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## Wildlife and the Canadian Constitution

Kennedy, Priscilla; Donihee, John

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Canadian Institute of Resources Law  
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# **Wildlife and the Canadian Constitution**

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***Canadian Wildlife Law Project***

**Paper #4**

**August 2006**

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## Foreword

This publication is the fourth in a series of papers on Canadian Wildlife Law being published by the Canadian Institute of Resources Law. The research and writing of these papers has been made possible as the result of generous grant by the Alberta Law Foundation, and the Institute thanks the Foundation for its support of this work. The Foundation of course bears no responsibility for the content of the papers and the opinions of the various authors. The Canadian Wildlife Law Project was originally developed and proceeded under the direction of John Donihee, then a Research Associate with the Institute. Following Mr. Donihee's return to private practice, the supervision and general editorship of the project has been assumed by Institute Research Associate Monique Passelac-Ross. I would like to thank both these individuals and all those who have contributed to the success of the project for their efforts towards developing a greater awareness of this important area of natural resources law.

Wildlife and a concern for wildlife are fundamental aspects of the Canadian heritage, and the fur trade and the harvest of wild game were essential parts of Canadian history. The need to provide a land base and the habitat to sustain wildlife populations is a recurring theme in both national and provincial natural resources policy; in particular, there has been a growing recognition of the need to preserve habitat for endangered species. Similarly, wildlife and access to wildlife have a particular importance for aboriginal peoples, and the rights to wildlife have been central among the concerns of First Nations in Canada. Finally, internationally, Canada is party to numerous conventions whose goals are the protection and sound management of wildlife – perhaps most notably in recent years, the Convention on International Trade in Endangered Species and the Biodiversity Convention.

Despite the obvious importance of wildlife to Canadians in all these contexts, surprisingly little has been written about wildlife law, and certainly no comprehensive overview of such law exists in Canada. The purpose of this series of papers is to begin to remedy this shortfall in Canadian legal literature.

J. Owen Saunders  
Executive Director  
Canadian Institute of Resources Law

Calgary, Alberta  
July 2006



## 1. Introduction

If we consider the prevailing attitudes toward wildlife at the time of Confederation in 1867, it should not be surprising that there was no direct statement related to wildlife in the *Constitution Act, 1867*.<sup>1</sup> In 1867, the provinces of Canada (Ontario and Quebec), New Brunswick and Nova Scotia joined to form Canada. Manitoba joined soon after, in 1870, British Columbia was admitted in 1871, and Prince Edward Island in 1873. The Prairie Provinces became part of Canada as the North Western Territory in 1870<sup>2</sup> and were not established as provinces until 1905. At the time of their entry into Confederation the boundaries of Ontario, Quebec, Manitoba were much reduced from those we currently see on our maps.<sup>3</sup> These boundaries were extended northward in 1912.<sup>4</sup> Newfoundland and Labrador did not join in Confederation until 1949.

In 1867 then, almost all of Canada was considered to be and was, in fact, a vast wilderness with abundant wildlife resources. The fathers of Confederation would have invested little thought in their deliberations to wildlife as a specific resource, although this matter was addressed somewhat in the Indian Treaties that followed Confederation. At the time of Confederation, the ethos of the day called for the wilderness to be subdued and wildlife was a part, and sometimes a dangerous part, of the wilderness.

In the latter part of the nineteenth century, game was considered to be a resource which would be exploited until depleted and which would eventually be replaced by agriculture.<sup>5</sup> Wildlife species other than game were not protected by law since non-game species had little economic value and they were not sought after by sportsmen. Predators and pests were the subject of laws intended to encourage their eradication.<sup>6</sup>

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<sup>1</sup>*Constitution Act, 1867*, formerly the *British North America Act, 1867*, (U.K.) 30 & 31 Vict., c. 3.

<sup>2</sup>*Rupert's Land and North-Western Territory Order*, R.S.C. 1985, Appendix II, No. 9 (as am. by *Canada Act, 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 3).

<sup>3</sup>See the maps in Bernard W. Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell* (Toronto: Carswell, 1994) at 15 to 23.

<sup>4</sup>*Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. 5, c. 40; *Quebec Boundaries Extension Act*, S.C. 1912, 2 Geo. 5, c. 45; and *Manitoba Boundary Extension Act*, S.C. 1912, c. 32.

<sup>5</sup>Aldo Leopold, *Game Management* (Madison, WI: University of Wisconsin Press, 1986) at 16-17. Leopold notes that: "In America the dominant idea until about 1905 was to *perpetuate*, rather than improve hunting. The thought was that restriction of hunting could "string out" the remnants of the virgin supply, and make them last a longer time. Hunting was thought of and written about as *something which must eventually disappear*, not as something which might be produced at will."

<sup>6</sup>For example, *The Wolf Bounty Act*, R.S.S. 1909, c. 123; *Of the Destruction of Noxious Animals*, R.S.N.S. 1851, c. 93; and *The Destruction of Bears*, C.S.N.B. 1877, c. 113.

Over time, however, from these roots, Canadian wildlife law has developed. Our wildlife law has been dynamic. It evolved in response to societal values and needs as well as in response to the requirements of the wildlife resource itself.

The purpose of this paper is to give an overview of the sources of Canadian wildlife law focusing on the constitutional authorities to legislate in respect of wildlife, and to outline as well how the distribution of public property, more specifically public lands, has affected these authorities.<sup>7</sup> The distribution of public property, including public lands, as well as law making authorities is set out in Canada's constitution. The paper starts with an exploration of the division of legislative powers over wildlife between federal and provincial governments. Our investigation of the constitutional framework will take us farther a field as well, as we consider how the control over public property contributes to wildlife management authority. We conclude this review of constitutional authority over wildlife by examining how both levels of government have developed institutions to facilitate interjurisdictional cooperation on matters related to wildlife.

## 2. Federal and Provincial Legislative Powers and Wildlife

The *Constitution Act, 1867* applied only to Ontario, Quebec, New Brunswick and Nova Scotia which were the original partners in Confederation. Provision was made in section 146 for the admission of Prince Edward Island, British Columbia, Manitoba<sup>8</sup> and Rupert's Land and the North Western Territories and Newfoundland.<sup>9</sup> Out of Rupert's Land and the North Western Territories, the provinces of Alberta and Saskatchewan were formed in 1905.

On the prairies, federal ownership and control of natural resources was maintained from 1905, when these provinces were created, until 1930. The *Constitution Act, 1930*, which confirmed and gave overriding effect to the *Natural Resources Transfer Agreements* for each of Alberta, Saskatchewan, Manitoba and British Columbia, transferred legislative authority and ownership of natural resources to the Prairie

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<sup>7</sup>This is obviously not a text on constitutional law. In this paper only the briefest overview of constitutional provisions affecting wildlife can be attempted. Those in need of more detailed analysis should refer to other constitutional authorities. Our purpose is simply to expose the reader to some of the constitutional provisions relevant to the wildlife management framework discussed in this text.

<sup>8</sup>*Manitoba Act, 1870*, 33 Vict., c. 3, originally *An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba*.

<sup>9</sup>Gerard V. La Forest, *Natural Resources and the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 27.

Provinces.<sup>10</sup> Federal control of Crown lands and resources on the prairies between 1905 and 1930 had enabled policies with respect to immigration, land settlement and railways to be implemented. This federal control was ended by the constitutional amendments of 1930. From then on, Alberta and Saskatchewan had the legislative powers set out in section 92 of the *Constitution Act, 1867*. Likewise, Newfoundland's entry in 1949 was also governed by a constitutional amendment and statute which ensured constitutional protection of Newfoundland's law making powers.<sup>11</sup>

Today, the three northern territories do not share the constitutional protection afforded to provincial legislative powers nor do they own the public lands in the territories. Each territorial government is established by a federal statute<sup>12</sup> and its authority over game management or wildlife could be changed by simple amendment of this federal legislation.

Despite the fact that it does not appear to address wildlife resources as a separate subject matter,<sup>13</sup> the *Constitution Act, 1867* has been interpreted to result in an exhaustive distribution of legislative authority and treatment of public property. The authority to legislate with respect to wildlife and any proprietary interests in this resource have therefore been fully allocated through the Constitution. Historically, section 109 of the *Constitution Act, 1867* provided for the allocation of wildlife ownership because of the relationship between wildlife and land ownership. Section 109 states:

“All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.”

Legislative authority over wildlife is also dealt with in the Constitution. Both federal and provincial levels of government have such authority.<sup>14</sup> Part VI of the *Constitution Act, 1867* assigns responsibility over legislative matters coming within different classes of

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<sup>10</sup>R.S.C. 1985, Schedules (1) to (4). British Columbia was included because the Peace River Block was not a part of British Columbia at the time of its entering Confederation. It was originally part of the North Western Territory.

<sup>11</sup>The *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.).

<sup>12</sup>The *Yukon Act*, R.S.C. 1985, c. Y-2; the *Northwest Territories Act*, R.S.C. 1985, c. N-27 and the *Nunavut Act*, S.C. 1993, c. 28.

<sup>13</sup>Game or wildlife was not treated any less favourably than forests or water resources. Fisheries were specifically mentioned because the fishing industry was already important in 1867. See *R. v. Robertson* (1886), 3 Man. L.R. 613 (Man. C.A.) at 617.

<sup>14</sup>See the discussion of *Robertson* and other related cases, *infra* note 27.

subjects to Parliament and the provincial legislatures. The list of these classes of matters is generally found in section 91 (federal) and section 92 (provincial) of the Act.<sup>15</sup>

The provincial list is usually considered to be finite so that if a matter is not covered within a class of subjects expressly given to the provinces, that matter will fall within the jurisdiction given to Parliament.<sup>16</sup> The wording in sections 91 and 92 is quite general and both sections include “catch all” clauses.<sup>17</sup> For example the opening words in section 91 state that Parliament can make laws for the “peace order and good government of Canada in relation to all matters not coming within the classes of subjects ... assigned exclusively to the legislatures of the provinces.” This is often called the federal POGG power, a reference to peace order and good government. These words are vital to the scope of section 91 powers. Subsection 92(16) gives provincial legislatures the power to legislate with respect to “[g]enerally all Matters of a merely local or private Nature in the Province.”

Most of the powers assigned to the federal or provincial governments are exclusive. This means that if legislative power over a matter is assigned to one level of government then the other cannot validly legislate in that area. There are a number of exceptions to the exclusivity of these legislative powers. For example, if an activity is necessarily incidental to a valid exercise of legislative jurisdiction and nonetheless affects the laws or interests of the other level of government, it may nonetheless be valid, as long as the overlapping provision is not in pith and substance an intrusion into the other level of government’s legislative sphere. There are also concurrent areas of legislative competence such as the environment,<sup>18</sup> natural resources, education and agriculture.

It is important at this stage to consider the manner in which wildlife is dealt with in the law. Wildlife is generally considered to be part of the land and accordingly it is within the “property” that belongs to the provinces because of section 109. As a consequence of wildlife being considered to be “property”, the legislative power over wildlife generally falls to the provinces under subsection 92(13): “Property and Civil Rights in the Province”, of the *Constitution Act, 1867*.

Below we briefly examine the federal and provincial constitutional authorities which have provided the basis for Canadian wildlife law.

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<sup>15</sup>Sections 91 and 92 are not the only provisions which assign legislative powers. See for example ss. 93-95, 101 and 132. Education is dealt with in s. 93 and agriculture is dealt with in s. 95. We will have more to say about s. 132 below in the context of migratory birds.

<sup>16</sup>See *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at 588 (P.C.); and *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626.

<sup>17</sup>*Supra* note 1 at 60.

<sup>18</sup>*Friends of the Oldman River Association v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 2.

### 3. Federal Authority over Wildlife

#### 3.1. Migratory Birds and Section 132

Under section 132 of the *Constitution Act, 1867*, Canada has the power to implement treaties entered into by the King or Queen of Great Britain. This arrangement was affected in 1931 by a constitutional amendment called the *Statute of Westminster, 1931*. That amendment enabled Canada to assume the responsibility for entering into treaties and conventions with other countries.<sup>19</sup>

The *Migratory Birds Convention Act* was passed in 1917 to ratify the *Migratory Birds Convention*, a convention or treaty on migratory birds entered into in 1916 between Canada and the United States.<sup>20</sup> The Convention provides that waterfowl, cranes, rails, shorebirds and pigeons are to be protected by a general closed season between March 10 and September 1, with some changes for specific birds. Migratory insectivorous birds and other migratory non game birds are generally protected by a closed season throughout the year. In 1994, the original Act implementing the Convention was replaced with a new *Migratory Birds Convention Act*.<sup>21</sup>

The application of the *Migratory Birds Convention Act* has been affected by the passage of the *Constitution Act, 1982* and the recognition of treaties entered into with Indians as being constitutionally protected. Prior to 1982, in cases such as *R. v. George*,<sup>22</sup> the *Migratory Birds Convention* was applied to limit the harvesting activities of Indians. Section 35 of the *Constitution Act, 1982*, which recognizes and affirms Aboriginal and

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<sup>19</sup>The scope of the treaty making power and the roles of the Governor-General and provincial Lieutenant Governors are beyond the scope of this chapter. Although Canada is responsible for entering into treaties, provinces also frequently have to enact legislation to implement the treaty provisions, as a result of their areas of constitutional legislative jurisdiction.

<sup>20</sup>The *Migratory Birds Convention*, August 16, 1916, was made by the United States and the King of Great Britain and Ireland, as a result of the inability of Canada at that time to enter into treaties and conventions. With the *Statute of Westminster, 1931*, Canada was granted the authority to enter into treaties and conventions on its own.

<sup>21</sup>*Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22. One of the driving forces for the 1994 reenactment of this legislation was the inclusion of s. 35 in the *Constitution Act, 1982*. Aboriginal rights challenges to spring hunting prohibitions found in the *Migratory Birds Convention Act* required a reconsideration of the relationship between the statutory scheme and aboriginal rights. See *R. v. Flett*, [1991] 1 C.N.L.R. 140 (Man. C.A.) and *R. v. Arcand* (1989), 65 Alta. L.R. (2d) 326 (Q.B.). By 1994, the *Migratory Birds Convention Act*, which had not been significantly revised since it was enacted, also needed modernization.

<sup>22</sup>[1966] S.C.R. 267. In this case the majority of the Supreme Court of Canada held that the *Migratory Birds Convention Act* applied to limit Indian hunting rights. See also *Sikyey v. R.*, [1964] 2 C.C.C. 325 (N.W.T.C.A.); aff'd [1964] S.C.R. 642.



treaty rights, overrules the application of the *Migratory Birds Convention*.<sup>23</sup> It should be noted that Article II of the Convention did provide with respect to the migratory birds closed season:

“... that Indians may take at any time scoters for food but not for sale.”

and with respect to other migratory non game birds:

“... except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.”

Consequently, although Indians have been able to take some migratory birds for food and their skins for clothing under this Convention, since 1916, the matter was not fully resolved until the re-enactment of the *Migratory Birds Convention Act* in 1994.

### **3.2. International and Interprovincial Trade and Commerce**

The federal power to regulate trade and commerce has undergone a number of shifts in interpretation over the years since Confederation. However, a detailed review of those changes is beyond the scope of this chapter. The federal government can legislate to address matters related to trade and commerce generally and has specifically addressed such activities in relation to wildlife. Because of limitations on the application of provincial laws, it is essential to have rules addressing both interprovincial and international implications of the movement of wildlife and wildlife products as part of national and international trade and commerce.

The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA),<sup>24</sup> incorporates into domestic law the Convention on International Trade in Endangered Species of wild fauna and flora (CITES), entered into on March 3, 1973 and ratified by Canada on April 10, 1975. Section 6 prohibits importation or exportation of any (whole) or part of any plant or of any animal, and also bars, except in accordance with a permit, the transport from one province to another province. WAPPRIITA interlocks with the import and export provisions found in provincial wildlife laws to form a complete national system for the management of wildlife trade.

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<sup>23</sup>See, for example, *R. v. Blackbird*, [2003] O.J. No. 1102 where the Ontario Court of Justice held that offences charged under the *Migratory Birds Convention Act* do not apply to First Nations.

<sup>24</sup>S.C. 1992, c. 52, in force May 14, 1996 (SI/96-41).

### 3.3. Interjurisdictional Wildlife

This issue is related to the authorities set out and discussed above in terms of the *WAPPRIITA*, but it is also important to note the 1974 Supreme Court of Canada decision in *Interprovincial Co-Operatives Ltd. v. R.*<sup>25</sup> which held that an interprovincial matter was beyond the scope of provincial jurisdiction. In a divided decision (4:3:1), the Supreme Court of Canada concluded that mercury pollution from Ontario and Saskatchewan, which flowed into the rivers in Manitoba, was an act done outside the province and not subject to the laws of that province, particularly under subsection 92(13) “property and civil rights”.<sup>26</sup> Mr. Justice Martland also concluded for different reasons that the control of pollution in interprovincial rivers is a federal matter.

Thus, it is clear that there is a federal role, beyond that found in relation to fisheries and migratory birds, in the regulation and management of interjurisdictional as well as international wildlife populations.

## 4. Provincial Authorities and Wildlife Law

### 4.1. Public Property, Natural Resources and Wildlife

Our English legal tradition includes a legal linkage between ownership of the land and the right to harvest wildlife. Wildlife is considered in the law to be part of the land. This is the basis for the view that wildlife normally falls under the legislative authority of a province. A review of some of the cases decided on this issue outlines the application of the constitutional authorities.

In one of the seminal cases, *R. v. Robertson*,<sup>27</sup> Justice Killam, for the court, held that the Manitoba game laws were *intra vires* the province’s jurisdiction under the *Constitution Act, 1867*. The Court held that game and the regulation of the taking of game fell within two provincial classes of powers: 92(13) Property and civil rights and 92(16) Matters of a merely local or private nature. The Court observed that the federal government had never legislated in the area of game or wildlife, and that federal fisheries regulation was a very different situation. Fisheries were specifically mentioned in the Constitution as a matter of federal jurisdiction as a result of “settlement of terms of union” during negotiations leading up to Confederation.<sup>28</sup> Killam J. ruled that provisions enacted to protect the “supply of game” within a province fell within subsections 92(13)

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<sup>25</sup>[1976] 1 S.C.R. 477.

<sup>26</sup>Discussed below.

<sup>27</sup>(1886), 3 Man. R. 613.

<sup>28</sup>*Ibid.* at 616-617.

or 92(16) because the object of the provincial legislation was “essentially local” in ensuring adequate numbers of wildlife for residents of the province. Killam J. relied on *City of Fredericton v. The Queen*<sup>29</sup> and *Hodge v. the Queen*,<sup>30</sup> as support for the proposition that a matter of concern for an entire province still fell within subsections 92(13) or (16). Game laws were held to be laws of a local nature, which restricted the civil rights of residents to hunt where and when they pleased.

A number of cases subsequently considered or followed *R. v. Robertson* in different contexts, yet with the same outcome on the question of provincial jurisdiction over wildlife. Cases concerning native hunting rights, such as *Cardinal v. Attorney General of Alberta*,<sup>31</sup> have upheld a province’s right to legislate regarding wildlife on any land within the province, regardless of the titleholder. The British Columbia Court of Appeal in *Rex v. Morley*,<sup>32</sup> followed *Robertson*, indicating that the protection of wildlife was a matter of provincial jurisdiction, but also determined that where federal and provincial legislation appear to overlap, courts and legislatures must “reconcile the respective powers they contain and give effect to all of them”. In this case, a non-native had killed a pheasant on an Indian reserve during closed season. Justice Martin held that the federal law regarding trespassing on reserves did not conflict with provincial game laws, and each charge could be prosecuted. Justice Gallihier made a particular point of indicating that game laws dealt with conservation concerns within that province, having regard to that province’s natural and environmental conditions. As Justice McPhillips points out, a hunting prohibition during certain seasons is not the same as a prohibition on trespassing for the purposes of hunting by non-natives. The regulation of game falls under subsections 92(13) and (16), and the province has exclusive jurisdiction in this area, except for the federal jurisdiction over Indian reserves.

A similar issue arose in *R. v. Smith*,<sup>33</sup> where a member of the armed forces was charged under the Ontario *Game and Fisheries Act* for hunting within a federal military camp (Petawawa Military Camp Reserve). Justice Robertson held that, although the federal government had title to the military camp land, the land remained within provincial jurisdiction concerning wildlife. Inhabitants of the federal military camp were still subject to provincial law. The New Brunswick Supreme Court, Appeal Division

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<sup>29</sup>(1880), 3 S.C.R. 505 at 567.

<sup>30</sup>[1883] 9 App. Cas. 117.

<sup>31</sup>(1974) 40 D.L.R. (3d) 553.

<sup>32</sup>[1932] 4 D.L.R. 483.

<sup>33</sup>[1942] 3 D.L.R. 764 (Ont. C.A.).

followed *R. v. Smith* in *R. v. Hartt*; *R. v. Stewart*,<sup>34</sup> holding that the provincial *Game Act* was valid legislation as it governed the conservation of game within the province.

In *R. v. Chiasson*<sup>35</sup> the New Brunswick Court of Appeal held that both the federal government and provincial governments could enact similar provisions if there was no operational conflict between the two provisions. Thus the New Brunswick *Fish and Wildlife Act* provision regarding careless handling of firearms could operate concurrently with the federal *Criminal Code* section on the same matter. Justice LaForest, writing for the court, determined that “Absent federal legislation, there can be no doubt that provincial legislation aimed at the protection and conservation of game is valid as being a matter of local nature (s. 92(16) or as relating to property and civil rights (s. 92(13)).” He cited several cases supporting this statement: among them *R. v. Robertson*; *R. v. Morley*; and *R. v. Smith*.

Provincial legislative authority over wildlife is thus clear and is based on both ownership of public lands and the powers set out in subsections 92(13) and 92(16) of the *Constitution Act, 1867*. This authority can also be subject to a valid exercise of federal authorities. There are other limits on provincial constitutional authority over wildlife and they are set out briefly below.<sup>36</sup>

#### 4.2. Scope of Provincial Wildlife Legislation

One of the important limits to provincial legislative authority includes the exclusivity of federal authorities, so that if provincial wildlife law intrudes into an area of exclusive federal legislative authority under section 91 of the *Constitution Act, 1867*, the provincial law will be *ultra vires*, or beyond the competence of the provincial legislature. When this happens, the provincial wildlife law would be of no force or effect. In such cases, the Courts analyze the legislation in light of the division of constitutional authorities and determine which level of government should have jurisdiction over the subject area addressed by the legislation.<sup>37</sup> There have been a series of cases addressing this issue going back to early decisions of the Privy Council.<sup>38</sup> As mentioned above,<sup>39</sup> however,

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<sup>34</sup>(1979), 94 D.L.R. (3d) 461.

<sup>35</sup>(1982), 27 C.R. (3d) 361 (N.B.C.A.).

<sup>36</sup>Generally speaking, these limits also apply to legislation of the Territorial Governments although there are additional limits on territorial laws found in the legislation which establishes these governments.

<sup>37</sup>This is called a “pith and substance” analysis.

<sup>38</sup>*C.P.R. Company v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Montcalm Construction Inc. v. Minimum Wage Commission*, (1978) 93 D.L.R. (3d) 641 (S.C.C.); see also *R. v. Chiasson*, *supra* note 35.

<sup>39</sup>*Supra* note 18.

once we consider the relationship between wildlife and the environment more generally, concurrent jurisdiction may be the rule.

It is also clear that a province cannot legislate as to matters outside its provincial boundaries. This limit on provincial laws has been clearly drawn by decisions of the Courts.<sup>40</sup> Thus provincial wildlife laws must be in relation to matters inside the boundaries of a province. There are other limits related to the applicability of provincial legislation to the federal Crown which are of limited interest, but the most important may be that federal lands can be subject to special arrangements with respect to wildlife. This is relevant in respect of national parks where a special regime for wildlife management is set up under the *Canada National Parks Act*<sup>41</sup> and regulations. In such instances, the federal regime applies.

## 5. Wildlife and Federalism – Working Together to Manage Wildlife

All of the provinces' legislative authorities are limited in similar fashion. As noted above, this presents problems in dealing with matters where rivers flow through provinces or out of the country and equally where animals range through provinces or countries. The best solution in such cases is federal provincial cooperation and Canada has a long experience with such efforts.

Ian Attridge wrote in 1996 that Canada's constitutional structure, with jurisdiction split into two almost mutually exclusive arenas of power, was not conducive to cooperative arrangements between federal and provincial governments.<sup>42</sup> He suggested the "significant overlap" in regulation, along with "gaps" in legislative authority, justify a "cooperative and coordinated" federal-provincial response to biodiversity.<sup>43</sup> Attridge pointed out that "[b]eyond jurisdictional entanglement, there is no explicit principle declared within Canada's constitution which establishes a direct conservation, sustainable use and equitable sharing touchstone for the nation."<sup>44</sup> Institutions have however

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<sup>40</sup>See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 and *Interprovincial Co-operatives v. R.*, *supra* note 25.

<sup>41</sup>S.C. 2000, c. 32.

<sup>42</sup>I. Attridge, "Conclusions and Musings" in Attridge, I., ed., *Biodiversity Law and Policy in Canada: Review and Recommendations* (Toronto: Canadian Institute for Environmental Law and Policy, 1996) 465 at 467.

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.* at 468.

developed to facilitate interjurisdictional cooperation on matters related to wildlife and wildlife management.

The Wildlife Ministers' Council of Canada adopted *A Wildlife Policy for Canada* in 1990, which provided the foundation for interjurisdictional cooperation in wildlife management in Canada. However, as the introduction clearly points out, “[t]his national policy is not intended to alter” the constitutional division of powers in Canada.<sup>45</sup> Article 2.1 of the 1990 policy calls for “comprehensive, cross-sectoral conservation policies” to be established.<sup>46</sup> Article 5 promotes joint management with First Nations through comprehensive land claim agreements and other arrangements.<sup>47</sup> Article 6 also endorses cooperative arrangements between governments, non-governmental organizations (NGOs) and First Nations.<sup>48</sup>

The federal and provincial governments signed a “Statement of Commitment to Complete Canada’s Network of Protected Areas” in 1992, increasing the number of parks to achieve cooperative ecosystem management.<sup>49</sup> According to Parks Canada, ecosystem management is a “broad, consensus-based approach to land management.”<sup>50</sup> The new parks, necessary for this comprehensive management of ecosystems, will be established through “cooperation with provinces, territories, Aboriginal Peoples, other federal departments, interest groups and the public.”<sup>51</sup> The same year, the National Forest Congress and the *National Forest Strategy* led to the signing of the 1992 *Canada Forest Accord*, whose signatories formed the National Forest Strategy Coalition.<sup>52</sup> The signatories included both federal and provincial/territorial governments, NGOs, First Nations, representatives from industry and post-secondary institutions, and environmental groups. The Canadian Council of Forestry Ministers’ aim in promoting a cooperative effort was “[t]o ensure that the [1992 National Forest] Strategy was implemented in an

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<sup>45</sup>Wildlife Ministers’ Council of Canada, *A Wildlife Policy for Canada* (Ottawa: Canadian Wildlife Service, 1990) at 7.

<sup>46</sup>*Ibid.* at 11, article 2.1.

<sup>47</sup>*Ibid.* at 16.

<sup>48</sup>*Ibid.* at 18.

<sup>49</sup>Canadian Parks Ministers’ Council, *The 1992 Statement of Commitment* (Ottawa: August 2000), online: <[http://www.cd.gov.ab.ca/preserving/parks/fppc/1992statement\\_eng.pdf](http://www.cd.gov.ab.ca/preserving/parks/fppc/1992statement_eng.pdf)>.

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*

<sup>52</sup>Canadian Council of Forest Ministers, *Sustainable Forests: A Canadian Commitment* (Hull: March 1992) and *Canada Forest Accord* (Ottawa: 4 March 1992).

open, coordinated, holistic and directed fashion” by “a government and non-government coalition.”<sup>53</sup>

The Committee on the Recovery of Nationally Endangered Wildlife (RENEW) was established in 1988 by the Wildlife Ministers’ Council of Canada. The Committee combines agencies from the federal, provincial and territorial levels of government with NGOs such as the Canadian Nature Federation, the Canadian Wildlife Federation, and the World Wildlife Fund. RENEW has been charged with the task of preventing the extirpation, endangerment and extinction of species in Canada and with establishing recovery programs to maintain and increase certain wildlife populations. RENEW recovery teams consist of “representatives and experts from a wide variety of organizations”<sup>54</sup> including parks, historical societies, universities and even American organizations.<sup>55</sup>

Like the 1990 Wildlife Policy, the *Species at Risk Act*<sup>56</sup> indicates that it will conform to aboriginal treaties and respect the authority of other federal ministers and provincial governments. The preamble specifically notes that all the “governments in this country” must “work cooperatively” to ensure consistent conservation measures are in place through the “establishment of complementary legislation and programs.”<sup>57</sup> The preamble also indicates that, in certain circumstances, the costs of conservation programs “should be shared.”<sup>58</sup> Section 48 provides that, where a listed species resides in more than one jurisdiction, the ministers of each jurisdiction must participate in the formulation of the action plan implementing the recovery strategy for that species.<sup>59</sup> Likewise, management plans for species of special concern must be a cooperative effort between “the appropriate provincial and territorial minister of each province and territory in which the listed wildlife species is found” as well as federal ministers and aboriginal organizations.<sup>60</sup>

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<sup>53</sup>Canadian Council of Forest Ministers, *National Forest Strategy 1998-2003: A Canadian Commitment* (Ottawa: May 1998) at iii.

<sup>54</sup>Canadian Wildlife Service, “What is RENEW?” in *RENEW Annual Report No. 8* (1988-1998), online: <[http://www.speciesatrisk.gc.ca/publications/renew/1988-98/default\\_e.cfm](http://www.speciesatrisk.gc.ca/publications/renew/1988-98/default_e.cfm)>.

<sup>55</sup>Canadian Wildlife Service, “RENEW Recovery Teams” in *RENEW Annual Report No. 8* (1988-1998.), online: <[http://www.speciesatrisk.gc.ca/publications/renew/1988-98/default\\_e.cfm](http://www.speciesatrisk.gc.ca/publications/renew/1988-98/default_e.cfm)>.

<sup>56</sup>S.C. 2002, c. 29.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*, s. 48(1.)

<sup>60</sup>*Ibid.*, s. 66(1)

In 1996, the federal and provincial governments of Canada signed a National Accord for the Protection of Species at Risk in Canada (the Accord).<sup>61</sup> The news release from Environment Canada heralds the Accord as a “mechanism for cooperation” that “commits governments to complementary legislation and programs.”<sup>62</sup> In fulfillment of their obligations under the National Accord, several jurisdictions have enacted legislative provisions for species at risk and have produced reports concerning the status of wild species in their jurisdictions.<sup>63</sup>

The Habitat Stewardship Program for Species at Risk is perhaps the most successful illustration of cooperation between levels of government and the private sector. According to the 2000-2001 Annual Report, there has been significant cooperation and financial contribution between the provinces, NGOs, the private sector and the federal government relating to stewardship efforts. The report indicates that, for every dollar of federal funding, “non-federal resources” contributed \$1.70.<sup>64</sup> Twenty-one percent of the program costs were covered by “in-kind” donations, including volunteer time.<sup>65</sup> Nearly half of the habitat areas that were newly protected under the program were obtained through conservation easements and agreements with landowners.<sup>66</sup> The report also predicts that cooperation will increase in future years as the “model for program delivery-regional partnerships is evolving rapidly.”<sup>67</sup>

The Northwest Territories acknowledges that the protection of species at risk requires more than government initiatives.<sup>68</sup> It developed a *Protected Areas Strategy* in 1999 with the support of the federal government. The Strategy states that “government institutions,

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<sup>61</sup>Agreement in Principle, 2 October 1996 in Charlottetown, P.E.I.

<sup>62</sup>Environment Canada, News Release, “Wildlife Ministers Commit to Protecting Canada’s Endangered Species” (2 October 1996).

<sup>63</sup>Nova Scotia Department of Natural Resources, *General Status Ranks of Wild Species in Nova Scotia* (Halifax: 2001), online: <<http://www.gov.ns.ca/natr/wildlife/genstatus/>>; Alberta Environment/Alberta Sustainable Resource Development, *The General Status of Alberta Wild Species 2000* (Edmonton: 2001), online: <[http://www.srd.gov.ab.ca/fw/status/2000/2000\\_General\\_Status\\_Species\\_Rpt.pdf](http://www.srd.gov.ab.ca/fw/status/2000/2000_General_Status_Species_Rpt.pdf)>.

<sup>64</sup>Canadian Wildlife Service, *Habitat Stewardship Program for Species at Risk 2000-2001 Annual Report* (Ottawa: Environment Canada, 2002) at 4.

<sup>65</sup>*Ibid.*

<sup>66</sup>*Ibid.* at 5.

<sup>67</sup>*Ibid.* at 13.

<sup>68</sup>Northwest Territories, Resources, Wildlife and Economic Development, “Protecting NWT Species at Risk – A Northern Approach – Introduction.”



together with industry and environmental organizations, will assist in the implementation of this Strategy.”<sup>69</sup>

Saskatchewan has articulated a policy of interjurisdictional cooperation in *Conserving Saskatchewan’s Natural Environment: Framework for a Saskatchewan Biodiversity Action Plan*.<sup>70</sup> Goal 5 specifically addresses cross-border initiatives and planning to complement provincial schemes, and recognizes the need to address an entire ecosystem, rather than only portions within particular political boundaries.<sup>71</sup> As the policy document points out, Saskatchewan’s limited financial resources necessitate looking for cost-sharing arrangements, as well as fostering cooperation with local governments and First Nations. The Biodiversity Action Plan also recognizes the effectiveness of regional expertise in international biodiversity initiatives.<sup>72</sup>

These are just some examples of the cooperative approaches to wildlife management which operate within our constitutional context. It seems likely that in the long term, both strong provincial legislation and cooperative initiatives will be essential to the maintenance of wildlife on Canadian landscapes.

## 6. Conclusion

Both levels of government have essential roles to play in our national framework for the protection and management of wildlife. In order to ensure a coordinated framework for wildlife management, cooperative federalism is essential. Our constitution sets out a division of powers which includes limits on both federal and provincial jurisdiction over wildlife. Only a cooperative effort will ensure the long term presence of wildlife on our landscapes.

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<sup>69</sup>NWT Protected Areas Strategy Advisory Committee, *NWT Protected Areas Strategy: A Balanced Approach to Establishing Protected Areas in the Northwest Territories* (Yellowknife: 1999) at 6.

<sup>70</sup>See online: <<http://www.se.gov.sk.ca/ecosystem/biodiversity/Biodiversity%20Booklet%20b.pdf>>.

<sup>71</sup>*Ibid.* at 26.

<sup>72</sup>*Ibid.* at 27.

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