



**Community Enforcement of Environmental Laws¹
Options for BC First Nations**

A. INTRODUCTION

As British Columbians understand, even the most rigorous environmental laws are rendered ineffective by lack of enforcement. A gross measure of the decline in enforcement in B.C. over the past 15 years is revealed in the figure that between 1995 and 2005 the number of enforcement actions by the Ministry of Environment's conservation officer service fell by 50 percent.² At the same time, some communities undertake research, monitoring, stewardship, education and restoration to improve the quality of ecological systems throughout local government land, Crown land, and traditional territories. While community members fulfill an "observe, record, report" role, reporting infractions to senior government staff, the inability to issue fines or take action through enforcement means that many offences are not pursued. Fisheries and Oceans Canada fisheries officers, Ministry of Environment conservation officers and Ministry of Forests compliance and enforcement staff do not have the resources and are often unwilling to enforce a significant portion of offences taking place in remote areas.

In this context, many First Nations communities have become dissatisfied with the enforcement priorities of senior levels of government. Some communities, particularly First Nations, are seeking to assume some jurisdiction for enforcing environmental laws. Community enforcement of environmental laws refers to community members having some authority for ensuring that resource management and environmental protection laws, regulations and permits are upheld. For First Nations communities, this can also mean enforcing aboriginal and treaty rights, both on reserve and throughout traditional territories. Toxics regulation and monitoring in the United States relating to environmental justice concerns is the area of environmental law where community enforcement has received the greatest attention given legislator's recognition that government enforcement is sufficiently inadequate and unreliable to promote compliance by permittees.³

A mature model of a community approach to environmental law enforcement can be found in the Great Lakes Indian Fish and Wildlife Commission ("the Commission"), comprised of 11 Ojibwe Nations in Michigan, Minnesota and Wisconsin.⁴ Its purpose is to protect natural resources on tribal lands and off reservation treaty rights to hunt, fish and gather in treaty-ceded lands, as recognized in treaties between the Ojibwe and United States of 1836, 1837,

¹ This backgrounder is based on the work of Tim Watson, Environmental Law Clinic Intensive student 2008-2009.

² West Coast Environmental Law (2007). No Response: A Survey of Environmental Law Enforcement and Compliance in B.C. at p. 5. <http://www.wcel.org/wcelpub/2007/14259.pdf>

³ See, for example, Richard J. Lazarus and Stephanie Tai (1999) Integrating Environmental Justice Into EPA Permitting Authority 26 *Ecology Law Quarterly* 617.

⁴ <http://www.glifwc.org/about/about.html>

1842, and 1854.⁵ Other non-treaty agreements with state and federal governments allow for the co-management of resources in the areas covered by the treaties. The Commission's enforcement authority stems from delegation by member tribes, government and government agencies.⁶ State legislation, such as the *Great Lakes Fish and Wildlife Commission Warden Bill* ("the Commission Bill"), recognizes the Commission's enforcement division as a Tribal Law Enforcement Agency.⁷ Self Regulation Agreements with the Fish and Wildlife Service, Forest Service, Coast Guard and National Park Service grant the Commission concurrent jurisdiction with federal agencies such that the federal agencies refrain from enforcement activities in areas where the tribes operate this service. Conservation wardens must be certified law enforcement officers under state legislation, a key requirement that secures the legitimacy of conservation wardens with government enforcement agencies.⁸ Under the Commission Bill, wardens receive many of the powers of state law enforcement officers and are authorized to enforce state criminal laws.⁹

The Commission's conservation wardens enforce tribal codes against members where there is an intertribal agreement in place. The tribal regulations enforced by the wardens include for ricing (the harvest of wild rice), fishing, hunting and the introduction of aquatic invasive species.¹⁰ Conservation wardens also enforce state environmental laws against non-tribal members on ceded lands through cross-deputization agreements with state departments. Courts have ruled that states can limit the exercise of treaty rights in ceded territory where reasonable and necessary for conservation, public safety and public health. However, a tribe can pre-empt state regulation if it addresses state conservation, public safety and public health goals.¹¹ The Commission Bill extends jurisdiction to wardens outside of ceded lands in specific circumstances, for example where the warden believes that a felony has been committed or to provide assistance to an officer of primary jurisdiction.¹²

Returning to the B.C. milieu, both the provincial and federal governments have expressed an interest in increasing First Nations' role in enforcement.¹³ Given this context and the interest by some First Nations in enforcement powers, the purpose of this backgrounder is to discuss several of the jurisdictional means by which communities or community members could receive enforcement powers. Section B defines the scope of community enforcement. Section C canvases some of the existing jurisdiction that could be used by First Nations

⁵ <http://www.glifwc.org/about/about.html>

⁶ Jason Stark, Tribal Attorney GLIFWC, Personal Communication to Tim Watson, March 25, 2009.

⁷ *Great Lakes Indian Fish and Wildlife Commission Warden Bill*, 2007 Wisconsin Act 27.

⁸ <http://www.glifwc.org/employment/officers032009.pdf>; Training requirements are set out in Jason Stark, *Great Lakes Indian Fish and Wildlife Commission's Law Enforcement Authority & the Maize of Interjurisdictional Enforcement Issues* (unpublished), September 26, 2008 p. 7.

⁹ *Ibid* p. 20.

¹⁰ <http://www.glifwc.org/regulations/regulations.html>

¹¹ Jason Stark, Tribal Attorney Great Lakes Indian Fish and Wildlife Commission, Personal Communication to Tim Watson, March 30, 2009.

¹² Jason Stark, Tribal Attorney Great Lakes Indian Fish and Wildlife Commission, Personal Communication to Tim Watson, March 25, 2009.

¹³ Examples of this are found in the Nisga'a Agreement and agreements finalized under the Yukon Umbrella Agreement.

communities to enforce environmental laws.¹⁴ Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday June 15 2009.

B. SCOPE OF COMMUNITY ENFORCEMENT

Community enforcement in the environmental justice and urban toxics regulation context has involved access to information about levels of pollutants, community monitoring, creating good neighbour agreements, participating in community-industry advisory committees, and setting priorities for abatement and clean-up.

The emerging notions of community enforcement in the First Nations rural/traditional territory context focus on community priorities for enforcement, which are not necessarily the same as government agency enforcement priorities, and the scope of enforcement jurisdiction. Considerations about the scope of jurisdiction involve a variety of factors, including geographic (on reserve and off reserve throughout traditional territories) and substantive (the range of activities enforcement officials may undertake). Finally, the issue of who employs the enforcement official has considerable implications for priority setting and optics in the community. The difference in the authority and legitimacy of a provincial or federal employee versus an employee of a First Nation is significant, in both the eyes of the community and the Crown.

A variety of obstacles impede the development of community enforcement regimes, including lack of funding, lack of training and capacity,¹⁵ no recognition of Aboriginal title, and limited reserve landbase on which to carry out enforcement activities. For enforcement activities off-reserve, the same obstacles arise, with an additional need for inter-Nation coordination for monitoring and enforcement.

A final concern involves the inherent conflict for some First Nations in enforcing provincial and federal laws because such activities acknowledge Crown jurisdiction and may conflict with the recognition and expression of aboriginal rights and title. First Nations may also oppose some Crown laws.

C. EXISTING OPPORTUNITIES FOR COMMUNITY ENFORCEMENT

In Canada and the United States a variety of ways to engage in community enforcement exist or are being contemplated. These include delegation or appointment under existing laws, citizen suit provisions, treaties or land claims, and the B.C. *Recognition Act*.

¹⁴ While amendment of the Constitution is another option that has been used in different countries, this approach is not offered here as viable in the Canadian context.

¹⁵ Training modules relevant for conservation officers are offered at Northwest Community College with campuses from Haida Gwaii in the west to Houston in the east, Western Training Academy in Hinton and the Justice Institute of BC. Park rangers receive some training through the BC Institute of Technology (online and in Burnaby).

1. Delegation/Appointment

Existing legislation enables ministers or their delegates at both the federal and provincial levels to designate or appoint enforcement officers and specify the range of powers that the officers hold. Traditionally these appointments result in additional government employees.

Federal legislation that enables this type of delegation includes:

- *Canada National Parks Act*, S.C. 2000, c.32;
- *Canada Wildlife Act*, R.S.C. 1985, c.W-9;
- *Canadian Environmental Protection Act*, S.C. 1999 c.33;
- *Canadian Environmental Assessment Act*, S.C. 1992 c.37;
- *National Marine Conservation Areas Act*, S.C. 2002, c.18;
- *Fisheries Act*, R.S.C. 1985, c.F-14;
- *Oceans Act*, S.C. 1996, c.31;
- *Species At Risk Act*, S.C. 2002, c.29.

Provincial legislation in B.C. that enables this type of designation includes:

- *Environmental Assessment Act*, S.B.C. 2002, c.43;
- *Environmental Management Act*, S.B.C. 2003, c.53;
- *Forest and Range Practices Act*, S.B.C. 2002, c.69;
- *Park Act*, R.S.B.C. 1996, c.344;
- *Wildlife Act*, R.S.B.C. 1996 c. 488.

The most well-known of these appointments are Fisheries Officers (under the federal *Fisheries Act*), Park Rangers (under the provincial *Park Act*), and Conservation Officers (under the provincial *Environmental Management Act*).

Fisheries Act

Section 5(1) of the federal *Fisheries Act* enables the Minister to designate fishery officers and guardians with each designee holding a certificate specifying the powers that the officer or guardian may exercise.¹⁶ Section 5(4) extends this jurisdiction to a fishery officer or guardian enforcing Nisga'a laws made under the Fisheries Chapter of the Nisga'a Final Agreement.

Fisheries and Oceans Canada (FOC) also administers an Aboriginal Guardian Program that designates employees of a First Nations as fisheries guardians pursuant to section 5 of the *Fisheries Act*.¹⁷ The Aboriginal Guardian Program has been part of the Aboriginal Fisheries Strategy Agreements since 1992, with FOC providing training in the 1990's. New training

¹⁶ *Fisheries Act*, R.S.C. 1985, c.F-14 s.5(2).

¹⁷ http://www.pac.dfo-mpo.gc.ca/tapd/guardian_e.htm

ceased in 1999 due to “difficulties in administration and funding restrictions.”¹⁸ Additional training sessions were held in 2008 for existing Fisheries Guardians.¹⁹

Feedback from First Nations involved in the Guardian Program has been mixed.²⁰ Participants report frustration with lack of training and responsibility given the limited powers envisaged under each Aboriginal Fisheries Strategy. There is also some tension created in the community when Fisheries Guardians ticket community members, or are recruited by FOC for work outside the community.

An example of a Fisheries Guardian Program is that of the Haida Nation, established in the mid 1990's.²¹ Haida Fisheries Guardians have less authority than Fisheries Officers, for example they cannot issue tickets, and they usually accompany Fisheries Officers on patrol. From a community perspective, FOC has provided little direction for the Program and there is a lack of concurrence on the role of the Haida in fisheries management. FOC has provided the Haida with the option of negotiating Enforcement Protocols for each species, which would provide ticketing authority. Currently the sole protocol is for the razor clam.

Park Act

Another example of appointment with enforcement powers is found under the provincial *Park Act* where section 4(2) enables the Minister to appoint park rangers and when doing so limit the powers and function an appointee may exercise. The Ministry of Environment policy that governs the appointment of park rangers requires, in most cases, that the appointee be an employee of the Ministry and have completed some training.²²

Section 4.2 of the *Park Act* provides for First Nations to enter into joint management agreements with the provincial government with respect to conservancy lands.²³ The agreements address First Nations' members carrying out activities necessary for the exercise of aboriginal rights and access for social, ceremonial and cultural purposes on land in conservancies. For example, the Kitlope Conservancy on the northwest coast is created through a partnership agreement between Parks Canada, the Province of B.C. and the Haisla Nation. The Haisla Nation's primary goal for the conservancy was to protect the area from

¹⁸ http://www.pac.dfo-mpo.gc.ca/tapd/guardian_e.htm

¹⁹ Rose Marie Carnes, Director of Aboriginal Governance and Policy, Fisheries and Oceans Canada. Personal Communication to Tim Watson, November 13, 2008.

²⁰ Claire Hutton, formerly Outreach Worker, Sierra Club of Canada BC Chapter. Personal Communication to Tim Watson, November 18 2008.

²¹ Pat Fairweather, Haida Fisheries Program Manager. Personal Communication to Tim Watson, November 27, 2008.

²² Bob Austed, Visitor Services Manager, Ministry of Environment. Personal communication to Tim Watson, November 7, 2008.

²³ A conservancy is Crown land, designated under the *Park Act* or by the *Protected Areas of British Columbia Act*, whose management and development is constrained by the *Park Act*. Under the *Park Act*, any interest in land in a conservancy, as well as most uses of a natural resource in a conservancy, must be authorized by a park use permit. A park use permit can only be issued if the use or activity will not hinder, restrict, prevent or inhibit the development, improvement or use of the conservancy in accordance with the four reasons for setting aside a conservancy.

logging and potentially reserve the land for a future treaty settlement. Under the terms of the agreement, Haisla park rangers are appointed and fulfill the necessary training requirements through the B.C. Institute of Technology, as required under the *Parks Act*.²⁴

A variety of tensions have arisen in the administration of the Kitlope Conservancy. The Haisla Nation is focused on conservation while provincial government priorities are on management and permitting.²⁵ The Haisla also perceive the provincial government as taking a senior partner, rather than an equal, role.

Where First Nations have concerns with enforcing provincial and federal laws, the conservancy model may provide an interim stage between no enforcement jurisdiction and full enforcement across a traditional territory. In conservancies the focus is on conservation, preservation and co-management, which many First Nations are able to embrace even though conservancies do not encompass the entirety of a traditional territory. B.C. Parks is currently reviewing opportunities for First Nations to become park rangers, and is working with FOC and the Ministry of Forests to evaluate using the conservancy model for First Nations to enforce environmental laws.²⁶ Of primary concern for the government agencies is ensuring that all individuals with enforcement authority are well-trained and act in the public interest.

Environmental Management Act

Finally, the provincial *Environmental Management Act* establishes the conservation officer service that enforces a variety of provincial and federal laws.²⁷ Section 106(3)(b) enables the chief conservation officer or her/his delegate to appoint special conservation officers who do not have to be employees of the provincial government. Upon the request of an organization or individual for special conservation officer status, an appointment includes only those powers and authorities necessary to meet the goals stated in the request.²⁸ Depending on the powers granted, the appointment will include specific training conditions.²⁹

²⁴ Brenda Duncan, Executive Director. Na Na Kila Institute. Personal Communication to Tim Watson, November 14, 2008.

²⁵ Brenda Duncan, Executive Director. Na Na Kila Institute. Personal Communication to Tim Watson, November 14, 2008.

²⁶ Bob Austed, Visitor Services Manager, Ministry of Environment. Personal communication to Tim Watson, November 7, 2008.

²⁷ For example, the Conservation Officer Service Authority Regulation, B.C. Reg. No. 318/2004 sets out the following acts for enforcement by conservation officers: *Commercial River Rafting Safety Act*, *Dike Maintenance Act*, *Ecological Reserve Act*, *Environmental Management Act*, *Fish Protection Act*, *Fisheries Act*, *Forest and Range Practices Act*, *Forest Practices Code of British Columbia Act*, *Integrated Pest Management Act*, *Land Act*, *Liquor Control and Licensing Act* sections 40 and 44, *Motor Vehicle Act* sections 13 (1), 24, 33, 70, 71, 73, 84, 177 and 204; *Motor Vehicle (All Terrain) Act*, *Water Act*, *Water Protection Act*, and *Wildfire Act*.

²⁸ Terry Ahern, Senior Policy and Program Analyst, Ministry of Environment. Personal Communication to Tim Watson, November 19, 2008.

²⁹ Terry Ahern, Senior Policy and Program Analyst, Ministry of Environment. Personal Communication to Tim Watson, November 19, 2008. Conditions can include training in search, seizure and arrest, seizure of evidence, the law of evidence, statement taking, ticketing, obstruction and dealing with hostile individuals, note taking and investigational aids, case preparation and Crown Counsel reports, and court procedure.

Two models for community-based conservation officers emerge. The first involves First Nations' staffing a conservation officer position stationed in the community who provides mentoring to First Nations' members to become conservation officers. Another model is for a First Nation to establish an enforcement office and provide oversight for the staff. Interaction between the conservation officer service within the Ministry of Environment and the First Nation would be as department to department.

Staff in the Ministry of Environment, Conservation Officer Service Branch have indicated that they would welcome a proposal to establish a program for First Nations conservation officers under an agreement, protocol or more formal Memorandum of Understanding.³⁰ Their concerns lie primarily in the areas of adequate training, oversight and Ministry liability for errors made by community conservation officers. To date the appointment of special conservation officers has been limited to those who work for enforcement agencies that have policies and procedures controlling staff conduct. Funding is a significant obstacle.

Contingent on funding and capacity, it would appear that the provincial government supports the training and hiring of First Nations' members as park rangers and conservation officers, while the federal Aboriginal Fisheries Guardian Program has met with limited success. Significant issues of funding, training, capacity, and whether individual communities can influence the focus of enforcement remain.

2. Citizen Suit Provisions

A variety of environmental legislation in the U.S. has "citizen suit" provisions that provide authority for citizens to commence actions against people and governments alleged to have violated environmental statutes.³¹ Canadian laws are virtually devoid of citizen suit provisions, while the purpose of judicial review is not enforcement, per se. Law reform to secure citizen suit provisions could provide another avenue for community enforcement, however the cost and time associated with using court actions would prohibit their use by many First Nations.

3. Modern Treaties

Since the 1970s the government of Canada has negotiated several treaties or land claims in northern Quebec, Yukon and British Columbia where Aboriginal communities have some law-making and enforcement powers.

For example, First Nations with Final Agreements arising from the Yukon Umbrella Agreement, as treaties, have the authority to make laws in relation to Settlement Land that

³⁰ Mark Hayden, Chief Conservation Officer, Ministry of Environment. Personal Communication to Tim Watson, November 28 2008.

³¹ See, for example, the federal *Clean Air Act* [as amended through P.L. 108-201, February 24, 2004], at s.304

apply to anyone physically present on Settlement Land.³² One example of a Final Agreement regime is that of the Carcross/Tagish First Nation.³³ The Final and Self Government Agreements establish the regime for the management and administration of First Nation Settlement Lands, which include fee simple lands, category A lands that include mines and minerals and category B lands that do not include mines and minerals.³⁴ The Self Government Agreement accords the Carcross/Tagish First Nation significant power to enact laws of a local or private nature on Settlement Lands, such as for land management, hunting, trapping, fishing, protection of fish, wildlife and habitat, administration of justice, control or prevention of pollution, and protection of the environment. The parties agree to conclude an agreement on the administration of justice, and the First Nation may establish fines of up to \$300,000 for violations of Carcross/Tagish First Nation law relating to use of the Settlement Lands and natural resources.

This one example shows the unhampered ability of the federal, provincial and First Nations governments to craft modern treaties that fully accord First Nations the ability to establish environmental management priorities and to enforce those priorities.

4. Proposed British Columbia Recognition Act

The Government of BC has proposed a provincial *Recognition Act* whose purpose would be to recognize that Aboriginal rights and title exist in B.C. without requiring proof or strength of claim to enable the development of shared decision-making mechanisms for planning, management and tenuring decisions for land and resources.³⁵ This could include establishing processes and new institutions for dispute resolution. The *Recognition Act* would apply to all ministries and provincial agencies. While it appears that the development of this legislation is on hold pending consultation with business organizations, if acted upon in the future it will have implications for enforcement by First Nations.³⁶

D. DISCUSSION

Despite jurisdictional, administrative and funding obstacles, the provincial government has some interest in devolving enforcement authority to First Nations. Evidence of this interest can be found in the activities of a Ministry of Environment intern from a coastal First Nation who is currently looking into options for increased enforcement and the negotiation of a five year pilot project between the Nanwokolis group, B.C. Parks and the Ministry of

³² <http://www.eco.gov.yk.ca/landclaims/lawmaking.html>

³³ Agreement located at: http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/326501/carcross_framework.pdf

³⁴ CTFN Final Agreement, Chapter 1 Definitions / s. 12.1.0-2.

http://www.cyfn.ca/uploads/xy/qp/xyqpsa2WYclywzkluT81DA/ctf_e1.pdf

³⁵ <http://www.gov.bc.ca/arr/newrelationship/default.html>.

³⁶ See, for example, Katie Derosa, 'Litany of Concerns' Delays Bill for Natives. Victoria Times Colonist March 15 2009 <http://www.timescolonist.com/Litany+concerns+delays+bill+natives/1391103/story.html>.

the Environment where it is envisaged that the First Nation participants will assume enforcement authority as park rangers and conservation officers.³⁷

This paper is a modest attempt to identify some of the issues associated with community, and specifically First Nation, enforcement of environmental laws in B.C.

³⁷ Wally Eamer, Negotiator; Nanwokolis Tribal Group. Personal Communication to Tim Watson, December 8, 2008.

For More Information:

Legislation and Regulations

Federal

Canada National Parks Act, S.C. 2000, c.32;
Canada Wildlife Act, R.S.C. 1985, c.W-9;
Canadian Environmental Protection Act, S.C. 1999 c.33;
Canadian Environmental Assessment Act, S.C. 1992 c.37;
National Marine Conservation Areas Act, S.C. 2002, c.18;
Fisheries Act, R.S.C. 1985, c.F-14;
Oceans Act, S.C. 1996, c.31;
Species At Risk Act, S.C. 2002, c.29.

Provincial

Conservation Officer Service Authority Regulation, B.C. Reg. No. 318/2004
Environmental Assessment Act, S.B.C. 2002, c.43;
Environmental Management Act, S.B.C. 2003, c.53;
Forest and Range Practices Act, S.B.C. 2002, c.69;
Park Act, R.S.B.C. 1996, c.344;
Wildlife Act, R.S.B.C. 1996 c. 488.

Articles

Richard J. Lazarus and Stephanie Tai (1999) Integrating Environmental Justice Into EPA Permitting Authority 26 *Ecology Law Quarterly* 617.

Web Sites

Fisheries & Oceans Canada, Aboriginal Guardians Program
http://www.pac.dfo-mpo.gc.ca/tapd/guardian_e.htm

Great Lakes Indian Fish and Wildlife Commission
<http://www.glifwc.org/about/about.html>

Recognition Act <http://www.gov.bc.ca/arr/newrelationship/default.html>.

Reports

West Coast Environmental Law (2007). No Response: A Survey of Environmental Law Enforcement and Compliance in B.C. <http://www.wcel.org/wcelpub/2007/14259.pdf>