



Modernization of Approvals – proposed regulatory amendments to the *Fish and Wildlife Conservation Act*

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of Natural Resources

Submitted by: The Ontario Bar Association,
Animal Law Section



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The Ontario Bar Association ("OBA") appreciates the opportunity to provide comments regarding the Ministry of Natural Resources ("MNR") proposed changes to a number of regulations under the *Fish and Wildlife Conservation Act*, SO 1997, c 41 ("FWCA").

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 18,000 lawyers, judges, law professors and law students. This submission was prepared by the newly formed OBA Animal Law Section (the "Section"). The Section was approved by the Board in October 2012 following two very successful and well-attended programs on animal law. The success of these programs lead to the creation the new Animal Law Section. The Section's mandate is to address legal and administration of justice issues as they relate to animal regulation and welfare.

Overview

The proposed regulatory amendments followed the MNR declaration of their three-year transformation plan, with the goal of modernizing their business to provide faster and improved services, as well as, to reduce the burden on individuals, businesses and government.¹

As noted in the Regulation Proposal Notice, the following proposed amendments are only the first wave of a series of proposed approval related amendments. It is the Section's opinion that if passed as proposed, these amendments will greatly reduce the effectiveness of the FWCA by reducing necessary regulatory oversight. In addition to the general deterioration of the quality of the FWCA, the proposed changes stemming from the MNR's desire to reduce administrative costs represent an offloading of provincial responsibility to ensure proper wildlife management. Finally, the changes as proposed diminish the quality of appropriate protections regarding the welfare of Canada's wildlife, both in captivity and in the wild.

¹ Ministry of Natural Resources, "Modernization of Approvals – A Proposed Policy Framework for Modernizing Approvals for Ontario's Natural Resources" (2012), online: <
http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@fw/documents/document/stdprod_099952.pdf>.



Proposed Changes and Commentary

Proposed Regulatory Amendments related to Hunting

1. Resident License to Hunt Raccoon at Night: Residents will no longer be required to obtain a Resident Licence to hunt raccoon at night. They will still be required to obtain a Small Game Licence and follow the same rules currently set out in regulation under the *Fish and Wildlife Conservation Act*: the resident must be accompanied by a dog (licensed for hunting), hunt during the open season, and comply with current hunting and firearms restrictions.

Comment: Many provincial and federal statutes prohibit night hunting with the aid of illuminating devices because of the inherent danger in hunting at night, for hunters and other residents, as well as the ease of attracting and spotting animals with the aid of illuminating devices.² Generally, provincial statutes and regulations which prohibit hunting at night have exceptions for authorized capture of animals without the use of firearms.³ Accordingly, an alternative to authorizing night hunting might be the sole authorization of licenced trappers to take fur animals at night by means of a trap. At the very least, such a proposed change should be accompanied by a regulatory restriction on the power source of the light.

2. Licence to Chase Raccoon at Night or Fox, Coyote, or Wolf during the Day: Persons engaging in these activities will no longer be required to obtain a licence to chase raccoon at night or fox, coyote or wolf during the day. However, each individual participating in the activity will be required to obtain a Small Game Licence. Those undertaking these activities will continue to be permitted to conduct them outside the open season, provided that they are not in possession of a firearm. In order to obtain

²See e.g. *The Wildlife Regulations*, 1981, RRS c W-13.1 Reg 1, s 11(1) “No person shall hunt any wildlife during the period from one-half hour after sunset to one-half hour before sunrise.”; *Wildlife Act*, CCSM c W130, s 12(1) “No person shall at night use lighting or reflecting equipment for the purpose of hunting, killing, taking or capturing a vertebrate animal or attracting or confusing a vertebrate animal for the purpose of hunting, killing, taking or capturing it”; *Wildlife Act*, RSA 2000, c W-10, s 28 “A person shall not hunt wildlife, except by trapping, during the period commencing at ½ hour after sunset and ending at ½ hour before sunrise the following day.”; *Wildlife Regulations*, CNLR 1156/96, s 42(1) A person shall not make use of or take advantage of any artificial light or device involving the use of artificial light to hunt, take or kill any game.; *Wood Buffalo Nation Park Game Regulations*, SOR/78-830, s 38 “No person shall, for purposes of hunting, use a search light, spot-light, jack light, night light, motor vehicle light or any other type of light.”.

³ See e.g. *The Wildlife Regulations*, *ibid* at s 11(3); *Wildlife Act*, *ibid* at s 12(2).



their first Small Game Licence, individuals are required to successfully complete the hunter education course and purchase a hunting version Outdoors Card.

Comment: The proposed change is unclear in regards to the location that such activity will be permitted. The Section advises that such activities be regulated and monitored by the MNR. Accordingly, we recommend that the existing licencing provision remains unchanged or that there be territorial restrictions on this practice.

Proposed Regulatory Amendments related to Protection of Property

3. Protection of Property Authorizations: Licenced hunters will be added to the current list of class agents permitted to assist landowners with specific problem wildlife without obtaining further authorization. Under the proposed change, at the request of the landowner, licenced hunters will be permitted to harass or kill certain species of wildlife if the wildlife is damaging or about to damage the landowner's property, provided that the activity is permitted by municipal by-laws. Individual authorizations will continue to be required in order to harass or kill white-tailed deer or American elk. All other current rules or provisions set out in regulation will remain the same.

Comment: Section 31 of the FWCA currently authorizes persons who believe on reasonable grounds that wildlife is damaging or about to damage their property to harass, capture or kill the wildlife, or to use an authorized agent to do the same. The proposed Protection of Property Authorization effectively broadens the pre-existing authority to kill wildlife at the discretion of landowners. With no additional oversight from agents who may be more familiar with what constitutes a threat to property as well as the best method to deal with the alleged problem. The broadening of this provision makes it simpler for land owners to resort to lethal means to deal with animals that are deemed to be threats to property. Simplifying the process to allow for lethal measures without oversight is not considered to be effective property/wildlife management.

As well, the Section advises it would be beneficial to include definitions of "harassing" and "damaging property." We recognize that this will have to be defined in the FWCA itself.

4. Authorization to Hunt/Trap for Hire or Employ for that Purpose: Under the proposed change, municipalities will no longer be required to obtain approval from MNR to hire or employ hunters or trappers to harvest furbearing mammals to help resolve human-



wildlife conflicts within their municipal boundaries, and such hunters or trappers may accept financial compensation from municipalities for their activities. All other current rules or provisions related to hunting and trapping these species (e.g. bag limits, seasons) will continue to be set out in regulation.

Comments: This proposed offload of MNR responsibility to municipalities is arguably a delegation of authority that is better exercised at the provincial level. Specifically, the MNR has a duty to promote healthy, sustainable ecosystems and conserve biodiversity as well as develop effective management policies for wildlife across Ontario. Municipalities across Ontario operate on very limited budgets. This leads to municipalities guiding their wildlife management decisions based on monetary realities and not necessarily on best practices.

Considering the expertise and experience of the MNR in wildlife management, the Ministry should ensure that the best approach is taken to resolve human-wildlife conflicts, and maintain their authority to oversee municipal decisions.

5. Authorization to Destroy, Take, or Possess Nests and Eggs: Currently, it is illegal to damage, take or possess the nests or eggs of most birds without specific MNR approval. Under the proposed change, businesses that are undertaking certain activities that already require consideration of environmental values (e.g. maintenance of telecommunications towers or transmission corridors, forest management) will be permitted to destroy the nests and eggs of certain species of birds without MNR approval. The requirement to obtain approval will still exist for migratory birds protected under the *Migratory Birds Convention Act* and birds listed as endangered or threatened under the *Endangered Species Act, 2007*. Individuals and proponents of other types of activities will still be required to obtain an authorization to destroy, take or possess nests or eggs.

Comment: This proposed change lacks the requisite details to properly comment. Specifically, the type of “environmental values” that will be considered by exempt businesses, is of crucial significance to assessing the effect that this proposed amendment will have on birds and bird habitats. In addition, it is crucial that the specific species of birds that fall into this exception also be disclosed.



Any provision that pre-approves destruction of nests and eggs increases the risk of inadvertent unauthorized nest destruction. Without requiring any additional oversight or permits, business proponents may not have the requisite expertise to appropriately assess the potential impact of nest, bird and egg destruction.

Environment Canada has recognized that migratory bird nests and eggs are inadvertently disturbed or destroyed by routine activities associated with forestry, mining, energy generation and transmission, oil and gas development, commercial fishing, agriculture and ranching, residential and commercial development, transportation, and other industry. The “inadvertent, though reasonably predictable disturbance or destruction of migratory bird nests and eggs is known as incidental take. The cumulative effects of incidental take can have long-term consequences for migratory bird populations in Canada.”⁴

Although the requirement to obtain approval will still exist for migratory birds protected under the *Migratory Birds Convention Act*, and birds listed as endangered or threatened under the *Endangered Species Act, 2007*, many species of birds with plummeting populations are not yet on the catastrophic edge of extinction. These birds still deserve continued and enhanced protection, not the weakened protections proposed.

In light of these predictable but negative consequences, Ontario must take a precautionary approach to protecting biodiversity within the province. Recognizing the importance of wild bird populations, most provinces and territories have statutes which prohibit interfering with, and/or the destruction of, birds, bird nests and eggs, without prior authorization.⁵ This administrative requirement is arguably a prudent safeguard against the ongoing habitat loss and degradation, threatening the conservation of wild birds.

On the international front, the European Union *Bird Directive* is a comprehensive piece of legislation that protects all wild bird species naturally occurring in the European

⁴ Environment Canada “Planning Ahead to Reduce Risks to Migratory Bird Nests” (<http://www.ec.gc.ca/paom-itmb/default.asp?Lang=En&n=0A6756EE-1>)

⁵ See e.g. *Wildlife Act*, CCSM c W130, s 49; *Wildlife Act*, RSBC 1996, c 488, s 34; *Wildlife Act*, SNU 2003, c 26, s 72; *Wildlife Act*, RSNS 1989, c 504; *Wildlife Act*, RSNWT 1988, c W-4; *The Wildlife Regulations*, 1981, RRS c W-13.1 Reg 1, s 6(1);



Union.⁶ Recognizing the gravity of the effect of human actions on birds and their habitats, as well as the importance of conservation of these habitats, the *Bird Directive* bans activities such as the deliberate killing, capturing, or disturbance of all species of birds, destruction of their nests and taking of eggs.⁷

Proposed Regulatory Amendments related to Possession, Buying or Selling of Wildlife

6. Resident and Wildlife Export Permits: Ontario residents will no longer be required to obtain a permit in order to export a black bear, white-tailed deer, or moose killed in Ontario. Requirements regarding the exportation of wildlife established elsewhere (e.g. under the *Convention on International Trade in Endangered Species*) will continue to apply.

Comment: The authorization of the exporting of black bears, white-tailed deer and moose will put Ontario on the map for perpetuation of the trade in wildlife parts.

The demand for bear bile in traditional Chinese medicine has made bear bile one of the most valued animal products in the world. It is estimated that bile sells for about \$410 USD per kilogram in China and the average gallbladder selling for about \$10,000 USD in South Korea.⁸ To help curb the harvest and subsequent sale of highly valued bear parts, several provinces have enacted regulations which prohibit the possession and sale of bear parts, specifically naming bear gall bladders and bile.⁹

In the legislative debates surrounding the proposed Bill 139, *An Act to promote the conservation of fish and wildlife through the revision of the Game and Fish Act*, it was

⁶On the Conservation of Wild Birds, Directive 2009/147/EC of the European Parliament and of the Council, Article 1, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:020:0007:0025:EN:PDF> [*Bird Directive*].

⁷ *Bird Directive*, *ibid* at Article 5.

⁸ Laura E Tsai, “Detailed Discussion of Bears Used in Traditional Chinese Medicine” (2008) *Animal Legal and Historical Center*, online: < <http://www.animallaw.info/articles/ddusbearbile.htm> >.

⁹ See e.g. *Miscellaneous Licences and Permits Regulation*, Man Reg 53/2007, s 12 “No person, including the holder of an animal parts dealer’s licence, shall possess, buy, sell, trade, import or export, or offer to buy, sell, trade, import or export (a) a gall bladder that has been removed from the carcass of a bear; or (b) bile taken from the gall bladder of the carcass of a bear.” *Regulation respecting the possession and sale of an animal*, RRQ, c C-61.1, r 23, s 2 “The sale of bear gall-bladders and bile is prohibited.”; *Wildlife Act Commercial Activities Regulation*, BC Reg 338/82, s 2.08(1) “A person commits an offence by possessing or importing (a) bear gall bladders, or (b) bear genitalia that are separated from the carcass or the hide.”



clear that there was great concern both internationally and domestically about the illegal trade of animal parts.¹⁰

Authorizing the export of certain wildlife will result in a reversal of any progress addressing the above concerns. Despite the health of Ontario's white-tailed deer, moose and black bear populations, Ontario must carefully ensure that it is not perpetuating the trade in wildlife parts.

7. Game Hides and Cast Antlers Dealers Licence and Export Permit: At present, persons wishing to buy or sell the hides of certain game mammals and cast antlers as a business must obtain a Game Hide and Cast Antlers Dealer's Licence. Under the proposed change, such businesses will no longer be required to obtain a licence but will be required to keep records of their business transactions, including sources of all game hides and cast antlers in their possession and the number sold. These record-keeping requirement will not apply to licenced trappers selling black bear hides under their licence. Under an associated proposed change, businesses will no longer be required to obtain an export permit prior to exporting game hides or cast antlers from Ontario. All other current rules or provisions related to the activities described above will be retained and will be set out in regulation. Requirements established elsewhere regarding these activities (e.g. under the *Convention on International Trade in Endangered Species*) will continue to apply.

Comment: The general deregulation regarding the sale of wildlife parts raises concerns about the perpetuation of the illegal trade in wildlife parts. Accordingly, please see comment number 6.

Proposed Regulatory Amendments related to Wildlife In Captivity

8. Authorization to Release Wildlife Imported to Ontario or Propagated from Stock Imported to Ontario: Proposed changes related to these activities are as follows:
 - a. Municipalities that are authorized under the Fish and Wildlife Conservation Act to issue licences for pheasant hunting will be allowed to release pheasants up to two weeks prior to the start of the pheasant open season and throughout the open season,

¹⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No (26 November 1997) at 1530 (Hon Mr Snobelen), online: <http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1997-11-26&Parl=36&Sess=1&locale=en>.



without obtaining further authorization from MNR. Municipalities will still be required to seek approval from MNR prior to issuing licences to hunt pheasants, cottontail rabbits, varying hares and European hares.

b. Individuals will be allowed to release up to 10 pheasants or chukar partridges on their own property for immediate put and take hunting activities during the open season without obtaining an authorization from MNR. Individuals who wish to release more than 10 birds must obtain a Licence to Own and Operate a Game Bird Hunting Preserve. Individuals wishing to keep pheasants in captivity for longer than 10 days must obtain a Licence to Keep Game Birds in Captivity.

c. Persons who wish to release pheasants or chukar partridges to support dog training and field trial activities during the closed season will no longer be required to obtain an authorization to release from MNR. Authorizations for field trials will continue to identify rules regarding releases of these birds. The period of time during which such releases are allowed will be identified in regulation.

All other current rules or provisions related to release of wildlife will remain the same and will be set out in regulation.

Comment: The elimination of authorization to release pheasants or chukar partridges to support dog training and field trial activities is of concern. Specifically, it is unclear if individuals operating dog training and trial activities, who only wish to use these game birds, will still be required to obtain a licence in accordance with Part IV of the *Wildlife in Captivity Regulations*.¹¹

9. Licence to Keep and Propagate Game and Specially Protected Reptiles and Amphibians in Captivity: Under the proposed change, individuals will no longer be required to obtain a licence to keep/propagate certain species of game and specially protected reptiles and amphibians, but the current requirement to get approval from MNR to obtain (e.g. buy or take from wild) specimens of certain species will be continued. All other current rules or provisions related to keeping reptiles and amphibians in captivity will remain the same and will be set out in regulation.

¹¹ *Wildlife in Captivity*, OReg 668/98



Comment: The proposed regulatory change is unclear regarding how many specimens of certain species will require MNR approval to be taken from the wild or bought. Specifically, it is unclear if individuals who wish to keep/propagate specially protected reptiles and amphibians will need to get approval from MNR to obtain all these species. Furthermore, the proposed changes are also unclear with regard to what species of game may be kept/propagated without a licence.

By eliminating the current licensing regime under Part II of the *Wildlife in Captivity Regulation*, as well as Part III of the FWCA the MNR is essentially eliminating all regulation of people who keep/propagate specially protected reptiles and amphibians.

¹² With no record of which individuals are maintaining such operations, there will be no oversight regarding the care and control of these species.

Accordingly, we recommend that it is in the best welfare of these species that the current licensing requirement is not eliminated for those individuals wishing to keep/propagate certain species of game and specially protected reptiles and amphibians.

Other Proposed Changes

Non-resident Small Game Licence

10. Small Game Licences will be streamlined by allowing non-residents to harvest additional small game species which may be currently harvested by residents but not by non-residents. Adding species which are considered to have healthy, sustainable populations (including crows, groundhogs, skunks and opossums) to the list of species which may be hunted by a non-resident would better align resident and non-resident Small Game Licences. As is the case for residents, non-resident Small Game Licence holders would be permitted to hunt only during the open seasons and in the areas identified in regulation.

Comment: The proposed regulatory change, regarding adding additional species to the existing list of animals allowed to be harvested by Non-Resident Small Game Licences, is

¹² *Wildlife in Captivity, ibid.*



very ambiguous. Before such a change is proposed, the MNR should provide the public with the specific animals that this proposed change will include.

Term Length of a Trapping Licence

11. The regulatory provision regarding the length of the term of a trapping licence will be deleted. Currently, the Trapping Regulation specifies that trapping licences are valid for one year, from September 1 to August 31 of the following year. The removal of this provision will provide the flexibility to issue multi-year trapping licences if desired in the future. If approved, the term of a trapping licence would be set out on the trapping licence itself rather than in regulation, and could be for more than one year.

Comment: The proposal of only including the length of the term of a trapping licence on the licence itself, versus in regulations, significantly reduces the transparency regarding the typical duration of a trapping license.

Accordingly, the Section recommends that all possible term lengths of a trapping licence be published in regulations to ensure the transparency of the duration of trapping licenses issued.

Conclusion

The Animal Law Section of the Ontario Bar Association appreciates the opportunity to consult with the Ministry of Natural Resources. We would be pleased to answer any questions you may have with respect to the issues raised and we look forward to further discussion on the issues identified.