Contaminated Sites on First Nation Lands

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Introduction

Contaminated sites on First Nation lands are a pervasive issue all across Canada. Contamination is a concern for First Nations and non-First Nations alike as the adverse impacts of pollution and toxins in the ground are notoriously long-lasting and difficult to contain. Certainly, leachate does not care where a jurisdictional boundary lies. Remediation of these sites is challenging because it requires a coherent interjurisdictional management plan. Issues such as inadequate, conflicting or absent legislation, lack of funding and, most significantly, competing jurisdictions, make monitoring, enforcement and clean-up on First Nations lands complex and very costly.

The challenge of regulating contamination across jurisdictional boundaries cannot be understated. The recent example of a permit issued for biosolid waste dumping in the Nicola Valley aptly demonstrates the complex factors at play. In that case, a local waste management company received a permit to spread treated sewage sludge on lands in Merritt, B.C. The subject lands are within the traditional territories of several local First Nations and also within the vicinity of their reserve lands. First Nations and local community members united in their concerns about leachate from the biosolids impacting local water supplies and adversely affecting the ecosystem. The First Nations were also worried about impacts on their Aboriginal rights. There were blockades of the road to the treatment facility and the First Nations came together to take over Premier Christy Clark's constituency office in West Kelowna for several days. When asked for comment on how the permit had come to be approved the Premier stated: "the problem is there are a number of agencies in the provincial government plus the [Agricultural Land Commission] involved, and the permit was issued by the regional district. There's a lot of hands in the pot here, so it's taking a little bit more time than I would have hoped to get it settled." [1]

The Premier's words are a good representation of what can often happen in the provincial and local government context. When we are dealing with contamination on First Nation lands, the number of hands in the pot is increased exponentially, as is the amount of time it can take to navigate issues. The competing jurisdictions of the federal and provincial Crowns, the First Nations themselves, and even local governments create a complex web of legislative and regulatory tools that can conflict with one another. Responsibility for execution of remediation and accessibility of funding sources varies across jurisdictions as well.

In this paper, I will discuss the various legislative regimes that govern environmental regulation on First Nation lands and how these regimes impact management of contaminated sites. I will also look at the ways that the Province and First Nations could work together within the existing framework to better address site contamination on reserve.

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[1] Danny Kresnyak, "First Nation supporters occupy premier's Kelowna office, demand end to sewage dumping" *Vancouver Observer* (16 April 2015) online: Vancouver Observer < http://www.vancouverobserver.com/news/first-nation-supporters-occupy-premiers-kelowna-office-demand-end-sewage-dumping>.

Takeaway Points

There are some key facts that inform this discussion that for ease of reference, I summarize below:

1) Reserve lands are subject to exclusive federal jurisdiction under section 91(24) of the *Constitution Act, 1867*[2]. As a result, the provincial *Environmental Management Act* ("***EMA***")[3] and associated provincial Contaminated Sites Regulation[4] generally do not apply on reserves.[5]
2) The *EMA* provides a comprehensive regime for managing and remediating contaminated sites in British Columbia, whereas comparable federal regulation is a patchwork of regulation and policy which lacks the scope, detail and ease of enforcement of *EMA*.
3) Most reserve land in British Columbia is administered by Indigenous and Northern Affairs Canada ("**INAC**") pursuant to the *Indian Act*.[6]
4) INAC and Environment Canada are the federal authorities responsible for addressing contaminated sites on reserve. They both lack the necessary funding and capacity to meet their commitments under existing regulatory regimes and have generally been ineffective at preventing and remediating contaminated sites on reserves.[7] In 2009, INAC reported the largest number of contaminated sites liability among all other federal departments.
5) In some cases, First Nations administer their reserve lands independently of INAC, either through a Land Code enacted pursuant to the *Framework Agreement*[8] and *First Nations Land Management Act* ("***FNLMA"***)[9], or through self-government established pursuant to a final agreement.
6) In many cases, and for a number of reasons, First Nations often lack the necessary resources to effectively prevent and remediate contaminated sites, or to prosecute polluters regardless of the land management regime applicable to their lands.
7) Through final agreements and federal legislation like the *First Nation Commercial and Industrial Development Act* ("***FNCIDA***")[10] it is increasingly possible for provincial environmental legislation to apply to First Nation lands.
8) Interests in reserve lands are granted by contract (leases, licenses, permits, etc.) which frequently referentially incorporate provincial environmental standards, turning them into contractual obligations.
9) First Nations have Aboriginal rights on provincial lands that may be adversely effected by contamination of lands that fall within provincial jurisdiction.

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[2] (U.K.), 30 & 31 Vict., c. 3, reprinted in RSC 1985, App. II, No. 5 ("*Constitution Act, 1867*").
[3] *Environmental Management Act,* SBC 2003 c 53.
[4] British Columbia BC Reg 4/2014.
[5] There is caselaw, discussed below, that challenges this assumption, at least in respect to the provisions of the *EMA* dealing with financial responsibility for remediation.
[6] *Indian Act*, RSC 1985, c I-5 ("*Indian Act*").
[7] *Fall 2009 Report of the Auditor General of Canada to the House of Commons*, "Chapter 6: Land Management and Environmental Protection on Reserves", Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_e_33252.html> ("Auditor General's Report")
[8] *Framework Agreement on First Nation Land Management*, February 12, 1996, as amended in 2007.
[9] SC 1999 c. 24.
[10] SC 2005, c. 53.

Contaminated Sites in Context

For the most part, a reference to First Nation lands in this paper means "lands reserved for Indians", or reserves, exclusively within federal jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867.* These lands represent a relatively finite inventory of lands available to First Nations for community, housing, cultural activities and economic development[11] and they are the primary focus of this paper. Nevertheless, it is worth keeping in mind that First Nations also exercise rights over their traditional territories and that their interest in preventing and remediating contamination extends to these lands as well. With courts increasingly affirming the land rights of First Nations within their traditional territories, and with the reality of cross-jurisdictional contamination, it is important for provincial and municipal authorities to work closely with First Nation and federal authorities to address issues of contamination both on and off reserve.

Currently, First Nations are the fastest growing population in Canada and while many are moving to urban areas, many more live on reserve, creating an increasing demand for housing and amenities.[12] Pressure on reserve lands also comes from the growing number of non-First Nations people living on reserve,[13] and from housing, business and resource development projects. All of these factors contribute to contamination of reserve lands and add urgency to the question of how to address the contamination in a meaningful way.

There are numerous ways in which First Nations land become contaminated and equally myriad kinds of contamination. Some sites are historical; the residue of federally sanctioned industry on First Nation lands. Others are contemporary and arise from an array of authorized and unauthorized economic development and other activities conducted on First Nations lands by businesses, individuals and governmental authorities. Still other contaminated sites are caused by activities on provincial and private lands that release contamination impacting First Nation lands through downstream effects. In 2009, the Auditor General identified federal liability for contaminated sites on reserves at $143 million, up from $98 million in April 2008.[14]

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[11] The federal government operates a reserve creation program and an addition-to-reserve program, but both are complex, time-consuming processes, with the result that reserve creation has not kept up with demand. A very recent policy directive for INAC's Land Management Manual is aimed at streamlining the process looks promising, but has not been in effect long enough to measure its efficacy. *Land Management Manual, Chapter 10 – Additions to Reserve/Reserve Creation 2016*, "Directive 10-1: Policy on Additions to Reserve/Reserve Creation", effective July 27, 2016. Online: https://www.aadnc-aandc.gc.ca/eng/1465827292799/1465827347934#mm

[12] Indigenous and Northern Affairs Canada, "Fact Sheet – Urban Aboriginal population in Canada," 2010, Online: INAC: <http://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302>.

[13] Lower Mainland Treaty Advisory Committee, "Collection of School Taxes from Non-Members Living on Indian Reserves and Treaty Settlement Lands," https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjE-4-ozprPAhVB1RQKHcHNCJsQFggcMAA&url=http%3A%2F%2Fcnvapps.cnv.org%2Fminutearchive%2FAttachments%2F2011%252003%252028%2520item%252014%2520attach%252002.pdf&usg=AFQjCNEnoNkwy7ZF18BicCH3HD99DsU56g at pg. 4.

[14] Office of the Auditor General of Canada, *Fall Report of the Auditor General of Canada*, ch. 6 (Ottawa: OAG, 2009) at 6.93 ("Auditor General's Report, 2009").

The Regulatory Gap

While First Nation lands are within the exclusive jurisdiction of the federal Crown, provinces have exclusive legislative authority over the management of provincial lands[15] and natural resources.[16] The vast majority of legislation governing environmental management and contaminated sites remediation is provincial. With some exceptions, provincial legislation does not apply to First Nation lands.[17] The federal Crown cannot create environmental management laws that interfere with provincial powers under s. 92(5) of the *Constitution Act,* 1867, but it could create such laws to govern First Nation lands. Thus far, Parliament has failed to take effective steps. Federal environmental legislation does not provide an effective or comprehensive management regime for reserve lands. This results in what is commonly referred to as the "regulatory gap", and which means, in practical terms, that there is very little meaningful regulation for dealing with remediation of contaminated sites on reserve lands.

The federal Crown does exercise limited environmental regulation through federal laws of general application, such as the *Canadian Environmental Assessment Act*[18]*,* the *Fisheries Act*[19], the *Species at Risk Act*[20], and the *Canadian Environmental Protection Act*[21]. However, these laws are not specific to First Nation lands and are of limited utility. The primary legislation through which the federal Crown exercises its jurisdiction over reserve lands is the *Indian Act.* There are no provisions in the *Indian Act* specific to environmental management of reserve land or the protection of the environment. In recent years, the federal Crown has made some attempts at addressing environmental issues on reserves with new legislation and policy directives. These efforts have been targeted primarily at transferring control of land management to the First Nations themselves, but have been fairly ineffective at resolving the challenges related to environmental management. In large part, this is a result of INAC transferring authority for the management of reserve lands to First Nations and effectively downloading responsibility for closing the regulatory gap onto their governments without ensuring that the required legislative tools, funding or capacity are available.[22] In 2009, the Auditor General concluded that "INAC and Environment Canada have not addressed significant gaps in the regulatory framework that protects reserve lands from environmental threats."[23] In 2016, the unfortunate reality is that very little has changed.

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[15] *Constitution Act, 1867*, section 92(5).
[16] *Ibid*, section 92A,
[17] In *Derrickson v. Derrickson* [1986] 1 S.C.R. 285, the Supreme Court of Canada held that section 88 of the *Indian Act*, which referentially incorporates provincial laws of general application, only applies to "Indians", but not to lands reserved for Indians. At para. 57: "The submission that s. 88 does not apply to lands reserved for Indians is quite simple. It is to the effect that not one but two subject matters are the object of s. 91(24) of the *Constitution Act 1867,* namely: "Indians" and "Lands reserved for Indians." Since only Indians are mentioned in s. 88, that section would not apply to lands reserved for Indians."
[18] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19 ("*CEAA 2012*").
[19] *Fisheries Act,* RSC 1985, c F-14 ("*Fisheries Act*").
[20] *Species at Risk Act*, SC 2002, c 29 "(*SARA")*.
[21] *Canadian Environmental Protection Act*, SC 1999, c 33 ("*CEPA*").
[22] Auditor General's Report 2009, at para. 6.35-6.46.
[23] Auditor General's Report 2009, at para. 6.93.

The regulatory gap exists due to a lack of, or inadequate, regulation of environmental management on reserve and because of lax enforcement of existing regulations. This causes two main problems. The first is that First Nations lands may be more likely to become contaminated than other lands. There are numerous examples of how this plays out. A common example is that of businesses and individuals using First Nations lands as dumping grounds for household, construction and other waste in order to avoid paying tipping fees at municipal landfills. Another common example is that of businesses seeking to establish their works on reserve in order to avoid having to comply with more stringent provincial and municipal regulations.

The second key issue is that once First Nations lands are contaminated, it can be extremely difficult, if not impossible to properly remediate them. In part, this is because there are very few regulations that apply, but even worse, the few regulations that do exist are not enforced with regularity, or at all. Probably the most problematic example is that of the *Indian Reserve Waste Disposal Regulation*.[24] As the Auditor General noted, "INAC has not met key responsibilities for implementing existing regulations to provide essential environmental protection on First Nation reserves. While regulations exist under the *Indian Act* to cover solid waste management, most landfill sites on reserves operate without permits, monitoring, or enforcement by INAC."[25]

Efforts at Closing the Gap

The federal government's efforts at addressing environmental management issues on reserve have been primarily focussed on transferring administrative and management responsibility to the First Nations themselves. One way this is being achieved is through the development and implementation of the *Framework Agreement* and the *FNLMA.* Under this program, INAC delegates responsibility for land management to First Nations who administer this authority pursuant to their own Land Code. Modern treaty negotiations are another way that the federal Crown has been able to transfer some or all of its land management responsibilities to First Nations. In both cases, First Nations have been eager to enter the process in hopes of closing the regulatory gap and asserting greater control over their lands.

The mechanics of these processes, as well as their benefits and pitfalls, are discussed in more detail elsewhere in this paper. Suffice to say that the efforts of the federal Crown in both these efforts have been enormously hindered by their failure to provide adequate resources both to First Nations and to INAC for development, training, infrastructure and implementation. In effect, Parliament has put the cart before the horse by enacting legislation without ensuring the necessary infrastructure to implement it in a meaningful or functional way.

Other efforts by the federal Crown include policy directives and legislation of very limited applicability, such as the *FNCIDA*, which can only be used in rare circumstances. This will be discussed in further detail below.

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[24] Canada CRC., c. 960. ("*IRWDR*").
[25] Auditor General's Report 2009, at para. 6.94.

The Basics: Environmental Management Under the *Indian Act*

The majority of First Nations in British Columbia operate under the default land management regime set out in the *Indian Act* and its regulations. Band councils exercise certain powers analogous to municipal powers through their bylaw making authority under section 81(1), but these powers are very limited. Under the *Indian Act*, INAC is the authority responsible for land management decisions such as issuing permits, easements, and leases to third parties on First Nation lands. INAC is also the authority primarily responsible for enforcement and remediation on reserve lands.

Although the *Indian Act* sets out a broad scope for federal government discretion over the affairs of First Nations and their reserve lands it does not address environmental management in a comprehensive or coherent way. There are no express provisions for the protection of environment on reserve. The environmental management that is available emerges indirectly through regulation, through the First Nation's by-law making authority, and through contract.

i. Indian Reserve Waste Disposal Regulations

The *IRWDR* was enacted in 1978 and has not been updated since. It was designed to address the disposal of waste on reserve but it is massively problematic for a number of reasons. It is very dated and limited in scope. It fails to address any modern standards of waste and environmental management, toxic substances or consistency with existing or proposed federal wastewater regulations. A summary conviction is required before a penalty can be imposed or a clean up order issued and penalties are virtually meaningless (fine of $100, 3 months in prison, or both).

There are no coherent management standards or criteria articulated in the *IRWDR*. Instead, the regulation governs the operation of garbage dumps and the disposal and storage of waste on reserve through a project specific permit system. The Minister can grant a one-year permit directly to an actor, or can delegate that authority to the band council through permit.[26] All the substantive rules and criteria for meaningfully addressing waste management or the contamination of reserve lands incidental to the permitted uses are set out in the permit; effectively regulating through contractual obligations rather than through law. Since permits are only issued for specific projects, there is no regulation where there is no permit beyond the requirement that there be a permit.

Where a permit is issued directly to the actor, INAC maintains responsibility for monitoring and enforcement of the permit. According to the Auditor General's Report, INAC "neither promotes nor conducts significant surveillance on reserves to look for illegal dump sites or garbage burning and is not equipped to monitor compliance, conduct inspections, or enforce regulations….Moreover, we found that INAC does not issue permits for sewage treatment and disposal and makes no other effort to apply the existing regulations."[27] Crown prosecutors have been reluctant to prosecute offences under the

[26] *IRWDR*, at s. 5 and s. 7.
[27] Auditor General's Report 2009, at para. 6.61

regulation or spend court time pursuing the fine[28] and are disinclined to seek clean-up orders because they do not consider these prosecutions to be in the public interest.

Where the authority to issue the permit is delegated to the band council, the band council steps into the Minister's shoes, becoming solely responsible for monitoring, enforcement and liability. First Nations are no more equipped to manage or enforce these permits than INAC is, and the federal Crown does not provide additional funding or resources to support the delegated authority.

Perhaps worst of all is that by occupying the field, the regulation prevents First Nations from addressing waste management on their own lands directly through bylaws enacted pursuant to section 81 since the by-laws may not conflict with *Indian Act* regulations. For example, while a First Nation might be able to create some regulations touching on waste management, as will be discussed in the next section, it is not within their legislative authority to impose stiffer penalties for offences that result in contamination of their lands.

ii. Section 81(1) Bylaws

Section 81 of the *Indian Act* sets out the purposes for which band councils may make by-laws "not inconsistent with" the *Indian Act* or any federal regulation. These powers are analogous to the powers granted to councils of municipal corporations.[29] Notably, environmental management matters are not enumerated powers under section 81(1). However, band councils do have authority to make bylaws regarding the health of residents, the prevention of nuisances, zoning, and the protection of game on the reserve. INAC suggests that these by-law powers can incidentally address issues of pollution and contamination on reserve by regulating:

- Garbage disposal;
- Solvent abuse;
- burning (grass, tires, garbage etc.);
- the use of dangerous materials; and
- management of fur-bearing animals, fish and other game on reserve (which is limited to zoning nature preservation areas and protecting areas from development.[30]

Although there is potential for band council by-laws to play a role in the management and prevention of contaminated sites on reserve, it is a role with serious limitations because the enforcement mechanisms are very weak. Offences must be prosecuted through summary conviction, and the maximum penalties are a fine of $1000, imprisonment for a term not exceeding 30 days, or both. The expense of

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[28] MacKenzie, James, "Environmental Laws on First Nations Reserves: Bridging the Regulatory Gap." Prepared for *The Pacific Business & Law Institute,* 2012, at p. 10.
[29] *R v Stacey*, [1982] 3 CNLR 158.
[30] Indigenous and Northern Development Canada, *Appropriate Authorities in the Indian Act for the Enactment of By-Laws*, 2012, Online: INAC <http://www.aadnc-aandc.gc.ca/eng/1100100013962/1100100013963>.

prosecuting bylaw offences can be a deterrent to First Nations already faced with huge administrative burdens, especially for the prospect of a fine that amounts to little more than the cost of doing business for most polluters.

The 2014 amendments to the *Indian Act* have removed a significant hurdle to band council's bylaw-making authority under section 81(1) of the Act by eliminating the requirement for Ministerial approval of bylaws prior to enactment. [31] First Nations may also now keep fines imposed under their bylaws, rather than having the monies go to the Minister. These changes may encourage more efforts by First Nations at regulating contamination through bylaw since it may now be possible to have more meaningful penalties through the creation of continuing offences. However, the question of whether the section 81 power extends this far is a matter of debate and has yet to be tested. As it stands, the maximum penalties are insufficient to deter major polluters or to recover the costs of remediation.

iii. Contract

On INAC administered reserves, third parties who are not members of the band can only obtain a legal interest in the lands through a lease, license or permit granted by the Minister.[32] As with permits issued under the *IRWDR,* INAC attempts to fill the regulatory void by including provisions respecting environmental protection and monitoring of contaminants in the instrument granting the interest. While this creates an avenue for ordering clean-up and obtaining cost recovery, these are purely contractual remedies, lacking the teeth of a strict liability legislative regime. The negotiation of these contracts can be lengthy and costly for all parties, as can dispute resolution or litigation after the fact.

An example that underscores the importance of comprehensive lease provisions is the ongoing legal dispute between Canada and a waste systems company who operated a landfill on the reserve lands of a BC First Nation subject to a federally administered lease. The company allowed significant contamination to occur requiring millions of dollars in remediation. Canada terminated the lease and sued the responsible company. Canada's claims against the company are based on breaches of the provisions of the lease, federal fisheries legislation, and diminution in value of the reserve lands. Interestingly, Canada also relied on the *EMA* and the BC *Contaminated Sites Regulation* in an attempt to obtain cost recovery under section 46(5) of the *EMA*. The defendants to Canada`s claim sought a summary trial dismissing Canada`s reliance on *EMA* on the constitutional ground that *EMA* doesn`t apply to reserve land. The BC Supreme Court declined to rule on the constitutional question on summary trial in part because Canada could still succeed on the breach of contract claim or another cause of action.[33]

[31] *Indian Act Amendment and Replacement Act,* SC 2014, c. 38.
[32] The Minister can issue temporary use permits under s. 28(2), can grant a lease for designated lands under s. 37(2) and can grant leases of lands held by individual members of a band under s. 58(3).
[33] *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2015 BCSC 1998

Other Federal Regulatory Tools

Other federal legislation and programs that apply generally to First Nation lands include *CEAA 2012*, the *FNCIDA* and the Federal Contaminated Sites Management Program.

1. *CEAA 2012*

CEAA 2012 codifies a mandatory environmental assessment process that is triggered by statutory thresholds regarding the size and impact of proposed projects. *CEAA 2012* is prospective; it seeks to identify and safeguard against potential contamination arising from projects on federal lands, including First Nation lands. However, the amendments to the federal environmental assessment regime that resulted in *CEAA 2012* have limited the availability and scope of such environmental assessments. Only projects that are listed in the *Regulations Designating Physical Activities*[34] trigger environmental assessments and these tend to be, for the most part, large scale industrial activities where there is significant potential for adverse environmental impacts. Most of the projects that take place on First Nation lands are not designated projects.[35]

Under section 67 of *CEAA 2012*, INAC is obligated to flag other projects that will have adverse environmental impacts on First Nation lands, and apply for an environmental assessment. To fulfill this obligation, INAC has implemented an Environment Review Process for projects on reserve lands, but this is a discretionary procedure, which rarely leads to a full environmental assessment.[36]

2. *First Nation Commercial and Industrial Development Act*

The *FNCIDA* is a federal act introduced to close the regulatory gap for complex commercial and industrial development on reserve land. The *FNCIDA* allows the Governor in Council to make regulations governing commercial or industrial undertakings located on reserve lands. The *FNCIDA* is project specific and is a voluntary option for First Nations.

There are two major benefits of the *FNCIDA*. First, the *FNCIDA* allows for referential incorporation or harmonization of relevant provincial and municipal laws. This makes provincial laws like the *EMA* and the *Contaminated Sites Regulation* applicable to a project, and it makes it possible for provincial and municipal agencies already engaged in monitoring and enforcement of existing regulations to expand that authority onto reserve lands made subject to the regulation. Any referentially incorporated regulations and laws will prevail over band by-laws, but will not prevail over any existing federal

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[34] Canada SOR/2012-147.

[35] The modifications in *CEAA 2012* limiting the types of projects that are designated projects has resulted in an incongruence with the related provisions in the INAC *Land Management Manual* dealing with environmental assessments. The *Land Management Manual* provisions relating to environmental assessments at Directive 12 have not been updated to reflect the new *CEAA 2012* thresholds. However, supplemental INAC policies have been developed to account for INAC's modified obligations with respect to *CEAA 2012.*

[36] Indigenous and Northern Affairs Canada, "Proponents' Guide to Aboriginal Affairs and Northern Development Canada's Environmental Review Process," 2014, Online: INAC < https://www.aadnc-aandc.gc.ca/eng/1403215245662/1403215349135>.

legislation unless they are expressly exempted. The second benefit is that the *FNCIDA* can order an environmental assessment, even when such an assessment is not triggered by *CEAA 2012*.

Although promising, the *FNCIDA* is infrequently used because developing the regulations is a cumbersome process, requiring buy in from federal, provincial and municipal governments. INAC policy is that the *FNCIDA* is only suitable for large scale projects that can justify the cost of the negotiations. There are just three First Nations in Canada who have made regulations under the *FNCIDA*, one of which is here in British Columbia. The *Haisla Nation Liquefied Natural Gas Facility Regulations*[37] is a good example of how the *FNCIDA* can work to close the regulatory gap. The *HNLNG* designated the site of a natural gas facility as project lands. The regulation referentially incorporates a number of British Columbian laws that now apply to the project lands, including the *EMA*, the *Contaminated Sites Regulation*, the *Oil and Gas Activities Act*[38], the *Occupiers Liability Act*[39], the *Water Act*[40] and the *Ground Water Protection Regulation*[41] among others. The *HNLNG* also incorporates a number of provincial protocols issued pursuant to section 64 of the *EMA*. In incorporating these legislative instruments, the *HNLNG* exempts some provisions and adapts others, thereby tailoring the regulation to the project lands. Significantly, the *HNLNG* expressly excludes the application of the *IRWDR* to the project lands. The end result is a comprehensive regulatory framework reasonably familiar to industrial actors that can impose strenuous restrictions on contamination and holding responsible parties liable for contaminating the project lands.

3. *Federal Contaminated Sites Management Program*

In the absence of a legislative scheme comparable to *EMA*, the federal government has opted instead to address contaminated sites through policy. The most significant of these policies is the Federal Contaminated Sites Action Plan ("**FCSAP**"). FCSAP, in contrast with the prospective nature of *CEAA 2012*, is a reactive policy that addresses existing contaminated sites through a risk-based approach focused on limiting Canada's liabilities. Funding is allocated for cleanup of contaminated sites based on their risk classification. Sites are classified based on the scale of risk the intended land use scenarios will pose to human health and the natural environment. The guidelines used under FCSAP are more stringent than those of BC's *Contaminated Sites Regulation*. However, as a policy, the commitments and standards set out under FCSAP, and other associated policies dealing with contaminated sites, do not have the force of law and First Nations are unable to rely on them to set enforceable standards for environmental management of their lands.

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[37] Canada, SOR/2012-293 ("*HNLNG*").
[38] SBC 2008, c. 36.
[39] RSBC 1996, c. 337.
[40] RSBC 1996, c. 486.
[41] British Columbia BC Reg. 152/2016

The FCSAP is overseen by the Treasury Board. The Treasury Board maintains the Federal Contaminated Sites Inventory. There are currently over 23,000 sites that have been assessed either due to federal activity, or federal ownership over the lands.[42] Over 4,500 such sites are in British Columbia.[43]

Although the Treasury Board oversees the program, Environment Canada is responsible for its implementation. The program requires each federal department with responsibility for federal lands to identify, assess, manage, and remediate the contaminated sites on their lands. The Treasury Board acts as an umbrella board to oversee the program while Environment Canada ensures that the federal departments can access the program, and each federal department is responsible for doing the leg work in their own area, according to their own established policies.

INAC's role in the Federal Contaminated Sites Management Program

Consistent with the structure of the program, INAC is responsible for identifying, assessing, managing, and remediating contaminated sites on First Nation lands. INAC's Contaminated Sites Management Policy applies to all First Nation lands subject to INAC's administration.[44] This Policy essentially commits to meeting the relevant standards set by FCSAP. A 2014 internal audit by INAC indicated that INAC is the custodian of a total of 5,132 contaminated sites with just over 1000 of these being "suspected sites."[45]

First Nations as Regulators

As discussed above, federal efforts at closing the regulatory gap have focussed on transferring regulatory authority over First Nation lands to the First Nations themselves, either through the *Framework Agreement* and *FNLMA*, or through final agreements.[46]

1. *Framework Agreement and First Nation Land Management Act*

Through the *Framework Agreement*, the federal Crown transfers its land management powers over reserves to the First Nation. The *FNLMA* is the legislation through which Canada ratified the *Framework Agreement*. The First Nation effects regulatory and administrative authority over its reserve lands through its own land code, which replaces the *Indian Act* land management regime. There are currently 35 First Nations in British Columbia who have signed the Framework Agreement, and have passed or are

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[42] Treasury Board of Canada Secretariat, "Federal Contaminated Sites Inventory," Online TBCS: <https://www.tbs-sct.gc.ca/fcsi-rscf/cen-eng.aspx?dataset=prov&sort=name>.
[43] *Ibid*.
[44] Indigenous and Northern Affairs Canada "Contaminates Sites Management Policy, 2010, Online: INAC < https://www.aadnc-aandc.gc.ca/eng/1100100034643/1100100034644>.
[45] Indigenous and Northern Affairs Canada, *Audit of the Northern Contaminated Sites Program (excluding Giant and Faro mines)* (Internal Audit) (Ottawa: 2014) Online: <https://www.aadnc-aandc.gc.ca/eng/1448398179809/1448398268983>.
[46] This is the predominant conclusion of the 2009 Fall Auditor General's Report. See also INAC, "Audit of Environmental and Contaminated Sites Management (South of 60º)" (Internal Audit) (Ottawa: 2012) Online: INAC <https://www.aadnc-aandc.gc.ca/eng/1368193565284/1368193725278>

in the process of passing a land code.[47] Twenty First Nations in British Columbia now operate under their own land code.[48]

One of the first things a First Nation is required to do once its land code comes into force is to "develop and implement through First Nation laws an environmental protection regime" that is at least equivalent to the provincial regime, and an environmental assessment regime applicable to all projects on its reserve lands.[49] The *Framework Agreement* originally required that the First Nation negotiate an environmental management agreement with the federal and provincial governments which would set out the details of these regimes and identify how they would be enacted.[50]

In 2012, Canada sought to expedite the enactment of environmental protection laws for land code First Nations by removing the environmental management agreement requirement and replacing it with funding for environmental protection plans ("EMP"). Unfortunately, this move has created some issues because the authority of First Nations to enact and enforce environmental protection laws remains unclear. While a number of provisions of the *FNLMA* and Framework Agreement support First Nation's authority in these areas others do not, such as those provisions of the *Indian Act* that touch on environmental matters and remain with INAC under the Land Code model. For example, INAC is currently pursuing a regulatory amendment to the *IRWDR* to allow for the *IRWDR* to no longer apply to or be enforced by land code First Nations.[51] To date, INAC has taken conflicting positions regarding the application of the regulation under *FNLMA* and has issued *IRWDR* permits on land code lands which has created confusion and liability for First Nations and INAC alike.

Regardless of the potential confusion arising from the move to EMPs, First Nations may enact laws under their land codes governing the development, conservation, protection, management, use, and possession of First Nation land.[52] The land code and any laws enacted under it take precedence over any conflicting *Indian Act* provisions. Through the use of land code laws, a First Nation is able to zone and regulate land uses, to require environmental assessments, establish environmental protection standards, and establish requirements for user fees and sureties. Significantly, the environmental standards and punishments established by a First Nation under a land code must at least be equivalent in their effects to the standards and punishments imposed by the province in which the First Nation is situated.[53]

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[47] First Nations Land Advisory Board Resource Centre, "Member Communities," Online: LABRC < http://labrc.com/member-communities/>.
[48] *Ibid*.
[49] *FNLMA*, s. 20.
[50] Section 21(1) of the *FNLMA* used to read: "Before enacting any First Nation law respecting environmental protection, a First Nation shall enter into an agreement with the Minister [of AANDC] and the Minister of the Environment in relation to environmental protection in accordance with the Framework Agreement." *First Nations Land Management Act*, ss. 21(1), in force from April 3, 2009 to June 28, 2012, accessed online at: http://www.canlii.org/en/ca/laws/stat/sc-1999-c-24/63770/sc-1999-c-24.html#history
[51] INAC Regulatory Initiative, *Indian Reserve Waste Disposal Regulations (Regulations Amending), pursuant to the Indian Act*, online: https://www.aadnc-aandc.gc.ca/eng/1423604442004/1423604470475
[52] *FNLMA*, s. 20(1).
[53] *FNLMA*, s. 21(2).

Despite the opportunity that the *FNLMA* represents, many First Nations in the operational phase are finding it challenging to develop, implement and enforce strong environmental laws with the available operational funding. Therefore, the regulatory gap in environmental protection and enforcement on First Nation lands can persist as a result of a gap in capacity.

The First Nation assumes all liability for acts or omissions in relation to their land that occur after the land code comes into force.[54] The *FNLMA* provides that lands that are environmentally unsound at the time of transition can be excluded from the application of the land code and this can assist in reducing First Nation liability. This means that the federal government retains management duties and ultimate liability for those lands. The federal Crown also remains liable for contamination resulting from Canada's management of reserve lands prior to a land code coming into effect.

2. Final Agreements

Modern final agreement negotiations have the potential to transfer the administrative and management authority over land to the First Nation. The BC Treaty Commission facilitates these treaties. To date, eight modern treaties have been implemented in British Columbia. As of 2015, over half of all First Nations in British Columbia are in the process or have completed the implementation of a modern treaty.[55]

Once a modern treaty is implemented, the land within the treaty is no longer considered section 91(24) lands under federal authority. This means that the *Indian Act* land management provisions and regulations including the *IRWDR* no longer apply to final agreement lands. Instead the final agreement First Nation obtains the jurisdiction to pass laws respecting land and environmental management. Generally, the scope of the regulation that a final agreement First Nation can pass tends to exceed that of a land code First Nation under the *FNLMA.* Additionally, in the absence of First Nation made laws on a subject, final agreements will usually provide that relevant provincial laws will apply to final agreement lands. For example, if a final agreement First Nation failed to pass environmental laws then the BC *EMA* would apply to that First Nation's lands.

A number of final agreements, including the Tsawwassen First Nation and Tla'amin First Nation final agreements, provide that while those First Nations have the authority to enact environmental protection laws over final agreement lands, applicable provincial or federal laws will prevail in the case of any inconsistency. Final agreement First Nations may also referentially incorporate provincial laws and regulations into their own laws. For example, the Tsawwassen First Nation, in its *Soil Transport, Deposit and Removal Regulation* requires that geotechnical assessments with respect to land fill permits must meet the standards set out in the *EMA* and *Contaminated Sites Regulation.* [56]

As with the transfer of land management responsibilities under the *FNLMA*, liability issues can arise for pre-existing contaminated sites, particularly where a First Nation obtains jurisdiction over former

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[54] *FNLMA*, s. 34.
[55] "BC Treaty Negotiations Annual Report 2015" BC Treaty Commission, Status Report. (2015) Online: BCTC <http://www.bctreaty.net/files/pdf_documents/BCTC-AR2015.pdf>.
[56] Tsawwassen First Nation Soil Transport, Deposit and Removal Regulation, 2011, at s. 3(3)(a).

provincial crown lands under the final agreement. Final agreements address this concern directly by assigning liability and remediation responsibilities for contaminated sites to the province. In the Maa-nulth Final Agreement, British Columbia must inspect sites on former provincial lands prior to development to assess whether there is pre-existing contamination for which British Columbia could be liable. In cases where contamination exists, British Columbia is responsible for remediating the site according to the standards of the *EMA*[57] and is entitled to recover the costs of remediating the site from the responsible party.[58]

The above provisions of the Maa-nulth Final Agreement were put into action in 2013 when the Toquaht First Nation gave notice it intended to develop a campground on final agreement lands. Upon receiving the notice, British Columbia conducted a site investigation which found high levels of arsenic and other metals in the site soil as well as a number of threats to groundwater. The source of the contamination is a mine that ceased operations in the 1960s. Toquaht and British Columbia worked together to close the site and an adjacent marina to ensure public safety. Remedial planning, which is being carried out jointly by British Columbia and Toquaht, is still ongoing. In the interim the closure of the site is adversely impacting the economic use of the marina and campsite by Toquaht.

Ultimately, modern treaties are an effective means to address the regulatory gap that exists in land management schemes under the *Indian Act*. Treaty implementation funding assists in bridging the capacity gap with greater success than under the *FNLMA*. However, modern final agreements are very time consuming and difficult to negotiate and implement and the BC treaty making process has had limited success in the last 15 years.

[57] Maa-nulth Final Agreement, Chapter 2, section 2.9.2
[58] Maa-nulth Final Agreement, Chapter 2, section 2.9.5

A Comparative Chart

The table provided below sets out the which of the regulatory tools discussed in this paper apply under each of three land management regimes identified.

	Indian Act Land Management	***FNLMA Land Management***	***Modern Final Agreement Management***
Regulatory Authority	INAC	The First Nation	The First Nation
Nature of Land	S 91(24) federal land	S 91(24) federal land	Not s. 91(24) federal land
Apportionment of Liability	Canada as liable.	Contamination from activities prior to land code: Canada is liable. Contamination from activities after land code: the First Nation is liable.	The First Nation is liable, with the potential to incorporate in the treaty remediation by British Columbia or Canada to identified contaminated sites.
Strongest Protective Tools	*Indian Act* s. 81(1), *FNCIDA, IRWDR,* FESCAP	*FNLMA*; *Framework Agreement*	Treaty Negotiation.
Application of the *EMA*	Rarely. Only in the event that it is incorporated in the *FNCIDA*.	No. The First Nation is expected to implement an environmental protection regime equivalent to the *EMA*.	Yes, if the First Nation does not develop stronger environmental protection laws under the Treaty process.
Application of the *IRWDR*	Yes.	Unclear.	No.
Application of the *FNCIDA*	Yes.	Yes.	Yes.
Application of *CEAA 2012*	Dependent on project.	Discretion to opt into an environmental assessment.	Discretion to opt into a provincial or federal environmental assessment.
Availability to Enact Bylaws to Address Contaminated Sites	No explicit power to enact bylaws to address contaminated sites.	Yes, but limited capacity to do so.	Yes.
Strength of Enforcement	Weak.	Stronger.	Strongest.

The First Nations/Provincial Relationship

The issue of contaminated sites has come to the fore recently in British Columbia as a result of the Mount Polley mine tailings pond spill. This was followed by an Auditor-General's report that concluded that many major mining operators in British Columbia have only given half the security required to complete post-shut down remediation. The Auditor-General found that under-funding in security

amounts to a potential $1.2 billion liability for British Columbia.[59] Adding to these concerns is the recently revised estimate of British Columbia's contaminated site liabilities. A change in the methodology for how contaminated sites are evaluated resulted in a revision upward of total provincial liabilities for contaminated sites to $508 million.[60]

In response to these and other considerations the British Columbia Ministry of Environment is reviewing aspects of the provincial site remediation legal regime. This work has included public consultation on the prevention of contamination from soil relocation. The subsequent report indicated that some respondents expressed concern about the regulatory gap on federal reserve lands and that this gap is exploited by developers and contractors to remove contaminated soil from provincial lands to under-regulated federal lands. Respondents suggested a number of solutions including resolving methods of ensuring the application of the provincial *Contaminated Sites Regulation* on federal lands and establishing tighter restrictions on the transport contaminated soil from provincial lands.[61]

A strong provincial/First Nation relationship is important for tackling the issue of contaminated sites. This will involve, as the respondents above suggest, both integration of regulations to close present gaps and a commitment by the province to exercise its jurisdiction in such a way as to prevent the contamination of First Nation reserves and traditional territories. As has been discussed in this paper, there is increasing overlap in provincial jurisdiction and First Nation lands. This takes the form of increased provincial responsibility to be aware of applicable regulatory schemes on reserve and of asserted Aboriginal title and rights. It also comes in the form of *FNCIDA* and final agreements, which allow for provincial environmental laws to apply to First Nation lands. This creates the jurisdictional space for the province to take an increased role in addressing contaminated sites on First Nation lands and in holistically tackling the liabilities created by existing contaminated sites.

Conclusion

The regulatory framework for addressing contaminated sites on First Nation land is dependant on the administrative and management regime under which a First Nation operates. The status of these regimes and the relationship of a particular First Nation to them is not static. The *FNLMA*, *FNCIDA*, and final agreements have opened the door for the blending of regulatory frameworks where formerly the federal regime alone applied. This makes for a more complex regulatory regime, but also one more capable of addressing the regulatory gaps affecting environmental management on reserve.

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[59] Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, (Victoria: OAGBC, 2016) at page 41.

[60] Rob Shaw, "B.C. government's liability for contaminated sites balloons to $508 million" *Vancouver Sun* (30 June 2016) Online: Vancouver Sun <http://vancouversun.com/news/politics/b-c-governments-liability-for-contaminated-sites-balloons-to-508-million>.

[61] British Columbia Ministry of Environment Land Remediation Section, *Land Remediation Discussion Paper Consultation* (Victoria: British Columbia Ministry of Environment, 2015) Online: <http://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-remediation/docs/requests-for-comments/soil_relocation-summary_of_public_comments.pdf>.

The province of British Columbia is poised to take an increased role in the management of First Nations lands as *FNCIDA* and final agreements allow for the referential incorporation and application of provincial regulations and enforcement on First Nation lands. Moreover, land code First Nations are increasingly developing regulations that are helping to harmonize their land management systems with provincial environmental standards.

However, the majority of First Nations in British Columbia remain subject to the *Indian Act* reserve land management regime and are faced with inadequate federal environmental management tools, under which contaminated sites are largely addressed by unenforceable policy.