

Annotated bibliography: *Bylaws*

The National Centre for First Nations Governance

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What is a Bylaw?

For the purposes of this document, a bylaw is defined as a legal instrument enacted by the Council of a First Nation community. Bylaws set out rules that people in the community (Native or non-Native, resident or non-resident) must follow in areas under the Council's jurisdiction.

Bylaws under the Indian Act

If the community does not have a self-government agreement, a bylaw must be made pursuant to section 81, 83, or 85.1 of the Indian Act. Only Council has the responsibility for enacting, and the authority to enact, a bylaw, and is responsible for the content, although it may delegate the drafting to another party. The Indian Act outlines subjects that bylaws may govern.

A bylaw may have some connection to other statutes or regulations already in place, depending on the subject; this means that these statutes or regulations must be taken into consideration when a bylaw is drafted.

A bylaw enacted by Council must be consistent with any regulations already made by the Governor in Council, for example in such areas as traffic, waste disposal, health, Council procedures and other topics.

Statutory requirements

For a bylaw to be legally enacted, it must meet all statutory conditions. A bylaw pursuant to section 81 must be mailed to the Minister of Indian Affairs within four days of its enactment. If it is faxed, the date of transmission is equivalent to the mailing date. It can be sent to the district office or regional office of Indian Affairs. Failure to meet this requirement could put the legality of the bylaw in question; that is, it could be struck down by a court.

- A bylaw under section 81 comes into force forty days after a copy has been mailed to the Minister, unless it is either disallowed or declared to be in force within that period. (See section 82 of the Indian Act.) The bylaw's enactment date must be specified; equally importantly, the actual date that the bylaw is mailed to the Minister must be recorded.
- Bylaws made pursuant to section 83 (money bylaws) become effective on the date they are approved by the Minister.

- Bylaws adopted pursuant to section 85.1 do not need the approval of the Minister, and the disallowance power does not apply; however, the approval of the membership pursuant to section 85 is required in order for the bylaw to be valid. The bylaw is recorded as soon as it is received at Indian Affairs, and the effective date is the ministry's date of enactment.

Penalties

- For the violation of a bylaw pursuant to section 81, the Council may impose a fine or a term of imprisonment, or both, upon summary conviction.
- For the violation of a bylaw pursuant to section 83, the penalties are specified in paragraphs 83(1) (e) and (e, 1).
- For the violation of a bylaw pursuant to section 85.1, the penalty is specified in paragraph 85.1 (4).

Legality

The Indian and Northern Affairs Canada (INAC) cannot guarantee the legality and enforceability of bylaws: approval of a bylaw by the Minister is not an expression by the Minister that the bylaw is valid. Only a court of law has the authority to determine its validity. All bylaws are subject to interpretation by a court of law if challenged.

INAC policy is to make every effort not to unduly interfere with the right of the Band Council to pass bylaws. After a bylaw has been recorded, INAC may make written suggestions for its improvement. Should the council entertain such suggestions, it may either repeal the bylaw and enact a new one, or pass an amending bylaw that modifies the original. In either case, the bylaw must be renumbered, with a new date of enactment. A Band Council Resolution (BCR) cannot modify a bylaw. Only a bylaw can amend or repeal another bylaw.

A bylaw is as binding on individual members of the council as it is on any person in the community. For all intended purposes, it must relate to or address the needs of the community.

Cree Naskapi and James Bay Northern Agreement Act

The Cree Naskapi (of Quebec) Act (CNA) came into effect on June 14, 1984. This Act was made pursuant to section 9 of the James Bay Northern Quebec Agreement (JBNQA) and section 7 of the Northern Quebec Agreement (NQA). Eight bands are included in this Act:

- Great Whale
- Chisasibi
- Old Factory
- Eastmain
- Rupert House
- Nemaska
- Mistassini

Under this legislation, each Band has authority over its respective concerns and responsibilities on its designated land. The Indian Act does not apply. The Band, through its Council, has the power to enact bylaws and these can be adopted only at Council meetings.

- Bands may make bylaws subject to section 45 of this Act, for the good provision, management of their citizens and over their designated land area. They are, however, somewhat limited when it comes to taxation, unless they are subject to section 45(2a). Should they entertain a bylaw subject to section 45(2a), it must be approved by 10% of the electors at a Special Meeting.
- The Band can make bylaws respecting land and resource use and planning. (See section 45(5) of the CNA pursuant to section 46 of the CNA.) The First Nation can also make bylaws respecting zoning subject to section 47 of the CNA.
- For a bylaw to be enacted under section 46 of this Act, it must be approved by 25% of electors of the Band at a Special Meeting. Any other bylaw that was previously adopted or is inconsistent with this newly adopted bylaw is replaced by this new bylaw.
- The enactment of this bylaw requires that at least 15% of the electors vote at a Special Band Meeting.
- Subject to section 48 of this Act, a Band can make a bylaw respecting hunting, fishing, trapping, and protection of wildlife. This proposed bylaw must be approved by at least 10% of the electors of the Band at a Special Band Meeting.
- A copy of each proposed bylaw described in section 48(1) of this Act must be submitted to the Coordinating Committee referred to in section 24 of the JBNQA, and in the Act respecting hunting and fishing rights in the James Bay and New Quebec Territories, in order to enable the Committee to make representations to the Band.

- Where the Act does not require a by-law or resolution to be approved by the electors of the band, the by-law or resolution may nevertheless provide that it does not come into force unless approved by the electors of the band at a special band meeting or referendum at which the minimum percentage of electors specified in the by-law or resolution vote on the matter.
- The original copy of the bylaw must be signed by the Chairman of the Band Council Meeting and the Band Secretary, or by another person designated by the bylaw.
- Within one week of a bylaw's enactment by the Band with the approval of electors of the Band, a copy of the bylaw will be posted at a public space on the Band's designated land area. A bylaw comes into force on the day it is posted.
- The Minister of Indian Affairs Canada will get a copy of such bylaw within 30 days of its enforcement.
- Application can be made to the Provincial Court or Superior Court of Quebec within 90 days of the enforcement of a bylaw to have it quashed based on the manner in which it was enacted.
- Application can be made to the Provincial Court or Superior Court of Quebec within six months after the enforcement of the bylaw to have it quashed based on the illegality of the bylaw.
- If a bylaw is quashed, any action or actions that may have occurred during the time period the bylaw was in force, goes against the Band.

Kwanlin Dun First Nation

In 2005, the Kwanlin Dun First Nation (KDFN) in the Yukon Territory of Canada ratified its land claim and self-government agreements. The KDFN, the government of Canada and the government of the Yukon signed the agreement in Whitehorse on Feb. 12, 2005. The First Nation includes the following communities:

- Carcross/Tagish First Nation
- Champagne and Aishihik First Nations
- Kluane First Nation
- Kwanlin Dun First Nation
- Liard First Nation
- Little Salmon/Carmacks First Nation

- First Nation of Nacho Nyak Dun
- Ross River Dena Council
- Selkirk First Nation
- Ta'an Kwach'an Council
- Teslin Tlingit Council
- Tr'ondëk Hwëch'in (formerly known as Dawson First Nation)
- Vuntut Gwitchin First Nation
- White River First Nation

Under this self-governing agreement, KDFN has the authority to enact laws applicable to its Settlement Lands¹. It also has the power to deliver programs and services and enact laws for its citizens in the Yukon over a wide range of matters, including language, culture, health care, education, training, and social services.

The KDFN has the exclusive power to enact laws in relation to the governance of the KDFN, such as the administration, operation, and internal management of its affairs. It also has the authority to enact laws relating to matters in the Yukon, such as:

- Provision of programs and services for citizens relating to their cultural beliefs and practices.
- Provision of health care, social and welfare services, and training programs.
- Jurisdiction over adoption, guardianship, and placement of KDFN children.
- Provision of education programs and services.
- Programs and services relating to aboriginal language.
- Inheritance, will, intestacy, and administration of estates of citizens, including rights and interest in Settlement Lands.
- Procedures consistent with the principals of natural justice for determining the mental competency or ability of citizens, including administration of the rights and interests of those found incapable of responsibility of their own affairs.
- Provision of services to citizens for resolution of disputes outside the courts, solemnization of marriage to citizens.
- Licenses in respect of matters related to the administration and internal management of the KDFN or for the management of administration and internal

management of the KDFN to fulfill its responsibilities under the Final Agreement or this Agreement and matters ancillary to the forgoing.

The KDFN has the power to enact laws of a local or private nature on Settlement Lands in relation to the following:

- Use, management, control and protection of Settlement Lands¹.
- Allocation or disposition of rights and interests including expropriation by the KDFN for KDFN purposes.
- Use, management, administration, and protection of natural resources under the ownership, control, or jurisdiction of the KDFN.
- Gathering, hunting, trapping, or fishing and the protection of fish, wildlife, and habitat.
- Licensing and regulation of any person or entity carrying on any business trade, profession, or other occupation.
- Control or prohibition of public games, sports, races, athletic contests, and other amusements.
- Control of the construction, maintenance, repair and demolition of structures.
- Prevention of overcrowding of residences or other building structures.
- Control of the sanitary condition of buildings or property.
- Planning, zoning and land development.
- Curfews, prevention of disorderly conduct, and control or prohibition of nuisances.
- Control or prohibition of the operation and use of vehicles.
- Control or prohibition of the transport, sale, exchange, manufacture, supply, possession, or consumption of intoxicants.
- Establishment, maintenance, provision, operation, or regulation of local services and facilities.
- Caring and keeping livestock, poultry, pets, and other birds and animals, and impoundment and disposal of any bird or animal maltreated or improperly at large, but the caring and keeping of the livestock does not include game farming or game training.

- Administration of justice.
- Control or prohibition of any actions, activities, or undertakings that constitute, or may constitute, a threat to public disorder, peace, or safety.
- Control or prohibition of any activities, conditions, or undertakings that constitute, or may constitute, a danger to public health.
- Control or prevention of pollution of the environment.
- Control or prohibition of the possession of firearms, other weapons and explosives.
- Control or prohibition of transport of dangerous substances.
- Matters coming within the good government of Citizens on Settlement Lands.

Laws are proposed and enacted by the KDFN depending on the nature of the topic and on the location within the Settlements Lands. In some cases, depending on the section of the Settlement Lands, Yukon Law or City of Whitehorse Law will prevail. Should the KDFN want to enact a law to adopt a Yukon or City of Whitehorse law, whichever jurisdiction has the responsibility of the law in question will apply.

The KDFN may enact a law, depending on the nature of the law and the location on the Settlement Lands¹, if no Yukon or City of Whitehorse Law is in force in relation to that particular matter, and if the law is consistent or compatible with Yukon or City of Whitehorse Law.

The KDFN will provide a copy of any law it proposes to enact to the Yukon government and the City of Whitehorse, depending on the area in the Settlement Lands¹ affected, at least 60 days prior to enacting the law. The Yukon and the City of Whitehorse will determine which of them is the applicable authority in respect of the matter and will advise the KDFN. Within 60 days of receipt of the proposed KDFN law, the applicable authority will advise the KDFN in writing whether it intends to pass the law in relation to the matter and whether it has any concerns with the proposed law. Should the KDFN receive no reply from the applicable authority, they may enact the proposed law.

- If the applicable authority advises the KDFN within the 60 day period that it has some concerns regarding the proposed law, the applicable authority and the KDFN will try to resolve the expressed concerns of the applicable authority.
- If, within 90 days after KDFN received notice of the concerns expressed by the applicable authority, those concerns are still unresolved, the applicable authority

may refer the matter to an arbitrator under 26.7.0 of the Final Agreement³ for a declaration. The outcome is binding on all parties to the arbitration.

- The KDFN is responsible for the administration and enforcement of any law enacted, in accordance with section 28.8.1 and section 28.8.2.

Websites

<http://www.solon.org/Statutes/Canada/English/I/I-5.html>

(feb.27.08)

<http://www.indiancountry.com/content.cfm?id=830>

News article about the Nisga'a self-government agreement, including discussion of areas in which the new government may make laws (accessed Feb. 26, 2008)

<http://laws.justice.gc.ca/en/M-7.6/index.html>

The Mi'kmaq Education Act (accessed March 31, 2008)

http://www.ainc-inac.gc.ca/ps/lts/nelts/blw/index_e.html

Discussion on INAC website of bylaws (accessed March 8, 2008)

http://www.ainc-inac.gc.ca/pr/pub/matr/fnl_e.html

Discussion on INAC website of First Nations Land Management Act (accessed March 7, 2008)

http://www.ainc-inac.gc.ca/pr/info/tln_e.html

INAC glossary of terminology, intended to provide a general understanding of some terms generally used by INAC (accessed March 7, 2008)

http://www.ainc-inac.gc.ca/pr/info/nit_e.html

INAC fact sheet on the Nisga'a Treaty (accessed March 11, 2008)

<http://scc.lexum.umontreal.ca/en/1999/1999rcs3-134/1999rcs3-134.html>

Supreme Court of Canada decision that First Nation council by-laws were constitutionally inapplicable to a provincial utility because, as written, they constituted taxation (accessed March 11, 2008)

http://www.hrcr.org/safrica/cultural_religious/pamajewon.html

R. v. Pamajewon [1996] 2 S.C.R. 821: A decision of the Supreme Court of Canada disallowing council bylaws allowing high-stakes gambling. The court based its decision on failure to prove that the activity governed by the bylaw was practiced traditionally, and therefore the bylaws fell outside the scope of inherent self-governing rights. (Accessed March 11, 2008)

<http://www.cra-arc.gc.ca/E/pub/gi/notice198/notice198-e.pdf>

Notice from the Canada Revenue Agency on the impact of the Kwanlin Dun agreement on eligibility for GST rebate (accessed March 13, 2008)

<http://www.yukoncommunities.yk.ca/communities/whitehorse/fn/>

Description of Yukon First Nations (accessed March 13, 2008)

<http://www.atns.net.au/agreement.asp?EntityID=4477>

Kwanlin Dun agreement, including summary (accessed March 11, 2008)

<http://www.justice.gov.yk.ca/prog/cjps/cj/comjuscom.html#kwanlindun>

Discussion of Kwanlin Dun community justice initiatives (accessed March 14, 2008)

The following links are to regulations made under two Yukon statutes to reflect the coming into force of the Kwanlin Dun Agreement (accessed March 13, 2008):

http://www.gov.yk.ca/legislation/regs/oic2005_046.pdf

http://www.gov.yk.ca/legislation/regs/oic2005_044.pdf

<http://www.atns.net.au/agreement.asp?EntityID=2026>

Cree Naskapi agreement, including summary (accessed March 13, 2008)

<http://www.creenaskapicommission.net/text/guide.htm#2>

Cree Naskapi Commission website - where to get further information on relevant legislation (accessed March 13, 2008)

<http://www.bcwatersheds.org/issues/water/bcgwlp/q2.shtml>

General guide to aboriginal rights and title (accessed March 14, 2008)

http://www.qp.gov.bc.ca/statreg/stat/I/96219_01.htm#section26

Section of British Columbia's Indian Self Government Enabling Act dealing with applicability of First Nations bylaws passed by self-governing communities (accessed March 14, 2008)

<http://canlii.org/ca/sta/i-5/whole.html>

The Indian Act (accessed March 11, 2008)

http://www.shannonthunderbird.com/indian_act.htm

Evolution of the Indian Act and related legislation (accessed March 14, 2008)

http://www.wfn.ca/pdf/19_20050302163717.pdf

Example of a bylaw passed by Westbank, a self-governing First Nation (accessed March 24, 2008)

Sample Residency Bylaw

** Please note that this is a sample bylaw only. Any submission of a bylaw based on this sample bylaw does not automatically ensure that the bylaw will be allowed to come into force. The bylaw must be considered in its entirety before such a determination can be made. The Minister of the Department of Indian Affairs and Northern Development cannot guarantee the present or future validity or enforceability of a bylaw based on this sample bylaw.*

BYLAW NO. 19__.

of the _____ Band

A BYLAW GOVERNING THE

RESIDENCE OF BAND MEMBERS AND OTHER PERSONS

ON THE _____ INDIAN RESERVE

or

The Band

Bylaw Number

BEING A BYLAW TO REPEAL AND REPLACE

BYLAW NO.

ENACTED ON THE _____ DAY OF _____ 19__

WHEREAS the Council of the _____ Band desires to make a bylaw governing the residence of Band Members and other persons on the reserve;

AND WHEREAS the Council of the _____ Band is

empowered to make such bylaw pursuant to paragraphs 81(1) (p.1), (q) and (r) of the Indian Act;

AND WHEREAS it is considered necessary for the health and welfare of the _____ Band to regulate the residence of Band members and other

persons on the reserve;

AND WHEREAS the Council of the Band did enact Bylaw Number
on the day of , 199 , and wishes to repeal the said Bylaw Number
and replace it with this bylaw; (*this recital should only be included if you are
repealing an already existing bylaw*)

NOW THEREFORE the Council of the _____ Band hereby
makes the following bylaw:

Short Title

1. This bylaw may be cited as the " _____ Band Residency By-
Law".

Interpretation

2. In this bylaw

"*applicant*" means a person who has submitted an application for permission
to be a resident of the reserve in accordance with section 5;

"*band*" means the _____ Band;

"*child*", includes a child born in or out of wedlock, a legally adopted child
and a child adopted in accordance with Indian custom;

"*council*" means the Council, as defined in the Indian Act, of the
_____ Band;

"*dwelling*" means any house, apartment, mobile home, or a room located
therein, or any similar lodging suitable for habitation;

"*member of the Band*" means a person whose name appears on the
_____ Band list or who is entitled to have his name appear on the
_____ Band list pursuant to the Indian Act or the membership rules

of the Band;

"*officer*" means any police officer, police constable or other person charged with the duty to preserve and maintain the public peace, and any bylaw enforcement officer or other person appointed by the Council for the purpose of maintaining law and order on the reserve pursuant to Bylaw No. ____

Relating to Law and Order;

"*principal residence*" means the place at which a person resides on a more permanent basis than at any other place at which the person may reside from time to time;

"*reserve*" means the _____ Indian Reserve number(s) _____, _____ ;

"*reside*" means to live in dwelling, otherwise than as a visitor to the reserve;

"*resident*" means a person who is entitled to reside on the reserve, as provided by section 3;

"*spouse*" means a person who is married to , or who co-habits in a relationship of some permanence and commitment, akin to a conjugal relationship, with a resident of the _____ Band.

Entitlement to Reside on Reserve

3.(1) A person is entitled to reside on the reserve only if the person

(a) has his principal residence on the reserve at the time this bylaw comes into force and only until he ceases to have a principal residence on the reserve;

(b) is authorized to reside on the reserve pursuant to one of the following

provisions of the Indian Act: sections 18.1, 20, and 24 and subsections 28(2) and 58(3); or

(c) has the permission of the Council pursuant to section 7, or of the Committee of Elders pursuant to section 12, to be a resident of the reserve.

(2) A spouse or dependent child of a person who is entitled to reside on the reserve under subsection (1), who actually resides with that person at or after the time the entitlement arises, is entitled to reside on the reserve until such time as the spouse or dependent child ceases to reside on the reserve, and such entitlement is independent of the entitlement of that person.

(3) Notwithstanding subsection (2), any spouse or dependent child of a person who has been granted permission to reside on the reserve for a defined period is not entitled to reside on the reserve after the end of that defined period.

Registrar of Residents

4.(1) The Council shall appoint a Registrar of Residents to provide for the administration of applications, petitions and appeals made under this bylaw and to maintain records related to the residents of the reserve.

(2) The Registrar of Residents shall maintain a Residents List, on which is recorded

(a) the name of each resident;

(b) an indication as to whether each resident is a resident for an indefinite or defined period;

(c) the length of any defined period of residence; and

(d) the location of each resident's dwelling.

Application to be a Resident

5.(1) Any person may apply to the Council for permission to be a resident of the reserve or to extend any defined period for which permission was previously granted to the person by the Council to be a resident of the reserve.

(2) The application shall be filed with the Registrar of Residents and shall include

- (a)** the applicant's reasons for applying to be a resident;
- (b)** if the applicant proposes to reside on the reserve for a limited time, the approximate duration of the proposed residence;
- (c)** the location at which the applicant proposes to reside;
- (d)** the name of the applicant's spouse, if any;
- (e)** the names of the applicant's dependent children, if any; and
- (f)** any additional information the applicant wishes to provide relating to the considerations listed in subsection 7(2).

Hearing

6.(1) Within ninety (90) days after the filing of a properly completed application, the council shall hold a hearing with respect to the application.

(2) At least fourteen (14) days prior to the hearing, the Registrar of Residents shall

- a)** give written notice to the applicant of the date, time and place of the hearing and inform the applicant that he has a right to appear at the hearing and be heard in support of the application; and
- b)** post in the Band office a copy of the notice.

(3) At the hearing, the Council shall

(a) provide the applicant with an opportunity to present evidence and to make oral and written submissions, or both, in support of the application; and

(b) provide any resident present at the hearing with an opportunity to be heard.

(4) The council may make rules of procedure governing the hearing of applications and shall keep records of its proceedings.

Decision

7.(1) After it has heard all of the evidence and submissions, the Council shall meet in private to consider the application.

(2) In determining whether an application for permission to be a resident of the reserve should be granted, the Council shall take into consideration each of the following:

(a) whether the applicant has arranged for a place to reside on the reserve;

(b) whether the applicant's residing on the reserve would be compatible with the culture, society and community of the Band and welfare of the members of the Band residing on the reserve;

(c) whether the applicant is of good moral character;

(d) the extent to which the applicant is prepared to commit his personal and economic resources to the welfare and advancement of the community residing on the reserve;

(e) the availability on the reserve of adequate housing, land and services; and

(f) whether the applicant is or will be employed on the reserve.

(3) Where the applicant is a member of the Band, the Council shall consider only the criteria enumerated in paragraphs (2) (a) and (e).

(4) Within ten (10) days after the hearing, the Council shall dispose of the application by

(a) granting the applicant permission to be a resident of the reserve for an indefinite period until such time as the applicant ceases to reside on the reserve;

(b) granting the applicant permission to be a resident of the reserve for a defined period;

(c) extending any defined period for which permission was previously granted to the person by the Council to be a resident of the reserve; or

(d) refusing the application,

and shall give written notice of its decision to the applicant, incorporating reasons in support of its decision.

(5) Within five (5) days after disposing of the application, the Council shall post a notice of its decision in the Band office.

(6) Any applicant whose application is refused under this section may appeal to the Committee of Elders pursuant to section 12.

Reapplication

8. Where an application made under section 5 is refused pursuant to the provisions of section 7, the Council is not required to consider any further application by that person for a period of one (1) year from the date of the refusal, unless the applicant can show that there has been a material change of

circumstances.

Enforcement

9.(1) An officer may order any person who is residing on the reserve, and who is not a resident, to cease to reside on the reserve.

(2) Where a person who has been ordered under subsection (1) to cease to reside on the reserve fails or refuses to do so within thirty (30) days after the order is made under subsection (1), an officer may issue a further order prohibiting the person from being on or re-entering the reserve for a period of sixty (60) days.

(3) Any person who fails or refuses to comply with an order made under subsection (2), commits an offence.

(4) Every one who assists a person who has been ordered to cease to reside on the reserve, to continue to reside on the reserve commits an offence.

Revocation of Entitlement to Reside

10.(1) On the petition of any ten (10) residents, the Council may revoke the entitlement of any person to reside on the Reserve who is referred to in section 3, other than a member of the Band or a person referred to in paragraph 3(1)(b), where, after a hearing, it has been shown that

(a) the person, while a resident of the reserve, has been convicted of an indictable offence under the Criminal Code (Canada) for which a pardon has not been granted; or

(b) the person, within any period of two years while residing on the reserve, has committed two (2) or more offenses under the Criminal Code (Canada), against the person or property of another resident, for

which he has been convicted and for which a pardon or pardons have not been granted;

and that it would be detrimental to the best interests of the Band to permit the person to continue to be a resident on the reserve.

(2) Within thirty (30) days after the petition referred to in subsection (1) is received by Council, the Council shall hold a hearing into the matter.

(3) At least fourteen (14) days prior to the hearing, the Registrar of Resident shall

(a) give written notice to each petitioner and to the affected resident of the date, time and place of the hearing and informing the petitioner and the affected resident that he has a right to appear at the hearing and to be heard; and

(b) post in the Band office a copy of the notice.

(4) At the hearing, the Council shall

(a) provide each petitioner and the affected resident with an opportunity to present evidence and to make oral and written submissions, or both, on the petition; and

(b) provide any resident present at the hearing with an opportunity to be heard.

(5) The Council may make rules of procedure governing the hearing of petitions under this section and shall keep records of its proceedings.

(6) After it has heard all of the evidence and submissions, the Council shall meet in private to consider the petition.

(7) Any revocation of entitlement of a person to reside on the reserve shall

require a special majority of three-quarters (3/4) of the Council voting in favour of the petition and shall incorporate written reasons in support thereof.

(8) Within ten (10) days after the hearing, the Council shall render its decision in writing to the petitioners and the affected resident.

(9) Within five (5) days after the Council's decision, the Council shall post a notice of the decision in the Band office.

(10) A petition shall not be considered under this section in respect of a resident who, at the time of the petition, is under the age of sixteen (16) years.

(11) No revocation of a resident's entitlement to reside on the reserve shall affect the entitlement of the spouse and children of that resident to continue to reside on the reserve.

(12) A resident whose entitlement to reside on the reserve has been revoked by the Council under this section may appeal the decision of Council to the Committee of Elders pursuant to section 12.

Committee of Elders

11.(1) The Council shall appoint a Committee of Elders, consisting of five (5) Elders of the _____ Band, to hear appeals pursuant to sections 7 and 10 and to make recommendations to the Band Council.

(2) Any recommendation of the Committee of Elders requires the support of at least three (3) Elders.

(3) The Committee of Elders may make rules of procedure governing appeals and shall keep records of its proceedings.

Appeals

12.(1) Within thirty (30) days after the posting of a notice of the Council's

decision in the Band office, the applicant in the case of section 7, or the affected resident in the case of section 10, may appeal the Council's decision to the Committee of Elders by filing a written request with the Registrar of Residents that the Committee of Elders hear the appeal.

(2) Within thirty (30) days after the filing of the request, the Committee of Elders shall conduct a hearing with respect to the appeal.

(3) At least fourteen (14) days prior to the date of the hearing, the Registrar of Residents shall

(a) give written notice to the appellant of the date, time and place of the hearing and shall inform the appellant that he has the right to appear and make oral or written submissions, or both, at the hearing in support of the appeal; and

(b) post in the Band office a copy of the notice.

(4) At the hearing, the Committee of Elders shall

(a) provide the appellant with an opportunity to present evidence and to make oral or written submissions, or both, in support of the appeal; and

(b) provide any resident present at the hearing with the opportunity to be heard.

(5) After it has heard all of the evidence and submissions, the Committee of Elders shall meet in private to consider the appeal.

(6) In determining whether an appeal should be allowed, the Committee of Elders shall take into consideration the criteria set out in subsections 7(2) and (3) in the case of a section 7 appeal, and the criteria set out in subsection 10(1) in the case of a section 10 appeal.

(7) Within ten (10) days after hearing the appeal the Committee of Elders shall make written recommendations to the Council.

(8) The Committee of Elders shall give written notice of its decision to the appellant.

Final Decision

13.(1) Within ten (10) days after the Council has received the recommendations referred to in subsection 12(7), the Council shall dispose of the application by

(a) granting the applicant permission to be a resident of the reserve for an indefinite period until such time as the applicant ceases to reside on the reserve;

(b) granting the applicant permission to be a resident of the reserve for a defined period;

(c) extending any defined period for which permission was previously granted to the person by the Council to be a resident of the reserve; or

(d) refusing the application,

and shall give written notice of its decision to the applicant.

(2) Within five (5) days after disposing of the application, the Council shall post a notice of its decision in the Band office.

Penalties

14. Any person who contravenes any of the provisions of this bylaw commits an offence and is liable on summary conviction to a fine not exceeding one thousand dollars (\$1,000.00) or to imprisonment for a term not exceeding thirty (30) days, or both.

Repeal

(The following section is to be incorporated into this bylaw only if you already have a bylaw regulating the residence of band members and other persons in place for your community that you wish to repeal.)

15. Bylaw number enacted on the th day of , 19 , and being a Bylaw to regulate the residence of band members or other persons on the Reserve , be and the same is hereby repealed.

* * *

THIS BYLAW IS HEREBY enacted at a duly convened meeting of the Council of the _____ Band this ___ day of _____, 199_.

Voting in favour of the bylaw are the following members of the Council:

(member of the Council)

(member of the Council)

(member of the Council)

(member of the Council)

being a majority of those members of the Council of the _____ Band present at the aforesaid meeting of the Council.

The quorum of the Council is _____ members.

Number of members of the Council present at the meeting: _____

I, _____ Chief/Councillor of the Band, do hereby certify that a true copy of the foregoing bylaw was **mailed** to the Minister of Indian Affairs and Northern Development at the District/Regional/Hull office (as the case may be) pursuant to subsection 82(1) of the Indian Act, this ___ day of _____,19__.

(Witness) (Chief/Councillor

NOTES

General

The Indian Act is of no assistance as to the meaning and scope of "the residence of band members and other persons on the reserve" in section 81(1)(p.1). It is not completely certain what powers have been conveyed to band councils under section 81(1)(p.1) but the general consensus seems to be that this subsection refers to who may reside on the reserve.

Section 2

"Child" is defined in the same manner as "child" in section 2 of the Indian Act. It is advisable to define a word in a Band bylaw in the same manner as that word is defined in the Indian Act.

The phrase "dependent child" referred to in subsections 2(2) and (3) is not defined. To determine whether or not a child is "dependent", one will have to look at each case separately to decide whether the child relies on someone else for support or is not able to exist or sustain him without the aid of someone else.

Section 3

Section 3(1)(a) - Bylaws cannot eliminate rights which were acquired prior to the making of a bylaw. This sample bylaw acknowledges the vested rights of those who are residing on the reserve at the time the bylaw comes into force. In other words, this bylaw allows members and non-Band members, native and non-native people, whose principal residence is on the reserve at the time the bylaw comes into force, to continue residing on the reserve until such persons

cease to reside on the reserve. Any other person who wishes to reside on the reserve after the bylaw comes into force either must be authorized to reside on the reserve pursuant to the Indian Act, must be covered under section 3(2) of the bylaw or else must apply for permission to be a resident of the reserve.

Section 3(1)(b) - Since subsection 81(1) provides that a Band Council may make bylaws which are not inconsistent with the Indian Act, any powers provided to the Council in a residency bylaw can not be used to infringe on residency rights which an individual may have arising from the Act. The relevant provisions of the Indian Act read as follows:

18.1. A member of a band who resides on the reserve of a band may reside

there with his dependent children or any other children of whom the member has custody.

20.(1) No Indian is lawfully in possession of land in a reserve unless, with

the approval of the Minister, possession of the land has been allotted to him by the council of the band.

(2) The Minister may issue to an Indian who is lawfully in possession of land

in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

(3) For the purposes of this Act, any person who, on September 4, 1951,

held a valid and subsisting Location Ticket issued under the Indian Act, 1880,

or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

(4) Where possession of land in a reserve has been allotted to an Indian by

the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

(5) Where the Minister withholds approval pursuant to subsection (4), he

shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

(6) The Minister may extend the term of a Certificate of Occupation for a

further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

(a) approve the allotment by the council of the band and issue a

Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or

(b) refuse approval of the allotment by the council of the band and

declare the land in respect of which the Certificate of Occupation was

issued to be available for re-allotment by the council of the band.

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

28.(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

58.(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

Section 3(2) - The entitlement of a spouse or dependent child to reside on the reserve is independent of the other spouse's entitlement to reside on the reserve under s. 3(1). In other words, if a person entitled to reside on the reserve pursuant to subsection 3(1) ceases to reside on the reserve, that person's spouse and dependent child may continue residing on the reserve until such time as the spouse or dependent child cease to reside on the reserve.

Section 6

To alleviate any concerns which may arise with respect to natural justice or section 7 of the Charter, it is advisable for Band Councils to incorporate in their

Residency Bylaw a hearing process with respect to applications for permission to reside, especially where the Council has some discretion in determining whether or not to grant or deny an application.

In this sample bylaw, the Council must take into consideration, with respect to applications made by non-Band members, several factors set out in section 7(2), some of which are more discretionary in nature than others. By providing the applicant with an opportunity to present evidence and submissions in support of his application, the Band Council will be in a better position to determine whether to grant or refuse an application.

Whenever a Band bylaw deals with a sensitive issue such as who may or may not reside on the reserve, Band Councils should strive to incorporate principles of natural justice (for example, notice and hearing) in their bylaws. The decision-making process should be as open as possible so that both applicants and residents can be fully informed about the decisions made in relation to the residence of persons on the reserve.

Section 7

In this sample bylaw, the decision whether to grant permission to reside on the reserve is left with the Band Council. Before coming to a decision, the Band Council must take into consideration the factors set out in subsections 7(2) and 7(3) of the bylaw. A distinction is made between Band members and non-Band members.

With respect to Band members, the Band Council really has no discretion in granting or refusing an application. The Band Council must grant permission if (1) the applicant has arranged for a place to reside on the reserve, and (2) there

are adequate housing, land and services available on the reserve.

With respect to non-Band members, however, the Band Council has limited discretion in granting or refusing an application. For example, the Band Council must determine whether the applicant's residing on the reserve would be compatible with the culture, society and community of the Band and welfare of the members of the Band residing on the reserve. As long as the Band Council does not have absolute discretion to decide an application, it is permissible for a Band Council to establish criteria in its Residency Bylaw which are discretionary in nature. Each applicant must be looked at separately and in light of the circumstances at the time of the application. It would be, therefore, virtually impossible to draft a bylaw which did not incorporate some discretion into the decision-making process.

In our view, the differential treatment between the members of the Band and non-members of the Band is justifiable under the Canadian Charter of Rights and Freedoms, given that the reserve is set apart by the Federal Government for the use and benefit of a particular Band. Band members should have a preference over others to be entitled to reside on their reserve.

Section 9

Those found residing on the reserve in contravention to this bylaw may be ordered by an officer to cease to reside on the reserve. Where that person fails or refuses to cease to reside on the reserve within thirty days after the order, an officer may issue a further order prohibiting the person from being on or reentering the reserve for a period of sixty days. It is at this point in time that the person would be considered to be a "trespasser". Therefore, the person

could be convicted under either the Residency Bylaw or section 30 of the Indian Act, if the person refused to leave the reserve. The person, however, could not be prosecuted under both, as this would offend section 11(h) of the Canadian Charter of Rights and Freedoms.

Section 10

In this sample bylaw, the Band Council cannot revoke the residency entitlement of a member of the Band or of a person authorized to reside on the reserve pursuant to the Indian Act. The Council may revoke the entitlement of non-Band members, but only where, after a hearing, it has been shown that

- 1) *the non-Band member has committed certain offences and*
- 2) *it would be detrimental to the best interests of the Band to permit the non-Band member to continue to be a resident of the reserve.*

Again, limited discretion is given to the Band Council to determine, in light of all the facts, whether or not to revoke a person's entitlement to reside on the reserve.

It is strongly recommended that a Band Council provide for a hearing when dealing with the revocation of one's entitlement to reside on the reserve. An affected resident should be given an opportunity to defend his or her position on this delicate matter.

Since the reserve is set apart by the Federal Government for the use and benefit of a particular Band, a distinction can be justified as between members and non-members of the Band with respect to the revocation of entitlement to reside.

As it is an administrative decision dealing with residents who are legally residing on the reserve but whose behaviour has caused some concern in the

community, it is arguable that revocation is not an additional "penalty" added on to the criminal penalties imposed under the Criminal Code (Canada) for the offences referred to in subsection 10)(a) & (b) of the bylaw. For this reason, it can be argued that it does not contravene s. 11(h) of the Charter.

Section 11

A Band Council may set up a review body to hear appeals and to make recommendations with respect to applications for permission to reside and revocation proceedings. Even though such a review body exists, the Council must make the final determination. This process does not exclude the jurisdiction of the Courts, but usually a court would not hear a matter until after all appeal proceedings under the bylaw had been exhausted.

Section 12

In this sample bylaw, an appeal is given to the applicant in the case of section 7, and to the affected resident in the case of section 10. The Committee of Elders, to which the appeal is made, has the same discretion in deciding an appeal as the Band Council had with respect to the particular matter.

It is advisable that a hearing be held so that the appellant has an opportunity to present evidence and submissions in support of his case. This would be in accordance with the principles of natural justice and the Charter. Once the Committee of Elders has reached a decision, it makes written recommendations to the Council. The Council then makes a final determination pursuant to section 13.

RRBG/953-5273/May 29, 2000

WESTBANK FIRST NATION
DISORDERLY CONDUCT AND NUISANCES
LAW NO. 2005-19

WHEREAS Council of Westbank First Nation deems it advisable and in the best interests of Westbank First Nation to enact a law for the prevention of disorderly conduct and nuisances within Westbank Lands;

NOW THEREFORE Council of Westbank First Nation repeals Disorderly Conduct and Nuisances By-law No. 1995-03 and enacts the following law:

1. TITLE

- 1.1 This Law may be cited for all purposes as the "*WFN Disorderly Conduct and Nuisances Law No. 2005-19*".

2. DEFINITIONS

- 2.1 In this Law, unless the context otherwise requires:

"Council" means the governing body of Westbank elected pursuant to the *Westbank First Nation Constitution*;

"disorderly conduct" means any act or behavior, including:

- (a) fighting;
- (b) making or causing unreasonable noise;
- (c) using abusive language;
- (d) using offensive or indecent gestures or displays;
- (e) being drunk;
- (f) loitering;
- (g) exposing, firing or discharging any gun, pistol or other firearm, or using or threatening to use any other article as a weapon, except in defence of life or property;
- (h) interfering in any manner with the orderly conduct of commercial, administrative, educational, recreational, health care, religious or ceremonial activities on Westbank Lands; or
- (i) any other disorderly behavior;

that disrupts public order on Westbank Lands, scandalizes the community, or causes public inconvenience, annoyance or alarm;

"nuisance" means any act, activity or condition, including:

- (a) the abandonment of cars, household appliances or furniture, or parts of cars, household appliances or furniture;
- (b) the storage of abandoned cars, household appliances or furniture, or parts of cars, household appliances or furniture;
- (c) the dumping or storage of tires, garbage or other refuse;
- (d) the burning of tires, grass, garbage, leaves or other refuse;
- (e) the discharge of any substance into the air or water;

- (f) noise;
- (g) the creation of noxious smells; or
- (h) any other act;

that materially impairs, otherwise than by direct physical interference, the use and enjoyment of a registered holder's parcel of land, or that prejudicially affects a person's health, comfort or convenience or the public health, safety or welfare of Westbank, but does not include any act, activity or condition to the extent it is unavoidably necessary for carrying on any business or other means of livelihood authorized by Council;

"parcel of land" or **"parcel"** means any lot, block, manufactured home pad or other area in which real property within Westbank Lands is held or into which real property within Westbank Lands is subdivided and the improvements affixed to it;

"peace officer" means a member of the local detachment of the Royal Canadian Mounted Police responsible for policing Westbank Lands, or any delegate;

"person" in addition to its ordinary meaning, includes any association, household, society, corporation, partnership or party, whether acting by themselves or by a servant, agent or employee, and the successors, assigns and personal or other legal representatives of such person to whom the context can apply according to law;

"registered holder" means a person who is registered in the Westbank Lands Register as the holder of an interest in Westbank Lands and, where applicable, includes the occupant;

"Westbank" or **"WFN"** means the Westbank First Nation as defined in the *Westbank First Nation Constitution*;

"Westbank Lands" means:

- (a) the following Westbank Indian Reserves:
 - (i) Mission Creek Indian Reserve No. 8
 - (ii) Tsinstikeptum Indian Reserve No. 9
 - (iii) Tsinstikeptum Indian Reserve No. 10
 - (iv) Medicine Hill Indian Reserve No. 11
 - (v) Medicine Creek Indian Reserve No. 12; and
- (b) lands set apart by Her Majesty the Queen in right of Canada in the future as lands reserved for the use and benefit of Westbank, within the meaning of subsection 91(24) of the *Constitution Act, 1867*;

"WFN Law Enforcement Officer" means a peace officer or any person or persons appointed by Council, from time to time, to administer and enforce the provisions of Westbank Laws enacted by Council, and includes any delegate.

- 2.2 Unless otherwise provided in this Law, words, expressions and rules of construction used in this Law have the same meaning as in the *Westbank First Nation Constitution*.

3. DISORDERLY CONDUCT

- 3.1 Everyone who commits an act of disorderly conduct is guilty of an offence.
- 3.2 The WFN Law Enforcement Officer may order any person who is engaging in any disorderly conduct to stop such conduct immediately.

4. NUISANCE

- 4.1 Everyone who creates or causes a nuisance is guilty of an offence.
- 4.2 The WFN Law Enforcement Officer may order any person who is causing or who threatens to cause a nuisance on Westbank Lands to refrain from causing the nuisance or to abate the nuisance within such period as is reasonable in the circumstances.
- 4.3 In determining whether a period fixed by the WFN Law Enforcement Officer under section 4.2 was reasonable in the circumstances, a court shall take into account:
 - (a) the nature and extent of the nuisance;
 - (b) the methods available to abate the nuisance;
 - (c) the approximate time required to abate the nuisance; and
 - (d) the effect of the order on any business or means of livelihood of the person who is the subject of the order.

5. ENFORCEMENT

- 5.1 Where a person who has been ordered to stop engaging in disorderly conduct, or to refrain from causing a nuisance or to abate a nuisance within a specified period, fails or refuses to comply with the order, the WFN Law Enforcement Officer may take such reasonable measures as are necessary to stop the disorderly conduct, or to prevent or to abate the nuisance.
- 5.2 A person who fails or refuses to comply with an order made under sections 3.2 or 4.2, or who resists or interferes with the WFN Law Enforcement Officer acting under section 3.2 or section 5.1, commits an offence.

6. FEES AND FORMS

- 6.1 Council may, by resolution passed at a duly convened meeting, establish, correct, revise or update the terms of any applicable fee schedules, forms, protocols or other related documentation which complement and support this Law, and will post notice of same in a public area of the WFN administration building and make a copy of same available for viewing free of charge at the administrative offices of Westbank and available for distribution at a nominal charge.

Westbank Law, or from the neglect or failure, for any reason or in any manner, to enforce this Law or any other Westbank Law.

- 9.4 All actions against Westbank for the unlawful doing of anything that:
- (a) is purported to have been done by Westbank under the powers conferred by this Law or any Westbank Law, and
 - (b) might have been lawfully done by Westbank if acting in the manner established by law,

must be commenced within six (6) months after the cause of action first arose, or within a further period designated by Council in a particular case, but not afterwards.

- 9.5 Westbank is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to Westbank, within two (2) months from the date on which the damage was sustained. In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes:

- (a) there was reasonable excuse, and
- (b) Westbank has not been prejudiced in its defence by the failure or insufficiency.

10. APPLICATION OF LAW

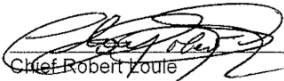
- 10.1 Where any federal Act or regulation or provincial Act or regulation or any other Westbank Law may apply to any matter covered by this Law, compliance with this Law will not relieve the person from also complying with the provisions of the other applicable Act, regulation or law.
- 10.2 If any section of this Law is for any reason held invalid by a decision of a court of competent jurisdiction, the invalid section or subsection will be severed from and not affect the remaining provisions of this Law.
- 10.3 The headings given to the sections and paragraphs in this Law are for convenience of reference only. They do not form part of this Law and will not be used in the interpretation of this Law.
- 10.4 Unless otherwise noted, any specific statute named in this Law is a reference to a statute of British Columbia and the regulations thereto, as amended, revised, consolidated or replaced from time to time, and any Law referred to herein is a reference to a law of Westbank, as amended, revised, consolidated or replaced from time to time.

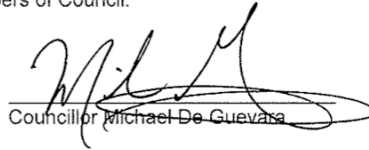
11. REPEAL

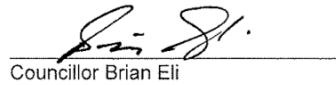
- 11.1 Disorderly Conduct and Nuisances By-law No. 1995-03 is hereby repealed.

BE IT KNOWN that this Law entitled, "WFN Disorderly Conduct and Nuisances Law No. 2005-19" is hereby read for the first, second, and third and final time and is hereby enacted as Law No. 2005-19 by the Council of Westbank First Nation at a duly convened meeting of Council held on the 14th day of February, 2005.

Voting in favour of the Law are the following members of Council:


Chief Robert Louie


Councillor Michael De Guevara


Councillor Brian Eli


Councillor Loretta Swite


Councillor Michael Werstuik

being a majority of those members of Council of Westbank First Nation present at the aforesaid meeting of Council.

The Quorum of Council is three (3) members.

Number of members of Council present at the meeting: 5.