



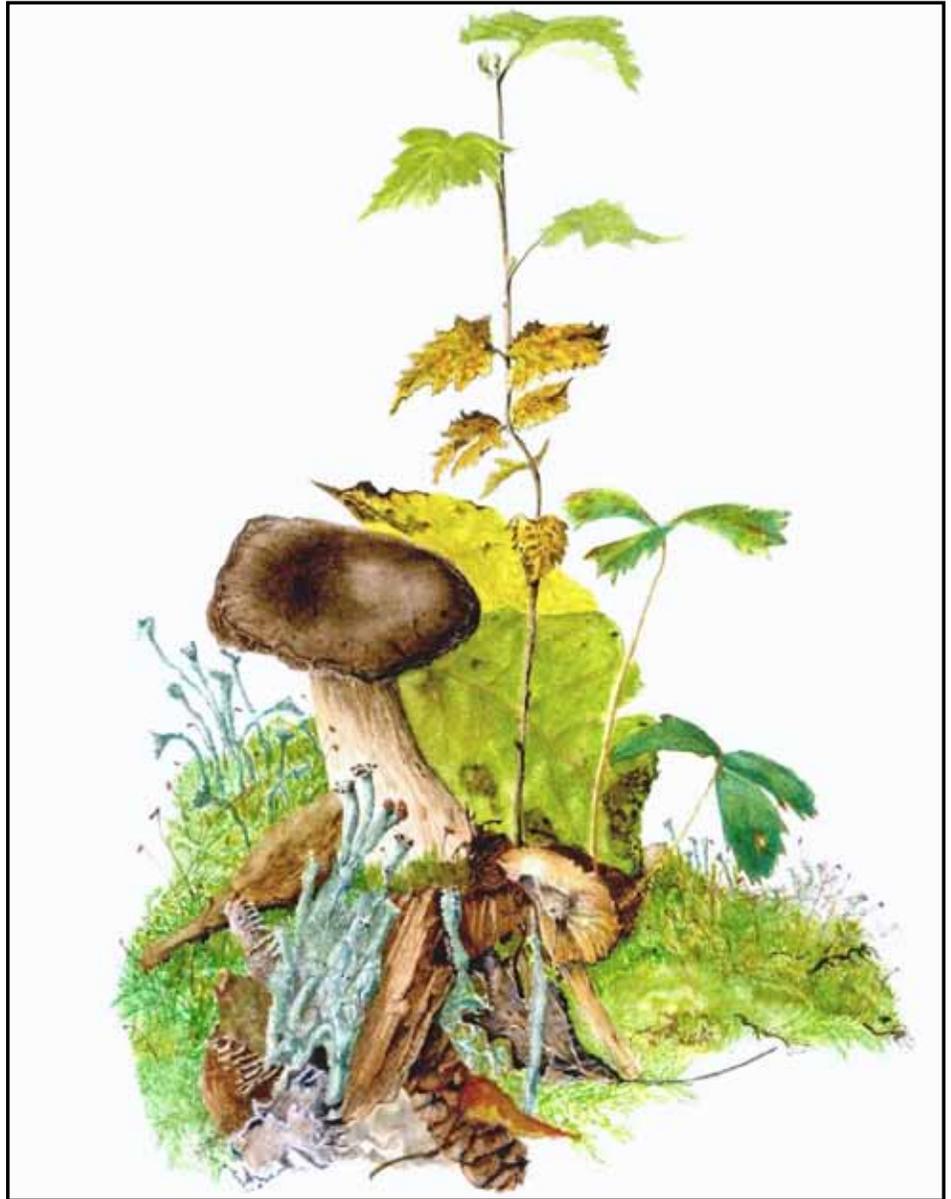
ENDANGERED SPECIES UNDER ALBERTA'S WILDLIFE ACT: EFFECTIVE LEGAL PROTECTION?

By Shaun Fluker

On March 23, 2010 Alberta's Endangered Species Conservation Committee renewed its 2002 recommendation that the Minister of Sustainable Resource Development designate the grizzly bear as a threatened species under the *Wildlife Act* (Alberta). The legal implications of such designation could be few or many under Alberta's legislative framework for endangered species. This article explores these implications in more detail.

My focus here is on provincial legislation. In my opinion, anyone who seeks effective legislative protection for endangered species in Alberta must advocate for provincial legislation. This is because wildlife and its habitat are by and large property of the provincial Crown and it is a general principle of constitutional law in Canada that the federal government cannot in substance legislate over provincial property under the guise of a regulatory scheme. This is why the habitat protection provisions contained in the *Species at Risk Act* (Canada) for listed species are generally limited in application to federal lands within a province (eg. national parks). So, while federal legislation is welcome, any meaningful attempt to protect an endangered species will impact provincial property and necessarily requires effective provincial legislation.

As most readers will know, Alberta's endangered species legislation is far from effective. The most glaring sign of trouble is perhaps this: the legal status of the grizzly bear as a threatened species has been under consideration by the Alberta government for eight years and yet, during this time, the government has issued a species recovery plan (*Alberta Grizzly Bear Recovery Plan 2008*) and an update (*Status of the Grizzly Bear in Alberta: Update 2010*). Why introduce a recovery plan for a species yet to be designated as threatened with extinction? And, if the grizzly bear is so



Mushrooms and Lichens with Birch Saplings, Watercolour, 28 x 37 cm © JOAN SHERMAN

threatened such that a recovery plan is necessary, what is left for the Minister of Sustainable Resource Development to consider before making the designation? That the provincial legal framework is silent on these questions is perplexing to say the least.

Endangered species legislation in Canada (federal and provincial) is the

result of Canada's ratification of the UN Convention on Biodiversity in 1992 and the subsequent Federal-Provincial Accord for the Protection of Species at Risk signed in 1996. Alberta's 1996 commitment to legislative protection for endangered species led to amendments in the *Wildlife Act*. Unlike the federal government and several other provinces,

however, Alberta has yet to enact stand-alone endangered species legislation but this is under consideration (*See Alberta's Strategy for the Management of Species at Risk 2009 – 2014*).

Endangered species legislation can be evaluated on the following components: listing categories, listing process, protection and recovery measures. What follows is an evaluation of the *Wildlife Act* in relation to these components.

Listing categories

The *Wildlife Act* provides no substantive definition of an endangered species other than stating in section 1(1) that an endangered species is that “prescribed as such” in schedule 6 to the *Wildlife Regulation* (Alberta). More troubling is the absence of any reference to the designation of threatened species in the *Wildlife Act*. The legislation purports to affix the designation of threatened to a species by virtue of a footnote to schedule 6 in the *Wildlife Regulation* which states in reference to listed endangered animals: “These organisms are further categorized as “threatened” by the Department.”

The only legal designation applicable to protecting a species in Alberta is that of ‘endangered’, since that is the only category mentioned and defined in the *Wildlife Act*. I don’t quite know what to make of the footnote designation that ‘endangered’ also means ‘threatened’, except to say that they are perhaps legal equivalents if the latter has any legal status at all. Yet government policy defines them as distinct categories: (1) An endangered species is one facing imminent extirpation or extinction; (2) A threatened species is one likely to become endangered if limiting factors are not reversed. (*See Alberta's Strategy for the Management of Species at Risk 2009 – 2014*) So while government policy dictates that a species cannot be both ‘endangered’ and ‘threatened’, for the purposes of the *Wildlife Act* the two designations are arguably equivalent. The policy is, of course, simply guidance for the Minister and is of no legal consequence in making an endangered (or threatened) designation under the *Wildlife Act*.

With the absence of any legal rules pertaining to what constitutes an endangered (or threatened) species in Alberta, an endangered species is, for

all intent and purposes, that which the Minister prescribes as such.

Listing Process

Section 6(1) of the *Wildlife Act* requires the Minister to establish and maintain an Endangered Species Conservation Committee (ESCC) which functions as an advisory body and makes recommendations to the Minister on matters pertaining to endangered species, including: (1) which species should be listed as endangered; and (2) the preparation and implementation of recovery plans for endangered species. Section 6(2) requires the ESCC to appoint a subcommittee of scientists to assess the status of species and report to the committee as a whole on whether the species should be listed as endangered.

Apart from these legal requirements, the composition and functioning of the ESCC is wholly within the discretion of the Minister or the committee itself. Why might this be of concern from a species protection perspective? First, there is no legal requirement that members of the ESCC have any qualifications related to species conservation. While in practice ESCC members may be so qualified, there is no legal process by which to ensure this. Current members of ESCC include representatives from groups not commonly thought of as experts

in protecting endangered species such as: Alberta Association of Municipal Districts and Counties, Alberta Beef Producers, Alberta Irrigation Projects Association, Alberta Energy, Canadian Association of Petroleum Producers and Western Stock Growers Association. Second, there is no legal process to direct how and on what basis the ESCC decides to assess the status of a species in Alberta. There is no legal process to enable a concerned citizen to petition for an assessment of whether a species is at risk.

Perhaps most troubling with respect to the functioning of the ESCC is that its recommendations can remain under consideration by the Minister indefinitely. While section 6 of the *Wildlife Act* empowers the ESCC to make an endangered listing recommendation to the Minister there is no corresponding legislative obligation on the part of the Minister to even respond to the recommendation, let alone agree or disagree with it. In other words, ESCC recommendations on their own likely have no legal effect.

Protection and Recovery Measures

The legal effect of an endangered species listing under the *Wildlife Act* is twofold: (1) It is an offence pursuant to section 36(1) to “wilfully molest, disturb, or destroy a house, nest or den” of an individual listed as an endangered species; and (2) penalties for certain offences are elevated when committed in respect of an endangered species. A listing under the *Wildlife Act* however creates no legal obligations in relation to measures more commonly associated with protecting endangered species, such as recovery strategies and critical habitat protection.

There is no legal obligation on the Minister under the *Wildlife Act* to prepare or implement a recovery plan for a listed endangered species. Nor is there any legal requirement as to what a recovery plan must include if such a plan is prepared by the Minister. Section 6(3) of the *Wildlife Act* states that a recovery plan may include the identification of critical habitat but the legislation does not require it. Given the absence of legal obligations here it is surprising to read what *Alberta's Strategy for the Management of Species at Risk 2009 – 2014* has to say in this regard (at page 9):



Trees of the Boreal Forest, Graphite, 28 x 36 cm © JOAN SHERMAN

A recovery plan must be produced for *Endangered* and *Threatened* species.

A recovery plan contains three elements:

1. A summary of current biological status of the species and an evaluation of the factors which have contributed to its decline.

2. A strategy indicating recovery goals and the strategies necessary to mitigate limiting factors and maintain or recover populations.

3. An action plan that lists the specific activities (including costs, schedules, and participating agencies) that will be completed to achieve the goals of the recovery program.

The obligation to produce a recovery plan with action items is at most an internal directive based on permissive authority; there is no legal obligation in the sense that a judicial review application could be filed to require the preparation and implementation of a recovery plan under the *Wildlife Act*.

The absence of any legal requirements with respect to critical habitat protection for endangered

species is likely the reason why the Grizzly Bear Recovery Team limited its recommendations to identifying and designating “Grizzly Bear Priority Areas” wherein significant constraints on human land-use would be implemented to reduce human-caused bear mortalities (identified as the primary culprit adversely impacting the grizzly population in Alberta). Without any legal requirements to make such critical habitat designations (assuming that is what was intended by a ‘priority area’), it is of no surprise that the 2010 status update reports little progress towards the implementation of any human access restrictions in the habitat areas identified by Alberta Sustainable Resource Development.

In short, the *Wildlife Act* neither precludes effective legal protection for endangered species nor requires effective legal protection. The legislation sets a minimalist process for identifying endangered species and developing strategies for their recovery but stipulates very few obligations in this regard such that most of the Alberta endangered

species regime is governed by policy. It is not the case that effective legal protection for endangered species under the *Wildlife Act* isn’t possible – and, indeed, a casual read of species at risk policies on the Alberta Sustainable Resource Development website suggests that effective protection isn’t just possible but is in fact taking place. However, the absence of legal rules governing endangered species under the *Wildlife Act* means there is little transparency, no predictability, and no accountability in government decisions pertaining to protecting endangered species in Alberta. So while effective legal protection might be possible, it isn’t very likely either. The grizzly bear is case in point. 🐻

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