DEVELOPMENT OF ABORIGINAL LANDS: SUCCESSES, RISKS AND ENVIRONMENTAL CONCERNS RESPECTING CONTAMINATED SITES

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I. INTRODUCTION

This paper provides an overview of the most common land management regimes that govern development and environmental management on First Nations lands in B.C., discusses the successes and challenges First Nations face with respect to the current policy based regime that applies to contaminated sites on most Indian reserves in B.C. and proposes strategies for moving forward as the options for development and protection of the environment on First Nations lands expand. Specific examples of the Squamish First Nation's experience with addressing contaminated sites on its Indian reserves are provided where applicable.

II. WHICH FIRST NATIONS LAND MANAGEMENT REGIME APPLIES TO THE CONTAMINATED SITE?

A. *INDIAN ACT*, R.S.C., 1985, c. I-5

Indian reserves are "lands reserved for Indians" under section 91(24) of the *Constitution Act*, 1982. Thus, Parliament has exclusive legislative jurisdiction with respect to their development and management. Canada has regulated development and land management by way of the *Indian Act* since 1868. Under the *Indian Act*, Indian reserves are vested in Her Majesty and are held "for the use and benefit" of an Indian Band. Canada must approve any use of reserve land by third parties. The Minister must approve permits under section 28(2) and Cabinet must approve a designation of reserve land under section 38(2). Any other arrangements with non-members of the First Nation are, technically, invalid under section 28(1). A "designation" is a surrender of a right or interest in reserve land that is not "absolute". Usually, a designation is for the purpose of a long term lease arrangement for commercial or industrial purposes. A designation must be approved by a majority of the electors of a First Nation. (Section 39)

The *Indian Act* does not include specific provisions for protection of the environment on Indian reserve lands. First Nations whose land management is governed by the *Indian Act* do not have the authority to make bylaws with respect to environmental protection on Indian reserve land. The federal government does not have comprehensive legislation in place for identification and remediation of contaminated sites. There is federal legislation that addresses pollution, hazardous substances, wastewater quality standards, ocean dumping and emergency response and clean up of spills in the marine environment[1], but there is no comprehensive federal legislation that regulates contaminated sites on Indian reserves. The Indian Reserve Waste Disposal Regulations are a tool First Nations can use but are of limited value in protecting the environment because their scope is narrow. Therefore, these First Nations need to rely on Federal laws and policy and permitting and leasing arrangements to prevent and remediate contaminated sites. The key federal government program addressing contaminated sites on Indian reserves is the Federal Contaminated Sites Action Plan which is discussed further below.

Aboriginal Affairs and North Development Canada (AANDC), and its predecessors, are guided by the department's "Land Management Manual", when considering whether or not to, and on what conditions, Canada should grant interests in reserve land to third parties. Chapter 12 of the Manual deals specifically with "Environmental Obligations". This chapter includes the following requirements:

1. An Environmental Site Assessment (ESA) is required prior to Canada granting an interest in land to ensure that the land in question is capable of supporting the contemplated land use;

[1] See for example, the *Fisheries Act,* R.S.C., 1985, c. F-12, *Canada Marine Act*, S.C. 1998, c. 10 and *Canadian Environmental Protection Act,* S.C. 1999, c. 33 and their Regulations.

2. The proponent of the project is responsible for funding the appropriate environmental management process including ESAs and Environmental Assessments (EAs);

3. ESAs must be undertaken in accordance with the *Canadian Standards Association (CSA)* standards and by a qualified assessor;

4. Phase I ESAs which are five years and older will be deemed to be stale dated and will require a re-assessment;

5. Re-assessment of an ESA may be undertaken at the recommendation of a qualified assessor if, based on listed criteria, it is determined that changes to land use or environmental law and policy are significant enough to render the report stale-dated; and

6. The AANDC Regional Office must ensure that the results and recommendations of ESAs and EAs are incorporated into the terms and conditions of land instruments granting interests in reserve land, (e.g., who is responsible for environmental clean-up, risk management and monitoring?).[2]

B. *FIRST NATIONS LAND MANAGEMENT ACT*, S.C. 1999, c. 24

In 1991, a group of First Nation Chiefs approached AANDC with a proposal to allow First Nations to opt out of the *Indian Act* provisions dealing with land and resources management on Indian reserves. These discussions resulted in the negotiation of the Framework Agreement on First Nation Land Management (Framework Agreement), signed by Canada and 14 First Nations in 1996.[3] The *First Nations Land Management Act* (FNLMA) which received Royal Assent on June 17, 1999, ratified and gave effect to the Framework Agreement. The Squamish Nation was among the first 14 First Nations who negotiated the Framework Agreement. The FNLMA enables First Nations in B.C., with the support of the majority of the members of their communities,

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[2] For more information see the INAC Land Management Manual at: http://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738.

[3] http://www.fafnlm.com/framework-agreement.html

to take over administration and control of their Indian reserve lands from Canada. This includes withdrawing the lands from the land management provisions of the *Indian Act* and passing its own land use and management law, usually called a Land Code. In 2002 the regime was opened up to other First Nations and there are currently 30 First Nations operating with their own Land Codes across Canada. Canada transfers administration and control of the reserve land to the First Nations via an Individual Agreement which describes the lands to be transferred and the terms and conditions of the transfer. Once a First Nation has voted in favour of their Individual Agreement and Land Code, the First Nation is considered "operational" under the FNLMA regime.

Under section 7 of the FNLMA, a First Nation and Canada may agree to exclude from the application of the Land Code a portion of the First Nation's reserve lands if these are in an environmentally unsound condition that cannot be remedied by measures that are technically and financially feasible before the date that the land code is to be submitted for community approval.

Under section 34 of the FNLMA, a First Nation is not liable in respect of anything done or omitted to be done before the coming into force of its land code by Canada in relation to First Nation land and Canada indemnifies a First Nation for any loss suffered by the First Nation as a result of an act or omission of Canada prior to the coming into force of its land code. The same applies vis a vis Canada, to acts and omissions of the First Nation after the Land Code comes into effect. Thus, part of the negotiation of the Individual Agreement includes identifying, and where possible, remediating contaminated sites that exist prior to the First Nation's land code coming into force. Canada funds this process.

Under sections 20(1)(b) and 20(2)(c) of the FNLMA, First Nations with their own Land Code may pass laws respecting "development, conservation, protection, management, use and possession of First Nation Lands" and respecting "environmental protection".

Under section 21(2) of the FNLMA and section 24.5 of the Framework Agreement, environmental protection standards and punishments for failing to meet those standards in a First Nation law, must meet or beat provincial standards. Under section 40(2) of the FNLMA and section 24.6 of the Framework Agreement, if there is any inconsistency or conflict between a First Nation's environmental protection law and a federal environmental protection law, the federal environmental protection law applies.[4]

Under sections 24.1 through 24.8 of the Framework Agreement and section 21(1) of the FNLMA operational First Nations are required to enter into an Environmental Management Agreement (EMA) with Canada prior to enacting laws in relation to environmental protection. Section 24.3 of the Framework Agreement states that the EMA is "a plan on how the First Nation will enact environmental protection laws deemed essential by the First Nation and the Minister of the Environment. It will also include timing, resource, inspection and enforcement requirements."[5] There is a lot of uncertainty regarding the meaning and intention of the Framework Agreement and the FNLMA provisions regarding EMAs. First Nations feel Canada has tried to maintain too much control over the content of their environmental laws than is intended or required by the Framework Agreement and the FNLMA.

The writer is not aware of any First Nation in Canada who has entered into an EMA with Canada or passed its own environmental protection laws under its own Land Code. It is likely that many First Nations are considering referentially incorporating provincial laws to avoid duplication of laws and uncertainty regarding use and development of

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[4] As noted above, the key pieces of federal legislation that govern environmental protection are the *Canadian Environmental Protection Act* and the *Fisheries Act* which continue to apply to First Nation's land under the FNLMA (s. 40(2)). The key piece of provincial legislation is the *Environmental Management Act*, S.B.C. 2003, c. 53 and its Contaminated Sites Regulation (B.C. Reg. 375/96).

[5] The areas of environmental protection that the parties to the Framework Agreement deemed to be "essential for all First Nations" are:
(a) solid waste management;
(b) fuel storage tank management;
(c) sewage treatment;
(d) environmental emergencies. (Section 24.4)
It is interesting that managing contaminants and pollution on Indian reserves is not listed in section 24.4 as an "essential" area to cover in an EMA, yet that is one of the first subjects that come to mind when one considers the plain meaning of the term "environmental protection".

First Nations Land under a Land Code. However, operational funding from Canada is limited. Thus, such laws may not be passed until First Nations are able to increase their own source revenue.

C. *FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT ACT*, S.C. 2005, c. 53

The *First Nations Commercial and Industrial Development Act* (FNCIDA) was introduced in the House of Commons on November 2, 2005, and came into force on April 1, 2006. The primary purpose of this legislation is to close the regulatory gap on Indian reserves and allow complex commercial and industrial projects to proceed in a more certain regulatory environment. This regulatory gap includes the lack of environmental protection laws on Indian reserves.

FNCIDA allows the federal government to produce regulations for complex commercial and industrial development projects on Indian reserves. The Act essentially provides for the adoption of regulations on Indian reserves that are compatible with provincial laws that apply outside the reserve. This compatibility with existing provincial regulations increases certainty for the public and developers while minimizing costs.

Federal regulations are only made under FNCIDA at the request of participating First Nations. The regulations are project-specific, developed in cooperation with the First Nation and the relevant province, and are limited to the particular lands described in the project.

These regulations allow the government to delegate monitoring and enforcement of the new regulatory regime to the province via an agreement between the federal government, the First Nation and the province.

This First Nation-led legislative initiative was developed in cooperation with five partnering First Nations: Squamish Nation of British Columbia; Fort McKay First Nation and Tsuu T'ina Nation of Alberta; Carry the Kettle First Nation of Saskatchewan and Fort William First Nation of Ontario. All five partnering First Nations passed Band Council Resolutions in support of the legislative initiative, and some have advanced plans for various commercial or industrial projects using FNCIDA, and some have advanced plans for various commercial or industrial projects using FNCIDA.[6]

The proposed Haisla Nation Liquefied Natural Gas Facility Regulations were published in the Canada Gazette Part 1 on July 28, 2012.[7] The Haisla Nation is planning for the development of a liquefied natural gas export facility, in conjunction with a consortium of corporate partners (Kitimat LNG), on its Bees Indian Reserve No. 6 in British Columbia. The Executive Summary of the Regulation states that in the absence of an adequate federal regulatory regime to ensure environmental protection, health and safety, and investor certainty, the proposed liquefied natural gas project would likely not proceed, thereby depriving the Haisla Nation and British Columbia of significant direct and indirect economic benefits. The Regulation incorporates and applies the B.C. *Environmental Management Act* (EMA) and many of its Regulations, including the Contaminated Sites Regulation (CSR), with some minor adaptations.

The Squamish First Nation Regulation relating to proposed market residential condominium towers on Capilano IR No. 5 in West Vancouver are in the process of being written. They also contemplate applying the EMA and CSR with some adaptations.[8]

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[6] http://www.aadnc-aandc.gc.ca/eng/1100100033561/1100100033562
[7] http://www.gazette.gc.ca/rp-pr/p1/2012/2012-07-28/html/reg1-eng.html
[8] Pers. Comm. with K. Stephan, legal counsel to the Squamish Nation.

D. TREATY LANDS IN B.C.[9]

Three First Nations in B.C. are managing their former reserve lands and other traditional lands under modern land claims agreements, or Treaties, they have entered into with the B.C. and Canadian governments – Nisga'a Nation, Tsawwassen First Nation and Maa Nulth First Nations.[10] Other Treaties are awaiting ratification or implementation (Yale First Nation and Sliammon First Nation) and several are in the process of negotiation.[11] Treaties in B.C. usually provide that Provincial law will apply on First Nation Lands.[12] Therefore, subject to the terms of the Treaty and any laws passed by the First Nation under the Treaty, BC's EMA and CSR will apply to a contaminated site that existed prior to the Treaty implementation date or a site that becomes contaminated after the Treaty is implemented. Some Treaties create a process for managing contaminated sites that existed at the time the lands were transferred to a First Nation under a Treaty. For example, section 2.9 of the Maa Nulth Treaty, creates a process for BC to remediate some Treaty Lands of the Toquaht Nation if the Nation decides to develop the lands and it is determined that the lands are contaminated based on the standards of the BC EMA.

B.C. Treaties enable First Nations to pass their own environmental protection laws. For example, the Maa Nulth First Nations may make laws to protect, preserve and conserve the environment including the prevention, mitigation and remediation of pollution and degradation of the environment.[13] Some First Nations have passed environmental protection laws that mimic the regulatory system under the B.C. EMA.[14] Although the writer is not aware of any Treaty First Nations in B.C. who have legislated environmental quality standards at this time, it is anticipated that many Treaty First

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[9] This paper considers only modern day Treaties in BC, not historical Treaties. This paper does not review the powers of the Westbank First Nation and Sechelt First Nation under their Self-government Agreements with Canada.

[10] Note that the Nisga'a Final Agreement was negotiated outside the B.C. Treaty Commission process.

[11] See www.bctreaty.net for more detailed information regarding the treaty process.

[12] See for example, s. 1.5.1 of the Maa Nulth Final Agreement.

[13] Section 22.4.1 of the Maa Nulth Final Agreement. Note that s. 22.4.2 states: Federal Law or Provincial Law prevails to the extent of a Conflict with Maa-nulth First Nation Law under 22.4.1.

[14] See for example the Yuułuʔiłʔatḥ *Environmental Protection Act*: http://www.ufn.ca/index.php?page=11.

Nations will apply provincial environmental quality standards from the B.C. CSR in order to create consistency between on and off-reserve economic development.[15]

III. FEDERAL CONTAMINATED SITES MANAGEMENT PROGRAM

A. OVERVIEW

As noted above, Indian reserves are vested in Her Majesty the Queen in Right of Canada. They are federal lands under Canadian law and policy. Canada manages contaminated sites on federal land by way of policy (subordinate legislation) rather than legislation. Canada's contaminated sites management policy is not, however, overseen by Environment Canada. It is Treasury Board that approves policy for management of federal real property. Contaminated sites fall under this policy. An overview of the policy is found in the Treasury Board Policy on Management of Real Property, dated November 1, 2006:

> 6.1.12 Known and suspected contaminated sites are assessed and classified and risk management principles are applied to determine the most appropriate and cost-effective course of action for each site. Priority must be given to sites posing the highest human health and ecological risks. Management activities (including remediation) must be undertaken to the extent required for current or intended federal use. These activities must be guided by standards endorsed by the Canadian Council of Ministers of the Environment (CCME) or similar standards or requirements that may be applicable abroad. The costs of managing contamination caused by others must be recovered, when this is economically feasible.[16]

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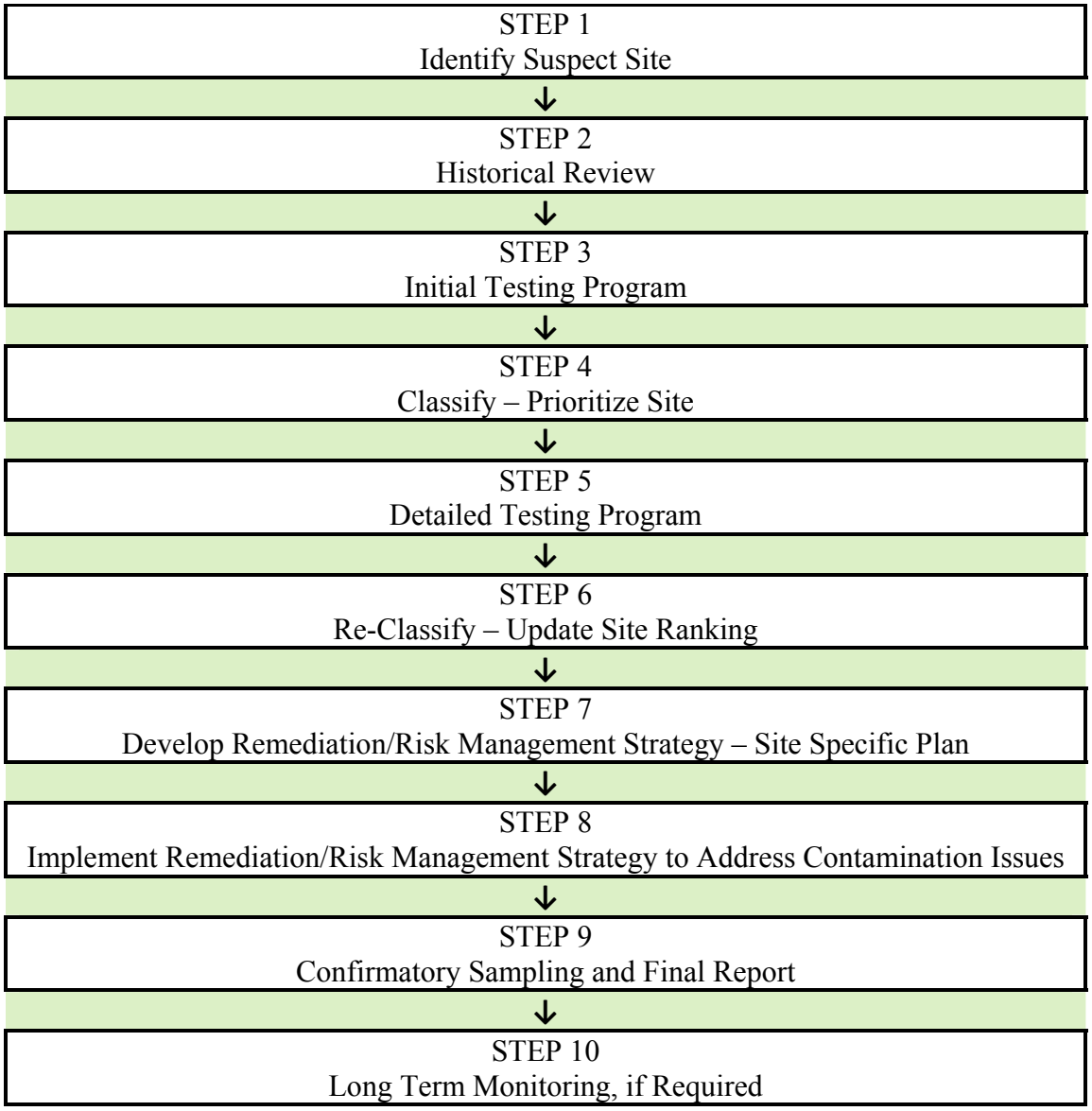
[15] Pers. Comm. with B. Lehmann, Ratcliff & Company, legal counsel to Maa Nulth First Nations.

[16] http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12042&section=text Contaminated Sites are classified by the National Classification System for Contaminated Sites prepared by the CCME: http://www.ccme.ca/assets/pdf/pn_1403_ncscs_guidance_e.pdf

Canada's approach to addressing contaminated sites is set out in a federal policy document titled "A Federal Approach to Contaminated Sites" dated November 2000 and prepared by the Contaminated Sites Management Working Group. An overview of Canada's 10 step approach is set out in Figure 1 of the document and is reproduced here:[17]



[17] From the Report of the Commissioner of the Environment and Sustainable Development – Spring 2012, Chapter 3, Federal Contaminated Sites and Their Impacts. (http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201205_03_e_36775.html#hd5b, p. 73.)

Similar to the approach to assessing and remediating contaminated sites on Provincial lands the federal process generally involves an environmental site assessment of a site to determine if it is contaminated, a detailed assessment of scope and nature of contamination, a risk assessment, remediation planning, implementation of remediation plan and environmental monitoring. However, the standards that apply to determine if a site is contaminated and used for remediation planning are the non-legally binding environmental quality objectives of the Canadian Council of Minister of the Environment (CCME).[18] Generally speaking these guidelines are more stringent than the standards created by the B.C. CSR under the EMA.

B. ROLE OF TREASURY BOARD

The Treasury Board of Canada Secretariat maintains a database called the Federal Contaminated Sites Inventory. Federal departments and custodians of federal land put data into this inventory, which serves as a record of basic information on sites for which the Government of Canada has accepted responsibility. The inventory includes such information as location of the site, contaminants, quantity of contamination, proximity to human population, and current status of each site. The site is searchable online.[19] As of March, 2011 there were approximately 22,000 sites in the inventory.

The Treasury Board Secretariat develops and monitors implementation of Federal Contaminated Sites Policy and Environment Canada administers and co-ordinates the program. Each federal department or agency with responsibility for federal lands is responsible for identifying, assessing, managing and remediating contaminated sites on their lands in accordance with policies they must develop.

Funds for the management of federal contaminated sites are obtained through the Federal Contaminated Sites Action Plan (FCSAP). Commenced in 2005, this program

[18] The CCME Environmental Quality Guidelines can be found at: http://www.ccme.ca/publications/ceqg_rcqe.html.
[19] http://www.tbs-sct.gc.ca/fcsi-rscf/home-accueil-eng.aspx

was to receive $3.5 billion in cost-shared funds to be used over 15 years. It supports projects that meet certain administrative criteria and technical criteria. Just over one-third of the sites listed in the Federal Contaminated Sites Inventory as of March 2011 are funded through this program. Canada estimates that its financial liabilities associated with 2,200 contaminated sites to be $4.3 billion. However, a recent report of the Commissioner of the Environment and Sustainable Development estimated that 81% of the sites in the inventory have not been studied sufficiently to understand the full extent of the federal government's exposure to liability.[20] This suggests much more funding is required to assess and remediate federal contaminated sites.

C. AANDC'S CONTAMINATED SITES MANAGEMENT POLICY

Indian reserves in BC not subject to a Land Code or Treaty are managed by the BC Regional office of AANDC. AANDC is a key player in the FCSAP. In 2009, it had the largest contaminated sites liability among all custodial federal departments.[21] AANDC's key policy documents for managing contaminated sites on Indian reserves is the Contaminated Sites Management Program (CSMP) and Policy.[22] AANDC's policy dates back to 2002. AANDC also has its own information management system for contaminated sites it manages. It is the Environmental Stewardship Strategy Information Management System (ESSIMS). This database is not available to the public. This database feeds information to the Federal Contaminated Sites Inventory referred to above.

AANDC's Contaminated Sites Management Policy is guided by the Treasury Board Management of Real Property Policy. The principles and objectives of the AANDC policy emphasize the following:

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[20] http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201205_03_e_36775.html#hd5b, p. 78 and 81.
[21] Evaluation of INAC's Contaminated Sites Management Policy and Program, December 4, 2008. http://www.aadnc-aandc.gc.ca/eng/1100100011881/1100100011892
[22] http://www.aadnc-aandc.gc.ca/eng/1100100034643/1100100034644 and http://www.aadnc-aandc.gc.ca/eng/1100100034640/1100100034641. AANDC also manages the Northern Contaminated Sites Management Program which is separate from the CSMP.

(a) The approach to managing contaminated sites is risk-based.

(b) AANDC promotes the "polluter pays" principle.

(c) Priorities for managing contaminated sites are:

(i) human health and safety;

(ii) legal and claims obligations;

(iii) significant impacts on the environment; and

(iv) concerns of First Nations, Inuit, Northerners and other stakeholders.

(d) AANDC will manage future policies and programs to prevent future contaminated sites liabilities to the Crown.

(e) The program is subject to "available resources" appropriated by the Treasury Board.[23]

D. BENEFITS AND CHALLENGES

The FCSAP and associated federal policy, has been used successfully by First Nations in B.C. to remediate contaminated sites on Indian reserves mostly when human health is at risk and Canada is unable, for a variety of reasons, to apply the "polluter pays" principle. Often, federal policy enables the parties to apply the more stringent environmental quality standard as between the federal CCME guidelines discussed above and the standards set out in the CSR. Mostly, the program seems to be most effective when the program is linked to processes that involve First Nations recovering management and control of their lands through processes such as the FNLMA or Treaty negotiations. (See more detailed discussion below.) Contaminated sites on federal

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[23] See the Treasury Board Policy on Management of Real Property dated November 1, 2006 (http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12042&section=text) and AANDC Contaminated Sites Management Policy (http://www.aadnc-aandc.gc.ca/eng/1100100034643/1100100034644) Note that the Treasury Board Policy on Management of Real Property replaced a more specific policy titled Treasury Board Federal Contaminated Sites Management Policy dated July 1, 2002. The latter policy is archived online at: http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/realproperty/fcsmp-gscf01-eng.asp#Effective.

lands in B.C. benefit from the colder climate in much of the rest of the country because if funding becomes available in the last quarter of a fiscal year, sometimes B.C. is the only province where excavation and other remediation work can be undertaken.

However, the program has many challenges especially for First Nations operating under the *Indian Act* land management regime discussed above. For example:

The program is not a regulatory regime: FCSAP and the Treasury Board land management policies are risk management based programs which are focused on limiting Canada's exposure to liability going forward, rather than preventing or regulating contaminated sites on Indian reserve lands. The program does not authorize a decision-maker to identify a contaminated site, determine liability, issue remediation orders or recover costs of clean up, as the B.C. EMA does. The lack of regulatory regime, together with the fact that AANDC does not have the resources to monitor the Indian reserve lands it manages fuels the perception that Indian reserves are environmental enclaves.

Uncertainty regarding the Crown's fiduciary duty for lessee's pollution: The federal Crown likely owes a fiduciary duty to a First Nation to protect its reserve land from contamination by lessees that occurs under a lease of reserve land between the lessee and Canada (on behalf of the First Nation). However, the scope and nature of that duty are uncertain. The courts in Canada have not considered the issue directly. The uncertainty makes it more difficult to ensure these sites fit within the Federal policy's priorities.

Discretion in AANDC/Canada: The FCSAP program provides complete discretion in the regional AANDC offices. The means by which decisions are made is not transparent and it is unclear if the CSMP priorities and policies are being applied consistently, therefore, creating much uncertainty for First Nations.

"Polluter Pays" Policy: Since Canada promotes the "polluter pays" principle, if a polluter exists, the regime does not assist a First Nation because Canada cannot "order" a polluter to remediate a site. The writer has experienced Canada using this aspect of federal policy to justify not applying funds to contaminated site identified under the program (at least where no human health or serious environmental risk exists.)

Lack of Financial/Political Support: As identified by the Commissioner's report, there are many more contaminated sites in the federal inventory than funds available for their management. As a result, despite the list of priorities in AANDC's policy, in reality, only Class I sites with a human health risk have any real chance of receiving funding. In the 2009 – 10 and 2010 – 11 fiscal years, the program received a $245 million influx of $245 million in funding from Canada's Economic Action Plan but that funding is no longer being provided.

Inability of First Nations to develop legally binding Land Use Plans: As per federal policy, lands are to be remediated as per their "current or intended use". Due to barriers to economic development of First Nation's lands, many Indian reserve lands are underutilized and not being utilized for their highest and best use. The *Indian Act* does not enable a First Nation to make bylaws with respect to land use plans. Without legally binding land use plans, what is the appropriate environmental benchmark for assessing and remediating a contaminated site on Indian reserve land is often a difficult issue to negotiate in the federal process.

Different objectives between First Nations and Canada: First Nations generally wish to have their Indian reserve lands remediated to a standard that will enable them to meet housing needs and/or economic development objectives. Since Canada is paying for the costs of assessing and remediating the contaminated sites, aside from situations where the site creates significant risks to human health or the environment, its primary objective is to appropriately assess and remediate the lands at the least cost to tax payers. These different objectives often make it difficult to agree on the environmental quality objectives and best remediation option to apply at a site.

IV. THE SQUAMISH NATION EXPERIENCE – SUCCESSES, CHALLENGES AND STRATEGIES GOING FORWARD

A. SUCCESSES

1. First Nations Land Management Initiative

The Squamish First Nation Chiefs and Council approved an Individual Agreement and Land Code for the Nation in the Spring of 2011 but the documents were not ratified by the Squamish First Nation members when put to a double majority vote in May, 2011.

The Squamish Nation and Canada undertook quite an extensive contaminated sites identification and remediation program during the negotiation of the Individual Agreement. The Nation had to negotiate hard for Canada to agree to fund the process through the FCSAP and FNLMA programs. The Nation argued that it has some of the most valuable Indian reserve land in all of Canada much of which had historically been used for industrial operations with insufficient leasing provisions in place to protect the environment.

Phase I ESAs were undertaken on all 24 Squamish Indian reserves. Phase II ESAs were required on most of the Indian reserves. Human health and ecological risk assessments of several areas of environmental concern (AEC) were undertaken. Three AECs were remediated by excavation and offsite disposal of contaminated soils during the process and it was determined that many sites could be risk managed. Although there is still work to be done, the information obtained during the FNLMA process has been and will be valuable to the Nation. As discussed below, the process assisted the Nation and Canada to determine that one contaminated sited would be excluded from application of the Squamish Nation Land Code had it been ratified.

Some AECs identified during the FNLMA process on Xwmélch'tstn (Capilano IR No.5) were part of an historical gravel pit operation. The pit was subsequently filled with unsuitable, imported fill from several untracked sources. Primary contaminants identified were hydrocarbons and creosote to a depth of 8 metres in some places. The FCSAP program funded the remediation of this site which involved excavation and off-site disposal of soil above the CCME commercial standards because the site is designated for commercial use in the Capilano Master Plan, December 2004. 6,345 cubic metres (12,971 tonnes) of soil was excavated and classified and 1,037 cubic meters (2,075 tonnes) of soil was disposed offsite. The site has now been approved by the Squamish Nation membership for designation under the *Indian Act* for commercial development purposes.

2. Parcel G Member Housing Project - Xwmélch'tstn (Capilano IR No.5)

Parcel G is an area of land on Xwmélch'tstn that is approximately 22 hectares in size and that is designated in the Squamish Nation Capilano Master Plan for residential development for Squamish Nation members. Contamination of Parcel G is primarily hydrocarbons and some metals caused by unsuitable filling of the large gravel pit that historically operated on Xwmélch'tstn. The environmental investigations and remediation that have been required for the project have not been funded by AANDC, despite the similarity with the commercial area on Xwmélch'tstn that was remediated by AANDC under FCSAP. The Nation has funded the environmental work through its own-source revenues because of the urgent need for housing for its members. Given membership growth and an aging population the demand for on-reserve housing by Squamish members exceeds 800 members and their family.

The area has been and will be developed in eight phases. Phases 1 to 3 have been completed and the Nation is seeking further capital funds from AANDC to complete the project. The eight phase project will result in 318 additional lots for Squamish Nation member housing.

The Nation's remediation planning has enabled it to construct the first four phases of the project in areas with the least amount of contamination and to address the contamination on a lot by lot basis. Discussions between the Nation and AANDC regarding funding of environmental clean-up during future phases of the project is ongoing.

B. CHALLENGES

1. Pacific Environment Centre Site on Xwmélch'tstn (Capilano IR No.5)

In 1974, the Minster of Indian Affairs and Northern Development leased waterfront lands located on Xwmélch'tstn on the east of the Lion's Gate Bridge right-of-way, to Public Works Lands Company Limited (now called Canada Lands Company Limited) for the purpose of allowing Environment Canada to develop a Pacific Environment Centre. The Pacific Environment Centre ("PEC") was never built, but part of the lands were sub-leased to Vancouver Wharves Ltd. ("Vancouver Wharves") which was in the business of exporting mineral ores. Ores were stockpiled on and off the sub-leased lands and contaminated the soil and groundwater.

In the 1990s, federal and provincial regulators became aware that heavy metals were migrating from the PEC site into the receiving waters of Burrard Inlet. Environment Canada conducted environmental studies of the soil and groundwater of the PEC site, and discovered high concentrations of heavy metals migrating underground water from the Vancouver Wharves site onto the PEC site, and then into Burrard Inlet. Canada has excavated some areas of contaminated soil and installed a permeable reactive barrier along the shore of Burrard Inlet to remove contaminants from the groundwater before it enters the Inlet. The site is designated in the Squamish First Nation Capilano Master Plan for green space and market residential development by the Nation in the future. Therefore, Canada's remediation plan includes extensive excavation of contaminated soil before the lands are utilized for residential purposes. The cost of remediation is in the tens of millions of dollars.

Issues the Nation has faced as a result of this site include:

(a) no regulatory regime available to force clean up;

(b) costs incurred to understand the nature and extent of the environmental issues and potential impacts on Squamish people and the environment;

(c) disputes regarding when remediation should occur (now or at the end of the lease);

(d) disputes regarding whether remediation objectives should be based on risk based or numerical standards or if the remediation objective should be to return the lands and waters to the condition they were in prior to the lease being granted;

(e) the role of the Nation in the assessment and remediation process when it is not technically the landlord but has the most at stake going forward; and

(f) how to move forward to utilize the site for its highest and best use.

The Nation had decided to exclude the site from the application of its Land Code (had it been ratified by the membership) because of its environmental condition.

2. Brownfield Redevelopment

Aside from preventing contaminated sites from arising in the future, the biggest challenge for the Squamish Nation going forward is how to ensure highest and best use of contaminated sites that are not posing a risk to human health or the environment but increase the costs of development of lands. Development of contaminated sites on Indian reserves managed under the *Indian Act* face unique challenges compared to "Brownfields" located off Indian reserves, such as lack of investor confidence, financing (lands cannot be mortgaged) and the need for servicing agreements with neighbouring local government bodies. This makes the redevelopment of these sites even more challenging to address.

C. STRATEGIES GOING FORWARD

1. Leasing Provisions regarding Environmental Protection

Some contaminated sites on Indian reserves are caused, at least in part, by the lack of a legally binding or enforceable lease or permit being in place or because these instruments did not contain adequate provisions for environmental protection or for allocating the liability associated with environmental issues. An important requirement for preventing future contamination of First Nation land is to include fair and reasonable provisions in leases that meet industry standards of the day.

2. New Land Management Regimes – FNLMA, FNCIDA and Treaties

Where they meet other objectives of a First Nation, the new land management regimes created by the FNLMA, FNCIDA and Treaties can provide better avenues for environmental protection while at the same time encouraging development of Brownfields by improving investor confidence, financing options and servicing arrangements. All three regimes appear to be moving in the direction of applying B.C. environmental protection laws and standards on Indian reserves or former Indian reserves and utilizing existing provincial regimes for enforcement and monitoring. Subject to any applicable agreements or Treaties which apply to the transition to the new regime, the B.C. EMA may apply to sites that were contaminated prior to the new regime coming into effect.[24]

3. Environmental Assessment of Projects

Improving environmental assessment processes that apply to proposed projects on First Nation's land is another method for preventing environmental contamination caused by development of the lands. As with environmental protection laws, First Nation's subject to the *Indian Act* do not have bylaw making power under the

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[24] It is possible that Canada could be a "responsible person" under the EMA because it is a "current owner" or "previous owner" of Indian reserve land (s. 45 and 46 of the EMA and s. 29 of the CSR). However, in the absence of a specific provision in the EMA, it is not certain in constitutional law if a provincial law can apply to the Federal Crown.

Indian Act to pass an environmental assessment law. However, First Nations can develop internal policies and procedures that incorporate environmental assessment into their development processes. The FNLMA and Treaties enable First Nations to pass their own environmental assessment laws.

4. Develop a Brownfield Strategy

   First Nations who have contaminated sites located on lands with relatively high value, can develop strategies for redevelopment of those sites for their highest and best use. Such a strategy needs to take into consideration the unique circumstances on First Nations lands created by the *Indian Act* or the other land management regimes discussed above.

5. Land Use Planning

   Land use planning on Indian reserves can help to ensure the lands are utilized for their highest and best use rather than, as they have been historically, using them mostly for industrial uses. This can help prevent environmental damage to the lands and waters. Although not legally binding under the *Indian* Act, a well thought out and comprehensive land use plan approved by a Band Council in consultation with membership can be a persuasive tool when negotiating assessment standards and remediation objectives with third parties.