Wildlife and Habitat Protection / Management Other than by Wildlife Laws: Roles for Courts

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INTRODUCTION

Wildlife laws *per se*, such as wildlife or species at risk legislation, only go part of the way, and a relatively minor part of the way, towards protecting or managing wildlife or habitat ("wildlife/habitat"). A myriad of other laws, both common and legislative, are relevant to wildlife/habitat impacts, for better or worse. This paper looks at the limitations of wildlife laws, and then discusses other law-based protection or management of wildlife/habitat approaches falling under the broad category of "other than wildlife laws" ("OTWLs"). Given its short length, the paper takes a broad-brush approach. The aim is not to inspect details; it is rather to demonstrate both how wildlife/habitat issues permeate an immense assortment of laws and to show how courts can play significant roles regarding the outcomes for wildlife/ habitat.

ABOUT WILDLIFE LAWS[1]

Law commentator John Donihee identifies three eras of wildlife management: game management (Confederation to 1960s), transitional wildlife management (1960s to mid-1980s), and sustainable wildlife management (mid-1980s to present).[2] Game management legislation regulates wildlife as resources, e.g. by regulating hunting, trapping, predation, and marketing. Although such laws may contain limited immediate habitat protection provisions (e.g. nests, dens), they aim at preserving game for utilization. Transitional wildlife management "is characterized by the ongoing refinement and detail of hunting control mechanisms, using a combination of geographic areas, seasons and harvest restrictions." Typical regulatory mechanisms include "habitat protection and management, and artificial replenishment, including restocking, game farming …."[3] Sustainable wildlife management reflects evolving values regarding wildlife in recognizing wildlife's intrinsic as well as resource values. It is typified by legislation with a strong environmental or ecological focus, and legislated endangered species and habitat protection. Aboriginal rights and entitlements also may be recognized in this era as well as strengthened controls on trade in wildlife.[4]

If one only considered wildlife laws *per se*, it would be difficult to make the argument that legislation better protects wildlife/habitat in the "sustainable wildlife management era" than before it, with few exceptions. One is the Nunavut *Wildlife Act*[5]with its incorporation of the *Nunavut Land Claims Agreement* respecting wildlife, habitat, and the rights of Inuit.[6]Another is that a few wildlife laws (outside of species at risk laws) provide habitat protection beyond immediate habitat. Even then such provisions are limited, for example, powers to designate

[1] Also see Arlene Kwasniak, *Alberta Wetlands: A Law and Policy Guide, Second Edition*, (CIRL/NAWMP, 2016) especially chapters 7 and 8.
[2] John Donihee, *The Evolution of Wildlife Law in Canada* (Calgary: CIRL, 2000) pp 12-17.
[3] *Ibid*, both quotes.
[4] *Ibid*, pp 16-17.
[5] *Wildlife Act*, SNu 2003, c 26. Other more "sustainable management" legislation includes the *Wildlife Conservation Act*, RSPEI 1988, c W-4.1, Quebec's *An Act Respecting the Conservation and Development of Wildlife, RSQ s C-61.1*, and Nova Scotia's *Wildlife Act*, RSNS 1989. For more information see Monique Passelac-Ross, *Overview of Provincial Wildlife Laws*, (Calgary: CIRL, 2006).
[6] *Wildlife Act*, SNu, ibid, s 1.

habitat protection areas on Crown land, or to regulate unique interferences with habitat.[7] Other exceptions are the many provincial/territorial and federal of species at risk laws. As important these are to wildlife/habitat protection/management, they are limited and reactive and may trigger too late. Generally, species members must be gasping for breath and their natural habitat largely developed for these Acts to kick in.

Wildlife laws *per se* are not enough to effectively protect or manage wildlife/habitat. Wildlife laws, except for species at risk laws, have little to do with wildlife/habitat impacts from development, or wildlife/habitat protection. In our complex society we must look beyond wildlife laws to better comprehend the law-based sources that permit impacts on or provide protection for wildlife/habitat.

WILDLIFE AND HABITAT PROTECTION/MANAGEMENT OTHER THAN BY WILDLIFE LAWS

OTWLs may fall under common law, legislation, or other categories such as private and public stewardship and economic instruments. OTWLs are ubiquitous and it is a safe wager that more wildlife/habitat is protected or impacted through the application of OTWLs, than wildlife laws. Here are some examples of OTWLS, and of courts involvement with them.

Common law

OTWLs based in common law offers a number of approaches to protect/manage wildlife/habitat.[8] Here are a few.

Contracts:

Contracts that could be used to assist in wildlife/ habitat protection include contracts between conservation organizations and landowners to refrain from land use practices that could adversely affect habitat or to monitor or restore habitat. However, contracts are limited by a term of time, and apply only to the parties to the contract, unless the obligations are assigned. Also, a contract, unaccompanied by an interest in land, does not "run with the land" and bind future landowners who are not party to it.

A case in point is *Willman v Ducks Unlimited (Canada).*[9] The Defendant, Ducks Unlimited Canada (DUC), filed a caveat against the Plaintiff's land to give notice of DUC's interest in a landowner agreement that enabled DUC to access the land and to carry out waterfowl management activities. The Manitoba Court of Appeal struck down the caveat on the basis that caveats by their nature give notice of *interests in land*. The landowner agreement did not, the Court found, confer an interest in land, and did not bind future owners. It was rather a personal contract that permitted DUC to enter the land to carry out certain activities.

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[7] For example, the British Columbia *Wildlife Act*, RSBC 1996, c 488, ss 5 and 6 which authorize critical habitat designations in wildlife management areas on Crown land, and s 77 which makes releasing livestock in wildlife habitat an offence.

[8] For a more comprehensive discussion, see *Alberta Wetlands: A Law and Policy Guide*, Second Edition, *supra* note 1 ch 16, and Arlene Kwasniak, *Legal and Economic Tools and Other Incentives to Achieve Wildlife Goals*, (Calgary: CIRL, 2006) Wildlife paper #5.

[9] *Willman v Ducks Unlimited (Canada),*, [2004] MJ No 363 (MBCA).

Easements and Restrictive Covenants

Unless modified by statute, easements and restrictive covenants require two separate parcels of land, a dominant and servient tenement, and the dominant tenement must benefit from restrictions on (restrictive covenants) or permissions or rights in relation to (easements), the servient tenement. Properly constituted easements and restrictive covenants run with the land and bind future owners.

Easements and restrictive covenants could have many uses for wildlife/habitat protection. For example, a conservation organization could enter into a restrictive covenant with a landowner to restrict the owner's uses of land to benefit connected wildlife habitat on the organization's lands in the same area. The organization might negotiate an access easement to monitor compliance.

An example of a statutory modification is section 219 of the British Columbia *Land Title Act*[10] which authorizes the Environment Minister, a municipality, and certain others to enter into a covenant with a landowner to secure certain amenities. The covenant runs with the land, may impose negative or positive obligations, and does not require a dominant tenement. "Amenity" includes environmental, wildlife, and plants. Government has used such covenants to protect wildlife habitat.[11]

Windset Greenhouses (Ladner) Ltd v The Corporation of Delta[12]considered the validity of a section 219 covenant. The municipality of Delta required Windset to enter into covenants to, among other things, enhance wildlife habitat, and restrict heat sources and light emissions, as a pre-condition to Winset's being granted a development permit. Windset executed the covenant on its understanding that they were temporary and would be replaced by a municipal bylaw governing these matters. Delta did not get to passing the bylaw as officials reasoned that they could rely on the covenants. The British Columbia Supreme Court agreed with Windset that the covenants were intended to be temporary and that Windset executed them because a bylaw would replace them within a reasonable time. The Court issued an order under the *Law of Property Act*[13] to cancel portions of them. The Court was careful to draw a distinction between bylaws, which can be changed, and section 219 covenants, which might be perpetual.

Leases

Leases -- time-limited interests in land that give a right to occupy -- can protect wildlife/ habitat in a variety of ways. A conservation organization, for example, could lease land to restore and protect habitat. Or a lease, such as a Crown grazing lease, or Crown oil and gas lease, could include habitat protection conditions.

Hansen Drilling Ventures Ltd v Alberta Conservation Association, (ACA), an Alberta Surface Rights Board decision, provides an example relating to an oil and gas lease.[14] The ACA, with the

[10] *Land Title Act*, RSBC 1996, c 250, s 219.
[11] See British Columbia government website at << http://www.env.gov.bc.ca/lower-mainland/ecosystems/restrictive_covenants/index.htm>>.
[12] *Windset Greenhouses (Ladner) Ltd v The Corporation of Delta*, 2001 BCSC 462
[13] The *Law of Property Act*, RSBC 1996, s 35(1)(e), enables a court to change or cancel such covenants.
[14] *Hansen Drilling Ventures Ltd v Alberta Conservation Association*, 2013 ABSRB 856

Alberta Fish and Game Association, owned land to restore it to native vegetation to provide habitat for endangered species, in particular sage grouse. Hansen's industrial activities would interfere with the restoration and re-vegetation. The Panel was asked to set the compensation that Hansen must pay for its use of the land. The ACA presented 12 comparable loss of use agreements. In the end the Panel raised annual compensation from $2000 to $4,261, which was more in line with the comparables. It is interesting that instead questioning whether restoration to native habitat for listed species was a *use* of land, or trying to quantify the actual value of the loss of use, the Panel stated "the marketplace is usually the best determinant of fair and reasonable rates of compensation."[15]

Licence

A person may give a licence to another to do something on land. Regarding wildlife/habitat a licence could include, for example, a right to enter land to restore, maintain, and monitor habitat conditions. A licence, on its own, does not bestow a property interest. This can be important as a property interest typically includes rights to enforce the interest against third parties that interfere with the interest.

A case in point is *Chingee v British Columbia*.[16] Harry Chingee held a guiding territory certificate and two registered traplines both issued by the Province under the *Wildlife Act.*[17] Chingee claimed that Crown authorized logging activities on Crown land interfered with his interests. He claimed damages on the basis of nuisance and trespass, among others. British Columbia asked the British Columbia Supreme Court to strike Chingee's statement of claim.

Chingee claimed his interests were profits á prendre. A profit á prendre gives the right to enter another's land and take some profit, such as wildlife, hay, trees, etc. It is a property interest but does not confer exclusive possession of land. It is limited to the exclusive right of entering the land to remove the profit.[18]

The Court found that the interests would not support a trespass action. Trespass is a wrongful interference with land in the plaintiff's possession. Chingee was not in possession in the required sense, and the defendants' logging activities were expressly authorized by the Crown so any interference was not "wrongful."[19] Although the Court entertained the claim that the trapline interest could be a profit á prendre, the Court found that the elements of nuisance --unreasonable interference with the use and enjoyment of land-- were not met as against the Crown or other defendants.[20] The Court relied on British Columbia's public lands legislation that prescribed a multiple use approach to public land management. The Court stated that "realization of wildlife values is one of many considerations among the purposes and functions of the Ministry described in its legislation. Other objectives relate to maximizing forest productivity, timber harvesting, and recognizing the financial interests of the government."[21] The legislated resource

[15] *Ibid*, para 3.
[16] *Chingee v British Columbia*, 2016 BCSC 760
[17] *Ibid* at para 2.
[18] "Profit á prendre," *Halsbury's Laws of England*, 2nd ed, Vol 27, p 607.
[19] *Chingee v British Columbia*, *supra* note 16, para 68.
[20] *Ibid*, paras 72 and 73.
[21] *Ibid*, para 53.

management multiple use scheme shaped and limited what would constitute "unreasonable interference."[22]

Statutory

Countless statutes are OTWLs in that their application can protect or impact wildlife/habitat. In this paper only a few are discussed. However, it would be remiss not to at least first mention other types of OTWLS and provide examples in the footnotes.

- legislated plans that authorize or guide government decision-making regarding land use;[23]
- legislation that designates land for environmental/ecological protection;[24]
- municipal planning legislation that authorizes zoning that exclude areas from development;[25]
- although not usually legislated, international conventions and commitments concerning wildlife/habitat;[26]
- government wildlife/habitat policies;[27]
- legislation and policies creating or sanctioning economic instruments like off-sets regarding impacted wildlife/habitat.[28]

Conservation Easements

Most provinces/territories have conservation easement/covenant statutes. These statutes create a property interest in land. To constitute the interest, a landowner enters into a voluntary agreement with a person authorized by statute to protect the natural or other authorized values of all or a part of his/her land by restricting development, for a term of time or in perpetuity. When registered at the appropriate land registry, a conservation easement/covenant runs with the land and development restrictions are enforceable in accordance with its terms and the legislation.[29]

Transfer of Development Credits

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[22] *Ibid*, para 72.

[23] An example is Newfoundland and Labrador's sustainable forest management plans made pursuant to the *Sustainable Forest Management Planning Regulation*, NL 61/13, under the *Forestry Act*, RSNL1990, c F-23. Such plans can exclude from harvesting areas of environmental or ecological importance, such as connective wildlife habitat.

[24] The multitude of Federal, and provincial/territorial park and wildlands protection legislation includes the *Wilderness Areas Protection Act*, SNS 1998, c 27

[25] For example, Alberta's Strathcona County's Conservation land use district 10.2.1.whose purpose is "To provide for the preservation of environmentally sensitive lands which have significant natural capability for conservation, passive recreation and education." There are no permitted uses, and only a couple of passive outdoor-based discretionary uses. Online at << https://www.strathcona.ca/files/files/at-pds-draftlub-part10-0304.pdf>>.

26 Examples abound and many are identified in Arlene Kwasniak, *Alberta Wetlands: A Law and Policy Guide, Second Edition*, *supra* note 1, c 15. One example is the *Ramsar Convention on Wetlands of National Importance*, (11 ILM 969 (1972, in force 1975) under which wetlands can be designated, and the jurisdiction of the designation agrees to protect and manage sites for their ecological values.

[27] An example is the Canadian Biodiversity Strategy, online: <http://www.biodivcanada.ca/default.asp?lang=En&n=560ED58E-1>.

[28] The 2013 Alberta *Wetland Policy* is an off-set example. Although not legislated (Cabinet approved only) compliance with it can be required by approvals under the *Water Act* (RSA 2000, c W-3).

[29] In Alberta, conservation easements fall under the *Alberta Land Stewardship Act*, SA 2009 c A-26-8, ss 28-35.

Transfer of Development Credit ("TDC") programs provide a legal process to preserve natural, agricultural, or heritage values of rural or urban land by permitting the transfer of development potential from one area and conferring it on another, more appropriate for development.[30] Unlike traditional zoning, TDC programs enable compensation to a landowner for the loss of development potential to carry out public conservation policies. Such programs have been hailed as "an innovative way to accommodate both preservation interests and development interests."[31]

Panelist Dave Poulton further discusses conservation easements and TDC programs.

Environmental assessment

Government decision-makers need information in order to decide whether to issue a statutory authorization (e.g. a mining permit). This is especially so if a proposed project could have significant environmental effects or other social costs. Environmental assessment ("EA") offers governments a planning and decision tool for preventing or mitigating environmental problems that will likely result from a project, including impacts to wildlife/ habitat. Through the EA process governments may become aware of the overall impact on the environment of development projects. Armed with this awareness, decision-makers decide whether to issue the required statutory authorization so that the project may go ahead, issue the authorization with conditions, or not to issue the authorization at all. All provinces/territories and the federal government have EA legislation. [32] In addition, EA can be carried out pursuant to Indigenous communities/Government co-management agreements and legislation.[33]

Project EA may relate to wildlife and habitat protection or management in many ways, for example:

A project that could impact wildlife/habitat that is being assessed will likely require a wildlife baseline analysis. As summarized by a consultant/biologist data requirements might include:

- "Lists of expected species present on site, emphasizing species of conservation concern
- Site specific features (e.g., bear dens, mineral licks, raptor nests)
- Identified habitats of importance (e.g., ungulate winter range, areas of known concentration)
- Documented seasonal habitat use
- Estimates of animal abundance (listed by habitat and season)
- Historical distributions and habitat use
- Behavioral responses to development activities."[34]

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[30] For an overview of TDCs previous to their statutory status in Alberta, see Arlene Kwasniak, "The Potential for Municipal Transfer of Development Credits Programs in Canada," 15 JELP 2, (2004) 47.

[31] Deborah Bowers and Tom Daniels, *Holding Our Ground: Protecting America's Farms and Farmland*, (Washington: Island Press, 1997) p 171.

32 In Alberta, for example, environmental assessment of a project may be required by the provincial government, under *the Environmental Protection and Enhancement Act*, RSA 2000, c E-12, or by the federal government under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c. 19, or by both in a single harmonized assessment.

[33] For example, the Nunavut Land Claims Agreement (1993) established the Nunavut Impact Review Board (NIRB), which is responsible for assessing all projects in Nunavut, and the Inuvialuit Final Agreement (1987) established the Environmental Impact Screening Committee.

[34] EDI Environmental Dynamics Inc., Wildlife Baseline and Monitoring Overview of Wildlife Information Requirements in Environmental Assessment, online << http://edynamics.com/uploads/documents/factsheets/Wildlife%20Baseline_Studies_27May2010_cm.pdf>>.

Project EA may bring to light the presence of:

- species at risk, and the application of the federal *Species at Risk Act*,[35] or provincial/territorial species at risk legislation that could lead to wildlife/habitat protection;
- Aboriginal rights related to wildlife and habitat and potential protection of rights;
- public and stakeholder concerns that could lead to protection, project rejection or abandonment, or stricter development conditions to better protect wildlife and habitat.

In contrast to project EA, a regional EA ("REA") plan covers a geographic area and can involve:

- a comprehensive ecological baseline study;
- identification of areas or categories of life or culture particularly susceptible to development, or otherwise meriting preservation and protection;
- a risk analysis regarding impacts of existing and planned project developments, including cumulative impacts studies, and a mapping out of where development to specified degrees may occur and where it is off limits.

Accordingly, REA takes into account wildlife/ habitat and provide degrees of insulation from development.[36]

A strategic EA (SEA) focuses on the environmental effects of a government's policies, plans, and programs. For example if a province considered adopting the Y to Y program, which strives to secure connective wildlife habitat from Yellowstone to Yukon, then assessing the environmental impacts of adopting the program and developing policy with respect to YtoY would constitute SEA.

Both SEA and REA may be operative in project EA, including with respect to potential wildlife/habitat impacts of a proposed project.

Project EA – the proof is in the permit and what follows

Obviously assessing environmental effects alone with not protect/manage wildlife or habitat. It is what is done with the information that counts. Following EA a project could be turned down, approved with conditions, or approved without conditions. Conditions may include mitigation to lessen effects, including with respect to wildlife/habitat. Conditions need to be monitored and followed up on to ascertain their effectiveness. Where unforeseen environmental impacts result irrespective of conditions, adaptive management requirements on approval (if any) can oblige a proponent to alter environmental management to alleviate issues and impacts.

As a final comment in this section, research disclosed very few instances where the fact that an EA was conducted clearly resulted in *actual protection* of wildlife/ habitat. If a project has positive results for wildlife/habitat, it is more likely that it is because the EA lead to avoiding, minimizing or

[35] *Species at Risk Act*, SC 2002, c 29.

[36] For example the Class EA for Timber Management on Crown Lands in Ontario, online: << https://www.ontario.ca/page/class-ea-forest-management-crown-lands-ontario-mnr-71>>, which was developed to inform regulating timber management and harvesting on Crown lands. A disputed issue was the EA's adequacy in protecting wildlife and habitat.

mitigating wildlife/habitat impacts. Even then, such positive results depend on EA recommendations being followed through in apt permit conditions, monitoring, follow-up and adaptive management, which does not always occur.[37]

EA and courts

There is no shortage of court enforcement/interpretation of EA matters in relation to wildlife/habitat in Canada. A Canlii search on January 22, 2018 disclosed 76 cases involving the *Canadian Environmental Assessment Act* (2012 and 1992) alone. A case demonstrating some positive results for wildlife/habitat is the 1998 British Columbia Supreme Court decision *George v Marczyk.* [38] This was the first BC decision on the then new provincial EA law. The case concerned the proposed open pit Huckleberry Copper Mine. In 1995 Huckleberry applied for a certificate under the provincial *Mine Development Assessment Act.* [39] The assessment process began under that Act but then transitioned to the new *Environmental Assessment Act.* [40] The certificate was granted, subject to conditions. The validity of the certificate was challenged on judicial review on numerous grounds including that "The issue of the impacts of the project on wildlife and the consequent potential adverse effect on First Nations was not addressed prior to certification. In particular, the mapping presented to the committee was unacceptable and that until such mapping is completed work on the compensation for impacts and wildlife could not take place and in fact it was never done."[41] These wildlife impacts and mitigation, the petitioners argued, should have been identified in the EA process, and then would have been available as a basis for constitutionally required First Nations consultation. The Court agreed, and added that the proponent should have provided such data under the provincial *Environmental Assessment Act.*[42] The Court ordered that such data be produced within a given timeframe, that First Nation consultation resume with this new information, and that the certificate subsequently be amended as appropriate.[43] Ultimately the provincial and federal approvals were finalized but subject to the proponent's developing reclamation plans to restore or enhance fish and wildlife habitat after mine closure.[44] Interestingly, in 2015 Huckleberry Mines won an award in the metal mine reclamation category from the British Columbia Technical and Research Committee on Reclamation (TRCR). The award was for its "habitat compensation work in a successful remediation of fishways (using fish ladders) in a local creek in the vicinity of the Huckleberry copper mine."[45] The creek contained no fish until 1996, a year after the start of the reclamation work.

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[37] The point is well illustrated in Meinhard Doelle's "The Disconnect Between EA & Implementation: A Look at the Methylmercury Issue in the Lower Churchill Project," Dalhousie University Environmental Law News, November 20, 2015, online: << https://blogs.dal.ca/melaw/2015/11/20/the-disconnect-between-ea-implementation-a-look-at-the-methylmercury-issue-in-the-lower-churchill-project/>>.

[38] *George v Marczyk*, 1998 CanLII 6737 (BC SC).

[39] SBC 1990, c 55.

[40] *Environmental Assessment Act*, SBC1994, c.35.

41 *George v Marcczyk*, *supra* note 38, para 4.

42 *Ibid*, paras 69, 70.

43 *Ibid*, para 75.

[44] Canadian Environmental Assessment Agency, Cumulative Effects Assessment Practitioners' Guide Huckleberry Copper Mine: Case Study Highlights, online << https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=43952694-1&offset=17&toc=hide>>.

[45] Peter Caulfield, "Huckleberry Mines wins award for mine reclamation," in Canadian Mines and Energy (2016), online: << http://www.miningandenergy.ca/sustainability/article/huckleberry_mines_wins_award_for_mine_reclamation/>>.

THE MORAL OF THE STORY

Impacts on wildlife/habitat, for good or bad, may result from the application of a myriad of laws. Individuals and organizations wanting to preserve and protect wildlife/habitat necessarily must look at the larger law-based puzzle pieces and work with and connect the pieces to realize their aims. In addition to law-based pieces, such individuals and groups can pursue other avenues, not discussed here, such as grants, land acquisition, lobbying, education, and stewardship programs. Yellowstone to Yukon Conservation Initiative ("YtoY"), already mentioned, is a good example. Its website describes it as "a joint Canada-U.S. not-for-profit organization that connects and protects habitat from Yellowstone to Yukon so people and nature can thrive."[46] YtoY uses a variety of methods and relies on legislative provisions of statutes from a number of jurisdictions, and the collaboration of hundreds of people and groups, to accomplish its work. If the validity of a piece of YtoY's puzzle of connective habitat were to be challenged and put before a court, the court, of course, would have to examine the relevant legislation and the particulars of the circumstances. The author hopes that when doing its job, courts include among these particulars, the complex legislative and non-legislative overlay of elements of protection/ management of wildlife/habitat and consider how using court interpretation and enforcement powers could sometimes reinforce or topple it. Courts have tools to take this perspective, and when appropriate find for wildlife/habitat protection rather than destruction, such as relying on purposes clauses (where applicable), incorporating principles of international law, considering the public interest, public trust, and principles of equity. Though these, and other court tools, cannot be spelled out here, the author hopes that further research will ensue that explores how courts can fairly further wildlife/habitat protection and sustainable management in its considerations and decisions.

[46] YtoY website, About Us, online: <https://y2y.net/vision/about-us>.