

# First Nation Environmental Laws *Enforcement and Oversight*

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With thanks to the  
First Nations Land  
Management  
Resource Centre for  
the invitation



# Agenda

## **1. Introduction and Background**

- CELA
- Land Code Structure

## **2. Environmental Laws in First Nation Communities**

- Applicable Laws
- Minimum Levels of Protection
- Law Making Recommendations

## **3. Enforcement of First Nation Laws**

- Relevant Provisions
- Options for Enforcement
- Resources

# 1. Introduction and Background

- CELA
- Land Code Structure

# About Us

[www.cela.ca](http://www.cela.ca)

Public interest law organization, funded by Legal Aid Ontario

Core mandate is to provide access to justice, use and improve laws that protect human health and the environment



# CELA

## Our Priorities

### **1. Access to Environmental Justice**

CELA places high priority on cases and law reform work aimed at ensuring access to environmental justice; and

### **2. Pollution Prevention and Public Health and Safety**

CELA places high priority on cases and law reform work aimed at ensuring safe, healthy and livable communities.



Canadian  
Environmental Law  
Association  
EQUITY. JUSTICE. HEALTH.

# CELA

## Our Services

1. Direct representation of eligible clients in proceedings in trial or appellate courts and before administrative tribunals
2. Test cases
3. Summary advice, including brief services and referrals
4. Public legal education and outreach
5. Law reform

We are Ontario's only clinic providing environmental law legal aid services across Ontario.

The specific allocation of time each year is dictated largely by needs of our client Community

# Land Codes

## Opportunities and Gaps

Land Code system provides **opportunities** for First Nations to:

- Reclaim governance
- Have greater potential to administer their lands under a more comprehensive and autonomous set of laws and policies than First Nations operating under the *Indian Act*.

**Need for clarity** and legal resources pertaining to:

- Enforcement of recognized environmental law-making authority of First Nations under the *Framework Agreement on First Nation Land Management*
- Applicability of federal and provincial environment and resource laws

# Authority to Manage Lands and Resources

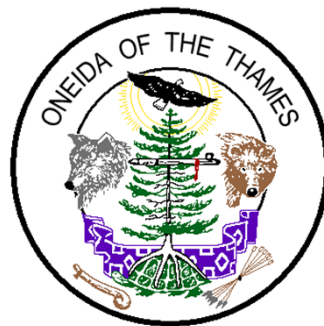
## FA s. 18

- Section 18.1 of the Framework Agreement states:

**18.1** *The council of a First Nation with a land code in force will have the power to make laws, in accordance with its land code, respecting the development, conservation, protection, management, use and possession of First Nation land and interests or land rights and licences in relation to that land. This includes laws on any matter necessary or ancillary to the making of laws in relation to First Nation land.*



# Resource



- Indigenous Source Water Protection Toolkit was created in response to threats to source water identified and prioritized by First Nation communities
- **Toolkit** provides a range of legal tools (bylaws, sample Land Code provisions and Consultation Protocol) which can be used in Indigenous communities to protect source waters and mitigate threats:
- <https://cela.ca/source-water-protection-in-indigenous-communities/>

## 2. Environmental Laws in First Nation Communities

- Applicable Laws
- Minimum Levels of Protection
- Recommendations

# Overview

## Applicable Federal Laws

### 1. General Rule (s 40(1))

In the event of an **inconsistency** or **conflict** between a Land Code and any federal law relating to environmental protection, federal law prevails to the extent of the inconsistency or conflict.

### 2. Specified Areas (ss 40 – 43)

- The FNLMA lists the following areas where the federal law continues to apply:
  - migratory birds, endangered species or fisheries (s 40(2))
    - *Species at Risk Act*
    - *Migratory Birds Convention Act*
  - the *Emergencies Act* (s 42)
  - the *Nuclear Safety and Control Act* and *Nuclear Energy Act* (s 43(1))

## Applicable Federal Laws *FNLMA* s. 40(1), 42, & 43

**40 (1)** *For greater certainty, in the event of any inconsistency or conflict between a land code or a First Nation law and any federal law that relates to environmental protection, the federal law prevails to the extent of the inconsistency or conflict.*

**(2)** *For greater certainty, this Act does not extend or limit any right or power in relation to migratory birds, endangered species or fisheries.*

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**42** *The Emergencies Act continues to apply to First Nation land except that any appropriation, requisition or use of First Nation land required under that Act must be expressly authorized by order of the Governor in Council*

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**43 (1)** *Subject to subsection (2), nothing in this Act limits the application of the Nuclear Safety and Control Act and the Nuclear Energy Act to First Nation lands.*



# Overview

## Minimum Levels of Environmental Protection

- Any standard established by First Nation laws related to environmental protection must be “**at least equivalent in their effect**” to any laws established by province in which the First Nation land is situation:
  - E.g. provincial environmental protection acts
- First Nation laws respecting environmental assessment **must establish an EA regime** that is applicable to all projects carried out on FN land that are approved, regulated, funded or undertaken by the First Nation
  - What’s a project? Any project designated by regulations made under paragraph 109(b) of the *Impact Assessment Act* or designated in an order made by the Minister under subsection 9(1).

# Minimum Environmental Protection Standards

## *FNLMA s. 21*

### ***Environmental protection regime***

**21 (1)** *After the coming into force of a land code, a First Nation shall, to the extent provided in the Framework Agreement, develop and implement through First Nation laws an environmental protection regime. The regime must be developed in accordance with the terms and conditions set out in the Framework Agreement.*

### ***Minimum standards***

**(2)** *The standards of environmental protection established by First Nation laws and the punishments imposed for failure to meet those standards must be at least equivalent in their effect to any standards established and punishments imposed by the laws of the province in which the First Nation land is situated.*

### ***Environmental assessment regime***

**(3)** *First Nation laws respecting environmental assessment must, to the extent provided in the Framework Agreement, establish, in accordance with that Agreement, an environmental assessment regime that is applicable to all projects carried out on First Nation land that are approved, regulated, funded or undertaken by the First Nation.*



## Recommendations

### Law Making Considerations

Use **interpretive provisions** (ie. definitions) to set out what is meant by terms like acceptable risk, aggregate exposures, cumulative effects, environmental justice, hot spots, public trust, safer alternative, significant environmental harm, & vulnerable population

Set out **weight of evidence** and how totality of evidence, with precautionary, substitution and environmental justice principles will be applied

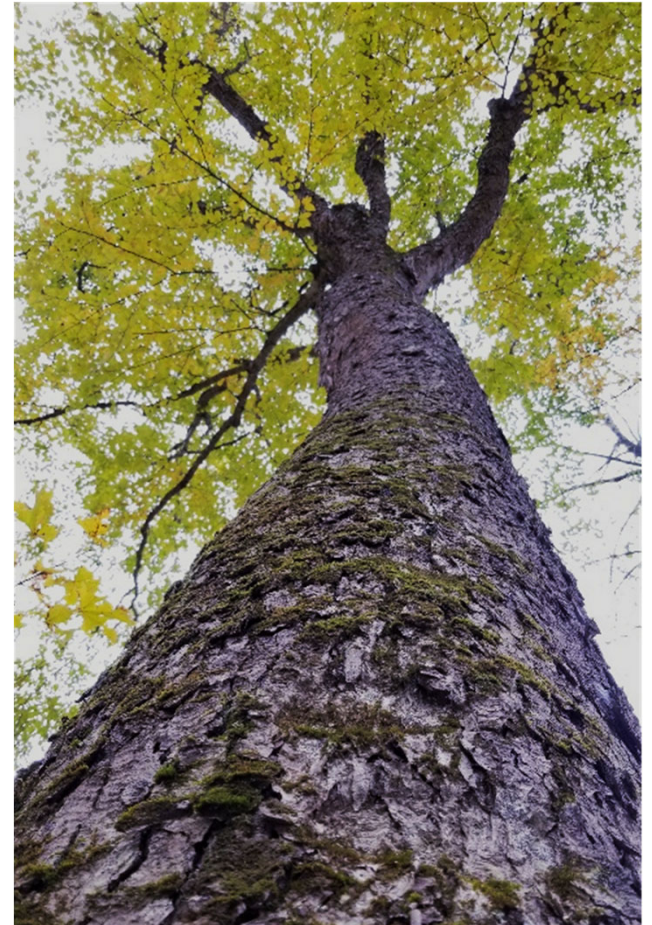
Impose **positive duties** on proponents to self-report compliance (make available online)

**Mandatory** (“shall,” “must”) versus **non-mandatory** (“should” “may”); **prescription** versus **discretion** ( “reasonable, “promote”, “adequate”)



# Resources

- 1. Canadian Environmental Protection Act:
  - <https://cela.ca/wp-content/uploads/2019/07/proposed-amendments-to-CEPAOct-12-2018.pdf>
- 2. Template “Consultation and Accommodation Protocol”
  - <https://cela.ca/wp-content/uploads/2019/07/LEGAL-TOOL-2.pdf>



### 3. Enforcement of First Nation Laws

- Relevant Provisions
- Options for Enforcement
- Resources

# Enforcement

## Opportunities and Gaps

- Even the strongest of environmental law are near meaningless, if they are not enforced
- While the Land Code system provides an **opportunity** for First Nations to reclaim their governance, it also creates **new areas of uncertainty**:
  - Community level and understanding the scope of federal laws which still apply, either in whole or part,
  - How related matters like enforcement and implementation, fully affect the scope of a Land Code's jurisdiction
  - Among government Ministries with environment and lands mandates or, in industry who often lack even a basic understanding of the jurisdiction and authority of a Land Code system.

# Enforcement

## Non-compliance and Contraventions

- In 2016-17, only 3% of farms with Nutrient Management Plans were inspected by **MECP**; 62% found to be noncompliant

2018 Report of the Environment Commission of Ontario

- Ontario had lowest number of on-site mine inspections from **Environment Canada**
  - Quebec - every 0.9 years
  - Pacific and Yukon regions - every 1.5 year
  - Ontario - every 3.6
- **Fisheries and Oceans Canada** monitored only 60% of the compensation plans for tailings impoundment areas that used existing bodies of water-

2019 Spring Report of the Commissioner of the Environment and Sustainable Development

# Relevant Provisions

*FNLMA s 20(3), 21, 22(1) , 23*

## ***Enforcement measures***

**20(3)** *A First Nation law may provide for enforcement measures, consistent with federal laws or the laws of the province in which the First Nation land is situated, such as the power to inspect, search and seize and to order compulsory sampling, testing and the production of information.*

## ***Environmental protection regime***

**21 (1)** *After the coming into force of a land code, a First Nation shall, to the extent provided in the Framework Agreement, develop and implement through First Nation laws an environmental protection regime. The regime must be developed in accordance with the terms and conditions set out in the Framework Agreement.*



# Relevant Provisions

## *FNLMA s 20(3), 21, 22(1) , 23*

### ***Offences and punishment***

**22 (1)** *A First Nation law may create offences punishable on summary conviction and provide for the imposition of fines, imprisonment, restitution, community service and any other means for achieving compliance.*

### ***Incorporation by reference***

**(2)** *A First Nation law may adopt or incorporate by reference the summary conviction procedures of Part XXVII of the [Criminal Code](#), as amended from time to time.*

**(3)** *A First Nation may, in relation to prosecutions of contraventions of First Nation laws,*  
*(a) retain its own prosecutors;*  
*(b) enter into an agreement with a provincial government for the use of provincial prosecutors; or*  
*(c) enter into an agreement with Her Majesty for the use of agents engaged by Her Majesty.*



# Relevant Provisions

*FNLMA s 20(3), 21, 22(1) , 23*

## ***Evidence***

**23** *In any proceedings, a copy of a First Nation law appearing to be certified as a true copy by an officer of the First Nation — or, in the case of a First Nation law that applies to First Nation land that is a reserve referred to in subsection 6.01(1), by an officer of any of the First Nations for whose use and benefit the reserve has been set apart — is, without proof of the officer's signature or official character, evidence of its enactment on the date specified in the law.*

## ***Appointment of justices of the peace***

**24 (1)** *A First Nation or, if Her Majesty and the First Nation have entered into an agreement for that purpose in accordance with the Framework Agreement, the Governor in Council, may appoint justices of the peace to ensure the enforcement of First Nation laws including the adjudication of offences for contraventions of First Nation laws.*



# Resources

## Options for Enforcement

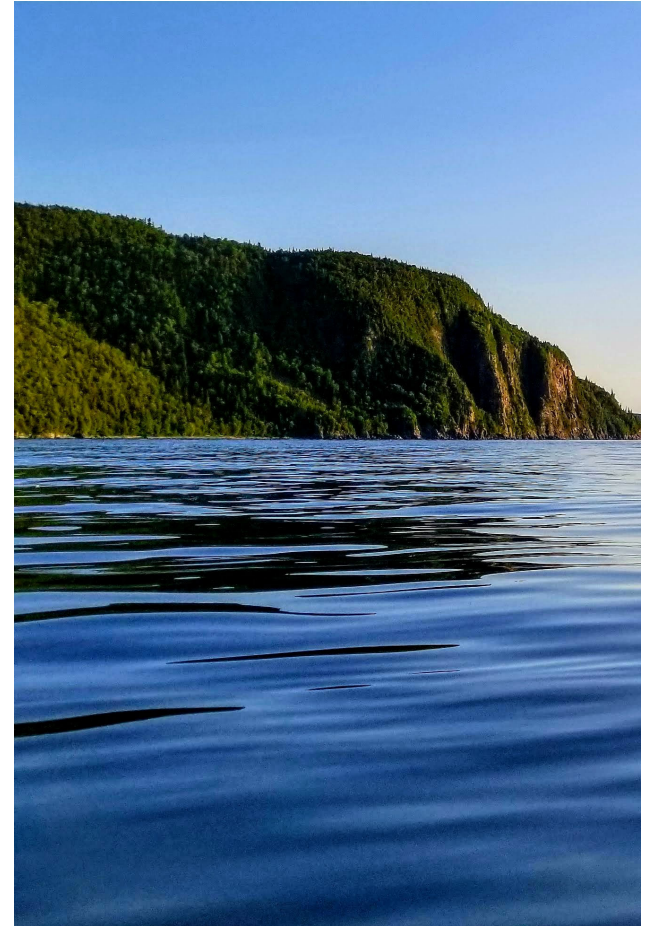
### 1. Enforcement measures and dispute resolution

<https://drive.google.com/file/d/1ow4bzFCtDbAvdVFlvOhpUofm7mJPoNQE/view>

(see sections 44-51 and 53)

### 2. Private Prosecutions

[https://cela.ca/wp-content/uploads/2019/10/Private\\_Prosecutions.pdf](https://cela.ca/wp-content/uploads/2019/10/Private_Prosecutions.pdf)





**Physical evidence** – ie. correspondence, mail, copies of correspondence, complaints you file, relevant records, site visits, note-taking;



**Samples** of air, water, soil or affected plant or animal matter



**Site visits** – have 2 persons present (ie. witnesses)



**Photographs** - admissibility dependent upon accuracy in truly representing facts



**Continuity of evidence** to prove case (keep in your possession, preferably under lock and key)

## Resources

### Enforcing Environmental Law



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# Resources

## Enforcing Environmental Law

### Pollution Journal

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Dates From: \_\_\_\_\_

To: \_\_\_\_\_

Type of Pollution: \_\_\_\_\_

Adapted from: *Environment on Trial: A Handbook of Ontario  
Environmental Law* (1<sup>st</sup> Edition 1974) by David Estrin and John  
Swaigen.

Date	Time		My Location	Pollution Description	Effects	Wind Direction
	Begin	End				

## Resources

### Enforcing Environmental Law



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## Healthy Great Lakes

Safeguarding freshwater in the Great Lakes Basin

CELA is a non-profit specialty legal aid clinic funded by Legal Aid Ontario. We work to protect

# Thank you!

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