

Management of Contaminated Sites on Indian Reserve Lands

By John W. Gailus



DEVLIN GAILUS

BARRISTERS AND SOLICITORS

Suite C-100, Nootka Court
633 Courtney Street
Victoria, BC V8W 1B9
250.361.9469
www.devlingailus.com

Site Remediation in British Columbia Conference

March 7-8, 2013

Vancouver, British Columbia

Legal Regime for Contaminated Sites on Indian Reserve Lands

1. Introduction

The legal regime on an Indian Reserve varies substantially from that found on provincial lands. As reserves are federal lands, provincial laws and regulations that purport to affect land do not apply on reserve. Unfortunately, there is no equivalent federal legislation to the *Environmental Management Act*, leaving the federal government and First Nations governments without one of the necessary tools to enforce the 'polluter pays' principle. First Nations and the federal government are left to rely upon contractual provisions, by-laws and often inadequate federal laws and regulations to deal with contaminated sites on reserve.¹

2. Overview of Legal Regime

The essential starting point for any discussion relating to reserve lands is the Constitution. Section 91(24) of the *Constitution Act, 1867* provides that "Indians and Lands Reserved for Indians" are a federal responsibility. As a result, the federal government has enacted the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act") to carry out its constitutional responsibilities. The Department of Indian Affairs and Northern Development (also known as Aboriginal Affairs and Northern Development Canada, or "AANDC") administers the Act.

The Act provides the following definition of "reserve":

"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band...

As reserves are federal lands, all third party interests, such as leases, permits, easements, etc. are issued by the Minister of AANDC and not the First Nation. However, as explained below, a First Nation may opt-out of the land management provisions of the Act.

Section 88 of the Act operates to incorporate provincial laws of general application into federal law. This section has been the subject of a great deal of litigation. Section 88 provides:

Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nation Fiscal and Statistical Management Act*, or with any order, rule,

¹ In preparing this presentation, I have reviewed papers prepared by Michelle Ellison and James MacKenzie for the Pacific Business and Law Institute Conference, September 26, 2012. Those papers are recommended to the reader as they explore some of these topics in greater detail.

regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Recently, the Supreme Court of Canada explained the purpose of section 88:

Section 88 reflects Parliament's intention to avoid the effects of immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law.²

The application of provincial laws to reserve land is severely limited. However, reserves are not federal enclaves completely beyond the reach of provincial law. To be found inapplicable, the provincial law must be found to affect "Indianness", and to "regulate Indians as Indians" or "Indians in relation to core values of their society".³ Provincial laws that do not affect Indians in this way, such as traffic laws, apply *ex proprio vigore*, or of their own force.

Unfortunately, the analysis does not end here. Section 88 of the Act also provides that, subject to the Act and any treaty, federal statute or First Nation by-law, all laws of general application from time to time in force in a province are applicable to Indians. However, section 88 does not say that provincial laws of general application are applicable to lands reserved for Indians.

In *Derrickson*⁴, the Supreme Court of Canada held that although provincial laws of general application may apply to Indians, they cannot apply to the right of possession of reserve lands. Adding another level of complexity, if both provincial and federal laws could validly apply to reserve lands, the doctrine of federal paramountcy applies, giving priority to the federal legislation.⁵

Given all of the above, the provisions of statutes and local by-laws normally applying to land in the province such as the *Environmental Management Act*, *Land Title Act*, *Strata Property Act* and *Residential Tenancy Act* do not apply on reserve land. Municipal zoning and land use controls do not apply either. To the extent that these laws regulate the use of reserve lands contrary to the principles set out above, they will not apply to those lands.

Environment does not fall under a particular head of power under the *Constitution Act, 1867*.⁶ While both the federal and provincial governments may legislate in the area of the environment, there is no equivalent federal legislation to the *Environmental Management Act*, which creates a significant regulatory gap, on reserve and other federal lands, including

² *R. v. Morris*, [2006] 2 S.C.R. 915 at 935.

³ See for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309.

⁴ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

⁵ *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23.

⁶ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3

airports, federal ports such as Vancouver, Victoria, Prince Rupert and Nanaimo and Department of Defence lands.

3. *Indian Act* Options for Dealing with Contaminated Sites

While the *Indian Act* does not contain any explicit references to the environment or environmental protection, there are some options available to the Crown and First Nations to address contaminated sites. The tools that are available to First Nations are limited and prospective, that is they are intended to impose certain terms and conditions prior to the land becoming a contaminated site. There are few legislative or regulatory tools available to deal with existing contaminated sites.

a) *Canadian Environmental Assessment Act, 2012* (“CEAA, 2012”)

Prior to repeal of the *Canadian Environmental Assessment Act*, virtually every project on reserve that required a federal authorization or involved the expenditure of federal funds required an environmental assessment as a prerequisite to granting such authorization. Usually, such projects resulted in a screening decision by AANDC to approve, not approve, or approve a project subject to certain mitigation measures. However, CEAA, 2012 has affected the environmental assessment process for on-reserve developments. Under CEAA 2012, screenings have been eliminated and projects that are not specifically listed in the regulations are exempt from environmental assessment.⁷ This change has significantly narrowed the kinds of projects that will go through the environmental assessment process. Nonetheless, projects occurring on federal lands will still be subject to some provisions of CEAA.

Section 67 prohibits responsible authorities, like AANDC from carrying out a project on federal lands unless:

- a) the authority determines the project is not likely to cause significant adverse environmental effects; or
- b) Cabinet determines that the significant adverse environmental effects caused by the project are justified in the circumstances.

AANDC is currently developing its ‘Environmental Management Approach’ to meet the requirements of CEAA, 2012. This policy will apply to all AANDC supported projects, leases and permits. AANDC’s approach will likely use elements of previous processes, similar to screenings

⁷ See CEAA Schedule 2: *Regulations Designating Physical Activities*, SOR/2012-147. Minor projects are still subject to all other applicable federal and provincial laws, regulations and permitting.

under the former CEAA.⁸ At this point, AANDC's method for assessing environmental impacts of minor projects is largely unclear. A finalized policy is not expected until March 2013.

a) *Indian Waste Disposal Regulations*

The *Indian Waste Disposal Regulations* (the "Regulations") make some attempt to regulate the use of reserve lands. The Regulations provide that:

3. No person shall:

- (a) operate a garbage dump in a reserve, or
- (b) use any land in a reserve for the disposal or storage of waste,

except under the authority of a permit issued pursuant to paragraph 5(a) or (b) in the manner specified in the permit.

Waste is defined to include garbage, liquid and semi-liquid substances, landfill and scrap of all kinds. The regulations also prohibit the burning of waste. In essence, the Regulations are intended to deal with garbage dumps and perhaps sewage treatment, but not contaminated sites.

Unfortunately, the penalties for violating the Regulations are laughable - \$100 fine or imprisonment for three months or both on summary conviction. Clearly, the costs of obtaining a conviction would exceed any fines that might be recovered. The author is not aware of any attempted or successful prosecutions under the Regulations.

b) Band By-laws

Section 81 of the *Indian Act* sets out a number of purposes for which a First Nation may enact by-laws including, *inter alia*, the regulation of traffic, law and order, prevention of disorderly conduct and nuisances, construction of infrastructure and housing, residency of band members, zoning, trespass, control of animals, fish and game, and so on. The section is reproduced below for reference:

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

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;...

(c) the observance of law and order;

⁸ See AANDC, "Environmental Management Approach for Non-Designated Projects of Reserve Land", online: <<http://www.aadnc-aandc.gc.ca/eng/1345141628060/1345141658639>>.

(d) the prevention of disorderly conduct and nuisances;...

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;...

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;...

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

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

Section 81 provides that by-laws are sent to the Minister of AANDC and become law unless disapproved by the Minister within 40 days. The penalties for contravention of by-laws are minimal. However, the Act also provides for the availability of injunctive relief to restrain a person from violating the by-law.

First Nations have myriad opportunities to expand their jurisdiction by enacting by-laws under section 81 of the Act. Unfortunately, when seeking advice from AANDC they are often advised that “the Minister will disallow that by-law” and that is the end of it. The law and order power in particular is a potentially powerful tool for First Nations to implement self government ‘on the ground’. So long as a First Nation does not tread into the federal criminal law realm, there is the potential to greatly expand First Nation authority over the activities on the reserve. In addition, the zoning power allows the First Nation to determine land use on the reserve ahead of time. This authority potentially goes well beyond what might be exercised by a municipality into areas of provincial jurisdiction. The author is not aware of any First Nations that have taken advantage of the by-law provisions of the Act to enact environmental protection laws.

c) Contractual Arrangements

As stated above, the federal Crown enters into all commercial agreements on behalf of First Nations that are subject to the land management provisions of the *Indian Act*.⁹ These leases, permits and easements all contain certain covenants regarding environmental obligations and

⁹ It is beyond the scope of this paper to review in detail the land management provisions of the *Indian Act*. However, a summary of the process may be found in Continuing Legal Education Aboriginal Law: Solicitors’ Issues, 2009 Paper entitled “Land Management and Economic Development under the *Indian Act*, available at http://www.devlingailus.com/pdfs/Land_Management_and_Economic_Development_under_Indian_Act.pdf.

environmental protection. However, even under such contractual agreements, only federal legislation and regulations would be applicable. While there is federal legislation that addresses pollution, hazardous substances, wastewater quality standards, fish habitat, etc., there is nothing comparable to the *Environmental Management Act*.

Contractual terms can fill some of the void, but oftentimes there are minimal requirements for monitoring and at the end of permit and lease terms, the polluter is nowhere to be found. Without some form of security, the Crown is often left to deal with the contaminated site.

In many other circumstances, First Nations or individual members take a “do it yourself” approach, bypassing the Crown process and dealing directly with third-parties. These “buckshee” agreements are technically void under section 28 of the Act. In a number of circumstances, the third-party may be engaged in environmentally risky behaviour (eg. unauthorized dumping of waste, fuel storage) and the contract (to the extent that there is one) with the First Nation is silent on environmental protection. Finally, the First Nation may choose to engage directly in such risky behaviour. However, unlike corporations, a First Nation does not have limited liability. While it is difficult to determine the scope of these “buckshee” or “do it yourself” arrangements, the author is aware of several gas stations that operate on reserve without the benefit of a lease or permit from the Crown. Obviously, this creates a huge contingent liability for the First Nation and the Crown.

4. Options Outside the Indian Act for Dealing with Contaminated Sites

Not all First Nations are subject to the *Indian Act*. Some have taken advantage of optional legislation, such as the *First Nations Land Management Act*, that provide for increased First Nation autonomy over land use decisions. Other First Nations have negotiated modern treaties, with British Columbia and Canada.

a) *First Nations Land Management Act*, S.C. 1999, c. 24

In 1999, after several years of negotiations with a group of First Nations, the federal government enacted the *First Nations Land Management Act* (the “FNLMA”). The FNLMA enables First Nations to opt out of many of the land management provisions of the *Indian Act*. In order to take over the land management responsibilities, the First Nation must first sign on to a Framework Agreement, then enter into an Individual Agreement, governing the transfer of administration over reserve lands and responsibilities and finally pass a Land Code.

There are currently approximately 30 First Nations operating under their own land codes in Canada, the majority in British Columbia. Examples include Sliammon First Nation in Powell River, Tsawout and Songhees First Nations in Victoria, and Squamish Nation in North Vancouver.

The key components of the FNLMA are a transfer of administration of reserves from Canada to the First Nation. Notwithstanding the transfer of administration, the lands remain federal lands. As a result, the regulatory challenges remain.

However, the First Nation can enter into agreements directly with third parties for the use of reserve land. The corollary of this is that the First Nation also becomes responsible for the enforcement of contractual provisions and the fiduciary responsibilities formerly held by the federal Crown when making decisions to grant interests to third parties.

The FNLMA provides that the First Nation is not responsible for anything done or omitted to be done by Canada prior to the coming into force of the Land Code. Canada indemnifies the First Nation for any loss that may be suffered by the First Nation as a result of any acts or omissions by Canada. However, after the Land Code is enacted, the First Nation takes on a similar obligation and indemnifies Canada against any losses that might occur due to any First Nation acts or omissions. Thus the First Nation would be responsible for any contaminated sites that might result from commercial activities authorized by the First Nation on the reserve. Any pre-Land Code contaminated sites remain the responsibility of Canada, and as part of the negotiations, there is a process in place to identify such sites.

One of the significant advantages of the FNLMA is that it explicitly authorizes First Nations with Land Codes to pass a variety of laws, including laws respecting environmental protection. Section 20 of the FNLMA provides:

- 20(1) The Council of a First Nation has, in accordance with its land code, the power to enact laws respecting
 - (a) interests or rights in and licences in relation to First Nation land;
 - (b) the development, conservation, protection, management, use and possession of First Nation land; ...
- (2) Without restricting the generality of subsection (1), First Nation laws may include laws respecting
 - (a) the regulation, control or prohibition of land use and development including zoning and subdivision control; ...
 - (c) environmental assessment and environmental protection...

Section 21 of the FNLMA suggests that the First Nation is obliged to develop an environmental protection regime. However, any First Nation environmental protection standards must at least be equivalent to provincial standards. A further limitation, a prerequisite to the First Nation enacting environmental laws, is an environmental management agreement with Canada, which attempts to harmonize such laws with the province. Basically, the First Nation and Canada (and the province if they choose to participate) must first agree on the scope of the environmental laws prior to them being enacted by the First Nation.¹⁰ We are not aware of any First Nations who have taken advantage of the opportunity to develop such environmental laws under the FNLMA.

¹⁰ FNLMA, section 21(1) & Sections 24.1 – 24.8 of Framework Agreement. Note that section 24.4 of the Framework Agreement envisions a limited scope for environmental protection laws.

b) *First Nations Commercial and Industrial Development Act, S.C. 2005, c. 53*

One exception to the rule that provincial laws do not apply to reserve land is the *First Nations Commercial and Industrial Development Act* (“FNCIDA”). FNCIDA authorizes the federal government to produce regulations for commercial or industrial development on reserve. FNCIDA allows a First Nation to enact regulations that harmonize its approval processes with the provincial or local authority.

The development of FNCIDA was pushed by First Nations who were involved in commercial and industrial activity both on and off-reserve. FNCIDA is like the FNLMA voluntary. A First Nation must request by Band Council Resolution that it be added to the schedule to the Act. Any regulations will be project-specific and will be the result of negotiations amongst the Federal Crown, the province and the First Nation.

Three First Nations in Canada have enacted regulations under FNCIDA. In British Columbia, the Haisla Nation Liquefied Natural Gas Facility Regulations (the “LNG Regulations”) were published in the Canada Gazette in July, 2012. The Regulations are intended to apply to a proposed liquefied natural gas (“LNG”) facility that the Haisla Nation is planning with its partners on the Bees Indian Reserve No. 6, near Kitimat, British Columbia. This is the smallest of the LNG facilities that have been proposed in Northwest British Columbia.

Among other things, the LNG Regulations incorporate and apply the Environmental Management Act and many of its regulations, including the Contaminated Sites Regulation (“CSR”) with some minor modifications.

c) *Treaty Agreements*

The modern treaty negotiations that have taken place to date change the nature of reserves that may have been held by the First Nations. They are no longer section 91(24) lands, which means that the limitations and protections set out above no longer apply to these settlement lands.

To date three modern treaties have been implemented in British Columbia. Each of these treaties provides that the First Nation has the authority to enact environmental protection laws over their settlement lands. Chapter 16 of the Tsawwassen Final Agreement provides that:

1. Tsawwassen Government may make laws applicable on Tsawwassen Lands to manage, protect, preserve and conserve the Environment including laws in respect of:
 - a. the prevention, mitigation and remediation of pollution and the degradation of the Environment;
 - b. waste management, including solid wastes and wastewater...

2. A Federal or Provincial Law prevails to the extent of a Conflict with a Tsawwassen Law made under clause 1.¹¹

Thus, while the Treaty provides the First Nation with the right to enact environmental protection measures, any Federal or Provincial Law, such as the *Environmental Management Act* would trump the First Nation Law if it is inconsistent (eg. lesser standards or regulations) with that Act. However, in the absence of a First Nation Law, the *Environmental Management Act* and other provincial environmental laws that do not conflict with federal laws, would apply to their settlement lands.

5. Federal Contaminated Sites Program

a) Overview

Canada manages contaminated sites on federal land by way of policy rather than legislation. Canada's contaminated sites management policy is overseen by Treasury Board which has overall responsibility for the management of federal real property. The federal government introduced the Federal Contaminated Sites Action Plan ("FCSAP") in 2005 to provide funding and support federal departments, agencies, and consolidated Crown corporations in managing contaminated sites. The program is intended to be a 15-year program with a commitment of \$3.5 billion over the term of the program. Recently, the federal government announced a \$1 billion commitment through 2014 to deal with contaminated sites. While these sums are significant, a recent report from the Commissioner of Environment and Sustainable Development raised a significant concern that the government does not know the full extent of its potential liability.¹²

b) Treasury Board's Role

The Treasury Board of Canada Secretariat maintains a database called the Federal Contaminated Sites Inventory. The Contaminated Sites Inventory includes such information as location of the site, contaminants, quantity of contamination, proximity to human population, and current status of each site. There are currently over 22,000 sites in the inventory, with approximately 4,450 in British Columbia, the majority located on reserves.

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.

¹¹ Tsawwassen Final Agreement, Chapter 15. Virtually identical language is used in the Maa-Nulth First Nations Final Agreement, while the Nisga'a Final Agreement has more limited language

¹² 2012 Spring Report of Commissioner of Environment and Sustainable Development, Chapter 3, available at http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201205_03_e_36775.html#hd4b

c) Treasury Board Policy

The Treasury Board Policy on Management of Real Property provides the federal government's policy for dealing with contaminated sites:

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.¹³

Thus, the priority for clean-up of sites is based on a risk management model. Priority is given to sites posing the highest human health and ecological risks. However, it is important to note that the approach to remediation is to remediate the property to a standard required for current or future federal use. There are two implications of Treasury Board holding the purse strings. First, all federal departments are eligible for a limited amount of funds on an annual basis and AANDC ends up competing with other federal departments such as DND for funds. Second, First Nations should not expect that funds will be invested to remediate a site to a higher standard, even if the First Nation requests it.

Canada's approach to addressing contaminated sites is set out in a federal policy titled "A Federal Approach to Contaminated Sites". 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 a remediation plan and environmental monitoring. However, the standards that apply to determine if a site is contaminated and used for remediation planning are the environmental quality objectives of the Canadian Council of Minister of the Environment (CCME).¹⁴ While they are not legally binding, these guidelines tend to be more stringent than the CSR standards under the *Environmental Management Act*.

d) AANDC Contaminated Sites Policy

Contaminated sites (including pre-Land Code sites) on reserve are managed by the BC

¹³ <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=2042§ion=text> Contaminated Sites are classified by the National Classification System for Contaminated Sites prepared by the CCME: http://www.ccme.ca/assets/pdf/pn1403_nscs_guidance_e.pdf

¹⁴ The CCME Environmental Quality Guidelines can be found at: <http://www.ccme.ca/publications/ceqgrcqe.html>.

Regional office of AANDC. As stated above, AANDC has the largest contaminated sites liability among all custodial federal departments.¹⁵

AANDC has enacted a relatively brief Contaminated Sites Management Policy, which repeats many of the policies found in the Treasury Board Management of Real Property Policy. However, the principles of the AANDC policy emphasize the following:

- (a) The approach to managing contaminated sites is risk-based.
- (b) Priorities for managing contaminated sites are:
 - (i) human health and safety;
 - (ii) legal and claims obligations;
 - (iii) significant impacts on the environment; and
 - (iv) work collaboratively with First Nations to manage contaminated sites.
- (c) Manage future policies and programs to prevent future contaminated sites liabilities to the Crown;
- (d) Follow the federal “polluter pays” principle.¹⁶

6. Challenges Managing Contaminated Sites on Reserve

In the absence of a coherent regulatory regime for the avoidance and management of contaminated sites, the federal government has chosen not to legislate, but instead relies on a policy-based approach.¹⁷ This approach has several implications:

1. The program is not a regulatory regime: FCSAP and the Treasury Board policies are risk management based programs, focused on limiting Canada's liability going forward, rather than preventing or regulating contaminated sites on reserve. 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 *Environmental Management Act* does.

¹⁵ Evaluation of INAC's Contaminated Sites Management Policy and Program, December 4, 2008. The report estimated INAC's potential liability at \$1.5 billion in 2008. The report is available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cs_1100100011882_eng.pdf

¹⁶ INAC Contaminated Sites Management Policy, August 20, 2002. Available at <http://www.aadnc-aandc.gc.ca/eng/1100100034643/1100100034644>

¹⁷ Several of the Challenges set out in this section have been adapted from Michelle Ellison's PBLI Paper referenced above.

2. 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 occur under a lease of reserve land between the First Nation and Canada (on behalf of the First Nation). However, the scope and nature of that duty are uncertain as courts have not considered the issue directly. Therefore, the Crown proceeds at its own pace in determining when and the extent to which it will remediate a site.
3. Polluter Pays Policy: While Canada promotes the "polluter pays" principle, if a polluter exists, the policy regime does not assist a First Nation because Canada cannot "order" a polluter to remediate a site. Unless the issue is addressed in a lease or permit, which may be enforced through court action, Canada is often left having to clean up the site.
4. Lack of Support for First Nation Initiatives: While the FNLMA, FNCIDA and Treaty negotiations all contemplate First Nations developing environmental laws, the default is that they must be equivalent to provincial laws. This does not encourage First Nation's self government or the development of innovative solutions to environmental protection. For First Nations under the *Indian Act*, AANDC does not support the development of by-laws that could potentially fill the regulatory gap.
5. Lack of Financial 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.
6. Competition for Resources: The program covers all contaminated sites that the federal government is responsible for, not simply AANDC. Thus, AANDC is left to compete with other Crown actors and agencies for limited resources.
7. Different objectives between First Nations and Canada: First Nations may wish to have their land remediated to a standard that will enable them to meet their economic development objectives or housing needs. On the other hand, Canada's approach is to limit the costs of assessing and remediating the contaminated sites. Its primary objective is to remediate the lands at the least cost to taxpayers. Thus, although a greater standard may apply than that on provincial land, Canada will choose to remediate to the least intensive level.
8. Canada is often the Polluter: Although not as often on reserves, on many federal lands, particularly DND lands, Canada is the polluter, thereby making it impossible to recover any funds from the polluter.

In sum, while there have been encouraging developments with optional legislative regimes, Indian reserves continue to lack legislation that squarely addresses the prevention and remediation of contaminated sites.