




Climate Change Workshop Responding to Climate Change through the Framework Agreement

Victoria / December 11 & 12, 2019

Presentation Objectives:

- Intersection of climate change and Indigenous people
 - Importance of the FA as a Governance Tool in response to Climate Change
 - FA Requirements to meet or beat Provincial Environmental Protection Standards and Punishments – specific examples
 - FA Requirements for Environmental Assessment processes consistent with CEAA
 - Potential amendments to the FA
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The intersection of Climate Change and Indigenous People

What does climate change mean for Indigenous People in Canada?

LOSS OF OPPORTUNITIES AND CONNECTION

Less ability to practice cultural activities such as hunting, harvesting, fishing and foraging. Rapid fluctuations and unpredictable changes in the environment lead to a loss of connection with the land.

FOOD SOVEREIGNTY AND ECOLOGICAL RISKS

Less access to wildlife, shifting ecosystems, altered harvesting cycles, impacts to important species and species-at-risk, impacts on water quality/quantity, air quality, increase in invasive species, decrease in the provision of critical ecosystem services

HEALTH & WELL-BEING AND THE POTENTIAL FOR HARM

Climate-driven changes to the environment are negatively affecting mental health and well-being, exacerbating existing stresses and problems, such as the suicide crisis. Increase risks from extreme weather, disasters and in performing traditional activities (e.g. hunting on sea ice or during unpredictable extreme weather)

RELIABILITY OF TRADITIONAL KNOWLEDGE

Ecosystem changes are occurring so rapidly that Indigenous peoples are finding it more difficult to predict natural processes. Elders report that within one generation, climate change has made the environment unpredictable, decreasing the reliability of traditional knowledge

THE ECONOMY, HOUSING & INFRASTRUCTURE

Need for well-built, energy efficient and climate-resilient buildings. Services (water, sewer, gas, electricity, solid-waste and waste water, security & enforcement) will be strained. Transportation, connectivity and accessibility will be stressed, particularly in remote communities. Impacts to resource development, tourism, energy production and consumption will impact economies

CULTURAL IMPACT

Climate change is affecting the integrity and social cohesion of Indigenous cultures and economies. Indigenous languages, traditional activities, intergenerational knowledge transfer, sacred and heritage sites are all at risk

How is it Affecting First Nation Communities?



Transportation, Connectivity & Accessibility to Services



Community Safety – Evacuations, Displacement



Sustenance, Food Security & Harvesting Cycles



Invasive Species & Species At Risk



Infrastructure – Housing Crisis



Water Quality & Quantity Issues



Economy: Commercial-Use



Air Quality - Human Health



Social – Loss of Cultural Practices & Suicide Crisis



Understanding the Framework
Agreement as a critical
Governance tool in building
climate resilient communities

Framework Agreement on First Nations Land Management

February 1996: FA Signed by 13 FN's & Canada. G2G.

June 1999: Federal legislation mirroring the FA = FNLMA.

Initiative to take back management, governance and control of on-reserve lands & resources.

FA provides the option to manage reserve lands & resources outside of the Indian Act (see handout)

Not a treaty, does not affect Aboriginal rights & title.

FA principles: transparency, accountability, community involvement

FA establishes the LAB & FNLMRC

Signatories exercise their lands authority through a **Land Code**.

Operational communities negotiate funding through an Individual Agreement with Canada.

Land Code

Basic Land Law of the First Nation; drafted and approved by the community.

Identifies reserve lands to be managed as “First Nation Lands”

Establishes limits on the powers of Council

Typically creates a Lands Advisory Committee, Lands Office, roles & responsibilities

Establishes rules & procedures for the use and occupation of First Nation Lands

Financial accountability for revenue from Lands

Procedures for making Laws

Conflict of Interest Rules

Dispute Resolution and appeals

Rules governing the creation, granting, transferring, registration and cancellation of interests in Lands (leases, permits, certificates of occupation, etc.)

Planning Powers under the FA vs. Indian Act

Powers of Council

<u>Indian Act</u>	<u>Framework Agreement & Land Code</u>
Imposed by Canada on communities with no consent or consultation	Negotiated on a G2G basis, developed and approved by community.
Only the Council may introduce land by-laws, with no requirement for membership input or consent.	Council is limited to the kinds of laws it can pass on it's own. Some laws (e.g. LUP, expropriation) may require ratification. There are due process requirements, members can propose new Laws.
Council may (with the approval of the Minister) negotiate leases up to 99 years	Council may only approve a lease in accordance with the rules of the Land Code, e.g. community ratification.
Council may use the land for development or other uses without the consent of the membership.	Council must draft a LUP that is typically voted on by communities. All uses of the land must comply with the LUP.
Council may grant land interests or uses to family members, themselves or friends.	Land Codes contain conflict-of-interest provisions to prevent this.
Council is accountable to the Department of Indian Affairs.	Council is accountable to the membership.
Membership cannot appeal a decision of Council.	Dispute resolution body is in place to handle appeals for decisions made by Council. Decisions can be overruled.



Land and Environmental Protection

- With the adoption of a Land Code, a First Nation assumes greater control over the laws, regulations, policies, and other tools that can be used to protect environmental values.
- FN's are required to establish an Environmental Assessment and Environmental Protection regime with the assistance of appropriate government agencies, subject to the provision of adequate resources.
- FN's must meet or beat Federal & Provincial environmental standards.

FA and Environmental Governance

Section 18.1 – Law Making Powers

The council of a First Nation with a land code in force will have the power to make laws, in accordance with its land code, **respecting the development, conservation, protection, management, use and possession of First Nation land** and interests or land rights and licenses in relation to that land.

Section 23.2 – EA & EP

The Parties intend that there should be both an **environmental assessment (EA)** and an **environmental protection (EP)** regime for each First Nation

Section 23.4 – Environment

The environmental assessment and protection regimes will be implemented through First Nation **laws**.

Section 23.6 – Environmental Management

This agreement is not intended to affect rights and power relating to migratory birds or endangered species **or fisheries (FNLMA, s. 40(2))**.

Section 24.3 – Environmental Management

The First Nation environmental protection standards and punishments **will have at least the same effect** as those in the laws of the province or territory in which the First Nation is situated.

Section 25.3 – EA

The First Nation's environmental assessment process will be **consistent with requirements of the Canadian Environmental Assessment Act (now the *Impact Assessment Act*)**

Laws which can be used to address climate change mitigation and adaptation



Land Use Plan &
Zoning Law



Environmental
Management Plan



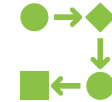
Environmental
Assessment Law



Environmental
Protection Law



Development
Procedures Law



Subdivision,
Development &
Servicing Law



Greenhouse Gas
Emissions Control Law



Enforcement and
Ticketing Law



Business Permitting
Law

Considerations for Law Development & Climate Change

What is your law development procedure?

How will you engage your community around climate change?

What are your relevant Provincial and Federal standards when it comes to climate change mitigation and adaptation?

Climate-informed planning: What future climate scenario are you planning for? (See next presentation for further details)

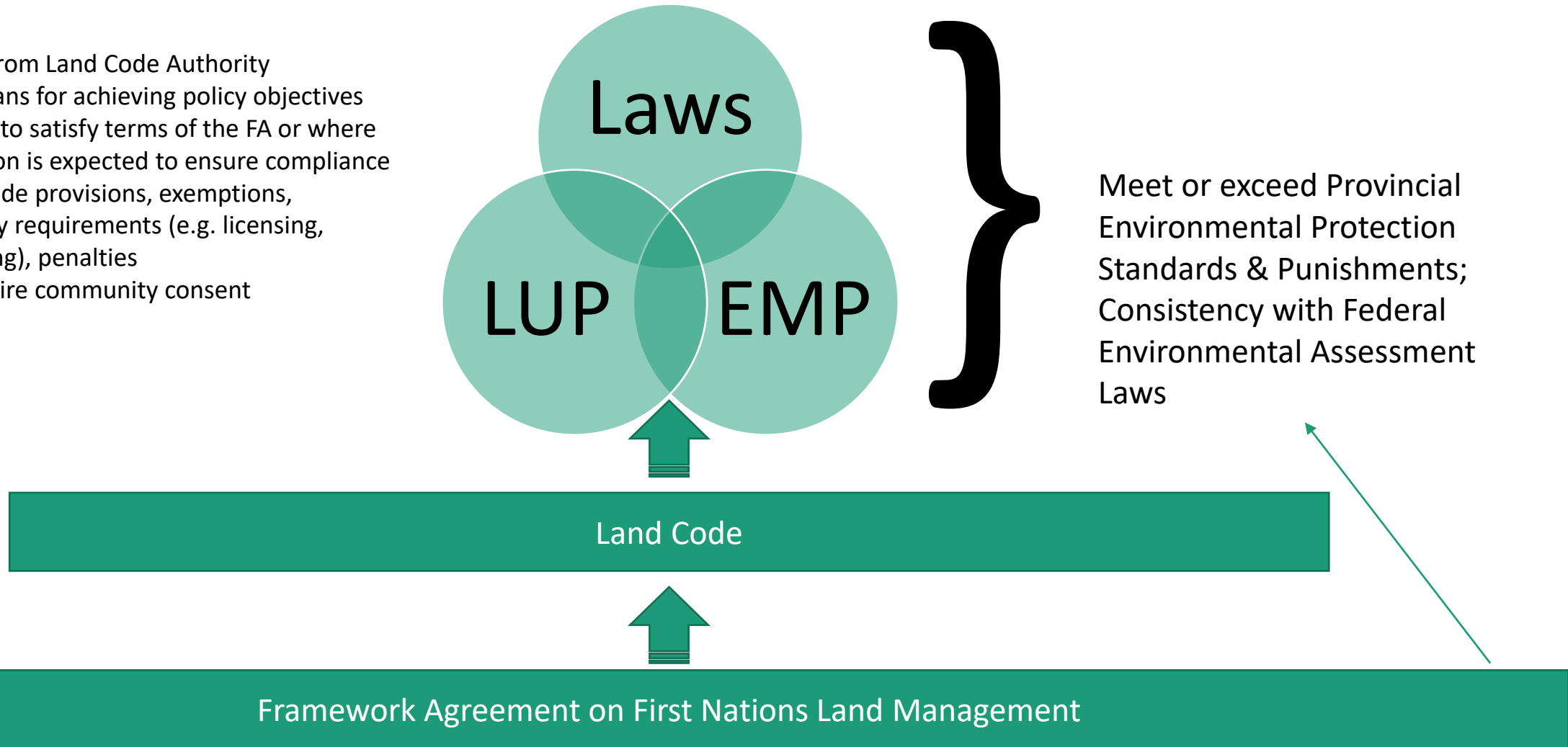
Where will you get your data for climate-related information?

Climate Change will influence or exacerbate existing environmental challenges.

Environmental Planning under the FA

Laws

- Derived from Land Code Authority
- Legal means for achieving policy objectives
- Required to satisfy terms of the FA or where legal action is expected to ensure compliance
- May include provisions, exemptions, regulatory requirements (e.g. licensing, monitoring), penalties
- May require community consent



First Nation Environmental Protection Laws meeting or exceeding Provincial Standards and Punishments: Example 1

Aitchelitz First Nation Environmental Protection Law

- Recognizes that standards of environmental protection established by the First Nation, and the punishments imposed for failure to meet those standards, must be at least equivalent in their effect to the standards and punishments imposed by the Province of BC
- Allows for Protection Orders to be issued when the Lands Manager believes on reasonable grounds that it is necessary to cease, suspend or alter activities on-reserve to prevent the discharge of Hazardous Waste into the environment
- Allows for penalties of up to \$1,000,000 or imprisonment of six months for offences
- Has been used by the First Nation to issue a Protection Order



First Nation Environmental Protection Laws meeting or exceeding Provincial Standards and Punishments: Example 2

Sema:th Soil Deposit, Removal and Transport Law

- Aims to prevent contamination of reserve lands through the deposition of soil and fill materials that are brought in from elsewhere
- Adopts the Province of BC Contaminated Sites Regulation (CSR), pursuant to the BC Environmental Management Act
- Goes further than Provincial rules and applies residential quality standards to all incoming soil, regardless of how the land is zoned in the LUP.
- Originally went further than Provincial rules by including gravel as soil. Was amended due to high costs for members and developers to build roads and gravel pads for housing, difficulty of finding residential quality gravel due to presence of naturally occurring metals. Now developers must ensure that gravel is free of hydrocarbons or other pollutants.



**Sumas
First
Nation**

First Nation Environmental Protection Laws meeting or exceeding Provincial Standards and Punishments: Example 3

Whitecap Dakota Environmental Protection Law

- Signing of bilateral agreement between Whitecap Dakota First Nation and the Saskatchewan Ministry of Environment
- 1st agreement in Canada between a provincial government and a First Nation in relation to the Framework Agreement
- Whitecap Dakota is incorporating and adapting Saskatchewan's *Environmental Management and Protection Act, 2010*, and select regulations
- Whitecap lands will be regulated in the same manner of other provincial lands in Saskatchewan with respect to environmental protection and contamination
- Saskatchewan Ministry of Environment can now support Whitecap Dakota's efforts
- Monitoring and enforcement can be contracted out to Saskatchewan environmental protection officers

Source: <https://www.saskatchewan.ca/government/news-and-media/2019/may/28/environmental-regulation-agreement>



First Nation EA Laws and Consistency with Federal EA Laws

Impact Assessment Act (formerly CEAA, 2012)

“The Minister and Governor in Council must take into account, when determining whether the adverse effects identified in the impact assessment report are in the public interest, is the extent to which a designated project contributes to **sustainability**.”

Subsection 22(1) and Section 63 state that either a review panel or the Minister **must** take into account the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of **climate change**.

[-https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-considering.html](https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-considering.html)

NOTE: Future amendments to the FA are considering removing requirement for consistency with CEAA/federal EA process.



Potential amendments to the Framework Agreement in light of the climate crisis

1. Potential application of the FA to Aboriginal Title lands (where Aboriginal Title is already recognized and affirmed, e.g. Tsilqot'in).

- The Tsilqot'in were the first Indigenous nation in Canada to receive a formal declaration of Aboriginal Title by the Supreme Court of Canada in 2014. While historic, there is no current legal framework to develop and apply Tsilqot'in law over their Title lands. The FA could fill in this gap.
- Potential benefit for climate action:
 - Indigenous territories are some of the most ecologically diverse landscapes in Canada
 - Preserving intact ecosystems is vital in the response to the climate crisis. Natural areas provide critical ecosystem services (e.g. carbon storage, food production, wildlife habitat, fisheries habitat, air and water purification, etc.).
 - Returning governance authority over Indigenous territories would include environmental governance.
 - Research shows that Indigenous Protected and Conserved Areas (IPCA's) are more effective in conserving species and vital ecosystem services, they promote participation, cooperation and co-governance, and they advance cultural revitalization and reconciliation.

Potential amendments to the Framework Agreement in light of the climate crisis

2. Broadened recognition of law-making authority to include greenhouse gas emissions regulations

- Some Nations are committing (in their Land Use Plans) to reducing their climate impact by limiting or reducing greenhouse gas emissions from on-reserve activities.
- Accounting for greenhouse gas emissions is complex. Inventorying and reporting on GHG emissions requires a consistent methodology, capacity, and regulatory requirements need to be established.
- Additional support from Canada would be required. Canada has not been clear in terms of how its climate commitments will impact development on First Nation land.
- Potential benefit for climate action:
 - Indigenous communities need economic development, but this development needs to be sustainable and in line with Canadian and global climate commitments.
 - There is currently a lack of data of the GHG footprint from on-reserve activities
 - GHG regulations could help ensure that emissions on-reserve are accounted and reported
 - This would help give First Nations the legal teeth to promote less carbon-intensive development on their lands

Questions & Discussion

