

Compliance & Enforcement

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Compliance & Enforcement

Enforcement under the Framework Agreement

Framework Agreement Amendments

Promoting Respect and Compliance for Laws

- Community Involvement and Enforcement
- Enforcement Strategies

Enforcement of Environmental Laws

- Powers for Enforcement
- Enforcement Officers
- Enforcement Activities
- Enforcement Powers
- Enforcement Actions
- Penalties
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Enforcement under the Framework Agreement

- The *Indian Act* land system has failed in part because there is no enforcement of by-laws and regulations
- The Framework Agreement provides options for building more effective environmental management and enforcement systems on an ongoing basis as an exercise of self government authority
- Section 19.1 of the Framework Agreement gives First Nations the power to enforce its Land Code and laws:

19.1 To enforce its land code and its First Nation laws, a First Nation will have the power to:

- (a) establish offences that are punishable on summary conviction;*
- (b) provide for fines, imprisonment, restitution, community service, and alternative means for achieving compliance;*
- (c) establish comprehensive enforcement procedures consistent with federal, provincial or territorial law, including inspections, searches, seizures and compulsory sampling, testing and the production of information; and*
- (d) provide for the collection of nontax debts, fees or charges owed to the First Nation using taxation collection remedies made under First Nation taxation laws.*



Framework Agreement Amendments

- Amendments to the Framework Agreement have expanded recognition of First Nation self government authority and enforcement powers

Phase 1 amendments:

- have simplified voting procedures, expanded on powers to make matrimonial real property laws and include examples of environmental law making powers
- also include some improvements to enforcement powers, recognizing First Nation authority to adopt enforcement procedures consistent with provincial and territorial laws (previously just federal enforcement procedures)
- clarify that prosecutors will either be appointed by First Nations or be provincial prosecutors (previous option of federal prosecutors has been dropped)

Phase 2 amendments:

- have yet to be negotiated with Canada
- the Lands Advisory Board has proposed recognition of additional law making powers (e.g. species at risk) and an expanded description of enforcement powers.



Promoting Compliance and Respect for Laws

The Framework Agreement provides for prosecution of laws, recognizing authority to impose fines and imprisonment for violation of laws – but we recognize the importance of promoting compliance and respect for laws to avoid excessive and costly reliance on prosecutors and courts.

Community Involvement and Enforcement

- One of the best ways to ensure a First Nation Land Law is followed is to involve the community.
- The community can help to identify when a law is needed and what it should include.
- Additionally, First Nation Land Codes set out the enactment process for land laws, often requiring community consultation, education, and voting procedures.
- Educating the community on an environmental law and its importance can also help to ensure compliance.
- Voluntary compliance with a law reduces the need for enforcement measures including fines, charges, and use of the court system.
- It is recommended that enforcement personnel first work with offenders where appropriate to achieve voluntary compliance with a law, rather than going straight to the courts.



Promoting Compliance and Respect for Laws

Examples of enforcement strategies for promoting compliance and respect for laws as well as resolving disputes arising under Framework Agreement First Nation laws include:

Reduce the risk of violation of laws

- community engagement and outreach
- Removing barriers to compliance (e.g. special hazardous waste collection drives)
- systems for monitoring and inspections...

Resolving violations of laws

- accidental non-compliance?
- inspector's orders
- revocation of permits...

Elders, Mediation, Dispute Resolution

- potential avenues to resolve disputes and promote healing
- more effective than typical court punishments?

Strong governance systems

- land records and information
- monitoring systems
- traditional knowledge
- coordination of laws with permit and lease systems
- connecting lands & enviro. managers with other depts
- timely issuance of permits & approvals
- reasonable fees for permits...

Partnerships

- economies of scale in working with other FNs to appoint JP's, building inspectors, enviro. experts...
- Potential partnerships with other gov'ts (FA amendments expressly recognize an option for a FN to confer authority on another gov't or agency)

Enforcement of Environmental Laws

Powers for Enforcement

- Promoting respect and compliance for laws is important but **establishing clear and widely recognized processes for full enforcement is vital to promoting compliance** and respect for laws
- Measures for enforcing an environmental law should be specified in the law itself; measures to address non-compliance and powers and duties for enforcement personnel should also be included
- A First Nation's legal counsel are recommended to ensure that enforcement measures in a law are both appropriate for the purposes and consistent with other First Nation laws.
- Note that environmental laws and their enforcement provisions will apply to all activities occurring on reserve, whether conducted by the First Nation, community members, non-members, or corporations.
- Factors to consider:



Enforcement of Environmental Laws

Enforcement Officers



Enforcement officers are responsible for enforcing the requirements of a First Nation's environmental laws. Details of who designates someone to be an enforcement officer and their responsibilities and powers must be outlined in a First Nation's environmental laws and should be consistent between various laws.

Responsibilities of enforcement officers

- carrying out inspections to verify compliance with environmental laws, decisions made under those laws, and any conditions specified in the decision statement, authorization or permit;
- issuing orders directing corrective measures where there is an alleged contravention of an environmental law, its accompanying regulations and the conditions in a decision statement, authorization or permit;
- taking other measures to compel compliance, such as issuing orders, directions and prohibitions;
- investigating suspected contraventions; and
- undertaking measures to compel compliance through court action, such as injunctions and prosecution.

Enforcement of Environmental Laws

Enforcement Activities

- **Monitoring:**

- involves collecting and analyzing information on the state of the environment in order to identify changes and trends over time.
- An integral part of scientific research, it is also a means of verifying whether policies and programs are having the desired results and if activities are in compliance with legislation (i.e., compliance monitoring).

- **Inspection:**

- Any activity to verify compliance; includes a review of documents or any other information related to a project and can be both off-site and on-site inspections.
 - Inspections are formal examinations carried out by someone in an official capacity at a specific time and place to observe whether some activity or development meets the required standards.
 - Inspections are a critical component of enforcing environmental legislation and protecting environmental health in matters as diverse as food safety, water quality, air quality, pest management, sanitation, noise control and injury prevention.

- **Investigation:**

- Conducted when the Enforcement Officer has 'reasonable grounds' to believe that an offence has been committed.
- The process by which evidence is gathered to confirm whether there is an alleged contravention of an environmental law.



Enforcement of Environmental Laws

Enforcement Powers

- **Search & Seizure:**
 - when there are reasonable grounds to believe that an offence has occurred, allows enforcement officers to enter onto premises, open containers to examine their contents, access information (including paper and computer files and data), and seize or take copies of any information or objects that may serve as evidence in court proceedings
 - May or may not require a warrant
- **Sampling, testing & taking measurements:**
 - allows enforcement officers to take samples (soil, water, air) for field or laboratory testing or to take other measurements in the field to verify compliance or in response to suspected non-compliance
 - Enforcement Officers must therefore have some training and expertise in scientific measurement and sampling procedures, sample storage and preservation, chain of custody, etc.



Enforcement of Environmental Laws

Enforcement Actions

- **Warnings:**

- can be written or verbal
- used when an enforcement officer wants to draw an offence to the attention of the offender and provide notice that a repeat of the offence may attract more serious sanctions
- are not a conviction or a finding of guilt
- enforcement officers must keep records of all warnings issued (written and verbal) and any actions undertaken by the offender to restore compliance in response to the warning

- **Tickets/Violation Tickets:**

- typically issued in the field for minor offences such as littering and specifies the corresponding fine amount
- can be either paid or disputed
- not paying or disputing a ticket within a defined time frame means the ticket holder is considered to have plead guilty, and the full amount is due immediately

- **Orders:**

- issued when the enforcement officer believes, on reasonable grounds, that there has been a contravention of the environmental law
- may order a person do stop doing something that is a contravention, cause it to be stopped, or take any measure necessary to comply or mitigate the effects of non-compliance
- must be in writing and must include the reasons for the order and the time and manner in which it must be carried out
- can include stop work orders, remedial orders, other orders



Enforcement of Environmental Laws

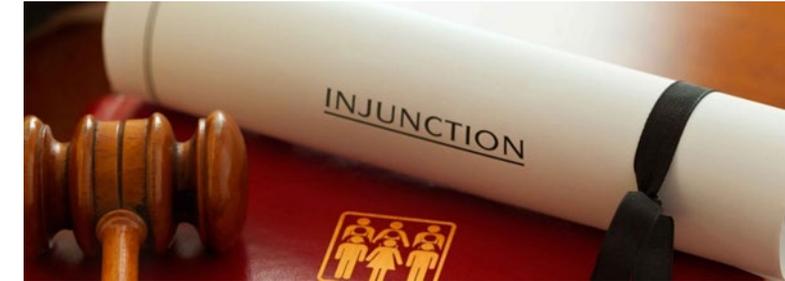
Enforcement Actions

- **Injunctions:**

- injunctions are court orders requiring an individual to do or refrain from a specific action to prevent harm to persons or property or otherwise ensure Justice
- Can lead to financial penalties for failure to comply with an injunction

- **Prosecution:**

- legal proceedings in which a person (or corporation) accused of an offence is tried in a court
- the means adopted to bring a supposed offender to justice and punishment by due course of law; its purpose is to determine guilt or innocence of a person charged with crime.
- enforcement officers will need to rely on lawyers to prosecute alleged offences in the court system
- The Framework Agreement provides for First Nations to appoint their own prosecutors, or to turn to provincial prosecutors (Note that Phase 1 Framework Agreement amendments dropped the express reference to federal prosecutors because Canada is unlikely to appoint their prosecutors given the specialized expertise of federal prosecutors)
- So far, no land code First Nations have agreements for the use of provincial prosecutors
- The Komoks First Nation on Vancouver Island hired a private prosecutor for their landlord-tenant dispute. Note provincial Attorneys General have authority to “stay” private prosecutions.
- Note: some prosecutors specialize in regulatory offences (as opposed to criminal or financial offences) – challenges: regulatory offence prosecutors are oversubscribed already and don’t know enough about land codes



Enforcement of Environmental Laws

Enforcement Actions

- **Justices of the Peace (JPs):**
 - The Framework Agreement provides an option to appoint Justices of the Peace - “to try offences established by or under a land code or a First Nation law”
 - There is also an option to request that Canada appoint a JP.....this option is not being pursued because Canada has no clear program or track record of appointing JP’s to assist in exercising self government
 - A ruling by a Justice of the Peace can be appealed to a court of competent jurisdiction (provincial courts) – other provisions of the Framework Agreement refer to courts of competent jurisdiction
 - First Nations must “....protect the independence of each justice of the peace it appoints in a way similar to that in a province, for example tenure, removal and remuneration”
 - Given the requirements for independence of JPs and potential appeals to the provincial courts, it may be helpful to explore with provinces having a First Nation JP cross appointed under provincial law
 - Ideally a JP appointed by a First Nation should have some legal training or experience but also be respected by community members and be familiar with the First Nation’s traditions and culture



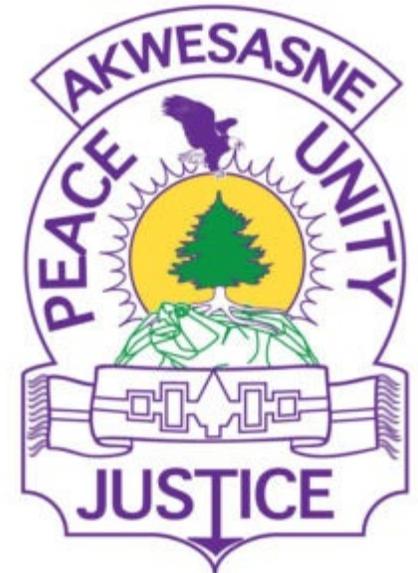
Justice of
the Peace



Enforcement of Environmental Laws

Enforcement Actions

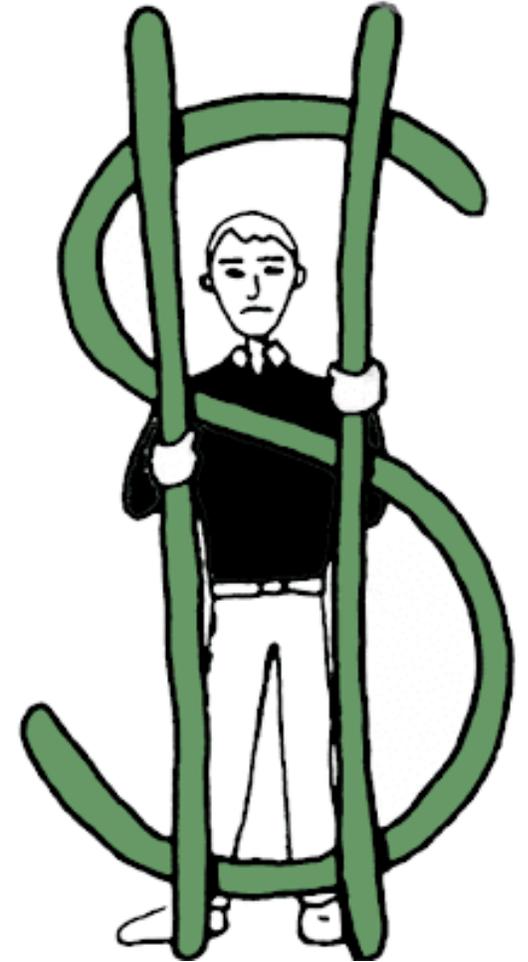
- **Court of Competent Jurisdiction for FN Environmental Laws:**
 - Given provincial court jurisdiction for summary conviction offences, the vast majority of offences will be within provincial court jurisdiction (some high dollar environmental fines may be within superior court jurisdiction)
 - Komoks case on Vancouver Island is not determinative in Ontario or Atlantic Canada – but it is a precedent establishing provincial court jurisdiction to consider land codes and First Nation laws under land codes
 - Work is currently underway to develop practical arrangements with provincial courts across Canada
 - A traditional court system is not expressly provided for in the Framework Agreement – but might be a longer term option
 - Some First Nations may wish to establish their own traditional courts – consider linkages or separation from provincial courts



Enforcement of Environmental Laws

Penalties

- The Framework Agreement provided for enforcement of laws on “summary conviction” – fines up to \$5000 and up to six months imprisonment, or both
- The Framework Agreement authorizes even higher penalties for violations of environmental laws, with penalties equivalent to prevailing provincial standards
- First Nations have flexibility in establishing fines within the limits recognized in the Framework Agreement (e.g., a First Nation can specify a maximum \$100 fine for certain minor environmental violations and maximum \$1,000,000 fines for more serious environmental violations if that penalty also applies under provincial law)
- First Nations set the maximum financial fines and terms of imprisonment (within the limits in the Framework Agreement) with the courts deciding the actual fine within those limits and deciding whether or not to impose any imprisonment



Enforcement of Environmental Laws

Policing

- Policing can be relevant to issues such as trespassing, curfews, matrimonial real property disputes, problematic residential tenancies, property vandalism, emergency management and response, traffic control and some serious environmental issues such as preventing illegal dumping, and unauthorized use and harvesting of natural resources
- Enforcement of some First Nation laws may require technical experts without triggering policing considerations (e.g. a First Nation law may describe the authority of an inspector to issue stop work orders or to revoke permits)
- Enforcement of other laws may require police assistance in support of compliance efforts by First Nation officials and technical experts (e.g. accompanying lands officers when changing locks on residences, disputes arising at construction sites etc.)



Enforcement of Environmental Laws

Policing

- Police assistance and improved policing of First Nation laws may help contribute to policing of more serious criminal activity – for example improving trust and relationships with key community leaders - and may help strengthen enforcement across neighbouring jurisdictions
- First Nation laws can include measures to address potential liability of police forces (recent Framework Agreement amendments recognize express authority to limit liability of officials within the limits under provincial law)
- Policing agreements can help identify land code laws for which police assistance may be required – and mechanisms for police to have access to authoritative and up to date versions of laws (again – the recent Framework Agreement amendments expressly provide an option to enter into agreements with other governments and agencies)





Questions & Discussion





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