

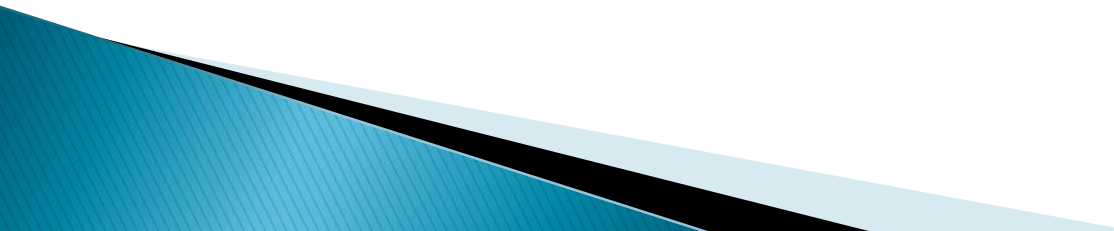
Gaining a Business Advantage On-Reserve: Using the First Nations Commercial and Industrial Development Act (*FNCIDA*) For Your Project

Lorne J Ternes
Professional Corporation
Jan. 30, 2011
CFAR Society

Outline

- ▶ FNCIDA & the Regulatory Gap
 - ▶ FNCIDA, Enabling Major Economic Development
 - ▶ The Fort McKay First Nation Oil Sands Project
 - ▶ Keys to Success and Lessons Learned
 - ▶ FNCIDA Project Update
 - Park Royal West Vancouver
 - Certainty of Title Act
 - Fort William Abibow Sawmill
 - Kitimat LNG Facility and Terminal
 - FireBox/Alexis FN – Biomass Electricity Generation Facility
 - ▶ Questions
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FNCIDA: The Regulatory Gap

- ▶ Because of Canada's Constitution much of the regulatory law normally applied to projects does not exist for on-reserve projects.
 - ▶ This Regulatory Gap significantly contributes to a serious economic development lag on Canadian Indian reserves.
 - ▶ Investors and project proponents detest uncertainties that compromise the business case for a project.
- 

How some people see the *Constitution of Canada Act, 1867* division of powers on reserve

Provincial Jurisdiction

- s. 92
- Property and civil rights

Federal Jurisdiction

- s. 91
- First Nation Indian reserve lands

- ▶ What the constitutional division of powers more likely looks like.
- ▶ Project proponents simply move on to other opportunities if it appears that the business case for a proposal would be better where the regulatory regime is less of a problem.

Provincial Jurisdiction

- s. 92
- Property and civil rights

**Uncertain
and
concurrent
jurisdiction**

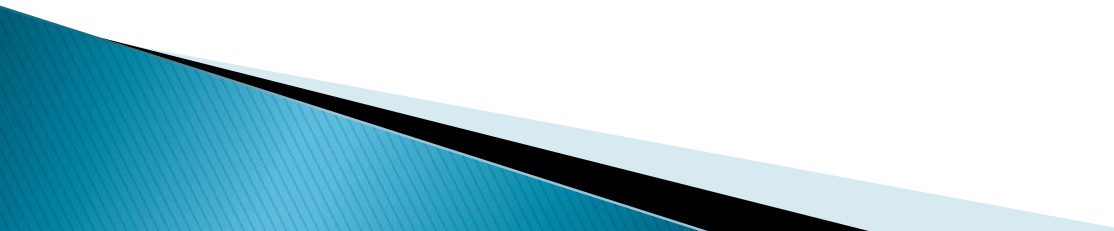
Federal Jurisdiction

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FNCIDA is an enabling statute that is intended to effectively plug the regulatory gap in a “tried and effective manner”

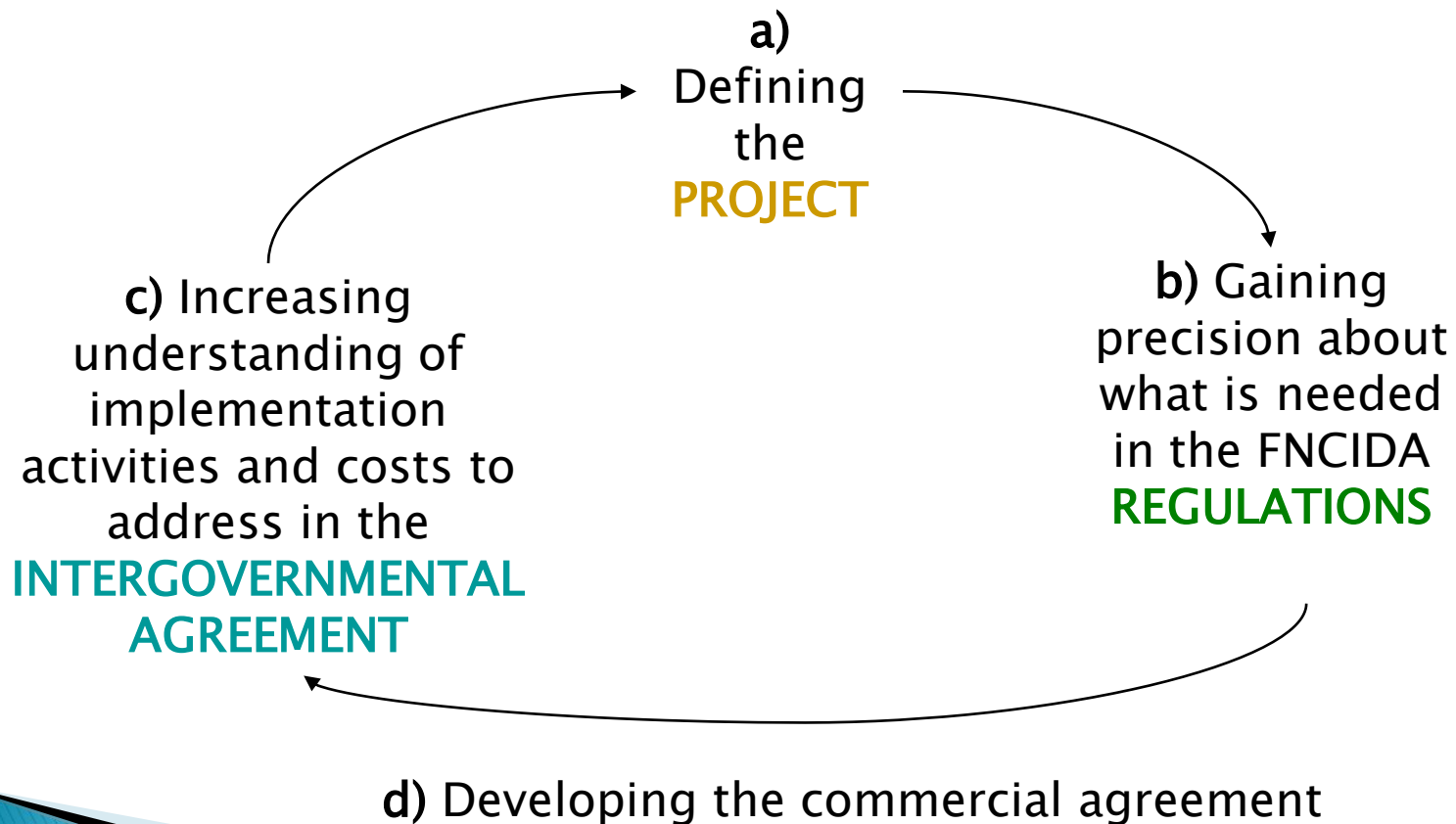
- ▶ Canada referentially incorporates the provincial law it needs into a new federal regulation

Model: Referential incorporation with necessary adaptations

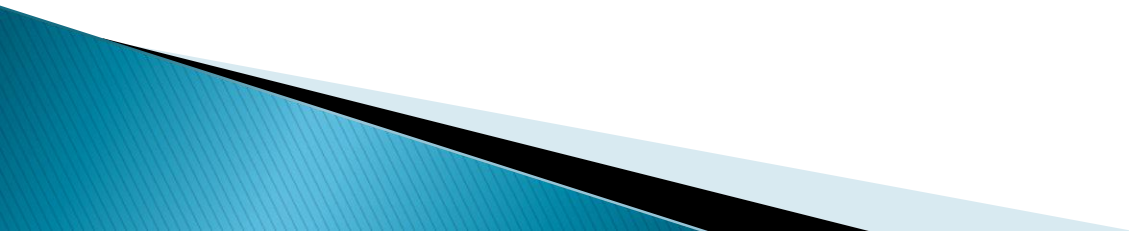
- ▶ Canada, the First Nation and the province agree to implement and enforce the new federal regulation on-reserve.
 - ▶ The province enforces on behalf of Canada
 - ▶ The First Nation and Project Proponent also enter into a Business Agreement
- 

Process for developing FNCIDA regulations and intergovernmental agreements

This is an iterative process which happens simultaneously



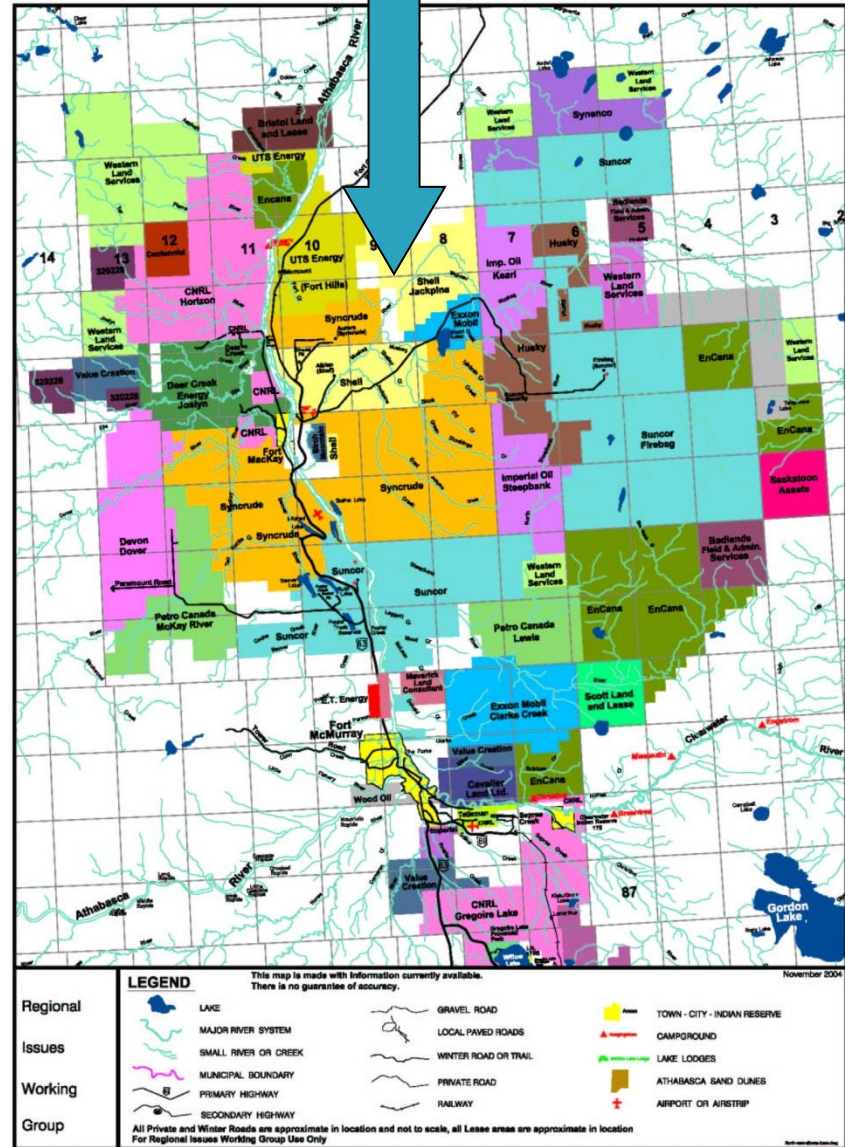
The Fort McKay First Nations Oil Sands Project, an Alberta Case Study



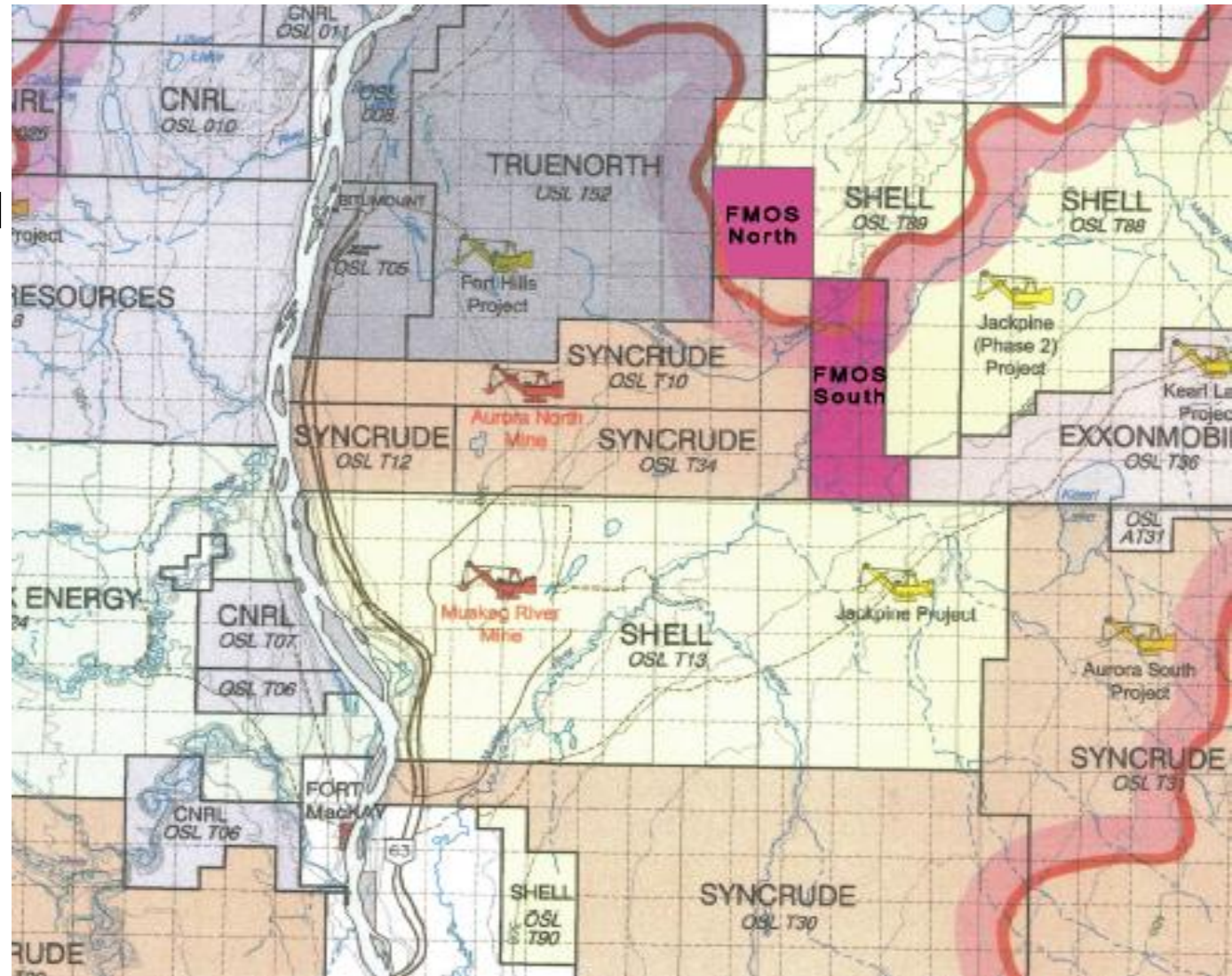
IR 174 C Project Lands

The Fort McKay First Nations Oil Sands Project


Canada, Fort McKay First Nation (*FMFN*) and Alberta enter into a Treaty 8 Land Entitlement Shortfall Agreement. As part of the Agreement FMFN receives 8,800 acres of proven oil sands bearing lands. There is no federal regime available to “develop” the lands.



Fort McKay FN and Shell Canada were proposing to mine reserve lands (FMOS south) as part of an expansion of Shell Canada's existing Jackpine mine project.



Fort McKay First Nation Oil Sands Regulations SOR/2007-79

- ▶ The federal regulation includes;
 - all (or part) of those Alberta laws and regulations selected and as amended from time to time,
 - some laws as generally adapted, and
 - some laws as specifically adapted.
 - ▶ Other federal and provincial laws apply of their own force and do not have to be referentially incorporated
 - ▶ Some parts of the regulatory regime can be placed into the federal lease (and do not need to be part of the federal regulation).
- 

Fort MacKay Oil Sands Intergovernmental Agreement

- ▶ The Canada–Alberta Agreement addresses, among other things:
 - Not affecting other Canada–Alberta Agreements
 - Term and early termination
 - Exercise of Powers and Performance of Duties
 - Dispute Resolution
 - Indemnities

The Operation was a Success But the Patient Died

- ▶ Although the new law was created and an intergovernmental implementation and enforcement agreement was negotiated, FMFN could not agree with the Project Proponent on a Commercial Arrangement.

Keys to Success and Lessons Learned

Be aware of everyone's deadlines

- Range of deadlines become collective deadlines; shared interests in meeting each others deadlines.

Commercial Timelines

(commercial and operational requirements for timing of mine expansion)

Provincial approval process timelines

Joint federal-provincial Environmental Assessment timelines

Federal regulation-making process deadlines

Federal, provincial, and FN approval processes for intergovernmental agreements

Processes under Indian Act for issuance of permits and leases

Timelines for FN, provincial, and federal elections

Keys to Success and Lessons Learned

- ▶ Treat development of regulations and intergovernmental agreements as technical/practical problems, not political problems.
- ▶ Emphasize respect
- ▶ Capacity is critical

FNCIDA Project Update



15E 338 TAYLOR WY, Park Royal, West Vancouver, \$725,000.00



This is a 1,700 sq ft, 2 bedroom, 2 bathroom unit with a bright open floor plan featuring a gourmet kitchen with granite countertops and stainless steel appliances. The unit also features a large living area with a fireplace, a walk-in closet, and a private balcony. The building offers a secure and convenient location with easy access to shopping, dining, and public transit.

View a Tour

Unit #	102150	Original Plan Area	1,700 sq ft
Property Type	Apartment	Garage/Parking	Not Available
Basement	None	St/Garage	Not Available
Bathrooms	2	Age	11

- Features:
- Hardwood
 - 75 Club Lvl

- Includes:
- Dishwasher
 - Full Bath
 - In-Unit Laundry
 - Storage Space
 - Walk-In Closet
 - Granite Counter w/ Sink
 - Hardwood Floors
 - Open Concept Living
 - Private Balcony
 - Stainless Steel Appliances
 - Walk-In Pantry

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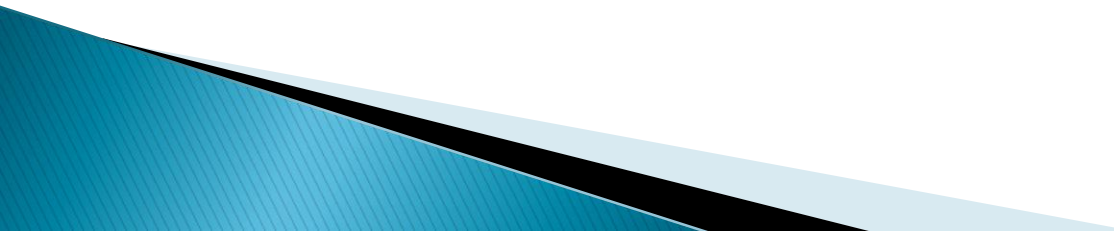
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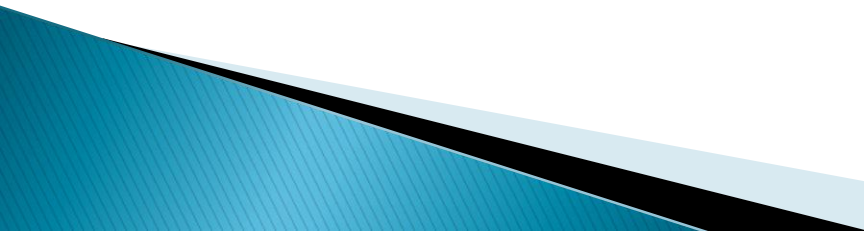
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Park Royal West Vancouver

- ▶ Plan to intensively develop selected Squamish Nation reserves within West Vancouver
 - ▶ Phases include high rise condo buildings and other residential and commercial development
- 

Certainty of Title Act

- ▶ Assented to June 29, 2010
 - ▶ Amends FNCIDA to provide for the referential incorporation of provincial systems for the registration of interests and rights in land (land titles systems)
- 

Fort William AbiBow Sawmill

- ▶ An existing and operating sawmill will be added to a Fort William Indian Reserve
- ▶ The Fort William First Nation Sawmill Regulations *SOR/2011-86* come into force June 30, 2011, the same time the land will be added to the Fort William First Nation Indian reserve lands.

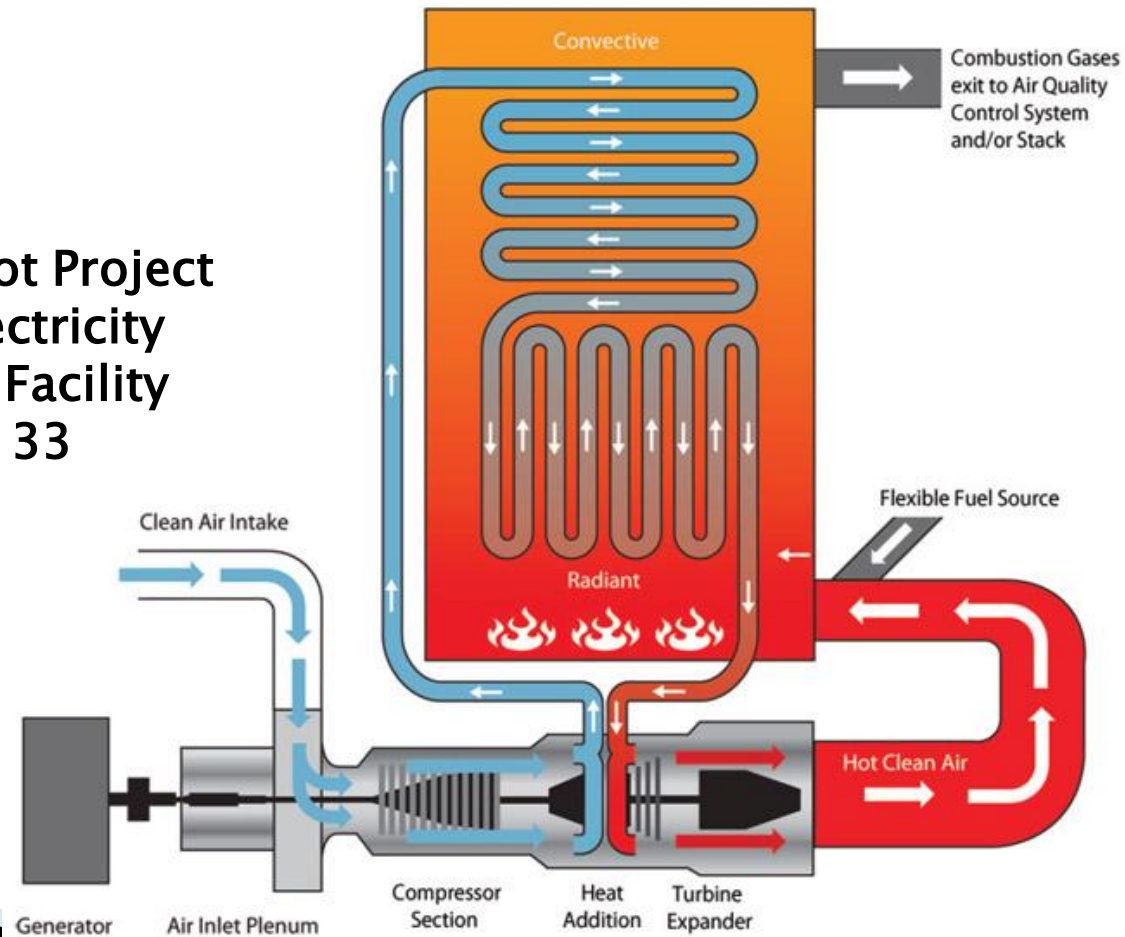
Kitimat LNG Plant & Terminal

- ▶ Apache Canada and EOG Canada have proposed to construct a liquefied natural gas (LNG) facility and an export terminal at Bish Cove BC
 - ▶ The LNG facility will be on Haisla Nation IR No. 6
 - ▶ The reserve has already been designated for the LNG facility and a 49 year lease is now in place (signed March 09, 2011)
- 

Alexis Nakota First Nation



30 MWe Pilot Project
BioMass Electricity
Generation Facility
Alexis IR #133



Opportunity Calls

- ▶ FNCIDA is beginning to “enable” major projects on Indian reserves.
- ▶ There are now FNCIDA success stories with an number of projects also moving closer to completion.
- ▶ Those considering major projects should contemplate the advantages of locating on reserve
- ▶ Think BIG

▶ **QUESTIONS**



Contact

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