

BATTLEGROUND ENVIRONMENT:

Webinar 1 – March 7, 2023

- *Species at Risk*
- *Fisheries and Water Management*



Environmental
Law Centre

Throughout Canada's history, the settler/colonial legal system has facilitated past and ongoing marginalization of Indigenous peoples in Canada. This includes our Constitutional documents and the way that they divide constitutional jurisdiction primarily between our federal and provincial governments leaving out the option for Indigenous Nations to be considered on an equal constitutional footing. As we consider these documents, we must acknowledge how the history of these laws, and their ongoing impacts, affect the First Nations, Métis, and Inuit Peoples who first made these 'jurisdictions' home. The ELC recognizes that environmental and natural resources laws, Indigenous rights and reconciliation are connected. For today, we specifically acknowledge that we are presenting this webinar from Treaty 6 territory - the traditional and ancestral territory of the Cree, Dene, Blackfoot, Sauteaux, Nakota Sioux and Métis Nation.



Environmental
Law Centre

An aerial photograph of a dense forest. The majority of the trees are dark green, but there are several clusters of trees with vibrant orange and red foliage, indicating the start of autumn. The text is overlaid in white, bold font.

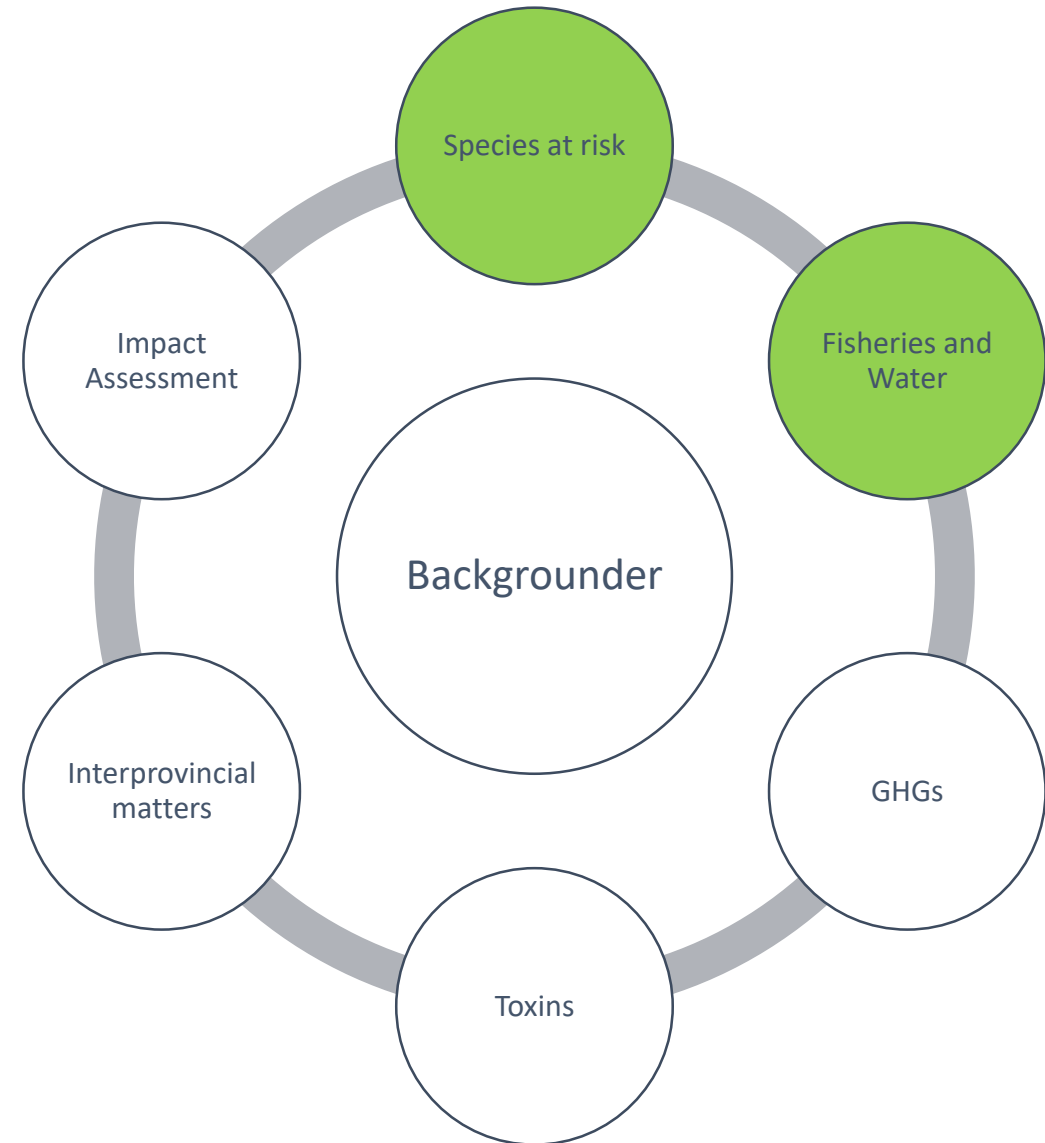
The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since 1982.

Our vision is a society where our laws secure an environment that sustains current and future generations and supports ecosystem health

The Environment & the Constitution Series

The Series

1. [Backgrounder to the Canadian Constitution.](#)
2. 6 subject matter reports
3. A report exploring the interaction of provincial environmental law and regulation with Aboriginal and Treaty rights.



A close-up photograph of a person's hands holding a fish in water. The fish is a rainbow trout, characterized by its silvery scales and a row of dark spots along its back. The water is dark and rippled, creating a textured background. The hands are positioned on either side of the fish, supporting it. The overall tone is natural and focused on the subject of the fish.

PRESENTATION OUTLINE

Brief Background of
the Constitution

Important
Constitutional Sections

Threatened
Jurisdiction: Species at
Risk and the
Constitution

A Fish out of Water:
Inland Fisheries, Water
Management and the
Constitution

A Brief History of the Canadian Constitution

The first iteration of our Constitutional documents was passed on July 1, 1867 with the *British North America Act*



The *Natural Resources Transfer Agreement (Act)* came about in 1930 and elevated the relevance of provincial laws for environmental and resource management



The last major amendment to the Constitution was done in 1982 with the patriation of our constitutional documents, addition of Indigenous rights, creation of the Charter, and inclusion of the amending formulae

The Constitution has remained the supreme law of the land throughout

The Division of Powers

The *Constitution Act, 1867*, sets out a federal system with control divided amongst two levels of government – the federal Parliament and provincial governments - with the jurisdiction to “exclusively” legislate over the enumerated matters



Section 91 Federal Powers

Section 92 Provincial
Powers

Important Constitutional Provisions: Species

Wildlife, including flora and fauna, are considered to fall generally under provincial control in the following sections:



Section 92(13) property and civil rights in the province

Section 92(16) all matters of a merely local or private nature

Section 109 all lands, mines, minerals, and royalties belonging to the several Provinces of Canada

Important Constitutional Provisions: Species

The federal government has overlapping authority over:

Aquatic species under section 91(12) sea coast and inland fisheries

Migratory birds under the *Migratory Birds Convention Act, 1994*

Under the criminal law power in section 91(27)

Important Constitutional Provisions: Water & Fisheries

Sea Coast and inland Fisheries
s.91(12) gives the federal
government “exclusive legislative
authority”

Provincial authority over property
and civil rights on land s.92(13)
Ownership/development of
resources within the province
(1930 NRTA)

Distinction between property in
fish (as a “item” of property owned
by the provincial Crown versus a
“fishery”)

Species at Risk: Provincial Legislation

In Alberta, the primary statute managing species at risk is the *Wildlife Act*.

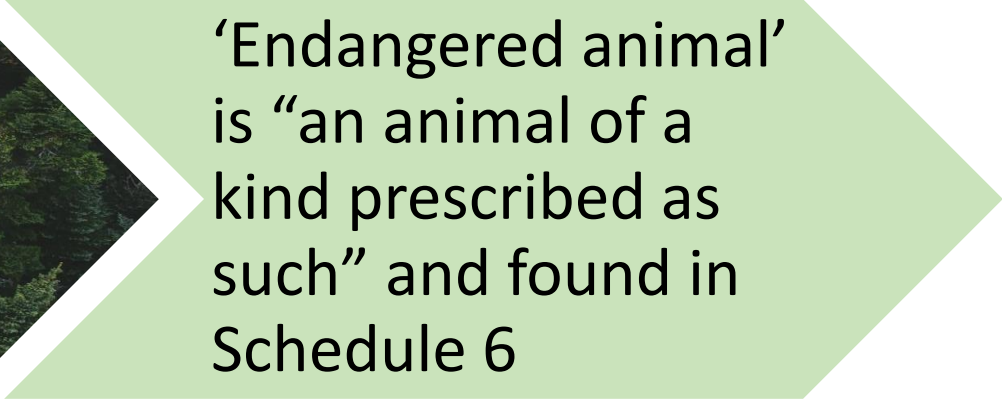
It is not a dedicated species at risk act and has no substantive definition of 'endangered' or 'threatened'.

It does have protections in place for the house, nest, den, or individual of a listed species. But does not have enforceable protections for critical habitat.

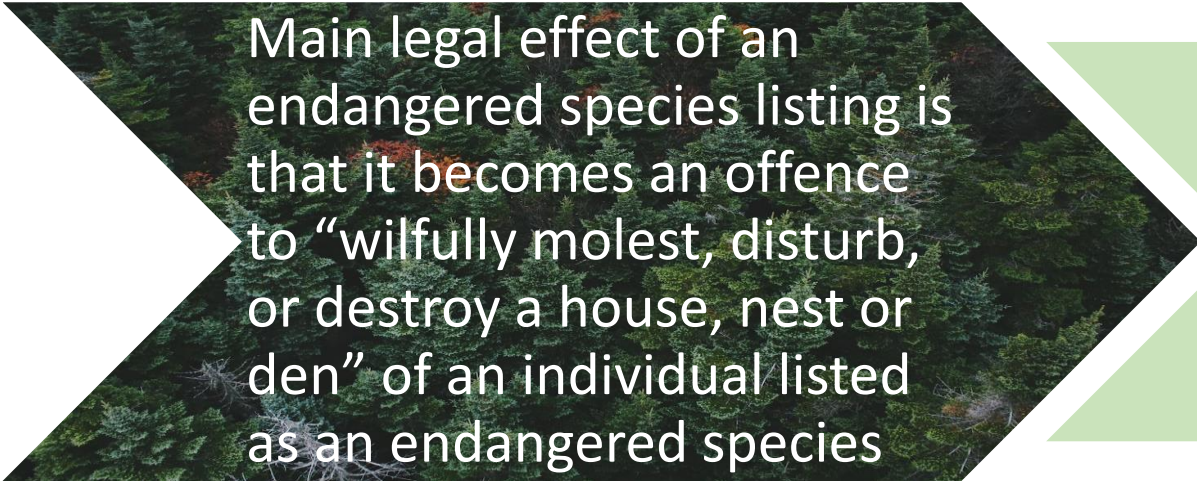
The Wildlife Act



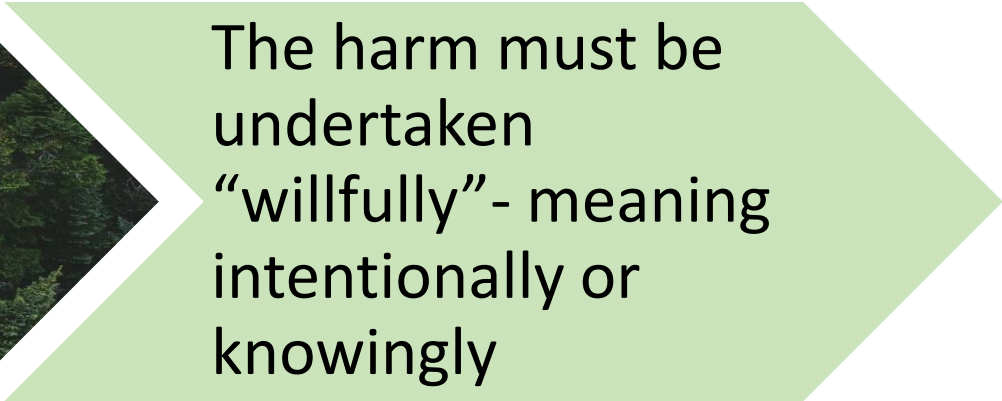
Property in all live wildlife in Alberta is vested in the Crown



‘Endangered animal’ is “an animal of a kind prescribed as such” and found in Schedule 6



Main legal effect of an endangered species listing is that it becomes an offence to “wilfully molest, disturb, or destroy a house, nest or den” of an individual listed as an endangered species



The harm must be undertaken “willfully”- meaning intentionally or knowingly

Species at Risk: Federal Legislation

The primary federal species at risk legislation is the *Species at Risk Act* (SARA) which purports to “prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of a special concern.”

Other important federal legislation includes the *Fisheries Act* and the *Migratory Birds Convention Act, 1994*.

THE SARA

A photograph of a mountain goat with brown and white fur and small, dark horns. The goat is standing in a forest of dead, grey trees, looking towards the camera. The background is slightly blurred, showing more of the forest.

Applies primarily to species located on federal lands, aquatic species, and migratory birds

Specific provisions enable SARA protection to extend to species located on provincially controlled land

Section 11: Conservation Agreements

Sections 32-34: Safety Net Provisions

Sections 58 & 61: Critical Habitat Orders

Section 80: Emergency Orders

We know from *R v Hydro-Quebec* that protection of the environment is a valid public purpose under the criminal law power



Does the federal criminal law power enable the federal government to extend prohibitions to species that reside on provincial or private lands?

Is it a public purpose to address the loss of biodiversity so as to trigger the criminal law power?



Criminal Law Power & the Chorus Frog

Groupe Maison Candiac Inc. v. Canada (Attorney General), 2018 FC 643,
2020 FCA 88 at para 55

Constitutional validity of an emergency order related to a Western Chorus frog on private land

If the release of toxic substances into the environment can properly constitute a criminal law purpose then why would an imminent threat to species at risk not do the same?

FCA upheld this decision ... “the apprehended disappearance of a listed wildlife species may constitute an “evil” to be suppressed”

.....no different than the ‘evil’ referred to in *Hydro-Quebec*

Leave to appeal to SCC denied.



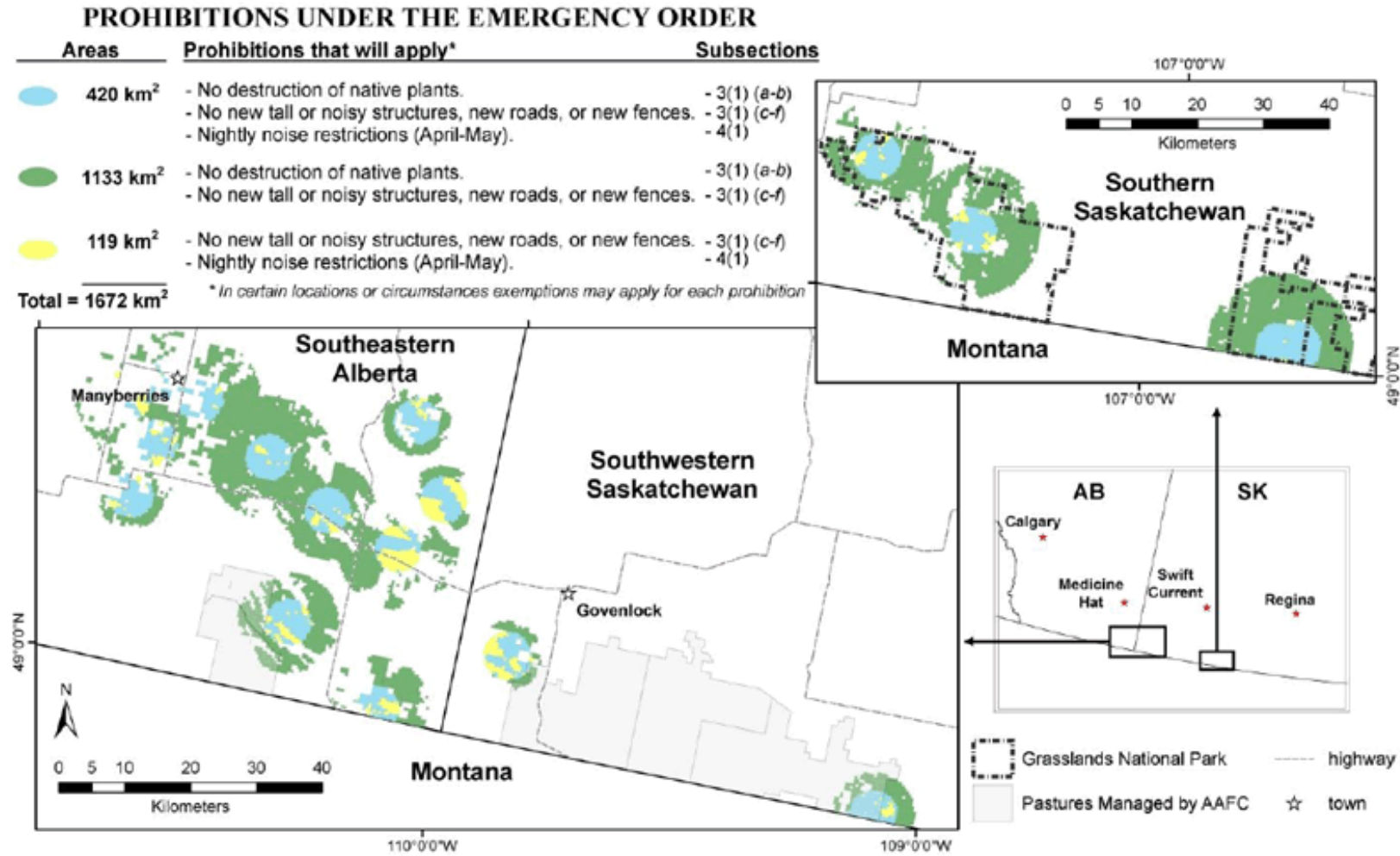
Can a similar approach be taken in relation to the other safety net provisions of the Act?

Case Studies: Sage Grouse

Recovery strategy was released in 2008 and after no further action was taken, the AWA took the federal government to court for a lack of critical habitat protection in the document

They returned a second time, asking for an emergency order pursuant to section 80 to protect the sage grouse on provincial lands

They got one.



Map of area affected by the 2013 Greater Sage-Grouse Emergency Order

Case Studies: Sage Grouse

The background of the slide is a photograph of two Sage Grouse birds in a field. The birds are positioned in the center of the frame, facing each other. They have mottled brown and white feathers, with a distinctive black and white collar around their necks and a small yellow patch on their heads. The background is a soft-focus landscape of dry grass and a blue sky.

After the Order, litigation was launched by a number of parties affected by the order including LGX Oil & Gas and the City of Medicine Hat

Civil suit has not yet proceeded to trial
Judicial review does not appear to be proceeding

Case Studies: Caribou

- In *Adam v Canada* a group of First Nations and ENGOs requested the Court to compel the federal Minister of the Environment to finalize a recovery strategy for boreal caribou and recommend an emergency order under section 80(2) of the SARA
- Prompted by the decision to declare caribou as self-sustaining despite 30 of 57 herds not falling under this category including **ALL** 13 herds in AB
- Court set aside the decision to declare caribou as self-sustaining for inadequate reasons but declined to order a section 80 emergency order

2012: Recovery
Strategy

2017: Update to the
Recovery Strategy

2020: Two section 11
conservation
agreements with
Alberta

Case Studies: Westslope Cutthroat Trout

- Fish native to “the mountain and foothill streams of southern Alberta within the Oldman and Bow Watersheds.” As of 2017, populations were assessed at low or very low and in some cases as no longer existing
- Recovery strategies have been released at both the provincial and federal level
- *2015 Critical Habitat Protection Order* identified critical habitat located outside of a national park and on provincial public lands

A Fish out of Water

Calgary

Why volunteers scoop thousands of fish out of Alberta irrigation canals each year

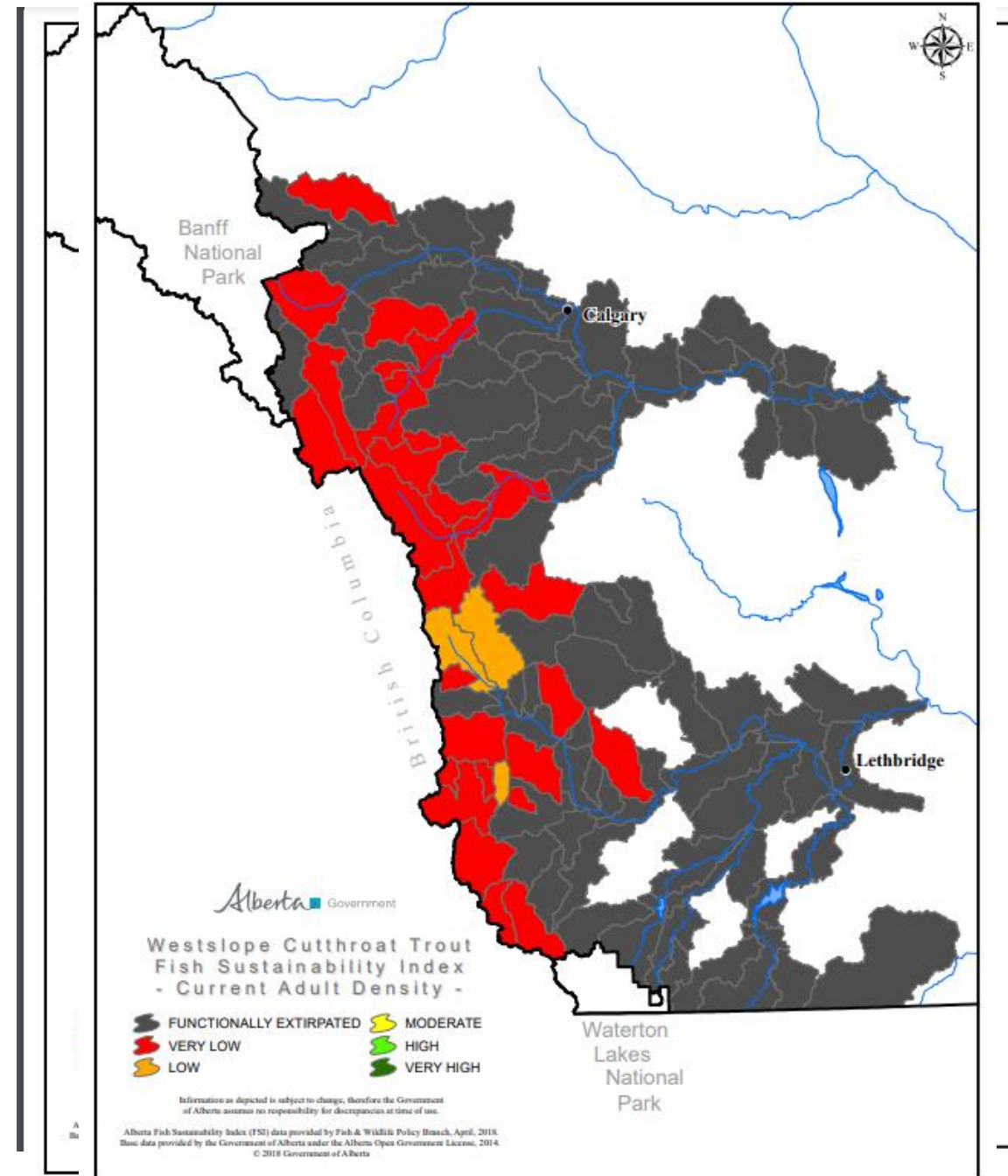


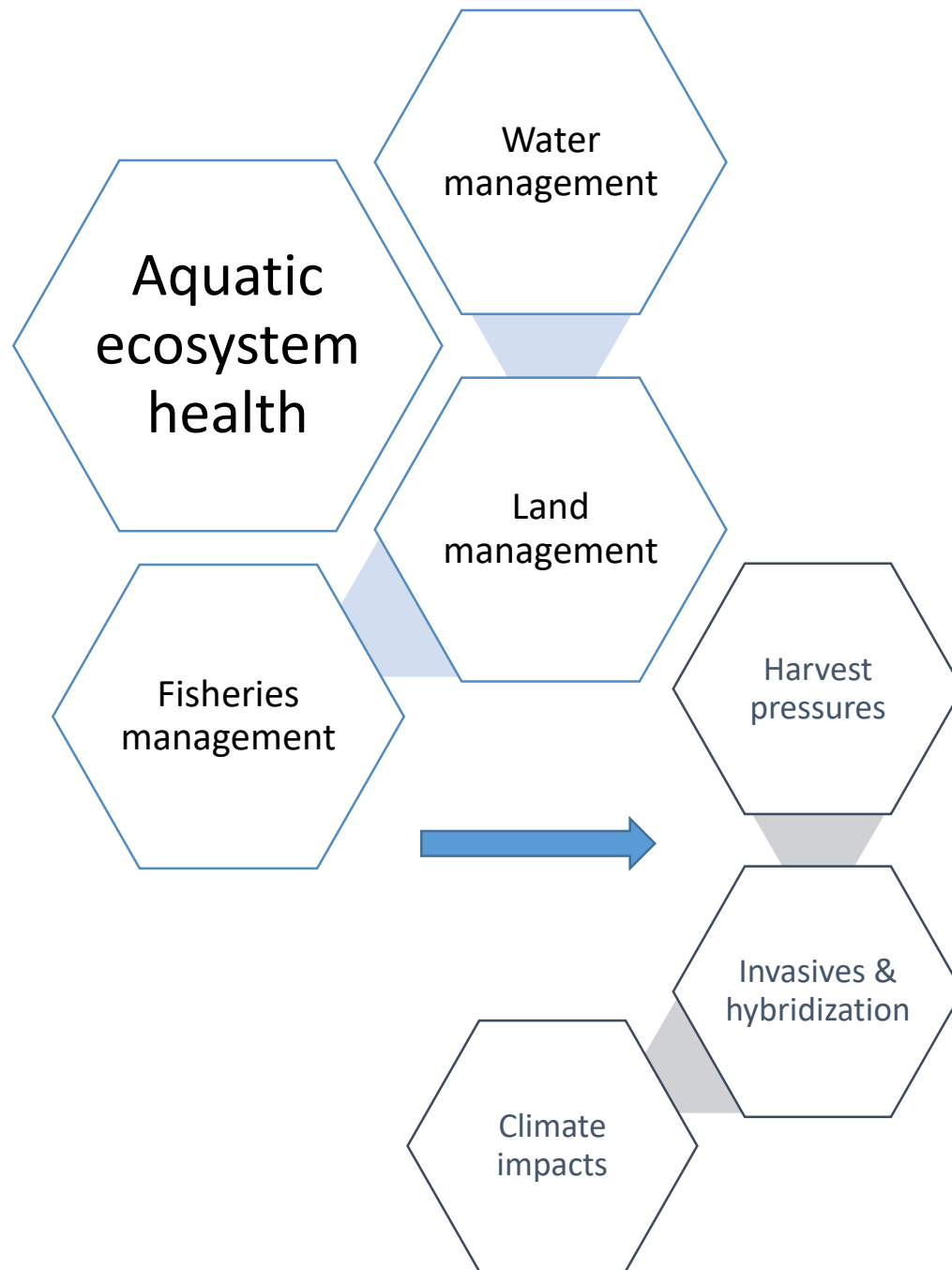
Alberta Environment says it's looking for solutions to decades-old conundrum

Taylor Simmons · CBC News · Posted: Oct 18, 2022 2:28 PM MDT | Last Updated: October 18, 2022



Trout Unlimited Canada volunteers scoop fish out of the Lethbridge Northern Irrigation District Headworks Canal in October 2022. (Trout Unlimited Canada)





What is a Healthy Aquatic System?

Lapointe, Nicolas WR, Steven J. Cooke, Jack G. Imhof, Daniel Boisclair, John M. Casselman, R. Allen Curry, Otto E. Langer et al. "Principles for ensuring healthy and productive freshwater ecosystems that support sustainable fisheries." *Environmental Reviews* 22, no. 2 (2014): 110-134.

Principles (Abridged)

- Laws of physics and chemistry apply to ecology
- Population regulated by reproduction, mortality and growth
- Habitat quantity and quality is required for productivity
- Connectivity is essential
- Species and habitats linked to watersheds
- Biodiversity can enhance resiliency and productivity
- Global processes affect local populations
- Human stressors have cumulative effects
- Evolutionary processes are important

Constitutional Flows

Federal

- Coastal and inland fisheries s.91(12)
 - What is a fishery? The place and act of fishing
 - What is habitat? Broadly defined – can include riparian areas (temperature functions)

Provincial

- Water and fish s.92(13)
 - Property and crown owned resources since 1930
- Reflected in Water Act, EPEA, Public Lands Act and others

Double Aspect Doctrine “recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power”: *Desgagnés Transport* |

Can Water Management Impinge on a Fishery?

- Clearly it can BUT there are practical challenges that make changing water management on this basis challenging
- Alberta's water management laws are clearly in provincial jurisdiction & constitutional tests are unlikely to change that (interjurisdictional immunity, paramountcy, necessarily incidental)
 - But more problematically they are ill equipped to address the issue
- Can a decision or order, or cabinet approved plan be unconstitutional on this basis? Politics aside I think the answer is yes, but the circumstances are limited

Functional protections	Federal Fisheries Act	Provincial Water Act Public Lands Act Environmental Protection and Enhancement Act	Observations
Water flows/quantity	Habitat protections (HADD)	Water Conservation Objectives Diversion regulations	Provincial flow regime constrained by FITFIR and historic allocations Federal system challenged by cumulative effects
Water quality	Deleterious substance release prohibitions	Release prohibitions (significant adverse effects)	Federal is more precautionary & protective Both systems fail to tackle cumulative loading (although federal is more preventative)
Habitat	Habitat protections (HADD)	Broad protection and requirement for approvals to impact aquatic habitat and bed and shores	Cumulative effects challenge both systems Provincial lacks habitat outcome/regs Federal Habitat offsets Enforcement effort/capacity

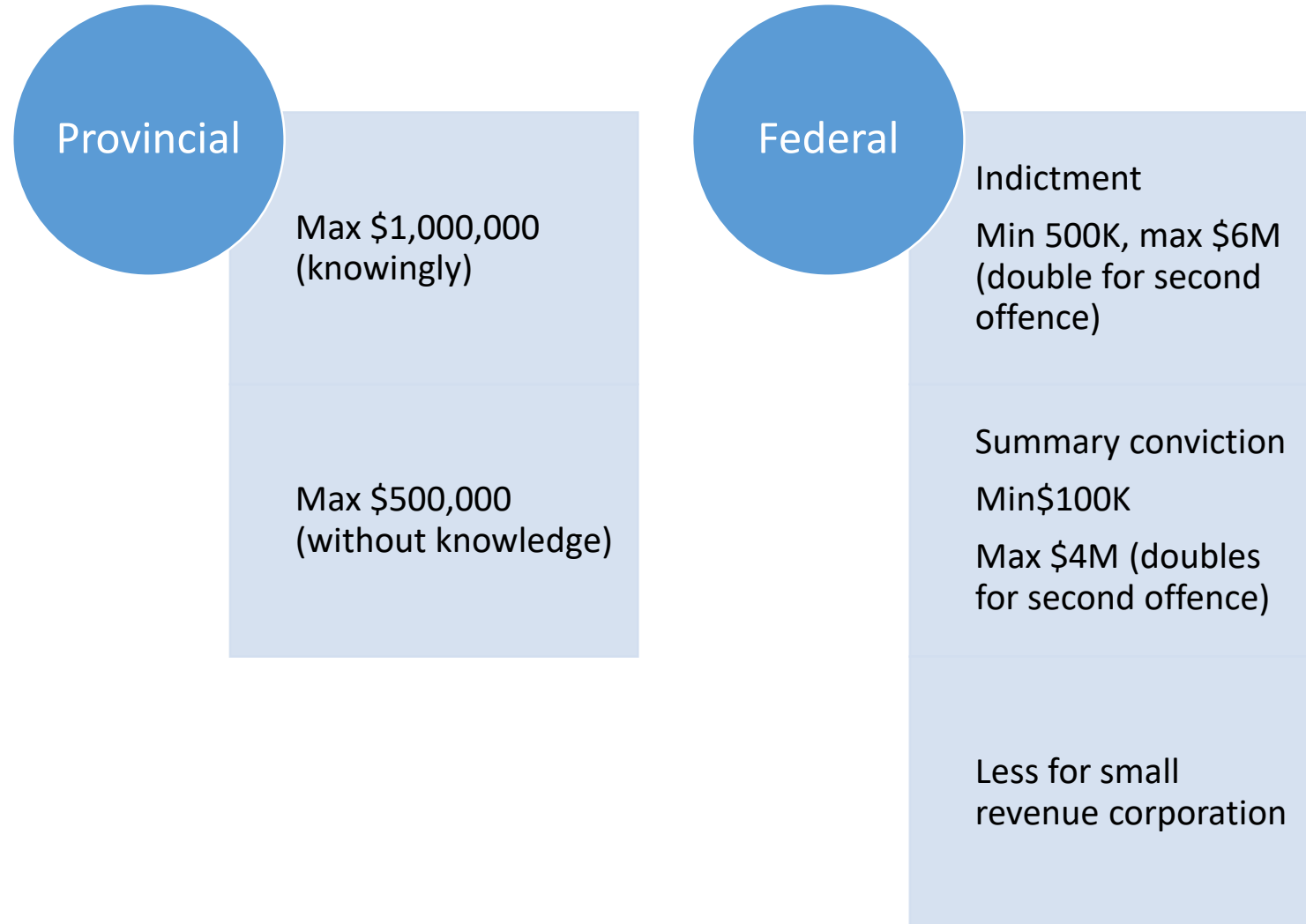
Enforcement and Administrative Powers

- Both jurisdictions have powers to order remediation of aquatic related impacts
- Provincial government has extensive experience and practice in issue Environmental Protection Orders (EPOS under EPEA), Water Management Orders (under the Water Act) and Enforcement Orders.
- Federal government does have the power to issue orders for flows below obstructions or “other things” impacting habitat. In practice - minimal use (e.g. BC Hydro)

Fines

Example CN diesel release in the North Sask.

The provincial fine \$125,000,
The federal fine under the *Fisheries Act* was
\$2.5 million



Conclusions

- Is the battleground real from a Constitutional perspective?
- Case law for species at risk management in the face of inadequate provincial/regional action has been upheld under the Criminal Law power
- For both Species at risk and fisheries → effective provincial management and regulation would mean a diminished federal need to assert its valid jurisdiction
- Double aspect means two valid positions, it does not necessarily value one aspect over another but both must comply – so harmony is the only feasible justification to counter federal “overreach”.

Questions?

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NEXT UP: Greenhouse Gases and Toxins/Plastics