:

- First Nation structures to deliver programs;
- framework agreements and partnerships with other governments or organizations;
- privatization or commercialization of First Nation government services (e.g. garbage collection); and
- First Nation investment in private enterprises.

vi. Combination and Timing of Instruments

These instruments are not necessarily stand-alone alternatives to one another. In fact, many of them are mutually supportive or otherwise interrelated. For example, information enables organizations to work effectively and organizations are often needed to administer legal rules, such as Laws or regulations, which may, in turn, be needed to support the creation of organizations.

Another important dimension of the range of available instruments is timing. Some instruments are better used in the initial stages of policy implementation while others may only be needed later if circumstances warrant. For example, information campaigns often precede the imposition of legal rules and, if they are effective enough, they may avoid the need for such rules.

E. Putting the Instruments in Place

This question involves the legal, procedural and organizational implications of using each instrument as well as the process requirements for making them operational. It also involves considering in greater detail the role that the First Nation council may play, whether acting alone or as a partner with other levels of government or the private sector.

You should assess:

- whether the use of the instrument is within the general mandate or authority of the First Nation;
- whether some specific legal authority is needed, for example, authority to impose taxes or penal sanctions, and, if so,
    - whether it requires new Laws to be made,
    - whether there is legal authority for the First Nation to make the new laws

It is particularly important to consult legal advisers when considering this legal aspect of the question.

- what the short- and long-term operational requirements, both organizational and financial, of the instruments are, including:
    - organizations and personnel needed to administer the instruments, for example, officials needed to assess benefit claims or conduct inspections,
    - additional resources for court costs;

- who should be consulted before the instruments are put in place (other First Nation departments, other governments, stakeholders);
- what processes are required to put the instruments in place, including processes required for any new laws (e.g. do guides and forms for the process to register documents in the First Nation Law Register need to be developed?);
- what, if any, monitoring or enforcement measures will be needed, such as penalties, inspections and court action (this is closely connected to the next question of what effect the instruments would have).

F. What Effect Would the Law Have?

This question involves assessing how the Law (or other instrument) would work, including:

- whether the Law will bring about the desired results, including whether people will voluntarily do what the instruments encourage or require, or whether some are likely to try to avoid compliance or find loopholes;
- whether the Law will cause any unintended results or impose costs or additional constraints on those affected by them;
- what the scope and nature of any likely environmental effects will be, particularly any adverse environmental effects and how they can be reduced or eliminated;
- what effect the instruments may have on inter-governmental relations, particularly in light of the First Nations' obligations under provincial or federal agreements;
- how the general public will react to the Law and, in particular, whether it will be perceived as being enough (or too much) to deal with the situation.

When deciding whether to choose Laws, you should also keep in mind their strengths and weaknesses. They can often be used to overcome resistance in achieving the desired results because they are binding and enforceable in the courts. However, they may also give rise to confrontational, rights-based attitudes or stifle innovative approaches to accomplishing the policy objectives. It should not be assumed that a legal prohibition or requirement will, by itself, stop people from doing something or make them do it.

G. Measuring the Effectiveness of the Law or Other Instrument?

It is not enough to choose various instruments and use them. Clear and measurable objectives must also be established as well as a means for monitoring and assessing whether they are being achieved. This assessment should be ongoing and include looking at how other governments are addressing the same situation. This is necessary both for determining whether the chosen instruments should continue to be used as well as for providing a better basis on which to make instrument-choice decisions in future.

H. Is a Law the Only Choice?

The final step is to choose the instruments that would be most effective in achieving the policy objective. It is important to realize that a single Law is seldom enough. Usually a combination of instruments is required, often in stages with different combinations at each stage. They should be chosen through a comparative analysis of their costs and benefits, taking into account the answers to the preceding questions.

This is also a good time to consider again whether there is a role for the First Nation Council. It may be that none of the instruments should be chosen if:

- the situation does not justify the First Nation's attention, for example, because there is no problem or the situation is beyond the First Nation's jurisdiction or is not a priority for it;
- the situation will take care of itself or will be addressed by others;
- the First Nation does not have the resources to address the situation;
- the First Nation becoming involved in the situation would lead to unmanageable demands to become involved in similar situations.

Sources of First Nation Legislative Proposals

There are basically five sources of legislative policy:

- the members;
- the Chief and Council;
- First Nation administration or Land Committee;
- courts and administrative agencies; and

- federal legislation (e.g. membership and election codes; matrimonial real property).

I. Guidelines / Checklists for Policy Development of Law (or other Instrument)

These Guidelines or checklists are a set of analytical criteria for use in the assessment and development of policy to propose a law. While the focus of this discussion is on making a law, a similar analysis or approach can be used to develop other instrument such as guidelines, policies, programs etc. These guidelines were originally developed as part of a broader exercise designed to improve policy-making in the federal government and to improve the quality of policy discussions in Departments and Cabinet Committees. The Guidelines have been modified for use by First Nations.

POLICY BASICS TEST

- ✓ Has the problem been adequately identified and are the goals and objectives clearly defined?
- ✓ Are there horizontal considerations and interdependencies with other priorities or issues (e.g. environment, etc.)?
- ✓ Are they in member-focused terms?
- ✓ Does this initiative build on and fill gaps in existing policy and programs (federal, provincial)?
- ✓ Does the proposal replace or overlap any existing program?
- ✓ Will this initiative be sustainable (social, economic, environmental) in the longer term?
- ✓ Have a range of options for the achievement of goals/objectives been considered? The full range and choice of instruments (e.g. legislative, regulatory, expenditures)?
- ✓ Has a feedback mechanism been incorporated into policy and program design to allow for evaluation, fine-tuning, and updating?
- ✓ Is the policy based on sound science advice?

PUBLIC OR COMMUNITY INTEREST TEST

- ✓ How would the proposal meet the needs of community members and other stakeholders?
- ✓ How do the overall societal benefits compare to its costs? Have the full range of risks been assessed?
- ✓ Does the proposal respect the rights of community members and other stakeholders and take into account their diverse needs (e.g. non-member, off reserve members, etc.)?
- ✓ Have community members and other stakeholders been given an opportunity for meaningful input?

FIRST NATION INVOLVEMENT TEST

- ✓ What is the rationale for First Nation involvement in this area (e.g. constitutional, legal, scope of issue)?
- ✓ Have the particular First Nation interests been adequately identified?

QUESTION OF ACCOUNTABILITY TEST

- ✓ Has an adequate accountability framework been developed? (in particular for multi-stakeholder arrangements)
- ✓ Have mechanisms been established for ongoing monitoring, measuring, and reporting to members on outcomes and performance?
- ✓ Have eligibility criteria and First Nation administration commitments been made publicly available?

URGING PARTNERSHIPS

- ✓ Can this initiative benefit from joint planning and collaboration?
- ✓ Has it been designed in a way that complements existing programming and services provided by the First Nation or another level of government?
- ✓ Are the relative roles and contributions of partners clear? How will they be publicly recognized?
- ✓ Have opportunities for partnerships with communities, voluntary sector and private sector been considered?
- ✓ Have mechanisms been established to consult with other governments?

EFFICIENCY AND AFFORDABILITY TEST

- ✓ Will the proposed option be cost-effective?
- ✓ Does the proposal assess non-spending options?
- ✓ Does it consider reallocation options?
- ✓ Would a partnership based effort result in a more efficient or effective program or service?
- ✓ What are the longer term funding issues associated with this proposal - for the First Nation, and for its partners?
- ✓ Are there program integrity issues related to this initiative (e.g. non-discretionary/legal commitments, risks, strategic investments)?
- ✓ Has the initiative considered downstream litigation risks?

PART 4: DRAFTING LAW

"The best way to get a bad law repealed is to enforce it strictly."
- Abraham Lincoln

When drafting laws, First Nation Councils should be aware that laws enacted under the authority of the Framework Agreement on First Nation Land Management and the Land Code ratified by the First Nation will apply only upon the territory over which the Council has jurisdiction, that being the actual reserve or First Nation land territory.

First Nation Councils must also bear in mind the fact that laws are a type of legislation, and, as such can come under the scrutiny of the courts. Accordingly, it is highly recommended that Councils retain the services of a lawyer to be of substantial assistance in the law development process.

When drafting a law it is critical to be logical and organized. A good suggestion for a guideline is to write the law in as simple and straight-forward a manner as the subject area allows.

For organizational purposes the law should be arranged in such a manner that the subject area of the law is divided into major groupings (i.e. administrative setup, administrative procedures, offences and penalties, appeal procedures...), or into whatever groupings are required to be addressed in the law. Then, within each general grouping there is a breakdown of related information pertaining to that specific grouping. Each piece of information that is included should be described separately. What results is a system of parts, sections, subsections and other subdivisions similar to the organization of federal and provincial laws. This will ensure readability and facilitate interpretation. Any law that is vague or ambiguous could be held invalid by a court.

Whether the First Nation Council drafts the law itself or takes the matter to a lawyer, certain basic drafting requirements must be met. There is a structure to every law and each part is important for different reasons.

A law consists of the following parts:

- title and numbering;
- recital;
- enacting clause;
- definition section (optional but strongly suggested);
- main body of the law;
- land code law procedural requirements; and
- schedules and appendices (optional).

A. Title and Numbering

A law should have a title which sufficiently describes its purpose. If the title is lengthy, the law may designate a "short title" for common usage. Using a short title is optional but quite common, and is used for easier reference purposes - for written or oral description.

It is critical to accurately identify laws. Any logical, clear, consistent system to identify laws may be used, however, it is suggested that a consecutive numerical system be used when numbering laws. For example, the year of enactment can form part of the number, i.e. " XX First Nation Law No. 1996.15" would mean the fifteenth law enacted in 1996. For each new year, the numbers would start again at number 1. The identification system is to ensure that when the law is being cited or used by the courts, First Nation Council, or any affected person there will be no reference to, or confusion with anything other than that particular law.

B. Recitals

A recital is not necessary, but may be important because a recital allows the Council to describe the reasons why the law is required. The recital gives the context in which the law can be interpreted. Courts, when interpreting laws may use the recital section to understand the context of the law and this may assist the courts in determining the reasonableness of the provisions.

The recitals to the law are a brief statement of its purpose and reasons why the law is required, and a listing of the authorities in the Land Code upon which the law is based. [Re Caldwell and Galt (1899) 30 O.R. 378]

C. Enacting Clause

An enacting clause is a formality that states that the First Nation Council has enacted the law, and that the law is in fact a law and not simply a Band Council resolution.

D. Definition Section

There is a particular purpose to every law. As laws are a method of addressing your community's needs it is extremely important for the law to be clearly written and understandable, yet precise enough that the law does what you intend it to do, when interpreted by a court.

One of the methods that may be used to ensure that a law is interpreted in a fashion you want it to be interpreted is to use a definition section wherein you define the key words in the law. If this is done then the courts, if they review your law, will use the definition you have assigned to the word and not some other definition which may or may not reflect what you want the law to do.

There are different sources of definitions for key words or concepts;

1. Definitions should be used to define words in a law which might require interpretation in the context of the law. Many words and phrases are defined in the Interpretation Act, R.S.C. 1985, c. I-2, and this Act should be referred to when developing a law.
2. Words used in a law, if defined in the First Nation Land Management Act (FNLMA), have the meaning given to them in the FNLMA unless a contrary intention appears in the law (see: sections 3 and 16, Interpretation Act, R.S.C. 1985, c. I-21). Although it may be possible in some circumstances to define a word in a law more broadly than it is defined in the FNLMA, in most cases to do so could affect the legality of the law. It is especially important not to expand in a law the meaning of any word used in the FNLMA, if that word is defined in there. Although it is usually permissible to define a word in a law more narrowly than it is defined in the FNLMA, the legality of this may also be questioned in some instances.
3. If the words or phrases are not defined in the law, or in other legislation, the courts will look to the generally accepted or established meanings of the words or phrases (i.e. dictionary meaning).

Accordingly, as a matter of practice it is advisable not to define words and phrases differently than they are defined in the FNLMA, unless it is absolutely necessary. If such a situation occurs it is suggested that the First Nation Council seek legal advice on the question.

Once the word, or phrase, is defined then the same word or phrase should be used in the body of the law to ensure the proper interpretation. For example, if one term is defined in the definition section but another term is used in the body the courts may assign a definition to the used word that is different from the word defined in the law.

When you are defining words and phrases, there are some general rules of construction which may be of assistance;

The definition of a word may be introduced by the verb "means" if it is intended to restrict the meaning of the word to the definition that is given. If, however, the intention is to expand the normal meaning of the word to other meanings that the word might not ordinarily bear, or to give examples of the intended meaning, it should be introduced by the verb "includes". For example, "boat" means a motor boat, or "boat" includes a motor boat - the first example using "means" indicates that only a motor boat is considered when the term "boat" is used, whereas in the second example any type of boat (i.e. sail boat, row boat, canoe, sailboard and any other device used to transport persons by water) also includes motor boats.

Words to be defined should be listed in alphabetical order and may be numbered or lettered. If the law is enacted in two or more languages then the words or phrases

should not be numbered or lettered because the alphabetical order would be different between the different languages.

E. Main Body of Law

The main body of a law will include substantive rules of procedure or conduct as well as measures for administering and enforcing the law.

Any format that is clear and understandable is satisfactory, but it is generally accepted that administrative provisions precede the operative or substantive rules.

It is also generally understood that the section or part pertaining to offenses and penalties come towards the end of the law. Offenses and penalties should include the following;

- the law should include a general provision that a person who violates any provision of the law, or a specified provision of the law, commits an offence. A specific offence may be cited wherein a specific penalty for that section may be used, however any penalty must comply with those set out below; and
- the penalties for violation of a First Nation law cannot differ in nature from those set out in Section 22 of the FNLMA. The law may also limit the fines to less than $5,000.00.

F. Law Making Procedures

It is very important to adhere to the procedural requirements of laws pursuant to the Land Code because laws can be successfully challenged in broad general ways in one, or a combination of the following ways, which could result in the law being ruled invalid;

- factually; examples such as "I was not the person who committed the offence" or "the facts as alleged by the law enforcement officer are not correct, and the real facts do not disclose an offence", (losing a case on factual grounds does not mean the law is invalid)
- on substantive or jurisdictional grounds; examples such as "the subject area in the law is beyond the jurisdiction of the First Nation Council to enact under Clause 18 of the Framework Agreement on First Nation Land Management", or "the law infringes the Charter of Rights and Freedoms", and/or,
- procedural deficiencies; examples such as "not holding a special meeting of the band for purposes of considering the law under the Land Code, but enacting the law anyway".

It is essential to comply with the provisions of the Land Code regarding enactment.

A statement to the effect that a law was made by a Council or community at a duly convened meeting on a particular date must be included. As well, the signatures of the

members of the First Nation Council who voted in favour of the law should appear at the end of the law with a statement informing the reader what constitutes a quorum of the band and the number of members of the Council present at the meeting.

G. Schedules and Appendices

There may be attached to the law schedules and appendices that are referred to in the law. These attachments to the law would be used for required forms necessary for application of the law (i.e. application forms to be used when applying to the band, i.e. residency, licenses), or schedules outlining the categories pertaining to the law (i.e. different zones described, or qualifying lists established in zoning laws; traffic zone designations, traffic offence fines, signing...). Reference to the schedules or appendices must be included within the body of the law as being part of the law.

Power to Make Certain Laws

Laws are enacted pursuant to the First Nation's Land Code. The Land Code outlines the power of First Nations to make land laws. The Framework Agreement, section 18.1 provides that:

> The council of a First Nation with a land code in effect 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.

To be valid, the subject-matter of the enacted laws must fall within the scope of the areas indicated in the Land Code. If the enacted laws do not fall within the scope of the authority given by the section of the Code then a reviewing court will overturn the laws, or delete from the law the improper portions, as they would be in excess of jurisdiction given to the Bands under the Framework Agreement.

Enforcement of First Nation Laws

First Nation Councils enact laws to encourage or require members/residents/visitors of the community to conduct themselves in particular ways or to avoid certain types of prohibited conduct.

Often the mere existence of a law with a small penalty is enough of a deterrent to stop or prevent undesirable behavior or practices. An example of this is a garbage law where a warning to someone to clean up garbage usually achieves the desired result.

Many people obey laws because they represent the community's collective view of how one should conduct oneself. Others obey laws to avoid the penalties which follow

failures to comply. Nevertheless, some laws may require significant penalties and strict enforcement to bring about the desired conditions in a community.

As First Nations laws are primarily a band's concern, in order to be effective there has to be a penalty and a method of enforcement. It is the obligation of band councils to enforce their own laws. The Department of Indian Affairs does not take responsibility for doing so.

The discussion in this session mainly concerns the enforcement options available to First Nations and the procedures involved in enforcing laws.

Identifying Offenses and Setting Penalties in the Law

Defining what conduct constitutes offenses under the law and setting the maximum amount of penalties for them is a matter of policy for the Council to determine. Above, we discussed the legal principles affecting penalties and the factors a Council might consider in setting maximum penalties, we also discussed the drafting requirements related to penalties and enforcement.

The key points to keep in mind in this session are:

- the by-law must set maximum penalties within the maximums set in the Framework Agreement;
- the law cannot establish minimum penalties; and
- the judge determines the actual sentence, based on input from the prosecutor (who may also include band council or community views or wishes) and from the offender

The Main Methods of Enforcing Laws

There are two main methods of enforcing laws:

- verbal and written warnings or discussions are often sufficient to convince people to modify their behavior to conform to the law requirements; and
- formal charges bringing offenders before the provincial courts may be required in other situations

Some communities have also developed Alternative Justice Mechanisms. These are discussed at the end of this session.

Two Kinds of First Nation Laws

There are generally two kinds of laws:

- those that are **administrative** in nature, such as building code or a zoning law; and

- those that are **quasi-criminal** in nature (dealing with law and order), such as traffic and environmental infractions.

SUMMARY - CHECKLIST FOR PREPARING BILL-DRAFTING INSTRUCTIONS

Getting Started

- Main objectives of the proposal
- Time needed to prepare drafting instructions
- Public commitments

General Legal and Policy Matters

- Legal context
- Policy context
- Resources
- Legal instruments for accomplishing policy objectives

Legal Structure of the Proposal

- Combining matters in a single bill
- Types of legal instruments
- Provisions that should be in the Law
- Provisions that should be in regulations
- Incorporation by reference
- Administrative instruments
- Recipients of powers

Drafting and Organization of a Law

- Titles
- Preambles and purpose clauses
- General application provisions
- Application to the Crown
- Financial provisions
- Information provisions
- Monitoring compliance
- Sanctions for noncompliance
- Enforcement powers
- Appeals and review mechanisms
- Dispute resolution mechanisms
- Extraordinary provisions

Technical legislative matters

- Sunset and review provisions
- Repeals
- Consequential and conditional amendments
- Transitional provisions
- Coming into force

GETTING STARTED

MAIN OBJECTIVES OF THE PROPOSAL

- ✓ What are the main objectives of the proposal?

It is essential to clearly articulate the precise purpose of proposed legislation, so that decision makers and the drafters properly understand what the legislation is supposed to achieve.

For amending bills that are intended to accomplish a number of different purposes, the instructions should explain these purposes separately in relation to the provisions that are to be amended. They should also include a general instruction to make consequential amendments to other provisions.

TIME NEEDED TO PREPARE DRAFTING INSTRUCTIONS

- ✓ Is there enough time to prepare the drafting instructions?

Thinking through the detail of drafting instructions will raise policy issues that were not identified when ideas were expressed in general terms in the policy development stage. Time will be needed to address and resolve these issues. The First Nation must be prepared to spend the time necessary to produce a coherent set of provisions to implement the proposal. Unresolved issues haunt a legislative project until they are resolved and it is wiser and more efficient in the long run to resolve as much as possible before the actual drafting begins.

The time spent in thinking through drafting instructions is well worth it. Good drafting instructions will avoid:

- delays in drafting the bill because of unresolved policy questions;
- having to go back to Council or the community to clarify policy issues that were not adequately resolved in the original proposal;
- having to propose amendments once the draft law has been prepared because the policy was still in flux after the draft law was introduced;
- being left without the necessary legal authority after the Law is passed to draft the regulations required to complete the legislative scheme.

Before establishing the time frames for the proposed law make sure that the legislative drafter has been consulted. The time needed to prepare the draft may be much greater than the expected.

PUBLIC COMMITMENTS

- ✓ Has the Chief and Council made any public commitments, either generally or about the specific legislative proposal, that will affect its contents or timing? These public commitments could affect the timing of the Law or require it to be framed in a certain way

Stakeholders or other governments are sometimes consulted on the draft proposals. When the aim of consultations is a negotiated agreement on wording that is to be proposed in the legislation, drafters should be consulted before specific wording is agreed on

GENERAL LEGAL AND POLICY MATTERS

LEGAL CONTEXT

- ✓ What legal considerations affect the proposal?

This portion of the drafting instructions should be completed by the legal adviser. It involves an assessment of the law related to the proposal in order to ensure that the resulting legislation will operate effectively.

Some areas of particular concern are:

- Does the First Nation have constitutional authority to make the Law?
- Will it affect matters within provincial or federal jurisdiction?
- Is it consistent with the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights?
- Does the proposal distinguish between members and non-members; on-reserve members and off-reserve members?
- Does the proposal raise any gender or other equality issues?
- Is it consistent with the Framework Agreement, the land code and other First Nation Laws?
- Any conflicting legislation should be specifically identified and the conflict should not be resolved by a general "notwithstanding" provision.
- Does the proposal respond effectively to any court decisions or legal opinions that gave rise to the legislation or any of its elements?
- Are there any agreements which the First Nation has signed that relate to the proposal?
- Does the proposal rely on provincial private law (for example, contracts or property) to supplement it? (e.g. Quebec civil law or common law.

POLICY CONTEXT

- ✓ Do any First Nation policies affect the proposal?

RESOURCES

- ✓ Who will incur costs as a result of the new Law?

If the First Nation will incur costs as a result of the legislation, a strategy must be identified for managing their reaction or obtaining their support.

- ✓ Will the proposed law require additional First Nation staff and / or staff training; new facilities or equipment?

If there are new First Nation costs associated with implementing or complying with the proposed legislation, a source of funding will be needed before approval.

LEGAL INSTRUMENTS FOR ACCOMPLISHING POLICY OBJECTIVES

- ✓ How will the policy objectives of the proposal be accomplished?

There are many legal mechanisms available for implementing policy objectives. These include:

- the creation of public bodies and offices;
- the conferral of powers and duties on public officials;
- rules that regulate, prohibit, require or authorize particular activities;
- the creation of sanctions for non-compliance with the rules.

Some particular mechanisms that are often adopted include:

- licensing schemes directed toward controlling particular activities;
- monitoring and enforcement provisions.

As far as possible, the drafting instructions should provide a picture of how the legislation will actually work, describing the type of machinery envisaged and the necessary powers and duties, including how the legislation will be enforced.

LEGAL STRUCTURE OF THE PROPOSAL

COMBINING MATTERS IN A SINGLE BILL

- ✓ What should be included in a single bill?

Related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows the Council to make the most effective and efficient use of their time for debate and study. However, matters should only be combined if it is appropriate and consistent with legislative drafting principles. Titles to Laws are among the most important tools people use to find the law. If very different matters are combined in one Law, it becomes more difficult for people to find the law relating to the matters that concern them.

TYPES OF LEGAL INSTRUMENTS

- ✓ What types of legal instruments should be used?

There are many legal instruments and other related documents available to implement policy. They fall into three categories:

- Laws
- Regulations
- Administrative documents (for example, contracts, internal directives, bulletins, decision documents).

Both Laws and regulations are forms of law, with the same legal effect. Administrative documents do not necessarily have legal effect.

Additional differences among these categories involve the procedures used to make them. First Nation Land Codes provide the process for making Laws. There are no general legislative requirements for other subordinate documents, although they are sometimes subject to particular requirements such as those relating to natural justice.

The provisions of any Law must fit together in a coherent scheme with the administrative documents that it authorizes. This means that the authority to make administrative documents must be established by the Law, either expressly or impliedly.

PROVISIONS THAT SHOULD BE IN THE LAW

- ✓ What should be in the Law?

Generally speaking, the Law contains the fundamental policy or underlying principles of legislation that are unlikely to change. The following additional matters are usually dealt with in the Law:

- provisions that might substantially affect personal rights (search and seizure powers, penalties for serious offences, expropriation);
- provisions establishing the structure of public bodies or providing for appointments;
- controversial matters that should be addressed by the Council;
- amendments to Laws, including the definition of terms used in Laws.

PROVISIONS THAT SHOULD BE IN REGULATIONS

- ✓ What should be in regulations or administrative documents?

Regulations should deal with matters of an administrative (as opposed to legislative) nature that are subordinate to the main principles stated in the Law. As an alternative to regulations, consider delegating authority to Council to pass a resolution(s) to deal with:

- procedural matters, for example, how to apply for a licence;
- matters that are likely to need adjusting often, for example, prescribing interest rates, setting annual fishing quotas;
- technical matters involving scientific or other expertise;
- rules that can only be made after the department gains some experience in administering the new Law, for example, prescribing the time within which certain steps should be taken;
- fees to be paid for services or programs established in a Law.

OTHER MATTERS

The drafting instructions should specifically provide authority to do any of the following things and provide reasons for requesting this authority:

- substantially affect personal rights and liberties;
- determine important matters of policy or principle;
- amend or add to the enabling Law or other Laws;
- exclude the ordinary jurisdiction of the Courts;
- apply retroactively;
- sub-delegate decision-making authority from the First Nation Council;
- impose a charge on public revenue or a tax on the public;

- set the penalties for offences

INCORPORATION BY REFERENCE

- ✓ Should some matters be dealt with through documents or laws incorporated by reference?

Legislation does not have to spell out all the details of what it requires or provides. It can instead refer to other laws or documents and incorporate their contents without reproducing them. If this is to be done, consideration should be given to whether particular authorizing provisions are needed. Incorporation by reference is also subject to the law-making limits of the First Nation and as well as requirements relating to the accessibility and comprehension of incorporated documents. Legal advisers can provide guidance on these questions.

ADMINISTRATIVE INSTRUMENTS

- ✓ What should be dealt with through administrative instruments?

Many of the elements of a regulatory scheme should be dealt with in administrative instruments, such as permits, licenses, directives or contracts. These include:

- legal requirements that are to be imposed individually on a case-by-case basis;
- fees non-binding guidelines;
- internal directives on administrative matters.

RECIPIENTS OF POWERS

- ✓ Who should decision-making powers be given to?

  - Chief and Council
  - First Nation manager or program head
  - Land Committee
  - Other?

Judicial and quasi-judicial powers

- Judicial and quasi-judicial powers must be exercised with impartiality and the delegates who exercise them should have the qualifications and security of tenure to ensure their impartiality (dispute resolution rules).

Administrative powers

- Most administrative powers are given to Chief and Council who, in turn, have implied authority to authorize officials in the First Nation administration to exercise them.
- Law registries or other public registries can be given to specific officials – a Registrar
- Inspection and enforcement powers are usually given to classes of officials created to exercise these powers.

DRAFTING AND ORGANIZATION OF A LAW

TITLES

- ✓ What will be the title of the Law?

Each bill has a long title, which sets out the scope of the bill and gives a brief description of its purpose. The wording of this title should be left to the bill-drafting stage.

A bill to enact a new Law also has a short title, which is used to identify the Law when discussing it or referring to it in other legislation. A short title is also sometimes included in an amending Law that is likely to be referred to in other Laws. A short title should succinctly indicate the Law's subject matter. The following are examples of the long and short titles of an Law:

- An Law to provide for the regulation of traffic and vehicles on roads on First Nation lands;
- The Road Traffic Law.

Finalizing the short title should also be left to the bill-drafting stage. However, a working title is needed from an early stage and care should be taken to establish an appropriate title since it often becomes more difficult to change as the proposal moves forward.

Try to avoid words such as "First Nation", "Canadian," "National," "Federal" and "Government" because they make it harder to find the Law by its subject matter in a table of statutes.

PREAMBLES AND PURPOSE CLAUSES

- ✓ Should there be a preamble or purpose clause?

Preambles and purpose clauses should not be included in a Law without carefully thinking about what they would add to the Law and what they would contain. They should not be used to make political statements. They can have a significant impact on how the legislation is interpreted by the courts.

Preambles and purpose clauses perform different, but overlapping functions.

Preambles:

- often provide important background information needed for a clear understanding of the Law, or to explain matters that support its constitutionality;

- are placed at the front of the Law;
- should be drafted sparingly to avoid creating confusion about the meaning of the legislation.

Purpose clauses:

- indicate what the intended results of the legislation are;
- should highlight only the principal purposes;
- are included in the body of the legislation; and
- generally have a greater effect on the interpretation of legislation than preambles.

When a bill amends an existing Law, only the amendments themselves are added to the text of the Law when it is reprinted in a consolidated form. The preamble is not included. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by legal advisors for appropriate language and content.

GENERAL APPLICATION PROVISIONS

✓ Should the application of the Law be confined or expanded in any way?

You should consider whether the Law should be applied to the First Nation itself, taking into account the following:

- binding the First Nation may entail additional legal liability for government activities;
- not binding the First Nation may render the legislation less effective if it governs an activity that the First Nation carries on to a significant degree;
- agents of the First Nation (for example, First Nation corporations) generally benefit from First Nation immunity, which may give them an advantage over private sector competitors.

An example is a building law. Does the First Nation have to comply with its own Building Law – obtain a permit, abide by building restrictions, zoning etc.?

FINANCIAL PROVISIONS

✓ Will there be provisions involving the collection or disposition of First Nation money?

A law may require that the First Nation pay from its own funds money to support a program or service. Once the money is allocated by Law, the First Nation has a legal obligation to spend that money and must amend the law to avoid non-compliance.

INFORMATION PROVISIONS

- ✓ Will the legislation restrict or require the disclosure of information?

The disclosure of information is affected by legal concepts of confidentiality and privilege. Provisions affecting the disclosure of information should be reviewed in light of these requirements and discussed with legal advisors.

The laws of other governments may also restrict the release or disclosure of personal or confidential information such as a Social Insurance Numbers.

SANCTIONS FOR NON-COMPLIANCE

- ✓ Will penalties or other sanctions be needed to ensure compliance with the legislation?

Most legislation is enforced by the imposition of sanctions for non-compliance. They range from penal sanctions, such as fines and imprisonment, to administrative sanctions, such as licence suspensions or disqualifications.

There are three basic methods of imposing sanctions:

- through the prosecution of offences in the courts;
- through offence ticketing schemes, such as the Contraventions Act;
- through the imposition of administrative monetary penalties or other administrative sanctions.

Provisions for the imposition of penal sanctions should reflect the principles set out in (sections 718 to 718.2 of) the Criminal Code. They should be reviewed to ensure that:

- they will be effective in obtaining compliance;
- there will be effective enforcement mechanisms, such as powers to conduct inspections or searches;
- the sanctions are appropriate for the seriousness of the noncompliant behaviour;
- the sanctions are variable enough to reflect the circumstances of the accused person in order to ensure that they receive equal treatment under the Law.

If administrative sanctions are to be imposed, a mechanism will be needed for their imposition. The creation of this mechanism raises many legal and policy choices to be considered, including choices about

- strict or absolute liability;
- the processes by which liability for and the amount of a sanction will be determined;

- the relationship of the administrative sanctions to criminal prosecution;
- the institutional structure of required impartial review.

It is essential that legal advisors be consulted in the development of sanctions and penalties to make certain the Law can be adequately enforced.

ENFORCEMENT POWERS

- ✓ Should the Law authorize searches, seizures and other action to support the prosecution of offences?

The Criminal Code provides a basic set of powers for the enforcement of legislation, including powers to make arrests, conduct searches and seize things. However, these powers may not be sufficient or they may have to be supplemented.

APPEALS AND REVIEW MECHANISMS

- ✓ Should there be procedures for appealing or reviewing decisions of administrative bodies created or authorized to make decisions under the Law?

Judicial Review

The Federal Court Act provides that the Federal Court may review the decisions of any "federal board, commission or tribunal." A First Nation decision can be reviewed as a result of this definition. This review concerns the legality of the decisions, as opposed to their merits. In most cases, applications for review are heard by the Trial Division of the Court. However, section 28 of that Act specifies bodies whose decisions are reviewed by the Court of Appeal.

Appeals

Appeals generally concern the merits as well as the legality of decisions. A right of appeal (or judicial review) exists only if it is granted expressly by the Act. Appeals may be taken to the courts (usually the Federal Court) or to an administrative tribunal created by the Act. A decision is not generally subject to judicial review if it is subject to appeal.

Review

It may also be appropriate to create other review mechanisms (in addition to judicial review and appeal). A decision-making body may be authorized to review its own decisions. Another body may be created to review the decision or an existing body (for example, the Chief and Council) may be authorized to review them.

DISPUTE RESOLUTION MECHANISMS

- ✓ Should there be mechanisms for the resolution of disputes arising under the legislation?

Consideration should be given to including provisions for the resolution of disputes instead of relying on the courts, whose procedures are usually costly and involved. Some examples of dispute resolution mechanisms are negotiation, mediation and neutral evaluation.

Alternative Dispute Resolution is provided for under the Framework Agreement.

EXTRAORDINARY PROVISIONS

- ✓ Does the proposal include any extraordinary provisions requiring specific Council attention and consideration?

Certain types of provisions should be specifically identified because they may be controversial. These sorts of provisions involve:

- the retroactive application of legislation;
- broad powers to grant exemptions from the legislation;
- power to sub delegate regulation-making powers;
- excluding the jurisdiction of the courts;
- expropriation of property;
- emergency powers;
- substantial restrictions on fundamental rights or freedoms; and
- regulation-making powers dealing with matters that are usually provided for in Laws

These matters are technical in nature and require that legal counsel provide opinions on the use of any of these matters having regard to the object of the proposed Law and compliance with laws of general application. For example, criminal legislation cannot be made retroactive.

TECHNICAL LEGISLATIVE MATTERS

SUNSET AND REVIEW PROVISIONS

- ✓ Should provisions be included for the expiry or review of the Law?

Caution should be taken when considering whether to include a "sunset" or expiration provision in a bill, since these provisions may result in a gap of legal authority if the new legislative regime cannot be brought into force in time. Similarly caution should be taken when considering inclusion of a provision for mandatory review of the Law within a particular time or by a particular committee given that this limits flexibility. Alternatives to these provisions should be fully explored before proposing to include them.

REPEAL

- ✓ Are there any Laws or regulations that have to be repealed as a result of the legislation?

If a new Law is proposed to replace an existing Law, the existing Law will have to be repealed. It may also be necessary to repeal particular provisions of related Laws as well as regulations.

CONSEQUENTIAL AND COORDINATING AMENDMENTS

- ✓ Are there any Laws or regulations that will have to be amended as the result of the legislation?

New legislation often affects provisions in other Laws. One of the most common examples of this occurs when the name of an Law is changed. References to the Law in other legislation must be amended to reflect the change.

You should also determine whether any other legislation amends the same provisions. If so, amendments will be needed to co-ordinate the amendments so that one does not undo the other.

TRANSITIONAL PROVISIONS

- ✓ Will any transitional provisions be needed to deal with matters arising before the Law comes into force?

Whenever changes are made to the law, consideration should be given to matters that arose under the previous law, but which are still ongoing after the new law comes into force. These matters include:

- regulations made under the previous law;
- rights or benefits granted under the previous law;
- appointments to offices;
- offences committed under the previous law; and
- judicial or administrative proceedings involving the application of the previous law.

COMING INTO FORCE

✓ When should the Law come into force?

When a Law comes into force, it begins to operate as law. A First Nation Law must include a provision concerning when it comes into force. There are a number of options. It may come into force:

- on a specified day;
- on a day dependent on a specific event (for example, the coming-into-force of another Law).

A Law may also provide that different provisions may come into force on different days.

CONCLUSION

Over the course of this workshop we have covered numerous law-making principles and practices. Through our brief dissemination of the Canadian Legal System, First Nation Law-Making Authorities, and the new abilities granted to First Nations under the *Framework Agreement on First Nation Land Management*, as well as our discussions on the need for, and drafting of, laws on reserve land, it is our hope that we have helped in that first step towards the creation of your individual laws.

Please note that at the end of this Law Making Guide, we have provided a summary of important points that you may want to consider when contemplating the creation of a new law. This summary includes a list of general legal and policy concerns, the process of drafting and organizing a proposed law, and technical points to consider prior to a law coming in to force. It reiterates that a law is not always the only instrument at your disposal. There are other legal instruments that you may find work better in varying situations, with the same legal effect.

It is important to remember that you are not alone when going through the process of developing new laws. The First Nations Land Management Resource Centre is available to help if you have any questions or concerns. We are here to assist you. Please feel free to contact us at:

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