

A photograph of two caribou in a natural habitat. On the right, a larger caribou with prominent, light-brown antlers stands facing left. On the left, a smaller caribou stands facing right. They are on a rocky, uneven ground with some sparse vegetation. The background is a dense forest of green trees. The lighting suggests it might be late afternoon or early morning.

PROGRESS REPORT ON THE STATE OF BOREAL CARIBOU CRITICAL HABITAT PROTECTION IN CANADA

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PHOTO CREDIT: RON THIESSEN

PROGRESS REPORT ON THE STATE OF BOREAL CARIBOU CRITICAL HABITAT PROTECTION IN CANADA

A WILDLANDS LEAGUE REPORT

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CONTEXT: WILDLANDS LEAGUE'S PERSPECTIVE

For many years, Wildlands League has been deeply concerned about the conservation status and recovery of boreal caribou in Ontario and across the country. Scientists consider boreal caribou as bellwethers of the health of boreal forests and wetlands. Boreal forests and wetlands cleanse our air and water, and store vast amounts of carbon within their soils, moderating climate change. Protecting Canada's remaining boreal caribou habitat is one of the most important means we have of maintaining fully functioning ecosystems within boreal forests and wetlands for generations to come.

Today Wildlands League is publishing the first ever progress report on whether boreal caribou critical habitat is protected in Canada. Indeed, this is the first such progress report for any species listed under the *Species at Risk Act* (SARA) for which critical habitat is identified in Canada.¹

To research and write the enclosed progress report, Wildlands League assembled a team comprised of a law student, two environmental lawyers, and a conservation leader who specializes in boreal caribou conservation. This team thoroughly analyzed relevant provincial, territorial, and federal laws. The resulting report reflects our team's expert assessment of the current state of protection for boreal caribou critical habitat throughout the country.²

The progress report fills an important gap that, unfortunately, has been created by the federal government. Under section 63 of SARA, the federal Minister of the Environment and Climate Change must release progress reports within 180 days from when a species' critical habitat is identified in a recovery strategy. For boreal caribou, critical habitat was identified in the 2012 Recovery Strategy, released on the SARA public registry in October 2012. Thus, the Minister was required to release the first progress report in April 2013. However, the Minister failed to do this – and, in the 4.5 years since then, the federal government has never released one single progress report for boreal caribou.

¹ The Canada – British Columbia Southern Mountain Caribou (Central Group) Protection Study (February 2017), online: https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/ProtectionStudy-Smc-central-v01-0217-Eng.pdf, conducts a very similar review of British Columbia legislation used to manage Southern Mountain Caribou and their habitat. For clarity, this review is not a progress report under section 63 of SARA.

² The legal analysis and conclusions in this report do not necessarily reflect the legal views of CPAWS.

On the fifth anniversary of the 2012 Recovery Strategy, this progress report shines desperately needed light on the provinces and territories' role in protecting boreal caribou critical habitat. The provinces and territories have had five years to protect boreal caribou critical habitat. So far, they have failed.

Progress reports under SARA are about accountability, transparency, and evidence-based decision-making. They ensure that, after identifying a species' critical habitat, Environment and Climate Change Canada officials continue to assess – on an ongoing basis – whether that critical habitat has been protected. Without any progress reports, the Government of Canada's ability to make timely, responsive “safety net” decisions under section 61 of SARA is undermined – which in turn undermines the Act's critical habitat protection scheme.

Progress reports are also intended to promote the public's right to know about steps taken – or not taken – to protect a species' critical habitat. They ensure that, when protection by provinces or territories is lacking, then Indigenous peoples, stakeholders, and the public can ask Environment and Climate Change Canada to consider whether federal intervention is necessary. Transparency also strengthens the incentive for provinces and territories to take greater steps toward protecting critical habitat.

After many years of non-compliance with SARA's requirements for progress reporting, Environment and Climate Change Canada recently signaled its intention to release a progress report by April 2018. We hope that it follows through. In the meantime, however, destruction of boreal caribou critical habitat continues unabated throughout the country. Protection and recovery actions are urgently required.

Wildlands League hopes that, by shining light on the current lack of protection, this first ever progress report on the protection of boreal caribou critical habitat in Canada encourages the provinces and territories to finally take the steps needed to protect boreal caribou critical habitat. It is also our hope that, after a decade of neglect of species at risk, our progress report supports a renewed approach within the federal government to conserving species at risk in Canada.



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THE REPORT



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EXECUTIVE SUMMARY

This is the first progress report on whether boreal caribou critical habitat is protected across Canada.

Woodland caribou, boreal population (herein referred to as “boreal caribou”) is distributed throughout boreal forests and wetlands across Canada occurring in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador, Yukon, and Northwest Territories.

Boreal caribou is listed as threatened in Schedule 1 of the *Species at Risk Act* (SARA).³ In October 2012, the federal Minister of Environment posted the Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada (2012 Recovery Strategy) to the SARA public registry. Under section 63 of SARA, the Minister of Environment and Climate Change is then required to release a progress report on the steps taken to protect “any portion of the critical habitat of a listed wildlife species [that] remains unprotected” every 180 days after posting a recovery strategy, until all critical habitat is protected.

However, the Minister has never complied with this legal requirement for regular progress reports on critical habitat protection.

This report aims to assess whether boreal caribou critical habitat in Canada is protected. Specifically, legislation governing species at risk, protected areas, and natural resource management, in each of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador, Yukon, Northwest Territories, and Canada, was assessed for whether it protects boreal caribou critical habitat to a standard consistent with protection under SARA. That is, this provincial and territorial legislation was assessed for whether it provides mandatory and enforceable protection against the destruction of boreal caribou critical habitat.⁴

Overall, the main finding of this legal analysis is that boreal caribou critical habitat remains largely unprotected across the country.

In Saskatchewan and Yukon, all portions of boreal caribou critical habitat remain unprotected. Similarly, in the remaining six provinces and one territory, the vast majority of critical habitat remains unprotected except for small portions that overlap with certain parks and protected areas.

In reaching this overall finding, the following types of legislation were assessed and the following conclusions were drawn:



³ *Species at Risk Act*, SC 2002, c 29, Schedule 1.

⁴ For a summary of the report’s methods, see the Appendix.

First, for each jurisdiction, it was assessed whether boreal caribou critical habitat is currently protected under species at risk legislation. Five of the nine provincial and territorial jurisdictions analyzed have species at risk legislation in place. However, these five jurisdictions have not protected boreal caribou critical habitat under their species at risk legislation:

- Manitoba, Ontario, and Québec have legislative schemes that do not provide mandatory and enforceable protection against critical habitat destruction, and furthermore, these jurisdictions have not protected any boreal caribou critical habitat under their legislation;
- Newfoundland and Labrador's species at risk legislation has the capacity to protect boreal caribou critical habitat, but critical habitat remains unprotected because no habitat orders have been made under this legislation; and,
- Similarly, Northwest Territories' species at risk legislation has the capacity to protect boreal caribou critical habitat, but no boreal caribou critical habitat has been designated by regulation.

British Columbia, Alberta, Saskatchewan, and Yukon do not have any standalone species at risk legislation. Therefore, for these four jurisdictions (and also, exceptionally, for Manitoba), it was assessed whether boreal caribou critical habitat is currently protected under general wildlife legislation. It was found that none of these five jurisdictions' general wildlife laws protect boreal caribou critical habitat. Moreover, of these five jurisdictions' wildlife laws, only two jurisdictions' wildlife laws have the capacity to protect critical habitat: Yukon's *Wildlife Act* and Manitoba's *Wildlife Act*.

Second, for each jurisdiction, it was assessed whether boreal caribou critical habitat is currently protected under parks and protected areas legislation. It was concluded that eight of the nine provincial and territorial jurisdictions have parks or protected areas legislation that has the capacity to protect critical habitat. However, in these eight jurisdictions, parks and protected areas protect – at best – only small portions of boreal caribou critical habitat:

- British Columbia, Alberta, Manitoba, Ontario, and Québec have parks and protected area legislation that is protective, but parks and protected areas created under the legislation overlap only minimally with boreal caribou critical habitat;
- Newfoundland and Labrador has parks legislation with the capacity to be protective, but no parks currently overlap with boreal caribou critical habitat, and other types of protected areas overlap only minimally with boreal caribou critical habitat;
- Yukon and Northwest Territories have parks and protected area legislation with the capacity to be protective, but no protected areas currently overlap with boreal caribou critical habitat.

Parks legislation in Saskatchewan does not have the capacity to protect boreal caribou critical habitat.

Third, in a few instances, it appeared that some jurisdictions have sought to assert that certain legislation, such as forestry or land use planning laws, may protect critical habitat. Therefore, the potential of those schemes to protect boreal caribou critical habitat was assessed. It was concluded that these legislative schemes do not protect boreal caribou critical habitat:

- British Columbia has previously pointed to the wildlife habitat areas and ungulate winter ranges established under the *Forest and Range Practices Act* and the *Oil and Gas Activities Act* as serving to protect boreal caribou critical habitat. However, these two statutes and the areas created thereunder do not protect boreal caribou critical habitat because the protections they offer are not mandatory but merely discretionary, and do not protect against the full suite of activities likely to destroy critical habitat.
- Alberta has pointed to regional planning as one tool to take action on boreal caribou. Under the *Alberta Land Stewardship Act*, regional plans with enforceable conservation directives and supported by a regulatory framework for effective implementation may protect critical habitat. There are currently no regional plans with enforceable conservation directives that overlap with boreal caribou critical habitat, and no regulatory framework for implementation.

- Ontario's Ministry of Natural Resources and Forestry relies in part on the *Crown Forest Sustainability Act, 1994* to take action on boreal caribou. The *Crown Forest Sustainability Act, 1994* does not protect boreal caribou critical habitat because it does not provide mandatory and enforceable protection against destruction.

Finally, it was assessed whether Canada's laws protect boreal caribou critical habitat. SARA implementation efforts were generally not analyzed, as Canada has not protected any boreal caribou critical habitat under section 61 protection orders or section 11 agreements. However, SARA implementation efforts were analyzed in relation to four national parks. Only two, Wood Buffalo National Park and Prince Albert National Park, protect boreal caribou critical habitat from destruction. It was concluded that Canada's national parks legislation does not itself protect boreal caribou critical habitat, with the exception of any wilderness areas that overlap with boreal caribou critical habitat. The *Canada Wildlife Act* has the capacity to protect boreal caribou critical habitat, through Canada's creation of national wildlife areas. However, no national wildlife areas currently overlap with boreal caribou critical habitat. Overall, boreal caribou critical habitat on some federal lands remains unprotected by federal legislation.



INTRODUCTION

Woodland caribou, boreal population (herein referred to as “boreal caribou”) is distributed throughout boreal forests and wetlands across Canada, occurring in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador, Yukon, and Northwest Territories. Boreal caribou require large continuous tracts of undisturbed habitat comprised of mature to old-growth coniferous forest, lichens, muskegs, peat lands, and upland or hilly areas.⁵

Boreal caribou is listed as threatened in Schedule 1 of the *Species at Risk Act* (SARA).⁶ In October 2012, the federal Minister of Environment posted the Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada (2012 Recovery Strategy) to the SARA public registry. The 2012 Recovery Strategy identifies boreal caribou critical habitat in Canada.⁷ It describes human land-use activities such as forestry, mines, industrial and infrastructure development, road development, pipelines, and hydroelectric corridors as activities likely to result in the destruction of critical habitat.⁸

Under section 63 of SARA, the Minister of Environment and Climate Change is required to release a progress report on the steps taken to protect “any portion of the critical habitat of a listed wildlife species [that] remains unprotected” every 180 days after posting a recovery strategy on the SARA public registry until all critical habitat is protected. However, the Minister has failed to ever release a progress report addressing the protection status of boreal caribou critical habitat.

In the absence of any reporting to date by the federal government, this is the first ever progress report to assess the current state of boreal caribou critical habitat protection across Canada.⁹ The report analyzes legislation governing species at risk, wildlife, parks and protected areas, and in some cases natural resource management, in each jurisdiction where boreal caribou critical habitat occurs.¹⁰ Specifically, this legal analysis answers the question of whether provincial, territorial, or federal laws currently provide mandatory and enforceable protection against the destruction of boreal caribou critical habitat.

This analysis begins with examining whether the respective jurisdiction has species at risk legislation. Stand-alone species at risk legislation is the best legislative means to ensure the survival and recovery of at-risk species like boreal caribou. While several different pieces of legislation could operate to protect boreal caribou critical habitat, relying on a patchwork of different laws can result in haphazard, incoherent or limited protection. In contrast, strong stand-alone endangered species laws provide protection against all potentially destructive activities.

⁵ Environment Canada, Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada, *Species at Risk Act* Recovery Strategy Series (Environment Canada: Ottawa, 2012) at vi.

⁶ *Species at Risk Act*, SC 2002, c 29, Schedule 1.

⁷ 2012 Recovery Strategy, at pages 32-35. Boreal caribou critical habitat is identified for all boreal caribou ranges except for one range in northern Saskatchewan.

⁸ 2012 Recovery Strategy, at pages 36-37. Section 2(1) of the *Species at Risk Act* defines critical habitat as “habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species”. The 2012 Recovery Strategy at page 32 identifies critical habitat for boreal caribou as: “the area within the boundary of each boreal caribou range that provides an overall ecological condition that will allow for an ongoing recruitment and retirement cycle of habitat, which maintains a perpetual state of a minimum of 65% of the area as undisturbed; and biophysical attributes required by boreal caribou to carry out life processes”.

⁹ Throughout the analysis, critical habitat means “habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species” (*Species at Risk Act*, SC 2002, c 29, s. 2(1)) and, specifically, boreal caribou critical habitat is as it is identified in the federal 2012 Recovery Strategy.

¹⁰ Please see the Appendix for a detailed account of the methods used to conduct this research.

Summary of Findings

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Boreal caribou critical habitat remains largely unprotected in British Columbia.

Boreal caribou is not listed under the *Wildlife Act*. Even if this species were listed, this legislation could not protect boreal caribou critical habitat.

The *Forest and Range Practices Act* and its *Government Actions Regulation* do not protect boreal caribou critical habitat. Currently, the general wildlife measures that have been established for wildlife habitat areas and ungulate winter ranges, under this legislation, do not prohibit the destruction of boreal caribou critical habitat. Further, as a matter of law, general wildlife measures do not create mandatory protection.

The *Oil and Gas Activities Act* and its *Environmental Protection and Management Regulation* do not protect boreal caribou critical habitat. The prohibitions in the Regulation are discretionary, and the Minister is not empowered to establish environmental measures that might protect boreal caribou critical habitat. The government's environmental objectives for wildlife habitat areas and ungulate winter ranges, established in the Regulation, do not create mandatory and enforceable protection.

Under the *Park Act*, Class A and Class C parks, and conservancies, have the potential to protect boreal caribou critical habitat. However, existing Class A and C parks, and existing conservancies, overlap only minimally with boreal caribou critical habitat.

Ecological reserves established under the *Ecological Reserve Act* have the potential to protect boreal caribou critical habitat. However, no ecological reserves currently overlap with boreal caribou critical habitat.

The *Environment and Land Use Act* does not protect boreal caribou critical habitat because neither the Act nor orders made under the Act create mandatory and enforceable protection against the destruction of critical habitat.



¹¹ Environment Canada (2016). Boreal Caribou Ranges in Canada [Data file]. Retrieved from <http://donnees.ec.gc.ca/data/species/protectrestore/boreal-caribou-ranges-incanada/> Commission for Environmental Cooperation (2010). Political Boundaries [Data file]. Retrieved from <http://www.cec.org/tools-and-resources/map-files/political-boundaries-2010>

Wildlife Act

Under the *Wildlife Act*, the Minister of Forests, Lands and Natural Resource Operations may, with the consent of the Lieutenant Governor in Council, establish wildlife management areas.¹² Further, the Minister may also make a regulation designating land within a wildlife management area as a critical wildlife area, if that land is required as habitat for a wildlife species.¹³

For species that are listed under the Act, the Act prohibits the alteration, destruction, and damage of wildlife habitat.¹⁴ Presently, however, no wildlife management areas or critical wildlife areas have been established that would protect boreal caribou critical habitat.¹⁵ Furthermore, at present, British Columbia has no power to establish any such areas, because boreal caribou is not listed under the *Wildlife Act*.¹⁶ The *Designation and Exemption Regulation* lists wildlife species governed by the *Wildlife Act*,¹⁷ and lists species that are designated as threatened or endangered.¹⁸ As boreal caribou is not listed in this Regulation, boreal caribou have no protection under the *Wildlife Act*.

If boreal caribou were listed in the Regulation, the *Wildlife Act* would not protect their critical habitat because the prohibition against alteration, destruction, and damage of wildlife habitat is not mandatory. A regional manager may give written permission to use land or resources in a wildlife management area, and may issue a permit exempting an individual from the prohibition against alteration, destruction, and damage.¹⁹ There are no constraints on the regional manager's authority to give permission in this regard.

Forest and Range Practices Act

Under the *Forest and Range Practices Act*, the Lieutenant Governor in Council may make regulations authorizing the Minister of Forests, Lands and Natural Resource Operations to establish ungulate winter ranges and wildlife habitat areas. The Lieutenant Governor in Council may also make regulations authorizing the Minister to establish general wildlife measures for these ranges and areas.²⁰

¹² *Wildlife Act*, RSBC 1996, c 488, s. 4(2).

¹³ *Ibid*, s. 5(1).

¹⁴ *Ibid*, s. 7(1).

¹⁵ *Wildlife Management Areas Regulation*, BC Reg 12/2015. See also Ministry of Forests, Lands and Natural Resource Operations, Wildlife Management Areas, online: <http://www.env.gov.bc.ca/fw/habitat/conservation-lands/wma/list.html>.

¹⁶ Subsection 1(1) of the *Wildlife Act* states that "wildlife" are species prescribed by regulation. Under s. 6(1), the Lieutenant Governor in Council may designate, by regulation, species as endangered or threatened species.

¹⁷ *Designation and Exemption Regulation*, BC Reg 168/90, Schedule A. Section 1 states that Schedule A prescribes "... "wildlife" for the purposes of the definition of "wildlife" in section 1 of the *Wildlife Act*."

¹⁸ *Ibid*, s. 13, Schedules D and E.

¹⁹ *Wildlife Act*, ss. 4(4) and 7(1). Subsection 7(2) allows for regulations to be made specifying that compliance with the standards under the *Coal Act*, *Geothermal Resources Act*, *Mineral Tenure Act* or *Oil and Gas Activities Act* or regulations or other instruments under these Acts is sufficient compliance with subsection (1). No regulations have been made to this effect. Subsection 7(3) provides that "the regional manager may issue a permit if the applicant has complied with section 78 of the *Environmental Management Act*," which gives discretion to the Minister of Environment to require an environmental impact assessment where a proposed action will have a detrimental environmental effect and where those effects cannot be assessed with information available to the Minister.

²⁰ *Forest and Range Practices Act*, SBC 2002, c 69, s. 149.1(1)(a).

Under this Act, the *Government Actions Regulation* empowers the Minister to make orders establishing ungulate winter ranges,²¹ and to make orders establishing wildlife habitat areas.²² The Regulation further empowers the Minister, by order, to establish general wildlife measures for ungulate winter ranges and wildlife habitat areas.²³

General wildlife measures are aimed at protecting or conserving wildlife habitat areas and ungulate winter ranges.²⁴ Authorized persons carrying out primary forest activities and woodlot licence holders are required to comply with any general wildlife measures, subject to certain exemptions.²⁵

Notably, as a matter of law, the Minister may only establish such general wildlife measures if satisfied that the protection or conservation to be offered by that measure is not provided for under any existing provincial enactment.²⁶ As some general wildlife measures have been established in recent years, in ungulate winter ranges and wildlife habitat areas that overlap with boreal caribou critical habitat, this supports the conclusion above that the *Wildlife Act* does not provide protection. Further, it indicates that the Ministry of Forests, Lands and Natural Resource Operations was itself of the view that all other provincial enactments, in existence at the time that its Minister established these general wildlife measures, do not provide for protection or conservation of boreal caribou critical habitat.

²¹ *Government Actions Regulation*, BC Reg 582/2004, s. 12. Subsection 12(1) provides that the Minister may, by order, establish an ungulate winter range if satisfied that the area contains habitat that is necessary to meet the winter habitat requirements for a category of specified ungulate species, and that this habitat requires special management that is not otherwise provided for under this regulation or another enactment. Subsection 12(2) provides that the Minister may, by order, establish an ungulate winter range objective for an ungulate winter range if satisfied that the ungulate winter range requires special management that has not otherwise been provided for under this regulation or another enactment.

²² *Ibid*, s. 10. Subsection 10(1) provides that the Minister may, by order, establish a wildlife habitat area if satisfied that the area is necessary to meet the habitat requirements of a category of species at risk or regionally important wildlife. Subsection 10(2) provides that the Minister may, by order, establish a wildlife habitat area objective for a wildlife habitat area if satisfied that the wildlife habitat area requires special management that has not otherwise been provided for under this regulation or another enactment.

²³ *Ibid*, s. 9(2). The Minister may establish a general wildlife measure if satisfied that the measure is necessary to protect or conserve the wildlife habitat area or ungulate winter range, and if this regulation or another enactment does not otherwise provide for that protection or conservation.

²⁴ *Ibid*, s. 9(2).

²⁵ For authorized persons carrying out primary forest activities, see *Forest Planning and Practices Regulation*, BC Reg 14/2004, s. 69. Violation of s. 69 is made an offence under s. 102(1). For woodlot licence holders, see *Woodlot Licence Planning and Practices Regulation*, BC Reg 21/2004, s. 55. Violation of s. 55 is made an offence under s. 90(1). Unlike s. 69 of the *Forest Planning and Practices Regulation*, s. 55 of the *Woodlot Licence Planning and Practices Regulation* contains both the requirement to comply and the potential for exemption within the same provision. Exemptions related to both of these compliance requirements are discussed below at the end of the discussion of the *Forest and Range Practices Act*.

²⁶ *Government Actions Regulation*, s. 9(2).

There are currently 24 wildlife habitat areas,²⁷ and two ungulate winter ranges,²⁸ established for boreal caribou in the province. Each of the two ungulate winter ranges are divided into two sets of units.²⁹ Geographically, these winter habitat ranges and ungulate winter ranges do not cover the entirety of boreal caribou critical habitat in British Columbia.

To date, the Minister has established two different sets of general wildlife measures, which relate to two different groupings of wildlife habitat areas, ungulate winter ranges, and units thereof. Specifically, for wildlife habitat areas numbered WHA 9-074 through WHA 9-096 and for ungulate winter range Units CHIN 001 – 006 and BCAR 001 – 058, the associated general wildlife measures prohibit new linear corridors, logging, new recreational trails and sites, and any “material adverse disturbance to caribou during the period of May 01 to June 01”.³⁰ While these general wildlife measures provide protection against some harmful activities, these measures fail to prohibit the full suite of activities identified in the 2012 Recovery Strategy as activities that destroy boreal caribou critical habitat, except arguably during one month of the year.

For wildlife habitat area WHA 9-101 and for ungulate winter range Units CHIN 007 – 011 and Units BCAR 059 – 100, the associated general wildlife measures do not prohibit any destructive activities beyond limitations on recreational trails and sites. Rather, they encourage less harmful road building practices and provide guidance on forestry activities, without imposing any restrictions.³¹

Importantly, in addition, compliance with these general wildlife measures is not mandatory. Specifically, the Minister may exempt authorized persons carrying out primary forest activities and woodlot license holders from compliance with general wildlife measures if compliance is not “practicable”.³²

Therefore, because they continue to allow some destructive activities, and because they are not mandatory, the general wildlife measures currently established for wildlife habitat areas or ungulate winter ranges under the *Forest and Range Practices Act* do not protect boreal caribou critical habitat against destruction.

²⁷ *ORDER – Wildlife Habitat Areas #9-074 to 9-088 Boreal Caribou – Fort Nelson Forest District*, (2011) BC Gaz I, Volume CLI, No. 3. For a copy of the order, go to http://www.env.gov.bc.ca/wld/documents/wha/RATA_9-074to088_Order_GWMs_only.pdf; *ORDER – Wildlife Habitat Areas #9-089-#9-096 Boreal Caribou – Fort St. John Resource District*, (2013) BC Gaz I, Volume CLIII, No. 20. For a copy of the order, go to: http://www.env.gov.bc.ca/wld/documents/wha/RATA_9-089to096_ord.pdf; *ORDER – Wildlife Habitat Areas #9-101 Boreal Caribou – Fort Nelson Resource District*, (2013) BC Gaz I, Volume CLIII, No. 20. For a copy of the order, go to: http://www.env.gov.bc.ca/wld/documents/wha/RATA_9-101_Order.pdf. See also British Columbia, “Approved Wildlife Habitat Areas (WHAs)”, online: <http://www.env.gov.bc.ca/cgi-bin/apps/faw/wharesult.cgi?search=species&species=boreal+caribou&speciesname=english&submit2=Search>.

²⁸ *ORDER – Ungulate Winter Range #U-9-009 Boreal Caribou – Fort St. John Timber Supply Area*, (2013) BC Gaz, Volume CLIII, No. 20. For a copy of the order, go to: http://www.env.gov.bc.ca/wld/documents/uwr/RATA_U-9-009_Order.pdf; *ORDER – Ungulate Winter Range #U-9-010 Boreal Caribou – Fort Nelson Timber Supply Area*, (2011) BC Gaz, Volume CLI, No. 3. For a copy of the order, go to: http://www.env.gov.bc.ca/wld/documents/uwr/RATA_U-9-010_Order_GWMs_only.pdf. See also British Columbia, “Approved Ungulate Winter Ranges”, online: http://www.env.gov.bc.ca/wld/frpa/uwr/approved_uwr.html.

²⁹ Ungulate Winter Range U-9-009 is divided into Units CHIN 001 – 006 and Units CHIN 007 – 011. Ungulate Winter Range U-9-010 is divided into Units BCAR 001-058 and Units BCAR 059 – 100. See *ibid*.

³⁰ *ORDER – Wildlife Habitat Areas #9-074 to 9-088 Boreal Caribou – Fort Nelson Forest District*, *ORDER – Wildlife Habitat Areas #9-089-#9-096 Boreal Caribou – Fort St. John Resource District*, *ORDER – Ungulate Winter Range #U-9-009 Boreal Caribou – Fort St. John Timber Supply Area*, and *ORDER – Ungulate Winter Range #U-9-010 Boreal Caribou – Fort Nelson Timber Supply Area*.

³¹ *Ibid*.

³² *Forest Planning and Practices Regulation*, s. 92 and *Woodlot Licence Planning and Practices Regulation*, BC Reg 14/2004, s. 79, respectively.

Oil and Gas Activities Act

Under the *Oil and Gas Activities Act*, the Lieutenant Governor in Council may make regulations respecting actions that permit holders and persons carrying out an oil and gas activity must take, or must refrain from taking, to protect or effectively manage the environment.³³ Such regulations may address, among other things, the protection of wildlife habitat features, wildlife habitat, and biodiversity, and any ungulate winter ranges or wildlife habitat areas established under the Act.³⁴

The Lieutenant Governor in Council may also make regulations authorizing the Minister of Forests, Lands and Natural Resource Operations to establish wildlife habitat areas and ungulate winter ranges, and to establish environmental measures for these areas.³⁵ Under the Act, “environmental measures” specify the action a person must take or refrain from taking to effectively protect and manage the environment.³⁶ It is an offence for a permit holder or a person carrying out oil and gas activities to fail to comply with any environmental measures established by Minister under any such regulation made under the Act.³⁷

The *Environmental Protection and Management Regulation* authorizes the Minister to establish wildlife habitat areas and ungulate winter ranges for the purposes of this Act.³⁸ It does not, however, authorize the Minister to establish environmental measures in these areas. The Regulation does directly impose numerous prohibitions and restrictions, aimed at protecting or managing the environment, on persons carrying out oil and gas activities.³⁹ However, the Oil and Gas Commission is empowered to exempt a person, or a class of persons, from these requirements if the Commission is “satisfied that, in the circumstances, it is not reasonably practicable for the person to comply”.⁴⁰ Therefore, as the only protections available under the Regulation are discretionary, the Regulation does not protect boreal caribou critical habitat from destruction.

The Minister has established a number of wildlife habitat areas and ungulate winter ranges under this Regulation. These are the same wildlife habitat areas and ungulate winter ranges discussed above in the context of the *Forest and Range Practices Act*. As concluded above, the general wildlife measures established for these areas and ranges, under the *Forest and Range Practices Act*, do not protect boreal caribou critical habitat from destruction.⁴¹

The Regulation also prescribes objectives with respect to wildlife habitat, including restrictions on operating within wildlife habitat areas and ungulate winter ranges, for the purposes of establishing the “government’s environmental objectives” under the Act.⁴² The objectives are not prohibitions and contravention of the objectives

³³ *Oil and Gas Activities Act*, SBC 2008, c 36, s. 103(1).

³⁴ *Ibid.*, ss. 103(2)(a), (b), (o), (v) and (w).

³⁵ *Ibid.*, ss. 104(1)(a) and (b).

³⁶ *Ibid.*, s. 1(2).

³⁷ *Ibid.*, ss. 36(1) and 104(1)(b).

³⁸ *Environmental Protection and Management Regulation*, BC Reg 200/2010, ss. 30 and 31.

³⁹ *Ibid.*, Part 3 (ss. 8.1-20).

⁴⁰ *Ibid.*, s. 21.

⁴¹ ORDER: WILDLIFE HABITAT AREAS 9-089 to 9-096 and 9-101 ENVIRONMENTAL PROTECTION AND MANAGEMENT REGULATION, (2013) BC Gaz 1, Volume CLIII, No. 20. For a copy of the order, go to: https://www.for.gov.bc.ca/tasb/legsregs/ogaa/OGAA_WHA_9_089-9_096+9_101_Boreal_Caribou_Order.pdf; ORDER: UNGULATE WINTER RANGE ENVIRONMENTAL PROTECTION AND MANAGEMENT REGULATION, (2011) BC Gaz 1, Volume CLI, No. 38. For a copy of the order, go to: https://www.for.gov.bc.ca/tasb/legsregs/ogaa/OGAA_UWRs_Order.pdf; ORDER: UNGULATE WINTER RANGE U-9-009 ENVIRONMENTAL PROTECTION AND MANAGEMENT REGULATION, (2013) BC Gaz 1, Volume CLIII, No. 20. For a copy of the order, go to: https://www.for.gov.bc.ca/tasb/legsregs/ogaa/OGAA_UWR_9_009_Boreal_Caribou_Order.pdf.

⁴² *Environmental Protection and Management Regulation*, s. 6. The definition of “government’s environmental objectives” is “the prescribed objectives of the government respecting the protection and effective management of the environment”; see *Oil and Gas Activities Act*, s. 1(2). Such objectives are established under the authority of s. 103(4).

is not an offence.⁴³ The objectives must only be considered, and need not be complied with, when the Oil and Gas Commission issues a permit under the Act.⁴⁴

Therefore, the *Oil and Gas Activities Act* does not protect boreal caribou critical habitat.

Park Act

Under the *Park Act*, the Lieutenant Governor in Council may establish Class A, Class B, and Class C parks, as well as conservancies.⁴⁵ Natural resources in Class A and Class C parks are protected from grant, sale, removal, destruction, damage, disruption, and exploitation.⁴⁶ Further, in Class A and C parks, only activities that are “necessary for the preservation or maintenance” of the park’s recreational values may be authorized by a park use permit.⁴⁷ Despite this, the Act also provides that park use permits may be issued for an activity related to resort or tourism development, provided that both the activity and the development are consistent with or complementary to the recreational values of the park involved.⁴⁸ These provisions do not foreclose the possibility of recreational development in Class A or C parks; however, any such development is nonetheless constrained by the need to conform to the park’s existing recreational values. Therefore, the *Park Act* protects boreal caribou critical habitat that overlaps with Class A and Class C parks from destruction.

In Class B parks, natural resources are likewise protected from damage and destruction. However, in Class B parks, park use permits may authorize destructive activities that are “not detrimental” to the recreational values of the park involved.⁴⁹ The discretion to issue park use permits in Class B parks is therefore slightly broader than in Class A and C parks: the Minister may permit activities that are destructive to boreal caribou critical habitat, provided they do not harm the park’s recreational values. Therefore, the *Parks Act* does not protect boreal caribou critical habitat that overlaps with Class B parks.

In conservancies, natural resources must not be granted, sold, removed, destroyed, damaged, disrupted, or exploited unless the Minister is of the opinion that the development, improvement, and use of the conservancy for its intended purposes will not be hindered.⁵⁰ Park use permits for commercial logging, mining, hydro electric power generation,⁵¹ and any other activities are prohibited in conservancies, unless the Minister is of the opinion that the activity will not restrict, prevent, or inhibit the development, improvement, or use of the conservancy for its intended purposes.⁵² Conservancies are created for the protection and maintenance of biological diversity and natural environments; social, ceremonial, and cultural uses of First Nations; and recreational values; and for the development or use of natural resources in a manner consistent with those purposes.⁵³ Conservancies can therefore protect boreal caribou critical habitat.

⁴³ *Oil and Gas Activities Act*, s. 86.

⁴⁴ *Ibid*, s. 25.

⁴⁵ *Park Act*, RSBC 1996, c 344, ss. 5(1).

⁴⁶ *Ibid*, s. 9(1). Section 1 defines “natural resources” as “land, water and atmosphere, their mineral, vegetable and other components, and includes the flora and fauna on and in them”.

⁴⁷ *Ibid*, ss. 8(2), 9(1) and 9(2).

⁴⁸ *Ibid*, s. 9.1. Note that ss. 8(2), 9(1), 9(2) and 9.1 have been considered and applied by the BC Supreme Court. For example, see *Society of the Friends of Strathcona Park v British Columbia (Environment)*, 2013 BCSC 1105 at paras 82-92 and 107-116 and *Cypress Provincial Park Society v. Minister of Environment, Lands and Parks*, 2000 BCSC 466 at paras 14-16 and 53- 58.

⁴⁹ *Ibid*, ss. 9(3) and 9(4). See also ss. 9(7) and 12(3), which prohibit damage and destruction of natural resources in any park unless the Minister is of the opinion that the activity does not restrict, prevent or inhibit use of the park for its intended purpose. See also *West Kootenay Community Ecosociety v HMTQ*, 2005 BCSC 784 at paras 30-38.

⁵⁰ *Ibid*, s. 9(9). See s. 5(3.1) for the purposes of conservancies.

⁵¹ *Ibid*, s. 9(10)(c) excludes local run-of-the-river hydro electric generation projects from the permitting prohibition.

⁵² *Ibid*, ss. 9(10) and 5(3.1).

⁵³ *Ibid*, s. 5(3.1).

At this point in time, British Columbia's Class A and Class C parks, and its conservancies, overlap minimally with boreal caribou critical habitat, which means that only a small amount of critical habitat is protected. The majority of boreal caribou critical habitat in the province is not protected by the *Park Act*.

Ecological Reserve Act

Under the *Ecological Reserve Act*, the Lieutenant Governor in Council may, by order, establish an area of Crown land as an ecological reserve.⁵⁴ The *Ecological Reserve Regulations* prohibit prospecting for minerals, logging, building roads or trails, using motorized vehicles, and removing plants from an ecological reserve.⁵⁵ The Regulations also prohibit any person from entering an ecological reserve for a purpose inconsistent with reserving Crown land for ecological purposes.⁵⁶ Contravention of these prohibitions is punishable by fine.⁵⁷

Therefore, the *Ecological Reserve Act* has the capacity to protect boreal caribou critical habitat. However, at this point in time, no ecological reserves overlap with boreal caribou critical habitat.

Environment and Land Use Act

Under the *Environment and Land Use Act*, the Lieutenant Governor in Council may, by order, establish protected areas upon recommendation by the Environment and Land Use Committee.⁵⁸ However, the Act does not contain provisions that create any mandatory and enforceable protections for such protected areas, and thus does not protect boreal caribou critical habitat from destruction.

Likewise, orders made under the Act cannot themselves provide mandatory and enforceable protection against the destruction of boreal caribou critical habitat. On occasion, the Lieutenant Governor in Council has made orders under the *Environment and Land Use Act* establishing protected areas, which orders rely on provisions of *Park Act* and regulations thereunder to provide some protection for these areas.⁵⁹ Any protection arising under these orders derives not from this Act, but from the *Park Act*. Further, not all protected areas created by order under this Act benefit from protection under the *Park Act* in this way.

Therefore, the *Environment and Land Use Act* does not itself protect boreal caribou critical habitat.

Policy Considerations

The British Columbia Ministry of Environment and Ministry of Forests, Lands and Natural Resource Operations has created the Draft Boreal Caribou Recovery Implementation Plan.⁶⁰ This Draft Implementation Plan deals exclusively with the management of boreal caribou in British Columbia. Management measures in non-binding policy documents do not equate to protection in law, such that this plan does not create any mandatory and enforceable protection of boreal caribou critical habitat.

⁵⁴ *Ecological Reserve Act*, RSBC 1996, c 103, s. 3(1).

⁵⁵ *Ecological Reserve Regulations*, BC Reg 335/75, s. 1.

⁵⁶ *Ibid*, ss. 1 and 2.

⁵⁷ *Ecological Reserve Act*, s. 7.1(1).

⁵⁸ *Environment and Land Use Act*, RSBC 1996, c 117, s. 7(1).

⁵⁹ For example, see *ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL – MOUNT ROBSON PROTECTED AREA ORDER*, OIC 0955-2004, (2004) BC Gaz I. For a copy of the order, go to: http://www.bclaws.ca/civix/document/id/oic/arc_oic/0955_2004.

⁶⁰ Ministry of Environment and Ministry of Forests, Lands, and Natural Resource Operations, Draft Boreal Caribou Recovery Implementation Plan (2017), online: <https://engage.gov.bc.ca/app/uploads/sites/121/2017/03/Draft-Boreal-Caribou-Recovery-Implementation-Plan-2017-2.pdf>.

In 2010, British Columbia established resource review areas (RRAs) to enable habitat restoration and mitigation actions within boreal caribou ranges.⁶¹ RRAs do not have a basis in law; they are temporary policy mechanisms used to manage boreal caribou critical habitat.⁶² At this time, four RRAs exist within boreal caribou critical habitat, in areas that do not currently contain any oil and gas, coal, mineral or placer tenures.⁶³ RRAs were originally one element of the Implementation Plan for the Ongoing Management of Boreal Caribou (*Rangifer tarandus* caribou pop. 14) in British Columbia, another policy document that was the predecessor of the Draft Boreal Caribou Recovery Implementation Plan.⁶⁴ One objective of the Draft Implementation Plan is to “replace existing RRAs with better aligned RRAs over untenured portions of caribou core areas, until incremental habitat protections and population management actions are finalized”.⁶⁵ For these reasons, they do not create mandatory and enforceable protection against critical habitat destruction.

⁶¹ Deborah Cichowski, Diane Culling and Scott McNay, Performance Measures for Resource Review Areas for Woodland Caribou in British Columbia (Ministry of Forests, Lands and Natural Resource Operations, 2012) at 1, online: http://www.env.gov.bc.ca/wld/speciesconservation/bc/documents/RRA_Performance_Measures_-_March_31,_2012.pdf [Cichowski *et al.*].

⁶² Canada-British Columbia Southern Mountain Caribou (Central Group) Protection Study (2017) at 55, online: https://www.registrellep-sararegistry.gc.ca/virtual_sara/files/ProtectionStudy-Smc-central-v01-0217-Eng.pdf.

⁶³ Ministry of Energy, Mines and Petroleum, British Columbia Resource Review Areas for Boreal Caribou in Northeast BC (map) (2010), online: http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-gas-oil/png-crown-sale/information-letters/boreal_caribou_rra.pdf.

⁶⁴ Cichowski *et al.*, at 4.

⁶⁵ Draft Boreal Caribou Recovery Implementation Plan, at 8. Of concern, the BC government has not disclosed the extent, location, justification, assessed impacts, or other facts and considerations regarding any such RRA realignments.

ALBERTA

Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Alberta.

While boreal caribou is listed under the *Wildlife Act*, the Act protects residences, not habitat. Current wildlife sanctuaries and conservation areas do not prohibit the destruction of boreal caribou critical habitat.

At this point in time, under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, there are no wilderness areas that overlap with boreal caribou critical habitat, and ecological reserves overlap only minimally.

The *Provincial Parks Act* does not protect boreal caribou critical habitat because the Minister may grant dispositions within parks for industrial development at his or her discretion. Nature preserves can be established within established parks that could protect boreal caribou critical habitat; however, none have been created to date.

No regional plans with any legally binding conservation directives currently exist under the *Alberta Land Stewardship Act* that protect boreal caribou critical habitat.



Wildlife Act

Under the *Wildlife Act*,⁶⁶ endangered species are prescribed in the *Wildlife Regulation*.⁶⁷ Boreal caribou is listed as an endangered animal in the *Wildlife Regulation* and is further categorized as “threatened” by the Department of Environment and Sustainable Resource Development.⁶⁸

The Act prohibits the disturbance or destruction of a listed species’ residence – namely, of a house, nest, or den. Boreal caribou do not have “residences”. By contrast, the Act does not prohibit the destruction of a listed species’ habitat.⁶⁹

Furthermore, under the *Wildlife Act*, the Minister may make regulations establishing wildlife sanctuaries and habitat conservation areas; respecting the use, control and management of these areas; and respecting the protection of wildlife habitat.⁷⁰ While the Minister has made a regulation establishing wildlife sanctuaries and conservation areas, this regulation does not impose any restrictions, limitations, or prohibitions within these areas.⁷¹ Therefore, these areas do not currently protect boreal caribou critical habitat.

Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act

The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* creates a framework for designating wilderness areas and ecological reserves. This Act protects wilderness areas and ecological reserves from many activities that are harmful to boreal caribou critical habitat. Specifically, it prohibits all surface dispositions, including dispositions for forestry, in wilderness reserves and ecological reserves, and prohibits dispositions for mining in wilderness areas.⁷² Further, it prohibits activities related to the construction or operation of any public work, road, railway, aircraft landing strip, helicopter base, structure, or installation, which prevents the disposition of many interests that would destroy critical habitat.⁷³ The Act also prohibits activities and actions within ecological reserves and wilderness areas that would destroy critical habitat, and prohibits destruction or damage of land and plant life within ecological reserves and wilderness areas.⁷⁴ It is an offence to contravene these prohibitions under the Act.⁷⁵

However, at this point in time, there are no wilderness areas that overlap with boreal caribou critical habitat,⁷⁶ and ecological reserves overlap only minimally.⁷⁷ This means only a small amount critical habitat is protected and the majority of boreal caribou critical habitat in the province remains unprotected by this Act.

Provincial Parks Act

The *Provincial Parks Act* prohibits the destruction or damage of plant life and land within a park, including specific prohibitions against the removal of timber, soil, sand, rock, or other natural materials.⁷⁸ However, these prohibitions are not mandatory. The Minister may permit the destruction or damage of plant life and land.⁷⁹

⁶⁶ *Wildlife Act*, RSA 2000, c W-10, ss. 1(1)(g) and 1(1)(i).

⁶⁷ *Wildlife Regulation*, Alta Reg 143/1997, Schedule 6.

⁶⁸ *Ibid*, s. 4(1)(i) and Schedule 6, Part 1, Sub-Part 2.

⁶⁹ *Wildlife Act*, s. 36(1).

⁷⁰ *Ibid*, ss. 103(1)(b), 103(1)(r), 103(1)(s) and 103(1)(u).

⁷¹ *Wildlife Regulation*, Schedule 11.

⁷² *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9, ss. 6(1) and 7(1).

⁷³ *Ibid*, s. 7(3).

⁷⁴ *Ibid*, ss. 8(1) and 10(1).

⁷⁵ *Ibid*, s. 13(1).

⁷⁶ *Ibid*, s. 3 and Schedule.

⁷⁷ Alberta Parks, “Parks by Class: Ecological Reserves”, online: [http://www.albertaparks.ca/albertaparksca/library/land-reference-manual/parks-by-class/?id=Ecological Reserve](http://www.albertaparks.ca/albertaparksca/library/land-reference-manual/parks-by-class/?id=Ecological%20Reserve). Whitemud Falls, Crow Lake, and Holmes Crossing Sandhills ecological reserves overlap with boreal caribou critical habitat.

⁷⁸ *Provincial Parks Act*, RSA 2000, c P-35, ss. 9.2, 10(1) and 10.1.

⁷⁹ *Ibid*, s.9.2, 10(2), 10.1.

Moreover, the destruction and damage of land, as well as the removal of timber, soil, sand, rock, or other natural materials, may be allowed as part of work being undertaken under ministerial disposition.⁸⁰ Under the *Provincial Parks (Dispositions) Regulation*, the Minister of Environment and Parks may allow industrial development in Alberta's parks, including mineral exploration, pipelines, sand and gravel, and utilities.⁸¹

This Act also allows the Minister to establish, by regulation, nature preserves within established parks to protect rare or sensitive features, objects, or species of special significance.⁸² While such regulations could potentially protect boreal caribou critical habitat, no such regulations have been made.

Therefore, the *Provincial Parks Act* does not protect boreal caribou critical habitat.

Alberta Land Stewardship Act

The *Alberta Land Stewardship Act* contemplates the use of regional plans that may have the effect of protecting boreal caribou critical habitat.⁸³ Conservation directives expressly declared in a regional plan may protect and conserve environmental values.⁸⁴ A regional plan may specify which parts are intended as binding law, which parts are intended as public policy, and, relatedly, which provisions of a regional plan constitute an offence if contravened.⁸⁵

Whether a regional plan protects boreal caribou critical habitat depends on the presence and nature of any conservation directives. A regional plan may permanently protect, conserve, manage and enhance environmental values through an express conservation directive. A conservation directive must precisely identify its nature, intended purpose, and the protection that it provides, along with an identification, or means of identifying, the parcels of land at issue.⁸⁶

However, not all conservation directives are enforceable. For a conservation directive to be enforceable, a regional plan must specify that a person's contravention of or non-compliance with a conservation directive constitutes an offence or makes them liable to other penalties.⁸⁷

Moreover, under this Act, the Lieutenant Governor in Council may make regulations respecting the terms and conditions of conservation directives, the enforcement of conservation directives, and the registration, recording, or filing of conservation directives.⁸⁸ No regulations have been made to this effect. As such, the Alberta government has not yet created a regulatory framework for the effective implementation of conservation directives.

There is currently one regional plan that overlaps with a small area of boreal caribou critical habitat, namely the Lower Athabasca Regional Plan.⁸⁹ This plan does not contain any conservation directives and does not otherwise protect boreal caribou critical habitat. If a regional plan overlapping boreal caribou critical habitat were to

⁸⁰ *Ibid*, ss. 10(1) and 10.1.

⁸¹ *Provincial Parks (Dispositions) Regulation*, Alta Reg 241/1977, ss. 28(1), 47, 58 and 74.

⁸² *Ibid*, s. 12(2).

⁸³ *Alberta Land Stewardship Act*, SA 2009, c A-26.8, s. 9(2)(e).

⁸⁴ *Ibid*, s. 37(1).

⁸⁵ *Ibid*, ss. 9(3) and 13(2.1).

⁸⁶ *Ibid*, ss. 37(1) and (2). Section 36 states that a title holder whose land is subject to a conservation directive has a right to apply for compensation according to ss. 38-42.

⁸⁷ *Ibid*, ss. 9(3) and 13(2.1).

⁸⁸ *Ibid*, ss. 43(2)(b), (c) and (d).

⁸⁹ Government of Alberta, Lower Athabasca Regional Plan 2012-2022 (2012), online: <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf>.

incorporate a legally-binding conservation directive, then depending on the nature of the conservation directive, that plan may protect boreal caribou critical habitat.

Policy Considerations

Alberta has created the Draft Little Smoky and A La Pêche Caribou Range Plan.⁹⁰ This Draft Range Plan has no legal basis. Range plans are not legal enactments. Furthermore, the Draft Range Plan aims only to manage rather than to protect boreal caribou habitat. For these reasons it does not create any mandatory and enforceable protection for critical habitat.⁹¹

The Draft Range Plan contemplates the use of Public Land Use Zones (PLUZs) under the *Public Lands Act*. Under the *Public Lands Act*, the Lieutenant Governor in Council can make regulations declaring an area of land as a PLUZ and controlling land use activities within it,⁹² and it is an offence to contravene such a regulation.⁹³ Each PLUZ can have a different set of prohibitions (or none at all);⁹⁴ strong prohibitions in a PLUZ are capable of protecting boreal caribou critical habitat. However, currently, PLUZs overlap minimally with boreal caribou critical habitat.⁹⁵ Further, these overlapping PLUZs do not prohibit the destruction of boreal caribou critical habitat.

⁹⁰ Government of Alberta, Draft Little Smoky and A La Pêche Caribou Range Plan (2016), online: <http://aep.alberta.ca/fish-wildlife/wildlife-management/caribou-management/caribou-action-range-planning/documents/LittleSmokeyAlaPêcheRangePlan-Draft-Jun2-2016.pdf>.

⁹¹ *Ibid.*, at 5.

⁹² *Public Lands Act*, RSA 2000, c P-40, s. 71.1(1).

⁹³ *Ibid.*, ss. 56(1)(j) and 59(2)

⁹⁴ *Public Lands Administration Regulation*, Alta Reg 187/2011, Schedule 4 sets out 18 PLUZs each with a different set of prohibitions.

⁹⁵ *Ibid.* The Brule Lake PLUZ and Athabasca Ranch PLUZ overlap with boreal caribou critical habitat.

SASKATCHEWAN

Summary of Findings

Boreal caribou critical habitat remains unprotected in Saskatchewan.

Boreal caribou is not listed as a wildlife species at risk under *The Wildlife Act, 1998*. Even if boreal caribou were listed, this legislation could not protect boreal caribou critical habitat. The regulations protect residences not habitat.

The Wildlife Habitat Protection Act does not protect boreal caribou critical habitat because *The Wildlife Habitat Lands Disposition and Alteration Regulations* permit dispositions for industrial activity and allow disposition holders to alter critical habitat.

The Parks Act does not protect boreal caribou critical habitat because neither the Act nor its regulations prohibit forestry in parks.



The Wildlife Act, 1998

The *Wildlife Act, 1998* allows the Minister of Environment to classify, designate, and list a species as extirpated, endangered, threatened, or vulnerable.⁹⁶ Species are listed under *The Wild Species at Risk Regulations*.⁹⁷ Boreal caribou is not listed in *The Wild Species at Risk Regulations*. Therefore, boreal caribou have no protection under *The Wildlife Act, 1998*.

In any event, even if boreal caribou were listed, *The Wildlife Act, 1998* would not protect its critical habitat. While *The Wild Species at Risk Regulations* protect the residences (den, house, nest, dam, or usual place of habitation) of extirpated or endangered wildlife,⁹⁸ this provision is aimed only at species' residences. This provision is not aimed at habitat. Habitat is a defined term in the Act.⁹⁹ This confirms that the different statutory terms of "habitat" and "residences" necessarily have different meanings.

Additionally, boreal caribou critical habitat is also not protected by other regulations under *The Wildlife Act, 1998*. *The Wildlife Management Zones and Special Areas Boundaries Regulations, 1990* set out five different classifications of land set aside for wildlife management, four of which have purposes consistent with habitat protection: wildlife management units, game preserves, road corridor game preserves, and wildlife refuges.¹⁰⁰ Wildlife habitat in these four land classifications may be destroyed or altered, if a person has a licence to do so.¹⁰¹ Any person may apply for a licence, unless otherwise disqualified by the Act or the regulations.¹⁰² The regulations do not limit the types of activities for which licenses may be issued. Given this broad discretion to issue licences for activities destructive to habitat, *The Wildlife Act, 1998* and its regulations do not protect critical habitat.

The Wildlife Habitat Protection Act

Under *The Wildlife Habitat Protection Act*, the Lieutenant Governor in Council may make regulations to designate Crown lands as wildlife habitat and ecological lands.¹⁰³ *The Wildlife Habitat and Ecological Lands Designation Regulations* list all the lands designated under this Act (over 1600 areas).¹⁰⁴ The Act prohibits alteration of any such designated wildlife habitat and ecological lands, unless the alteration is permitted in the regulations or authorized by the minister.¹⁰⁵ Additionally, the Act empowers regulations respecting the management, use, and alteration of wildlife habitat and ecological lands, and provides that wildlife habitat and ecological lands are to be managed and used consistent with those regulations.¹⁰⁶

Under this Act, *The Wildlife Habitat Lands Disposition and Alteration Regulations* permit dispositions for oil and gas exploration and extraction, forestry activities, and the exploration and extraction of sand, gravel, or clay.¹⁰⁷ Disposition holders may alter wildlife habitat lands, provided those alterations are permitted under these regulations or authorized by the Minister of Environment in writing.¹⁰⁸ There are provisions in the Regulations

⁹⁶ *The Wildlife Act, 1998*, SS 1998, c W-13.12, ss. 48 and 49.

⁹⁷ *The Wild Species at Risk Regulations*, RRS c W-13.11 Reg 1.

⁹⁸ *Ibid* at s. 5(1).

⁹⁹ *The Wildlife Act, 1998*, s. 2 defines "habitat" as including "soil, air, water, food and shelter components of the environment that are necessary to sustain wildlife and wild species". The federal *Species at Risk Act*, SC 2002, c 29 contains both a prohibition against the damage and destruction of residences, and separate prohibitions against the destruction of critical habitat.

¹⁰⁰ *The Wildlife Management Zones and Special Areas Boundaries Regulations, 1990*, RRS c W-13.1 Reg 45, ss. 4-7.

¹⁰¹ *The Wildlife Regulations, 1981*, RRS c W-13.1 Reg 1, s. 30.1.

¹⁰² *Ibid*, s. 31(1).

¹⁰³ *The Wildlife Habitat Protection Act*, SS 1983-84, c W-13.2, s. 3.

¹⁰⁴ *The Wildlife Habitat and Ecological Lands Designation Regulations*, RRS c W-13.2 Reg 4, Appendix.

¹⁰⁵ *The Wildlife Habitat Protection Act*, s. 7(1).

¹⁰⁶ *Ibid*, ss. 5 and 9.

¹⁰⁷ *The Wildlife Habitat Lands Disposition and Alteration Regulations*, RRS c W-13.2 Reg 1, s. 4(1).

¹⁰⁸ *Ibid*, s. 5.

that permit, and contemplate ministerial permission for, alterations that could destroy boreal caribou critical habitat.¹⁰⁹

As such, the protection afforded by the designation of wildlife habitat and ecological lands is not mandatory. Wildlife habitat may be altered by oil, gas, and mineral exploration and extraction; by forestry; by the extraction of sand, gravel and clay; and by other activities authorized by the Minister.

The Parks Act

The Parks Act sets out four classifications of provincial parks: historic parks, recreation parks, natural environment parks, and wilderness parks.¹¹⁰ It also creates a designation for protected areas.¹¹¹

The Parks Act permits logging on park land, if done in accordance with relevant forestry authorizations.¹¹² Such authorizations are not constrained or circumscribed by any need to protect boreal caribou critical habitat.¹¹³

Saskatchewan could create regulations that prohibit forestry in park land, but has not done so.¹¹⁴

Therefore, *The Parks Act* does not protect boreal caribou critical habitat.

Policy Considerations

Saskatchewan has created the Conservation Strategy for Boreal Woodland Caribou (*Rangifer tarandus caribou*) in Saskatchewan.¹¹⁵ This Conservation Strategy has no legal basis: neither *The Wildlife Act, 1998*, *The Wildlife Habitat Protection Act*, *The Parks Act*, nor *The Forestry Resources Management Act* empower or require the making of a conservation strategy. The Conservation Strategy sets out conservation strategies to benefit the boreal caribou population. However, this planning document does not create any mandatory and enforceable protection for boreal caribou critical habitat.

¹⁰⁹ See ss. 7(2) (for oil and gas dispositions), 8 (for mineral exploration and extraction dispositions), 11.1 (for sand, gravel, and clay dispositions), and 11.2 (for forestry dispositions).

¹¹⁰ *The Parks Act*, SS 1986, c P-1.1, s. 4.

¹¹¹ *Ibid.*, s. 5.

¹¹² *Ibid.*, s. 25(2).

¹¹³ *The Forest Resources Management Act*, SS 1996, c F-19.1. See also *The Forest Resources Management (Saskatchewan Environmental Code Adoption) Regulations*, RRS, c F-19.1 Reg 11, and the *Forest Resources Management Regulations*, RRS c F-19.1 Reg 1.

¹¹⁴ Subsection 26(1) of *The Parks Act* empowers regulations prescribing categories of zones within a park, as well as permissible activities in a zone. Subsection 27(1) empowers regulations for the protection, care, management, control, maintenance and improvement of park land.

¹¹⁵ Saskatchewan Ministry of Environment, Conservation Strategy For Boreal Woodland Caribou (*Rangifer tarandus caribou*) in Saskatchewan (Saskatchewan Ministry of Environment, 2013), online: <http://environment.gov.sk.ca/adx/adxGetMedia.aspx?DocID=684c7b2b-c971-4bea-a19a-1ab558364311&MediaID=0fc4b1b1-917f-4c54-9800-4fb33806206c&Filename=Woodland+Caribou+Conservation+Strategy.pdf&l=English>.

MANITOBA

Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Manitoba.

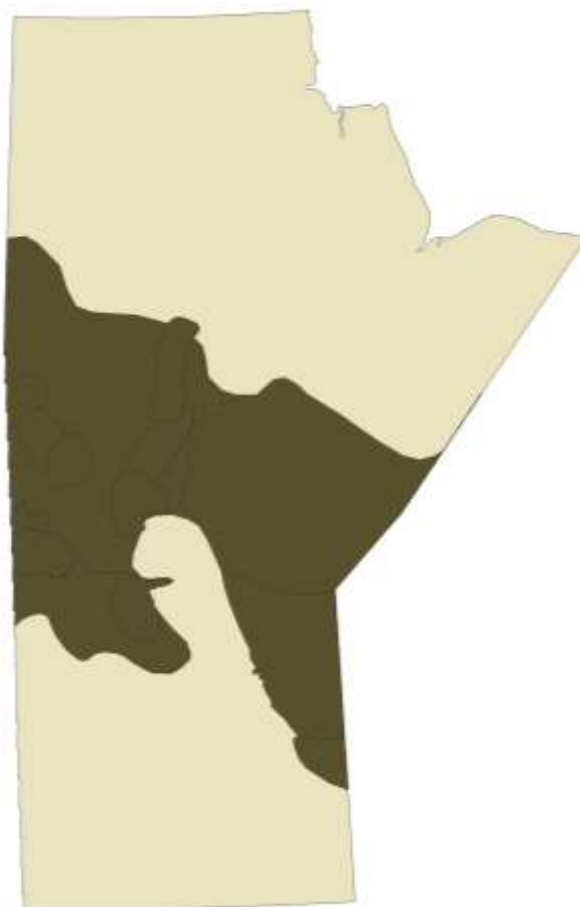
The Endangered Species and Ecosystems Act does not protect boreal caribou critical habitat because the Act's prohibition against destruction of critical habitat is not mandatory.

Under *The Provincial Parks Act*, wilderness parks, as well as areas within provincial parks categorized in the wilderness, backcountry or heritage land use categories, are protective of boreal caribou critical habitat. However, wilderness parks, and the wilderness, backcountry or heritage land use areas in other provincial parks, overlap minimally with boreal caribou critical habitat.

The East Side Traditional Lands and Special Protected Areas Act has the capacity to protect boreal caribou critical habitat from destruction; however, the Act currently does not do so because the restrictions set out in the four interim planning area regulations, and in the four management plans, have not been made enforceable by regulation.

The Wildlife Act does not itself protect boreal caribou critical habitat because its prohibitions against destroying or damaging habitat under are not mandatory. The *Use of Wildlife Lands Regulation* currently creates prohibitions in some wildlife management areas that protect boreal caribou critical habitat from destruction; however, these areas overlap minimally with boreal caribou critical habitat.

■ BOREAL CARIBOU RANGE



The Endangered Species and Ecosystems Act

Under *The Endangered Species and Ecosystems Act*, the Lieutenant Governor in Council may declare a species to be endangered, by regulation.¹¹⁶ Boreal populations of woodland caribou, excluding coastal populations, are declared endangered in the *Threatened, Endangered and Extirpated Species Regulation*.¹¹⁷

Once a species is declared endangered, the Lieutenant Governor in Council may make regulations respecting the preservation of the endangered species' habitat.¹¹⁸ No such regulations have been made for boreal caribou. If such regulations were made, they would not be enforceable.¹¹⁹

The Act prohibits the destruction, disturbance, or interference with the habitat of an endangered species, and the damage, destruction, or obstruction of a natural resource on which an endangered species depends.¹²⁰ Contravention of these prohibitions is an offence.¹²¹ However, these prohibitions are not mandatory. The Minister of Sustainable Development may exempt proposed development from the prohibition where measures are or will be established to reduce the impact of the development on species and its habitat.¹²² Existing developments licenced under *The Environment Act* may also be exempt from the prohibition if the Minister is satisfied that the measures minimize the impact of the development on species and its habitat.¹²³

Therefore, *The Endangered Species and Ecosystems Act* and its regulations do not protect boreal caribou critical habitat.

The Provincial Parks Act

Under *The Provincial Parks Act*, parks are classified as wilderness parks, natural parks, recreation parks, heritage parks, or Indigenous traditional use parks.¹²⁴ These provincial parks are then further categorized into one or more land use categories.¹²⁵ The Act prohibits destructive activities in wilderness parks. It also prohibits destructive activities in areas within other provincial parks categorized in the wilderness, backcountry, or heritage land use categories.¹²⁶ Contravention of these prohibitions is an offence.¹²⁷

¹¹⁶ *The Endangered Species and Ecosystems Act*, CCSM c E111, s. 8(1).

¹¹⁷ *Threatened, Endangered and Extirpated Species Regulation*, Man Reg 25/98, s. 2.

¹¹⁸ *The Endangered Species and Ecosystems Act*, s. 9(1).

¹¹⁹ Only contravention of the Act is an offence, per *The Endangered Species and Ecosystems Act*, s. 13(1).

¹²⁰ *Ibid*, s. 10(1).

¹²¹ *Ibid*, s. 13(1).

¹²² *Ibid*, ss. 10(2)(b) and 12(1)(b). "Development" under this Act means "development" as defined in *The Environment Act*, CCSM c E125, which includes industrial operations and activities that have an effect on an endangered feature of the environment, substantial utilization of a natural resource in such a way as to have an effect on another natural resource, and a significant effect on the environment (s. 1(2)).

¹²³ *Ibid*, ss. 10(2)(c) and 12(1)(b).

¹²⁴ *The Provincial Parks Act*, CCSM c P20, s. 7(2) and the *Provincial Parks Designation Regulation*, Man Reg 37/97, s. 2.1. In the Schedule to this Regulation, Chitek Lake Anishinaabe Provincial Park is classified as an Indigenous traditional use park and it is categorized within the backcountry land use category; see *infra* footnote 123. Therefore, those portions of boreal caribou critical habitat that overlap with this park are protected from destruction.

¹²⁵ *The Provincial Parks Act*, s. 7(3) and *Provincial Parks Designation Regulation*, s. 3.1. The land use categories are wilderness, backcountry, resource management, recreational development, heritage, access, and any other land use category specified in the *Provincial Parks Designation Regulation*. This Regulation specifies the additional land use categories of winter road access and Indigenous heritage, both of which categories are intended to have the same protection as land with a heritage land use categorization; see s. 3.1.

¹²⁶ *The Provincial Parks Act*, ss. 7(5) and 7(6).

¹²⁷ *Ibid*, s. 31(1).

However, at this point in time, wilderness parks and areas within provincial parks categorized in the wilderness, backcountry, or heritage land use categories overlap minimally with boreal caribou critical habitat, which means only a small amount of critical habitat is protected. The majority of boreal caribou critical habitat in the province is not protected by *The Provincial Parks Act*.

The East Side Traditional Lands and Special Protected Areas Act

The East Side Traditional Lands and Special Protected Areas Act enables First Nations and Aboriginal communities on the east side of Lake Winnipeg to engage in land use and management planning for First Nations' traditional land use areas.¹²⁸ The objectives of the Act include developing a new government-to-government relationship between the Wahanong Nakaygum Okimawin (East Side) First Nations. The Act also enables certain designated lands to be protected from development and other activities,¹²⁹ in particular through the designation of traditional use planning areas.¹³⁰

While the Act does not itself protect lands in the east side management area, it empowers protection through various means. For example, when a planning area is designated, the Lieutenant Governor in Council may make interim regulations that impose prohibitions, restrictions or conditions on the use and allocation of Crown land and resources in the planning area, and on development in the planning area.¹³¹ Four traditional use planning areas have been designated by regulation.¹³² Each of these four planning areas is divided into a number of land use areas, and each contains one (or more) designated areas that are protected from development activity that threatens boreal caribou critical habitat.¹³³ However, the protection that was offered by these regulatory prohibitions is not legally enforceable. A regulation under this Act must specify that contravention of specified provisions of the regulation constitutes an offence.¹³⁴ None of these four interim regulations specifies provisions which, if contravened, constitute an offence.

Additionally, the provincial government and First Nations and Aboriginal communities may enter into agreements respecting land use and management planning in designated planning areas, including agreements authorizing the development of management plans.¹³⁵ Four management plans have been approved, one for each of the planning areas.¹³⁶ In general, these management plans set out the uses of Crown land and the management of Crown resources in the four planning areas. However, again the protection offered by management plans is not legally enforceable. While the Act provides that all statutory decisions respecting the allocation, disposition or use of

¹²⁸ *The East Side Traditional Lands and Special Protected Areas Act*, CCSM c E3, s. 3(a). The “east side management area”, as defined by s. 1 of the Act and as designated by regulation, consists of all land shown on Plan of Survey No. 20457 filed in the Winnipeg office of the Director of Surveys appointed under *The Surveys Act*; see *East Side Traditional Lands Planning and Special Protected Areas Regulation*, MR 149/2010, s. 2.

¹²⁹ *The East Side Traditional Lands and Special Protected Areas Act*, s. 3(b).

¹³⁰ *Ibid.*, ss. 5 and 6.

¹³¹ *Ibid.*, s. 7(1). The regulations made under s. 7(1) have effect only until management plans for the planning areas come into effect or the earlier of: the date on which the management plans come into effect, or a date specified in the regulation itself; see s. 7(2).

¹³² *Asatiwisiipe Aki Traditional Use Planning Area Regulation*, MR 77/2011; *Little Grand Rapids First Nation Traditional Use Planning Area Regulation*, MR 154/2012; *Pauiingassi First Nation Traditional Use Planning Area Regulation*, MR 155/2012; *Pimitotah Traditional Use Planning Area Regulation*, MR 197/2011.

¹³³ *Asatiwisiipe Aki Traditional Use Planning Area Regulation*, ss. 3, 4 and 8; *Little Grand Rapids First Nation Traditional Use Planning Area Regulation*, ss. 4 and 8; *Pauiingassi First Nation Traditional Use Planning Area Regulation*, s. 4; *Pimitotah Traditional Use Planning Area Regulation*, ss. 4 and 7. However, beyond the various protected areas created within these planning regulations, the other types of land use areas designated in these four interim regulations do not protect boreal caribou critical habitat given that they permit activities, such as road development or logging, that damage or destroy boreal caribou critical habitat.

¹³⁴ *The East Side Traditional Lands and Special Protected Areas Act*, s. 21(1); see also s. 21(2).

¹³⁵ *Ibid.*, ss. 9-12.

¹³⁶ See Government of Manitoba, Sustainable Development, “Approved Plans” at https://www.gov.mb.ca/sd/lands_branch/approved_plans.html.

Crown land and Crown resources in a planning area must take an approved management plan “into account”,¹³⁷ and that any new development or other activity that takes place in the planning area “must be generally consistent with the plan”,¹³⁸ there is presently no legal mechanism by which to enforce compliance with an approved management plan.¹³⁹

In addition, “special protected areas” can be created within planning areas.¹⁴⁰ Special protected areas may be created by agreement,¹⁴¹ and then be designated by regulation.¹⁴² Any such special protected areas regulation must be consistent with the management plan for the planning area, as well as with the four interim regulations.¹⁴³ It does not appear that any special protected areas have, to date, been designated. Overall, while *The East Side Traditional Lands and Special Protected Areas Act* has the capacity to protect boreal caribou critical habitat from destruction, the Act currently does not do so because the restrictions set out in the four interim planning area regulations, and in the four management plans, have not been made enforceable by regulation. In any event, the various types of protected areas designated under these four regulations overlap only minimally with boreal caribou critical habitat in the province, such that critical habitat in Manitoba remains largely unprotected.

The Wildlife Act

The *Wildlife Act* primarily governs hunting and trapping activities.¹⁴⁴ While it contains a prohibition against destroying or damaging habitat on Crown lands, the prohibition is not mandatory as habitat destruction may occur pursuant to any authorization under any provincial legislation.¹⁴⁵ However, the Act does contain provisions that empower the protection of wildlife habitat. Specifically, where the Lieutenant Governor in Council is satisfied that the wildlife resource of the province would be better managed, conserved, or enhanced, it may designate Crown lands as wildlife management areas.¹⁴⁶ The designation of a wildlife management area does not automatically limit or affect the uses or activities that may be undertaken in that area; however, the Minister of Agriculture may make regulations that regulate or prohibit any use or activity in a wildlife management area.¹⁴⁷ Contravention of such a regulation is an offence subject to fine or imprisonment.¹⁴⁸

Under the Act, the Minister has made the *Use of Wildlife Lands Regulation*.¹⁴⁹ It states that, except as otherwise provided in this regulation, no person shall engage in building roads, stream crossings, or drainage works;¹⁵⁰ engage in haying, grazing, clearing, bulldozing, burning, fencing, logging, cultivation, mineral exploration,

¹³⁷ *The East Side Traditional Lands and Special Protected Areas Act*, s. 13(1).

¹³⁸ *Ibid.*, s. 13(2).

¹³⁹ The Lieutenant Governor in Council may make regulations to implement management plans; such regulations may specify that contravention of specified regulatory provisions constitutes an offence under the Act; see ss. 14(1) and 21(1). However, no such regulations have been made that would allow for management plans to be enforceable.

¹⁴⁰ *The East Side Traditional Lands and Special Protected Areas Act*, s. 1 (definition of special protected area) and s. 18.

¹⁴¹ *Ibid.*, s. 10.

¹⁴² *Ibid.*, s. 18.

¹⁴³ *Ibid.*, s. 18(3).

¹⁴⁴ *The Wildlife Act*, CCSM c W130.

¹⁴⁵ *Ibid.*, s. 50(1).

¹⁴⁶ *Ibid.*, ss. 2(1) and 2(2)(a).

¹⁴⁷ *Ibid.*, ss. 3(1)(b) and 3(2). Such regulation may apply either generally to all wildlife management areas, or to a specific wildlife management area (or to a part thereof).

¹⁴⁸ *Ibid.*, s. 80.

¹⁴⁹ *Use of Wildlife Lands Regulation*, Man Reg 77/99. The Minister has also made the *Woodland Caribou Protection Regulation*, Man Reg 113/91; however, it creates no protections for habitat.

¹⁵⁰ *Use of Wildlife Lands Regulation*, ss. 7(1)(a), (b) and (c).

or extraction;¹⁵¹ apply pesticides;¹⁵² or construct or use a building or structure in a wildlife management area.¹⁵³ Moreover, the Regulation contains specific prohibitions for many individual wildlife management areas.¹⁵⁴ Without analyzing the specific prohibition for every wildlife management area, it is noted that some (though not all) of these area-specific provisions protect boreal caribou. For example, in some (but not all) portions of the Red Deer Wildlife Management Area, no person shall engage in hydro-electric exploration or development, logging or commercial forest harvesting, mineral exploration or extraction, or any other activity that significantly and adversely affects habitat.¹⁵⁵ Furthermore, while the Minister may grant permits authorizing activity otherwise prohibited, for many (not all) individual wildlife management areas, the Minister may not authorize hydro-electric exploration or development, logging or commercial forest harvesting, mineral exploration or extraction, or any other activity that significantly and adversely affects habitat.¹⁵⁶

Therefore, reaching a final conclusion on whether the *Use of Wildlife Lands Regulation* protects boreal caribou critical habitat would require identifying which wildlife management areas overlap with this critical habitat, and reviewing the Regulation to assess what protection is provided to those specific areas. Generally speaking, many wildlife management areas protect boreal caribou critical habitat from destruction. However, wildlife management areas overlap only minimally with boreal caribou critical habitat, such that the majority of boreal caribou critical habitat in the province is not protected under *The Wildlife Act* and its regulations.

Policy Considerations

Under *The Endangered Species and Ecosystems Act*, Manitoba has created a recovery strategy entitled *Conserving a Boreal Icon: Manitoba's Boreal Woodland Caribou Recovery Strategy*.¹⁵⁷ This recovery strategy sets out goals, objectives, and guiding principles for the effective management of boreal caribou. However, this document does not create any mandatory and enforceable protection for boreal caribou critical habitat.

¹⁵¹ *Ibid.*, s. 7(1)(d). Subsection 7(1.1) provides that this prohibition does not apply to a person removing minerals under authority of a casual quarry permit issued under the *Quarry Minerals Regulation*, Man Reg 65/92.

¹⁵² *Ibid.*, s. 7(1)(e).

¹⁵³ *Ibid.*, s. 7(1)(f). Unless the structure is a portable structure or tent used temporarily for lawful recreational activities or lawful hunting; s. 7(2).

¹⁵⁴ *Ibid.*, ss. 8-45.

¹⁵⁵ *Ibid.*, s. 33.0.1.

¹⁵⁶ *Ibid.*, ss. 46(1), (2) and (3). Just by way of example, for the protected portions of the Red Deer Wildlife Management Area that, no permits for these activities may be given; see s. 46(3)(t.0.1). However, a permit may be given authorizing quarry mineral exploration or extraction in the Red Deer Wildlife Management Area; see ss. 46(4)(c) and (5).

¹⁵⁷ Manitoba Boreal Woodland Caribou Management Committee, *Conserving a Boreal Icon, Manitoba's Boreal Woodland Caribou Recovery Strategy* (Manitoba Conservation and Water Stewardship: Winnipeg, 2015), online: https://www.gov.mb.ca/sd/wildlife/sar/pdf/cariboustrategy_octfall2015.pdf.

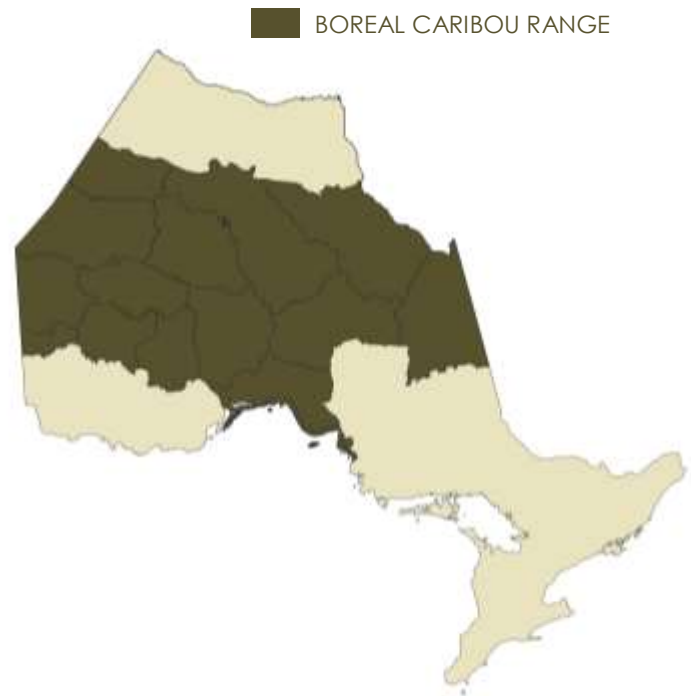
Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Ontario.

The *Endangered Species Act, 2007* fails to protect critical habitat because the *General Regulation* exempts many industrial activities, such as logging and mining exploration, from the Act's prohibition against the destruction of boreal caribou critical habitat.

The *Crown Forest Sustainability Act, 1994* does not protect boreal caribou critical habitat because it does not provide mandatory and enforceable protection against destruction.

Under the *Provincial Parks and Conservation Reserves Act, 2006*, provincial parks and conservation reserves are protective of boreal caribou critical habitat. However, existing provincial parks and conservation reserves overlap only minimally with boreal caribou critical habitat.



Endangered Species Act, 2007

Boreal caribou is listed as a threatened species on the *Species at Risk in Ontario List* under the *Endangered Species Act, 2007*.¹⁵⁸

The *Endangered Species Act, 2007* prohibits damage and destruction of a listed endangered or threatened species' habitat.¹⁵⁹ Contravention of this prohibition is an offence under the Act.¹⁶⁰

Under the Act, the Minister of Natural Resources and Forestry may issue permits that authorize activities that may damage or destroy a species' habitat.¹⁶¹ However, the Minister's discretion to issue these permits is constrained such that permitted activity would, in some situations, remain consistent with the protection of boreal caribou critical habitat. Namely, the Minister may issue such permits where the main purpose of the authorized activity is to assist, and will assist, in the protection or recovery of the species specified in the permit, and where the main purpose of the activity is not to assist in the protection or recovery of the species specified in the permit but will result in an overall benefit to the species.¹⁶² Contravention of the provisions of a permit is an offence.¹⁶³

Moreover, the Act provides for two potential types of instruments that could operate to permit damaging or destructive activities, similar to a permit issued under this Act. The first type are "Minister's instruments" that are "entered into, issued, made, or approved by the Minister" under Ontario or federal legislation or regulation.¹⁶⁴ The second type are "Prescribed instruments".¹⁶⁵ The Act constrains the Minister's discretion and other authorized officials' discretion to enter into, issue, make or approve instruments by imposing similar conditions as for permits issued directly under the Act itself. In this respect, the use of such instruments would, in most situations, likewise remain consistent with the protection of boreal caribou critical habitat.¹⁶⁶ With respect to enforceability, such instruments are enforced pursuant to the legislation under which they originate. As such, whether such instruments protect boreal caribou critical habitat must be determined in consideration of those instruments' legislative framework. Notably, it does not appear that any such instruments have ever been relied upon to authorize damage or destruction to a species' habitat and no instruments have been prescribed to date. For these reasons, a conclusion regarding whether these instruments protect boreal caribou critical habitat, by providing not just mandatory but also enforceable protection against destruction, is not made here.

The Act, as passed by Ontario's Legislature, was intended to provide habitat protection to all endangered and threatened species, commencing no later than July 1, 2013.¹⁶⁷ However, the Government of Ontario made significant amendments to the *General Regulation*, which came into force on July 1, 2013. These regulatory amendments exempted most industrial activities from the Act's prohibition against damage and destruction of a

¹⁵⁸ *Species at Risk in Ontario List*, O Reg 230/08, Schedule 3; and *Endangered Species Act, 2007*, SO 2007, c 6.

¹⁵⁹ *Endangered Species Act, 2007*, s. 10(1). For clarity, the remainder of references to "species" in this discussion of the *Endangered Species Act, 2007* and its regulations refers to endangered and threatened species.

¹⁶⁰ *Ibid.*, ss. 36(1) and 40.

¹⁶¹ *Ibid.*, s. 17(1).

¹⁶² *Ibid.*, ss. 17(2)(b) and (c). It is acknowledged that where the Minister issues permits under either subsection 17(2)(a) (necessary for the protection of human health or safety), or under subsection 17(2)(d) (for an activity that will result in a significant social or economic benefit to the province of Ontario), the conditions that constrain the Minister's discretion to issue such permits do not prevent the destruction of boreal caribou critical habitat. However, to date, the permits issued under subsections 17(2)(a) and (d) have been few in number, and they are generally reserved to rare situations that are very unlikely to implicate boreal caribou or their critical habitat.

¹⁶³ *Ibid.*, s. 36(1).

¹⁶⁴ *Ibid.*, s. 18(1).

¹⁶⁵ *Ibid.*, s. 18(2).

¹⁶⁶ *Ibid.*, s. 18(1)(e). Where the activity authorized by the instrument is necessary for the protection of human health or safety, pursuant to s. 18(1)(e)(i), the Minister's discretion is not constrained so as to prevent the destruction of boreal caribou critical habitat.

¹⁶⁷ *Ibid.*, s. 10(3).

species' habitat. This means many industrial activities, such as logging and mining exploration, may now lawfully damage and destroy boreal caribou critical habitat.¹⁶⁸

In particular, the *General Regulation* exempts persons conducting forest operations from the Act's prohibition against damage and destruction of species' habitat, provided that such operations are under the authority of a licence granted under the *Crown Forest Sustainability Act, 1994* and conducted before July 1, 2018.¹⁶⁹ The Regulation contains conditions specific to boreal caribou that forestry operations must meet to be eligible for the exemption.¹⁷⁰ These conditions refer to the applicable forest management plan, and were designed to be consistent with the government policy on caribou as found in the Forest Management Guide for Boreal Landscapes (Boreal Landscape Guide).¹⁷¹ The Boreal Landscape Guide and forest management plans set out objectives and best practices for the logging of Crown forests, specifically in the boreal forest region. However, these guidance documents do not prohibit destructive activity and thus do not protect boreal caribou critical habitat.¹⁷² The regulatory conditions reflecting these guidance documents likewise do not impose any mandatory protection against the destruction of boreal caribou critical habitat.

Moreover, as another example, the Regulation also exempts early exploration mining activity from the Act's prohibition against damage and destruction of species' habitat.¹⁷³ The Regulation contains conditions that must be met for early exploration mining activities to be eligible for the exemption.¹⁷⁴ These conditions require the provision of notice to the Minister; compliance with a mitigation plan and minimizing adverse environmental effects; and monitoring, follow-up, and reporting. However, the conditions do not prohibit destructive activity and do not protect boreal caribou critical habitat from destruction.

Furthermore, it is not an offence to violate any provision of a regulation under the *Endangered Species Act*, including the caribou-specific conditions for forestry operations and the conditions for early exploration mining.¹⁷⁵

Therefore, the *Endangered Species Act, 2007* does not protect boreal caribou critical habitat.

Crown Forest Sustainability Act, 1994

Under the *Crown Forest Sustainability Act, 1994*, forest operations in a Crown forest must be conducted in accordance with an applicable forest management plan, any forest operations prescriptions that apply to the forest

¹⁶⁸ *General Regulation*, O Reg 242/08.

¹⁶⁹ *Ibid.*, s. 22.1. The person must meet one of four conditions listed in subsection 22.1(2) to qualify for the exemption: 1) where the applicable forest management plan contains an operational prescription for area of concern specifically applicable to the species in question, the operational prescription must be followed; 2) where the applicable forest management plan does not contain an operational prescription but does contain a condition on regular operations that specifically applies to the species, the condition must be followed; 3) where the applicable forest management plan does not contain an operational prescription or a condition on regular operations, and where the person encounters a nest, hibernaculum, den or other feature of the species' habitat while conducting forest operations, the person must suspend operations in the area, must apply to the Minister to include an operational prescription for the area of concern or a site-specific condition on regular operations with respect to the site-specific feature, and must resume forest operations according to the amendments made to the forest management plan; and 4) if none of the above cases apply, the person must conduct the forest operations according to the applicable forest management plan.

¹⁷⁰ *Ibid.*, s. 22.1(3).

¹⁷¹ Ontario Ministry of Natural Resources, Forest Management Guide for Boreal Landscapes (Toronto, 2014), online: <https://www.ontario.ca/document/forest-management-boreal-landscapes>. As indicated at page 1, the Boreal Landscape Guide is one of a series of guides used by forest managers when planning and implementing forest management operations in Ontario.

¹⁷² The Boreal Landscape Guide and forest management plans are discussed in detail in the section below on the *Crown Forest Sustainability Act, 1994*.

¹⁷³ *General Regulation*, s. 23.10(2).

¹⁷⁴ *Ibid.*, s. 23.10(4).

¹⁷⁵ *Endangered Species Act, 2007*, s. 36.

operations, and an applicable work schedule approved by the Minister.¹⁷⁶ Forest management plans must comply with the Forest Management Planning Manual (FMPM) required under the Act.¹⁷⁷ In accordance with the Act,¹⁷⁸ the FMPM requires that forest management plans contain management objectives relating to Crown forest sustainability, including consideration for the conservation of habitat for animal life and the abundance and distribution of forest ecosystems.¹⁷⁹

The FMPM requires that forest managers use forest management guides in the development, management, and implementation of forest management strategies, prescriptions, and activities.¹⁸⁰ The Boreal Landscape Guide contains management direction for boreal caribou.¹⁸¹ The Boreal Landscape Guide provides science-based information and guidance for boreal caribou intended to minimize the risk that forestry operations might damage or destroy boreal caribou critical habitat, to be used in planning forestry operations.¹⁸² However, the Boreal Landscape Guide does not prohibit destructive activities in boreal caribou critical habitat. Further, it is not an offence to fail to comply with the Guide.

Therefore, the *Crown Forest Sustainability Act, 1994* does not protect boreal caribou critical habitat.

Provincial Parks and Conservation Reserves Act, 2006

The *Provincial Parks and Conservation Reserves Act, 2006* provides that the maintenance of ecological integrity shall be the first priority in park planning and management.¹⁸³ Under the Act, land in provincial parks and conservation reserves must be used and occupied in accordance with the Act and the regulations.¹⁸⁴ The Act prohibits industrial activities in provincial parks and conservation reserves.¹⁸⁵ It is an offence to violate these provisions.¹⁸⁶

However, the Act permits resource access roads, trails, and utility corridors in provincial parks and conservation reserves, subject to policies of the Ministry and approval of the Minister.¹⁸⁷ Access roads and trails may be permitted where they are required to access existing mining tenure or claims within or surrounded by a provincial park or conservation reserve, or to access minerals or crown timber outside a provincial or conservation reserve. Conditions for approvals of access roads, trails, and utility corridors require that there are no reasonable alternatives, that the lowest cost is not the sole or overriding justification, and that environmental impacts have been considered and all reasonable measures will be undertaken to minimize harmful environmental impact and to protect ecological integrity.¹⁸⁸

¹⁷⁶ *Crown Forest Sustainability Act, 1994*, SO 1994, c 25, s. 42(1). Under subsection 17(2) of the Act, work schedules must be prepared according to the Forest Management Planning Manual, and must be consistent with the forest management plan and any applicable forest operations prescriptions.

¹⁷⁷ *Ibid.*, ss. 68(1) and 68(2).

¹⁷⁸ *Ibid.*, s. 68(5)(b).

¹⁷⁹ Ontario Ministry of Natural Resources, Forest Management Planning Manual for Ontario's Crown Forests (Toronto, 2009) at A-33, online: <https://dr6j45jk9xcmk.cloudfront.net/documents/2821/fmpmanual-2009-aoda.pdf>.

¹⁸⁰ *Ibid.*, at A-19.

¹⁸¹ Ministry of Natural Resources and Forestry, Forest Management Guide for Boreal Landscapes (2014), at 9, online: <https://www.ontario.ca/document/forest-management-boreal-landscapes>.

¹⁸² *Ibid.*, at 9.

¹⁸³ *Provincial Parks and Conservation Reserves Act, 2006*, SO 2006, c 12, s. 3.

¹⁸⁴ *Ibid.*, s. 13(1).

¹⁸⁵ *Ibid.*, s. 16.

¹⁸⁶ *Ibid.*, ss. 46(1)(a) and 52.

¹⁸⁷ *Ibid.*, ss. 20(1) and 20(2).

¹⁸⁸ *Ibid.*, s. 21.

Therefore, the *Provincial Parks and Conservation Reserves Act, 2006* protects boreal caribou critical habitat in provincial parks and conservation reserves except from destruction by access roads, trails, and utility corridors.

At this point in time, Ontario's provincial parks and conservation reserves overlap minimally with boreal caribou critical habitat, which means that a small amount of critical habitat is protected from destruction (except by access roads, trails, and utility corridors). However, the majority of boreal caribou critical habitat in Ontario is not protected by the *Provincial Parks and Conservation Reserves Act, 2006*.

Policy Considerations

Ontario has created the Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*) (Forest-Dwelling, Boreal Population) in Ontario.¹⁸⁹ This recovery strategy recommends approaches for habitat protection.¹⁹⁰ However, this document does not create any mandatory and enforceable protection for critical habitat.

Ontario has also created a conservation plan titled Ontario's Woodland Caribou Conservation Plan.¹⁹¹ This document provides general policy direction regarding the conservation of Woodland caribou and outlines a range management approach to planning and decision-making.¹⁹² Additionally, Ontario's Range Management Policy in Support of Woodland Caribou Conservation and Recovery describes how Ontario intends its range management approach to be implemented.¹⁹³ However, these documents do not create any mandatory and enforceable protection for boreal caribou critical habitat.

Finally, the Ministry of Natural Resources and Forestry has created a technical document entitled General Habitat Description for the Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*).¹⁹⁴ This document is intended to provide a technical description of boreal caribou habitat that informs the general habitat definition in *Endangered Species Act, 2007*.¹⁹⁵ The General Habitat Description does not itself create any mandatory and enforceable protection for boreal caribou critical habitat.

¹⁸⁹ Ontario Woodland Caribou Recovery Team, Woodland Caribou (*Rangifer tarandus caribou*) (Forest-Dwelling, Boreal Population) in Ontario (Government of Ontario, 2008), online: <http://files.ontario.ca/environment-and-energy/species-at-risk/251755.pdf>.

¹⁹⁰ *Ibid* at 10-11.

¹⁹¹ Ontario Ministry of Natural Resources, Ontario's Woodland Caribou Conservation Plan, (Government of Ontario, 2009), online: <http://files.ontario.ca/environment-and-energy/species-at-risk/277783.pdf>.

¹⁹² *Ibid* at 8.

¹⁹³ Ontario Ministry of Natural Resources, Range Management Policy in Support of Woodland Caribou Conservation and Recovery, (Government of Ontario, 2014) at 5, online: <https://dr6j45jk9xcmk.cloudfront.net/documents/3945/caribou-range-management-en-final-december-2014.pdf>.

¹⁹⁴ Ministry of Natural Resources and Forestry, General Habitat Description for the Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*), (Ministry of Natural Resources: 2013), online: http://files.ontario.ca/environment-and-energy/species-at-risk/mnr_sar_ghd_car_en.pdf.

¹⁹⁵ *Ibid*, at 1.

QUÉBEC

Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Québec.

The *Act respecting threatened or vulnerable species* and the *Act respecting the conservation and development of wildlife* fail to protect critical habitat because there are many discretionary exemptions to the prohibition against habitat alteration.

National parks under Québec's *Parks Act* protect boreal caribou critical habitat; however, existing parks overlap minimally with boreal caribou critical habitat.

■ BOREAL CARIBOU RANGE



The province of Québec governs species at risk with two statutes: the *Act respecting threatened or vulnerable species* and the *Act respecting the conservation and development of wildlife*. Under the former, the Government may, after ministerial consultations and recommendation, designate a species as threatened or vulnerable, determine the features or conditions by which the habitats of those species may be identified, and determine which habitats of those species must be demarcated on a wildlife habitat chart.¹⁹⁶ The woodland caribou, woodland ecotype has been designated as a vulnerable wildlife species in the *Regulation respecting threatened or vulnerable wildlife species and their habitats*.¹⁹⁷ Where the government determines that the habitat of a threatened or vulnerable wildlife species must be demarcated on a chart,¹⁹⁸ the Minister must prepare the chart and publish a notice of that chart in the *Gazette officielle du Québec*.¹⁹⁹

Under these two statutes, habitat is protected both as geospatial location and the components of that area. The *Act respecting threatened or vulnerable species* prohibits alteration of biological, physical, and chemical components of threatened or vulnerable species habitat.²⁰⁰ Contravention of this prohibition is an offence under the Act.²⁰¹ The *Act respecting the conservation and development of wildlife* describes “habitat” as that which is demarcated in a wildlife habitat chart.²⁰² Québec has demarcated on a wildlife habitat chart, and published notice of in the *Gazette officielle du Québec*, three select areas of woodland caribou habitat.²⁰³ The southernmost habitat area overlaps with a small area of boreal caribou critical habitat. The two more northern habitat areas are not within boreal caribou critical habitat.

However, these habitat protections are not mandatory. The *Act respecting the conservation and development of wildlife* gives the Minister discretion to authorize activities that alter wildlife habitat.²⁰⁴ The Government, upon advice from the Minister and after public consultation, may also authorize activities that alter wildlife habitat where the consequences of not carrying on the activity would be more harmful to the public than the alteration of the wildlife habitat concerned.²⁰⁵ The provisions allow the Minister or the government to authorize activities that would destroy boreal caribou critical habitat.

Therefore, even if the entire boreal caribou critical habitat were demarcated on a wildlife habitat chart, these two acts would not protect boreal caribou critical habitat.

At least one wildlife sanctuary (La Vérendrye) overlaps minimally with boreal caribou critical habitat. However, logging appears to be permitted in this sanctuary, therefore La Vérendrye does not protect boreal caribou critical habitat from destruction. Another wildlife sanctuary may also overlap. It was not possible without additional GIS mapping, which was beyond the scope of this research, to determine how much if any of this second wildlife sanctuary overlaps with boreal caribou critical habitat. No wildlife preserves appear to overlap with boreal caribou critical habitat.

¹⁹⁶ *Act respecting threatened or vulnerable species*, CQLR c E-12.01, s. 10.

¹⁹⁷ *Regulation respecting threatened or vulnerable wildlife species and their habitats*, CQLR c E-12.01, r 2, s. 2(5)(a). For clarity, this ecotype of woodland caribou is a subgroup of boreal caribou.

¹⁹⁸ *Act respecting threatened or vulnerable species*, s. 11.

¹⁹⁹ *Act respecting the conservation and development of wildlife*, CQLR c C-61.1, ss. 128.2 and 128.3.

²⁰⁰ *Ibid.*, s. 128.6.

²⁰¹ *Ibid.*, s. 171.2.

²⁰² *Ibid.*, ss. 128.2-128.5.

²⁰³ *Gazette officielle du Québec*, (2007) GOQ, Vol. 139, No. 31. For a copy of the order, go to:

<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=1&file=2007A%2F8242.PDF>.

Woodland caribou habitat is identified at 47°41'34" N 70°50'11" W, 57°27'44" N 64°59'03" W, and 60°56'26" N 73°29'58" W.

²⁰⁴ *Act respecting the conservation and development of wildlife*, ss. 128.7 and 128.8.

²⁰⁵ *Ibid.*, s. 128.9.

Parks Act

The *Parks Act* prohibits industrial development within Québec's parks. Further, there are no exemptions to this prohibition that permit activities harmful to boreal caribou critical habitat.²⁰⁶ It is an offence to contravene this prohibition, which is punishable by fine.²⁰⁷ Moreover, the *Parks Regulation* additionally prohibits damaging vegetation in parks.²⁰⁸ Contravention of this prohibition is also enforceable.²⁰⁹

At this point in time, Québec's national parks overlap minimally with boreal caribou critical habitat, which means a small amount critical habitat is protected. However, the majority of boreal caribou critical habitat in the province is unprotected by Québec's national parks.

Policy Considerations

Québec has created an action plan for woodland caribou habitat management (Plan d'action pour l'aménagement de l'habitat du caribou forestier).²¹⁰ The Plan d'action sets out immediate steps to be taken to help maintain intact tracts of woodland caribou habitat;²¹¹ however, it does not create any mandatory and enforceable protection for boreal caribou critical habitat.

²⁰⁶ *Parks Act*, CQLR c P-9, s. 7.

²⁰⁷ *Ibid*, s. 11.2.

²⁰⁸ *Parks Regulation*, CQLR c P-9, r 25, s. 20.

²⁰⁹ *Ibid*, s. 25.

²¹⁰ Forêts, Faune et Parcs Québec, Plan d'action pour l'aménagement de l'habitat du caribou forestier, (Government of Québec, 2016), online: <http://mffp.gouv.qc.ca/publications/faune/napperon-caribou-forestier-2016.pdf>.

²¹¹ *Ibid* at 2.

NEWFOUNDLAND AND LABRADOR

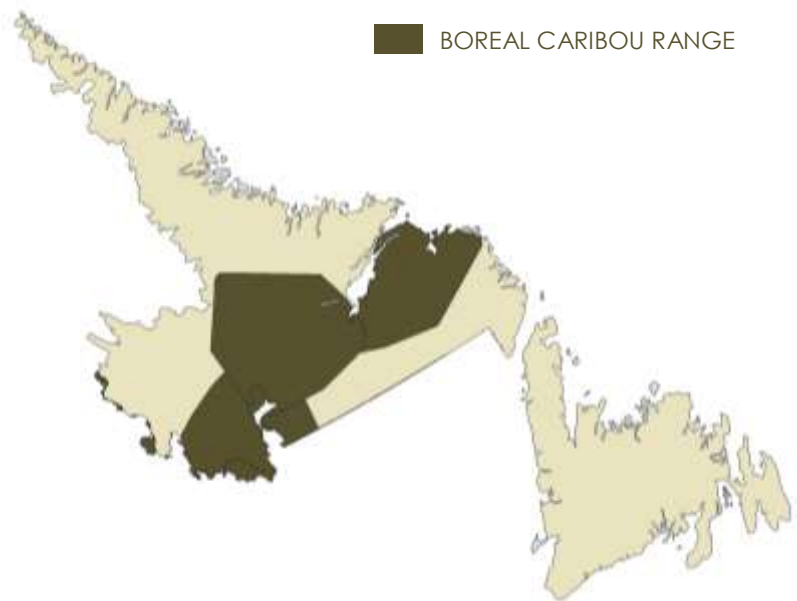
Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Newfoundland and Labrador.

No habitat orders have been made protecting boreal caribou critical habitat under the *Endangered Species Act*.

Provincial parks under the *Provincial Parks Act* protect boreal caribou critical habitat. However, no parks currently overlap with boreal caribou critical habitat.

Wilderness reserves, ecological reserves, and emergency reserves created under the *Wilderness and Ecological Reserves Act* also protect boreal caribou critical habitat. However, existing reserves overlap minimally with boreal caribou critical habitat.



Endangered Species Act

Under this statute, the Minister of Fisheries and Land Resources may, with the approval of the Lieutenant-Governor in Council, make regulations listing species under this Act.²¹² Woodland caribou is listed as threatened in the *Endangered Species List Regulations*.²¹³

Once a species is listed, the Minister may make an order setting aside land to be protected as recovery habitat and land to be protected as critical habitat.²¹⁴ In the order, the Minister must specify activities that are prohibited within recovery and critical habitat, as well as activities that are prohibited in those areas without a permit.²¹⁵ Further, it is an offence to contravene a habitat order.²¹⁶ At this time, the Minister has not made any orders setting aside land for boreal caribou recovery habitat or critical habitat.²¹⁷

Therefore, boreal caribou critical habitat remains unprotected by this Act.

Provincial Parks Act

The *Provincial Parks Act* prohibits the use of parks, in any manner, for industrial activities including mining, logging and hydro electric development.²¹⁸ Moreover, the *Provincial Parks Regulations* prohibit the destruction and damage of all plant life in parks.²¹⁹ Under the Act, it is an offence not to comply with the Act or the regulations.²²⁰ Therefore, the *Provincial Parks Act* has the capacity to protect boreal caribou critical habitat.

However, at this point in time, there are no provincial parks that overlap with boreal caribou critical habitat.

Wilderness and Ecological Reserves Act

Under the *Wilderness and Ecological Reserves Act*, the Lieutenant Governor in Council may set aside lands for wilderness reserves and ecological reserves.²²¹ The Minister of Fisheries and Land Resources may also order the establishment of emergency reserves.²²² The Act prohibits damage and destruction in wilderness reserves, ecological reserves, and emergency reserves, including from logging, agriculture, mining, and prospecting or claims staking.²²³ It is an offence to contravene the Act or the regulations.²²⁴

At this point in time, wilderness reserves, ecological reserves, and emergency reserves overlap minimally with boreal caribou critical habitat, which means a small amount critical habitat is protected. However, the majority of boreal caribou critical habitat in the province is not protected by this Act.

²¹² *Endangered Species Act*, SNL 2001, c E-10.1, s. 44(1)(a).

²¹³ *Endangered Species List Regulations*, NLR 57/02, Schedule B.

²¹⁴ *Endangered Species Act*, ss. 28(1)(a) and (b).

²¹⁵ *Ibid.*, ss. 28(3)(a) and (b).

²¹⁶ *Ibid.*, s. 38.

²¹⁷ Shelley Moores, Senior Manager, Endangered Species & Biodiversity, Newfoundland and Labrador Fisheries and Land Resources, Wildlife Division, Personal Communication, 13 July 2017.

²¹⁸ *Provincial Parks Act*, RSNL 1990, c P-32, s. 4(5). See also *Newfoundland and Labrador Wildlife Federation v Newfoundland (Minister of Environment and Labour)*, 2001 CanLII 376 36 (NL SCTD) at paras 22-25 which decided that the transportation of logs is captured by the s. 4(5) prohibition.

²¹⁹ *Provincial Parks Regulations*, NLR 91/97, ss. 3(1) and 1(b).

²²⁰ *Provincial Parks Act*, s. 9.

²²¹ *Wilderness and Ecological Reserves Act*, RSNL 1990, c W-9, ss. 4 and 5.

²²² *Ibid.*, s. 22(1).

²²³ *Ibid.*, s. 24. See also *Wilderness Reserve Regulations, 1997*, NLR 65/97, s. 7(1)(f).

²²⁴ *Ibid.*, s. 26.

Policy Considerations

Under the *Endangered Species Act*, Newfoundland and Labrador has created the Recovery Strategy for Three Woodland Caribou Herds (*Rangifer tarandus caribou*; *Boreal population*) in Labrador.²²⁵ This recovery strategy sets out objectives for habitat protection.²²⁶ However, this document does not create any mandatory and enforceable protection for boreal caribou critical habitat.

²²⁵ Schmelzer, I. *et al.*, Recovery strategy for three Woodland caribou herds (*Rangifer tarandus caribou*; *Boreal population*) in Labrador, (Department of Environment and Conservation, Government of Newfoundland and Labrador: Corner Brook, 2004) at ii, http://www.flr.gov.nl.ca/wildlife/endangeredspecies/recovery_strategy_feb2005_corrections.pdf.

²²⁶ *Ibid* at 4-5.

Summary of Findings

Boreal caribou critical habitat remains unprotected in Yukon.

Habitat protection areas and wildlife sanctuaries currently established under the *Wildlife Act* do not protect boreal caribou critical habitat. Moreover, the Commissioner in Executive Council has not listed boreal caribou as “specially protected wildlife”.

Parks established under the *Parks and Land Certainty Act* can protect boreal caribou critical habitat; however, there are currently no parks that overlap with boreal caribou critical habitat.



Wildlife Act

Under the *Wildlife Act*, the Commissioner in Executive Council may make regulations that designate and manage habitat protection areas.²²⁷ The Commissioner in Executive Council has designated eight habitat protection areas.²²⁸ However, none of these areas (with one exception) prohibit the destruction of habitat and none of these areas overlap with boreal caribou critical habitat.²²⁹

The Commissioner in Executive Council may also make regulations prescribing a species as “specially protected wildlife” and prescribing prohibitions, restrictions, or measures to be observed or implemented for the protection or survival of that species.²³⁰ However, the government has not listed boreal caribou as specially protected wildlife.²³¹

Furthermore, the Commissioner may prescribe wildlife sanctuaries and measures for the management, operation, and regulation of activities within these areas.²³² The Act does not prohibit destructive activities in a wildlife sanctuary. The Commissioner has designated two wildlife sanctuaries.²³³ However, neither of these designations prohibit the destruction of habitat. These two sanctuaries do not overlap with boreal caribou critical habitat.

Therefore, the *Wildlife Act* does not protect boreal caribou critical habitat.

Parks and Land Certainty Act

Under the *Parks and Land Certainty Act*, any development, use or activity in a park is prohibited unless it is authorized by the Act, the regulations, a park permit, or the order establishing the park.²³⁴ Unless otherwise permitted or required by the order establishing the park or by interim guidelines for the park, the Minister of Environment may not issue a park permit authorizing any industrial development or visitor-related development unless an approved park management plan is in force.²³⁵ Permits issued by the Minister for an activity, development, or use of a park must be consistent with any such approved park management plan.²³⁶ Neither the Act nor the regulations specify what a park management plan must include.

The Act also provides that the Minister may not issue a park permit for industrial development in ecological reserves and wilderness preserves.²³⁷ In addition to this prohibition against industrial activities in ecological reserves and wilderness preserves, the Act prohibits the removal, destruction, damage, disruption, or exploitation of natural resources in all parks, except as authorized by regulations or a park permit.²³⁸ No regulations have been made to this effect.

²²⁷ *Wildlife Act*, RSY 2002, c 229, s. 187.

²²⁸ *Wildlife Regulation*, YOIC 2012/84, s. 92.

²²⁹ *Ibid*, ss. 92 and 93(1). Subsection 93(1) prohibits the approach by any person within one kilometre of the habitat protection area designated to protect peregrine falcons and their nests.

²³⁰ *Wildlife Act*, s. 192(1)(b).

²³¹ *Wildlife Regulation*, Part 5.

²³² *Wildlife Act*, s. 192(1)(c).

²³³ *Wildlife Sanctuary Regulation*, YOIC 2002/84, Schedule A.

²³⁴ *Parks and Land Certainty Act*, RSY 2002, c 165, s. 30. Section 2 of this Act defines “development” as “the act of constructing, erecting, altering, placing or making any change in the use of or the intensity of use of any facility, structure, building, excavation, improvement or other installation on, over or under land in a park, or altering the use of any land within a park”.

²³⁵ *Ibid*, s. 31. Section 2 of this Act defines “industrial development” as “(a) development of mines and mineral, oil and gas, hydro-electric and other energy resources, and agricultural lands; (b) harvesting of timber resources, (c) development of townsites, and any land use, activity or infrastructure associated with the above”.

²³⁶ *Ibid*, s. 34.

²³⁷ *Ibid*, s. 32.

²³⁸ *Ibid*, s. 60(1).

Where a park management plan exists and prohibits destructive activities in a given park, these prohibitions have the effect of protecting boreal caribou critical habitat.²³⁹ If there is no approved park management plan in force, a permit may nonetheless be issued for development (short of industrial development) in a park, including altering the use of any land within a park.²⁴⁰

It is an offence to contravene a provision of this Act.²⁴¹

For these reasons, the *Parks and Land Certainty Act* has the capacity to protect boreal caribou critical habitat. However, at this point in time, there are no parks of any type established under the *Parks and Land Certainty Act* that overlap with boreal caribou critical habitat.

Policy Considerations

Yukon has created the Final Recommended Peel Watershed Land Use Plan, which overlaps with portions of boreal caribou critical habitat and would have important implications for the protection of that critical habitat.²⁴² The Final Recommended Plan depicts two types of conservation areas: special management areas and wilderness areas.²⁴³ However, the precise future steps regarding the Final Recommended Plan are presently uncertain, as a result of ongoing litigation at the Supreme Court of Canada.²⁴⁴ The implications of the Final Recommended Plan for boreal caribou critical habitat should be evaluated after the Supreme Court of Canada has rendered its upcoming judgment.

²³⁹ *Ibid.*, s. 34.

²⁴⁰ *Ibid.*, ss. 31 and 2.

²⁴¹ *Ibid.*, s. 84.

²⁴² Peel Watershed Planning Commission, Peel Watershed Land Use Plan (2011), online: <http://peel.planyukon.ca/downloads/FRLUP.html>. See also: “Final Recommended Land Use Plan and Related Documents”, online: <http://peel.planyukon.ca/downloads/FRLUP.html>.

²⁴³ *Ibid.*, ss. 3-4.

²⁴⁴ *First Nation of Nacho Nyak Dun et al v Government of Yukon*, SCC Docket No. 36779, online: <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36779>.

NORTHWEST TERRITORIES

Summary of Findings

Boreal caribou critical habitat remains largely unprotected in Northwest Territories.

Under the *Species at Risk (NWT) Act*, Northwest Territories has not designated boreal caribou critical habitat by regulation, and thus there is no mandatory and enforceable protection for critical habitat.

Similarly, the *Territorial Parks Act* does not currently protect boreal caribou critical habitat. No wilderness conservation areas currently exist, and this is the only class of park that prohibits industrial activity.

To the extent that land withdrawal orders under the *Territorial Lands Act (Canada)* and the *Northwest Territories Lands Act* prohibit activities that destroy critical habitat, these orders can protect boreal caribou critical habitat. However, at this point in time, many existing land withdrawal orders do not protect boreal caribou critical habitat from the full suite of destructive activities identified in the 2012 Recovery Strategy.



Species at Risk (NWT) Act

Boreal caribou is listed as a threatened species on the Northwest Territories List of Species at Risk under the *Species at Risk (NWT) Act*.²⁴⁵

The *Species at Risk (NWT) Act* protects listed species' critical habitat where the Commissioner of the Northwest Territories, on recommendation from the Minister, designates that critical habitat in a regulation.²⁴⁶ Designated critical habitat is protected from destruction by a mandatory prohibition.²⁴⁷ Designated critical habitat may also be further protected by any additional prohibitions created by regulation.²⁴⁸ Contravention of or failure to comply with these prohibitions is an offence under the Act.²⁴⁹

However, boreal caribou critical habitat is not protected by this Act because the government has not yet created any regulation designating critical habitat.

Northwest Territories has created the Recovery Strategy for the Boreal Caribou (*Rangifer tarandus caribou*) in the Northwest Territories under this Act. This recovery strategy sets out objectives and approaches for the conservation and recovery of the species. However, it does not create any mandatory and enforceable protection of critical habitat.²⁵⁰

Territorial Parks Act

Northwest Territories has the ability to create parks under the *Territorial Parks Act*.²⁵¹ The Act prohibits commercial and industrial activity in a territorial park without a park use permit.²⁵² It also prohibits the damage and destruction of a natural feature, subject to any regulations.²⁵³ The *Territorial Parks Regulations* requires a commercial use permit for any commercial or industrial activity in any park.²⁵⁴ Subject to this Act and the regulations, park use permits for commercial or industrial activity may be issued by the Superintendent or person designed in writing by the Superintendent upon application in the prescribed form and on payment of the prescribed fee.²⁵⁵ The Superintendent may include terms and conditions in a park use permit, including with regard to any matter not inconsistent with the Act or regulations that may be necessary to preserve the natural environment or the right to peaceful enjoyment of the park.²⁵⁶ Therefore, the prohibitions against commercial and industrial activity, and damage and destruction of a natural feature, are not mandatory.

²⁴⁵ Conference of Management Authorities Species at Risk, "NWT List of Species at Risk", online: <http://www.nwt-species-at-risk.ca/CMA/SarList>. The *Species at Risk (NWT) Act*, SNWT 2009, c 16, enables a cooperative approach to the conservation of species at risk in areas with settled land claims (see ss. 9, 11 and 12). The Conference of Management Authorities is established to build consensus among the Management Authorities on the conservation of species at risk in these areas (see s. 12).

²⁴⁶ *Species at Risk Act*, *ibid*, s. 153. Subsection 153(2) gives the Minister authority to make a recommendation in the absence of a consensus agreement from the Conference of Management Authorities only if he or she considers that the habitat is essential for the survival or recovery of the species, and the designation is necessary for the conservation of habitat.

²⁴⁷ *Ibid*, s. 80.

²⁴⁸ *Ibid*, s. 154.

²⁴⁹ *Ibid*, s. 119.

²⁵⁰ Conference of Management Authorities, Recovery Strategy for the Boreal Caribou (*Rangifer tarandus caribou*) in the Northwest Territories: *Species at Risk (NWT) Act* Management Plan and Recovery Strategy Series (Environment and Natural Resources, Government of the Northwest Territories: Yellowknife, 2017), online: http://www.nwt-species-at-risk.ca/sites/default/files/nwt_boreal_caribou_recovery_strategy_2017_final_0.pdf.

²⁵¹ *Territorial Parks Act*, RSNWT 1988, c T-4, s. 5.

²⁵² *Ibid*, s. 12. Section 1 defines industrial activity as including "the harvesting of timber resources, any activity in respect of a mine or minerals, and any activity in respect of an energy resources such as oil, gas or water".

²⁵³ *Ibid*, s. 13(1).

²⁵⁴ *Territorial Parks Regulations*, RRNWT 1990, c T-13, s. 22.

²⁵⁵ *Territorial Parks Act*, s. 8(1).

²⁵⁶ *Territorial Parks Regulations*, s. 23.1(1)(m).

Despite this discretion to permit destructive activities in territorial parks, there is one class of park in Northwest Territories that does enjoy mandatory and enforceable protection. The Act prohibits industrial development in wilderness conservation areas.²⁵⁷

No other class of park is protected against industrial development. The Government of Northwest Territories has broad authority to prohibit industrial development except for the leasing of mining rights which remains under federal authority.²⁵⁸

There are currently no wildlife conservation areas created in Northwest Territories.

At this point in time, the *Territorial Parks Act* does not protect boreal caribou critical habitat.²⁵⁹

Territorial Lands Act (Canada) and Northwest Territories Lands Act

The *Territorial Lands Act* (Canada) allows the Governor in Council to appropriate territorial lands in Northwest Territories as land management zones in order to protect the ecological balance or physical characteristics of that area.²⁶⁰ The Governor in Council could then make regulations respecting the protection, control and use of surface land in those land management zones, including regulations respecting land use permits.²⁶¹ The *Territorial Land Use Regulations* describe two land management zones.²⁶² However, the Regulations do not prohibit destructive activities within those zones.²⁶³

Under the *Territorial Lands Act* (Canada), the Governor in Council has also made regulations respecting the protection, control, and use of the surface of territorial lands;²⁶⁴ however, none of these regulations provide mandatory and enforceable protection against destruction of territorial lands.²⁶⁵

Additionally, this Act gives the Governor in Council other legislative powers that may be exercised in a way that protects boreal caribou critical habitat. Among them are the powers to order, with reasons for the withdrawal set out in the order, the withdrawal of any tract or tracts of territorial lands from disposal under the Act, including for the purpose of establishing parks or protected areas;²⁶⁶ to set apart and appropriate territorial lands for use as game

²⁵⁷ *Ibid*, ss. 3(2) and 3(8). Section 3(8) permits Northwest Territories to prohibit industrial activity in wilderness conservation areas to the extent that it has the power to do so. The power of Northwest Territories in this regard is limited only by the power retained by the federal government to lease mining rights on territorial lands (*Territorial Lands Act*, RSC, 1985, c T-7, s. 12). The federal government has made regulations to this effect (*Northwest Territories Mining Regulation*, SOR/2014-68, s. 62(5)).

²⁵⁸ *Territorial Lands Act*, RSC, 1985, c T-7, s. 12. See also, *Northwest Territories Act*, SC 2014, c 2, s 2, s. 19(1).

²⁵⁹ Northwest Territories has set the following priority and associated task: “Propose new legislation for the establishment of conservation and protected areas” and “Work with the GNWT Department of Industry, Tourism and Investment (ITI) as they lead the process to transform the *Territorial Parks Act* into the *Recreational Parks Act*.” See Department of Environment and Natural Resources, Healthy Land, Healthy People: Government of the Northwest Territories Priorities for Advancement of Conservation Network Planning 2016-2021 (2016) at 16, online: http://www.enr.gov.nt.ca/sites/enr/files/hlhp_cnp_priorities_2016-2021.pdf.

²⁶⁰ *Territorial Lands Act* (Canada), s. 4. This Act remains in force following devolution in Northwest Territories in 2014. However, as discussed below, Northwest Territories has passed replacement legislation, the *Northwest Territories Lands Act*, that going forward will be used to govern the matters formerly addressed under the *Territorial Lands Act* (Canada). Both pieces of legislation are addressed here.

²⁶¹ *Ibid*, s. 5.

²⁶² *Territorial Land Use Regulations*, CRC, c 1524, s. 3.

²⁶³ *Territorial Land Use Regulations*, CRC, c 1524.

²⁶⁴ *Ibid*, s. 23(j).

²⁶⁵ See the *Territorial Lands Regulation*, CRC, c 1525, the *Territorial Dredging Regulations*, CRC, c 1532, and the *Territorial Quarrying Regulation*, CRC, c 1527.

²⁶⁶ *Territorial Lands Act*, s. 23(a).

sanctuaries or other similar public purpose;²⁶⁷ and to set apart and appropriate such lands as may be necessary to facilitate land claim negotiations with First Nations.²⁶⁸

The Governor in Council exercised these powers on numerous occasions, prior to April 2014. In particular, numerous tracts of territorial lands were withdrawn from disposal.²⁶⁹ The withdrawal orders are not all made on the same terms; some prohibit most activities in the reserved lands, while others are subject to numerous exceptions.²⁷⁰ To the extent that such orders prohibit activities that destroy habitat, they can protect boreal caribou critical habitat from destruction. However, for many of these orders, there are exceptions to the land withdrawal such that they do not protect boreal caribou critical habitat from the full suite of destructive activities identified in the 2012 Recovery Strategy. In particular, many of the orders continue to allow mining-related activities.

Since April 2014, the government of Northwest Territories has mirrored many of these existing federal orders with territorial orders.²⁷¹ Going forward, similar land withdrawal orders, that may likewise have the effect of protecting boreal caribou critical habitat from some of the destructive activities identified in the 2012 Recovery Strategy, are expected to be made under the *Northwest Territories Lands Act*.²⁷²

Therefore, to the extent that the *Territorial Lands Act* (Canada) and its regulations continue to be in force, many orders withdrawing land from disposal do not protect boreal caribou critical habitat from some of the destructive activities identified in the 2012 Recovery Strategy. Any new orders under the *Northwest Territories Lands Act* that mirror, extend, or continue such federal orders likewise would not protect boreal caribou critical habitat.

²⁶⁷ *Ibid.*, s. 23(e).

²⁶⁸ *Ibid.*, ss. 23(a) and (d).

²⁶⁹ For a full list of the regulations made under this Act, including the orders made under s. 23, see the relevant page of the Justice Laws website, online: <http://laws-lois.justice.gc.ca/eng/acts/T-7/>.

²⁷⁰ *Ibid.*

²⁷¹ By way of example, the *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Dehcho Region) Order*, SI/2013-126, made under the *Territorial Lands Act* on November 28, 2013, indicates that the withdrawal would be “for a period of two years beginning on the day on which this Order is made.” (s. 2) Prior to the Order’s end date, the *Land Withdrawal Order (Dehcho Region)*, NWT Reg 048-2014 under the *Northwest Territories Lands Act* came into force, on April 1, 2014.

²⁷² *Northwest Territories Lands Act*, SNWT 2014, c 13. For the transitional provisions in this Act, see ss. 54-56.

Summary of Findings

Boreal caribou critical habitat remains largely unprotected on federal lands.²⁷³

The *Canada National Parks Act* does not protect boreal caribou critical habitat because, except in Wood Buffalo and Prince Albert National Parks, destructive activities may be authorized under the Act and its regulations. Wilderness areas within national parks protect boreal caribou critical habitat.

The *Canada Wildlife Act* does not protect boreal caribou critical habitat. No regulations have been made specifying the measures to be taken for the protection of any species of wildlife in danger of extinction, or specifying how lands purchased or acquired under the Act may be used for wildlife research, conservation, and interpretation. National wildlife areas established under this Act can protect boreal caribou critical habitat; however, there are currently no wildlife areas that overlap with boreal caribou critical habitat.

Canada National Parks Act

The *Canada National Parks Act* prohibits the use or occupation of public lands in a national park, except as permitted by the Act or the regulations.²⁷⁴ It is an offence to contravene this provision.²⁷⁵

The Act states that, in managing national parks, the first priority of the Minister of Environment and Climate Change shall be the maintenance or restoration of ecological integrity through the protection of natural resources and natural processes.²⁷⁶ Despite this, the Federal Courts have nonetheless held that the Act does not require that ecological integrity be the Minister's only consideration when making statutory decisions about park management, nor must ecological integrity be the determinative factor. According to the Courts, other interests can override the Act's first priority of ecological integrity.²⁷⁷

Moreover, the *National Parks General Regulations* additionally prohibit damage and destruction of flora and natural objects except in accordance with a permit.²⁷⁸ It is an offence to violate this provision.²⁷⁹ However, the Regulations allow a park superintendent to issue permits authorizing the removal or use of natural objects in a park for purposes of construction, where the construction will not have a significant adverse environmental impact on the park and its natural resources.²⁸⁰ A park superintendent may also issue permits authorizing the damage or destruction of any flora or natural objects in a park for the purposes of park management.²⁸¹ The Federal Courts have held that "park management" includes whatever is necessary to implement discretionary ministerial decisions regarding national parks; it is a broad concept that includes, for example, the construction of roads and other infrastructure intended to serve communities outside of national parks.²⁸² Therefore, the Regulations'

²⁷³ Not all laws have been analyzed. See Appendix for a detailed description of the approach taken to identify legislation for analysis, including the type of federal or Indigenous law that have not been analyzed herein.

²⁷⁴ *Canada National Parks Act*, SC 2000, c 32, s. 13.

²⁷⁵ *Ibid*, s. 24(1).

²⁷⁶ *Ibid*, s. 8(2). Section 2(1) of the Act defines "ecological integrity" as "a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes".

²⁷⁷ *Canadian Parks and Wilderness Society v Copps*, 2001 FCT 1123 at paras 38-39, 52-53, aff'd 2003 FCA 197. The Courts largely adopted Canada's submissions in this regard.

²⁷⁸ *National Parks General Regulations*, SOR/78-213, s. 10.

²⁷⁹ *Canada National Parks Act*, s. 24(2).

²⁸⁰ *Ibid*, s. 11(1)(a).

²⁸¹ *Ibid*, s. 12(1).

²⁸² *Canadian Parks and Wilderness Society v Copps*, 2001 FCT 1123 at para 56, aff'd 2003 FCA 197 at paras 111-112.

prohibitions against the removal, damage, and destruction of flora and natural objects are not mandatory, as the superintendent may issue permits for destructive activity.

Additionally, the Act allows the Governor in Council to make regulations declaring an area of a park to be a wilderness area.²⁸³ In these areas, the Minister may not authorize any activity that is likely to impair the wilderness character of the area.²⁸⁴ Therefore, wilderness areas protect boreal caribou critical habitat from destruction. The *National Parks of Canada Wilderness Area Declaration Regulations* delineate wilderness areas within eight national parks (Banff, Jasper, Kootenay, Yoho, Waterton Lakes, Fundy, Vuntut, and Nahanni).²⁸⁵ Of these, only Nahanni National Park Reserve overlaps with boreal caribou critical habitat; however, it was not possible without additional GIS mapping that was beyond the scope of this research to determine how much (if any) of its designated wilderness area overlaps.

With respect to Nahanni National Park Reserve,²⁸⁶ in 2014, the Minister of Environment published a Critical Habitat Protection Statement under SARA.²⁸⁷ The Minister's Protection Statement claims that boreal caribou critical habitat is "protected on federal land and water within Nahanni National Park Reserve", and supports this claim by citing certain provisions of the *Canada National Parks Act*.²⁸⁸ However, the Minister's claim is not legally correct. The Federal Courts have interpreted the provisions relied on in the Minister's Protection Statement, holding that these provisions mean that ecological integrity is not the determinative factor in park management, and that they can allow road construction in boreal caribou habitat in national parks.

In contrast to the approach taken to Nahanni, in 2013, the Minister published a notice in the *Canada Gazette*.²⁸⁹ The notice describes those portions of boreal caribou critical habitat overlapping with Wood Buffalo National Park and Prince Albert National Park.²⁹⁰ As a result of this notice, by late 2013, boreal caribou critical habitat in these two national parks was protected from destruction.²⁹¹

By contrast, the boreal caribou critical habitat that overlaps with Pukaskwa National Park remains unprotected. A SARA notice has not been published and a SARA ministerial order has not been made.

The *Canada National Parks Act* also allows the Governor in Council to establish national historic sites in order to "preserve a historic landmark, or any object of historic, prehistoric or scientific interest, that is of national

²⁸³ *Ibid.*, s. 14(1).

²⁸⁴ *Ibid.*, s. 14(2).

²⁸⁵ *National Parks Wilderness Area Declaration Regulations*, SOR 2002-387.

²⁸⁶ *Canada National Parks Act*, Schedule 2. The Act applies to park reserves; see ss. 2(1) and 39.

²⁸⁷ Legal Protection Statement for the Critical Habitat of Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Nahanni National Park Reserve of Canada (2014), online: http://www.registrelep-sararegistry.gc.ca/document/default_e.cfm?documentID=1336. The Minister made the Protection Statement in her capacity as the Minister responsible for the Parks Canada Agency, pursuant to s. 58(5)(b) of SARA.

²⁸⁸ The provisions referenced are s. 2(1) (definition of "ecological integrity") and s. 8(2) (ecological integrity shall be the first priority) of the Act, and s. 10 of the *National Parks General Regulations* (prohibition against damaging or destroying any flora or natural objects except in accordance with a permit under these Regulations). The Minister's Protection Statement does not refer to the 2010 Nahanni National Park Reserve of Canada Management Plan (online: <https://www.pc.gc.ca/en/pn-np/nt/nahanni/info/plan/plan4>). As explained in the Appendix, this report does not analyze park management plans under the *Canada National Parks Act*, or under other parks or protected areas legislation.

²⁸⁹ *Canada Gazette* Part 1, Vol. 147, No. 31, pp. 1918-1921. See http://www.registrelep-sararegistry.gc.ca/virtual_sara/files/g1-14731.pdf. The notice was published pursuant to s. 58(2) of SARA. The notice could not include Nahanni National Park Reserve as it is on Schedule 2 of the *Canada National Parks Act*.

²⁹⁰ Those locations correspond to portions of the Northwest Territory Range (NT1), Caribou Mountains Range (AB4), and Red Earth Range (AB6) within Wood Buffalo National Park, and a portion of the Boreal Plain Range (SK2) within Prince Albert National Park. See *ibid.*

²⁹¹ *Species at Risk Act*, ss. 58(1), (2) and (3).

importance.”²⁹² The *National Historic Sites of Canada Order* sets out all national historic sites in Canada.²⁹³ This Order also provides that certain provisions of the *Canada National Parks Act* apply to national historic sites. However, these statutory provisions do not serve to protect boreal caribou critical habitat from destruction.²⁹⁴

In addition, national historic sites appear to be protected under the *National Historic Parks General Regulations*.²⁹⁵ Similar to other regulations under this Act,²⁹⁶ these Regulations prohibit the damage or destruction of flora, fauna, or national objects in a national historic park,²⁹⁷ yet allow a park superintendent to issue permits authorizing damage or destruction of flora, fauna, or natural objects for “management of the Park” or for scientific purposes.²⁹⁸ Just as with the similar prohibition and permitting provisions found in the *National Parks General Regulations*, which is analyzed above, these Regulations likewise do not protect boreal caribou critical habitat in national historic sites from destruction.

The only national historic site that overlaps with boreal caribou critical habitat is the Saoyú-?ehdacho National Historic Site of Canada. For the reasons explained, boreal caribou critical habitat that overlaps with this national historic site is not protected from destruction.

Finally, the Act also allows the Governor in Council to make regulations to protect flora and natural features, and to restrict or prohibit activities and to control the use of park resources and facilities.²⁹⁹ However, none of the regulations made under the Act prohibit destructive activity.³⁰⁰

Therefore, the *Canada National Parks Act* does not protect boreal caribou critical habitat. Only Wood Buffalo National Park and Prince Albert National Park protect boreal caribou critical habitat from destruction, as a result of the *Canada Gazette* notice published under the *Species at Risk Act*.

Canada Wildlife Act

Under the *Canada Wildlife Act*, where the administration of any public lands has been assigned to the Minister of Environment and Climate Change under any federal law for the purposes of wildlife research, conservation, or interpretation, the Minister may carry out measures to conserve wildlife on those lands.³⁰¹ Under this Act, there are 16 statutory instruments assigning the administration, management, and control of public lands to the federal Minister of Environment for the purposes of wildlife research, conservation, and interpretation. The statutory instruments create national wildlife areas for wildlife conservation.³⁰²

The *Wildlife Area Regulations* prohibit industrial development, and prohibit damage and destruction of plants and natural objects, within wildlife areas.³⁰³ It is an offence to contravene these prohibitions.³⁰⁴ The Minister may issue

²⁹² *Canada National Parks Act*, s. 42(1)(b).

²⁹³ *National Historic Sites of Canada Order*, CRC, c. 1112.

²⁹⁴ *National Historic Sites of Canada Order*, CRC, c. 1112, s. 2. The applicable provisions of the *Canada National Parks Act* are ss. 8(1), 12, 16(1)-(3), 17-23, 24(2), 24(3) and 25-32. Subsection 8(2) does not apply to national historic sites. See also s. 42(3) of the *Canada National Parks Act*.

²⁹⁵ *National Historic Parks General Regulations*, SOR/82.

²⁹⁶ In particular, see the discussion above of the *National Parks General Regulations*.

²⁹⁷ *Ibid.*, s. 4(1).

²⁹⁸ *Ibid.*, s. 4(2).

²⁹⁹ *Canada National Parks Act*, ss. 16(1)(b) and (h).

³⁰⁰ See for example the *National Parks Building Regulations*, CRC, c. 1114, the *National Parks of Canada Businesses Regulations*, SOR/98-455, and the *National Parks of Canada Lease and Licence of Occupation Regulations*, SOR/92-25.

³⁰¹ *Canada Wildlife Act*, RSC 1985, c. W-9, s. 3(2)(c). Such conservation measures must be carried out in a manner consistent with any law respecting wildlife in the province in which the lands are situated.

³⁰² See the statutory instruments (SI) listed under “Regulations made under this Act”, online: <http://laws.justice.gc.ca/eng/acts/W-9/index.html>.

³⁰³ *Wildlife Area Regulations*, CRC, c. 1609, ss. 3(1)(d), (j) and (k).

³⁰⁴ *Canada Wildlife Act*, s. 13(1).

permits exempting individuals from these prohibitions, but the permitted activity must not interfere with the conservation of wildlife.³⁰⁵ Therefore, national wildlife areas protect boreal caribou critical habitat. There are currently 54 national wildlife areas across the country; however, none of these areas overlap with boreal caribou critical habitat.³⁰⁶

Moreover, the *Canada Wildlife Act* allows the Minister, in cooperation with one or more provincial governments, to take any necessary measures, and to make regulations specifying the measures to be taken, for the protection of any species of wildlife in danger of extinction.³⁰⁷ No such regulations have been made.

Furthermore, the Act allows the Governor in Council to authorize the Minister to lease, purchase, or acquire any lands, or any interests or rights in any lands, for the purpose of research, conservation, and interpretation of wildlife, with the agreement of provincial governments with interests in the same lands.³⁰⁸ The Act also allows the Governor in Council to make regulations specifying how lands purchased or acquired under the Act may be used, provided that use is consistent with wildlife research, conservation, and interpretation.³⁰⁹ No such regulations have been made.

Policy Considerations

Environment and Climate Change Canada has recently proposed a draft Action Plan for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada, under section 50(1) of the *Species at Risk Act*.³¹⁰ The proposed action plan states that the federal government will assess critical habitat across the country.³¹¹ It does not create any mandatory and enforceable protection for boreal caribou critical habitat.

Additionally, it is noted here that no section 11 agreements have been entered, under the *Species at Risk Act*, that protect boreal caribou critical habitat.³¹² As confirmed by the Federal Court of Appeal, a section 11 agreement can serve as an alternative to a critical habitat protection order under the *Species at Risk Act*, provided that that the agreement ensures that the critical habitat is legally protected from destruction.³¹³

Finally, Environment and Climate Change Canada has also created the proposed Policy on Critical Habitat Protection on Non-federal Lands. Many organizations, including Wildlands League, have submitted written comments to Environment and Climate Change Canada expressing concerns with the legality and merits of this draft policy.³¹⁴ If finalized, the proposed policy would guide the department's assessment of whether existing laws and measures protect critical habitat on non-federal lands.³¹⁵ However, the policy itself does not create any mandatory and enforceable protection for boreal caribou critical habitat.

³⁰⁵ *Ibid*, s. 4.

³⁰⁶ Environment and Climate Change Canada, "National Wildlife Areas Across Canada" (2017), online: <http://www.ec.gc.ca/ap-pa/default.asp?lang=En&n=2bd71b33-1>.

³⁰⁷ *Canada Wildlife Act*, ss. 8 and 12(b).

³⁰⁸ *Ibid*, s. 9(1)(b).

³⁰⁹ *Ibid*, s. 12(e).

³¹⁰ Environment and Climate Change Canada, Action Plan for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada [Proposed], (Environment and Climate Change Canada: Ottawa, 2017), online: https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/Ap-WoodlandCaribouBorealFederalActions-v00-2017Jul27-Eng1.pdf.

³¹¹ *Ibid* at 10.

³¹² Joseph Crocker, Director, Environment and Climate Change Canada, Assessment and Regulatory Affairs, e-mail communication on file with Anna Baggio, 6 June 2017.

³¹³ *Canada (Fisheries and Oceans) v David Suzuki Foundation et al.*, 2012 FCA 40 at para 118.

³¹⁴ Comments on file with Anna Baggio, Wildlands League.

³¹⁵ Environment and Climate Change Canada, Policy on Critical Habitat Protection on Non-federal Lands [Proposed], (Environment and Climate Change Canada: Ottawa, 2016) at 1, online: https://registrelep-sararegistry.gc.ca/virtual_sara/files/policies/CH_Protection_NFL_EN.pdf.

APPENDIX: METHODS

This Appendix summarizes the basic methodology used by the authors in analyzing the question at issue in this report: whether boreal caribou critical habitat identified in the 2012 Recovery Strategy is protected.³¹⁶

To answer this question, laws in each provincial and territorial jurisdiction where boreal caribou critical habitat occurs were examined. These jurisdictions are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador, Yukon, and Northwest Territories. Federal laws were also examined.

To determine whether boreal caribou critical habitat is protected by a given law, the law was assessed for whether it provides for mandatory and enforceable protection against the destruction of critical habitat.³¹⁷ This reflects the protection standard under the federal *Species at Risk Act* (SARA). As has been confirmed by the Federal Court of Appeal, to “protect” critical habitat means to restrict by law access to or development of land in order to preserve its wildlife. When addressing protection, Parliament’s intent was to avoid interference with and destruction of critical habitat. Under SARA, a “legal protection scheme is not a regulatory management scheme”. Non-compulsory or discretionary measures do not protect critical habitat; rather, protection requires avoiding the destruction of critical habitat through any means, including through activities authorized under discretionary permits or licenses. Legislation only legally protects critical habitat if its provisions, or if measures thereunder, prevent the destruction of critical habitat through legally enforceable means which are not subject to ministerial discretion.³¹⁸ In light of this SARA protection standard, prohibitions against the destruction of habitat, exemption and permitting provisions, and the extent of ministerial discretion in relation to exemptions and permitting, were assessed for each provincial, territorial, and federal law that was analyzed in this report.

The analysis refers only to laws in force as of August 31, 2017. Moreover, the analysis of each law reflects whether the law currently protects boreal caribou critical habitat.

For each provincial and territorial jurisdiction, the analysis proceeded as follows.

First, each jurisdiction was examined for whether it has stand-alone species at risk legislation. For jurisdictions with stand-alone species at risk legislation, those statutes were assessed for whether they currently protect boreal caribou critical habitat from destruction and for whether protection against destruction is mandatory and enforceable.

Second, for jurisdictions without stand-alone species at risk law, general wildlife legislation was assessed for whether it protects boreal caribou critical habitat.³¹⁹

Third, for jurisdictions that do not currently protect boreal caribou critical habitat under either species at risk legislation or general wildlife legislation, parks and protected areas legislation were examined. This analysis did not extend, whether for provincial, territorial, or federal jurisdictions, to any approved park-specific management plans for particular parks or protected areas.

Fourth, for jurisdictions that do not currently protect boreal caribou critical habitat under either species at risk legislation or general wildlife legislation, other legislation that those jurisdictions had previously sought to rely on

³¹⁶ Environment Canada, Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada, *Species at Risk Act* Recovery Strategy Series (Environment Canada: Ottawa, 2012).

³¹⁷ Throughout the analysis, critical habitat means “habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species” (*Species at Risk Act*, SC 2002, c 29, s. 2(1)) and, specifically, boreal caribou critical habitat is as it is identified in the federal 2012 Recovery Strategy, *ibid*.

³¹⁸ *Canada (Fisheries and Oceans) v David Suzuki Foundation et al.*, 2012 FCA.

³¹⁹ An exceptional decision was made, based on local circumstances and efforts, to assess general wildlife legislation in Manitoba despite that this province also has a stand-alone species at risk law.

to protect boreal caribou critical habitat was considered. Informed by the industrial activities identified in the 2012 Recovery Strategy as likely to result in the destruction of critical habitat,³²⁰ legislation governing those activities (such as forestry legislation) was assessed. Similarly, legislation referred to in provincial and territorial boreal caribou range plans as a basis for any proposed protection measures in these plans was also examined.

Where legislation relied on by a jurisdiction had no remote possibility of protecting boreal critical habitat, it was excluded from the analysis. Where such legislation was at least arguably connected to the potential to protect boreal caribou critical habitat, it was included in the analysis and subjected to the same SARA standard of mandatory and enforceable protection against critical habitat destruction.

At the outset of this research, a decision was made to exclude public lands legislation or Crown lands legislation from analysis, as this type of legislation is not typically concerned with the protection of species or their habitats.³²¹

Finally, while policies, guidelines, or recovery planning documents are not considered to be capable of providing mandatory and enforceable protection against critical habitat destruction, policy and planning documents relevant to boreal caribou conservation were identified and briefly reviewed for each jurisdiction.

Figure 1 below provides a visual description of the report's approach.

The analysis of federal legislation was approached in a slightly different fashion. Excluded from the analysis is SARA because the Minister of Environment and Climate Change has never issued a critical habitat protection order under section 61 of the Act or entered into any conservation agreements under section 11 for the purposes of protection. The Minister has issued a notice under subsection 58(2) of SARA regarding Wood Buffalo National Park and Prince Alberta National Park, and has issued a protection statement under paragraph 58(5)(b) of SARA regarding Nahanni National Park Reserve; these are analyzed in the discussion of the *Canada National Parks Act*.

Moreover, laws governing federal lands beyond the context of parks and wildlife areas were not considered, for the reason that the research team lacked the capacity to effectively research other federal land laws in the time provided for this project. Notably, reserve lands under the *Indian Act*, land subject to modern land claims agreements (which contain provisions for Indigenous co-management of lands, resources, wildlife and habitat for most of the Yukon and Northwest Territories), self-government agreements, or other federal statutes that directly govern First Nations' lands such as the *First Nations Land Management Act* or the *First Nations Commercial and Industrial Development Act* were not examined. However, it is possible that boreal caribou critical habitat on Indigenous lands subject to these federal laws, modern land claims agreements and self-government agreements may be protected from destruction. Recent experiences with co-management and self-government agreements with First Nations and other Indigenous groups in Yukon and Northwest Territories, including through co-management boards and also through Indigenous community self-regulation, have foregrounded boreal caribou habitat protection.

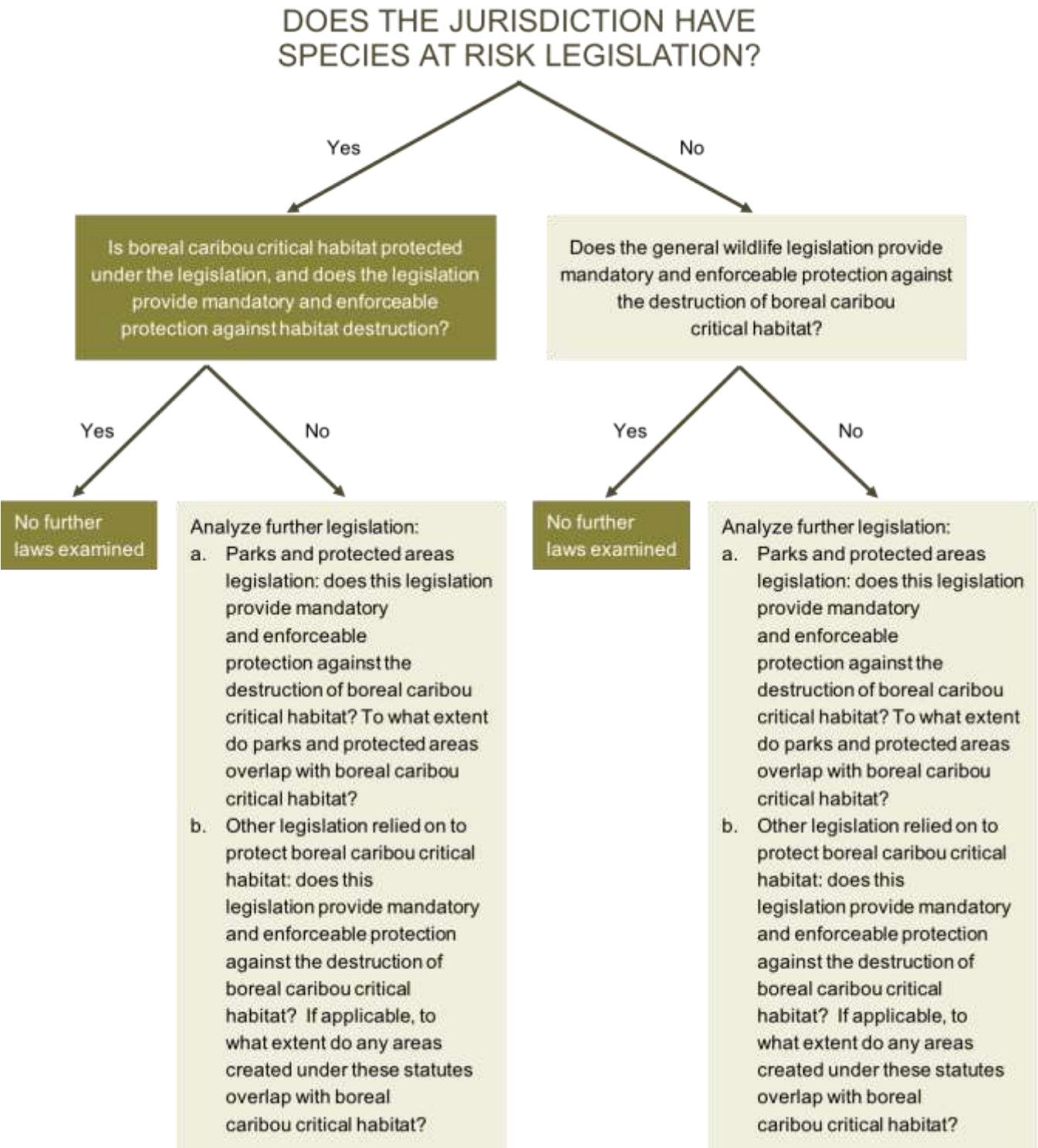
Further, neither Indigenous legal traditions nor Canadian law on Indigenous rights and title was considered for its capacity to protect boreal caribou critical habitat. It is possible, both in theory and in current practice, that Indigenous legal traditions and Indigenous rights and title may protect boreal caribou critical habitat from destruction. However, the research team again lacked the capacity and the expertise to effectively research Indigenous legal traditions and Indigenous rights and title across the country.

³²⁰ *Ibid* at 36-37.

³²¹ Two examples of this type of excluded legislation include the *Land Act*, RSBC 1996, c 245 and the *Public Lands Act*, RSO 1990, c P43. Note, however, that this report does include analysis of the *Territorial Lands Act*, RSC 1985, c T-7 and the *Northwest Territories Lands Act*, SNWT 2014, c13.

Otherwise, the analytical approach to the assessment of federal legislation followed the process identified above.

FIGURE 1



RECOMMENDATIONS

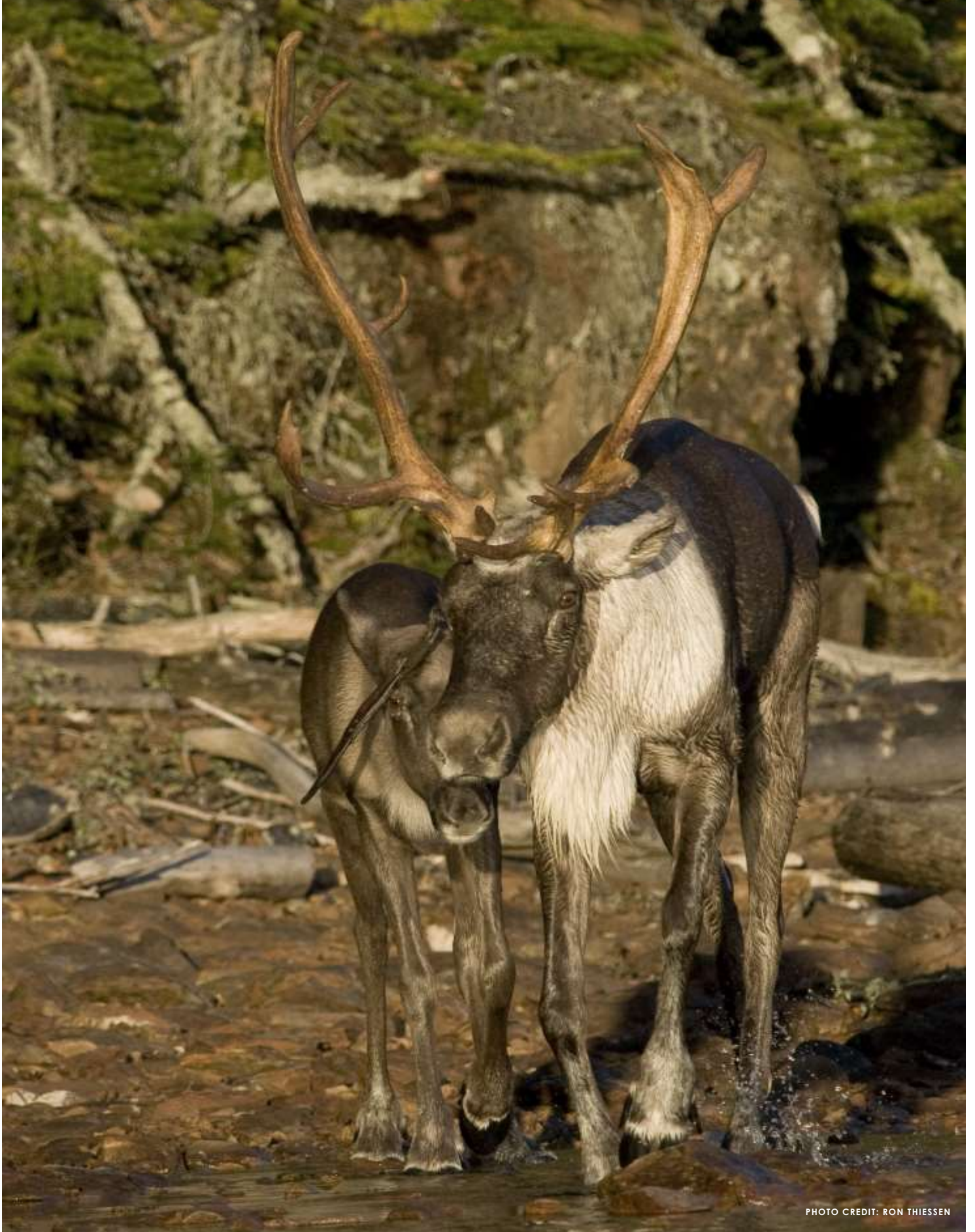


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THESE ARE WILDLANDS LEAGUE'S RECOMMENDATIONS:

1. The federal Minister of Environment and Climate Change must begin complying with section 63 of the *Species at Risk Act*. The Minister must release regular progress reports on the protection status of the critical habitat of boreal caribou, and for all other species to which section 63 applies. These progress reports must be released every 180 days after critical habitat is identified, until all portions of critical habitat are protected.
2. Five years after being identified in the 2012 Recovery Strategy, boreal caribou critical habitat remains unprotected or largely unprotected in all provinces and territories. The federal government must now take timely steps towards protecting boreal caribou critical habitat, using its powers under the *Species at Risk Act*. These protection powers include making critical habitat protection orders under section 61 of the Act, and entering agreements under section 11 of the Act.
3. Manitoba, Ontario, Québec, Newfoundland and Labrador, and Northwest Territories must take action to ensure that there is mandatory and enforceable protection of boreal caribou critical habitat under their species at risk legislation. Specifically:
 - Manitoba should amend *The Endangered Species and Ecosystems Act*, so as to remove or strictly circumscribe ministerial discretion to authorize activities that alter wildlife habitat.
 - Ontario should repeal the wide-ranging regulatory exemptions that it made in May 2013 under the *Endangered Species Act, 2007*. These exemptions shielded industrial activities from compliance with the statutory prohibition against damage or destruction of habitat, including with respect to boreal caribou critical habitat.
 - Québec should amend its species at risk legislation, to remove or strictly circumscribe ministerial discretion to authorize activities that alter wildlife habitat. Further, Québec should also demarcate the full geographical extent of boreal caribou critical habitat on a wildlife habitat chart, under the *Act respecting threatened or vulnerable species*.
 - Newfoundland and Labrador should make an order, under the *Endangered Species Act*, that sets aside and protects boreal caribou critical habitat, and that specifies prohibited activities.
 - Northwest Territories should designate boreal caribou critical habitat, in a regulation under the *Species at Risk (NWT) Act*.
4. British Columbia, Alberta, Saskatchewan, and Yukon must enact species at risk legislation. Standalone species at risk legislation is the best legislative means to ensure the survival and recovery of at-risk species like boreal caribou. New species at risk legislation must provide for mandatory and enforceable protection against the destruction of species' critical habitat.



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