

February 2005

# Laws for Air Quality on and off First Nations' Land in BC

Background Paper for workshop convened by  
Ministry of Water, Land and Air Protection

Prepared by  
West Coast Environmental Law  
for the Ministry of Water, Land  
and Air Protection

Chris Rolfe, Executive Director  
West Coast Environmental Law





# EXECUTIVE SUMMARY

This report is aimed at providing background information and analysis that will assist attendees at a workshop convened by the Ministry of Water, Land and Air Protection to discuss air quality issues on and around Indian Reserves.

Air pollution is a problem in Canada, in British Columbia and in large and small communities in BC. Two thirds of Canadians are exposed to harmful levels of smog, and an estimated 5,000 Canadians die prematurely due to smog. Far more are hospitalized, have emergency room visits or have to restrict their activities.

Air pollution is not just a “big city” problem. Indeed, in British Columbia, the communities with the worst air quality problems tend to be towns east of the coast mountains.

Those living on and around Indian Reserves in BC are not exempt from the impacts of air pollution. First Nations may also sometimes be located downwind from large and small emitters, and First Nations communities can be a source of emissions that affect both the First Nation and surrounding communities.

Particulate pollution is the most widespread and most harmful form of air pollution in BC. Particulates are fine solids or liquids that are suspended in the air. Fine particulate – tiny particles that are breathed deep into the lungs – is the leading cause of health problems from air pollution.

Fine particulate is directly emitted from burning wood, brush, agricultural waste and fossil fuels like diesel and gasoline. Major sources in BC communities include:

- The wood industry, especially beehive burners.
- The pulp and paper industry.
- Residential wood burning.
- Burning of diesel and other fuel by trucks, trains, ships and off-road industrial equipment. Cars and light duty trucks also emit particulate and pollutants that form particulate in the air.
- Prescribed burning – i.e., burning clear-cuts to prepare them for replanting.
- Burning of land-clearing debris.

- Backyard burning.

The mix of sources responsible for causing pollution will vary from community to community.

All governments – First Nations, federal, provincial and municipal have roles to play both in prohibiting or regulating polluting activities and in making investments that help minimize pollution. For most BC communities, the provincial government role is the most important.

BC's *Environmental Management Act* is BC's main law regulating air pollution. It is used to regulate industrial sources of pollution, regulate activities like open burning that are major sources of air pollution, and regulate products like wood stoves, cars and gasoline that have an impact on emission levels. The other provincial laws that are important for air quality include the BC *Environmental Assessment Act*, which requires environmental assessments for large projects.

Local governments have important functions related to air quality, passing zoning bylaws that separate residential areas from polluting industries. And some municipalities use their powers to regulate backyard burning.

The federal government role in improving air quality is important, but more limited than the provincial role when it comes to regulating polluters. The federal government plays an important role in regulating fuels, and emission standards for cars, trucks and small engines. The federal government can regulate substances that are declared toxic. Although fine particulate has been declared toxic, the federal government has relied on provincial regulation to deal with most non-transportation related sources of particulate. It also has the power to pass environmental protection regulations for federal lands and Indian Reserves, but has barely used this power.

The federal government also requires environmental assessments for many projects that are approved by the federal government, require transfers of federal or aboriginal land, are federally funded, or are carried out by the federal government. This ensures that many projects on Indian Reserves undergo some sort of environmental assessment.

The *Indian Act* also gives the federal cabinet the power to pass regulations for the management of Indian Reserves. Using this power the federal government prohibited burning waste or operating garbage dumps on Indian Reserves without a permit from Indian and Northern Affairs Canada or local band councils.

First Nations have various powers to deal with air pollution problems. Band council zoning can be used to separate polluting activities from residential areas and schools. Nuisance bylaws can be used to regulate backyard burning or similar problems. The Nisga'a Treaty and the First Nations Land Management Agreement also establish processes where First Nations can develop their own environmental protection regulations, but outside of the Nisga'a area this requires First Nations to enter into agreements with the federal government. No such agreements have been completed.

Table 1 summarizes the laws enabling different governments to take action on air pollution and the extent to which they have used these powers.

While the province takes the lead in regulating most sources of air pollution in BC, its powers are not unlimited. Under the Canadian constitution, Indian Reserves are part of a province, and most provincial laws apply on the Indian Reserve. But, judges will say that provincial laws do not apply to Indian Reserves (including areas leased to non-Indians) if the judge concludes that the provincial law affects the core of federal powers related to Indian Reserves.

In BC, what this means in practice is uncertain. Municipal land-use zoning bylaws do not apply to Indian Reserves, but the application of other environmental protection laws is less certain. In one BC case, a judge decided that sewage, health and safety bylaws did not apply to an Indian Reserve because they regulated land use. But, courts in other provinces have said that fire safety regulations and building permit requirements apply to Indian Reserves. And, the Supreme Court of Canada has said that provincial environmental protection laws apply to federally regulated businesses like inter-provincial railways. The opinion of the author is that the BC *Environmental Management Act* and regulations under it will generally apply to Indian Reserves, unless they have the effect of making a particular land use impossible. The application of the BC *Environmental Assessment Act* to Indian Reserves is also uncertain.

The result of legal uncertainty and differences in how local governments and band councils deal with pollution problems is that people living in different parts of BC do not have the consistent benefit of laws, bylaws and regulations that protect their health from air pollution. The biggest gap is created by the uncertain application of provincial air quality laws to Indian Reserves. While there is good reason to believe that provincial air quality laws do apply on Indian Reserves, it is possible that BC courts might disagree. If that occurs, Indian Reserves and surrounding areas lack basic protections offered by the *Environmental Management Act* and there would be virtually no protection of air quality on Indian Reserves. First Nations



may eventually remedy this uncertainty by establishing their own air quality laws but these will take time to develop and will require inter-governmental cooperation.

Table 1: Summary of air protection laws in place in BC.

Legislation	Potential Uses	Actual Uses	Applicability to Indian Reserves
BC <i>Environmental Management Act</i>	Can be used to regulate almost all sources of pollution in BC.	<p>Primary pollution control legislation in BC. A variety of tools are available under the Act to regulate different sources of pollution. These include:</p> <ul style="list-style-type: none"> <li>- Permits used to impose emission limits, technology requirements, monitoring requirements on individual operations. Generally used for large industrial point sources. Permits can be appealed by public.</li> <li>- Codes of Practice or regulations uses to impose standard requirements on “medium risk” facilities.</li> <li>- Regulations and Codes of Practice used to impose standard requirements on a wide variety of sources. Regulations that are particularly important for air quality in BC include: the <i>Agricultural Waste Control Regulation</i>; <i>Open Burning Smoke Control Regulation</i> (regulates open burning of land clearing debris); the <i>Solid Fuel Burning Domestic Appliances Regulation</i> (regulates types of wood stoves that can be sold in BC); requires wood stoves; <i>Wood Residue Burner and Incinerator Regulation</i> (phases out beehive burners) as well as regulations dealing with asphalt plants, oil and gas operations.</li> </ul>	Uncertain. Likely applicable if no indirect restriction on uses that can be made of property.
BC <i>Environmental Assessment Act</i>	Requires environmental assessments of any projects designated by the Minister or in regulation.	Requires environmental assessments of large projects.	Uncertain.
BC <i>Community Charter</i> and <i>Local Government Act</i>	Municipalities and some regional districts can: impose zoning to restrict where polluting businesses locate, regulate nuisances and traffic, and pass environmental protection regulations with provincial approval.	<p>Zoning in place in most areas.</p> <p>Backyard Burning Bylaws, anti-idling bylaws in effect in some municipalities.</p>	Zoning likely inapplicable. Backyard burning bylaws likely applicable

Legislation	Potential Uses	Actual Uses	Applicability to Indian Reserves
<i>Canadian Environmental Protection Act, 1999</i>	<ul style="list-style-type: none"> <li>- Power to pass regulations for federal and aboriginal lands (including Indian Reserves).</li> <li>- Power to pass regulations dealing with substances (including fine particulate) that are deemed toxic because of harm to environment.</li> <li>- Power to establish emission standards for vehicles and engines, require clean burning fuels.</li> <li>- Power to regulate international air pollution sources.</li> </ul>	<p>Only regulations applicable to air emissions and federal/aboriginal lands deal with PCB incinerators and ozone depleting substances.</p> <p>Very limited use of power to regulate toxics. Federal government relying on provincial regulations to deal with particulate, except feds have passed regulations dealing with engines and fuels.</p>	Yes
<i>Canadian Environmental Assessment Act</i>	Requires environmental assessment for most projects that are undertaken by the federal government, federally funded, require a transfer of land (including surrender of Indian Reserve), or are authorized under a federal law or regulation (this includes ministerial authorizations to use Indian Reserves)		Yes
<i>Indian Act</i>	<p>Federal cabinet can pass regulations to manage Indian Reserves.</p> <p>Band Councils can pass zoning and nuisance bylaws.</p>	<p><i>Indian Reserve Waste Disposal Regulation</i> prohibits burning waste without permit.</p> <p>Uncertain to what extent band councils have zoning or nuisance bylaws in place.</p>	Yes
<i>First Nation Land Management Act</i>	Allows Band Councils that have entered into agreement with federal government to adopt land management code and environmental protection laws.	A few bands have adopted Land Management Codes. No agreements in place to allow development of First Nation environmental protection laws.	Yes



# INTRODUCTION

This report is aimed at providing background information and analysis that will assist attendees at a workshop convened by the Ministry of Water, Land and Air Protection to discuss air quality issues on and around Indian Reserves.

Air pollution is a problem in Canada, in British Columbia and in large and small communities in BC. Most Canadians are exposed to harmful levels of air pollutants. Those most at risk from are individuals with heart and lung diseases, asthmatics, the elderly and children.

Those living on and around Indian Reserves in BC are not exempt from the impacts of air pollution. Poor people are more likely to have certain types of health problems or other challenges that make them more at risk from air pollution.<sup>1</sup> Because of higher rates of poverty among First Nations, aboriginal people may be particularly at risk from air pollution.

First Nations may also sometimes be located downwind from large emitters. Academic research in the United States has shown a strong tendency for large polluting industries to locate in poor, black neighbourhoods. While Canadian research has shown a different pattern – large emitters tend to locate in resource industry towns – there are instances where poor First Nations communities are among those most impacted by large emitters.

Finally, First Nations communities can be a source of emissions that affect both the First Nation and surrounding communities. Like any community, some First Nations people use wood stoves, burn garden and yard waste and engage in other activities that can contribute to air pollution. Also, polluting industries sometimes locate on Indian Reserves.

What makes the situation different in the case of First Nations communities is the uncertain application of some provincial and municipal air quality regulations to First Nation land. This is a key focus of this report.

Part I provides a brief overview of some of the main air quality issues in BC. Part II reviews the laws that are in place at the provincial, federal, municipal and First Nations level dealing with air quality. Part III looks at how provincial and municipal laws apply to First Nations land, and identifies areas where gaps may exist in regulation.



# PART 1: AIR QUALITY CONCERNS IN BC

According to the federal government, two thirds of Canadians are exposed to harmful levels of smog, and an estimated 5,000 Canadians die prematurely due to smog – two thousand more deaths than occur due to motor vehicle accidents. Far more are hospitalized, have emergency room visits or have to restrict their activities. A report commissioned for the Medical Health Officers of the Lower Mainland estimated between 15 and 150 premature deaths per year in the region attributable to air pollution.

As noted above, those most at risk are individuals with heart and lung diseases, asthmatics, the elderly and children.

Those living in poverty are more likely to be at risk because of air pollution: they have greater incidences of bronchitis, and asthma; they live in inadequate housing; they often have lower mobility and cannot afford to simply move away from sources of pollution. This may lead to disproportionate impacts of air pollution on Indian Reserves.

## WHAT POLLUTANTS ARE OF CONCERN IN BC?

Air Quality problems exist in communities throughout BC, but the types and causes of pollution vary. There are several kinds of pollution that are of concern in BC communities:

- **Fine particulate.** Particulates are fine solids or liquids that are suspended in the air. Particulate pollution is undoubtedly the most widespread and most harmful form of air pollution in BC. Three classes of particulate matter are of particular concern for human health:  $PM_{10}$  (particles less than ten microns<sup>2</sup> in diameter), fine particulate –  $PM_{2.5}$  (less than 2.5 microns); and ultra fine particulates (less than one micron). Fine and ultra fine particulate are increasingly recognized as primary causes of health problems from air pollution since they can be inhaled deeply into the lungs. Fine particulate is directly emitted from burning “biomass” (wood, brush, agricultural waste) and fossil fuels like diesel and gasoline. Fine particulate also forms in the atmosphere around other pollutants such as sulphur oxides, nitrous oxide, volatile organic compounds and ammonia emissions.
- **Hazardous Air Pollutants (HAPs).** Hazardous air pollutants are toxic chemicals exposure which can cause more serious health problems such as cancer or birth defects. Sources are varied and include chemical additives found in gasoline vapours, chemicals produced by burning wood and diesel, and formaldehyde produced by oriented strand board plants.

- **Nitrous Oxides (NO<sub>x</sub>).** Nitrous Oxides can cause bronchial congestion and scar the lungs. They also react with sunlight and volatile organics to create ground-level ozone. NO<sub>x</sub> comes from burning both fossil fuels and biomass.
- **Ground-level ozone** is formed in the atmosphere from the reaction of sunlight, VOCs and NO<sub>x</sub>. Ozone is a powerful irritant that can cause harm to humans even at levels where it is invisible to the eye. Both ozone and fine particulate decrease lung functioning, exacerbate cardio-respiratory diseases, and increase or exacerbate asthma. Ozone decreases the bodies' defences against infection.
- **Volatile Organic Compounds (VOCs).** Volatile organic compounds include a broad range of natural and human created compounds that are reactive. VOCs come from a variety of sources, including industry, motor vehicles and area sources (e.g., gas station refilling, open burning, paints and solvents in households, incomplete combustion in home heaters).
- **Smoke.** Smoke from burning wood, brush and other organic material is a major source of air pollution in many areas of BC. Smoke includes fine particulate, carbon monoxide, hazardous air pollutants, NO<sub>x</sub> and VOC.
- **Smog.** Smog is a mixture of carbon monoxide, ground level ozone and fine particulates. Carbon monoxide is a poisonous gas emitted by cars and released by forest fires and open burning.

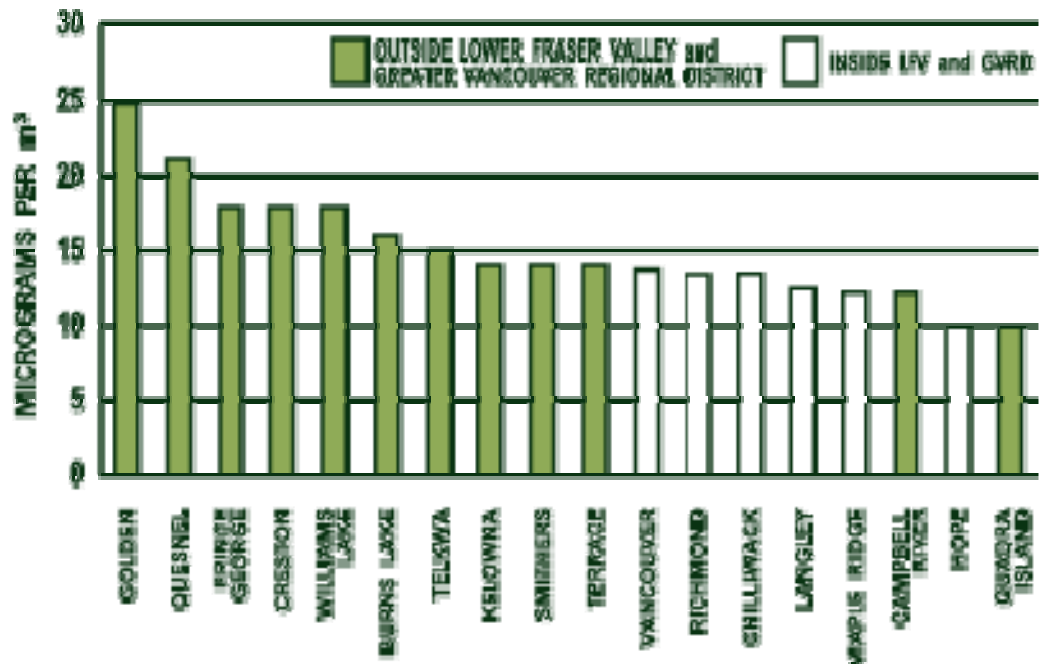
#### WHERE IS AIR POLLUTION A CONCERN IN BC?

Air pollution is not just a "big city" problem. Indeed, in British Columbia, most of the communities with the most significant air quality problems are smaller towns east of the coast mountains. There is no known safe level of particulate or ozone pollution, but there is clear evidence of health effects where concentrations of pollution exceeding 25 micrograms per cubic meter.

Figure 1 shows average particulate pollution levels in several communities around BC. Even though average concentrations are generally below the 25 $\mu\text{g}/\text{m}^3$  level, many of these communities will exceed that level at least some of the time.



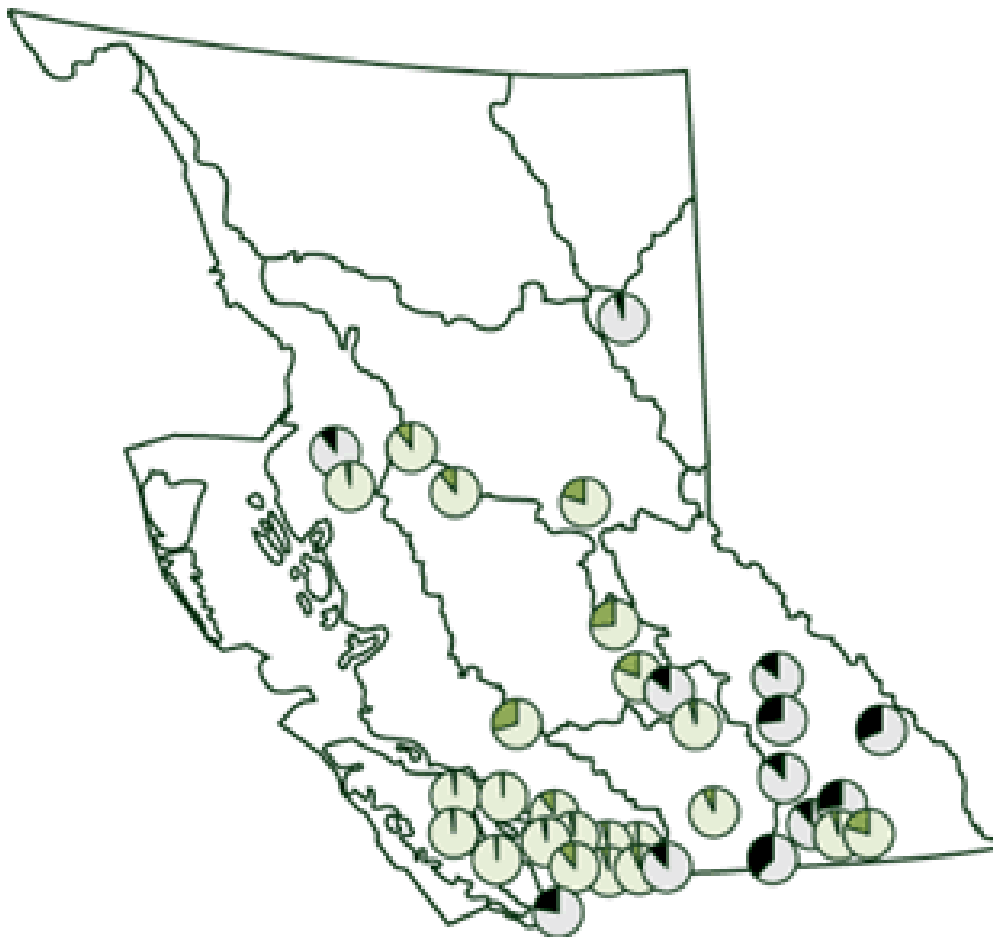
Figure 1: Annual Mean PM<sub>10</sub> Concentration for British Columbian Communities with Continuous Sampling Stations in 2000



Source: Ministry of Water, Land and Air Protection, Air Resources Branch 2001.

Figure 2 shows the percentage of the time where average concentrations of PM<sub>10</sub> pollution exceeded this level in BC communities where air quality is monitored. Dark portions of the pie show the percentage of the time where concentrations exceeded 25µg/m<sup>3</sup>. In 2000, 25 out of 40 communities monitored exceeded the fine particulate (or PM<sub>10</sub>) levels at which health risks are known to occur, on more than 18 days (or 5% of the time). Twenty-one of these communities exceeded this level on more than 36 days (or 10% of the time).

**Figure 2: Communities Where Particulate Exceeds Level of Known Health Impacts**



[View Graph Data](#)

Source: BC Ministry of Water, Land and Air Protection, Air Resources Branch, 2001. Air Data and Monitoring System Database.

Notes: The dark portion of the pie graphs shows the percentage of time in 2000, at each sampling station, that PM<sub>10</sub> exceeded 25 micrograms/m<sup>3</sup>, (i.e., levels above which health effects can occur). The green pies represent data taken from continuous samplers and the grey pies represent data taken from non-continuous samplers, (i.e., one sample every six days). The delineations on the map show the 10 ecoprovinces of British Columbia, based on Ecoregions of British Columbia, 1993.



## SOURCES OF AIR POLLUTION IN BC

Sources of air pollution vary hugely from community to community in BC. In large centres they include a mix of transportation, agriculture, industry, home and commercial heating. Large industrial sources are often prominent sources of pollution in some communities, while biomass burning by residences or the logging industry dominate in other areas.

Table 2 lists major sources of fine particulate emissions in BC, giving some idea of the significance of different sources of BC's largest air quality problem. The amount of emissions from a particular source is only one factor determining the extent of the problems caused by a source. Table 2 does not reflect other types of emissions (e.g., sulphur dioxide) that form fine particulate in the air. Nor does it reflect the varying health impacts of different types of fine particulate. For instance, fine particulate from burning diesel is believed to have greater health impacts than dust from roads. Also, it does not reflect human exposure. Health impacts will be greater where human exposure is greater: e.g., smoke that envelopes a school is more of a health concern than smoke far from human habitation.

The wood industry accounts for 11.2% of fine particulate emissions in BC – much of this is from beehive burners. The pulp and paper industry accounts for another 7% of emissions. Residential wood burning accounts for 7.2% of emissions. Because residential wood burning occurs near people's homes and most often on cold nights when there is little wind, the health impacts of residential wood smoke may be greater than indicated by the percentage emitted. Transportation, including marine, rail, on-road and off-road diesel burning equipment accounts for 8.4% of the emissions. This likely understates the impacts of transportation because it does not account for emissions of gases that form particulate in the air. Dust from roads accounts for about 30% of fine particulate emissions, but because dust is not as toxic as smoke from burned fuel, it is less of a concern. Prescribed burning – clearing clear-cuts of slash and preparing them for replanting – is responsible for 18.4% of emissions. Other sources of concern include burning construction and land clearing debris, especially when tires are used as fire starters, and burning of leaves and prunings.

**Table 2: Sources of PM<sub>2.5</sub> in BC 2000**

Source	Tonnes	Percentage of total BC PM <sub>2.5</sub> emissions
Wood Industry	12,669	11.2%
Pulp and Paper Industry	7,088	6.3%
Other Industry	4,633	4.1%
<b>TOTAL INDUSTRIAL SOURCES</b>	<b>24,390</b>	<b>21.6%</b>
Residential Fuel Wood Combustion	8,183	7.2%
Other non-industrial combustion	827	0.7%
<b>TOTAL NON INDUSTRIAL FUEL COMBUSTION</b>	<b>9,010</b>	<b>8.0%</b>
Heavy-duty diesel vehicles	1,160	1.0%
Marine Transportation	2,497	2.2%
Off-road use of diesel	3,688	3.3%
Other transportation	2,128	1.9%
<b>TOTAL TRANSPORTATION</b>	<b>9,473</b>	<b>8.4%</b>
<b>TOTAL INCINERATION</b>	<b>291</b>	<b>0.3%</b>
<b>TOTAL MISCELLANEOUS</b>	<b>1,229</b>	<b>1.1%</b>
Dust from Paved Roads	20,740	18.4%
Dust from Unpaved Roads	12,977	11.5%
Forest Fires	12,658	11.2%
Prescribed Burning	20,802	18.4%
Other open sources	1,359	1.2%
<b>TOTAL OPEN SOURCES</b>	<b>68,536</b>	<b>60.7%</b>
<b>TOTAL</b>	<b>112,929</b>	<b>100.0%</b>

Source: Environment Canada, Pollution Data Branch.



## PART II: REGULATING AIR POLLUTION IN BC

Various levels of government have roles in regulating air pollution and the activities that cause air pollution in BC. Part II reviews the various powers provincial, federal, First Nations and local governments have to regulate air pollution in BC. The issue of when provincial air quality laws apply on Indian Reserves is discussed in Part III.

### PROVINCIAL REGULATION OF AIR QUALITY

The provincial government has the most extensive powers to regulate air pollution in BC. The province can regulate industrial sources of pollution, forest practices – including prescribed burning – emissions from cars and trucks. It also has the power to regulate issues that have indirect impacts on air quality: for instance, it can regulate land use, prohibiting beehive burners in proximity to residential areas.

### ENVIRONMENTAL MANAGEMENT ACT

The *Environmental Management Act*, combined with the regulations passed under it and permits issued under it, is BC's main law regulating air pollution. The *Environmental Management Act* uses a mix of general prohibitions, permits, regulations and Codes of Practice to regulate air quality. The Act starts with a prohibition against introducing waste into the environment from various industries, businesses and activities listed in the *Waste Discharge Regulation*. This prohibition against introducing waste does not apply if the operation has a permit that allows them to emit waste and/or if they are in compliance with regulations or Codes of Practice. The *Environmental Management Act* also includes a general requirement that a person must not introduce waste into the environment so as to cause pollution.

The system for managing air quality in BC is undergoing major changes, but can be summarized as follows:

#### High Risk Sources

Under a new system being introduced by the Ministry of Water, Land and Air Protection, sources that are deemed by the Province to be high risk (e.g., pulp mills and beehive burners) will continue to be regulated by permit. The prohibition against emitting pollutants into the air from industries, businesses and trades listed in the *Waste Discharge Regulation* does not apply to a person that has a waste management permit authorizing the release of air pollutants. High risk facilities may also be subject to regulations. For



instance, regulations are in place setting a schedule for the phase out of beehive burners.

Permits vary in detail but typically put limits on the types of emissions and quantity of emissions, and/or impose requirements for monitoring emissions and require practices or technologies to reduce emissions. The standards and requirements included in permits are written by Ministry of Water, Land and Air Protection staff, and approved by waste management directors. In writing permits, staff are guided by a number of factors including:

- Practices used in other jurisdictions, e.g., what standards have been proven to be commercially feasible and are widely used in jurisdictions with similar air quality issues?
- Criteria. For certain types of industry, there are clear provincial government guidelines on the levels of pollutant that can be released from a facility. These guidelines specify the contents of permits.
- Air Quality Objectives. These are objectives for the maximum concentrations of pollutants in the ambient air. When a company applies for a permit for a large industrial facility, or undergoes an environmental assessment, government staff will consider whether the proposed facility will lead to air quality objectives being exceeded.

The effectiveness of the permit system in protecting human health is dependant on many factors. Staff may not always apply air quality objectives consistently; air quality objectives are in some cases out of date, and accept some risk of health impacts; and pressure from both those applying for permits can influence decisions.

Once a permit is issued, both permittees (the person allowed to emit waste under a permit) and members of the public can appeal permits to the Environmental Appeal Board asking for more or less stringent requirements.

#### Medium Risk Sources

Under the new system being introduced by the Ministry of Water, Land and Air Protection, medium risk operations will be regulated by “Codes of Practice.” Medium risk sources tend to be medium-sized point sources (e.g., asphalt plants and bulk petroleum storage facilities) but can also include area sources like farms.

A Code of Practice is simply a regulation passed by the Minister. Operations are exempted from the prohibition on introducing waste into the environment if they comply with a Code of Practice developed for that type of operation.



Operations subject to a Code of Practice do not require any specific government approval, and members of the public have no ability to challenge emission levels or practices that are approved by Code of Practice.

So far, no Codes of Practice have been developed, but there are a number of regulations which essentially do the same thing, exempting operations from prohibitions on emitting wastes if they follow the terms of the regulation. For instance, the *Agricultural Waste Control Regulation* sets various limits on pollution from agricultural operations and imposes pollution prevention practices.

Until such time as the province develops Codes of Practice for all medium risk sources, many of them will continue to be regulated by way of permits.

#### Low Risk Sources

If an industry or operation is not listed in the *Waste Discharge Regulation*, there is no prohibition against introducing waste into the environment, but a person must not introduce waste into the environment so as to cause pollution. The Act defines “pollution” as “substances or contaminants [in the environment] that substantially alter or impair the usefulness of the environment.”

#### Mobile and Area Sources

Not all sources of emissions fall within the above framework of high, medium and low risk facilities. Some regulations apply to activities that are not listed in the *Waste Discharge Regulation*. For instance, the *Open Burning Smoke Control Regulation* regulates prescribed burning in the forest industry and open burning of land clearing or demolition debris, and the *Solid Fuel Burning Domestic Appliances Regulation* requires retailers of wood stoves in BC to only sell stoves that meet environmental standards.

#### BC ENVIRONMENTAL ASSESSMENT ACT

BC's *Environmental Assessment Act* establishes a process for environmental assessment of relatively large projects in BC. Under the Act, it is illegal to undertake a reviewable project unless either the head of the Environmental Assessment office waives the requirement for environmental assessment, or an environmental certificate for the project is in place and complied with.

A reviewable project is any project that exceeds a threshold for that type of project set out in regulation. A number of large industrial projects (e.g., thermal power plants over 50 mw capacity) with significant potential to

impact on air quality are reviewable under the regulations. Also projects can be designated as reviewable by the minister.

The Act has little in the way of defined procedures or requirements, with the scope, procedures and methods of environmental assessment set by the Executive Director or the Minister. For those projects where the Executive Director determines procedure there is a requirement for public consultation.

## LOCAL GOVERNMENTS AND AIR QUALITY

Under the *Community Charter* and *Local Government Act*, local governments have certain powers to protect air quality using bylaws. Under the *Charter*, violations can be enforced by fines of up to \$10,000. Local government bylaw making powers include powers to regulate:

- Land use. For instance, both regional districts and municipalities can pass zoning bylaws that prohibit heavy industry in areas adjacent to residential areas.
- Roads. Municipalities can regulate the use of roads. Some municipalities have passed anti-idling bylaws that prohibit buses, trucks or cars from idling for more than a few minutes.
- Nuisances. Municipalities, and in some cases, regional districts, have the power to regulate nuisances, which are defined to include odour or dust that is “liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public” and “the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia that is liable to foul or contaminate the atmosphere.” Some municipalities have used this power to ban or regulate backyard burning, and the province has a model Backyard Burning Bylaw that it encourages municipalities to adopt.
- Environmental Protection. Municipalities can pass environmental protection bylaws, but these must be approved by the provincial government to have any affect. So far, the province has not given general approval to bylaws dealing with air pollution, but any municipal government could ask the Minister of Community, Aboriginal and Women’s Services to approve an air quality bylaw.

In addition to these powers, the Greater Vancouver Regional District has some specific powers under the *Environmental Management Act*. In particular, the GVRD’s director of waste management has the same powers as Ministry of Water, Land and Air Protection directors of waste management – e.g., to issue permits. But the GVRD also has an additional



general power to pass bylaws regulating air quality. For instance, the GVRD could impose its own permitting system on polluters – requiring permits from industries that don't require permits under the *Environmental Management Act*.

## FEDERAL POWERS OF REGULATION

Generally, the federal government was historically perceived as having narrower environmental protection powers than the provinces, but recent court cases have generally accepted a wider role for the federal government in terms of environmental protection. The following are the main federal laws that relate to air quality and first nations.

### CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

The *Canadian Environmental Protection Act, 1999* gives the federal government a number of powers related to air quality, as well as powers related to federal lands and Indian Reserves. These include:

#### **Regulation of Aboriginal Lands, Federal Lands and Federal Undertakings**

Division 6 of *CEPA, 1999* gives the federal cabinet the power to pass environmental protection regulations that apply to the federal government, federally owned lands, federally regulated industries (e.g., inter-provincial railways and shipping companies), and aboriginal land. Aboriginal land is defined to include Indian Reserves, surrendered land and land subject to land claims agreement where title rests with the federal government. So far, the only regulations passed under Division 6 that relate to air quality is a regulation of mobile PCB incineration facilities, and a regulation related to the release and capture of ozone depleting substances.

#### **Regulation of CEPA Toxics**

Part V of *CEPA* creates an extensive process for assessing substances used in commerce or released into the environment, determining if they are causing harm to the environment or human health, and declaring them toxic. Environment Canada considers a substance toxic under *CEPA* if it is entering the environment in amounts that have or may have a harmful effect on the environment or human health. Under *CEPA*, ozone depleting substances like CFC are considered toxic, even though they are not toxic in the normal sense of the word (i.e., poisonous). Similarly, an inherently poisonous substance may not be “*CEPA* toxic” if it is not released into the environment.

Once a substance is declared toxic the federal government has extensive regulatory powers. There are many regulations under *CEPA* that relate to particular “*CEPA* toxics” that are released into the air. From an air quality perspective, one of the most important *CEPA* toxics is  $PM_{10}$ . Although the sources of  $PM_{10}$  are widespread, the federal government has largely taken a cooperative approach, coaxing the provinces to regulate, and has only regulated in relation to fuels, vehicle emissions and emissions from off road engines.

### **Regulation of International Air Pollution, Vehicles and Fuels**

*CEPA* also includes a number of other specific regulation making powers that relate to air pollution. These include powers to regulate vehicle emissions, fuels and sources of pollution in Canada that are causing international air pollution.

#### INDIAN ACT

The *Indian Act* also gives the federal cabinet the power to pass regulations for the management of Indian Reserves.

The only regulation passed that has any bearing on air pollution is the *Indian Reserve Waste Disposal Regulation*, which prohibits burning waste or operating garbage dumps on Indian Reserves without a permit. Waste is defined as including “garbage, liquid and semi-liquid substances, land-fill and scrap of all kinds.” While the regulation could be interpreted as prohibiting backyard burning or burning garbage in home garbage burners, it appears to be aimed at larger, permanent operations. Permits can be issued by the Minister of Indian Affairs, or, with the authority of the Minister, the local band council. The maximum fines under the regulation are weak: not to exceed \$100 or a maximum period of three (3) months in jail.

#### CANADIAN ENVIRONMENTAL ASSESSMENT ACT

The *Canadian Environmental Assessment Act* establishes a process for conducting environmental assessments (EA) of projects involving decisions made by the federal government.

For projects in which the federal government is involved, the Act applies environmental assessment broadly. Unlike the provincial environmental assessment act, the federal act requires environmental assessments of relatively minor projects. The actual process can involve a relatively cursory screening or more in-depth comprehensive assessments for very large projects.



Projects will only be subject to assessment if there is some federal government involvement. Triggers for assessment include:

- the federal government proposing a project;
- the federal government granting money or some other form of financial assistance for a project;
- federal government granting an interest in federal land. (Federal land is defined to include Indian Reserves). This includes the leasing of designated (conditionally surrendered) lands.
- the federal government exercising a regulatory duty (e.g., issuing a permit or license) in relation to the project. Only regulatory duties listed in the *Law List Regulations* will trigger an assessment. These include ministers' authorizations to use Indian Reserve lands, to remove gravel or sand from Reserves, to mine in Reserves, and to burn waste.

The federal Minister of Environment can also order environmental assessments for projects on Indian Reserves that do not otherwise trigger and environmental assessment.

Although the Act can apply to smaller projects, some large projects may escape the provisions of the Act if they do not have a federal trigger. The federal environmental assessment process is relevant to air quality and Indian Reserves in two ways:

- it provides a means by which projects that threaten environmental quality on Indian Reserves can be assessed, and either rejected or conditions placed on the project.
- it is also a means by which the federal government can impose requirements on projects on Indian Reserve land.

## FIRST NATIONS

As Canadian courts continue to define aboriginal title and rights, they may define certain rights to regulate land over which First Nations have aboriginal title or rights. So far Canadian courts have recognized that aboriginal title “encompasses the right to choose to what uses land can be put” and that decisions with respect to the land held under aboriginal title are “made by the community”.<sup>3</sup> Both these suggest a communal right to regulate land use that could come into play once a First Nation has established aboriginal title. On the other hand, Canadian courts have yet to embrace aboriginal rights of self government, especially where the result of such a right might be to legalize activities that would otherwise be unlawful.

Until rights of regulation are either recognized in treaty or through court decisions, it is premature to attempt defining any such rights. First Nations may, however, have a role in influencing land use decisions that affect air quality. In particular, governments' duty to accommodate aboriginal interests<sup>4</sup> may influence land use decision-making.

#### INDIAN ACT

Band Councils have some powers under the *Indian Act* to regulate activities affecting air quality. As noted above, the federal Minister of Indian Affairs can delegate to band councils the power to use permits to regulate waste burning on Indian Reserves. Also bands can pass bylaws aimed at preventing nuisances. This is similar to the power municipalities use to regulate backyard burning. Band bylaws can impose fines of up to \$1,000 per violation.

#### FIRST NATION LAND MANAGEMENT ACT

The Framework Agreement on First Nation Land Management is a 1996 agreement between a number of bands across Canada and the Canadian Government. It was brought into force in 1999 by the *First Nations Land Management Act*. Together, the agreement and Act allow bands that are signatories to develop their own land codes and environmental protection provisions. At least 14 bands in BC are signatories.

The Act provides bands with a wide range of land related law-making powers and ensuring proper enforcement mechanisms are available, and it allows land related decisions to be made at the community level without the involvement of the Minister. Land codes must include basic legal framework provisions and deal with a number of issues that do not touch on environmental protection.

Bands that adopt land management codes can, but are not required to, pass a number of laws relevant to air quality. In particular, they can pass zoning laws and environmental assessment and environmental protection laws. They can also adopt enforcement regimes, providing for the power to inspect, search and seize and for compulsory sampling and testing, etc.

Before adopting environmental protection laws, however, bands are required to enter into an Environmental Management Agreement (EMA) with Canada and possibly the respective province. This is to ensure that First Nations have adequate resources to develop, enact, maintain and enforce their laws. Although a draft EMA has been developed, First Nations have not yet formally accepted the approach that has been suggested. Once



an EMA is in place, standards for environmental protection and the punishments for non compliance must be at least equivalent to existing provincial environmental laws.

Similarly, any environmental assessment regimes adopted by bands must be equivalent in some ways to the federal environmental assessment process. First Nation's assessment process must apply to all projects<sup>5</sup> on reserve land governed by a code, if the project is approved, regulated, financed or undertaken by the band council.

#### COMPREHENSIVE LAND CLAIM AGREEMENTS NISGA'A FINAL AGREEMENT

First Nations may also have environmental protection powers under Comprehensive Land Claim Agreements. Treaty 8 and colonial era treaties do not give any such powers, but Nisga'a final agreement does.

Under the Nisga'a agreement, the Parties (Nisga'a, federal and provincial governments) agree, in principle, to coordinated environmental assessments that meet the requirements of federal and provincial laws.

The Nisga'a government may also make laws in respect of environmental protection on Nisga'a Lands. In the event of a conflict between a Nisga'a law under this paragraph and a federal or provincial law, the federal or provincial law will prevail to the extent of the conflict. The agreement also contemplates agreements that delegate the administration and enforcement of federal and provincial environmental enforcement functions to Nisga'a institutions.

The parties agree to enforce their environmental laws fairly, impartially and effectively. They also agree not to relax environmental standards in the Nass Area for the purpose of encouraging investment.

### **PART III: REGULATORY GAPS**

There are numerous concerns with regard to the regulation of air quality that exist throughout British Columbia. For instance, West Coast Environmental Law has identified the lack of policy regarding the maintenance of air quality in pristine areas as a problem. Similarly, there are no policies which clearly state when the government will refuse to permit a facility because of the impacts of its emissions on local ambient air quality. While these concerns are regulatory gaps, the focus of this part is



gaps that occur because of the uneven geographic application of regulations in the Province.

A key related issue is the application of provincial and municipal air quality laws to Indian Reserves. The next section begins with a short summary of the law related to application of provincial and municipal laws to Indian Reserves. It then applies that law to provincial air quality laws. It concludes that while the law is uncertain, most recent, high-level, court cases suggest that BC air quality laws would apply to Indian Reserves. The uncertain application of provincial environmental laws, and the lack of comparable federal legislation, mean that those living on and around Indian Reserves may not have equal protection from the health impacts of poor air quality to those living away from Indian Reserves.

### WHAT DOES THE CASE LAW SAY ABOUT APPLICATION OF PROVINCIAL LAWS TO INDIAN RESERVES?

Under the *Constitution Act, 1867*, the federal government has authority over “Indians and lands reserved for Indians”. Canadian courts have grappled since 1867 with the ability of provincial governments and municipalities to pass laws that have effect on Indian Reserves and Indian people. The results are not entirely consistent, but following principles and observations can be made:

1. Provincial (and municipal) laws can apply to Indian Reserves.<sup>6</sup> For instance, provincial labour laws and traffic laws apply to people on Indian Reserves.<sup>7</sup>
2. Neither provincial nor federal laws can extinguish aboriginal or treaty rights. Provincial laws cannot single out Indians or Indian Reserves for special treatment. Aboriginal rights are protected under the *Constitution Act, 1982*, and any provincial law which in effect applied only to Indians or Indian Reserves would be outside the constitutional powers of provincial governments.
3. Provincial laws cannot affect an “integral part of primary federal jurisdiction over Indians and Lands reserved for Indians”.<sup>8</sup> This clearly includes laws that impair the status or capacity of Indians, or laws that affect the right to possession of Indian lands.<sup>9</sup> The Supreme Court of Canada has described the key issue as being whether laws relate to “Indianness” or “regulate Indians as Indians” or affect the “status and capacity of Indians as Indians”. Leading constitutional experts have suggested that there is an analogy between this rule and the constitutional rule that federal undertakings (e.g., inter-provincial



railways) are not subject to provincial laws that affect a vital part of the undertaking.<sup>10</sup>

4. Provincial regulation of land use may, at least in some cases, be invalid on Indian Reserves. Certain types of provincial regulation, especially municipal zoning, clearly go to an integral part of federal jurisdiction over Indian Reserves. One of Canada's leading experts on constitutional law states that provincial laws "probably cannot affect at least some uses of land on a reserve." Cases dealing with the application of provincial laws to public lands held by the federal government provide a powerful analogy. Municipal zoning bylaws do not apply to these federal lands.<sup>11</sup>
5. There is some authority for a general rule that provincial laws cannot regulate land use, but can regulate the 'activities of the user'. In a 1970 case, *Surrey v. Peace Arch Enterprises*,<sup>12</sup> the BC Court of Appeal held that municipal bylaws related to land use were inoperable on Indian Reserves. Many cases have accepted the premise that provincial laws cannot regulate land use on Indian Reserves, but have distinguished land use from the activities of the user.<sup>13</sup> On the other hand, courts in other provinces have not adopted the 'use' vs. 'activities of the user' distinction, instead limiting their consideration to the issues referred to in paragraphs 2-4.<sup>14</sup>
6. Courts have been inconsistent on the issue of whether provincial health and safety regulations apply to Indian Reserves. In *Peace Arch*, the BC Court of Appeal ruled that both municipal zoning bylaws (which restrict allowable uses and densities) and building, sewage disposal and health bylaws (which are intended to protect health or safety) regulated use and were inapplicable to Indian Reserves. According to the court, both "spelled out explicitly how land could be used." The decision that municipal building standards do not apply to Indian Reserves has support from cases holding that provincial building codes do not apply to other federal lands.<sup>15</sup>

The *Peace Arch* case fails to make a distinction between absolute restrictions on use ("no heavy industry allowed) and restriction in how a use is carried out ("heavy industry may not emit more than...") or activities of the user. Subsequent cases have held that restrictions on carrying on a retail business on Sundays relate to 'activities of the user' rather than 'land use' and are effective on Indian Reserves.<sup>16</sup>

*Peace Arch* is open to challenge on the basis that it is difficult to see how regulation of building standards, health or safety go to an "integral part of primary federal jurisdiction over Indians and Lands reserved for Indians" or to "Indianness". The BC Court of Appeal has

held that bylaws regulating the removal of gravel, aimed at producing revenue to pay for damage to roads from gravel, are valid on Indian Reserves.<sup>17</sup> Courts in other provinces have ruled that provincial building permit requirements<sup>18</sup> and fire safety laws<sup>19</sup> apply to Indian Reserves.

Similarly, the Supreme Court of Canada has ruled that provincial environmental protection laws apply to federal undertakings (e.g., inter-provincial railways).<sup>20</sup> Key issues in that and other cases dealing with application of provincial laws to federal undertakings are that the provincial laws do not indirectly stop essential activities of the railway, didn't interfere with the management of the railway or affect an integral part of railway operation.

7. Provincial laws which are inoperable on Indian Reserves are inoperable both on unsurrendered lands and conditionally surrendered lands.<sup>21</sup>
8. Provincial laws affecting status and capacity of Indians are brought into force by section 88 of the *Indian Act*. Section 88 of the *Indian Act* states that subject to treaties or inconsistent federal law, provincial laws of general application are applicable to Indians in the province. In other words, certain provincial laws that would otherwise be inoperative because of their impacts on Indians are operative by virtue of section 88.

Section 88 only refers to provincial laws of general application applying to Indians, not Indian Reserves. Thus, section 88 does not extend the application of provincial and municipal environmental laws that are otherwise inoperative to non-Indians on Indian Reserves.

Similarly, provincial laws or municipal laws that are inoperative under the principles of paragraph 5 above, do not appear to be applicable under s. 88. The courts have interpreted s. 88 as applying only to provincial laws that affected "Indianness" or affect "the status and capacity of Indians".<sup>22</sup> Where courts have considered the application of provincial safety, health, land use or building standards to Indian Reserves, they have considered section 88.<sup>23</sup>

9. Where provincial or municipal laws apply to Indian Reserves and federal laws deal with the same issue, the provincial or municipal law may have to yield to the federal law. Canadian courts recognize that both provincial and federal governments can regulate the same problem under different constitutional heads of power. Thus, the federal government might use its criminal law powers to regulate particulate emissions and the province could do the same thing based



on its power over 'property and civil rights'. In recent years, the courts have tended to accept that both laws can apply simultaneously, unless compliance with one law means breach of the other, or if compliance with one is contrary to the purposes of the other.<sup>24</sup> In these cases, the federal law will prevail over the provincial law.

## APPLYING THE LAW TO REGULATION OF AIR QUALITY

There is very strong argument that any provincial laws that put absolute restrictions on land use have no force on Indian Reserves (e.g., municipal zoning bylaws that do not allow heavy industry). This is based on the extent to which regulating land use goes to the core of federal jurisdiction over Indian Reserves, affecting the very nature of Indian Reserves, usurping band council or federal government's management of basic issues on reserves. Zoning bylaws would also tend to single out Indian Reserves (because different laws apply in different zones).

If air related provisions of the *Environmental Management Act* or other provincial or municipal regulations have the effect of not allowing a particular use, they are more likely to be seen as inoperable on Indian Reserves. In practice, however, there are few if any activities or land uses that are effectively outlawed by provincial environmental regulation. Provincial laws tend to go to "how to do it" and not "can you do it." In theory, permitting requirements of the *Environmental Management Act* that prohibit certain operations without a permit are an exception; in practice, however, the permitting system at most leads only to a delay in when a business or industry can operate.

The argument that provincial environmental quality laws do not apply to Indian Reserves also exists in relation to provincial environmental assessment laws. This is because environmental assessment can involve a deep, multifaceted consideration of a particular project and thus is more likely to be seen as going to the core of management of an activity on an Indian reserve. Also, environmental assessment certificates are needed before a particular project can start, and thus environmental assessment can allow the province to stop a proposed use.

It is possible to argue that air related provisions of the *Environmental Management Act* do not apply to Indian Reserves. On the one hand, the *Peace Arch* case found that provincial/municipal sewage and safety rules do not apply to Indian Reserves, clearly suggesting that provincial air quality laws do not apply. *Peace Arch* has not been overturned in BC. BC courts have also ruled that provincial/municipal building permit requirements and building bylaws do not apply to federal public land in BC.

On other hand, there are a number of factors suggesting that courts might apply air quality regulations to Indian Reserves. These include the following:

- Courts in other provinces have applied provincial fire and building safety regulations to Indian Reserves. These regulations are analogous to air quality regulations.
- The Supreme Court of Canada has said provincial air quality laws apply to the analogous subject of federal undertakings (e.g., inter-provincial railways).
- There is no Supreme Court of Canada support for the “use” vs. “activities of the user” distinction applied in BC courts.
- At least one case has suggested the *Peace Arch* case was wrongly decided.
- Assuming that the “use” vs. “activities of the user” distinction is correct, it is easy to argue that most air quality regulations fall within the “activities” class. Clearly, air quality regulations don’t restrict uses in the same way as zoning bylaws. In some cases, they clearly regulate activities of the user (e.g., types of wood stove that can be sold in BC), and are almost certainly applicable to Indian Reserves. Most often, they require the user to act in a particular way (e.g., limiting emissions to level x) if engaged in a particular use. Sometimes they may require building a specific type of facility or phasing out a specific type of facility (e.g., you must shut down your beehive burner), coming somewhat closer to regulating use.
- Using the Supreme Court of Canada sanctioned tests, it is difficult to see how regulation of air emissions goes to “Indianness”, “capacity of Indians” or an “integral part of primary federal jurisdiction over Lands reserved for Indians”.
- Academics have questioned decisions that suggest building bylaws do not apply to Indian Reserves,<sup>25</sup> and air quality laws are even less connected to the land.
- A distinction can be drawn between the sewage, building code and safety regulations involved in *Peace Arch* and air quality regulations. Building code, safety and possibly sewage standards have no impact off reserve, whereas air emissions clearly have impacts off reserve.

In conclusion, there is some uncertainty regarding the application of most provincial air quality regulations to Indian Reserves in British Columbia.



Much of this uncertainty is a result of the decision in *Peace Arch*, with court decisions in other provinces supporting application of provincial environmental laws to Indian Reserves. **The opinion of the author is that the *Environmental Management Act* and regulations under it will generally apply to Indian Reserves, unless the Act or laws have the effect of making a particular land use impossible. Higher courts are more likely to uphold the applicability of provincial regulations to Indian Reserves than lower courts.**

## THE RESULTING GAPS

Based on the above, the following conclusion can be made in relation to even application of air quality protection throughout BC:

- **Environmental Assessment.** Although the application of provincial environmental assessment legislation to Indian Reserves is open to challenge, it is likely that most projects which would trigger a provincial environmental assessment if undertaken off-reserve would trigger a federal assessment on-reserve. It is likely that most projects would trigger a federal assessment either because of the surrender of lands, ministerial approval of the use of lands, or permits for activities such as mining, burning waste, etc.
- **Zoning bylaws.** To the extent zoning bylaws are used to ensure that residential areas are protected from industrial emissions, there are geographic gaps in regulation throughout the province depending on whether municipalities or band councils have adopted appropriate zoning.
- **Local nuisance and backyard burning bylaws.** Similarly, both band councils and municipalities have the power to nuisances, and some of used this power to regulate backyard burning. The result is uneven geographic application of backyard burning requirements. There is no provincial regulation that fills this gap on- or off-reserve.
- **Other provincial air quality regulations.** The most significant gap in relation to air quality is created by the uncertain application of provincial air quality laws to Indian Reserves. There are compelling legal reasons for saying that provincial laws do apply on Indian Reserves. But, if *Peace Arch* is applied to BC's air quality laws, Indian Reserves and surrounding areas lack basic protections offered by the *Environmental Management Act*. **Other than *Indian Act* restrictions on burning waste, and a few CEPA restrictions related to specific toxic emissions, ozone depleting substances and mobile PCB incinerators there would be virtually no protection of air quality on Indian Reserves.** While First Nations may eventually remedy this uncertainty

by establishing their own air quality laws under the *First Nations Land Management Act* such laws cannot be adopted in Canadian law until agreements are in place between first nations and the federal government.

I:\Projects\General Environmental Law\Air Quality and Indian Reserves\MM on AQ IR report.doc



## ENDNOTES

---

- <sup>1</sup> People living in poverty tend to be at higher risk of health impacts of air pollution for several reasons. Poor people have higher rates of respiratory diseases like bronchitis and asthma, making them more susceptible to air pollution. They often lack the economic ability to move away from heavy industry or transportation corridors. Other risks include living in improperly designed and maintained buildings, exposure to cigarette smoke, poor nutrition. See: David Pengelly, John Last, Konia Trouton *Taking Our Breath Away, The health effects of air pollution and climate change*, (Vancouver: David Suzuki Foundation, 1998); N. Chaudhuri, “Child Health, Poverty and the Environment: the Canadian Context” (1998), *Canadian Journal of Public Health* 89.
- <sup>2</sup> A micron is one thousandth of a millimetre, or one millionth of a metre.
- <sup>3</sup> See the judgement of the Chief Justice in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paragraphs 166 and 115 respectively.
- <sup>4</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
- <sup>5</sup> Project is defined as being a project under the *Canadian Environmental Assessment Act*, i.e., undertakings such as construction, operation, modification or abandonment of physical works, or one of a fairly short list of activities listed in the *Inclusion List Regulations* SOR/94-637.
- <sup>6</sup> *R. v. Cardinal*, [1974] S.C.R. 695 (1973).
- <sup>7</sup> See respectively *Four B Manufacturing Ltd v. United Garment Workers of America*, [1980] S.C.R. 1031 (1979), and *R. v. Francis*, [1988] 1 S.C.R. 1025.
- <sup>8</sup> This phrase is from the judgement of Beetz, J. in *Four B Manufacturing Ltd.*, above at footnote 7.
- <sup>9</sup> Provincial family relations laws related to division of interests in land, do not apply to Indian reserves because possession of Indian Reserve land is at the core of the federal power over Indians and Indian reserves: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.



- 
- <sup>10</sup> Peter Hogg, *Constitutional Law of Canada*, chapter 27.2(c) (Toronto: Thompson Carswell, 2004).
- <sup>11</sup> *Canadian Occidental Petroleum Ltd. v. District of North Vancouver* (1986), 13 B.C.L.R. (2d) 34 (C.A.).
- <sup>12</sup> *Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.). See also *Stony Plain Indian Reserve No. 135*, [1982] 1 W.W.R. 302 (Alta. C.A., 1981).
- <sup>13</sup> *R. v. Duncan Supermarket Ltd.* (1982), 135 D.L.R. (3d) 700 (B.C.S.C.).
- <sup>14</sup> *Brantford (Township) v. Doctor* (1995), 29 M.P.L.R. (2d) 300 (Ont. C.J.) considered Peace Arch case but rejected the focus on use.
- <sup>15</sup> *Delta v. Aztec Aviation Group* (1985), 28 M.P.L.R. 215 (B.C.S.C.).
- <sup>16</sup> *R. v. Duncan Supermarket Ltd.* (1982), 135 D.L.R. (3d) 700 (B.C.S.C.).
- <sup>17</sup> *Rempel Brothers Concrete Ltd. v. Chilliwack (District)*, [1994] 5 W.W.R. 122 (B.C.C.A.); *International Aviation Terminals Ltd. v Richmond*, [1992] 4 W.W.R. 550 (B.C.C.A.) assumed building permits and code did not apply to Indian Reserves, but development cost charges did.
- <sup>18</sup> *Brantford (Township) v. Doctor* (1995), 29 M.P.L.R. (2d) 300 (Ont. C.J.).
- <sup>19</sup> *R v. Fiddler*, [1993] 3 W.W.R. 594.
- <sup>20</sup> *Canadian Pacific Limited v. Ontario* (1993) 103 D.L.R. (4<sup>th</sup>) 255 (Ont. C.A.), *aff'd* [1995] 2 S.C.R. 1028.
- <sup>21</sup> *Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.). See also *Stony Plain Indian Reserve No. 135*, [1982] 1 W.W.R. 302 (Alta. C.A., 1981).
- <sup>22</sup> *R. v. Dick*, [1985] 2 S.C.R. 309.
- <sup>23</sup> In *Derrickson v. Derrickson*, the Supreme Court of Canada held that section 88 would, incorporate provincial laws dealing with interests in land, so long as there was no conflicting federal legislation. Thus, it is clear that s. 88 can incorporate provincial laws that deal with interests in Indian Reserve land, but *Derrickson* was made in the context of a dispute between two Indians over the right to possess Indian Reserve land, an issue that goes to “status” and “Indianness”.



---

<sup>24</sup> *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113.

<sup>25</sup> Chapter 27.2 (c), Peter Hogg, *Constitutional Law of Canada*, (Toronto: Thompson Carswell, 2004).