

Chronic Wasting Disease (“CWD”): legislative tools for First Nations to address Chronic Wasting Disease

Presented by Jennifer A. Duncan, Barrister & Solicitor

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First Nations are Key Rights Holders impacted by CWD

- cultures and languages and their transmission from one generation to the other, are inherent and Treaty rights, protected by s. 35 of the *Constitution Act, 1982*.

- *R. v. Côté*, [1996] 3 SCR 139 at para. 56:

“In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.”

First Nation Jurisdiction to address CWD: Inherent Rights

First Nation Laws/Legal Orders

- First Nation laws regarding culturally significant species exist independent of federal, provincial or territorial laws
- First Nation law, pre-exists the two other sources of law (federal and provincial/territorial), is a third source of law
- First Nation laws are composed of the customs and traditions central to the culture of First Nations, and maintained through oral traditions including storytelling, and song

First Nation Jurisdiction to address CWD: Inherent Rights

First Nation Laws/ Legal Orders

- First Nation laws in oral stories have values and principles that have been passed on generation to generation since time immemorial
- First Nation stories often contain aspects of the laws of First Nations, including how to respect the sacred and vital relationships with animals and the land, the fact that First Nation people can speak to animals, and cultural keystone species such as caribou are medicine for First Nations

First Nation Jurisdiction to address CWD: Treaty Rights

- Treaties enshrine the rights to hunting, trapping and fishing throughout Treaty lands
- Treaty rights have been affirmed by the courts in a number of cases
- First Nation's with Treaty rights on the prairies have been impacted by the Natural Resources Transfer Agreements (NRTAs) were signed in 1930s between Canada and the provincial governments of Alberta, Saskatchewan, and Manitoba

Natural Resources Transfer Agreements & CWD: Federal, Provincial & First Nation's Jurisdiction

- NRTAs are particularly important concerning CWD and federal and provincial legislation, as para. 12 of the NRTAs in Alberta, and Saskatchewan (para. 13 in the Manitoba NRTA), specifically state that:
- **First Nations with Treaty rights have the right to hunt, fish, and trap for food on unoccupied Crown lands and other lands to which they have a right of access**

Natural Resources Transfer Agreements & CWD: Federal, Provincial & First Nation's Jurisdiction

- *R. v. Sundown*, 1999, SCC affirmed the NRTAs did not extinguish Treaty rights in Sask. but instead transferred responsibility to provinces to honor rights. Also clarified that Treaty rights take precedence over provincial regulations that might otherwise restrict hunting, fishing, and trapping
- NRTAs explicitly recognize and protect the hunting rights of First Nations, originally established under Treaties. These rights mean that First Nations must be able to address CWD so they can continue hunting deer, elk, moose, and caribou

NRTAs & CWD: Federal, Provincial & First Nation's Jurisdiction

- provinces must consult and collaborate (FPIC) with First Nation governments as partners in decision making when addressing CWD. This consultation and collaboration (FPIC) is essential to ensure that CWD management strategies do not infringe upon or limit the exercise of hunting rights
- provinces, under the NRTAs, have a duty to accommodate First Nations' Treaty rights. In the context of CWD and hunting rights, this involves implementing specific management practices to help maintain healthy populations of cervids and other wildlife critical to First Nations' subsistence and cultural practices

First Nation Jurisdiction over CWD: s. 35 Constitution, 1982

- Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty Rights, including Treaty rights that now exist in land claims agreements or may be so acquired.
- Aboriginal and Treaty rights prompt legal obligations on the Crown including the duty to consult (FPIC as per UNDRIPA) and accommodate, and a requirement to justify the infringement of Aboriginal and Treaty rights

First Nation Jurisdiction over CWD: s. 35 *Constitution, 1982*

- First Nation governments have jurisdiction and authority over land, wildlife and health by virtue of their inherent First Nation and Treaty rights, of which the *Constitution, 1982* is not the source of, but which are nonetheless, protected under section 35 of the *Constitution, 1982*
- land, wildlife and health jurisdictions have been further negotiated in many land claim and self-government agreements and other agreements, such as, regarding conservation, in Indigenous Protected and Conserved Areas

Federal Jurisdiction: CWD & First Nations s. 91 (24) *Constitution, 1867*

- federal government, through various Ministers such as Health Canada, ECCC, ISC, exercises environmental and health jurisdiction, on land reserved for Indians, as per the division of powers outlined in section 91(24) of the *Constitution, 1867*
- Section 91(24), *Constitution, 1867*, sets out the federal government has jurisdiction to legislate on matters related to the “core of Indianness”

Federal Crown Action: CWD

- Health Canada: acting through the
 - Canada Food Inspection Agency
 - Health of Animals Act
- ISC: provides information about CWD to First Nations and ensure a coordinated approach (ie, 2019 presentation to AFN)
- ECCC: provides advice on wildlife and ecosystem health issues, information about CWD to First Nations and ensure a coordinated approach (ie, 2019 presentation to AFN)

Federal Crown Action: CWD

- Agriculture and Agri-Food Canada (AAFC)
- Canadian Wildlife Health Cooperative (CWHC), in 2004, the Ministers Council, representing federal, provincial and territorial ministries with responsibilities for wildlife, mandated the Canadian Wildlife Directors Committee (related to the CWHC) to develop a national strategy to respond to and control CWD in Canadian wild animals

Provincial Crown Action: CWD

- wildlife and species at risk, have been considered to fall under mainly provincial jurisdiction: namely, under ss. 92(5), (13), (16), and s. 109 of the Constitution
- this is why we see provincial wildlife and species at risk departments working in the area of CWD, and in some provinces, such as BC, taking the lead in addressing CWD
- BC CWD Surveillance and Response Plan, BC Wildlife Health Program of the Ministry of Forests under the BC *Wildlife Act* in collaboration with First Nations, academics and stakeholders

Chronic Wasting Disease: jurisdictional gaps

- ISC and CIRNAC are the federal government departments primarily responsible for meeting Canada's obligations to First Nations (para. 12), however in the matter of CWD, Health Canada appears to be taking a significant federal lead, with ECCC and ISC taking a supportive roles
- Despite the responsibilities of the Federal government to First nations, so far, none of the federal departments are adequately addressing CWD from a First Nations rights' centred approach

Chronic Wasting Disease: jurisdictional gaps

- Jurisdictional gaps can be filled by First Nations asserting/exercising their jurisdiction through their own First Nation laws or laws in partnership with, for example ECCC, Health Canada, ISC and CIRNAC
- option of agreements with ECCC under SARA which can also be coordinated with provinces/territories

Chronic Wasting Disease: SARA

- *Species at Risk Act*, S.C. 2002, c. 29 (“SARA”), emerged from an extensive process of consultation and collaboration with Indigenous peoples, recognizes the *Constitution Act, 1982* section 35 Aboriginal and Treaty rights
- mandates federal cooperation with First Nations, based on First Nations’ traditional knowledge, and through the National Aboriginal Council on Species at Risk (“NACOSAR”)
- First Nations can utilize SARA as a lead partner in coordinating a national approach among all responsible authorities, to fill the gaps in measures in relation to CWD

Chronic Wasting Disease: SARA

- SARA can provide the federal legislative basis to protect cervids and their habitat from CWD
- Section 11 Agreements: for species that **are listed** under SARA, ie: woodland caribou, **boreal population are listed**
- Section 12 Agreements: for species that **are not listed** under SARA, ie: **barren ground caribou are not listed**
- First Nations can negotiate with the Federal Min. of ECCC to protect caribou from CWD (in coordination or harmony with the federal and territorial government or to prevail in the event of a conflict between the laws)

Chronic Wasting Disease: SARA s. 11

- Athabasca Chipewyan First Nation and Mikisew Cree, entered into an agreement with Canada pursuant to section 11 of SARA to support the recovery and protection of boreal caribou
- provisions which state the parties are to be guided by UNDRIP, informed by TRC's Calls to Action”
- is to be “guided by the precautionary principle”

Chronic Wasting Disease: SARA s. 12

- for cervid species that are not yet listed as at risk, SARA section 12 can be applied
- the signification challenge is that there are not yet any SARA section 12 agreements
- Canada thus far, has been reluctant to enter into any SARA s. 12 agreements

Chronic Wasting Disease: Environmental Racism, Doctrine of Discovery and *terra nullius*

- important to understand the concepts of environmental racism, the Doctrine of Discovery and *terra nullius*, as racist and colonial concepts which may be still influencing the application of Canadian legislation
- these concepts are important to acknowledge, especially when advocating for environmental justice and overcoming the reluctance of Canada to exercise their often, discretionary powers to, for example recognize First Nations governments' jurisdiction and authority to enter into conservation agreements

Chronic Wasting Disease: Environmental Racism

- Chavis, Jr., a commissioner for the United Church of Christ's Commission for Racial Justice, in the US, in the 1980s, defined environmental racism as:
 - the intentional siting of hazardous waste sites, landfills, incinerators and polluting industries in areas inhabited mainly by Blacks, Latinos, Indigenous peoples, Asians, migrant farm workers and low-income peoples.
- environmental racism is an extension of institutional racism

Chronic Wasting Disease: Environmental Racism

- Chavis Jr., elaborated further that environmental racism is racial discrimination in:
 - environmental policymaking,
 - enforcement of regulation of laws,
 - deliberate targeting of communities of colour for toxic waste disposal and the siting of polluting industries,
 - official sanctioning of the life-threatening presence of poisons and pollutants in communities of colour,
 - excluding people from the mainstream environmental groups, decision making boards, commissions, and regulatory bodies.

Chronic Wasting Disease: Environmental Racism

- cervid farms being located near First Nation reserves, without adequate measures to protect First Nation lands
- lack of rigorous disease management or enforcement in areas near First Nation territories can lead to the spread of CWD onto First Nation lands
- historically, First Nations have been excluded from key decision-making processes related to wildlife and land management. This exclusion has meant that First Nations have had little say in how CWD is monitored, controlled, or managed

Chronic Wasting Disease: Environmental Racism

- decisions made without First Nations input often fails to consider the specific needs and vulnerabilities of First Nations, leading to insufficient protection against CWD and the spread of CWD
- spread of CWD to First Nation lands can be seen as an extension of environmental racism, where the health and food security of First Nations are compromised due to the environmental policies and practices that prioritize non-First Nations' interests such as cervid farms
- CWD endangers the physical health of First Nations and undermines First Nations' jurisdiction, cultural practices and way of life

Chronic Wasting Disease: Truth & Reconciliation Commission

- In 2015, the Truth and Reconciliation Commission (“TRC”) issued 94 Calls to Action, Call to Action #47 states:

We call upon federal, provincial, territorial, and municipal governments to **repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.**

Chronic Wasting Disease: Truth & Reconciliation Commission – Doctrine of Discovery

- *Johnson v. M'Intosh*, a case denying Native American land rights, US Chief Justice John Marshall held that “all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”
- *Johnson v. M'Intosh* cited in two Aboriginal rights cases, *R. v. Sparrow* in 1990, and in 1996 in *R. v. Van der Peet*, which are foundational cases in Canadian law upon which conservation rights are based to assert Canadian authority over First Nations people and land with respect to wildlife

Chronic Wasting Disease: Truth & Reconciliation Commission – *Terra nullius*

- lands the Europeans being claimed were *terra nullius* (land belonging to no one) and therefore open to claim.
- imperialists could argue that the presence of First Nations people did not void a claim of *terra nullius*, since First Nations people simply occupied, rather than owned, the land. True ownership, they claimed, could come only with European style agriculture

Chronic Wasting Disease: UNDRIP

- UNDRIP, adopted in 2007 by the UN General Assembly, informs scope of Canada's obligations when it interprets and implements legislation
- UNDA, June 21, 2021, Canada committed to ensuring that the implementation of Canadian law is consistent with UNDRIP
- Several Articles of UNDRIP and UNDA are relevant with respect to CWD and its impact on First Nations: Articles 18, 19, 20(1), 24(1), 29(1), 31, 32(2)

Chronic Wasting Disease: UNDRIPA

- most important Articles with respect to CWD are Articles 19, 24(1), Article 29(1), and Article 31
- these Articles collectively address First Nations' rights to consent, health, environmental protection, and cultural preservation
- these rights are central to ensuring that First Nations are fully involved in combating the impacts of CWD on First Nation people, lands, and traditional practices

Chronic Wasting Disease: Precautionary Principle

- 1972 Stockholm Conference
- adopted by the United Nations in the 1992 Rio Declaration, Principle 15, which states:

... “to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Chronic Wasting Disease: Precautionary Principle

- First Nations can invoke the precautionary principle to implement measures that protect food sources of caribou, deer, and elk from CWD, as well as the land
- protective measures such as stricter regulations on hunting and consumption of potentially infected wild cervids, even in the absence of definitive evidence that CWD can cross species barriers to humans
- for the uncertainty about the full impact of CWD on human health, First Nations can use the precautionary principle to push for more preventive public health actions, such as education on safe handling and consumption of wild cervids, increased surveillance and testing of wildlife, and a ban on cervid farming

Chronic Wasting Disease: One Health

- while “One Health”, is a mainly western science concept, which recognizes the interconnectedness of biodiversity and health, it aligns with First Nations’ perspectives that the environment and health are to be addressed in a holistic manner
- First Nations may leverage “One Health” to protect First Nations people, rights, and species at risk from CWD by promoting collaborative research and monitoring efforts that incorporate both Western science and First Nations’ knowledge such as the concept of “Two Eyed Seeing”

Chronic Wasting Disease: Two Eyed Seeing

- Albert Marshall, Mi'kmaq Elder, explains, "Two-Eyed Seeing refers to learning to see from one eye with the strengths of Indigenous ways of knowing and from the other eye with the strengths of Western ways of knowing and to using both of these eyes together"
- One Health, which applies integrated, holistic approaches, is being utilized in Canada's 2030 Nature Strategy

Chronic Wasting Disease: Co-operative Federalism

- different levels of government can work together in harmony with legislation that ensures there are no operational conflicts between laws, all validly enacted by each government, including laws enacted by First Nation governments via their inherent law making power, or laws enacted via Canadian legislation such as SARA
- SARA recognizes that responsibility for conservation is shared by multiple layers of jurisdiction which can all operate concurrently and in harmony as per the legal principle of co-operative federalism

Chronic Wasting Disease: Conclusion

- SARA is a legislative tool to utilize in advocacy, as it enables a cooperative partnership between First Nations, Canada, provinces, and territories
- agreements under SARA can incorporate UNDRIP and UNDRIPA, the TRC Calls to Action, the precautionary principle, and the One Health approach
- incorporating principles of self-determination, SARA can help to overcome environmental racism and systemic colonial bias, while upholding and recognizing First Nations' inherent and Treaty rights. Inherent, and Treaty rights which are also protected by s. 35 of the Constitution, and the NRTAs

Chronic Wasting Disease: Conclusion

- SARA can ensure a cost benefit analysis, with First Nations values, is conducted, for a compensation assessment for First Nations impacted by CWD
- SARA s. 11 agreement with Athabasca Chipewyan First Nation and Mikisew Cree, recognizes First Nations jurisdiction over woodland caribou, boreal population, which is listed under SARA as threatened
- SARA under s. 11, and s. 12, with funding provided under s. 13 can provide for successful co-management strategies for CWD thereby safeguarding the deer, elk, moose and caribou populations and habitat that embody significant First Nations rights

Chronic Wasting Disease: Conclusion

- effectiveness of SARA for First Nations to address CWD depends on whether First Nation decide to advocate to use SARA as one of the tools to combat CWD
- Woodland caribou, boreal population can serve as the culturally significant focal species to be protected from CWD under SARA.
- focusing on woodland caribou, boreal population and habitat, measures under SARA to protect wood land caribou, boreal population and habitat, may also extend to deer, elk, and moose

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Questions/Comments?



jduncan@duncanco.ca

(778) 840-8212

www.duncanco.ca