



# Submission to the House of Commons Standing Committee on Indigenous and Northern Affairs

STUDY OF ENFORCEMENT ON  
FIRST NATION RESERVES

MAY 2021

ABOUT THE LANDS ADVISORY BOARD

## INTRODUCTION

The Lands Advisory Board is a national organization advocating on behalf of the 100 First Nations which govern their lands under the Framework Agreement on First Nation Land Management. The Framework Agreement provides an option for escaping the failed lands management system under the colonial, inadequate, ineffective, and antiquated *Indian Act*. Many First Nations have achieved tremendous success in governing lands under the Framework Agreement, leading a revolutionary change with advances in law making, retaking control over lands and the environment, dramatic changes in finances and taxation, multi-million-dollar economic projects, and so much more. Despite this success, there is immense frustration over the difficulties we face with enforcement of First Nation laws. **Self-government cannot adequately function without enforcement of laws.**

## BACKGROUND: THE MAGNITUDE OF THE PROBLEM

The nationwide problem with lack of enforcement of First Nation laws is damaging efforts to move beyond the Indian Act. Freedom from the inadequate Indian Act is meaningless if First Nation laws have no traction. This is not only damaging to First Nations but also damages Canada's stated support for self-government and moving beyond the Indian Act, as reflected in the preamble to Bill C-15, the proposed federal legislation to address the United Nations Declaration on the Rights of Indigenous Peoples.

There is an urgent need to improve self-government functionality immediately by fixing the challenges with enforcement of First Nation laws. **We are not interested in decades long negotiations with other governments.** First Nations have already enacted laws which require enforcement. None of us have the luxury of a ten-year timeframe to work out how to enforce these laws. Because of the urgent need for reform, our recommendations to Canada in this submission focus on what can be done in the relatively short term.

It is vital to understand the scope of lands governance of First Nations under the Framework Agreement. First Nations are not just making laws to support land transactions such as leases, licences, and permits. First Nations are enacting a broad range of laws to deal with their needs in terms of lands, natural resources, and the environment, including for example:

trespassing laws; community safety laws (eg laws regulating access to First Nation operated facilities); residential tenancy laws; emergency Covid-19 protection laws; land use planning laws; soil deposit, transport and removal laws; environmental assessment and environmental protection laws; laws governing removal and sale of timber or other natural resources; and matrimonial real property laws.

First Nations face differing challenges and opportunities and are using land related law-making powers to address issues specific to their communities. Enforcement solutions must be broad enough to encompass everything from trespass to environmental laws to family law. For example, effective enforcement of emergency protection orders to safeguard children requires linkages to provincial family law courts while other First Nation laws would be considered in other courts.

Having noted the importance of considering the broad scope of First Nation law making authority, it is important not to drown in fears of complexity. Most governments in Canada deal with a wide range of laws and enforcement systems, dealing with everything from trespass to family violence. Most

governments can turn to different courts such as family courts where that specialized expertise is needed.

## THE INDIAN ACT PROBLEM

The Framework Agreement recognizes authority to enact First Nation laws but does not completely terminate Indian Act by-law authority. Unfortunately, there has been chronic under-enforcement of Indian Act by-laws. Much of the difficulty in building effective enforcement of First Nation laws under the Framework Agreement can be traced back to difficulties in overcoming the legacy of failure under the Indian Act. First Nations do not start with experienced enforcement personnel and funding. Police, prosecutors, and courts are unfamiliar with Indian Act by-law enforcement let alone the Framework Agreement.

The authority to make by-laws under the Indian Act is in many cases stated in quaint, outdated terms (eg section 81(1)(k) of the Indian Act refers to “the regulation of bee-keeping and poultry raising”). There is no mechanism to delegate authority under by-laws. The “Offences, Punishment and Enforcement” provisions of the Indian Act (see sections 94 to 108 of the Indian Act) include many provisions which have been repealed and some of which are paternalistic.

The maximum financial penalty for violating a by-law is only one thousand dollars (see section 81(1)(r) of the Indian Act). The by-law making authority is constrained by federal regulations made under section 73 of the Indian Act and this includes for example the federal Indian Reserve Waste Disposal Regulations which set a maximum financial penalty of one hundred dollars for illegal dumping!

The federal government deserves some credit for efforts to deal with the Covid-19 pandemic by announcing guidelines to assist with enforcement of First Nation Covid-19 by-laws under the Indian Act. However, the federal guidelines explicitly exclude from consideration Covid-19 laws enacted under the authority of the Framework Agreement and comprehensive self-government agreements. In our view, this has been a giant step backwards, contrary to broader federal objectives of supporting self-government and moving away from the Indian Act. Surely Canada does not want to create a perception that enforcement can work (albeit weakly) under the Indian Act but not under the Framework Agreement and comprehensive self-government agreements.

## SELF-RELIANCE AND PARTNERSHIPS

Until enforcement systems are built, First Nations cannot count on what other governments in Canada take for granted; access to a basic system for policing, prosecution and courts for alleged offences under their laws. We recognize the importance of First Nations building their own systems and capacity for enforcement, such as our responsibility for crafting valid laws, raising awareness, education, promoting respect and compliance with laws, and training our own personnel to monitor enforcement.

However, unless a separate First Nations justice system is established, effective enforcement cannot be shouldered by First Nations alone. Many land code First Nations have faced refusal from police forces when they ask for help, with police forces expressing concerns regarding validity of land code laws, concerns about potential liability of police officers, and uncertainty regarding who will prosecute laws if charges are laid. It has been difficult to this point to reach agreement with either federal or provincial

prosecutors to tackle First Nation laws under the Framework Agreement. The Lands Advisory Board has reached out through provincial Attorneys General to request opportunities to engage with the chief administrative judges of provincial courts to work out practical procedures for cases which come before the courts, but progress has been slow.

The challenges outlined above might suggest to some that enforcement is a complex multi-jurisdictional issue that is extremely difficult to resolve. Further, the legacy of failure under the Indian Act might suggest to some that these long-standing challenges must be hard to resolve. We disagree because unlike so much of the legacy of the Indian Act, there are many factors pointing to the potential for success. Fundamentally, **Canada needs to see that we are reaching out to build partnerships for enforcement with other governments.** This is the polar opposite of a fight against the police, prosecutors, and the courts.

## A NOTE OF OPTIMISM

The Framework Agreement recognizes the authority of land code First Nations to enact laws punishable on summary conviction. **Summary conviction offences are well understood by police, prosecutors, and the courts and therefore solutions can be close at hand.** K'ómoks First Nation on Vancouver Island faced many difficulties but was ultimately successful in a private prosecution for trespass. Muskoday and Whitecap Dakota First Nations are working with Saskatchewan and Canada on practical measures which will hopefully move forward this year regarding policing and community safety officers. Membertou Nation in Nova Scotia is undertaking a pilot project to improve enforcement working with the Cape Breton Regional Police Service and others.

The Lands Advisory Board is hosting a “National Online Conversation” to draw together First Nation, federal, provincial and territorial officials to discuss a series of practical steps to improve enforcement (see [www.indigenouseenforcement.com](http://www.indigenouseenforcement.com)).

## RECOMMENDATIONS

The Lands Advisory Board offers the following recommendations:

- Canada’s Indigenous Justice Strategy should include an express commitment to tackling the enforcement of First Nation laws as a short-term priority over the next three years.
- Canada should identify the federal Attorney General as the lead Minister responsible for leading the federal government’s commitment to tackling the enforcement of laws.
- Canada’s efforts across various departments and agencies requires a strong lead at the bureaucratic level. Canada should appoint a special Ministerial representative or senior bureaucrat with credibility on policing and prosecutions to drive decision making within the federal bureaucracy. This Ministerial representative or senior bureaucrat should report directly to the Attorney General of Canada.
- Matrimonial real property laws require special consideration by Canada because effective enforcement of laws is directly related to goals of protecting women and children who are most likely to suffer from family violence. The federal *Family Homes on Reserve and Matrimonial Interests and Rights Act* contemplates “designated judges” identified by provinces who can issue

emergency protection orders in cases of family violence. However, there are many jurisdictions where there are no “designated judges”. Land code First Nations under the Framework Agreement also face challenges in implementing effective measures for emergency protection orders and other aspects of matrimonial real property laws.

- The Indian Act legacy of environmental mismanagement is attributable in part to woeful under-regulation and under-enforcement. Canada should include support for enforcement of First Nation environmental laws within broader strategies to assist First Nations with environmental management and addressing climate change. Framework Agreement First Nations are supposed to establish environmental protections which meet or exceed neighbouring provincial standards, but this is near impossible without adequate funding and enforcement systems.
- Canada’s development of new legislation regarding First Nations policing as an essential service should include exploration with the Lands Advisory Board of the potential for enforcement of First Nation laws as a part of that essential service.
- Canada should work with the Lands Advisory Board to develop as a standard option for inclusion in policing agreements the enforcement of First Nation laws. Canada should at a minimum ensure that there are no policy or program impediments to including policing of First Nation laws as part of policing agreements such as Community Tripartite Agreements.
- The Framework Agreement includes provisions to set limitations of liability for officials performing their duties similar to those established by other governments. Canada should work with the Lands Advisory Board to determine whether there are sufficient provisions in the Framework Agreement to ensure that police forces have the necessary authorities and limitations on liability to enforce First Nation laws.
- The authority under which police forces can enforce First Nation laws needs to be expressly set out in publications, including training materials available to police officers. Police officers and new trainees (as well as prosecutors and courts) must have no doubts as to the scope of their authority.
- Canada should explore with the Lands Advisory Board the establishment of a First Nations led prosecution service. This prosecution service would have to have sufficient funding, balance independence with appropriate oversight and service to First Nations. Canada and the Lands Advisory Board can also explore with provinces the extent to which any prosecutors in the First Nations led prosecution service should also be cross appointed under provincial law.
- The Lands Advisory Board has been mandated to negotiate funding on behalf of First Nations under the Framework Agreement. The current funding agreement expires on March 31, 2023 and the next phase of funding negotiations should include realistic federal investments to break free from the legacy of failure on enforcement of First Nation laws. This could include appropriate investments to unlock agreements with provinces and territories regarding enforcement.



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