

# **BATTLEGROUND ENVIRONMENT:**

**Webinar 4 – May 2, 2023**

## ***The Intersection of Environmental Law and Indigenous Rights***



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 7 territory - the traditional and ancestral territory of the Blackfoot Confederacy (Siksika, Kainai, Piikani), the Tsuut'ina Nation, the Îyâxe Nakoda Nations, and the Métis Nation (Region 3).



Environmental  
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# About the Environmental Law Centre

- The Environmental Law Centre (ELC) is a registered charity and has been seeking strong and effective environmental laws since it was founded in 1982.
- The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta.



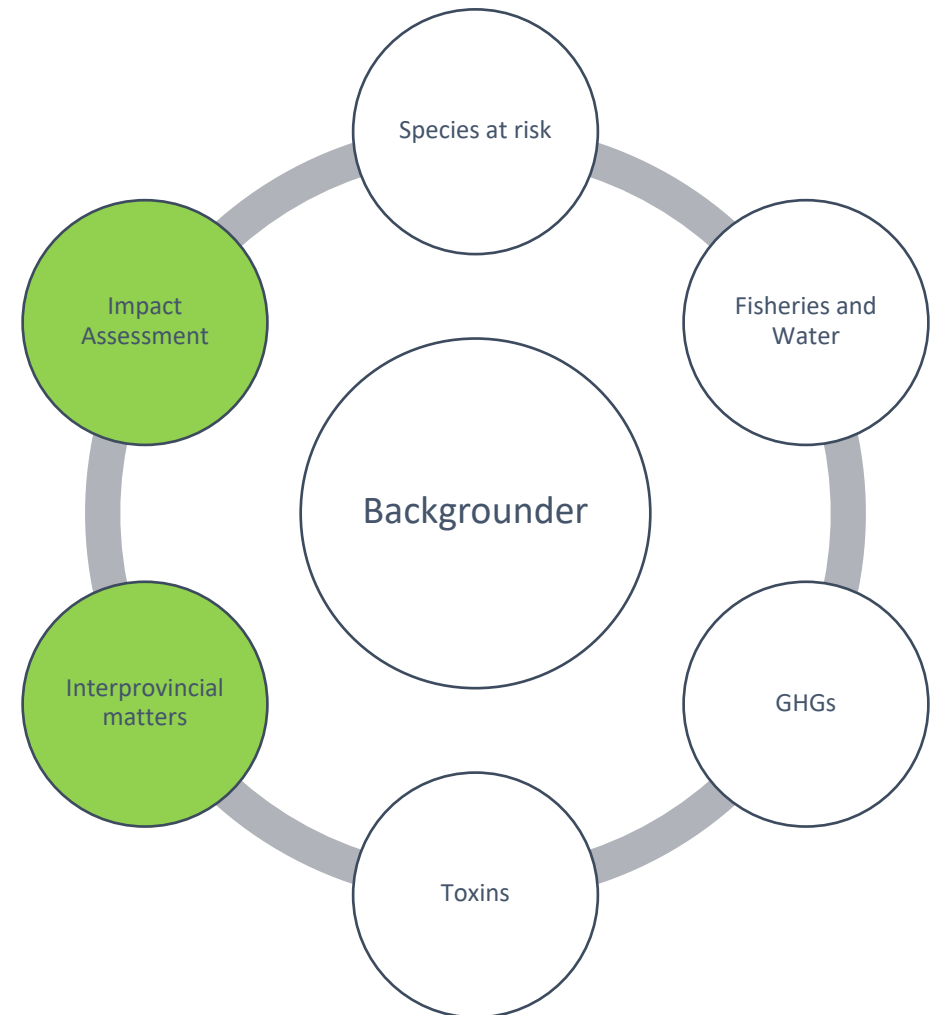
**The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since 1982.**

**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 interaction of provincial environmental law and regulation with Aboriginal and Treaty rights.



# Constitution Act, section 35

## **Recognition of existing Aboriginal and Treaty rights**

35 (1) The existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

## **Definition of Aboriginal peoples of Canada**

(2) In this Act, Aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

## **Land claims agreements**

(3) For greater certainty, in subsection (1) Treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.

## **Aboriginal and Treaty rights are guaranteed equally to both sexes**

(4) Notwithstanding any other provision of this Act, the Aboriginal and Treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

# Treaty Nos. 6, 7 & 8

- Land ceded to the Crown in exchange for specific rights, benefits and obligations
- Must look to text and oral history of treaties: *R v Marshall*, [1999] 3 SCR 456
- Right to continue harvesting activities throughout surrendered lands except those “taken up for settlement, mining, lumbering or other purposes” and subject to regulations that may be made

## WE ARE ALL TREATY PEOPLE



# NRTA & Limits on Treaty Rights

- NRTA agreements (Alberta, Saskatchewan and Manitoba) transferred federal Crown interest in all Crown lands to provinces:

“the [provincial] laws respecting game .. Shall apply to the Indians” and that “Indians shall have the right... of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”

- Extinguished Treaty rights for commercial harvesting and expanded harvesting rights (for food) to all unoccupied Crown lands and other lands where right of access: *R v Horseman*, [1990] 1 SCR 901



# Metis Settlements

- legislatively recognized Metis landbase: *Metis Settlements Act*, *Metis Settlements Accord Implementation Act*, and *Constitution of Alberta Amendment Act, 1990*
- Legislation addresses:
  - management, access and use of Metis Settlement lands
  - fishing activities
  - co-management agreement (addresses access for mineral extraction)
- also a harvesting agreement between Government of Alberta and Metis Nation – 4 harvesting areas in the province for hunting, fishing and trapping activities
- Recently signed Self-Government Recognition and Implementation Agreement with federal government

# Indigenous Rights & Legal Obligations

## Consultation and Accommodation

- Framework for consultation and accommodation
- Legislative Processes
- Administrative Tribunals
- Government Policy
- Impact and Benefit Agreements

# Environmental Regulation & Decision- Making in Alberta

- General Environmental Legislation
  - EPEA, *Water Act*
- Wildlife and Species at Risk Legislation
  - Federal: *Species at Risk Act, Migratory Birds Convention Act, Fisheries Act*
  - Provincial: *Wildlife Act, Fisheries (Alberta) Act*
- Land Use Planning and Management Legislation
  - *Public Lands Act, Alberta Land Stewardship Act, Municipal Government Act*, parks legislation
- Natural Resource Development Legislation
  - Sector specific: *Forests Act, Mines and Minerals Act, OGCA, REDA*

# Points of Intersection

- Wildlife: Conservation and Indigenous Harvesting Rights
- Water: Indigenous Ownership, Access and Use
- Land Use and Natural Resource Development Decisions: Cumulative Effects on Treaty Rights
- Regulatory Tribunals

# Wildlife: Conservation and Indigenous Harvesting Rights

- Some recognition of Indigenous rights in wildlife legislation but overall limited accommodation and often conflict
- Key points from case-law
  - conservation requirements are paramount over Indigenous rights - Indigenous rights have priority over sport and commercial
  - Indigenous harvesting rights may be regulated but must recognize s.35 rights
  - Conservation requirements must be justified as per *Sparrow*
  - Treaty may imply limits on the exercise of harvesting rights – i.e. for food and/or ceremonial purposes

# **Water: Indigenous Ownership, Access & Use**

- ownership of water, and beds and shores
- use and access rights
- water management planning

# Land Use & Natural Resource Development Decisions: Cumulative Effects on Treaty Rights

- Land Use Planning
- Environmental Assessment
- Natural Resource Development
- Blueberry River First Nation (Yahey) decision

# Regulatory Tribunals Role in Consultation & Accommodation

- Crown can rely, at least in part, on regulatory and environmental assessment processes
- tribunal must have clear authority to consult or to determine consultation was sufficient
  - Alberta Energy Regulator
  - Alberta Utilities Commission
  - Natural Resources Conservation Board
  - Alberta Environmental Appeals Board
- Canada Energy Regulator
- Impact Assessment Agency of Canada



# United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

- Truth and Reconciliation Commission of Canada: one of the first steps along reconciliation path is endorsement of UNDRIP
- UNDRIP adopted in 2008 as a resolution of UN General Assembly
- UNDRIP affirms unique rights of Indigenous peoples and provides framework for reconciliation – 46 Articles
- Fully endorsed by Canada in 2018 – UNDRIP Act, June 21, 2021
- In 2015, Alberta announced it will adopt UNDRIP but not clear how that's being implemented

# Rethinking Settler Law, Recognizing Indigenous Law

## Current opportunities for Indigenous Governance and Decision-Making

- *Blueberry River First Nation*
- *Moose Lake Access Management Plan*

## A Stepping Stone to the Future: An Act for Respecting Historic Treaties in Alberta

- Expressly endorse UNDRIP as law in Alberta
- Establish a framework for Nation-to-Nation negotiation of First Nations Traditional Land Use Management Frameworks

# Questions?

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