Input query

An Indigenous band council in Saskatchewan passed a bylaw banning the sale of alcohol on reserve land. A band member who operates a delivery service argues the bylaw is ultra vires because it conflicts with the federal Indian Act provisions on intoxicants and also violates their s. 2(b) Charter right to expression through commercial activity. Analyze (1) the scope of band council bylaw-making authority under the Indian Act and whether it extends to alcohol regulation, (2) whether there is a doctrine of federal paramountcy that would render the bylaw inoperative, and (3) whether a s. 2(b) challenge to a commercial restriction on reserve has any prospect of success. Address how the recent jurisprudence on Indigenous self-governance affects the traditional paramountcy analysis.

Format: Legal memo

Level of detail: Comprehensive

OVERVIEW

The band member's challenge is very likely to fail on both pleaded grounds, but he has better unpleaded arguments. Section 85.1(1)(a) of the *Indian Act* expressly authorizes bylaws "prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve," and Parliament repealed the old federal intoxicant offences in 1985 when it enacted that power, so the bylaw does not conflict with the Act but implements it: *Wolfe*, 1995 CanLII 4014 (SK CA). The paramountcy argument is a category error. The doctrine runs between valid federal law and conflicting provincial law (*Canadian Western Bank*, 2007 SCC 22; *FNIM Reference*, 2024 SCC 5), and where a band bylaw engages it at all, the bylaw sits on the federal side and displaces inconsistent provincial law through s 88 (*Meechance*, 2000 SKQB 156; *Hiawatha*, 2023 ONCA 524). The s 2(b) claim founders at the *Irwin Toy*, 1989 CanLII 87 (SCC) threshold: a ban on selling alcohol targets the physical consequences of conduct, not the conveyance of meaning, and *Ford*, 1988 CanLII 19 (SCC) protects commercial content, not the bare act of sale. *Charter* application to *Indian Act* band councils is settled (*Dickson*, 2024 SCC 10; *Saddle Lake*, 2026 FCA 125), and *Campbell*, 1996 CanLII 7298 (MB CA) strongly supports s 85.1 bylaws on the merits, though the sale prohibition was not itself litigated there. The recent self-governance jurisprudence strengthens the band's position, since *Houle*, 2025 FC 267 accepts a statutory right rooted in the *Indian Act* as an "other right" under s 25, but any inherent-right defence faces the *Pamajewon*, 1996 CanLII 161 (SCC) particularity and evidentiary barriers. The member's real prospects lie in strict compliance with the s 85.1(2) elector-assent requirement and s 86 publication, and in whether his delivery sales occur "on the reserve" at all. Confirm the bylaw text, the enactment record, whether the band is a Treaty 6 signatory, and where sales are concluded.

FACTS

An Indigenous band council in Saskatchewan has passed a bylaw banning the sale of alcohol on its reserve. A band member who operates a delivery service challenges the bylaw on two grounds: first, that it is *ultra vires* because it conflicts with the federal *Indian Act*, RSC 1985, c I-5 [*Indian Act*] provisions on intoxicants; second, that it violates his s 2(b) *Canadian Charter of Rights and Freedoms* right to expression exercised through commercial activity. The instructions do not state whether the bylaw was assented to by a majority of electors at a special meeting, whether it was published, whether the band is a Treaty 6 signatory, or where the member's sales are concluded. Each of those facts bears materially on the analysis below and must be confirmed.

ISSUES

1. What is the scope of band council bylaw-making authority under the *Indian Act*, and does it extend to prohibiting the sale of alcohol on reserve?

2. Is there a doctrine of federal paramountcy capable of rendering the bylaw inoperative for conflict with the *Indian Act*?

3. Does a s 2(b) challenge to a commercial restriction on reserve have any realistic prospect of success?

4. How does recent jurisprudence on Indigenous self-governance affect the traditional paramountcy and *Charter* analysis?

BRIEF ANSWER

The bylaw is almost certainly *intra vires*. Section 85.1(1)(a) of the *Indian Act* expressly empowers a band council to make bylaws "prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band." A prohibition on alcohol sale is the precise instrument Parliament created; it is not a conflict with the Act.

The paramountcy argument is a category error. Federal paramountcy operates between valid federal law and conflicting provincial law. It has no application between a federal statute and a subordinate instrument the statute itself authorizes. Where a band bylaw engages paramountcy at all, it does so on the federal side, displacing inconsistent provincial law through s 88 of the *Indian Act*.

The s 2(b) claim is very weak. Commercial expression is protected, but a ban on selling a regulated product targets the physical consequences of conduct, not the conveyance of meaning. Even if s 2(b) were engaged, s 25 of the *Charter* and s 1 both give the band substantial defences, and the appellate authority on s 85.1 bylaws is strongly favourable.

The member's real exposure lies elsewhere: strict compliance with the enactment formalities in ss 85.1(2) and 86, and the separate question of whether his delivery sales are "on the reserve" within the bylaw's words. Those are the points to investigate.

LAW

Bylaw-Making Authority Under the Indian Act

Section 81(1) of the *Indian Act* empowers a band council to make bylaws "not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister" for enumerated local purposes, including the health of residents (para (a)), the observance of law and order (para (c)), the prevention of disorderly conduct and nuisances (para (d)), zoning including prohibition of any class of business, trade or calling in a zone (para (g)), and the regulation of hawkers, peddlers or others who enter the reserve to buy, sell or deal in wares or merchandise (para (n)). Section 81(1)(r) caps penalties at a $1,000 fine or thirty days' imprisonment. Sections 81(2) and 81(3) supply enforcement: a prohibition order following conviction, and restraint by court action at the instance of the band council.

Section 85.1(1) is the specific alcohol power. It authorizes bylaws (a) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve; (b) prohibiting intoxication on the reserve; (c) prohibiting possession of intoxicants on the reserve; and (d) providing exceptions to (b) or (c). Section 85.1(2) makes elector assent a precondition: no such bylaw may be made "unless it is first assented to by a majority of the electors of the band who voted at a special meeting of the band called by the council of the band for the purpose of considering the by-law." Section 85.1(4)(a) makes contravention of a sale-prohibition bylaw a summary conviction offence punishable by a fine of not more than $1,000 or imprisonment not exceeding six months, or both. Section 86 requires publication on an internet site, in the First Nations Gazette, or in a newspaper of general circulation on the reserve, and s 86(4) provides that a bylaw comes into force on the day of first publication or a later specified day.

The statutory history is significant. The former federal intoxicant offences in ss 94 to 100 of the Act were repealed by RS 1985, c 32 (1st Supp), s 17, at the same time s 85.1 was enacted. Sections 82 (ministerial disallowance) and 85.1(3) (ministerial approval of intoxicant bylaws) were repealed by SC 2014, c 38.

Hiawatha First Nation v Cowie, 2023 ONCA 524 [*Hiawatha*] is the leading recent appellate treatment. Lauwers JA explained that the 2014 amendments were adopted "[i]n order to adapt the *Indian Act* and make it more practical for self-governance" and that they "further relax the minister's role in favour of increasing band council authority and autonomy" (at para 36). There are now three bylaw categories: s 81 bylaws requiring no ministerial approval; s 83 bylaws still requiring approval; and s 85.1 intoxicant bylaws, which "require the prior consent of the electors" (at para 39). All three are subject to s 86 publication (at para 40). Critically, until 2014 s 86 provided that "no such by-law is invalid by reason of any defect in form"; those words are gone, and "[i]t can be inferred that with increased law-making autonomy comes greater accountability for proper form and for compliance with natural justice norms" (at para 43). A bylaw "has the force and effect of a federal regulation" (at para 41), and its passage "is a serious act of law-making and must follow the rules of law-making in the Act in order to secure the legal weight of enforcement" (at para 65).

Gamblin v Norway House Cree Nation Band, 2000 CanLII 16761 (FCTTD) [*Gamblin*] confirms that ss 81 and 85.1 "grant band councils the authority to make by-laws for the protection of the community, including bans on intoxicants" (at para 52), but that the bylaw form is mandatory: "A band council resolution is not a by-law and vice versa: to assume they wield the same authority is a fallacy" (at para 53). A council that proceeds by resolution "clearly acted *ultra vires* the intended authority of their statutory jurisdiction" (at para 59).

In Saskatchewan, *R v Meechance*, 2000 SKQB 156 [*Meechance*] applies the same discipline, holding that a resolution "is not, in my opinion a federal law, order, rule or regulation within the meaning of s 88 of the *Indian Act*" and that "[t]he power conferred by that subsection is to make by-laws and not resolutions" (at para 14).

Paramountcy and the Place of Band Bylaws

The doctrine is federal-provincial. In *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*], Binnie and LeBel JJ held that "when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility" (at para 69). The fundamental test comes from *Multiple Access Ltd. v McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 SCR 161 [*Multiple Access*], where Dickson J. said there is no reason "to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other." Duplication of norms is not incompatibility, and a provincial law may supplement federal requirements (*Canadian Western Bank* at para 72). Frustration of federal purpose is a second branch, but the Court warned against giving too broad a scope to it and confirmed the rejection of the "occupied field" test: to impute an intention to occupy the field "in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint" (at para 74). The onus lies on the party invoking paramountcy (at para 75).

The Supreme Court restated the doctrine in the same terms in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [*FNIM Reference*]: "Under the doctrine of federal paramountcy, the provisions of a valid federal law prevail over conflicting or inconsistent provisions of a provincial law" (at para 132). Nothing in the doctrine as stated addresses a conflict between a federal statute and an instrument made under it.

Section 88 of the *Indian Act* is the conduit through which a band bylaw acquires displacing force. As quoted in *R v Charles*, 1997 CanLII 11288 (SK QB) [*Charles*], provincial laws of general application apply to Indians "except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder." In *Charles*, the argument that Parliament had "occupied the field" of reserve game management through s 81(1)(o) was rejected: s 81 provides a "mechanism by which band councils can assume management over certain activities within the territorial limits of their constituencies," but "providing of a mechanism whereby a field might be occupied is a different thing than actually occupying the field." *Meechance* completes the structure: once validated, a s 81(1)(o) bylaw "was in direct conflict with the provincial regulations … It, therefore, rendered inoperative those provincial regulations, to the extent that they dealt with non-resident hunters on the reserve" (at para 14). *Hiawatha* confirms the point at the appellate level: "Section 88 of the Act states that valid by-laws have paramountcy over laws of general application of the province on the reserve" (at para 42).

R v Gloade, 1986 CanLII 6946 (NS SCAD) [*Gloade*] is the only appellate decision in the corpus on the interaction of federal intoxicant provisions and provincial liquor law on reserve. It held the Nova Scotia *Liquor Control Act* applied to a band member of its own force, rejecting the argument that the then s 94 of the *Indian Act* occupied the field, and quoting Beetz J. in *R v Dick* to the effect that Parliament could not make the *Indian Act* paramount over provincial law merely by occupying the field: operational conflict would be required. *Gloade* was decided under the pre-1985 Act.

Section 2(b) and the Charter's Application to Band Bylaws

Ford v Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 SCR 712 [*Ford*] establishes that "there is no sound basis on which commercial expression can be excluded from the protection of s 2(b) of the *Charter*," and that commercial expression "plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy." The Court confined its holding: "the focus here is on choice of language and on a law which prohibits the use of a language. We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example to protect consumers) where different governmental interests come into play."

Irwin Toy Ltd. v Quebec (Attorney General), [1989 CanLII 87 (SCC)], [1989] 1 SCR 927 [*Irwin Toy*] supplies the operative framework. Dickson C.J. and Lamer and Wilson JJ. held that "where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression"; the distinguishing question is whether "the harm caused by the expression in issue is direct, without the intervening element of thought, opinion, belief, or a particular meaning," in which case "the regulation does aim at a harmful physical consequence, not the content or form of expression." Where purpose is neutral, the claimant bears the burden on effects and "must at least identify the meaning being conveyed and how it relates to the pursuit of truth," participation in the community, or individual self-fulfillment. On s 1, the Court held that it "will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups," while insisting there "must nevertheless be a sound evidentiary basis." Beetz and McIntyre JJ., dissenting on s 1 only, would have held the advertising ban unjustified.

RJR-MacDonald Inc. v Canada (Attorney General), [1995 CanLII 64 (SCC)], [1995] 3 SCR 199 [*RJR-MacDonald*] is the counterweight. The Court struck down a total ban on tobacco advertising and promotion under s 2(b), holding that "[a] complete ban on a form of expression is more difficult to justify than a partial ban" and that "[t]he government must show that only a full prohibition will enable it to achieve its objective," and further that "[m]otivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression." The impugned provisions concerned advertising: Parliament had not proscribed the sale, distribution or use of tobacco products. In dissent on s 1, La Forest J. would have upheld the scheme, reasoning that expression far from the core of s 2(b) values attracts a low degree of protection and an attenuated level of justification, and that to require Parliament to await definitive social science conclusions would impose an unjustifiable limit on legislative power.

Charter application to band councils is settled. In *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10] [*Dickson*], the majority (Kasirer and Jamal JJ., Wagner C.J. and Côté J. concurring) recorded that "courts at all levels have recognized that the *Charter* applies to Indian band councils exercising governmental powers under the *Indian Act*, because such powers have a statutory foundation and are delegated by Parliament" (at para 57), citing among others *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 [*Corbiere*] and *Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*] at paras 36-39, rev'd 2015 SCC 30. Under the second *Eldridge* branch, "it is the exercise of a power of compulsion that makes the *Charter* applicable to bodies exercising statutory authority" (*Dickson* at para 67). The majority's holding was expressly narrow: the *Charter* applied to the residency requirement "only insofar as that requirement flows from an exercise of statutory power under s 91(24)," and the Court made "no comment on whether an exercise of an inherent right of self-government untethered from federal legislation would be subject to the *Charter*" (at para 91). Martin and O'Bonsawin JJ., dissenting in part, agreed the *Charter* applies but held s 25 did not shield; Rowe J., dissenting in part on the cross-appeal, would have held the *Charter* does not apply at all.

In *Taypotat*, Mainville JA held that a band council "is clearly a *sui generis* government entity which exercises government authority within the sphere of federal jurisdiction under the *Indian Act*," holding "extensive by-law making powers under ss 81(1), ss 83(1)(2), and ss 85.1(1)," so that it "largely acts as a government under federal legislation" (at para 36); and that *Charter* protection extends to "protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation" (at para 38), lest a "jurisdictional ghetto" be created (at para 39).

Chisasibi Band (Chisasibi Eeyouch) c Napash, 2014 QCCQ 10367 [*Napash*] declared, in a prosecution under a band alcohol bylaw, "that, in accordance with its section 32, the *Canadian Charter of Rights and Freedoms* applies to the Chisasibi Band" (at para 181), reasoning that the bands and councils "remain legislative creations" whose main role is "to organize and manage a territory with a number of government prerogatives" (at para 104), and that it would be "rather difficult to stray from the opinions expressed by the majority jurisprudence, which prefers the approach that subjects Aboriginal governments to the *Charter*" (at para 103).

Section 85.1 Under Charter Scrutiny

R v Campbell, 1996 CanLII 7298 (MB CA) [*Campbell*] is the leading appellate authority upholding s 85.1 and a bylaw made under it. Twaddle JA, for a unanimous court, held the enabling section not discriminatory in a constitutional sense for three reasons: "(i) It is a law passed within the ambit of s 91(24) of the *Constitution Act, 1867* for the governance of Indians and the lands reserved for them; (ii) The prohibitions it authorizes were not imposed on the Indians of Moose Lake by other Canadians through Parliament, but freely adopted by those to whom it primarily applies …; (iii) It does not authorize a band to make different laws for different people, but only to make an enforceable policy choice for the governance of all people on the reserve." He added: "Place does not equal race in this instance because it is not society-at-large imposing the ban on those who live on a reserve, but rather reserve Indians accepting the ban for themselves." On overbreadth: "The purpose of the enabling legislation is the amelioration of intoxicant abuse on those reserves which face the problem. Each band is left to decide for itself whether it has the problem and, if so, whether to impose a complete or partial ban. … This is as custom-made as law can ever be. It is far from overbroad." And: "A court should be very slow to invalidate a local law on the ground of overbreadth when it has been crafted by those to whom it applies to meet their perceived needs."

The judgment under appeal, *R v Campbell*, 1996 CanLII 17959 (MB QB) [*Campbell* (MBQB)], had found s 85.1 to violate s 15(1) but to be justified under s 1. Wright J. reasoned that "legislation to seek to control and regulate possession and consumption of intoxicants in these geographical areas — clearly aimed to ameliorate the conditions of the inhabitants — makes sense," and that on evidence of "domestic and child abuse and criminal behaviour … a piecemeal restriction on its availability is simply unrealistic. Rather, a blanket prohibition is logical and reasonable." On s 7, he held that a legislature's right to "impose restrictions and prohibitions in relation to certain substances, provided it acts within its legislative authority, is unquestioned," and that "[t]he decision whether to regulate or punish 'harmless activity' is a governmental decision, not one for the courts."

In Saskatchewan, *R v Wolfe*, 1995 CanLII 4014 (SK CA) [*Wolfe*] treated the Onion Lake s 85.1 bylaw as valid throughout, reproducing its text ("No person shall sell, barter, or supply or manufacture intoxicants on the reserve of the Onion Lake Band"), and held on the relationship between the Act and the Treaty 6 prohibition clause: "The practical effect of s 85.1 is that no change in the Crown's treaty obligation took place. Before 1985, alcohol could not be introduced or sold and the Crown had an obligation to enforce that law. In 1985 and after, the prohibition and the obligation remained the same. Only the source of the prohibition can be said to have changed. Whereas, formerly the *Indian Act* prohibited the introduction of alcohol onto reserves, now the bylaw does." Treaty 6 itself provides that "within the boundary of Indian Reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor should be allowed to be introduced or sold."

Sections 25 and 35, and the Self-Governance Jurisprudence

Dickson supplies a four-step s 25 framework: (1) the claimant shows a *prima facie* breach; (2) the party invoking s 25 must satisfy the court that the impugned conduct is a right or the exercise of a right protected by s 25, bearing "the burden of demonstrating that the right for which it claims s 25 protection is an Aboriginal, treaty, or other right," and, for an "other" right, must "demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference"; (3) irreconcilable conflict must be shown; (4) courts consider limits including s 28 of the *Charter* and s 35(4) of the *Constitution Act, 1982* (at paras 178-182). "[W]here s 25 is found not to apply, the party defending against the *Charter* claim may show that the impugned action is justified under s 1" (at para 183).

Houle v Swan River First Nation, 2025 FC 267 [*Houle*] applies that framework to an *Indian Act* band that is not self-governing and has no constitution. Strickland J. held it unnecessary to determine whether the source of the "other right" was inherent self-government: "it is sufficient to find that one source of the 'other right' … arises by way of the Election Regulations, which codify SRFN election customs. This is a statutory right as the exercise of SRFN's authority to govern via the Election Regulations stems from the *Indian Act*" (at para 96). She relied on *Dickson*'s holding that s 25 rights "are not limited to those that are constitutionally entrenched and may instead include ordinary statutory rights," and concluded that the right in issue "is a statutory right and an 'other right' under s 25" (at para 104). She rejected the argument that

Dickson is distinguishable because the band is not self-governing: "the lack of a formal constitution does not reduce protections afforded by s 25" (at para 143).

Saddle Lake Cree Nation #462 v Collins, 2026 FCA 125 [*Saddle Lake*] is the first appellate application of the framework and calibrates it downward. Roussel JA noted that the band "no longer argues that the *Charter* does not apply …; this issue has been resolved by the recent decision of the Supreme Court of Canada in *Dickson*" (at para 12), confirmed that s 1 arises only if s 25 is inapplicable (at para 25), and held the s 25 claim failed for want of evidence: the band "failed to lead any evidence … that established that the Voting Prohibition fell within the category of an 'other right' that protects interests associated with Indigenous difference. … Simply referring to UNDRIP is insufficient" (at para 28).

Any inherent-right footing faces *R v Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 SCR 821 [*Pamajewon*]. Lamer CJ held that "[a]ssuming without deciding that s 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*" (at para 24); that the claim must be characterized with particularity, since to accept "a broad right to manage the use of their reserve lands" "would be to cast the Court's inquiry at a level of excessive generality" (at para 27); and that the evidence must establish that the activity, and its regulation, was integral to the distinctive culture (at para 28). The *FNIM Reference* recently repeated that rights of self-government "cannot be framed in excessively general terms" and cannot extend to a matter, "for example, the regulation of gambling," that is not integral to the distinctive culture of the First Nations in question, while leaving open whether s 35 protects self-government in child and family services (at para 112). The Court also confirmed that s 91(24) "is broad in scope and relates first and foremost to what is called 'Indianness' or Indigeneity" (at para 94), and that Parliament may give Indigenous laws force of law as federal law by incorporation by reference (at para 127).

Napash characterized the right asserted in defence of an alcohol bylaw as "the right to govern and regulate the possession and consumption of alcohol on its land" (at para 182), rejecting broader formulations as "much too broad" (at para 169) and as failing the *Van der Peet* requirement of precision (at para 172), and reserved to the parties "the right to submit any relevant evidence aimed at establishing or denying the existence of that Aboriginal right" (at para 183).

On the interpretive posture, *Pastion v Dene Tha' First Nation*, 2018 FC 648 [*Pastion*] holds that "[t]he enactment of Indigenous election legislation … is an exercise of self-government," and that "where Indigenous laws ascribe jurisdiction to an Indigenous decision maker, deference towards that decision maker is a consequence of the principle of self-government" (at para 23); Indigenous decision-makers "are particularly well-placed to understand the purposes that Indigenous laws pursue" (at para 22). *Pastion* quotes *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 for the proposition that a First Nation's capacity "to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power" but from an aboriginal right (at para 12).

Finally, *Corbiere* addressed s 25 only briefly. L'Heureux-Dubé J. observed that s 25 rights "are broader than those in s 35, and may include statutory rights," but that "the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms'" (at para 52), declining to articulate a general approach (at para 53). She also characterized the s 85.1 powers as among the band council's "primarily local functions" (at para 75).

<u>ANALYSIS</u>

<u>Issue 1: The bylaw is within the band council's authority</u>

A bylaw prohibiting the sale of alcohol on reserve is the paradigm exercise of s 85.1(1)(a). The provision authorizes bylaws "prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band" in terms that leave no interpretive gap. *Gamblin* states directly that ss 81 and 85.1 "grant band councils the authority to make by-laws for the protection of the community, including bans on intoxicants" (at para 52). *Wolfe* reproduces a Saskatchewan bylaw in materially identical language and treats it as valid throughout. There is no serious argument that alcohol regulation lies outside the scope of the power.

The argument that the bylaw "conflicts with the *Indian Act* provisions on intoxicants" inverts the statutory history. Parliament repealed the federal intoxicant offences in ss 94 to 100 at the very moment it enacted s 85.1. *Wolfe* records the consequence: "Only the source of the prohibition can be said to have changed. Whereas, formerly the *Indian Act* prohibited the introduction of alcohol onto reserves, now the bylaw does." Far from conflicting with the Act, the bylaw occupies the space Parliament deliberately vacated for band choice. The 2014 repeals of s 82 and s 85.1(3) reinforce this: *Hiawatha* reads them as measures to "further relax the minister's role in favour of increasing band council authority and autonomy" (at para 36).

The member's genuine vires argument is procedural, not substantive. Post-2014, formality is policed strictly. *Hiawatha* holds that with the deletion of the "no … defect in form" saving words, "with increased law-making autonomy comes greater accountability for proper form" (at para 43), and that bylaw passage "must follow the rules of law-making in the Act in order to secure the legal weight of enforcement" (at para 65). *Gamblin* and *Meechance* both invalidated council action for failure to use the bylaw form. Three questions therefore require confirmation: whether a special meeting was called for the purpose of considering the bylaw and a majority of electors who voted assented, as s 85.1(2) requires; whether the instrument is a bylaw rather than a band council resolution; and whether it was published as s 86(1) requires, since s 86(4) fixes coming into force on first publication. A failure on any of these defeats the bylaw on administrative grounds without reaching any constitutional question. Note that *Meechance* was decided under the repealed s 82(2) forty-day regime; the modern precondition is s 86 publication plus s 85.1(2) assent, and its statement of the coming-into-force mechanic should not be transposed.

A second conditional point favours the member. Section 85.1(1)(a) speaks of sale "on the reserve." If the delivery service concludes its sales off reserve and merely transports alcohol onto the reserve, whether the conduct is caught depends on the bylaw's actual words and on where the sale or "supply" occurs. *Wolfe* records that the Onion Lake bylaw was described in the narrative as prohibiting the "bringing of alcohol onto the reserve," while the reproduced text tracks the statutory language of selling, bartering, supplying or manufacturing "on the reserve." No authority in this record decides whether delivery into a reserve constitutes sale or supply on the reserve. The argument that delivery is caught as "supply … on the reserve" is available and, in our view, reasonably strong on the ordinary meaning of "supply," but it is untested. If the bylaw were drafted to prohibit conduct outside the s 85.1(1) subject matter, for example "importation" simpliciter, the excess would be *ultra vires* and the member would have a real point. Obtain the bylaw text.

Section 81 supplies overlapping support but should not be over-relied upon. Paragraphs (a), (c), (d), (g) and (n) of s 81(1) plainly reach related ground, and s 83(1)(a.1) supports business licensing. But s 85.1 is the specific alcohol power with its own consent precondition, and a council cannot evade s 85.1(2) by recasting an alcohol prohibition as a s 81 health or zoning bylaw. If the band's instrument was passed under s 81 alone without elector assent, that is a live vires objection.

Penalty discipline matters as well. Enforcement is limited to the summary conviction offence in s 85.1(4)(a), the prohibition order in s 81(2), and restraint by court action under s 81(3). *Gamblin* set aside banishment as beyond the Act's contemplated sanctions (at paras 57-59). If the bylaw purports to impose sanctions the Act does not authorize, those provisions are vulnerable even if the prohibition itself stands.

Issue 2: There is no paramountcy doctrine that reaches this bylaw

The member's paramountcy theory has no doctrine to attach to. Paramountcy, as the Supreme Court states it, operates between valid federal law and inconsistent provincial law: *Canadian Western Bank* at para 69; *FNIM Reference* at para 132. Neither decision addresses, and neither framework contemplates, a conflict between a federal statute and a subordinate instrument that the statute itself authorizes. A bylaw made under s 85.1 is not a competing legislative order; *Hiawatha* holds that it "has the force and effect of a federal regulation" (at para 41). The governing question for a delegated instrument is *ultra vires*: whether the bylaw is "not inconsistent with this Act" within s 81(1) and whether it satisfies the Act's own preconditions. That is Issue 1, not paramountcy.

Where a band bylaw does engage paramountcy, it does so on the federal side. Section 88 makes provincial laws of general application applicable to Indians "except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder": *Charles*. *Meechance* holds that once validated, a bylaw "rendered inoperative those provincial regulations, to the extent that they dealt with non-resident hunters on the reserve" (at para 14). *Hiawatha* confirms at the appellate level that "valid by-laws have paramountcy over laws of general application of the province on the reserve" (at para 42). The direction of travel is the opposite of what the member asserts.

Even on the member's own framing, the argument fails on the merits. The *Multiple Access* test requires actual operational conflict, "as where one enactment says 'yes' and the other says 'no'; … compliance with one is defiance of the other." Compliance with the bylaw is not defiance of the *Indian Act*; the Act does not require that alcohol be sold anywhere. On the frustration branch, *Canadian Western Bank* forbids inferring an occupied field "in the absence of very clear statutory language" (at para 74), and the onus lies on the party invoking the doctrine (at para 75). *Charles* answers the occupied-field version squarely: providing "a mechanism whereby a field might be occupied is a different thing than actually occupying the field." Far from being frustrated, the federal purpose is fulfilled: the repeal of ss 94 to 100 and the enactment of s 85.1 show Parliament intended precisely this local-option outcome.

The strongest form of the member's argument is a purposive one: that by repealing the blanket federal prohibitions in 1985, Parliament chose permissiveness, so a total band ban frustrates that choice. *Canadian Western Bank* recognizes that a purpose can be frustrated without direct textual conflict (at para 73), and in that case the federal scheme was found "permissive not exhaustive." The argument nonetheless fails, because the same 1985 amendment that repealed the offences enacted the express bylaw power. Parliament did not liberalize; it decentralized. *Campbell* describes the design exactly: "Each band is left to decide for itself whether it has the problem and, if so, whether to impose a complete or partial ban."

One genuine exposure that the member's framing overlooks should be flagged. *Gloade* holds that provincial liquor legislation applies to band members on reserve of its own force, because it touches them without touching their "Indianness." A delivery service selling alcohol on reserve without a provincial licence is therefore exposed to provincial prosecution independently of the bylaw, and striking the bylaw would not create a right to sell. *Gloade* was, however, decided under the pre-1985 Act, and two qualifications must be kept open. First, s 88 opens "[s]ubject to the terms of any treaty": if this band is a Treaty 6 signatory, the clause recorded in *Wolfe* ("no intoxicating liquor should be allowed to be introduced or sold") could support an argument that provincial liquor law does not apply on the reserve at all. That axis is unresolved on this record. Second, the interaction of a band prohibition and provincial licensing is a separate live front, as *Rice c Mohawk Council of Kahnawake*, 2009 QCCS 1716 [*Rice*] illustrates, where a member holding a provincial permit but no band permit lost his damages action; the court there assumed rather than decided bylaw validity. Confirm the treaty and, if provincial law is squarely in issue, research s 88 and the provincial liquor statute, neither of which this record develops.

<u>Issue 3: The s. 2(b) claim is very weak</u>

The threshold is not the obstacle: the *Charter* applies. *Dickson* records that "courts at all levels have recognized that the *Charter* applies to Indian band councils exercising governmental powers under the *Indian Act*, because such powers have a statutory foundation and are delegated by Parliament" (at para 57). *Taypotat* identifies the s 85.1(1) bylaw power expressly among the powers that make a council a government entity (at para 36). *Napash* declared the *Charter* applicable to a band prosecuting under an alcohol bylaw (at para 181). And *Dickson*'s scope limit at para 91, reserving the position of inherent self-government untethered from federal legislation, does not bite here, because s 85.1 authority is wholly statutory. *Saddle Lake* treats the threshold as resolved (at para 12).

The claim fails, or very likely fails, at the definition of the protected activity. Under *Irwin Toy*, a purpose is not to control expression "where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed." A prohibition on selling alcohol is directed at the physical consequences of alcohol availability and consumption, not at any meaning conveyed by the transaction, and the harm is "direct, without the intervening element of thought, opinion, belief, or a particular meaning." The purpose branch is therefore not engaged. On the effects branch the member bears the burden and "must at least identify the meaning being conveyed and how it relates to the pursuit of truth," community participation, or self-fulfillment. The bare act of selling a regulated good supplies no such meaning.

Ford gives the member the premise but not the conclusion. Commercial expression is protected: "there is no sound basis on which commercial expression can be excluded from the protection of s 2(b)." But what *Ford* protected was actual expressive content, signs, advertising and firm names, and the Court expressly declined to address "the permissible scope of regulation of advertising … where different governmental interests come into play." Nothing in *Ford* converts the sale of a product into expression. *RJR-MacDonald* is materially distinguishable on the same axis: it struck advertising and promotion prohibitions, and Parliament there had not proscribed the sale, distribution or use of the product. Here the bylaw does the reverse, prohibiting the activity and saying nothing about communication.

Two caveats keep this honest. First, if the bylaw sweeps in advertising or promotion of alcohol, for example a flyer or price list, *RJR-MacDonald* becomes directly relevant and the analysis changes: "[a] complete ban on a form of expression is more difficult to justify than a partial ban," and "[t]he government must show that only a full prohibition will enable it to achieve its objective." Check the bylaw for advertising provisions and, if present, treat them as a separate and materially weaker component. Second, the member's profit motive is not itself an answer: *RJR-MacDonald* holds that "[m]otivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified." The band should not argue the claim away on that footing.

If a *prima facie* breach were established, s 25 must be addressed before s 1: *Dickson* at paras 178-183; *Saddle Lake* at para 25. The band's s 25 position is available in principle but unproven. *Houle* establishes that the "other right" need not be inherent; a statutory right whose exercise "stems from the *Indian Act*" qualifies (at para 96, 104), and the absence of a self-government agreement or constitution is no distinction (at para 143). A s 85.1 bylaw is *a fortiori* tethered to the Act. But *Saddle Lake* is a warning: the band bears an evidentiary burden to demonstrate the right's existence and "the fact that the right protects or recognizes Indigenous difference," and a bare invocation of self-government fails (at para 28). *Napash* reserved the equivalent question for evidence (at para 183). *Corbiere* cautions that legislation relating to Aboriginal people cannot alone bring it within s 25 (at para 52). Whether s 25 shields this bylaw is therefore genuinely open, and it should be advanced only with an evidentiary record: elector-assent history, community harm evidence of the kind recorded in *Campbell* (MBQB) and *Wolfe*, and, if applicable, the Treaty 6 clause, which would put the band on the stronger "treaty" footing rather than the contested "other right" footing.

If s 25 does not apply, s 1 is a strong backstop, though not automatic. *Campbell* (MBQB) records the objective as the welfare and security of reserve inhabitants, holds that "a piecemeal restriction on its availability is simply unrealistic" and that "a blanket prohibition is logical and reasonable," and treated the majority-assent feature as an important element in the balance. *Campbell* holds a court "should be very slow to invalidate a local law on the ground of overbreadth when it has been crafted by those to whom it applies to meet their perceived needs." *Irwin Toy* supports deference on minimal impairment where vulnerable groups are protected, while requiring "a sound evidentiary basis." *Saddle Lake* shows s 1 failing for want of evidence (at para 30 per the record before us, on which we note only the general proposition). The band must therefore lead evidence of the alcohol-related harms motivating the bylaw; *Wolfe* records the kind of record that suffices, including evidence that alcohol problems were pandemic and that 80 percent of RCMP work on the reserve was alcohol-related.

Two limits on *Campbell* must be stated. It is a 1996 Manitoba appellate decision, persuasive but not binding in Saskatchewan; it predates *Dickson*'s s 25 framework; and, most importantly, the applicant withdrew his attack on the sale-prohibition provisions, so the merits concerned possession and intoxication. Its reasoning nonetheless reaches sale by parity: nothing in the three grounds of non-discrimination or in the overbreadth analysis turns on which of the s 85.1(1) prohibitions is in issue, and a sale ban sits further from the liberty and equality core than a possession ban does. In Saskatchewan the in-forum position is favourable: *Wolfe* treated a sale-prohibition bylaw as valid, and *Charles* and *Meechance* confirm provincial superior court comfort with the delegation structure.

<u>Issue 4: The self-governance jurisprudence strengthens, not weakens, the bylaw</u>

The recent jurisprudence does not create a new paramountcy analysis; it reinforces the bylaw's standing while confining the doctrinal routes available to defend it.

Three developments favour the band. First, *Hiawatha* reads the 2014 amendments as deliberately expanding council autonomy in aid of self-governance (at paras 36, 41), and notes that "the evolution towards self-government carries with it an emphasis on legality" (at para 63). Second, *Houle* holds that a statutory right rooted in the *Indian Act* can be an "other right" within s 25, and that the absence of self-governing status is no bar (at paras 96, 143). Third, *Pastion* frames the enactment and application of Indigenous law as an exercise of self-government attracting deference (at para 23), which supports both the s 1 margin and any judicial review posture.

Two developments cut the other way. *Dickson* and *Saddle Lake* together close off the argument that self-governance displaces *Charter* scrutiny of statutory bylaw powers: *Dickson* at para 57 and *Saddle Lake* at para 12 treat that question as settled, and *Taypotat*'s "jurisdictional ghetto" reasoning (at para 39) explains why. And *Saddle Lake* shows that self-governance rhetoric without evidence does not carry s 25 (at para 28).

An inherent-right defence of the bylaw is the weakest route and should not be the primary one. *Pamajewon* requires that any self-government claim be characterized with particularity and be shown, on evidence, to have been integral to the distinctive culture, including that the activity "was the subject of regulation by the [Aboriginal] community" (at para 28). The *FNIM Reference* repeats that such rights "cannot be framed in excessively general terms" and cannot extend to matters like gambling that are not integral to the culture in question (at para 112). *Napash* narrowed the claim in an alcohol case to "the right to govern and regulate the possession and consumption of alcohol on its land" and reserved its existence for evidence (at paras 182-183). Since intoxicants postdate contact, the *Pamajewon* threshold on an alcohol-specific claim would be difficult, and the record here contains no decision establishing such a right. *Pastion*'s quotation of the 2012 *Gamblin* decision, that lawmaking on leadership and governance is "not derived from the *Indian Act* or other statutory power," concerns leadership and governance law specifically and should not be extended to commercial or intoxicant regulation. Section 31 of the *Constitution Act, 1982* also confirms that nothing in the *Charter* extends any body's legislative powers, so an inherent characterization could not rescue a bylaw otherwise invalid.

The practical consequence is that the bylaw should be defended on its statutory footing, with s 25 advanced on the *Houle* route as a statutory "other right" supported by evidence, and s 1 held in reserve. If the band is a Treaty 6 signatory, the treaty prong of s 25 becomes the strongest single argument, given *Wolfe*'s holding that the treaty prohibition survived the 1985 amendments and that only its source changed. Confirm the treaty.

Forum

A *Charter* and vires challenge to a band bylaw would ordinarily proceed in Federal Court, the council being a federal board, commission or other tribunal; *Saddle Lake* confirms Federal Court jurisdiction under s 18.1 for *Charter* challenges to band instruments (at para 10). *O'Soup v Montana*, 2019 SKQB 185 confirms that a Saskatchewan superior court may address the legality of band council conduct where doing so is a necessary step in a proceeding properly before it. The same issues would arise collaterally as a defence to a prosecution under s 85.1(4).

CONCLUSION

The bylaw is within s 85.1(1)(a) and there is no conflict with the *Indian Act*; the Act was amended in 1985 precisely to substitute band prohibition bylaws for the repealed federal offences (Wolfe). The paramountcy argument is misconceived: the doctrine runs between federal and provincial law (*Canadian Western Bank* at para 69; *FNIM Reference* at para 132), and where a bylaw engages it, the bylaw displaces provincial law through s 88 (*Meechance* at para 14; *Hiawatha* at para 42). Even on the member's framing there is no operational conflict and no frustration of federal purpose.

The s 2(b) claim is unlikely to clear the *Irwin Toy* threshold, because a sale prohibition targets the physical consequences of conduct rather than the conveyance of meaning, and the member bears the effects-branch burden of identifying an expressive meaning tied to the s 2(b) values. *Ford* supplies the premise that commercial expression is protected but not the conclusion that selling is expression, and *RJR-MacDonald* is distinguishable because it concerned advertising while the product remained lawful. If a breach were found, s 25 is available in principle on the *Houle* statutory-right route but is untested for an alcohol bylaw and requires evidence (*Saddle Lake* at para 28), and s 1 is strong on the *Campbell* line but also evidence-dependent.

The member's best arguments are not the ones pleaded. They are: (1) non-compliance with s 85.1(2) elector assent, use of a resolution rather than a bylaw, or failure to publish under s 86, any of which defeats the bylaw on administrative grounds given *Hiawatha* at para 43 and *Gamblin* at para 59; (2) that his sales are not "on the reserve" within s 85.1(1)(a) and the bylaw's own words, a situs question no authority in this record decides; and (3) if the bylaw includes advertising restrictions or sanctions beyond ss 81(1)(r), 81(2)-(3) and 85.1(4), those components are separately vulnerable.

Four facts must be confirmed before advice is finalized: the bylaw's exact text; the enactment record, including the special meeting, the vote, and publication; whether the band is a Treaty 6 signatory; and where the delivery service's sales are concluded. The answers on issues 1 and 3 are conditional on the first two; the strength of the s 25 defence is conditional on the third; and the bylaw's application to this member is conditional on the fourth. A separate exposure exists under provincial liquor law independently of the bylaw (Gloade), subject to the unresolved s 88 treaty qualification.