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The Evolution of Wildlife Law in Canada

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Contents

Abstract

Wildlife law evolves in response to the ecological status of wildlife populations, changing values and societal objectives for wildlife and changes to the domestic and international legal context within which wildlife is managed. Canadian wildlife law has changed significantly since the time of Confederation.

This study briefly explored the constitutional framework for and common law sources of Canadian wildlife law. It then developed a series of criteria which distinguished three distinct eras in our wildlife law. The earliest, the game management era, lasted the longest from the time of Confederation until about the 1960s. The transitional wildlife management era then lasted until about the mid-1980's. The most recent sustainable wildlife management era is about 15 years old.

Provincial, territorial and federal wildlife laws were reviewed, assessed and grouped on the basis of the criteria developed in this study. The results show that the pace of change in our wildlife law is increasing and that the framework of wildlife law in all Canadian jurisdictions is moving toward more sustainable wildlife management.

Acknowledgements

The interest, enthusiasm and invaluable research assistance of Tracey Sandgathe in this project is gratefully acknowledged. Any errors or omissions are mine.

Abbreviations

CESCC	Canadian Endangered Species Conservation Council
CESPA	*Canada Endangered Species Protection Act*
CITES	*Convention on the International Trade in Endangered Species of Wild of Wild Fauna and Flora*
COSEWIC	Committee on the Status of Endangered Species in Canada
CWA	*Canada Wildlife Act*
MBCA	*Migratory Birds Convention Act*
SARA	*Species at Risk Act*
WAPPRIITA	*Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*

1.0 Introduction

> The evolution of [wildlife management] technique from custom toward law, and from restriction toward production, does not of itself suffice for an understanding of the game movement in America today. *Of even greater importance is the evolution of the objectives toward which the technique is applied, and the evolution of scientific tools for its improvement*[1] (emphasis added).

In his 1933 treatise on game management, Aldo Leopold highlighted the customary and economic origins of wildlife law and foreshadowed its modern evolution in response to both changing social objectives for wildlife and improvements in our capacity to understand the ecological forces affecting wildlife populations.

Wildlife law has evolved and continues to change. In Canada, however, not much has been written about wildlife law. Indeed, the topic is frequently lumped with the law related to fisheries,[2] a wholly different subject matter characterized by a rich early jurisprudence[3] which delineated federal and provincial constitutional authorities over the fisheries resource and fisheries waters.

In contrast to the clear allocation of legislative power over the "sea coast and inland fisheries" to Parliament under subsection 91(12) of the *Constitution Act, 1867*,[4] wildlife or game, as it would more likely have been referred to at the time, was not mentioned at all in the allocation of property and the division of powers between Parliament and the Legislatures at the time of Confederation.

Wildlife has nonetheless played a central role in Canadian history, affecting even the pattern of North American settlement. As Peter C. Newman observed in writing about the fur trade and, specifically, the importance of the beaver to the opening up of the continent:

> Seldom has an animal exercised such a profound influence on the history of a continent. Men defied oceans and hacked their way across North America; armies and navies clashed under the

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1 A. Leopold, *Game Management* (New York: Charles Scribner & Sons, 1933) at 481.

2 For example, the *Canadian Encyclopedic Digests*, both Western and Eastern (Ontario) versions, 3d ed. (Toronto: Carswell, 1991) lump these areas of the law under the heading "fish and game".

3 See, for example, cases such as *The Queen* v. *Robertson*, [1882] 6 S.C.R. 52; *In re Provincial Fisheries (Provincial Fisheries Reference)*, [1896] 26 S.C.R. 444; *A.G. Canada* v. *A.G. Ontario (Ontario Fisheries Reference)*, [1898] A.C. 700 (P.C.); *A.G. B.C.* v. *A.G. Canada (B.C. Fisheries Reference)*, [1914] A.C. 153 (P.C.); and *A.G. Canada* v. *A.G. B.C. (B.C. Fish Canneries Reference)*, [1930] A.C. 111 (P.C.) in which the early jurisdiction for fish, fisheries and fisheries waters were delineated.

4 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

> polar moon; an Indian civilization was debauched – all in quest of the pug-nosed rodent with lustrous fur.[5]

Wildlife and its use remain an integral part of Canadian life. In a 1991 survey, Environment Canada found that 18.9 million Canadians (90.2 percent of the population) took part in one or more wildlife related activities, devoting a total of 1.3 billion days and $5.6 billion dollars to those activities.[6] This survey also found substantial growth in the number of participants and in the amount of leisure time spent on wildlife related activities since earlier surveys in 1981 and 1987.[7]

Considering the importance of wildlife to Canadians, one might wonder why wildlife law seems to have escaped the attention of Canadian legal commentators. The situation in Canada is reminiscent of that in the United States where the first distinct treatment of federal wildlife law was undertaken by Michael J. Bean in 1977. In his revision of that work,[8] Bean indicated that until 1977, there was no single text analyzing wildlife law as a distinct component of environmental law nor was there much critical scrutiny of federal wildlife law in the periodical literature. This is the situation in Canada today, with the possible exception of the flurry of recent literature stimulated by federal species at risk legislation.[9]

One possible reason for the lack of attention to wildlife law in Canada is that unlike many other areas of the law, it is largely statutory. Furthermore, the modern trend is for wildlife managers to rely heavily on broad enabling statutes supported by voluminous regulations which provide the detail and flexibility necessary for wildlife management decision making. Thus, many of the annual adjustments made to accommodate the varying needs of wildlife populations and their users are effected by way of regulation changes. Most of this activity does not attract legal analysis.

Wildlife law has changed considerably in Canada in the period since ownership and legislative authority over natural resources were distributed at the time of Confederation. This paper will provide an overview of that evolution.

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5 P.C. Newman, *Empire of the Bay* (Toronto: Penguin Books, 1998) at 39.

6 Environment Canada, Canadian Wildlife Service, *The Importance of Wildlife to Canadians: Highlights of the 1991 Survey* (Ottawa: Minister of Supply & Services, 1993) at 3.

7 A more general survey in 1996 on "The Importance of Nature to Canadians" estimated that Canadians and foreign tourists spend almost $12 billion dollars per year on nature related activities. See Environment Canada, *Canada's Plan for Protecting Species at Risk* (Ottawa: Minister of Supply & Services, 1999).

8 M.J. Bean, *The Evolution of National Wildlife Law* (New York: Praeger Publishers, 1983).

9 See as one example, the suite of papers published by the Fraser Institute following an April 1998 conference on the proposed federal endangered species legislation.

Part 2 outlines the scope of this work and provides a brief but necessary review of the constitutional underpinnings of wildlife law in Canada. Part 3 will then describe the approach taken to effect my review of Canadian wildlife law. Part 4 will provide a short historical review of wildlife law to provide background and context for the statutory analysis. Part 5 outlines the thesis which is tested by this research. Part 6 provides a review and analysis of selected federal, provincial and territorial wildlife laws based on the statutory material. My conclusions are found in part 7.

2.0 Wildlife and the Constitution

2.1 Scope of the Analysis

This paper is about wildlife law, but that term requires further definition. Bean puts this issue into sharp focus in his book: "Part of the difficulty of providing a focused analysis of federal wildlife law is the very fundamental fact that its boundaries are so uncertain".[10] Similar definition problems have affected this review. Consequently, certain choices had to be made in order to limit the scope of the research to manageable proportions. First, with the exception of part 4 below, this paper only addresses wildlife statutes. Second, the paper does not include fish or marine mammals within its definition of wildlife, nor will any other aspect of Canada's jurisdiction under subsection 91(12) of the *Constitution Act, 1867*[11] be discussed. Third, despite a recent trend toward the broadening of statutory definitions of wildlife as a result of the 1990 Wildlife Policy for Canada,[12] the Canadian Biodiversity Strategy,[13] and endangered species legislation,[14] this paper will focus on the law relating to vertebrate animals and primarily those animals which have historically been pursued, hunted or otherwise valued as "game",[15] and their habitats. The consideration given to wildlife habitat and statutory habitat management and protection measures will be further limited to those provisions found

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10 Bean, *supra* note 8 at 2.

11 Unless otherwise cited, references to the "Constitution" below are references to the *Constitution Act, 1867*.

12 Wildlife Ministers Council of Canada, *A Wildlife Policy for Canada* (Ottawa: Canadian Wildlife Service, 1990). The Policy's definition of "wildlife" is "all wild life, including but not limited to animals, plants and the variety of organisms that support naturally-functioning ecosystems."

13 *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Ottawa: Minister of Supply & Services, 1995) [hereinafter *Canadian Biodiversity Strategy*].

14 See, for example, the definition of "wildlife species" in s. 2 of Bill C-65, *Canada Endangered Species Protection Act*, 2d Sess., 35th Parl., 45-46 Eliz. II, 1996-97.

15 This term is defined as "Wild birds and beasts. The word includes all game birds, game fowl and game animals." *Black's Law Dictionary*, 5th ed. (St. Paul, MN: West Publishing Co., 1979).

in the wildlife statutes themselves. Separate legislative schemes which have the effect of protecting wildlife habitats, based on mechanisms such as parks, ecological or other special areas, will not be considered. Finally, legislation directed at the protection of endangered or other species at risk will be included in this review.

I have chosen to use the term "wildlife law" in this paper since in my view it is more encompassing than the historic term, "game law". One of the difficulties with defining "wildlife" for purposes of this paper arises precisely because of the trend toward the expansion of the historic scope of such laws from statutes related almost exclusively to the regulation of the taking of game animals to laws addressing wildlife, which in more modern legislation often includes amphibians, reptiles and other orders, and includes the management of habitats and the wildlife environment more generally. Notwithstanding the limits outlined above, the reader is advised that the scope of the term "wildlife" as used in this paper may not be entirely static and that its meaning is inevitably somewhat broader in the context of more modern legislation.

Thus, this paper will primarily address the evolution of wildlife law as it applies to birds and mammals and their habitats. Any reference to "wildlife" below should be read in this context.

2.2 Constitutional Authorities and Wildlife

The Canadian Constitution did not make explicit reference to wildlife or to game at the time of Confederation. Nevertheless, extensive legislative powers with respect to wildlife are vested in the provinces and provincial ownership of public lands confers both legislative and, arguably, proprietary interests with respect to wildlife in the provinces. The federal government also has interests in wildlife based on several heads of legislative authority found in section 91 of the Constitution, on its ownership of lands, its responsibilities in the northern territories and internationally.

Provincial authorities over wildlife are based on ownership of Crown lands in the province, granted by section 109 of the Constitution, and on legislative authorities granted by subsections 92(5) "the management and sale of public lands belonging to the province ...", 92(13) "property and civil rights in the province" and 92(16) "generally all matters of a merely local or private nature in a province". With certain limited exceptions,[16] and with the

16 Historically, of course, before the creation of the prairie provinces, and until 1948 in the Northwest Territories, the federal government was responsible for game management in the northwest. The *Canada Wildlife Act*, R.S.C. 1985, c. W-9 has also been used in the provinces and northern territories to establish

exception of migratory birds, the provincial governments have generally had the primary responsibility for wildlife management in Canada. Because of provincial ownership of Crown lands, the majority of wildlife habitat in Canada is also under provincial control.

Wildlife is subject to the rule of capture.[17] Wild animals enjoying natural liberty are generally considered ownerless.[18] Ownership of wildlife has been acquired throughout the ages by those upon whose soil such animals have been captured or otherwise reduced to possession, or, alternatively, by those upon whom hunting rights have been bestowed by the landowners. Consequently, the provinces have an interest in wildlife on their land. The majority of the provinces and Yukon have expressly addressed property in wildlife in their legislation by declaring that wildlife ownership is vested in the provincial Crown unless otherwise transferred in accordance with legislation.[19]

Federal authority for wildlife can be traced to a number of legislative powers granted by the Constitution as well as to limited federal land ownership within the provinces, in national parks and the extensive areas of federal Crown lands in the three northern territories. Important heads of federal legislative power relevant to wildlife management include, subsections 91(2) "the regulation of trade and commerce", (24) "Indians and lands reserved for Indians", (27) "the criminal law". The federal general power to make laws for the peace order and good government of Canada found in the preamble to section 91 may also be relevant, especially since the emergence of the national concern doctrine in cases like *Crown Zellerbach*[20] as is the shared role in the environment recognized for the federal government by the *Oldman Dam*[21] case.

Federal responsibility with respect to international commitments is another important area for the federal government's involvement in wildlife matters. The most important historical aspect of this authority results from the federal government's legislative responsibility for the implementation of Empire Treaties under section 132 of the Constitution. Between 1867 and 1926, when Canada secured responsibility for its foreign affairs, the government of Great Britain could bind Canada through its treaty commitments. It did so in 1916 when it entered

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some small Canada Wildlife Areas, but the most important recent federal initiative affecting provincial interests in wildlife is the recently tabled *Species at Risk Act*.

17 *Pierson* v. *Post*, 3 Caines 175 (N.Y. S. Ct. 1805); and also *Young* v. *Hichens* (1844), 6 Q.B. 606, 115 E.R. 228.

18 R.M. Allison, "Wildlife Ownership in Canada" (1980) 28 Chitty's L.J. 47.

19 W.A. Tilleman II, "Property Rights in Wildlife" (November 1989) [unpublished]. See for example, the Alberta *Wildlife Act*, R.S.A. 1984, c. W-9.1, s. 10.

20 *R.* v. *Crown Zellerbach Canada Limited*, [1988] 3 W.W.R. 385 (S.C.C.).

21 *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

into the *Convention for the Protection of Migratory Birds in Canada and the United States of America*.[22] As a result, the implementing legislation, the *Migratory Birds Convention Act, 1994*[23] is federal law. Canada's power to enact new legislation under section 132 of the Constitution ended when it took over control of its external affairs. There can be no more Empire Treaties binding Canada or legislation under this section and consequently, federal and provincial responses to such commitments as the *Convention on Biological Diversity* must be negotiated as exercises in cooperative federalism. With the exceptions noted, the historical tendency has been for the federal government to defer to the provincial governments in matters related to natural resources and the wildlife management field has been no exception.

3.0 Research Methodology

This paper provides an historical and comparative review of wildlife legislation compiled from Parliament and all provincial jurisdictions[24] with the exception of Nunavut.[25] The volume of legislative material to be reviewed was reduced by sampling the evolution of wildlife law in each jurisdiction periodically. The periods chosen were based on the timing of statutory revisions. Thus, beginning at or just before the time of Confederation,[26] Canadian wildlife laws in each jurisdiction have been reviewed as they existed at the time of each consolidation of laws for statutory revision.

The results are inevitably somewhat uneven. Each jurisdiction consolidates and revises its legislation on its own timetable. This difficulty may warrant some caution with respect to the validity of any cross jurisdictional comparisons made in the paper. It would, however, appear to be irrelevant with regard to the longitudinal trends within jurisdictions which are my

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22 *Convention for the Protection of Migratory Birds in Canada and the United States of America*, 16 August 1916 [hereinafter *Migratory Birds Convention*].

23 S.C. 1994, c. 22.

24 Unless the context otherwise requires, the terms "province" and "provincial" should be read in this paper to include the "territory" and "territorial".

25 Nunavut has been excluded because their current wildlife legislation is the same as the current legislation in the Northwest Territories and because they share that territory's legislative history. Section 29 of the *Nunavut Act*, S.C. 1993, c. 28 as am., provided that the laws in force in Nunavut on 1 April 1999 would continue in force until amended or changed. This included wildlife legislation and consequently the new territory has inherited the N.W.T. *Wildlife Act*, R.S.N.W.T. 1988, c. W-4, as am., until it is changed.

26 The only significant body of pre-Confederation law examined was for the province of Newfoundland. Initial review indicated that starting the examination of Newfoundland legislation in 1949 would not reveal the trends we hoped to describe. Our examination of law in that jurisdiction thus includes consolidations going back to 1892.

primary focus. I suggest, notwithstanding this difficulty, that given the length of the period of record,[27] the trends identified are valid and noteworthy and that there is adequate foundation for the limited cross jurisdictional comparisons made below.

4.0 An Historical Context for the Examination of Wildlife Law

"The statutes for preserving the game, are many and various, and not a little obscure and intricate" noted Blackstone in his Commentaries.[28] Their number was also prodigious. Between 1671 and 1831, Parliament passed no fewer than two dozen Acts designed to regulate the hunting of game.[29] It is beyond the scope of this paper to provide more than the briefest sketch of the pre-Confederation origins of Canadian wildlife law. The historical overview presented below should nonetheless give the reader a sense of the approach to game management and the legal tradition brought by our law makers to the task of drafting wildlife laws in the early years after Confederation, steeped as they were in English legal traditions.

In his review of the social history of Yukon wildlife, Robert McCandless observed that our laws about wildlife are at least as old as the common law and that more than nine hundred years of evolution lie behind the wildlife laws of North American jurisdictions.[30] Aldo Leopold traces the history of game management back even farther, to the beginnings of human history,[31] noting that in the Mosaic Law found in the Book of the Covenant Moses decreed:

> If a bird's nest chance to be before thee in the way, in any tree or on the ground, with young ones or eggs, and the dam sitting upon the young or upon the eggs, thou shalt not take the dam with the young; thou shalt in any wise let the dam go, but the young thou mayest take unto thyself; that it may be well with thee and thou mayest prolong thy days. (Deuteronomy 22:6)

This stricture certainly seems to intend the protection of the dam as breeding stock.

An appreciation of the origins and development of English game law requires some

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27 In most jurisdictions over 100 years and at least several consolidations of the statutory material.
28 W. Blackstone, *Commentaries on the laws of England*, 9th ed. (London: 1783) vol. IV at 174.
29 P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831* (Cambridge: Cambridge University Press, 1981).
30 R.G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985).
31 Leopold, *supra* note 1 at 5.

consideration of both the historical and social context within which these laws developed. While historically game was an important food source, the hunt itself was also important. Hunting can, for example, serve a martial goal, providing the hunter with a lawful opportunity to use weapons and improve his skills. Ultimately, hunting could and did serve important social purposes too. A review of the development of game law is a review of the exercise of feudal entitlement and hunting privilege. McCandless comments on the pattern which emerges from a study of English game laws as follows:

> Since the time of William the Conqueror, a certain pattern in the laws respecting wildlife seems to impress itself again and again – that the use of wild animals as objects of sporting pleasure has inevitably prevailed over the use of wild animals as meat. The pattern is first revealed in the laws themselves, in changes in diet for some peoples and not others caused by the decline in numbers of wild animals, and finally, in the evolution of a subculture preoccupied with wildlife sporting activities and immensely influential in the drafting of game laws.[32]

Two of the most fundamental issues to be addressed by wildlife law include first, the question of who owns wildlife and how ownership rules vary with the circumstances and second, what restrictions should be placed on hunters and which hunters should suffer restriction to ensure the sustainability of the harvest. Over time English game law answered these questions in a way that reinforced both property and privilege.

The English common law rules with respect to property in wildlife (*ferae naturae*) were based in part on Roman law. For example, the Roman concept of wildlife as *res nullius* applied. That is, wildlife belonged to no one until it was killed or captured and the proprietary interest did not arise until control was effectively complete.[33] This fundamental concept is still found in our wildlife law and underlies the rule of capture.

Roman law also held that property in wild animals could be derived from the ownership of the land.[34] This concept called *ratione soli* gave the land owner the absolute right to kill and take wild animals caught on his land. Thus, the right arose as an incident of land ownership

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32 McCandless, *supra* note 30 at 2.

33 *Supra* note 19. In *Pierson* v. *Post*, Post and his dogs were pursuing a fox when Pierson arrived and killed the fox. The issue was whether Post's pursuit was sufficient to overcome the property rights threshold. The Court held that it was not. The essential issue was control. The Court felt that mere pursuit was not sufficient to establish a property interest. The common law also recognized a fundamental distinction between wild and domestic animals. The latter are the subject of absolute ownership rights. A property interest in a wild animal will cease if that animal regains its freedom by escaping human control.

34 *Supra* note 19 at 4, citing L. Goodeve, *Goodeve on Personal Property*, 5th ed. (London: Sweet & Maxwell, 1912).

and wildlife killed by a land owner on his land became his property. Early English wildlife law recognized similar interests but there were exceptions.

The principle derived from another Roman law concept called *ratione priviligii* was also applied in English wildlife law. This justification is more like a licence and was derived from a transfer of hunting rights from the Crown. This constitutes one of the exceptions to *ratione soli* and the hunting rights thus granted could be exercised in areas where the hunter did not own the land. The property in game killed under such a right was converted unconditionally to the taker. Thus, ownership of land and the exercise of hunting rights granted as a privilege by the Crown were the two primary ways in which wildlife could be appropriated.

Restrictions on the right to hunt were imposed by Anglo-Saxon kings. Certain animals such as deer were reserved to persons of noble birth. Those tracts of land not given to nobles formed part of the King's Forest and were administered separately. A distinct body of custom and law developed to govern activities there. The Forest Laws controlled all activity in these areas from hunting and fishing to timber cutting and grazing rights. Hunting and other rights in these areas were exercised as royal franchises.[35]

After 1066, William claimed title to all of England by right of conquest, including title to all forested and unoccupied areas. He centralized the legal system throughout the realm bringing all courts under the King's authority but the separation between the Forest Laws and the common law was allowed to remain. He eventually claimed the sole right to hunt throughout the realm but bestowed hunting privileges on favoured nobles. Some examples of these feudal entitlements include the right of "park", to pursue such superior beasts as deer and fox across one's own lands; "chase" the right to pursue superior beasts across the lands of others; and "free warren" which permitted the grantee to kill inferior beasts such as hare and fowl as long as the noble prevented others from doing likewise.[36]

The Forests were among the king's most valued possessions. In fact William expanded these areas by evicting tenants and destroying their farms and homes. Over time, the forest officers responsible for these areas became notorious for their abuses and extortion. So much so that the Barons extracted a new "Forest Charter" from King John at Runnymede in 1215, at the same time as the more famous Magna Charta was signed.

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35 McCandless, *supra* note 30, Chapter 1 – Old Laws New Attitudes.

36 G.C. Gray, *Wildlife and People: the Human Dimension of Wildlife Ecology* (Urbana, IL: University of Illinois Press, 1993). From Chapter 7, Wildlife Law, Policy and Administration.

The preservation of wildlife in Forests was, however, always an important part of their administration. The complexity of the Forest Laws obscured a rich social tradition of hunting.[37] Some of the earliest secular books described the elaborate rituals attendant on hunting, which suggests the importance of the hunt to the society of the day.[38] Hunting became a means for the nobility to mark their status and to distinguish themselves from the peasantry. The hunt was more than a pastime or a way of getting meat. It likely tied into a visible demonstration of ownership. The hunt included a highly ritualized process of sharing which at the same time confirmed the right of the noble to the land.

The early texts clearly show the formative importance of custom in shaping and controlling hunting activities and, eventually, in contributing to game laws. The sportsman hunter is not a creation of the industrial age but the modern manifestation of a centuries old European tradition.[39]

McCandless indicates that by the time of the Renaissance, all of the untamed forests of England had disappeared but there remained an unabated interest in hunting "even if the animals hunted had become tame, fat and slow". Thus, as noted by Leopold,[40] European game management has for centuries had one simple and precise objective: the improvement of hunting for and by the private landholder. As wild areas and the game that depended on them disappeared, the nobility and privileged classes enjoyed the responsibility for enacting laws to preserve their favoured pastimes.

In England, the qualification laws, so-called because they restricted hunting to those who could "qualify" based on the value of their property, first appeared in the fourteenth century when 40 shillings worth of property was required in order to hunt. These laws were in place for four hundred years, until their repeal in 1831. By the seventeenth century, fully one hundred pounds of property per year was required to qualify for the right to hunt.

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37 McCandless, *supra* note 30.

38 Among commonly cited examples are the treatise entitled, *The Master of Game* (London: Ballantyne & Hanson, 1904) apparently written in 1413 by Edward the Second Duke of York, one of the few English nobles to fall at Agincourt. A contemporaneous text was by William Twicci, *The Art of Hunting* (Northampton: William Mark, 1908). During Elizabeth I's reign, George Turberville wrote *Book on Falconrie or Hawking* (London: 1611) and its second half, *Book on Hunting* (London: 1611). McCandless, *supra* note 30, suggests that it is possible that Edward's text was a translation of earlier French works.

39 McCandless, *ibid.* at 8.

40 Leopold, *supra* note 1.

Written laws establishing closed seasons for conservation purposes go back at least to Henry VIII who decreed protection for waterfowl and their eggs from May 31 to August 31 each year. James I later protected pheasants and partridges under this prohibition. By the time of Henry VIII, limitations on hunting equipment had taken definite legal form as well. Herons could not be taken except by hawk or long bow. Elizabeth I began the use of limitations on hours of hunting by prohibiting the night hunting of pheasant. Also, by the time of Elizabeth I, bounties had been placed on a large number of ravening birds and vermin.[41]

The Forest Laws fell into disuse after the execution of Charles I. Over harvesting for ship timbers and clearing for grazing land reduced the forests. Lumber and forest land could no longer be sold without interfering with the hunting pleasures available from the forests.

The Hanoverian monarchs were also very fond of hunting but their game laws came to reflect larger political issues than mere poaching.[42] George the I's Parliament raised the penalty for poaching to a fine of fifty pounds and a three year jail sentence, later adding the option of transportation to the colonies for a period of seven years. In 1723, came the infamous "Black Acts" with their chilling warning that armed and disguised persons in the forests "shall suffer Death as a Felon without Benefit of Clergy".

During this period the "Blacks" were trying to defend their ancient privileges under the Forest Laws and became allied with the Jacobites, implacable enemies of the Hanoverians.[43] So game laws contributed to the goals of quelling local insurrection and the harshness of the penalties may have had little to do with the relative values placed on human life as opposed to wildlife.

Thus, the qualification laws were conceived to do more than reserve game to landowners and the privileged few. The restrictions on the possession of hunting gear, nets, dogs and guns to the privileged class, supporters of the Crown, were also intended to contribute to the safety of the realm. In the end, supporters of the Crown had the opportunity of continued practice with guns while dissidents and unreliable elements were disarmed.[44] Thus viewed, it is clear that class discrimination was one of the purposes of the qualification laws. Only prominent citizens were permitted to possess guns, take and eat game.

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41 *Ibid.* at 8-10.
42 McCandless, *supra* note 30 at 11.
43 *Ibid.* at 11.
44 T. Lund, "Wildlife Law Before the American Revolution: Lessons from the Past" (1975) 74 Michigan L.R. 49.

Game laws as we know them today grew out of reforms to the old Forest Laws and the acts of the eighteenth century during a time of reform under George III and William IV. Hunting licences appeared for the first time in 1784 and in 1829, the Black Acts were replaced by the Night Poaching Act. In 1831, the requirement for property qualification to hunt was abolished.[45] These changes continued during the reign of Queen Victoria. Seasons and bag limits were established. By 1871, game laws had become a matter of such interest that the British Home Secretary had cause to inquire into and publish the game and trespassing laws in all other countries in the world.[46]

This inquiry indicated that several jurisdictions in North America already had game laws of their own and, as noted by McCandless, while their origins may have been based on the old principles of English law, they had, by 1871, evolved a life and momentum of their own.

5.0 The Three Stages in the Evolution of Canadian Wildlife Law

This study describes three general stages or eras in the evolution of Canadian wildlife law which emerged from a critical review of the statutes listed in Appendix 1. The criteria used to distinguish and describe these stages were developed from a literature review conducted in conjunction with the statutory review.

As Leopold noted in his review of the history of ideas in game management, "history shows that game management almost always has its beginnings in the control of the hunting factor. Other controls are added later."[47] Thus, the criteria used to distinguish the three eras in our wildlife law are in many respects additive. For example, hunting and predator control may initially be sufficient to sustain the availability of game in an area but eventually, other means to manage the resource and maintain the harvest must be resorted to. The provisions which characterize the later eras therefore are frequently grafted on to those of the earlier eras. The stages in the evolution of our wildlife law described in this study are therefore largely characterized by the emergence and application of new mechanisms or techniques for managing and sustaining wildlife.

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45 McCandless, *supra* note 30 at 13.
46 *Ibid.* at 13, citing U.K., Parliament, *Blue Books*, vol. 67 (1871) Parliamentary Papers at 524-700.
47 Leopold, *supra* note 1 at 4.

More recently, however, Canadian wildlife law has been affected by legal changes such as special entitlements for aboriginal people arising from section 35 of the *Constitution Act, 1982*,[48] and more importantly, by changing societal objectives and values for wildlife itself.

One of the clearest indications of changing values for wildlife in Canada may be the recent emergence of concern for endangered species. Once a species or population is reduced to such a status, it would obviously lose any importance as game. In an earlier era, the response might simply have been to permanently ban hunting of the species but to otherwise forget it from a wildlife management standpoint.[49] The modern sustainable wildlife management approach is to commit significant public resources to the protection of the species and its habitat and to recovery planning. This change is at least in part based on the view that wildlife has an inherent value within our ecosystem and perhaps even the view that wildlife have a right to exist.[50]

These changes in values about wildlife make modern statutes more complex and certainly affect the process of achieving consensus on their content.[51]

5.1 Criteria for Stage 1: The "Game Management Era"

As was indicated by the review in part 4, at the time of Confederation, federal and provincial legislators in Canada had a well developed frame of reference for the development of Canadian wildlife law, based on the English common law and statutory framework. There were nonetheless already major differences. The privilege and qualification requirements in English game law had already been rejected. McCandless describes the situation thus:

> The early immigrants to North America would have resisted any attempts by the colonial

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48 *Constitution Act, 1982*, being Schedule B to the *Canada Act,1982* (U.K.), 1982, c. 11.

49 This is more or less what happened to buffalo in the west. See, for example, the early legislation of the prairie provinces which simply banned buffalo hunting but did little more to encourage recovery of the species. This response was consistent with the prevailing views about hunting at the time. See *infra*, note 53.

50 These new values are captured in the following paragraph drawn from the Preamble to Bill C-33, *Species at Risk Act*, 2d Sess., 36th Parl., 48-49 Eliz. II, 1999-2000: "Wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons."

51 Again, a good recent example may be the federal experience in developing endangered species legislation. Despite strong support for action (76% of Canadians believe governments should do more and 88% of Canadians support laws to protect the habitat of endangered species: *supra* note 7), Canadian governments have spent almost four years working on federal legislation without entirely achieving consensus.

> administrators to deny them access to land and wildlife. The promise of abundant wild meat had wide appeal to those driven from the land by enclosures and the effects of the Industrial Revolution. An added inducement lay in the promise of economic gain based on wildlife such as traffic in fur, hides and meat.[52]

However, at the time of Confederation, some of the worst abuses of market hunting were already coming to public attention. In the mid to late 1870's the plains buffalo were wiped out. Not long afterward, passenger pigeons were extinguished. Game scarcities were a matter of concern for Canada, particularly with respect to the nutritional needs of Indian bands on the prairies.

Our early legislative history was largely one of hunting controls. As Leopold noted: "In America, the dominant idea until about 1905 was to perpetuate rather than to improve or create hunting. The idea was that restrictions on hunting could string out the remnants of the virgin supply and make them last longer. Hunting was thought of as something which must eventually disappear".[53]

Thus, the criteria developed to characterize legislation typical of the game management era include:

1) Legislation that is focused on game animals, generally excluding other wildlife from its protection;

2) The ongoing development of a system of hunting controls including seasons, bag limits and some restrictions on weapons and gear;

3) The presence of predator control mechanisms;

4) Provisions to prevent or control market hunting; and

5) Some limited mechanisms for the preservation of game lands (refuges, sanctuaries, etc.).

These criteria are consistent with Leopold's history of ideas in game management.[54] In fact criteria 2, 3 and 5 are based on Leopold's analysis. Criterion 1 reflects the utilitarian nature of early game laws. They most often only protected those animals or birds that were

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52 McCandless, *supra* note 30 at 12-13.
53 Leopold, *supra* note 1 at 16.
54 *Ibid.* at Chapter 1.

considered useful to man. Criterion 4 reflects the perceived threat of market hunting to wildlife as a source of food, an important consideration as the country was settled. This concern was already present at the time of Confederation.

Stage 1 encompasses the longest period in the history of Canadian wildlife law, beginning at or before the time of Confederation and lasting in many jurisdictions until the 1960's and sometimes longer.

5.2 Criteria for Stage 2: The "Wildlife Management Era"

The second stage in Canadian wildlife law is characterized by the ongoing refinement and the detail of hunting control mechanisms, using a combination of geographic areas, seasons and harvest restrictions. Greater reliance on regulations was also necessary to achieve this fine control in terms of wildlife management. A broadening in the focus of wildlife management techniques occurs from hunting controls to mechanisms such as habitat protection and management, and artificial replenishment, including restocking, game farming and the like. The scope of the statutes often expands to include "wildlife", not just game.

The criteria developed to identify wildlife laws from this era include:

1) The scope of the statutes expands from "game" to "wildlife";

2) Habitat management and protection measures appear and are strengthened;

3) Provisions for artificial replenishment of wildlife appear; and

4) There is much greater reliance on regulations in order to achieve detailed wildlife management objectives.

This era is best characterized as transitional. The old game management focus has expanded to afford protection to wildlife as opposed to only hunted species. Increased demand for wildlife[55] has resulted in the need to manage harvesting more carefully in order to balance consumptive uses with emerging non-consumptive uses and values. Environmental factors have also begun to affect habitat and wildlife populations making habitat management and protection essential.

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55 *Supra* notes 6 and 7.

Wildlife law had been stable for a long period through the game management era. The criteria selected to characterize stage 2 are based in part on Leopold, specifically, criteria 2 and 3 are derived from his work. Leopold commented on the use of preserves or sanctuaries as means to ensure the continuation of wildlife populations. Criterion 2 takes this idea further since it refers to active habitat management, not just the setting aside of safe areas for wildlife. Criteria 1 and 4 resulted from the statutory and literature reviews. The need to manage smaller areas and populations more intensively is a result of increased and potentially conflicting demands for wildlife. These management goals could not be achieved with early game management statutes which made relatively little use of regulations. The transition to the modern wildlife statute required greater reliance on regulations. Finally, increased demands for the protection of wildlife and changing values meant that more than game animals had to be protected.

In most jurisdictions, stage 2 lasts until the early to mid 1980's.

5.3 Criteria for Stage 3: The "Sustainable Wildlife Management Era"

The most recent stage in the evolution of Canadian wildlife law is approximately fifteen years old. The evolution in our wildlife law in stage 3 reflects significant changes to the values that Canadians attach to wildlife. Changes to some wildlife statutes also reflect new constitutional protection granted for aboriginal harvesting. International commitments such as controls on the international wildlife trade arising from the *Convention on the International Trade in Endangered Species of Wild of Wild Fauna and Flora*,[56] and the Canadian commitment to the *Convention on Biological Diversity* begin to affect the content of domestic law. Statutory change has also been encouraged by the adoption of the 1990 Wildlife Policy for Canada and government commitments to the protection of endangered species. Environmental controls and stronger protection for habitat emerge to protect wildlife as an ecological vision for wildlife management and law takes hold. Most of these changes are quite recent and the pace of change seems to be increasing.

The criteria for identification of stage 3 wildlife laws include:

1) The continued expansion of the concept of "wildlife";

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56 *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973 [hereinafter CITES].

2) Stronger environmental or ecological focus for legislation, including strengthened habitat protection capabilities;

3) Endangered species and biodiversity protection appears either in the wildlife statutes or in stand alone legislation;

4) Aboriginal rights and entitlements are reflected in some wildlife laws; and

5) Strengthened controls on domestic and interjurisdictional trade appear in wildlife laws.

The criteria chosen to characterize the third stage in the evolution of Canadian wildlife law reflect the ongoing changes in values about animals and the environment as well as the influence of national and international commitments to the environment and wildlife.

The third era in our wildlife law is just emerging. Because each jurisdiction responds on its own time table and because of the short time period since the emergence of these new ideas, the stage 3 trends in the legislation reviewed were clear but somewhat uneven.

6.0 Results of the Statutory Review

The results of the statutory review are reported below with the provinces and territories presented in alphabetical order and Canada last. The wildlife statutes of each jurisdiction were tested based on the criteria developed in part 5 and were then grouped into the three eras depending on the provisions of the statutes and the particular evolutionary sequence of the wildlife law in each jurisdiction. Some comment is provided on the content of the statutes in each era in each jurisdiction.

6.1 Alberta

6.1.1 The Game Management Era

The following statutes meet the criteria for the Game Management Era in Alberta Wildlife Law:

- *The Game Act*, R.S.A. 1955, c. 126
- *The Game Act*, R.S.A. 1942, c. 70
- *The Game Act*, R.S.A. 1922, c. 70
- *The Game Act*, S.A. 1906-1915, c. 14

- *The Wolf Bounty Act*, S.A. 1906-15, c. 13

Consistent with other early statutory game management systems in the west, Alberta's laws initially included a predator control law, *The Wolf Bounty Act* which made provision for the payment of a ten dollar bounty on wolves and wolf pups. Derived as they were from the Ordinances of the Northwest Territories, the first and subsequent *The Game Acts* also permitted or encouraged the hunting of crows, grackles, English sparrows and birds of prey, hawks and eagles by excluding them from the protection provided to birds under the Act.[57] Interestingly, this exposure to hunting also extended to geese in the 1906-1915 Act. It is hard to imagine that this was an oversight since geese were explicitly excluded from the statute's protection. This matter was, however, corrected in the 1922 Act.

The approach in the Alberta *The Game Act* of 1906-15 was to define "game" to include all animals, dead or alive and birds protected by the Act. The scheme in the statute then paid almost no attention to any animals except the big game and game birds listed in sections 4 and 5 of the Act respectively. These sections set seasons for those big game and birds for which hunting were allowed, established permanent close seasons for some, such as buffalo and pronghorn antelope, and bag limits for other species. Young animals and birds and females were protected. Hunting controls were well developed in Alberta by this time. Non-quota limitations such as the prohibition of night and Sunday hunting and prohibitions against the use of poison and set guns and other contrivances were in place. The application of hunting controls was limited in the areas of the province north of 55 degrees of latitude.

Dealing in game and market hunting was permitted by the statute, subject to control therein. The buying, selling and storage of game birds in the close season was prohibited and the statute provided for the making of regulations to govern the trade of big game, game birds and furbearers. A game dealers licence was established through the legislation. Licences were required to hunt big game for both resident and non-resident hunters.

57 It is, as noted by Aldo Leopold, *supra* note 1, difficult if not impossible to separate the control of predators and bird "pests" as competitors of game animals in order to maximize human hunting prospects from the desire to do so in order to improve agricultural production. For purposes of our discussion it may be sufficient to note that such controls have been part of game management from the earliest of times and that they were almost universally found in stage 1 legislation reviewed in this study.

The Elk Island and Rocky Mountain Parks were established as game preserves where no hunting was allowed.

The 1922 legislation was the same in all major respects. The use of game preserves was expanded. Birds of prey were still not protected under the Act.

In 1942, *The Game Act* distinguished game, big game, game birds and furbearers. It declared the province's property in all wild animals and birds. It extended the requirements for licences to virtually all hunting and trapping, expanded the number of game preserves, acknowledged in provincial legislation, for the first time, federal migratory birds legislation and expanded the use of regulation to manage game. For example, the harvesting of big game, game birds and furbearers could now be controlled on the basis of season, bag limits and area of the province, as determined in regulation. The early roots of the legislation were still evident. Predator and pest control were still part of the statutory scheme. There were no restrictions on the hunting or trapping of wolves, cougars, wolverine, skunk and other pests. Black birds, crows, owls and other birds of prey were still not protected.

The 1955 *Game Act* was little changed from the 1942 version.

6.1.2 The Wildlife Management Era

The following statutes in Alberta meet the criteria of the wildlife management era:

- *Wildlife Act*, R.S.A. 1980, c. W-9
- *The Wildlife Act*, R.S.A. 1970, c. 391

The scope of the 1970 *The Wildlife Act* was expanded as the definition of "wildlife" shows. It included big game, game birds, birds of prey, furbearers, furbearing carnivores and "any other species of vertebrates". The Act envisioned several types of establishments to contribute to wildlife management including big game farms, game bird farms, and pheasant shooting grounds. The new Act defined "habitat" and provided for its protection, rehabilitation and management by establishing a fish and wildlife habitat fund paid for by a habitat stamp. It also protected wildlife and habitat by establishing a wildlife damage fund to compensate farmers and ranchers for crop and livestock damage from wildlife. Hunting and trapping in provincial parks was prohibited and the potential for the use of sanctuaries and preserves was expanded.

The legislation was made explicitly subject to federal migratory bird and game export import legislation.[58] The limited exemption from hunting controls for persons residing in the northern part of the province disappeared. Hunting controls were further codified and tightened up. The use of regulations to achieve these goals was expanded by the inclusion of over 40 heads of regulation making power. Birds of prey and predators were brought within the statutory scope and could no longer be hunted without a licence.

The 1980 Act provided for habitat management areas and for the identification of habitats by type and by region and for the management of these areas on the basis of regulation. Agreements for the managing and improvement of habitat were permitted between the government and any person or government. The potential use of regulation further expanded as more heads of regulation making authority were added.

6.1.3 The Sustainable Wildlife Management Era

The following statutes meet the criteria for the sustainable wildlife management era in Alberta:

- *Wildlife Act*, R.S.A. 1984, c. W-9.1[59]

The current Alberta legislation's scope has been further expanded to include "animals" defined as all vertebrates except people and fish. The term "wildlife" used in the Act includes big game, birds of prey, furbearing animals, upland game birds and migratory game birds and non-game animals. The Act also makes reference to "endangered animals" which can be prescribed, and "endangered organisms" which include endangered animals or an organism of an endangered species (prescribed) including animals, invertebrates, plants, algae, fungi, fish and other groups.

The uses of the fish and wildlife trust fund[60] are expanded to include the protection and enhancement of endangered species and their habitats and the promotion of conservation, among other purposes. The Act establishes an endangered species conservation committee one of whose roles is to advise the Minister on endangered species and biodiversity conservation.

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58 *Migratory Birds Convention Act, 1994*, *supra* note 23; and the *Game Export Act*, R.S.C. 1985, c. G-1 (repealed).

59 Consolidated to 19 March 1998.

60 This is the continuation and expansion of the earlier habitat trust fund.

The systems of hunting controls developed historically and refined in the 1970 and 1980 Acts is essentially unchanged as are the controls placed on wildlife trade, export and import. The game ranching system initially established in the 1980's is moved off into separate legislation which controls "game production animals". More of the detail for habitat management is moved into the regulations to the Act.

6.2 British Columbia

6.2.1 The Game Management Era

The following statutes meet the criteria for the game management era in British Columbia:

- *Game Act*, R.S.B.C. 1960, c. 160
- *Game Act*, R.S.B.C. 1948, c. 135
- *Game Act*, R.S.B.C. 1936, c. 108
- *Game Act*, R.S.B.C. 1924, c. 98
- *Game Protection Act*, R.S.B.C. 1911, c. 95
- *Birds Protection Act*, R.S.B.C. 1911, c. 21
- *Game Protection Act*, R.S.B.C. 1897, c. 88
- *Game Protection Act*, C.S.B.C. 1888, c. 52
- *An Act for the Preservation of Game (Small Birds)*, C.S.B.C. 1877, c. 79
- *Game Ordinance, 1870*, C.S.B.C. 1877, c. 80
- *Game Ordinance, 1870*, R.S.B.C. 1871, No. 133

The game legislation in British Columbia in the period from 1870 until and including the *Game Protection Act* of 1888 was rudimentary and it did not even meet the criteria outlined above for the game management era.

The scope of the legislation in this period covers "game" which was a limited list of game animals and birds. In the 1870 Ordinance, birds are only covered for portions of the year and controls on the commerce in game and birds are limited to the prohibition of possession of game in cities and towns during parts of the year. In an 1871 amendment to the Ordinance, the protection of insectivorous birds from hunting was added to the legislation. The 1877 Ordinance gave a more expansive list of game and birds the hunting and commerce in which were subject to the legislation. By 1888, the *Game Protection Act* covered "quadruped animals" and birds including the young and old of feathered animals. By this time a more systematic approach to hunting controls had emerged including prohibitions on egging

(gathering eggs of game birds), night hunting and the hunting of hen pheasants. Likewise, the buying and selling of pheasants was prohibited.

The 1897 *Game Protection Act* is the first of the early B.C. statutes which seems to meet all the stage 1 criteria. It applied to quadruped animals and the young and old of feathered animals. Hunting control had become more systematic. No hunting or possession of the female of big game animals[61] or birds was permitted. Seasons and bag limits for these animals were set. Seasons were set for furbearer harvest. Gear controls were established for bird hunting. Egging, night hunting and the use of poison and explosives were prohibited. The export of animals and birds was prohibited but with a licence, the heads and horns of some animals could be exported. Regulation was imposed on the purchase and sale of game animals and birds.

The legislation did not apply to Indians. Special provisions were also made for hunting by free miners, a recognition of the early importance of mining to the opening up of the B.C. interior and of the importance of game to miners and prospectors in remote areas. The Act also made provision for private game bird reserves.

The 1911 legislation protected "animals" as they were defined in the Act. It continued the exemption for Indians and the special status of free miners. It did not apply in private preserves, enclosures and pleasure grounds. Export of game was still prohibited without a licence but the permit system for heads and horns continued. Certain scheduled animals and birds could not be exported. The system of hunting controls was refined and more detailed. No hunting was permitted of scheduled animals in close season. Certain contrivances, batteries and swivel guns were outlawed as was the use of bait and drugs for hunting birds. Licences were required for residents to hunt game. The Lieutenant Governor in Council was given the authority to set up game preserves where hunting was prohibited.

In the 1924 Act, the focus on hunting controls and the limitation and management of trade in wildlife continued and developed. Licensing requirement were established covering the import of live wildlife. An advisory game conservation board was established and the requirement for guiding licences first appeared. Wider use of regulation was starting to appear as well with approximately twelve heads of regulation making authority included in the Act.

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61 I use the term "big game" because it best indicates the animals covered: deer, elk, caribou, mountain sheep and goats. Also covered by the legislation were hare, some birds and wild ducks. The legislation did not use the term "big game".

The 1936 Act permitted farmers to kill game causing depredation on their land and continued the historical special treatment of Indians and free miners, with some limited exceptions. Hunting along highways was prohibited and other public safety provisions were introduced and to limit hunting. The system of hunting controls continued to expand. A broader list of game related activities now required a licence or permit, including hunting, trapping, angling, the breeding of game, export of game and heads or horns of game, guiding, outfitting, and the transportation and storage of game.

The 1948 legislation is virtually unchanged from the 1936 Act. The expansion of the use of regulations as a means to achieve detailed management control continues. Likewise, the 1960 *Game Act* is little changed. It made the rules about bird hunting in the Act subject to federal migratory bird legislation. Birds of prey are first protected from hunting in this Act and the scope of the Act is expanded to include predatory animals.

6.2.2 The Wildlife Management Era

The legislation which meets the criteria for the wildlife management era in British Columbia is:

- *Wildlife Act*, R.S.B.C. 1979, c. 433

The scope of the legislation changed to include "wildlife" defined as game animals and other vertebrates. Game is defined to include big game, game birds and furbearers. Big game included animals in the deer family, mountain sheep and goats, bear cougar and wolf and other mammals specified by the regulations. The province's property in wildlife is asserted for the first time in legislation. Damage to habitat was a concern of the statute and provisions were included to recover damages in order to permit restoration of the habitat. The government was authorized to acquire land for the conservation and management of wildlife. The system of hunting controls and control of the import and export of wildlife was refined and tightened but not significantly changed from earlier legislation. No trade in wildlife was allowed except by permit or licence. The use of regulation was further expanded with some 31 heads of regulation making authority.

6.2.3 The Sustainable Wildlife Management Era

The following statutes meet the criteria for the sustainable wildlife management era in British Columbia:

- *Wildlife Act*, R.S.B.C. 1996, c. 488[62]

The current *Wildlife Act* defines "animal" to include a mammal, bird, reptile or amphibian. Game includes big game, small game, game birds, furbearers and other prescribed animals. The definition of big game from the 1979 Act is unchanged. New scope is added to the statute. Endangered and threatened species are defined and provisions for their designation and management are included. Habitat is defined for the first time and the number and types of wildlife management areas are increased. Critical wildlife areas can now be established depending on the habitat needs of endangered and threatened species. Wildlife management areas and sanctuaries can be established by regulation and provisions are included to protect wildlife habitat. It is an offence to alter, damage or destroy habitat by depositing substances on land or water that are harmful to wildlife or habitat. Provision is made for orders to prevent entry or damage to wildlife management areas or sanctuaries and a right of action is established to enable the government to recover of prevent damage to such habitats. A habitat conservation trust fund is established. Some of the purposes for the trust include the conservation or enhancement of biological diversity and the enhancement of wildlife populations or habitats.

Reference to CITES among the provisions for import and export control ensures that the province's system for managing wildlife trade is integrated with national and international systems. The statute grants very extensive regulation making authorities to the Lieutenant Governor in Council.

6.3 Manitoba

6.3.1 The Game Management Era

The following statutes meet the criteria for the game management era in Manitoba:

- *The Game and Fisheries Act*, R.S.M. 1954, c. 94
- *The Predator Control Act*, R.S.M. 1970, c. P110
- *The Predator Control Act*, R.S.M. 1954, c. 205
- *The Game and Fisheries Act*, R.S.M. 1940, c. 81
- *The Wolf Bounty Act*, R.S.M. 1940, c. 236
- *The Game Protection Act*, R.S.M. 1913, c. 75
- *The Insectivorous Birds Act*, R.S.M. 1913, c. 96

62 Consolidated to 28 March 1998.

- *An Act Respecting Wolf Bounty*, R.S.M. 1913, c. 207
- *An Act Respecting the Protection of Game*, R.S.M. 1902, c. 66
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.M. 1902, c. 81
- *An Act Respecting Wolf Bounty*, R.S.M. 1902, c. 176
- *An Act for the Protection of Game and Fur-bearing Animals*, R.S.M. 1891, c. 62
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.M. 1891, c. 75
- *An Act Respecting Animals*, C.S.M. 1880, c. 18, s. LXII-LXXXIV

The earliest Manitoba legislation reviewed, was limited in its scope and provided protection to only those animals and birds listed in the statute. It established a close season for elk, moose, caribou and other deer and their young. A close season was also established for woodcock, snipe, plover, grouse , partridge, swans, geese, ducks and other birds. A close season was established for some furbearers as well. No bag limits were established. The use of certain gear was outlawed, as was the use of poison to hunt animals and birds. There were exemptions from the legislation for those travellers in need and for Indians on reserves.

The *Insectivorous Birds Acts* of 1891, 1902 and 1913 were very similar. They extended protection to birds that were not protected and managed by the game legislation and excluded from their protection such birds of prey and agricultural or other bird pests as, eagles, falcons, hawks, owls, black birds, jays, crows, ravens, English sparrows, shrikes and others.

The control of predators, especially wolves and coyotes, was encouraged by a bounty system which has been present in Manitoba since its earliest days.[63] The 1880 *An Act Respecting Animals* includes provisions for the payment of a bounty for wolves heads. The *Wolf Bounty Acts* of 1902, 1913 and 1940 and the *Predator Control Acts* of 1954 and 1970 are similar and provide a mechanism for the establishment and payment of bounties on wolves. In the later legislation, predators are defined to include red foxes and bears. While the mechanism for payment varies, the scheme for suppression of wolves and other predators remains largely unchanged.

The *Game Protection Act* of 1891 was not much changed from the 1880 legislation. It set seasons for big game of the deer family, elk, moose, caribou, for game birds such as grouse, pheasant, partridges, woodcock, snipe, sandpipers and ducks, and for furbearers. No bag

63 The Laws of Assiniboia include, for example, c. XLIX, 1862 which provides for a bounty on wolves heads.

limits were included. Sunday hunting was prohibited. Some contrivances and modes of hunting were outlawed such as swivel guns and batteries for geese and swans and poison more generally. Possession in close seasons was outlawed and the Act prohibited purchase, sale and hunting for export from the province. Non-resident licences were established. The Act did not apply to Indians on their reserves.

The *Game Protection Act* of 1902 continued to apply only to the game animals mentioned. It is much like the 1891 legislation but the first bag limits appear in this law. Two male of the deer family per year and for grouse, partridge, prairie chicken, plover and ducks, 100 per season, no more than 20 in a day. This legislation begins the process of establishing more comprehensive hunting controls, banning night hunting, expanding the kinds of prohibited gear and contrivances and prohibiting the running of dogs in the deer season. The Act does permit the sale and export of heads and hides from game animals. Otherwise it made no major changes.

The Game Protection Act of 1913 was the first of the Manitoba statutes to meet all the stage 1 criteria and to establish a comprehensive game management regime. Again, it applied only to the animals mentioned in the Act. Hunting controls continued to expand. Seasons were set; bag limits for game of the deer family were reduced. Deer under one year of age could not be hunted. The hunting of buffalo was also prohibited. Non-quota controls became an ongoing part of the game management scheme. Permits were now required for hunting game and the use of licencing and permitting expanded to more and more activities. Non-residents were broken into two classes, Canadians and non-resident aliens with different fees set for their licences. Export of game from the province by non-residents required a permit. The cold storage of game also required a permit. The first game reserves were established based on a list in the Act. Special rules were put in place for miners, explorers and other residents in the area north of 54 degrees of latitude, an approach similar to that applied in early Alberta legislation and for free miners in British Columbia.

The Game and Fisheries Act of 1940[64] defined "game" as all furbearing animals and all animals and birds protected by the Act and regulations. However, it distinguished big game and game birds from other game based on lists contained in the statute. Hunting controls continued to expand. Areas, seasons and bag limits were put in place either by the Act or by regulation for big game, game birds and furbearers. Prohibited gear or contrivances now included the use of vehicles and aircraft and controls on the use of automatic weapons, the kind of bullets or shot used and the caliber of ammunition used. Hunting and possession of game was unlawful

64 No review was undertaken of the fisheries component of this or the 1954 legislation.

in close season. Game could not be shipped outside the open season and permits and coupons attached to the game were required for such shipments. An advisory game commission was established to assist the Minister. The use of regulations as a means to achieve finer management control began and some 17 heads of regulation making authority were included in the Act. The designation of game reserves and wildlife sanctuaries where hunting is unlawful was now achieved by way of regulation. Four schedules to the Act list game reserves and bird sanctuaries. Hunting was prohibited in provincial game reserves and national parks. All hunting of game was controlled by licence except wolves or rabbits in the open season. The rights granted to Indians to hunt for food on unoccupied Crown lands at all seasons were first recognized in this legislation.

The Game and Fisheries Act of 1954 was not much changed from the 1940 legislation.

6.3.2 The Wildlife Management Era

The following legislation satisfies the criteria for the wildlife management era in Manitoba:

- *The Wildlife Act*, R.S.M. 1970, c. W140

The scope of this statute was expanded. It included reference to big game, exotic animals, furbearers and game birds, all species listed either on Schedules to the Act or in regulation. It also referred to migratory birds and migratory game birds as defined in federal legislation. It defined "wild animal" and included a list of such species on a schedule. The capability to manage habitat and populations was enhanced by including provisions related to wildlife management areas, established by regulation, in the Act. Government had the authority to acquire lands to create wildlife management areas, including the expropriation of such lands if required. The proprietary interest of the Crown in right of Manitoba to wildlife in the province was asserted in section 7. The Minister was granted the authority, subject to the approval of cabinet, to enter into agreements for a variety of wildlife management purposes, including investigations concerning the habits, environment, movements and habitat of wildlife. The destruction of wildlife habitat was made an offence and the Crown was given a cause of action to recover damages for the restoration of habitat. A very extensive list of regulation making powers was included in the Act.

6.3.3 The Sustainable Wildlife Management Era

The following Manitoba statutes meet the criteria for the sustainable wildlife management era:

- *The Endangered Species Act*, S.M. 1990, c. E-111
- *The Wildlife Act*, R.S.M. 1987, c. W130[65]

The scope of the 1987 *The Wildlife Act* is broader than that of the previous wildlife legislation. "Wildlife" is defined as a vertebrate of any species or type, wild in nature in the province but does not include fish. Definitions are included for amphibians, reptiles, big game, furbearers, game birds and small game, based on a series of schedules to the Act and the regulations. A broad definition is included for habitat as is a definition for protected species, this latter again based on a list established by regulation. The Act includes provisions for wildlife farms for the raising and propagation of wildlife. A wide variety of special use areas can be designated by regulation. There are separate lists for Crown lands as opposed to special uses possible on private or mixed Crown and private lands. These uses include wildlife management areas, refuges and endangered species areas, among others. The Act includes provisions for the protection and management of endangered species. Offences are created to prevent damage to such species and their habitats. Destruction of wildlife habitat is still an offence and the Crown's right of action in such instances continues. The Minister is required to report to the Legislature each year about the allocation of wildlife. Every five years a report on the status of wildlife, on the effectiveness of wildlife management programs, an analysis of the trends in and demand for wildlife in the province and an analysis of the capability of the province's wildlife resource to meet that demand must be laid before the Assembly. The Minister's authority to make agreements to achieve the province's wildlife goals is expanded. A compensation system for livestock killed by hunters is established. This statute is supported by a very long list of wide ranging regulation making powers.

The Endangered Species Act of 1990 protects threatened and endangered species and their habitats in order to ensure their survival in the province. The Act prevails over other legislation and binds the Crown. Endangered species are those threatened with extinction or extirpation. It is an offence to kill, injure possess or interfere with one of these species or to destroy, disturb or interfere with their habitat or the natural resources upon which they

65 Consolidated to April 1998.

depend. Manitoba has designated eleven endangered species, four threatened species and eight extirpated species under this legislation.[66]

6.4 New Brunswick

6.4.1 The Game Management Era

The New Brunswick statutes which meet the criteria for the game management era include:

- *Game Act*, R.S.N.B. 1973, c. G-1
- *Game Act*, R.S.N.B. 1952, c. 95
- *Game Act*, R.S.N.B. 1927, c. 36, Vol. I
- *Game Act*, C.S.N.B. 1903, c. 33
- *The Protection of Certain Birds and Animals*, C.S.N.B. 1877, c. 112
- *The Destruction of Bears*, C.S.N.B. 1877, c. 113
- *An Act to Encourage the Destroying of Wolves*, R.S.N.B. 1786-1836, CAP. V
- *An Act to Grant a Bounty on the Destruction of Bears in this Province*, R.S.N.B. 1786-1836, CAP. XIX

The early predator control legislation is primarily of historical interest. New Brunswick encouraged the elimination of wolves and bears because of their depradation of livestock and the perceived threat to humans. The payment of bounties for bears, lynx and porcupine continued in the game legislation until 1952. Porcupine were more likely a pest than a threat.

The 1877 legislation for the protection of birds and animals applied only to those animals and birds listed in the Act. It set seasons but no bag limits for moose, caribou and deer along with furbearers and game birds. It established some early controls on the method of hunting. No dogs could be used to hunt large game and nets, swivel and punt guns and other contrivances were prohibited in hunting for brant, ducks and game birds.

The 1903 *Game Act* is the first New Brunswick statute to meet all the criteria for stage 1. It defined "game" as any animal or bird mentioned in the Act or of a species or class similar thereto. The Act set seasons for moose, caribou, furbearers and game birds. The statute closed the season for partridge for two years after the passage of the legislation. Bag limits were set for moose, caribou and deer. The Act prohibited Sunday hunting, night hunting, jacklighting and the use of dogs or snares to hunt deer, moose and caribou. Hunting and

66 *Threatened, Endangered and Extirpated Species Regulation*, Man. Reg. 25/98, ss. 1, 2 & 3.

possession of guns in parks and pleasure grounds was prohibited. The buying, selling, offering and exposing of game was prohibited except as provided for in the Act. Common carriers had to ensure that game was tagged before they transported it. It was an offence to attempt to or to hunt partridge for export. Both residents and non-residents required licences to hunt. Bounties were established for lynx.

The 1927 *Game Act* was very similar to the 1903 Act. It set seasons for deer, moose and caribou but closed season for caribou until 1930. Controls and prohibitions with respect to these species were as in the 1903 statute. Seasons were set for furbearers and for partridge. A bag limit was also set for these birds. Licences were required to hunt big game and birds. Non-residents needed licences and guides to hunt. Controls on trade and sale of game were not much changed from the 1903 Act. Section 84 of the 1927 Act gave the Minister the authority to set up game refuges where hunting and the possession of guns was prohibited.

The 1952 *Game Act* was again limited in its application to those animals mentioned in the Act. "Game" was defined as furbearing animals, game animals and game birds, all of which definitions included a list of applicable animals. Game birds included migratory birds as defined in federal legislation. Game animals included moose, caribou, deer, hare and rabbit. The statute set the seasons for game animals, furbearers and game birds. It set bag limits for those animals which could be hunted. Cows and calves of game animals could not be hunted, nor could beaver, until 1955. A number of hunting offences were created including Sunday and night hunting, hunting in parks, the use of dogs or snares for game animals and snares for bears, the use of poison for furbearers, and the use of various gear and contrivances. Also prohibited was hunting from vehicles and certain dangerous hunting practices. Licences were required for both residents and non-residents to be able to hunt. Non-residents needed a guide. Licences included tags which must be affixed to game. The list of activities requiring a licence has expanded from that in earlier legislation. The controls on the hunting, possession and trade in game were made more comprehensive. The use of regulations to enable detailed control of hunting and other activities was also expanded. Trade in wildlife was restricted by requiring export permits, by limiting the transportation services provided by common carriers unless a permit was obtained and by restricting the sale of game. This Act provides for the establishment of game refuges where no hunting was permitted.

Careful review of the 1973 *Game Act* indicates that is very similar to the 1952 legislation and that no significant changes in the system of game management were effected by the 1973 statute. The reliance on regulation for the fine detail of wildlife management continued to expand as did the number of kinds of licences and the rules associated with their issuance and use.

6.4.2 The Wildlife Management Era or the Sustainable Wildlife Management Era?

Review of the balance of the modern New Brunswick legislation indicates that wildlife management in the province is clearly in the sustainable wildlife management era but on its own, the 1980 *Fish and Wildlife Act* fails to satisfy the criteria for stage 3.[67] The following statutes were reviewed:

- *Endangered Species Act*, S.N.B. 1996, c. E-9.101
- *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1[68]

The *Fish and Wildlife Act* of 1980 defines "wildlife" as any vertebrate animal or bird that is wild in the province, except a fish and any exotic animal introduced to the province". Furbearing animals and game birds are also defined and include a list, supported in the case of game birds by the inclusion of those migratory birds covered by federal legislation. The Act contains a clause declaring the province's property in wildlife within the province. The hunting control system is refined by the inclusion in the statute of detailed regulation making provisions. Overall, the 1980 Act is not significantly changed from the 1973 legislation. Control of seasons, areas to be hunted, bag limits and licence entitlements for residents and non-residents and for a variety of rules with respect to the exercise of hunting privileges are provided for by the statute. A variety of provisions including gear restrictions, prohibitions against the use of vehicles, certain contrivances and requirements to affix tags and the requirement to report hunting activities are included in the legislation and are similar to those in earlier statutes. The import and export of wildlife into the province is controlled by permit.

The *Endangered Species Act* of 1996 defines an endangered species as "any indigenous species of fauna or flora threatened with imminent extinction or imminent extirpation throughout all or a significant portion of its range". The Act binds the Crown. Endangered species are designated by regulation. It is an offence to wilfully or knowingly kill, injure, disturb or interfere with endangered species and with the nests, dens, habitats of endangered species.

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67 It appears that New Brunswick manages wildlife habitats in conjunction with forest management objectives and thus outside the scope of its wildlife legislation. This is one of the few provinces with a stand alone wildlife policy: *Wildlife Policy for New Brunswick*, September 1995. The policy includes provisions related to habitat management. Personal communication, Dr. A. Boer, Director, Fish and Wildlife Branch, Department of Natural Resources and Energy. Because of the way in which the research for this paper was limited, forestry legislation was not reviewed.

68 Consolidated to 31 March 1997.

6.5 Newfoundland

6.5.1 The Game Management Era

The following statutes meet the criteria for the game management era in Newfoundland:

- *The Killing of Wolves Act*, R.S.N. 1952, c. 198
- *Of the Preservation of Game Act*, C.S.N. 1916, c. 148
- *The Preservation of Deer Act*, C.S.N. 1916, c. 147
- *Of the Preservation of Beavers Act*, C.S.N. 1916, c. 149
- *Of the Preservation of Foxes Act*, C.S.N. 1916, c. 150
- *Of Killing Wolves Act*, C.S.N. 1916, c. 151
- *Of the Preservation of Game Act*, C.S.N. 1892, c. 144
- *Of the Preservation of Deer Act*, C.S.N. 1892, c. 143
- *Of Killing Wolves Act*, C.S.N. 1892, c. 142

The predator control legislation in Newfoundland was aimed at wolves and based on the *Of Killing of Wolves Acts*. The payment of bounties was authorized by the legislation of 1892, 1916, and 1952. These statutes were very similar and as noted in other provinces, predator control likely contributed to both game management and agricultural goals.

The 1916 legislation for the preservation of foxes established a season for fox hunting. The statute passed the same year for the preservation of beavers set a close season for beaver for the period from 1913 to 1916 and established an offence of hunting, killing or pursuing beaver and another offence for the possession or procuring of beaver skins.

The 1892 *Of the Preservation of Deer Act* prohibited the hunting of moose or elk for a ten year period after 1886. The Act established a season and bag limit for caribou. Non-residents were required to secure a licence to hunt caribou. No export of caribou was permitted as an article of commerce. The Act prohibited the use of dogs, snares, pits, traps and other contrivances while hunting for caribou. Poor settlers and members of surveying parties were allowed to kill caribou for food when in need.

The 1892 *Of the Preservation of Game Act* established seasons for ptarmigan, curlew, plover, snipe, wild or migratory birds except geese, wild rabbits and hare. No bag limits were set for these species. It was an offence to hunt this game other than during open season. The sale of game was possible in the period subsequent to the open season. The 1916 *Of the Preservation of Game Act* was virtually unchanged from the 1892 statute. The 1916 *Of the*

Preservation of Deer Act reduced the bag limit for caribou and established a small no hunting zone. Otherwise, this 1916 Act was very similar to the 1892 *Of the Preservation of Deer Act*.

6.5.2 The Wildlife Management Era

The following statutes meet the criteria for the wildlife management era in Newfoundland:

- *Wild Life Act*, R.S.N. 1990, c. W-8
- *The Wild Life Act*, R.S.N. 1970, c. 400
- *The Wild Life Act*, R.S.N. 1952, c. 197

The Wild Life Act of 1952 expanded the scope of earlier legislation. The term "wild life" is defined as "any wild animal or bird to which the provisions of the Act or the regulations apply". Thus, despite the breadth of the term wild life, the statutory framework is still limited by its own terms. The Act provided the authority for the Minister to establish reserves for wild life where no hunting was permitted. The statute gave the Minister the authority to establish regulations in order to ensure the protection, preservation and propagation of wild life and included some 26 heads of regulation making authority. Among other things, regulations could be made to set seasons, bag limits, and areas where hunting could take place, to control methods of hunting, for the establishment of licences and to regulate the possession, sale and purchase of wild life. The Minister was also given the authority to establish an advisory board to assist him in his duties.

The *Wild Life Acts* of 1970 and 1990 were very similar to that of 1952. The regulation making powers in these later statutes continue to expand.

None of the Newfoundland wild life laws meet the criteria for the sustainable wildlife management era. We are informed that the government of Newfoundland is developing endangered species and biodiversity legislation but that these initiatives are still in the public consultation phase.

6.6 Northwest Territories[69]

6.6.1 The Game Management Era

The following Northwest Territories legislation meets the criteria for the game management era:[70]

- *Game Ordinance*, R.S.N.W.T. 1974, c. G-1
- *Game Ordinance*, R.S.N.W.T. 1956, c. 42
- *The Game Ordinance*, S.N.W.T. 1905, c. 85
- *The Useful Birds Ordinance*, S.N.W.T. 1905, c. 107

The Useful Birds Ordinance and *The Game Ordinance* of 1905 were legislation of the Territorial Council when it sat in Saskatchewan and have a prairie flavour. In the period after the creation of the prairie provinces, Parliament re-exerted its authority and in 1906, enacted the *Northwest Game Act*.[71] Local control of game was reestablished by amendment of the *Northwest Territories Act* and repeal of the *Northwest Game Act* in 1948.[72]

The 1956 Ordinance was applicable in what until April 1, 1999 was the Northwest Territories. This statute had features which clearly marked it as "northern" legislation, such as the creation of a general hunting licence for long term residents, and trading post and outpost licences to authorize commerce in game meat. Similar provisions are found in legislation of the Yukon Territory. The absence of bag limits and the open approach to the sale of game continued well into the 1970's and are features of northern wildlife regimes All these statutes nonetheless met the stage 1 criteria.

The Useful Birds Ordinance prohibited the hunting or killing of any birds except birds of prey such as hawks or eagles and bird pests such as crows, ravens, blackbirds, cowbirds, grackles and sparrows and other listed birds. The statute also provided for the protection of useful birds by prohibiting the destruction of their eggs.

The Game Ordinance of 1905 protected those animals and birds listed in the statute. The term "game" was defined in reference to lists of big game and game birds contained in sections 4

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69 This analysis is equally applicable to the history of wildlife law in Nunavut. See *supra* note 25.

70 There was no revision of territorial legislation between 1905 and 1956.

71 R.S.C. 1906, c. 151.

72 S.C. 1948, c. 20 added legislative authority for the "preservation of game in the Territories to the NWT Act." The *Northwest Game Act* was repealed effective 1 July 1949.

and 5 of the statute. The Ordinance set seasons for big game, game birds and furbearers. It established a close season for beaver until the end of 1908. It included a number of prohibitions to protect game including the prohibition of night hunting, the use of poison, the use of set or swivel guns and the use of dogs or lights to hunt big game. The statute prohibited the hunting of the females or young of big game and it established a requirement for non-residents to have hunting licences. Trade in game was controlled in a limited way. Game could not be exported without the permission of the Commissioner. The sale of the meat of mountain goats and sheep was prohibited.

Otherwise, the sale of game was possible subject to the Ordinance.

The 1956 *Game Ordinance* reflected the remoteness, the small population and the importance of game meat in the Northwest Territories. It defined "game" to include big game, furbearers and game birds. Big game included bison, musk ox, mountain sheep and goat, deer, caribou, moose, bear and any animal declared to be big game by the Commissioner. Game birds included migratory birds, grouse, ptarmigan and prairie chicken. The hunting provisions for birds were subject to federal migratory birds legislation. The hunting controls in the statute were subject to the rights granted to Indians and Eskimos to hunt for food on unoccupied Crown lands at all seasons of the year.[73] The statute requires that hunters have a licence to hunt unless otherwise authorized. It provided for the setting of seasons and bag limits for game. However, with the exception of caribou, no bag limits for big game were set. The Ordinance included a series of gear restrictions and prohibitions to control hunting activities. Some examples include restrictions on automatic firearms and certain types of ammunition, prohibitions against the use of snares and poison, hunting from vehicles, the use of dogs and the wasting of game meat fit for human consumption. Twelve different kinds of licences were established by the Ordinance. A general hunting licence for aboriginal and long-term residents of the territory provided for special privileges. Holders of this licence could sell game meat. Their hunting privileges were virtually unlimited. Trade in game meat was authorized and trading post or outpost licences allowed for the commercial sale of game meat. Hotels, restaurants, mining camps and other such establishments could serve game meat if granted permission. The Ordinance provided for the registration of traplines in the Mackenzie District and the establishment of fur farms. Finally, it established wildlife preserves and sanctuaries. Hunting was prohibited in both these types of areas. General hunting licence holders could,

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73 Today, identical limitations on Territorial authority to enact wildlife legislation are found in s. 18(3) of the *Northwest Territories Act*, R.S.C. 1985, c. N-27 as am. They are very similar to limitations on the application of provincial game law to Indians found in the schedules of the *Natural Resources Transfer Acts* of 1930 which transferred control and ownership of natural resources to the provinces of Alberta, Manitoba and Saskatchewan.

however, hunt furbearers in preserves.

The *Game Ordinance* of 1974 was very similar to the 1956 statute, largely unchanged in scope. The hunting controls in the statute were expanded and became more detailed. Hunting from roads, from vehicles and from aircraft was prohibited. Bag limits were still not widely imposed. Provisions to establish bounties for predatory animals were included. Trade in game meat was still legal but some limits were being established. General hunting licence holders could sell meat but only subject to the regulations. The export of game and live predators was prohibited except with permission of the Commissioner. The Mackenzie Bison Sanctuary was established. Generally there are few major changes between the 1956 and the 1974 Ordinances.

6.6.2 The Wildlife Management Era or the Sustainable Wildlife Management Era?

The legislation which meets the criteria for stages 2 and 3 for the Northwest Territories includes:

- *Wildlife Act*, R.S.N.W.T. 1988, c. W-4[74]
- *Wildlife Ordinance*, S.N.W.T. 1978, c. 8

The *Wildlife Ordinance* of 1978 was new legislation which repealed the 1974 statute. The 1988 revision of this statute included only minor changes. Since 1988, one major amendment has taken place, adding a part 2 to reflect the results of the settlement of the Inuvialuit land claim.[75] Otherwise, the current Act is largely the same as the 1978 legislation. It includes features which meet the stage 2 criteria but its habitat management authorities and approach to domestic and interjurisdictional trade in wildlife are limited. The statute includes no provisions for the protection of endangered species or biodiversity. I have concluded that this legislation best fits the stage 2 criteria.

The *Wildlife Ordinance* of 1978 was broader in scope than earlier legislation. It defined wildlife as "a vertebrate except a fish that in its natural range is wild in nature and is naturally occurring in the Territories." The term habitat was included and defined. The term "game" was defined to include big game, small game and furbearing animals. The Ordinance was made expressly subject to migratory birds legislation and the limits in the *Northwest Territories Act*. Extensive use was made of regulations to enable detailed wildlife management

74 Consolidated to April 1999.
75 *The Western Arctic Claim: The Inuvialuit Final Agreement*, 1984.

controls. Over 30 heads of regulation making power are found in the Ordinance. A system of wildlife management units, zones and areas, on a scale of decreasing size, provided the basis for wildlife management. A number of special areas can be created, including wildlife sanctuaries and preserves, wildlife management areas and critical wildlife areas. All of these designations and the details of the management scheme for each area are based on regulation. The licencing and permitting system was also refined but the details of the numbers, types and entitlements attached to licences was relegated to regulation. Hunting controls and prohibitions are quite similar to the 1974 legislation. Trade in wildlife was still possible but widespread commercial use was limited. General hunting licence holders could still barter and trade among themselves but sale to others was no longer permitted. The outpost and trading post licences disappeared. Transportation and export permits for game are now required.

The 1988 revision is not materially different from the 1978 Ordinance. Since 1988, the only major change to the statute has been the 1994 amendment to include provisions reflecting the special harvesting rights granted to Inuvialuit who settled a land claim in 1984. Part 2 of the Act, however, merely repeats the wording of the wildlife harvesting portions of the land claim. No changes to the statute have been made to reflect the settlement of more recent land claims.[76]

The Territorial Government has undertaken public consultation to discuss changes to its wildlife legislation. The government recently released two discussion papers on changes to the Act, one addressing the need for general change and updating, the second addressing the need for species at risk legislation.

6.7 Nova Scotia

6.7.1 The Game Management Era

The legislation which meets the criteria for the game management era in Nova Scotia includes:

- *Lands and Forests Act*, R.S.N.S. 1967, c. 163
- *Lands and Forests Act*, R.S.N.S. 1954, c. 145
- *The Forests and Game Act*, R.S.N.S. 1923, c. 153

76 The Gwich'in and Sahtu Dene Metis settled claims in 1992 and 1993, respectively. These claims also include wildlife harvesting chapters which affect territorial legislation.

- *The Game Act*, R.S.N.S. 1900, c. 101
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1884, c. 76
- *An Act for the Preservation of Useful Birds and Animals*, R.S.N.S. 1873, c. 13
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1873, c. 73
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1873, c. 74
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1864, c. 92
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1864, c. 93
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1851, c. 92
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1851, c. 93

The *Of the Destruction of Noxious Animals* statutes did not change from their inception in 1851 through the 1864 and 1873 revisions of Nova Scotia's statutes. The legislation provided for the destruction of bears, wolves and wildcats through the establishment of a bounty.

The *Of the Preservation of Useful Birds and Animals* legislation was of limited scope and extended statutory protection only to those animals and birds listed in the legislation. These early statutes do not meet all of the stage 1 criteria. The 1851 Act simply prohibited the hunting or killing of partridge, snipe or woodcock except in season. It also included the authority to set a moose season and a period during which moose meat could be bought and sold. The 1864 and 1873 versions of this statute set seasons for moose and caribou and bag limits. They prohibited the killing of pheasants and set seasons for furbearers. They prohibited the buying or selling and the possession of game birds in the close season. The 1873 Act prohibited the export of moose and caribou hides.

An Act for the Preservation of Useful Birds and Animals of 1873 set a close season for moose until 1877 and prohibited the sale and possession of moose meat. It prohibited night hunting for game birds, set a season for rabbits and hare and established a close season on beaver until 1877. Ducks were added to the game birds for which seasons were set.

The last of the early Nova Scotia game statutes was the *Of the Preservation of Useful Birds and Animals* from 1884. This Act set a season and bag limits for moose and caribou. During this time these animals could be hunted and their meat could be bought and sold. Some general prohibitions controlling hunting techniques were included in the statute. No snares, traps or pits and no dogs could be used to hunt moose or caribou. The statute set a seasons for beaver, rabbit and hare and other furbearers. It made provision for the live trapping of mink so that they could be bred on fur farms. The Act set seasons for grouse, partridge, ducks and other game birds and close season for pheasants. It prohibited the killing of song birds and the destruction of nests or eggs of birds protected by the Act. This Act also prohibited the

export of moose or caribou hides from the province.

The Game Act of 1900 was quite similar to the 1884 legislation. It applied to "game" which included moose, caribou, deer and elk, furbearers and game birds. It continued the prohibition against snares, pits, traps, dogs and other contrivances used in the hunting of big game. It set seasons and bag limits for these animals. It also outlined the periods during which meat and hides from these animals could be sold. The statute set seasons for rabbits, hares and furbearers and for game birds. It prohibited the hunting of game birds at night as well as the use of snares, nets and traps for hunting birds at any time. This Act established the first requirement for a non-resident hunting licence.

The Forests and Game Act of 1923 set seasons and a bag limits for moose, deer and caribou and prohibited the hunting of females and young of these species. The Act allowed farmers to chase off or kill large game which was destroying their crops. It was still legal to sell the meat of these animals during limited periods of the year but the meat had to be certified to indicate that it was lawfully killed. A close season for beaver, fisher and marten was established. The provisions in this statute for seasons and bag limits for game birds are very similar to those contained in the 1900 legislation. The number and types of licences provided for by the statute increased. Export permits were now required for all game protected by the statute.

The *Lands and Forests Act* of 1954 continued with the system of hunting controls for big game, furbearers and game birds established in earlier legislation and continued the refinement of the general prohibitions applicable to hunting activities. It prohibited night hunting of big game and the killing of swimming moose. Bag limits were established for game birds and the statute still allowed some birds of prey to be hunted. It prohibited destruction or damage to beaver houses and muskrat pushups. The sale of moose, caribou or deer meat and the sale of game birds was prohibited. This statute included the first provisions for the establishment of game sanctuaries where hunting and trapping could be prohibited. The use of regulations to effect detailed wildlife management goals was initiated in this Act.

The *Lands and Forests Act* of 1967 was much like the 1954 Act. Extensive use of regulations appears for the first time in this statute. Controls on hunting intended to ensure public safety appear. Provisions such as offenses for the careless use of firearms, for hunting along highways and for having loaded guns in vehicles were included. The Act included provisions for the establishment and regulation of pheasant hunting preserves and for the creation of wildlife management areas and regulation of hunting therein.

6.7.2 Wildlife Management Era or Sustainable Wildlife Management Era?

The following statutes meet the criteria for the sustainable wildlife management era in Nova Scotia:

- *Endangered Species Act*, S.N.S. 1998, c. 11
- *Wildlife Act*, R.S.N.S. 1989, c. 504[77]

Review of the Nova Scotia wildlife legislation indicates clearly that the most recent *Wildlife Act* and endangered species statute meet the criteria for stage 3. It would seem that given the twenty year time span between the 1967 revision and the most recent *Wildlife Act* that the province skipped right through stage 2 which was characterized above as being transitional.

The *Wildlife Act* of 1989 has a statement of purpose some of the elements of which include the goal of maintaining the diversity of species at levels of abundance to meet management objectives and the goal of insuring adequate habitat for established populations of wildlife. The statute includes reference to endangered species, defines conservation as the wise use of the wildlife resource ... toward the maintenance of sustained, optimum populations of wildlife. Wildlife is defined as any species of vertebrate which is wild by nature. This statute contains a clause vesting ownership of wildlife in the province. The Act establishes a wildlife advisory council and a habitat conservation fund. The fund's purpose is indicated to be research, the enhancement of habitats and the acquisition of land in order to protect wildlife habitat. The minister is given broad authority to enter into agreements in order to protect and manage wildlife and their habitat. This statute provides for wildlife sanctuaries, wildlife management areas and establishes a new type of area called wildlife parks which can be used for the exhibiting and breeding of wildlife or nature reserves. The Act protects threatened and endangered species and their habitat. These species are designated by regulation. The Act contains very extensive regulation making provisions. Most of the management controls on hunting activities will be effected by way of regulation. The general prohibitions associated with hunting activities contained in this legislation are similar to those in earlier statutes.

In 1998, Nova Scotia enacted the *Endangered Species Act* which provides for the designation, protection, conservation and recovery of species at risk, including the protection of their habitat. The Act indicates that the conservation of species at risk is a key component of a broader strategy to maintain biodiversity and to use biological resources in a sustainable manner. The statute includes a non-derogation clause in order to ensure that any actions

77 Consolidated to April 1999.

taken to protect species and risk do not adversely affect aboriginal rights. The statute binds the government and it supersedes other laws and bylaws. It provides for the establishment of a species at risk conservation fund to pay for scientific reports, recovery planning activities and the acquisition of habitat. Endangered species are species that face imminent extinction or extirpation. They are listed by way of regulation. The statute prohibits the killing, injuring, possession, disturbing, taking or interference with an endangered or threatened species or some are activities affecting the dwelling places or habitats of these species. The act provides for recovery planning to begin within one year of a species being listed. Once core habitat of these species is identified it is accorded protection by law.

6.8 Ontario

6.8.1 The Game Management Era

The following Ontario legislation meets the criteria for the game management era:

- *The Wolf and Bear Bounty Act*, R.S.O. 1970, c. 500
- *The Game and Fisheries Act*, R.S.O. 1960, c. 158
- *The Wolf and Bear Bounty Act*, R.S.O. 1960, c. 434
- *The Game and Fisheries Act*, R.S.O. 1950, c. 153
- *The Wolf and Bear Bounty Act*, R.S.O. 1950, c. 427
- *The Game and Fisheries Act*, R.S.O. 1937, c. 353
- *The Protection of Birds Act*, R.S.O. 1937, c. 354
- *The Wolf Bounty Act*, R.S.O. 1937, c. 355
- *The Game and Fisheries Act*, R.S.O. 1927, c. 318
- *The Protection of Birds Act*, R.S.O. 1927, c. 319
- *The Wolf Bounty Act*, R.S.O. 1927, c. 320
- *The Ontario Game and Fisheries Act*, R.S.O. 1914, c. 262
- *The Protection of Birds Act*, R.S.O. 1914, c. 263
- *The Wolf Bounty Act*, R.S.O. 1914, c. 264
- *The Ontario Game Protection Act*, R.S.O. 1897, c. 287
- *An Act for the Protection of Insectivorous and other Birds*, R.S.O. 1897, c. 289
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1897, c. 290
- *An Act for the Protection of Game and Fur-Bearing Animals*, R.S.O. 1887, c. 221
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.O. 1887, c. 222
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1887, c. 223
- *An Act for the Protection of Game and Fur-Bearing Animals*, R.S.O. 1877, c. 200

- *An Act for the Protection of Insectivores and other Birds Beneficial to Agriculture*, R.S.O. 1877, c. 201
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1877, c. 202

From 1887 to 1970, Ontario had legislation encouraging the destruction of wolves through the establishment of a system of bounties. From 1950 until 1970, in prescribed areas, bears could also be destroyed in order to collect a bounty. This legislation varied little during this whole period. It simply established the bounty system and provided for the proof of a kill and the collection of a bounty upon sch proof. This legislation may have contributed to both agricultural and wildlife management goals.

Beginning with *An Act for the Protection of Insectivorous and other Birds Beneficial to Agriculture* in 1877, and continuing with *The Protection of Birds Acts* until 1937, Ontario had legislation in place to protect small insectivorous birds that were useful in an agricultural context. Throughout this period and thereafter, game birds were managed under separate legislation. The protections offered to insectivorous and game birds were not until quite recently extended to birds of prey such as eagles, falcons, hawks and owls and to birds which were treated as pests, kingfishers, jays, crows, ravens, English sparrows, grackles and others. Over time this list was reduced but only in the last 20 years or so has the importance of birds of prey, in particular, been reflected by corresponding statutory protection. The overall scheme of this legislation was to protect the "useful" birds, their eggs, nests and young and to prohibit the killing capturing and possession of such birds. Birds of prey and bird "pests" were not so protected.

The 1877 and 1887 game and furbearer protection laws were very similar. Their protections extended only to the species dealt with in the statutes. This included big game, deer, moose, elk and caribou, game birds, wild turkeys, pheasant, grouse and partridge, quail, woodcock and snipe and waterfowl. It also included furbearers. These Acts set seasons for hunting these species but no bag limits. They limited the period during which game might be sold and they outlawed traps, nets, snares, poison, nightlights and battery guns as well as other engines and contrivances for use in hunting big game and game birds. The 1887 Act authorized the establishment of private preserves, areas where imported game raised for hunting could be hunted. It prohibited the use of dogs to hunt deer.

The Ontario Game Protection Act of 1897 continued the evolution of Ontario game law, establishing licence requirements. Non-residents needed a licence to hunt in Ontario and residents now needed a deer licence. Common carriers were limited in transporting deer to certain periods and the requirement for a coupon to be affixed to the game so transported

was instituted. The hunting of big game and game birds for export was prohibited. Trespass on private land and into standing crops in pursuit of game was prohibited. Game preserves were authorized and could be established by Order in Council. A Board of Fish and Game Commissioners was established to advise the government.

From 1914 to 1960, the five revisions to the game and fisheries legislation indicate a measured and deliberate evolution of the Ontario game management regime. Hunting control, including seasons and bag limits were refined in response to management need. Bag limits for big game were reduced. The detailed management provisions required to manage game in the province were progressively moved into regulation. The prohibitions on gear, firearm types, the use of poison and various contrivances for hunting big game and game birds were refined, tightened and for the latter portion of this period were not materially changed. Licence requirement were expanded and the possession, sale and transport of game became tightly controlled. Limits were placed on the use of vehicles, boats and aircraft for hunting. Non-residents in parties of two or more had to hunt with guides after 1937. By the end of the period all hunting required a licence, the propagation of game for restocking purposes required a licence, the hunting of frogs was subject to control under the legislation and hunting in provincial parks was prohibited, subject to the regulations. These statutes all meet the stage 1 criteria.

6.8.2 The Wildlife Management Era

The following statutes in Ontario meet the criteria for the wildlife management era:

- *The Game and Fish Act*, R.S.O. 1970, c. 186

This Act was transitional and it meets most of the stage 2 criteria. It included very extensive regulation making authorities with over 47 different categories of subject matter for regulations. The statute included a purpose statement which refers to the goal of managing, perpetuating and rehabilitating the wildlife resources of Ontario in order to establish and maintain a maximum wildlife population. The Act provided authority for the acquisition of lands to effect those purposes, for the Minister to enter into agreements with land owners to meet these purposes and for habitat improvement, protective measure and restocking. Provisions for artificial replenishment appear in this statute but they were present in earlier Ontario game laws as well. The Act continued to provide for game bird hunting preserves and fishing preserves. It also continued to apply to the harvesting of frogs and provided for the setting aside of waters for the conservation or propagation of frogs. The many regulatory authorities provided for great detail in the management of wildlife.

6.8.3 The Sustainable Wildlife Management Era

The following Ontario statutes meet the criteria for the sustainable wildlife management era:

- *Fish and Wildlife Conservation Act*, S.O. 1997, c. 41
- *Endangered Species Act*, R.S.O. 1990, c. E.15
- *Game and Fish Act*, R.S.O. 1990, c. G.1
- *Game and Fish Act*, R.S.O. 1980, c. 182

The scope of the game and fish legislation in Ontario has included frogs since 1960 but in 1980 and thereafter, it is expanded to include other amphibians and reptiles as well. The *Fish and Wildlife Conservation Act* makes provisions for specially protected amphibian, birds, invertebrates, mammals, raptors, reptiles and wildlife to be scheduled and accorded protection. Ontario has had endangered species legislation since the 1980's and the provisions of the game and fish legislation are subject to the provisions protecting endangered species when these latter provide greater protection. The current suite of legislation from Ontario clearly meet the stage 3 criteria.

6.9 Prince Edward Island[78]

6.9.1 The Game Management Era

The following statutes meet the criteria for the game management era in Prince Edward Island:

- *The Game Act*, R.S.P.E.I. 1951, c. 67
- *The Game Act, 1937*, S.P.E.I. 1937, 1 Geo. VI, Cap. 13
- *The Game Act, 1928*, S.P.E.I. 1928, 18 Geo. V, Cap. 16
- *The Game Act, 1906*, S.P.E.I. 1906, 6 Edw. VII, Cap. 26
- *An Act for the Preservation of Partridge*, S.P.E.I. 1898, 61 Vict., Cap. IX
- *An Act to Protect Wild-fowl*, S.P.E.I. 1884, 47 Vict., Cap. VIII
- *An Act for preventing the killing of Wild Ducks, Snipe, Woodcock, and Bittern, at improper seasons*, S.P.E.I. 1873, 36 Vict., Cap. VI

78 Prince Edward Island's legislation was searched as far back as material was available and no consolidations were found between 1773 and 1951. The statutes used in this review were thus selected to give a reasonable indication of the eras in PEI wildlife law.

The 1873, 1884 and 1898 legislation do not meet the criteria for game management era legislation. The 1873 Act protected only ducks, snipe woodcock and bittern from hunting during the breeding and hatching season from mid April to the beginning of September. It also prohibited possession and sale of these species on the Island. The 1884 Act prohibited the use of torches and other night lights in the hunting of wild fowl. The 1898 Act would appear to have been passed to give partridge on the island a chance to recover from over harvesting. It prohibited any killing, possession or sale of partridge on the Island for two years after the passage of the legislation.

The Game Act of 1906 defined game as any animal or bird mentioned in the Act or species similar thereto. It established close seasons and created offences for taking buying, selling or offering game during the close season. It applied to partridge, ducks, shorebirds geese, hares and rabbits, martin and otter. Hawks, owls, crows, English sparrows and other bird pests that are not game could be hunted at any time. Night hunting, jacklighting, poisoning and similar prohibitions are included. Common carriers are prohibited from transporting game and the export or attempt to export game are prohibited. Non-residents cannot hunt without licences.

The Game Act of 1928 was largely unchanged from the 1906 version. It applied to the same list of game animals and included virtually the same hunting controls as the earlier Act. Bag limits were included for partridge and the hunting of pheasant was prohibited at all seasons. Hunting of non-game birds was also prohibited except the bird pests such as hawks, owls, English sparrows, etc. Wasting game was now an offence and angler's permits appeared for the first time.

The Game Act of 1937 applied to any animal, bird or fish mentioned in the Act, except domestic foxes and dogs. Bag or creel limits were set for trout and salmon, by weight or number of fish. The provisions of the federal migratory bird legislation were incorporated for those game birds covered by that Act. Close season for beaver was established and it became unlawful to destroy beaver lodges or musk rat pushups. The feeding of trout or salmon to mink or fox was prohibited. The prohibitions against sale or traffic in wildlife continued except with respect to hare or rabbit. Game licence holders could now take a limited number of birds out of the province. Owners of enclosed property were constituted wardens for purposes enforcing the Act on their own lands. Otherwise, there were no major changes to the statutory system.

The Game Act of 1951 continued the earlier definition of game, defined "fish"as a fish mentioned in the Act, listed furbearers and defined migratory birds on the basis of the definitions in the federal legislation. Upland game birds were distinguished from migratory

birds. This Act contained the first assertion of the province's property interests in wild animals and birds. The hunting controls included seasons set by species, bag limits and possession limits for birds that could be hunted as well as for hares and rabbits. Non-quota limits included protection of eggs and nests, prohibition of the use of bait and poison, the use of dogs to hunt mink, wasting of game and limits on the types of equipment which could be used to hunt and fish. A special prohibition against the dumping or release of deleterious substances into salmon or trout waters was included in the Act. No sale of upland game birds was allowed. Licences were still not needed for the hunting or killing of crows, blackbirds, starlings grackles, hawks and some owls. Bounties for the killing of skunks and foxes were provided for. Non-resident hunting licences were available but in limited numbers.

6.9.2 The Wildlife Management Era

The following statutes meet the criteria for the wildlife management era in Prince Edward Island:

- *Fish and Game Protection Act*, R.S.P.E.I. 1988, c. F-12
- *Fish and Game Protection Act*, R.S.P.E.I. 1974, c. F-8

The *Fish and Game Protection Act* of 1974 was expanded in scope, and defined "exotic animals" and prohibited their release. It defined fish, furbearers and game. The latter being "any animal, bird or fish designated as such by the regulations." Hunting and possession of migratory birds was based on federal legislation. Bounty provisions were continued for fox and skunk.

The 1974 Act included provisions to permit and regulate the establishment of private and public fishing preserves and private and public shooting preserves based on regulations and the requirement for licences to use these areas. These preserves were areas where fish or wildlife stocking and propagation could take place to provide recreational opportunities for users. Wildlife management areas were also provided for as established by regulation. The prohibition against the release of deleterious substances into trout and salmon waters was continued.

The system of hunting controls contained in earlier legislation, including bag limits, seasons and close seasons, gear controls and other non-quota limitation, was continued. Licences were required for angling and hunting, except for hare and rabbit in the open season.

The *Fish and Game Protections Act* of 1988 is almost identical to the 1974 legislation and made no significant changes to the system or approach to game management in the province.

6.9.3 The Sustainable Wildlife Management Era

The following statutes meet the criteria for the sustainable wildlife management era in Prince Edward Island:

- *Wildlife Conservation Act*, S.P.E.I. 1998, c. 107

The scope of this Act is considerably broadened from that of earlier statutes. It includes definitions for "aboriginal persons", provisions for the definition of endangered, threatened and vulnerable species and for their protection, a definition of and the means to protect wildlife habitat and a very broad definition of "wildlife", consistent with the approach taken in the 1990 Wildlife Policy for Canada.[79] In fact, only those species excepted from the definition of wildlife by regulation are not covered by the statute. Endangered, threatened and vulnerable species are prescribed by regulation. The Minister is required by the Act to report to the Lieutenant Governor in Council once each decade on the state of wildlife habitat, wildlife resources, wildlife initiatives and programs on both Crown and private lands and on the effects of land use and environmental activities on wildlife and wildlife habitats.

Offences are created to prevent the killing or harming of endangered, threatened or vulnerable species or their habitats.

The system of hunting controls developed in earlier legislation is maintained as are provisions for public and private fishing or shooting preserves. Section 18 of the Act provides for conservation agreements to include conservation easements or covenants applicable to private land for a series of purposes including the protection or enhancement of ecosystems, habitats and the retention of botanical, zoological and morphological features of the land. The regulation making powers contained in the Act are very broad and provide all the scope and detail necessary for detailed wildlife and habitat management and control.

79 *Supra* note 12.

6.10 Quebec

6.10.1 The Game Management Era

The following Quebec statutes meet the criteria for the game management era:

- *Game Act*, R.S.Q. 1964, c. 202
- *Game Laws*, R.S.Q. 1941, c. 153
- *Game Laws*, R.S.Q. 1925, c. 86
- *The Quebec Game Laws*, R.S.Q. 1909, ss. IX, 2309-2358
- *The Quebec Game Laws*, R.S.Q. 1888, ss. 1396-1420

The Quebec Game Laws of 1888 extended protection to those species of animals mentioned in the Act. These protections included the closing of season for moose until 1890, the setting of a season and bag limit for caribou and deer, for furbearers and for some game birds, including ducks. Other protections included the prohibition of certain hunting gear and contrivances, of the use poison for hunting, of night hunting for game birds and of the collection or disturbance of their eggs. A list of insectivorous birds were protected from March to September. Common carriers were prohibited from transporting the meat of moose, caribou and deer except in the open season. The sale of game was explicitly permitted but within limited periods of the year.

The Quebec Game Laws of 1909 refined its hunting controls by breaking the province into two zones, one general zone and a zone in the Chicoutimi, Lac Saguenay area where the harvesting limits were relaxed for some species. The general hunting control system was developed and refined. Seasons were set for deer, moose and caribou, for furbearers and for game birds. Bag limits for big game were reduced. Prohibitions appear to prevent the hunting of cow moose and young deer, moose and caribou, hunting of moose and deer in their winter yards, and the use of dogs to hunt deer or moose. The statute extended the prohibition against egging to all wild fowl. The close season for insectivorous birds was extended to November but a list of birds of prey, eagles, hawks, owls and bird pests including ravens, magpies, sparrows and grackles were specifically excluded from this protection. Sale of game meat continued to be possible during the open season and for 15 days thereafter. Cold storage licences appeared and holders of those licences and restaurants and hotels were permitted to serve game subject to licencing. Resident and non-resident hunting licences appeared. A wolf bounty was established. The establishment of private hunting territories by lease of Crown land with areas up to 200 square miles was authorized. Holders of these leases were given the exclusive right to hunt in these areas.

The *Game Laws* of 1925 was very similar to the 1909 version. The term "game animal" was defined to mean any animal or bird protected by this Act or its regulations. The general prohibitions applicable to hunting were expanded. Prohibitions against night hunting of big game, jacklighting, the use of ropes, snares set traps and fixed guns and wasting game were added to the Act. Seasons and bag limits were set for big game, furbearers and birds. A provision was included allowing variation of these limits for poor settlers and Indians. The trade, transportation and sale provisions for game were not significantly changed. Licences were required for trapping, fur sale, game sale, cold storage, for fur farms and to breed captive wildlife. The persons responsible for lumber camps, mining crews and similar remote activities were made vicariously responsible for any violations of game law committed by their employees. The regulation making and licensing provisions were expanded. Bird sanctuaries could now be established where there was to be no killing or capture of birds. The wolf bounty was continued. The 1925 statute contained a well developed hunting control system and was already fairly comprehensive in terms of its management of commercial activities related to game.

The *Game Laws* of 1941 divided the province into four sections for game management purposes allowing the setting of seasons and bag limits and other hunting controls to be varied by section of the province. This Act was very similar to the 1925 Act. Some of the differences included reductions in bag limits for large game. A bounty on bears was established. New authorities were granted the Minister to set up experimental farms to test captive breeding programs and to set up zoological gardens for research and other purposes.

The *Game Act* of 1964 was only incrementally different from the 1941 legislation. Safety provisions such as prohibitions against loaded guns in and hunting from vehicles were included. The sale of game meat and grouse and partridge was prohibited.

6.10.2 The Wildlife Management Era

The Quebec legislation which meets the criteria for the wildlife management era includes:

- *Wildlife Conservation Act*, R.S.Q. 1977, c. C-61

The scheme of this statute was modern, the detail depending heavily on supporting regulations. The Act established over 26 heads of regulation making authority. As an example of the approach taken, the section on hunting specifies that the animals which may be hunted, the season and the region of the province where this may take place will be outlined in the regulations. Similarly, the provisions on possession of wildlife indicate that the periods when

the possession of wildlife will be legal, the species of game which may be possessed and the number will be specified in regulation. The detail of the expanded scope of the statute is also relegated to regulation. New licensing provisions for outfitting were included in the Act. Otherwise except for the changes noted above, it was much like the 1964 Act.

6.10.3 The Sustainable Wildlife Management Era

The Quebec laws which meet the criteria for the sustainable wildlife management era include:

- *An Act Respecting the Conservation and Development of Wildlife*, R.S.Q. 1998, c. C-61.1
- *An Act Respecting Threatened or Vulnerable Species*, R.S.Q. 1998, c. E-12.01
- *An Act Respecting Hunting and Fishing Rights in the James Bay and New Quebec Territories*, R.S.Q. 1998, c. D-13.1

The *Act Respecting Hunting and Fishing Rights in the James Bay and New Quebec Territories* was not reviewed in detail. This legislation was required in order to reflect the special hunting and fishing rights granted to the Cree, Inuit and Naskapi peoples through the settlement of land claims in northern Quebec. These rights are protected by section 35 of the *Constitution Act*. The provisions of the other two statutes listed above apply in these land claim areas to the extent that they are not inconsistent with the land claim based harvesting rights.

The 1998 legislation, *An Act Respecting the Conservation and Development of Wildlife*, has a wide focus and must be read with the third statute listed above which addresses threatened and vulnerable species. The wildlife statute defines "animal" as "any mammal, bird, amphibian or reptile of any genus, species or subspecies propagating in the wild in Quebec or elsewhere, from indigenous stock ...". The Act applies to threatened and vulnerable species as well. It makes provision for the protection of habitats. These areas are studied and the Minister develops a list of areas which, subject to consultation with cabinet, is demarcated on a chart. At this stage, the habitat is officially recognized and activities that may damage it are prohibited, with some exceptions. The habitat is incorporated into land use plans and municipalities must consider it in their activities. The Act makes extensive use of regulations to effect detailed wildlife management and control of hunting. It provides for the establishment of wildlife preserves and sanctuaries on both public and private lands. Hunting can be prohibited and the management of these areas is accomplished by regulation. The wildlife legislation contains some unique provisions for cooperative approaches to wildlife conservation and management with native communities.[80] These provisions allow for

80 In the Act, see Chapter 11.1 "Provisions Specific to Native Communities".

agreements to better reconcile native harvesting for food, ritual or social purposes. The provisions of such an agreement prevail over the Act and its regulations as long as the native community abides by the agreement. The Act also includes the authority to adapt regulations when necessary to reconcile them with native activities.

An Act Respecting Threatened or Vulnerable Species addresses and protects such populations of wildlife and plants in Quebec. Threatened or vulnerable species are designated in regulation after consultation among cabinet members. The habitats of these species are identified and demarcated on a chart as are wildlife habitats more generally under the wildlife legislation. Offences are created to prohibit activities which may adversely affect designated species or their habitats.

6.11 Saskatchewan

6.11.1 The Game Management Era

The following statutes meet the criteria for the Game Management Era in Saskatchewan wildlife law:

- *The Wolf and Coyote Bounty Act*, R.S.S. 1978, c. W-15
- *The Game Act*, R.S.S. 1965, c. 356
- *The Wolf and Coyote Bounty Act*, R.S.S. 1965, c. 358
- *The Game Act*, R.S.S. 1953, c. 323
- *The Wolf and Coyote Bounty Act*, R.S.S. 1953, c. 325
- *The Game Act*, R.S.S. 1940, c. 251
- *The Wolf Bounty Act*, R.S.S. 1940, c. 253
- *The Game Act*, R.S.S. 1930, c. 208
- *The Useful Birds Act*, R.S.S. 1930, c. 164
- *The Wolf Bounty Act*, R.S.S. 1930, c. 117
- *The Game Act*, R.S.S. 1920, c. 132
- *The Useful Birds Act*, R.S.S. 1920, c. 131
- *The Wolf Bounty Act*, R.S.S. 1920, c. 98
- *The Game Act*, R.S.S. 1909, c. 128
- *The Useful Birds Protection Act*, R.S.S. 1909, c. 127
- *The Wolf Bounty Act*, R.S.S. 1909, c. 123

From 1909 until 1965, Saskatchewan wildlife law focused on “game” which was divided into big game, including bison, deer, moose and antelope and game birds, including geese, ducks,

cranes, shore birds, grouse and prairie chickens. Hunting controls predominated the provisions of the statutes including close seasons, and areas, including enclosed land. Sunday hunting and night hunting were prohibited. Certain hunting apparatus was outlawed as was poisoning of game and the use of dogs to hunt big game. Bag limits were instituted and over time reduced for both big game and game birds. Transportation and export of game were controlled and sale was prohibited. By 1920, game preserves could be established where hunting was prohibited. Private preserves game and fur farms were allowed and controlled by licensing.

Predator control was an ongoing element of the statutory scheme for the province but in an agricultural setting such as Saskatchewan in this period, such laws were likely as important to agriculture as they were to game management. The killing of birds of prey, crows, starlings, English sparrows and other pests was authorized by excluding these birds from the protection provided by the various *Useful Birds Acts*. By 1940, this latter statute had been eliminated as that scheme for protecting some birds had been built into *The Game Act*.

By 1940, greater use of regulations in order to support more detailed game management schemes became apparent as the number of heads of regulation making authority in the Act increased. This trend of increasing use of regulations continued with each new consolidated version of the Act. In *The Game Act* of 1953, the province first included a provision vesting ownership on game in the Crown. In the 1953 Act we also find the first explicit mention of Indian treaty harvesting rights guaranteed under the *Natural Resource Transfer Agreement*.[81] Over time the restrictions on the purchase, sale and shipment of game were tightened.

6.11.2 The Wildlife Management Era

The following statutes meet the criteria for the wildlife management era in Saskatchewan:

- *The Wildlife Act*, S.S. 1979, c. W-13.11
- *The Game Act*, R.S.S. 1978, c. G-1

The process of transition in Saskatchewan legislation arguably begins with *The Game Act* of 1978. The distinction between groups of game animals was refined with the addition of separate classes for migratory game birds and upland game birds. Game reserves and bird sanctuaries were distinguished to permit separate management. The regulation making provisions now permitted the establishment of four types of areas, game preserves, bird

81 See the Schedules to the *British North America Act, 1930* (U.K.), 21 Geo. V., c. 26.

sanctuaries, game management zones and areas for the protection or management of birds or animals. The use of regulations to effect wildlife management goals was expanded based on this law through an increased number of regulation making authorities.

The Wildlife Act of 1979 continued the transition process, repealing the earlier legislation and defining "wildlife" as vertebrate animals or birds of any species except fish wild by nature in the province. The term "habitat" first appeared and was given a wide definition in this legislation. Trade or traffic in wildlife was prohibited subject to the Act and regulations. Hunting controls in the 1978 and 1979 legislation were very well developed and did not change much from earlier game legislation. The establishment of detailed wildlife management mechanisms continued with the expansion of regulation making powers in the Act. No fewer than 37 heads of regulation making power are found in the 1979 legislation.

6.11.3 The Sustainable Wildlife Management Era

The following statutes meet the criteria for the sustainable wildlife management era in Saskatchewan:

- *The Wildlife Act, 1997*, S.S. 1997, c. W-13.11

This statute incorporates provisions covering hunting by Indians and interlocks with the provisions of the *Migratory Birds Convention Act* to reinforce the protection of these species. It continues the well developed system of hunting controls which has been a feature of Saskatchewan game law since 1909. The Act also includes provisions for the protection of habitat. The scope of the statute includes "wildlife" which are all vertebrates except fish, "wild species" which include plant and animal species and other organisms, and "wild species at risk". Part V of the Act is directed at the protection of wild species at risk. The importation of wildlife into the province is now controlled. The propagation and rehabilitation of wild species and wild species at risk is permitted subject to licencing requirements. Agreements for the protection, conservation, encouragement, propagation and reintroduction of wildlife, wild species and habitats are provided for.

6.12 Yukon

6.12.1 The Game Management Era

The following statutes meet the criteria of the game management era in Yukon:

- *Game Ordinance*, C.S.Y. 1976, c. G-1
- *Game Ordinance*, R.S.Y. 1975, c. G-1
- *Game Ordinance*, R.S.Y. 1971, c. G-1
- *Game Ordinance*, R.S.Y. 1958, c. 50
- *The Fox Protection Ordinance*, C.S.Y. 1914, c. 38
- *Yukon Game Ordinance*, C.S.Y. 1914, c. 39
- *An Ordinance Respecting the Preservation of Game in the Yukon Territory*, C.S.Y. 1902, c. 72

The early legislation was intended for the "preservation of birds and beasts" in Yukon. It did so by setting close seasons and allowing hunting during limited periods of the year. It focused on large game, musk ox, caribou, moose, deer, mountain sheep and goats and bison. Bison hunting was entirely prohibited. Swans, duck, geese, cranes and other migratory birds as well as grouse, partridge, pheasant and prairie chicken were also protected by close seasons and bag limits. Eggs and nests were also protected. The use of poison, dogs and some hunting gear was prohibited. The wasting of game was prohibited. These Ordinances did not apply to Indians but prohibited contracting with Indians to hunt game. The early legislation in Yukon provided very generous bag limits and explicitly provided for market sale of game by residents. By 1914, we see evidence of the attractiveness of big game hunting in Yukon. The 1914 Ordinance included provisions for licenced outfitting and guiding and established a one hundred dollar non-resident hunting licence fee.

By 1958, the law included a provision vesting ownership of all game in the Crown and its scope included big game, predatory animals, game birds and furbearers. Long term residents were able to hold a general hunting licence and did not need separate licences for the various classes of game. Game sanctuaries had been established and the trend toward the use of regulations to refine the detail of the game management system had begun. There were seven heads of regulation making authority in the Ordinance. Trade in game was still permitted within the Territory on the basis of a Trading Post Licence. Wildlife sanctuaries were established to protect and preserve wildlife and hunting was prohibited in these areas. The 1971, 1975 and 1976 Ordinances were not significantly different than the 1958 law.

Yukon is unique in several respects with regard to its game laws. First, market hunting was allowed and was an important part of the economy beginning with the need to feed miners during the gold rush.[82] Second, because of the unique legislative arrangements establishing

82 *Supra* note 30 at 48. McCandless points out that during the 1920s that the sale of game meat was very much a part of the Yukon scene.

the Territorial legislature, it could not limit the activities of Indians hunting for food on unoccupied Crown land.[83] Finally, the territory does not own Crown lands and thus its habitat management capability has always been limited. Thus the criteria chosen to distinguish the various eras of wildlife management legislation in this territory are affected by the special legal framework in the territory.

6.12.2 The Wildlife Management Era or Sustainable Wildlife Management Era?

Review of Yukon's wildlife statutes indicates that the 1986 Act was quite progressive. It appears that there are no clear stage 2 statutes. As indicated below, the 1986 Act satisfies more of the stage 3 criteria than the stage 2 criteria. Consequently it will be classified and discussed as a stage 3 statute.

The following statute meets the criteria for the sustainable wildlife management era in Yukon:

- *An Act to Amend the Wildlife Act*, S.Y. 1992, c. 15
- *Wildlife Act*, R.S.Y. 1986, c. 178

The 1986 Act defines "wildlife" as all vertebrates which are not fish. It goes on to distinguish between big game, fur bearing animals and game birds and outlines a system where hunting can be controlled on the basis of species, season and area of the territory. Bag limits and possession limits are provided for and can be varied by species and area on the basis of the regulations. Certain hunting methods are prohibited as is harassment of wildlife and dangerous hunting. Sale or purchase of wildlife is prohibited. Outfitting, guiding and trapping concessions and licences are provided for. The legislation is made explicitly subject to Indian hunting rights under the *Yukon Act*.

The Act provides for the designation of "specially protected wildlife" which include elk, musk ox, deer, cougar, gyrfalcons and peregrine falcons, trumpeter swans and other prescribed species. This grouping included some endangered and other species at risk but also included animals with locally or territorially threatened populations. This provision is not addressed unequivocally to endangered species. The Act also includes strong habitat management provisions. The regulation making powers in the Act are very extensive covering a broad range of topics. The 1992 amendment further strengthens habitat management authorities. This amendment protects habitat from the effects of development, including the establishment of a habitat protection fund.

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83 See the *Yukon Act*, R.S.C. 1985, c. Y-2, s. 19(3).

6.13 Canada

Part 2 of this paper outlined the different constitutional bases for federal and provincial legislation with respect to wildlife. Notwithstanding their importance, some of the federal authorities, such as Canada's role in regulating interprovincial and international trade and commerce,[84] have resulted in wildlife legislation which is fairly narrow in scope.[85] Other federal wildlife legislation such as the *Northwest Game Acts* were only of historical interest and will not be reviewed below. Our territories have now managed wildlife within legislative frameworks akin to the provinces for over fifty years.[86]

In light of this paper's interest in the evolution of wildlife law, it is important to include federal legislation in the review. Canada has primary responsibility for several areas which have had significant recent impact on Canadian wildlife law. For example, federal endorsement of CITES and the *Convention on Biological Diversity* has had an important forcing effect on provincial legislation and has led to such initiatives as the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*[87] (WAPPRIITA) and Bills C-65[88] and C-33[89] which address species at risk in Canada. Canada is also responsible for Indians and lands reserved for Indians under subsection 91(24) of the *Constitution Act* and, since the inclusion of section 35 in the *Constitution* in 1982, constitutional protection for aboriginal wildlife harvesting rights has also precipitated changes to wildlife laws. Thus the exercise of federal authorities in the wildlife area has made important contributions to the development of our wildlife law.

Federal officials also play a leadership role in wildlife matters, nationally and internationally. They played a central role in the development of the Wildlife Policy for Canada in 1990. No overview of the evolution of Canadian wildlife law could be complete without including a review of federal laws.

Federal wildlife law has also evolved but, given the unique role and focus of federal legislative authorities, the effectiveness of the part 5 criteria in identifying evolutionary trends in federal wildlife law has been affected. This problem has been offset by discussing federal wildlife laws

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84 Under s. 91(2) of the *Constitution Act*.
85 For example, the *Game Export Acts* discussed below.
86 The technical exception is Nunavut but wildlife management there is based on the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4, the roots of which can be traced back to 1949.
87 S.C. 1992, c. 52.
88 Bill C-65, *supra* note 14.
89 Bill C-33, *supra* note 50.

as a whole once the individual statutory developments have been traced. The results of these efforts are outlined below.

6.13.1 Game Export and Import Legislation

The following statutes were reviewed:

- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52
- *Game Export Act*, R.S.C. 1985, c. G-1
- *Game Export Act*, R.S.C. 1970, c. G-1
- *Game Export Act*, R.S.C. 1952, c. 128
- *Export Act*, R.S.C 1927, c. 63
- *Export Act*, R.S.C 1906, c. 50

The 1906 and 1927 Acts merely listed a series of goods upon which the Governor in Council could impose export duties. Sections 5 and 6 of these statutes were identical. They declared unlawful and prohibited the export of the carcasses and parts of certain game animals and established a penalty for exporting or attempting to export such goods. The game protected by these provisions included deer, wild turkeys, quail, partridge, prairie fowl and wood-cock.

In the 1952 *Game Export Act*, "game" was defined as the carcass or any part, including the skin of any wild animal, domestically raised fur bearing animal, wild fowl or wild bird, thus expanding the application of the Act. This legislation no longer simply addressed exports from Canada. The new system prohibited the export of game, including the taking, carrying, shipping or having in possession of game for these purposes, from the province where the game was killed to any area in Canada beyond the limits of the province of origin, without an export permit. Thus the legislative focus shifted from international to interprovincial trade and the federal and provincial export control systems were interlinked. The new system could be brought into force in any province by proclamation of the Governor in Council. The system established in 1952 went virtually unchanged in the 1970 and 1985 revisions of the Act.

The WAPPRIITA was enacted in 1992, repealing the old game export legislation. As the name indicates, this statute is aimed at the control of both international and interprovincial trade in wild animals and plants. It also implements a system which is consistent with Canada's obligations under CITES. This Act defines "animal" and "plant" as any specimens, whether dead or alive of any species of animal or plant listed in an appendix to CITES. It is binding on Canada and a province. Section 4 expresses its purpose as the protection of certain species

of plants and animals by implementing CITES and regulating international and interprovincial trade. It prohibits the import of animals and plants which were not legally owned or transported according to the laws of a foreign state.

The statutory system depends on a series of regulations which indicate the species which may not be imported to or exported from Canada and which list those species which may not be transported from one province to another. As in the earlier legislation, the provincial export permitting system is incorporated and accommodated. Section 7 prohibits transport of an animal or plant out of a province into another province except as provided for by the permitting system of the province of origin. Federal permits are also established for the importation, exportation or interprovincial transport of an animal or plant. WAPPRIITA includes modern enforcement provisions and provides for significant penalties as well as court orders to enforce the Act. As indicated the statutory scheme contemplates and depends on a number of regulations.

6.13.2 Migratory Birds Legislation

The following statutes were reviewed:

- *Migratory Birds Convention Act,1994*, S.C. 1994, c. 22
- *Migratory Birds Convention Act*, R.S.C. 1985, c. M-7
- *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12
- *Migratory Birds Convention Act*, R.S.C. 1952, c. 179
- *Migratory Birds Convention Act*, R.S.C. 1927, c. 130
- *Migratory Birds Convention Act*, S.C. 1917, c. 18

The *Migratory Birds Convention Act* (MBCA) was originally passed to ratify and bring into effect the *Migratory Birds Convention*.[90] The MBCA distinguished between "migratory game birds", "migratory insectivorous birds" and "migratory non-game birds". The statute provided a list of the species in each category based on lists in the *Migratory Birds Convention*. These are the birds protected by this statute. The Governor in Council was empowered to make regulations to identify those periods in a year or years when migratory birds were protected; for the granting of permits to kill migratory birds or harvest their eggs and nests; for the prohibition of shipment or export of migratory birds and their eggs during the close season in any province and for the conditions in which international traffic in such birds may be carried on; for the prohibition of killing and the molesting of migratory birds; and for other

90 *Migratory Birds Convention*, *supra* note 22.

purposes expedient to the carrying out of the intentions of the MBCA. Possession of birds, nests or eggs during prohibited periods was prohibited. Enforcement provisions were established including a fine for violation of the provisions of the MBCA of up to one hundred dollars.

In 1927, the fine for a violation of the Act was three hundred dollars and a fine splitting provision was included. Otherwise the MBCA was virtually unchanged. Likewise in 1952, 1970 and 1985, there were only minor changes. For example, the maximum fine provided for by section 12 of the 1985 MBCA was three hundred dollars, unchanged since 1927.

The MBCA was repealed and replaced in 1994. At least part of the rationale for change arose because of challenges to the constitutionality of the prohibition against spring hunting by aboriginal people based on section 35 of the *Constitution Act, 1982*[91] but it is also clear that the statute was in need of modernization.

The 1994 MBCA has been changed and now simply applies to "migratory birds" as listed in the *Migratory Birds Convention*. It includes a non-derogation clause, reflecting the constitutional paramountcy of aboriginal rights. It binds Canada and a province and repeats its historical purposes of protecting migratory birds and implementing the *Migratory Birds Convention*. The administration and enforcement provisions have been modernized and updated and the penalty provisions are significantly strengthened. The regulation making powers are extended and a number of new heads of regulation making power enhance the potential to manage migratory birds and to ensure enforcement of the MBCA. A provision is also included explicitly authorizing "protection areas" for migratory birds and their nests and for the control and management of those areas.

6.13.3 The Canada Wildlife Act

The following statutes were reviewed:

- *Canada Wildlife Act*, R.S.C. 1985, c. W-9[92]
- *Canada Wildlife Act*, S.C. 1973, c. 21

In 1973, the *Canada Wildlife Act* (CWA) defined "wildlife" as any non-domestic animal and it extended the provisions of the statute respecting wildlife to wildlife habitat. The Act

91 See for example, *R. v. Flett*, [1991] 1 C.N.L.R. 140 (Man. C.A.).
92 Consolidated to 31 December 1997.

authorized the Minister to undertake and promote measures for the encouragement of public cooperation in wildlife conservation and interpretation; to initiate conferences and research on wildlife conservation and interpretation; to undertake research and to establish facilities to that end; to establish advisory committees; and to coordinate and implement wildlife policies and programs. The Minister could be assigned public lands by the Governor in Council when they were required for wildlife research or conservation and could enter into agreements with the provinces for purposes of wildlife research, interpretation and conservation. Agreements were also possible with municipalities and other organizations, subject to provincial approval. Section 8 of the CWA authorized the Minister to take measures necessary for the protection of endangered species in cooperation with the provinces. The Governor in Council could authorize the Minister to acquire lands by purchase or lease for the conservation and interpretation of migratory birds and, with the agreement of the provinces, other wildlife. The CWA provided a series of regulation making authorities to assist in achieving the statutory purposes. The 1985 revision of this statute was virtually unchanged but a series of amendments were made in 1994.

The definition of "wildlife" from the 1973 CWA was repealed in 1994 and subsection 2(4) provided for the application of the Act to "any animal, plant or other organism belonging to a species that is wild by nature ... and to the habitat of any such animal, plant or other organism". A non-derogation clause was included in the CWA to recognize the paramountcy of aboriginal rights. The CWA was made binding on Canada or a province. Section 4.1 was added to allow the establishment of protected marine areas in the internal waters, territorial sea and exclusive economic zone of Canada. The enforcement provisions in the statute were updated and strengthened.

6.13.4 The Endangered Species Bills

The following Bills were reviewed:

- Bill C-33, *Species at Risk Act*, 2d Sess., 36th Parl., 48-49 Eliz. II, 1999-2000
- Bill C-65, *Canada Endangered Species Protection Act*, 2d Sess., 35th Parl., 45-46 Eliz. II, 1996-97

Bill C-65, the *Canada Endangered Species Protection Act* (CESPA), was introduced to Parliament in 1996[93] and died on the order paper in 1997. This Bill was intended to prevent wildlife species from being extirpated or becoming extinct and to provide for the recovery of

93 First reading 31 October 1996.

extirpated, endangered or threatened as a result of human activity. The CESPA was to be binding on Canada and a province. The CESPA was to apply to wildlife species and their habitats including aquatic species and their habitats and migratory birds and their habitats protected by the MBCA in Canada subject to certain reservations. Wildlife species were defined as "a species, subspecies or geographically or genetically distinct population of animal, plant or other organism that is wild by nature ...". In the provinces, but not in the territories, the CESPA was only to apply to federal land. In the territories, the application of the Act could be varied by order of the Governor in Council based on a determination of the equivalency of territorial wildlife legislation. A variety of agreement were possible with the provinces for the administration of the CESPA, including recovery planning activities and federal contribution to the costs of programs and measure to conserve endangered species.

Designation of endangered and species at risk was to be undertaken by a Committee on the Status of Endangered Species in Canada (COSEWIC) which was to be subject to the general direction of a Canadian Endangered Species Conservation Council (CESCC). The killing, harming, capture or taking of species at risk and the possession, collection, buying and selling of these species were prohibited. The damaging or destruction of the residences of listed species was prohibited. Emergency orders to designate species were provided for. Recovery plans were to be mandatory and prepared within one year of a species designation as endangered or two years if designated threatened or extirpated. The statute required environmental impact assessment if a wildlife species at risk or its critical habitat might be affected by a development. The enforcement provisions were stringent and included provisions for investigations and for endangered species protection actions by citizens, this latter proving very controversial. Significant penalties were provided for.

Bill C-33, currently before Parliament,[94] may result in a *Species at Risk Act* (SARA). The new Bill includes among its purposes the prevention of wildlife form being extirpated or becoming extinct, the recovery of wildlife that is extirpated, endangered or threatened by human activity and the management of species of special concern to prevent them from becoming endangered or threatened. SARA includes a Ministerial level CESCC with functions identical to those in the CESPA. The new Bill provides for wide agreement making powers for the federal minister in order to encourage stewardship. Such agreements can be made with any government in Canada, organization or person to provide for the conservation of species at risk. Agreements to provide financial contributions to programs for the conservation of wildlife are also authorized. SARA removes the responsibility for designation of wildlife species at risk from COSEWIC and assigns it to the Governor in Council. The prohibitions against killing,

94 First reading 11 April 2000.

harming, possession, collecting, buying and selling of listed species and damaging or destroying their residences are unchanged, but in SARA they are limited, in the provinces, to aquatic species and migratory birds covered by the MBCA unless an order to the contrary is made by the Governor in Council. In the territories, these prohibitions do not apply unless the law in the territory does not protect the species. The recovery process is now to be based on recovery strategies.

SARA includes new provisions for the protection of critical habitats, including the use of codes of practice, standards and guidelines. Regulations may be made to protect critical habitats on federal lands. The Bill would provide compensation to persons affected by any extraordinary impacts of the application of those sections of SARA which protect critical habitats of listed threatened and endangered species. Citizens' endangered species protection actions are gone but investigations will still be possible.

6.13.5 Discussion of Federal Legislation

Even though federal wildlife legislation is derived from unique constitutional authorities, the review conducted above indicates that it too has evolved in response to environmental changes, new social attitudes about wildlife and legal commitments both domestic and international.

Laws relating to export control initially addressed only listed species and then expanded to apply to wild animals, domestically raised furbearers, wild fowl and wild birds. The statutory controls also evolved from a purely export oriented approach to the control of interprovincial trade in support of provincial systems. These earlier statutes are better characterized by stage 1 criteria for the game management era. WAPPRIITA is a modern statute which establishes federal controls in support of CITES and also supports and reinforces provincial systems. It applies to both import and export and to plants and animals. This expansion of scope and interlocking of domestic and international controls is consistent with stage 3 sustainable wildlife management era criteria.

Migratory birds legislation was always restricted in scope to the species listed in the *Migratory Birds Convention* but the MBCA has also evolved. There was little change from 1917 until 1994. The older legislation contained no clear reference to habitat, included limited regulation making powers and was primarily focussed on hunting controls, setting seasons and bag limits and matters reminiscent of the stage 1 criteria. In the 1994 re-enactment of the MBCA, recognition was given to aboriginal rights, the identification and management of protection areas by regulation was provided for and the enforcement and management system was

updated with greater reliance now being made on regulations to effect detailed management controls. These changes are captured by the criteria for stages 2 and 3.

The CWA was recent legislation, first enacted in 1973, but even here we see evolution. The definition of wildlife in the most recent version was replaced by a provision applying the CWA to any plant, animal or other organism and their habitats. This CWA has included, since 1973, the first reference to endangered species in federal wildlife law. The 1994 amendments to the CWA included reference to and protection for aboriginal rights and also expanded the potential for the creation of wildlife conservation areas by providing for protected marine areas to supplement the potential use of the CWA to protect wildlife and habitats on land. The 1973 CWA as a whole was consistent with stage 2 criteria and the most recent version is consistent with stage 3 criteria.

The Endangered Species Bills respect aboriginal rights, take an ecological focus to protecting species at risk and address a wide spectrum of wildlife species. They were motivated by the need for Canada to take action to protect biodiversity in a manner consistent with its commitments to the *Canadian Biodiversity Strategy*.[95] These Bills reflect stage 3 criteria and are entirely consistent with other sustainable wildlife management legislation.

Thus from this brief review, it is clear that federal wildlife law has evolved and, even taking into account its different sources and objectives, that is can be classified into stages in the same way as provincial and territorial wildlife laws were earlier in this study. Considering the most recent suite of federal laws, WAPPRIITA, the 1994 re-enactment of the MBCA and amendments to the CWA as well as the Endangered Species Bills, it seems clear that federal wildlife law, taken together, has evolved to meet the criteria for the sustainable wildlife management era.

7.0 Conclusion

This paper systematically reviewed the evolution of Canadian wildlife law from Confederation to the present. Based on a literature review and initial statutory analysis, a series of criteria were developed which were used to distinguish the eras in our wildlife law. The wildlife

95 *Canadian Biodiversity Strategy*, *supra* note 13.

statutes of all Canadian jurisdictions were then analyzed and grouped on the basis of the selected criteria.

The method chosen to sample wildlife laws in this research does not appear to have significantly affected the description of the progression through the wildlife law eras in the various Canadian jurisdictions. However, the use in some jurisdictions of laws unrelated to wildlife to effect wildlife management goals could not be factored into this analysis. For example, New Brunswick appears in part to address wildlife habitat management through its forest management process. This may explain the paucity of habitat provisions in what is otherwise modern wildlife legislation in that jurisdiction. A similar limitation arising because of the scope of this research may also have affected the findings about habitat management under the Ontario legislation. Notwithstanding these limitations on the scope of the research, it is suggested that the study design was sound and that the results of this review of Canadian wildlife law are clear.

Seven provinces, Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan have progressed through three clear stages in the evolution of their wildlife law. Three jurisdictions, New Brunswick, Nova Scotia and Yukon seem to have skipped from the game management era to the sustainable wildlife management era without a statute that clearly met the criteria for the transitional wildlife management era. These jurisdictions are characterized by fairly long periods between the enactment of their current legislation and their last statutory revisions. In Nova Scotia, for example, the last revisions were separated by over 20 years (1967 to 1989). In New Brunswick, the last revision was in 1973 while the province's endangered species law was enacted in 1996. In Yukon, wildlife law has always been of central importance and that jurisdiction has a history of progressive exercise of its wildlife authorities. For these reasons, it seems that these jurisdictions skipped the transition era and enacted laws reflecting the latest values and mechanisms for wildlife management. Newfoundland and the Northwest Territories are the jurisdictions which have no wildlife laws that meet the criteria for the sustainable wildlife management era. It should be noted, however, that the governments of both these jurisdictions have legislative initiatives under way which will likely result in stage 3 legislation. Likewise, the government of Nunavut has recently undertaken a significant reworking of its wildlife legislation.

Canada's wildlife legislation is based on different constitutional and legal authorities than the provinces'. This study may have been somewhat less successful in delineating the evolution of Canada's wildlife laws because the criteria developed in part 5 were weighted in favour of the provincial legislative context. The results of the review of federal wildlife statutes nonetheless also show an evolutionary trend which mirrors the historical changes in

provincial wildlife legislation. Federal and provincial wildlife management are affected by most of the same environmental factors and trends in societal objectives for wildlife. It is thus suggested that any differences between the evolutionary progression of federal and provincial wildlife laws are a feature of unique federal legislative authorities and are not reflection of the external forces for change affecting wildlife laws.

The analysis in this paper has identified three eras in wildlife legislation in Canada. The first long game management era lasted from the time of Confederation until about the 1960's. The transitional wildlife management era lasted until about the mid 1980's and the modern sustainable wildlife management era is ongoing and still developing.

Canadian wildlife law is shaped by a variety of factors. The management of wildlife populations for consumptive use predominated during the first two eras in our wildlife law. The scope of Canadian wildlife legislation is now changing. Modern wildlife law is a mechanism through which society seeks to manage wildlife populations and habitats in order to sustain these resources for future generations. This expanding framework for wildlife law reflects a fundamental shift in our society's values and in its objectives for wildlife resources. It also reflects the global interdependence of our environments and the wildlife with which we share them. For Canadians who truly value their wildlife resources, the trends identified by this research should be cause for encouragement.

Appendix 1

Relevant Wildlife Legislation

1. Alberta

- *Wildlife Act*, R.S.A. 1984, c. W-9.1
- *Wildlife Act*, R.S.A. 1980, c. W-9
- *The Wildlife Act*, R.S.A. 1970, c. 391
- *The Game Act*, R.S.A. 1955, c. 126
- *The Game Act*, R.S.A. 1942, c. 70
- *The Game Act*, R.S.A. 1922, c. 70
- *The Game Act*, S.A. 1906-15, c. 14
- *The Wolf Bounty Act*, S.A. 1906-15, c. 13

2. British Columbia

- *Wildlife Act*, R.S.B.C. 1996, c. 488
- *Wildlife Act*, R.S.B.C. 1979, c. 433
- *Game Act*, R.S.B.C. 1960, c. 160
- *Game Act*, R.S.B.C. 1948, c. 135
- *Game Act*, R.S.B.C. 1936, c. 108
- *Game Act*, R.S.B.C. 1924, c. 98
- *Game Protection Act*, R.S.B.C. 1911, c. 95
- *Birds Protection Act*, R.S.B.C. 1911, c. 21
- *Game Protection Act*, R.S.B.C. 1897, c. 88
- *Game Protection Act*, C.S.B.C. 1888, c. 52
- *An Act for the Preservation of Game (Small Birds)*, C.S.B.C. 1877, c. 79
- *Game Ordinance, 1870*, C.S.B.C. 1877, c. 80
- *Game Ordinance, 1870*, R.S.B.C. 1871, No. 133

3. Manitoba

- *The Endangered Species Act*, S.M. 1990, c. E111
- *The Wildlife Act*, R.S.M. 1987, c. W130
- *The Wildlife Act*, R.S.M. 1970, c. W140

- *The Predator Control Act*, R.S.M. 1970, c. P110
- *The Game and Fisheries Act*, R.S.M. 1954, c. 94
- *The Predator Control Act*, R.S.M. 1954, c. 205
- *The Game and Fisheries Act*, R.S.M. 1940, c. 81
- *The Wolf Bounty Act*, R.S.M. 1940, c. 236
- *The Game Protection Act*, R.S.M. 1913, c. 75
- *The Insectivorous Birds Act*, R.S.M. 1913, c. 96
- *An Act Respecting Wolf Bounty*, R.S.M. 1913, c. 207
- *An Act Respecting the Protection of Game*, R.S.M. 1902, c. 66
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.M. 1902, c. 81
- *An Act Respecting Wolf Bounty*, R.S.M. 1902, c. 176
- *An Act for the Protection of Game and Fur-bearing Animals*, R.S.M. 1891, c. 62
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.M. 1891, c. 75
- *An Act Respecting Animals*, C.S.M. 1880, c. 18, s. LXII-LXXXIV
- *Premium on Wolves' Heads*, Laws of Assiniboia 1862, c. XLIX [not mentioned in text]

4. New Brunswick

- *Endangered Species Act*, S.N.B. 1996, c. E-9.101
- *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1
- *Game Act*, R.S.N.B. 1973, c. G-1
- *Game Act*, R.S.N.B. 1952, c. 95
- *Game Act*, R.S.N.B. 1927, c. 36 [text mentions Vol. 1]
- *Game Act*, C.S.N.B. 1903, c. 33
- *The Protection of Certain Birds and Animals*, C.S.N.B. 1877, c. 112
- *The Destruction of Bears*, C.S.N.B. 1877, c. 113
- *An Act to Encourage the Destroying of Wolves*, R.S.N.B. 1786-1836, CAP. V
- *An Act to Grant a Bounty on the Destruction of Bears in this Province*, R.S.N.B. 1786-1836, CAP. XIX

5. Newfoundland

- *Wild Life Act*, R.S.N. 1990, c. W-8
- *The Wild Life Act*, R.S.N. 1970, c. 400
- *The Wild Life Act*, R.S.N. 1952, c. 197
- *The Killing of Wolves Act*, R.S.N. 1952, c. 198

- *Of the Preservation of Game Act*, C.S.N. 1916, c. 148
- *The Preservation of Deer Act*, C.S.N. 1916, c. 147
- *Of the Preservation of Beavers Act*, C.S.N. 1916, c. 149
- *Of the Preservation of Foxes Act*, C.S.N. 1916, c. 150
- *Of Killing Wolves Act*, C.S.N. 1916, c. 151
- *Of the Preservation of Game Act*, C.S.N. 1892, c. 144
- *Of the Preservation of Deer Act*, C.S.N. 1892, c. 143
- *Of Killing Wolves Act*, C.S.N. 1892, c. 142

6. Northwest Territories

- *Wildlife Act*, R.S.N.W.T. 1988, c. W-4
- *Wildlife Ordinance*, S.N.W.T. 1978, c. 8
- *Game Ordinance*, R.S.N.W.T. 1974, c. G-1
- *Game Ordinance*, R.S.N.W.T. 1956, c. 42
- *The Game Ordinance*, S.N.W.T. 1905, c. 85
- *The Useful Birds Ordinance*, S.N.W.T. 1905, c. 107

7. Nova Scotia

- *Endangered Species Act*, S.N.S. 1998, c. 11
- *Wildlife Act*, R.S.N.S. 1989, c. 504
- *Lands and Forests Act*, R.S.N.S. 1967, c. 163
- *Lands and Forests Act*, R.S.N.S. 1954, c. 145
- *The Forests and Game Act*, R.S.N.S. 1923, c. 153
- *The Game Act*, R.S.N.S. 1900, c. 101
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1884, c. 76
- *An Act for the Preservation of Useful Birds and Animals*, R.S.N.S. 1873, c. 13
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1873, c. 73
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1873, c. 74
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1864, c. 92
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1864, c. 93
- *Of the Preservation of Useful Birds and Animals*, R.S.N.S. 1851, c. 92
- *Of the Destruction of Noxious Animals*, R.S.N.S. 1851, c. 93

8. Ontario

- *Fish and Wildlife Conservation Act*, S.O. 1997, c. 41

- *Endangered Species Act*, R.S.O. 1990, c. E.15
- *Game and Fish Act*, R.S.O. 1990, c. G.1
- *Game and Fish Act*, R.S.O. 1980, c. 182
- *The Game and Fish Act*, R.S.O. 1970, c. 186
- *The Wolf and Bear Bounty Act*, R.S.O. 1970, c. 500
- *The Game and Fisheries Act*, R.S.O. 1960, c. 158
- *The Wolf and Bear Bounty Act*, R.S.O. 1960, c. 434
- *The Game and Fisheries Act*, R.S.O. 1950, c. 153
- *The Wolf and Bear Bounty Act*, R.S.O. 1950, c. 427
- *The Game and Fisheries Act*, R.S.O. 1937, c. 353
- *The Protection of Birds Act*, R.S.O. 1937, c. 354
- *The Wolf Bounty Act*, R.S.O. 1937, c. 355
- *The Game and Fisheries Act*, R.S.O. 1927, c. 318
- *The Protection of Birds Act*, R.S.O. 1927, c. 319
- *The Wolf Bounty Act*, R.S.O. 1927, c. 320
- *The Ontario Game and Fisheries Act*, R.S.O. 1914, c. 262
- *The Protection of Birds Act*, R.S.O. 1914, c. 263
- *The Wolf Bounty Act*, R.S.O. 1914, c. 264
- *The Ontario Game Protection Act*, R.S.O. 1897, c. 287
- *An Act for the Protection of Insectivorous and other Birds*, R.S.O. 1897, c. 289
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1897, c. 290
- *An Act for the Protection of Game and Fur-Bearing Animals*, R.S.O. 1887, c. 221
- *An Act for the Protection of Insectivorous and Other Birds Beneficial to Agriculture*, R.S.O. 1887, c. 222
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1887, c. 223
- *An Act for the Protection of Game and Fur-Bearing Animals*, R.S.O. 1877, c. 200
- *An Act for the Protection of Insectivores and other Birds Beneficial to Agriculture*, R.S.O. 1877, c. 201
- *An Act to Encourage the Destroying of Wolves*, R.S.O. 1877, c. 202

9. Prince Edward Island

- *Wildlife Conservation Act*, S.P.E.I. 1998, c. 107 (Bill No. 31, proclaimed 15 September 1998)
- *Fish and Game Protection Act*, R.S.P.E.I. 1988, c. F-12 (repealed)
- *Fish and Game Protection Act*, R.S.P.E.I. 1974, c. F-8
- *The Game Act*, R.S.P.E.I. 1951, c. 67
- *The Game Act, 1937*, S.P.E.I. 1937, 1 Geo. VI, Cap. 13

- *The Game Act, 1928*, S.P.E.I. 1928, 18 Geo. V, Cap. 16
- *The Game Act, 1906*, S.P.E.I. 1906, 6 Edw. VII, CAP. 26
- *An Act for the Preservation of Partridge*, S.P.E.I. 1898, 61 Vict., Cap. IX
- *An Act to Protect Wild-fowl*, S.P.E.I. 1884, 47 Vict., Cap. VIII
- *An Act for preventing the killing of Wild Ducks, Snipe, Woodcock, and Bittern, at improper seasons*, S.P.E.I. 1873, 36 Vict., Cap. VI

10. Quebec

- *An Act Respecting the Conservation and Development of Wildlife*, R.S.Q. 1998, c. C-61.1
- *An Act Respecting Threatened or Vulnerable Species*, R.S.Q. 1998, c. E-12.01
- *An Act Respecting Hunting and Fishing Rights in the James Bay and New Quebec Territories*, R.S.Q. 1998, c. D-13.1
- *Wildlife Conservation Act*, R.S.Q. 1977, c. C-61
- *Game Act*, R.S.Q. 1964, c. 202
- *Game Laws*, R.S.Q. 1941, c. 153
- *Game Laws*, R.S.Q. 1925, c. 86
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