

# The Law: Help or Headache?





NAN/NAPS Justice Symposium  
March 3, 2020





# OUTLINE OF PRESENTATION

## INTRODUCTION OF SCENARIOS

-  Scenario 1: Leadership request for enforcement of BCR for Removal
-  Scenario 2: Leadership request for search and seizure


## SCENARIO 1: LEGAL CONSIDERATIONS re. REMOVAL

## GENERAL CONSIDERATIONS re. BY-LAWS


-  Template Intoxicant By-law initiative (potential of expanding to other types of by-laws)
-  New provincial policing legislation

## NAPS ENFORCEMENT COMMUNICATIONS PROTOCOL (PROPOSED)


# INTRODUCTION OF SCENARIOS

 Goal: explore considerations and potential solutions to contemporary issues relating to safety and law enforcement in your communities through discussion of two familiar scenarios.

# Scenario 1: BCR for Removal

 A citizen of your First Nation has been living in a common law relationship with a non-member. The couple lives in band housing on your First Nation's reserve. It is an open secret that the common law partner, who is not a citizen of your First Nation, has been bringing drugs into your First Nation for the purposes of trafficking. Chief and Council want this individual out of the community. They pass a Band Council Resolution for their removal. The Chief asks the NAPS officer to assist. What happens next?

## Scenario 2: Search & Seizure

 Your First Nation has been struggling with an influx of illicit drugs in the community. Chief and Council have been tipped off by a trusted community member about a specific house in which these drugs are being stored and sold from. The Chief passes on this information to their NAPS officer, asking the officer to enter the house and seize all the drugs. What happens next?



# Legal Considerations re. Removal: By-laws



**Litigation with a conscience.**

# Removal: Overview

- Canadian Case Law: BCR must be incorporated into a by-law
- Removal Template: *Tobique Nation Trespass Act* (2017)
- *Indian Act*, s. 81(1) and “Removal”
- Key Features of Removal
- *Indian Act*, s. 85(1) and “Eviction”
- Model By-laws
- More Canadian Case Law: Canadian Court Decisions on Removal

# Canadian Case Law:

## BCR must be incorporated into a by-law

### Key Facts:

- Norway House Band Council passed a BCR declaring that any community member caught using drugs or alcohol would be (a) evicted from their residence and (b) subject to removal from the Community.
- Subsequently, Tron Gamblin, a Member, was charged with possession of a controlled substance (marijuana).
- Council ordered Gamblin to (a) vacate his home and (b) leave the reserve.
- Gamblin challenged the decision in Court.
- The Court ruled that the Removal was illegal.
  - **In order to removal by BCR, the Council must adopt a by-law first.**
  - Important Note: the Court also ruled that the eviction was legal, since Gamblin violated the private tenancy contract that prohibited illegal drugs.



# Tobique First Nation (2017): Model Removal and Trespass Bylaw

Although the *Indian Act* does not contain explicit removal powers, many Councils – including Tobique First Nation – have successfully adopted removal powers by passing residency/trespass by-laws pursuant to s. 81(1) of the *Indian Act*.

- **In practice, when a Nation adopts a Trespass/Residency By-law, the by-law's first or second clause should expressly state that its powers derive from s. 81(1), subsections (c), (p), (p.1), (q), (r).**
  - → See **next slide** for text of s. 81(1)

The Tobique “Trespass Act” grants Council the power to remove Members for criminal conduct or serious bylaw violations, pursuant to s. 81(1) of the *Indian Act*.

- Available on-line: <http://www.tobiquefirstnation.ca/policies/Trespass%20Act.pdf>  
Key sections include:

# *Indian Act, s. 81(1):* Residency/Trespass Bylaws

**81 (1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

...

**(c)** the observance of law and order;

...

**(p)** the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

**(p.1)** the residence of band members and other persons on the reserve;

**(q)** with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

**(r)** the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

# Key Features of Removal

**When considering the removal of a community member or visitor by BCR, the following guidelines are recommendations for a process:**

- 1) First, it is recommend that a Band Council adopt a Residency/Trespass bylaw. It is recommended that the bylaw explicitly state that its powers derive from:
  - s.35(1) of the *Constitution Act*: “self-determination”; and
  - s. 81(1) of the *Indian Act*, which gives Nations the power to pass by-laws on residency/trespass. This includes the power of removal and/or eviction.

# Key Features of Removal (Cont'd)

- 2) A Trespass/Residency bylaw should set out:
- A) Grounds for removal;
  - B) Process for removal, including opportunity for a hearing;
  - C) Various punishments/consequences short of removal;
  - D) Opportunity to apply for reinstatement.

## Key Features of Removal (Cont'd)

- 3) Once the bylaw is in place, a Council may commence removal proceedings against an individual. At the end of such a process, Council has the power to have the individual removed from the community by BCR.
- 4) There is a distinction between Removal and Eviction (see slides 14-16). The court decisions discussed in the following slides suggest that it is easier to evict someone from Band housing than it is to fully remove them from the community.
- 5) It is likely that an eviction from band housing would have the effect of forcing the individual to leave the community.

# Eviction and *Indian Act*, s. 85.1(1)

## Eviction is easier than removal.

Canadian courts have consistently held that tenancy agreements between a First Nation and First Nation members are private law contracts. Because of this, a community can include in these contracts any term of its choosing.

*Cottrell v. Chippewas of Rama Mnjikaning First Nation Band*, [2009] F.C.J. No. 369 at 82

In practice, this means that a tenancy agreement can include a term allowing Council to evict the tenant for illegal drug use/intoxication.

Section 85.1(1) states that Nations have authority to enact by-laws relating to intoxicants, including prohibiting persons from being intoxicated on the reserve and/or from having intoxicants in their possession on the reserve.

# Model Removal/Eviction Bylaws

- Samson Cree First Nation: Residency Bylaw (2012)
  - Gives Council the power to evict and/or remove community members who have been convicted of serious crimes against another person.
  - The stated source for these powers is Indian Act, s. 81(1).
  - [http://sp.fng.ca/fngweb/444\\_residency\\_by-law\\_2012.pdf](http://sp.fng.ca/fngweb/444_residency_by-law_2012.pdf)
- Wahgoshig First Nation: Trespass Bylaw (2016)
  - Bylaw gives Council authority to remove a Non-Member for “trespass”:
    - “Trespass” includes the offence of living on-reserve without written authorization;
    - “Trespass” also includes: violating reserve bylaws, hunting/fishing without a permit, disturbing the peace, criminal acts.
  - Under the bylaw, Council may at any time adopt a BCR removing and/or evicting a Non-Member Resident with written notice.
  - The BCR can order the individual to vacate a specific Premise/Premises, or the reserve as a whole.
  - Grounded in s. 81(1) of the *Indian Act*

# An Unsuccessful Removal: Lessons from *Kamalatisit v Sandy Lake First Nation*\*

In 2019, the Canadian Human Rights Tribunal ordered Sandy Lake First Nation to allow a removed resident, Angele Kamalatisit, to return to the reserve.

The Tribunal also ordered the Nation to pay her \$20,000 for “pain and suffering.”

## Key Facts:

- Sandy Lake First Nation did not have any residency or trespass bylaw. The removal of Ms. Kamalatisit was done by way of BCR by Chief and Council.
- Ms. Kamalatisit was not a Member of the Nation, but had lived and worked there as a Guest for ten years.



# An Unsuccessful Removal: Lessons from *Kamalatisit v Sandy Lake First Nation*\*

- In 2012, the Council removed Kamalatisit, alleging that she was a “disruptive” presence.
- The Tribunal found that Kamalatisit was removed as retribution for the political activities of her common-law partner, who *was* a Member of the Nation, and therefore more difficult to remove.
- In 2019, the Tribunal found that the Council discriminated against Kamalatisit by denying her occupancy of a residential accommodation based on the prohibited ground of family/marital status.

# *Atikamekw d'Opitciwan c Weizineau*\*: Quebec Court enforces removal order

## Key Facts:

- In 2017, the Opitciwan Nation Band Council (Quebec) adopted a Removal/Trespass Bylaw, pursuant to s. 81(1) of the Indian Act.
- Subsequently, Kelly-Marguerite Weizineau, a resident (unclear if Member or Non-Member) was criminally convicted for trafficking narcotics.
- The Council then passed a BCR removing Weizineau for five years. She ignored the order and hid in various homes in the community.
- The Council successfully applied to the Quebec Superior Court to uphold the removal of Weizineau.

→ See next slide re: the Obligation to ensure Support Systems for Removed Persons

# *Atikamekw d'Opitciwan c Weizineau* cont'd

The Court also authorized the Council to work with Quebec police to forcibly expel Weizineau if necessary.

## **Note re: Support Systems for Removed Persons:**

- In ***Weizineau***, the Court upheld the removed person's request that her removal "be executed in such a way that the defendant is **not left alone or without support** at the boundaries of the Opitciwan Indian Reserve" (para 17).
- It is therefore good practice for Council to work with the removed person and outside communities to ensure they will have access to support services once they have left the community.



# CONSIDERATIONS re. BY-LAWS






**Litigation with a conscience.**

# NAPS Template Intoxicant By-law Initiative








## Context:

-  Crown and Courts declining to prosecute and try First Nations by-law cases.
-  NAPS working with communities to minimize intoxicant use; has worked with Sandy Lake, Bearskin Lake, Kasabonika re creation & implementation of intoxicant by-laws.
-  S. 85(1) of the *Indian Act*. Certain procedures must be followed to make the by-law valid and enforceable.

# NAPS Template Intoxicant By-law Initiative (Cont'd)



## Key features

-  Provides clarity re. role of NAPS officers, role of by-law enforcement officers, role of community-based committees.
-  Process starts with issuance of a ticket/Certificate of Offence by a NAPS officer for a by-law infraction.
  -  The Certificate of Offence offers different options to the person who receives it: a Community Resolution Process option; a fine option; a trial option.
-  Community-based panels/committees play a role in enforcement/process.
  -  Importance of avoiding conflict of interest.

## CERTIFICATE OF OFFENCE

Under: First Nation Law Relating to Intoxicants By-Law #

Nishnawbe-Aski Police Service

I \_\_\_\_\_ believe and certify that on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ (am/pm)

Name: \_\_\_\_\_

Address: \_\_\_\_\_ Date of

Birth: \_\_\_\_\_

At: \_\_\_\_\_

Did commit the offence(s) of:

\_\_\_\_ Being Intoxicated (s. 3.1)

\_\_\_\_ Possessing an Intoxicant (s. 3.2)

\_\_\_\_ Possession for the Purpose of Trafficking (s. 3.3)

\_\_\_\_ Trafficking an Intoxicant (s. 3.3)

\_\_\_\_ Supplying an Intoxicant to a Minor (s.3.3)

Witnesses: \_\_\_\_\_

Signature of issuing NAPS officer: \_\_\_\_\_

Date of Issuing Certificate: \_\_\_\_\_

You must choose one of the following options within 15 days of the date of this Certificate:

- A. ☐ **Community Option:** Acknowledge responsibility and enter into a Community Resolution Process to respond to the concerns raised by your conduct. You will be notified of when and how this resolution process will take place.
- B. ☐ **Fine Option:** Acknowledge responsibility and pay a fine of \$ \_\_\_\_\_ by \_\_\_\_\_ day of \_\_\_\_\_.  
[this option is NOT available for Youth or for Serious Offences as defined in s. 2.8]
- C. ☐ **Trial Option:** Have your case decided in the Ontario Court of Justice. You will be notified of the date and time to appear in court. If you are convicted, you may be sentenced to a fine and/or imprisonment.

If you do not choose any of the above options, or within 6 months, you fail without reasonable excuse to demonstrate substantial compliance with the option you have chosen, you will be deemed responsible for the offence, and the matter will be referred to Chief and Council for further action. You may be subject to a fine and/or consequences regarding your eligibility for community services, including employment, housing, and band-administered medical programs. If you are not a Lake First Nation band member you may be evicted from the community, and temporarily or permanently prohibited from returning, without further notice.

Please submit this form indicating your choice to the band office

Attention: By-Law Enforcement Officer

\*Cash or cheque payments are accepted. Please make cheques payable to

First Nation

**You must choose one of the following options within 15 days of the date of this Certificate:**







- A. ☐ **Community Option:** Acknowledge responsibility and enter into a Community Resolution Process to respond to the concerns raised by your conduct. You will be notified of when and how this resolution process will take place.
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First Nation band member you may be evicted from the community, and temporarily or permanently prohibited from returning, without further notice.



# Challenging a Ticket

-  Within 15 days
-  The options need to be described in the By-law:
  -  Consultation with Chief and Council
  -  Hearing panel
    -  Submitting documentation (e.g. medical)
  -  Trial Option

# Consider...

-  Possibility of developing template by-laws for other issues of interest (e.g. eviction)

# New Policing Legislation: *Community Safety and Policing Act, 2019*

- ✈ Has been passed into law (March 26, 2019) but is not yet in force.
- ✈ Will replace the *Police Services Act*.
- ✈ Provides a pathway for a First Nation police service and board to be held to the same legislated adequacy standards that all other police services in the Province are held to.

# *Community Safety and Policing Act, 2019*

## (Cont'd)

- Introduces specific provisions pertaining to enforcement of First Nations by-laws (not in *PSA*):
  - Enforcement of First Nations by-laws (except prescribed by-laws, if any) is not a necessary part of the required minimum standard of providing “adequate and effective policing” (s. 11(2)).
  - A police Board may exceed the required minimum standards, including by providing policing services for enforcement of by-laws (s. 11(3)).
  - A First Nation Board may enter into an agreement with the Minister for funding with respect to enforcement of First Nation by-laws (s. 32(17)).
  - A First Nation band council can enter into an agreement with the Minister to have the Ontario Provincial Police (“OPP”) provide policing on the First Nation reserve or other specified area, and this agreement can specify that enforcement of First Nation by-laws is to be included in the services to be provided by the OPP (ss. 76(1), 76(2)).

# *Community Safety and Policing Act, 2019*

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# NAPS ENFORCEMENT COMMUNICATIONS PROTOCOL [proposed]



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# Enforcement Communications Protocol






ENFORCEMENT  
COMMUNICATIONS  
PROTOCOL  
*[proposed]*

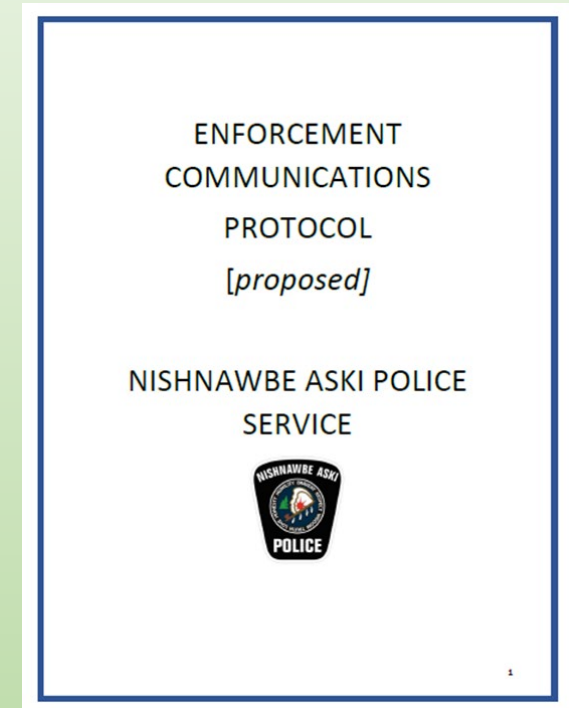
NISHNAWBE ASKI POLICE  
SERVICE



# Enforcement Communications Protocol

## Goals:







-  strengthen the relationship between First Nations leadership and NAPS;
-  increase the efficacy of enforcement actions and NAPS' responsiveness to community concerns;
-  have improved communication and sharing of information in a manner that:
  -  respects police operational independence;
  -  does not risk jeopardizing ongoing NAPS operations or officer safety.





# Enforcement Communications Protocol


## Key features:

-  For serious/criminal activity.
-  Direct communication between Chief/designate and head of NAPS' Intelligence Unit.
  -  Chief/designate shares specific concerns with **Detective Inspector Brad Duce (807-620-2677)**, who informs Chief whether NAPS is already aware and already taking enforcement-related steps.
-  Specified report-back time for head of Intelligence Unit to update Chief/designate.
  -  7-10 business days from time of first call.
  -  Then as mutually decided on a case-by-case basis.






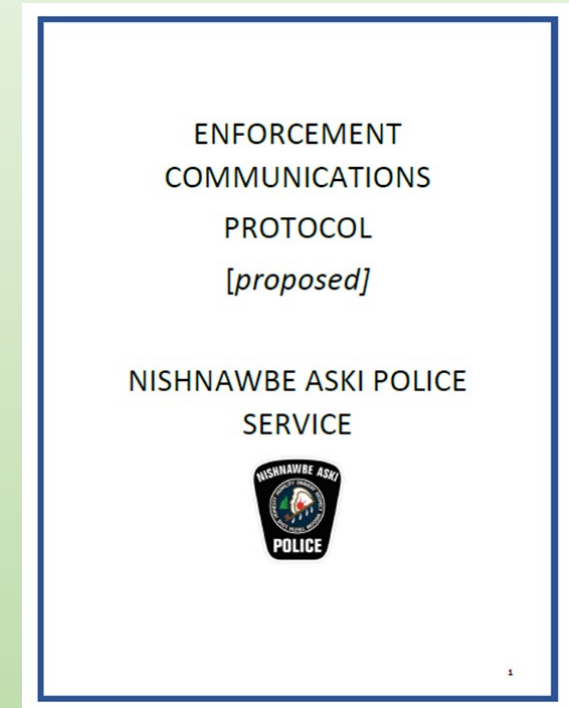
# Enforcement Communications Protocol

## NAPS Intelligence Unit:


 Mandate: to combat drug trafficking and distribution; firearms investigations; monitoring, arresting and dismantling any gang activity, criminal organization, crime group or its members, responsible for violent criminal activity within the province of Ontario with specific focus on the Northern First Nation Communities

 Five (5) detectives and a civilian specifically trained in:


-  Drug Enforcement Investigations;
-  Guns & Gangs Investigations; and
-  Criminal Intelligence Analysis.



# Enforcement Communications Protocol

 Does not replace or detract from already-existing mechanisms.

 e.g. Crime Stoppers

 1-800-222-TIPS (8477)

 <https://www.canadiancrimestoppers.org/tips>





# Miigwetch!



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**Main Office:** 10 Alcorn Avenue, Suite 204, Toronto ON M4V 3A9 Phone: (416) 964-0495 Fax: (416) 929-8179  
**Northern Office:** 104 Syndicate Avenue North, Suite 200, Thunder Bay, ON P7C 3V7 Phone: (807) 622-4900 Fax: (416) 929-8179