

# Supporting Inclusive Resource Development (SIRD) East Africa TRAINING PROGRAM 2019



THE CANADIAN  
BAR ASSOCIATION



Global Affairs  
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LAW SOCIETY OF KENYA



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# Session 4: Canadian Perspectives on Environmental Protection and Indigenous Rights



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# Effective Environmental Management

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- An effective environmental regime assumes a willing and effective government ready and able to implement policies and programs designed to protect the environment.
- An effective environmental regime involves:
  - comprehensive measures which are designed to prevent or control activities resulting in adverse environmental effects, including prohibition, licensing, and incentives (e.g. grants, taxation, emissions trading systems);
  - consistent, principled, and transparent enforcement through expert, well-funded and trained regulatory agencies;
  - a system of review of the environmental (and other) impacts of development proposals, that gives a voice to potentially affected parties; and
  - information and education to foster a culture of environmental protection.



# Key Goals of Environmental Protection

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## International Framework

### Key Elements of UNDP's Social and Environmental Standards (SES)

Principle 1: Human Rights

Principle 2: Gender Equality and  
Women's  
Empowerment

Principle 3: Environmental  
Sustainability

#### Project Level Standards

Standard 1: Biodiversity Conservation and  
Sustainable Resource Management

Standard 2: Climate Change Mitigation and  
Adaptation

Standard 3: Community Health, Safety and  
Working Conditions

Standard 4: Cultural Heritage

Standard 5: Displacement and Resettlement

Standard 6: Indigenous Peoples

Standard 7: Pollution Prevention and Resource  
Efficiency



# Environmental Protection in Canada

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- Environmental matters in Canada are a shared jurisdiction for law making.
- Federal government has jurisdiction over environmental matters that are of national significance or cross land boundaries (chemical classification and management, designation of toxic substances, national pollution reporting, transportation of dangerous goods, fisheries, pipelines).
- Provinces and Territories also have jurisdiction over environmental matters that are within their land boundaries (waste classification and management, mineral extraction, electricity generation, water use and taking, resource recovery recycling).



# Environmental Protection in Canada

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- Municipal or regional governments –ability to make by-laws relating to local issues (noise, building types, sewer discharges)
- There is often an overlap between the different levels of environmental laws
- Indigenous law - legal principles related to environmental governance, land and resources for their nation



# Tracking Pollution

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In Canada – the National Pollution Release Inventory (NPRI) is Canada's legislated, publicly accessible inventory of pollutant releases (to air, water and land), disposals and transfers for recycling. It is a key resource for:

- Identifying pollution prevention priorities;
- Supporting the assessment and risk management of chemicals, and air quality modelling;
- Helping develop targeted regulations for reducing releases of toxic substances and air pollutants;
- Encouraging actions to reduce release of pollutants into the environment; and
- Improving public understanding.



# Tracking Pollution

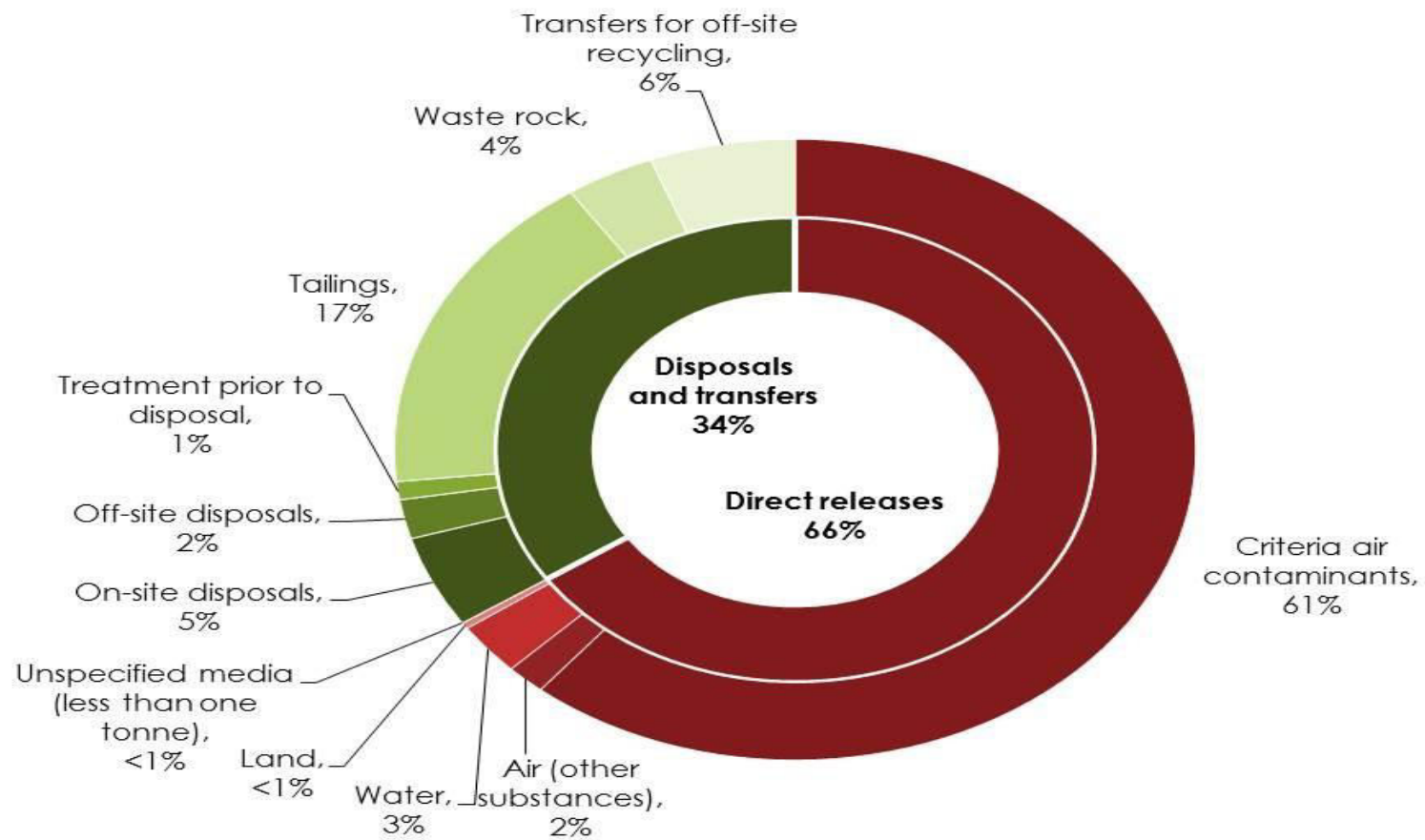
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In 2017, 7 001 facilities reported to the NPRI a total of 4 920 807 tonnes covering over 320 substances:

- 3,226,906 tonnes of pollutants were released directly to the environment;
- 1,693,901 tonnes were disposed to landfills, applied to land or injected underground, either on the facility site or off-site; and
- 288,328 tonnes were transferred off the facility site for treatment prior to final disposal or for recycling and energy recovery.







Total quantities reported to the NPRI:  
4 920 807 tonnes

# Indigenous peoples in Canada

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- As of 2011, approximately 4.3% of the total Canadian population is Indigenous.
- Diverse population, which can be subcategorized into three groups: Inuit, Métis and First Nations.
- There are hundreds of different Bands within the First Nations' population, as well as multiple different languages and spiritual beliefs.



# Indigenous law in Canada

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Canadian legislation and jurisprudence has developed a robust set of laws developed to reflect and acknowledge Indigenous peoples' historic use and occupation of the land, and reconciling that historic use with Crown sovereignty. These rights are Constitutionally-protected.

- **Aboriginal rights:** right to *use* the lands in accordance with historical practices, customs and traditions integral to the Indigenous group's distinct culture.
- **Treaty rights:** derived from treaties. Varies throughout the country, although typically involves an exchange of Aboriginal title for Reserve Lands and other benefits, such as hunting and fishing rights, annuities, and assistance in agriculture.
- **Aboriginal title:** a proprietary right to the land derived from exclusive use and occupation of the land at the time of the assertion of sovereignty by the British Crown.



# Evolution of Indigenous law in Canada

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- **Royal Proclamation of 1763**: affirmed that certain lands were to be reserved for Indigenous people.
- **British North America Act (1876)**: Federal jurisdiction over “Indians, and lands reserved for Indians”.
- **Indian Act (1876)**: Legislation to “civilize” the Indigenous people.
- **Catherine's Milling & Lumber Co. v. The Queen (1888)**: Indigenous peoples’ rights to the land are a “personal and usufructuary right dependent on the good will of the sovereign”
- **Calder v British Columbia (Attorney General) (1973)**: First recognition of concept of Aboriginal title.
- **Constitution Act, 1982**: Recognizes and affirms existing treaty rights, and Aboriginal rights and title.



# Evolution of Indigenous law in Canada

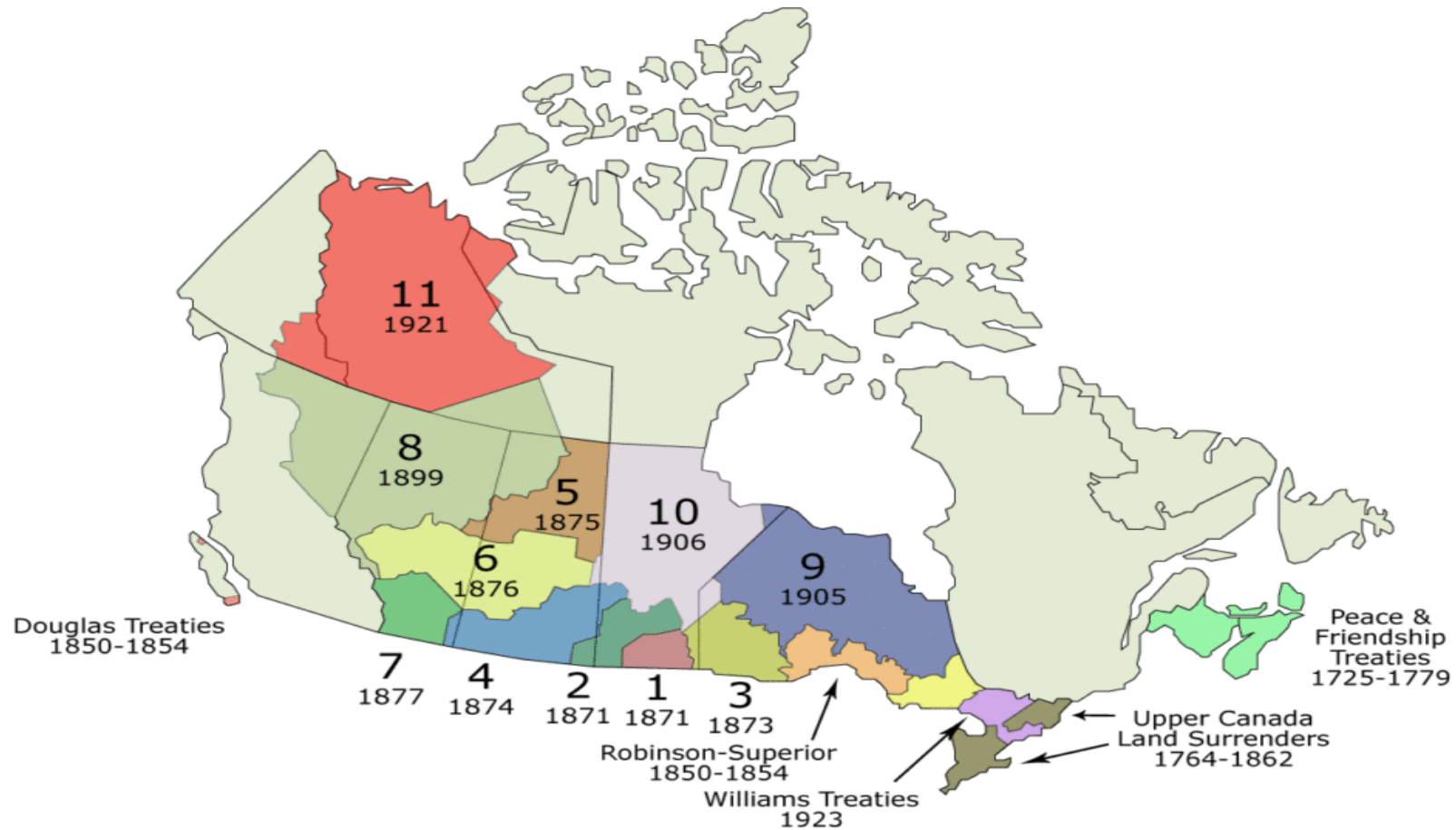
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- ***R. v. Sparrow*** (1990): Establishes the test for when infringement of Aboriginal rights/title can be justified.
- ***R. v. Van der Peet*** (1996): Establishes test for Aboriginal rights.
- ***Delgamuukw v. British Columbia*** (1997): Establishes test for Aboriginal title.
- ***R. v. Powley*** (2003): Establishes modified test for Aboriginal rights in the context of Métis peoples.
- ***Haida Nation v. B.C.*** (2004): Creates the concept of the duty to consult.
- ***Tsilhqot'in Nation v. British Columbia*** (2014): First declaration of Aboriginal title.



# Treaty Development

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# Duty to Consult – Role of Non-Crown Entities

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- While the duty to consult is the Crown's duty, procedural aspects of consultation can be, and often are, performed by a project proponent or regulatory body.
- The Crown is entitled to rely on regulatory bodies' processes in satisfying the duty to consult.
- Regulatory bodies are also frequently tasked with assessing the adequacy of consultation.
- Regulatory bodies consultation efforts and decisions are subject to judicial review or appeal.





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

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- Canada has announced that it will fully implement United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Main themes:
  - the right to self-determination;
  - the right to be recognized as distinct peoples;
  - the right to free, prior and informed consent; and
  - the right to be free of discrimination.



# Best Practices for Environmental Protection

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Review of best practices by media for the life of a project:

- Planning, development, operation, closure and reclamation
  - Impacts to Air
  - Impacts to Land
  - Impacts to Water
- Additional considerations:
  - Species at risk/endangered species
  - Emergency/Spill contingency planning
  - Transportation of Dangerous goods
  - Climate change impacts, assessment, adaptation and resilience



# Best Practices for Environmental Protection

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## Impacts to Air

- Requirement that emissions or discharges of any type to the air are regulated. Create list of substances to be monitored, reported and disclosed.
- Must conduct studies and scientific calculations to determine substances being emitted, concentrations, duration, plume direction and potential impacts (includes noise and dust emissions from blasting and transportation).
- Require mitigating controls to minimize impact to environment and also health and safety of workers and neighbours.
- Application for approval to discharge to the air with standards, limits and terms & conditions.
- Requirements to monitor and file regular reports and duty to report non-compliance and inform public of emergency situations
- Maintain public registry of complaints for transparency and to build public confidence
- Enforcement must be effective, consistent and balanced.



# Best Practices for Environmental Protection

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## Impacts to Land

- Comprehensive assessment of all impacts of project development to land including all phases of project development through to closure and reclamation.
- Include assessment of impact to local populations and broad inclusion of gender rights.
- Infrastructure impacts.
- Requirement to manage all materials and plan for all waste management activities.
- Species at risk/endangered species must be considered and determine if compensation habitat can mitigate impacts.
- Approvals required for all activities and phases, including monitoring, reporting, transparency, financial assurances to guarantee performance.
- Same for all media – monitor, report, maintain public registry for transparency.
- Must have effective, balanced and consistent enforcement.



# Best Practices for Environmental Protection

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## Impacts to Water

- Assessment of water use, taking, treatment and disposal
- Water conservation and impacts to local water table, consider source water protection areas
- Require scientific modelling of water taking and potential impacts to people, eco systems
- Waste water treatment and disposal
- Approvals required for all aspects of water use including terms and conditions for sampling, monitoring and reporting (eg: duration of permit)
- Climate change adaptation and resiliency assessment increase rains and drought impacts
- Spill contingency and remediation – focus on impacts to community, ecosystem, operations
- Same for all media– monitor, maintain public registry for transparency and balanced enforcement



# Canada -Environmental Bill of Rights?

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Private members bill introduced in April 2019

Would provide that every person residing in Canada has the following rights:

- (a) the right to a healthy and ecologically balanced environment;
- (b) the right to reasonable, timely and affordable access to information regarding the environment;
- (c) the right to effective, informed and timely public participation in decision-making regarding the environment, including in relation to any Act of Parliament respecting the environment and any environmental policy of the Government of Canada;
- (d) the right to bring a matter regarding the protection of the environment before courts tribunals; and
- (e) the right to request a review of any Act respecting the environment, any instrument made under such an Act or any environmental policy of the Government of Canada.





# Key Takeaways

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- Environment impacts from resource and extractive projects exist.
- Need to fully delineate and understand the potential impacts of any project to all media (air, land and water).
- Tracking pollution is an important tool to assist in decision making.
- Indigenous rights in Canada are constitutionally protected.
- Capacity building and education by funding public participation.
- Plan and implementation of mitigation actions.
- Climate change risks and build in adaptation and resiliency strategies.
- Planning for emergency and spill contingencies.
- Monitoring, public reporting and enforcement.





# Resources

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Canadian Environmental Protection Act, 1999  
<https://laws-lois.justice.gc.ca/eng/acts/c-15.31/>

Environmental Emergency (E2) Regulations  
<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-51/index.html>

National Pollution Release Inventory (NPRI)  
<https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/tools-resources-data.html>

(federal) Fisheries Act  
<https://laws-lois.justice.gc.ca/eng/acts/f-14/>

Ontario Environmental Protection Act  
<https://www.ontario.ca/laws/statute/90e19>

Ontario Water Resources Act  
<https://www.ontario.ca/laws/statute/90o40>

(Ontario) Mining Act  
<https://www.ontario.ca/laws/statute/90m14>



# Resources

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Transportation of Dangerous Goods Act, 1992 (S.C. 1992, c. 34) <https://laws-lois.justice.gc.ca/eng/acts/T-19.01/index.html>

[Transportation of Dangerous Goods by Rail Security Regulations \[Not in force\]](#) (SOR/2019-113)

[Transportation of Dangerous Goods Regulations](#) (SOR/2001-286)

Indigenous Rights – Honour treaty rights  
<https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>

Truth and Reconciliation Commission of Canada  
<http://www.trc.ca/>

Canadian Environmental Bill of Rights – proposed April 2019  
<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-438/first-reading>



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