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Urban Forests: The Regulation of Garry Oak  
Ecosystems in British Columbia

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## **Urban Forests: The Regulation of Garry Oak Ecosystems In British Columbia**

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**Date:** 1 May 2007

### **Executive Summary**

British Columbia's Garry oak ecosystem is unique in Canada and contains a significant number of plant and animal species at risk of extirpation. Its health and continuity have been threatened by urban development, and an ecosystem-based protection strategy is needed to ensure its continued existence. However, no single legal or policy tool exists to foster and protect it.

At the local government level, Official Community Plans, Regional Growth Strategies, tree protection bylaws and zoning bylaws offer some short-term options for protecting Garry oak ecosystems. However, the first two act as vision statements and are not legally binding on local governments, while tree protection bylaws allow felling protected trees in certain circumstances, do not always require that replacement trees be planted and offer limited protection for seedlings. As well, though zoning bylaws could be used to create protected ecosystem zones, their non-conforming uses exception allows non-conforming land use to continue even once new zoning regulations are in place. Municipalities also have the power to pass bylaws protecting public health and the environment, though, which could be used to create broader bylaws that protect urban forest ecosystems.

The provincial government offers minimal protection for Garry oak ecosystems. While they are included in B.C.'s Sensitive Ecosystem Inventory, the province's *Wildlife*

*Act* does not protect plant species and Garry oaks themselves are not considered threatened on the provincial government's list of endangered species. Nonetheless, the province is responsible for the funding mechanisms available to local governments and tax-shifting measures that reward urban forest protection could be implemented in provincial legislation as a means of rewarding those who protect Garry oak ecosystems. The province's constitutional responsibility for forests likely extends to urban forests and could be used as a basis for lobbying for a provincial urban forest strategy.

The federal government's National Forest Strategy and Habitat Stewardship Program offer some positive directions for urban forests. The former has recently recognized the importance of Canada's urban forests while the latter currently provides funding to Garry oak ecosystem protection initiatives. As well, at the international level the federal government's commitment to both the Rio Declaration and Agenda 21, though not legally binding, can be used as lobbying tools to persuade the federal government to take further action to protect Canada's urban forests.

Utility wires and airports pose special challenges to the Garry oak ecosystem. Both the *Community Charter* and the *Hydro and Power Authority Act* contain provisions that grant utility companies and municipal authorities broad powers to prune or remove trees that interfere with utility wires, and many tree protection bylaws also include exceptions for this. However, recent case law makes it unclear how broadly these powers should be construed. The federal *Aeronautics Act* grants the federal Minister of Transportation the power to determine what modifications must be made to the trees surrounding Canadian airports so that they may operate safely. In both cases, replanting

cut trees a safe distance from the utility lines or airports that they threaten could be advocated for so as to minimize these laws' impact on the urban forest.

## **I. Introduction**

The Garry oak ecosystem is unique in Canada. Found mostly on rocky knolls, south-facing slopes and ridges throughout the south eastern tip of Vancouver Island and in some areas of the Gulf Islands and the lower mainland, the Garry oak ecosystem is well-adapted to the warm, dry summers that characterize this area and is similar to ecosystems found in Washington, Oregon and California. Garry oak meadows are biologically rich and support a high diversity of plant and animal life. This includes approximately 93 species of organisms considered to be “at risk”,<sup>1</sup> though a recent report indicates that this number may be closer to 100.<sup>2</sup> When Garry oak ecosystems exist in areas with deep soil, they support rich meadow ecosystems with a profusion of wildflowers.<sup>3</sup>

While some of the species within the Garry oak ecosystem have always been rare, particularly those that reach the northern limits of their distribution in southern British Columbia, recent decades have led to significant overall habitat loss for the Garry oak ecosystem. It is estimated that, at present, less than five per cent of the habitat associated with the Garry oak ecosystem remains in a near-natural condition.<sup>4</sup> Some of the challenges faced by Garry oak ecosystems include urban development in Garry oak

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<sup>1</sup>British Columbia Ministry of the Environment, “Saving Sensitive Ecosystems: Woodlands” (2000), online: <<http://www.env.gov.bc.ca/sei/index.html#vancouverisland/publications/saving/ourlivinglegacy.pdf>> [“Saving Sensitive Ecosystems”] at 1.

<sup>2</sup> Capital Regional District, *State of the Environment Indicators Report* (Victoria, BC: Capital Regional District Roundtable on the Environment, 2006), online: <<http://www.crd.bc.ca/rte/index.htm>> [“*SOEI Report*”] at 18.

<sup>3</sup> “Saving Sensitive Ecosystems”, *supra* note 1 at 2.

<sup>4</sup> *SOEI Report*, *supra* note 2 at 18.

meadows, increased competition with invasive species such as Scotch broom and English ivy, few seedlings surviving to replace older trees, patchwork tree protection bylaws, and increasingly violent windstorms that may be linked to global climate change, such as those that struck B.C. in December 2006. The lack of young Garry oak seedlings to replace the large number of trees reaching their twilight years is of special concern.<sup>5</sup> A 1998 study noted that while competition from invasive species was initially presumed to be the main reason for this lack of regeneration, well-maintained saplings fared no better in establishing themselves over the long term.<sup>6</sup> The Garry Oak Meadow Preservation Society's own survey of Garry oaks in the municipalities of Victoria, Oak Bay, Esquimalt and Saanich found that many seedlings were the victims of lawn mowing.<sup>7</sup> Obviously, the current urban population growth near remaining Garry oak ecosystems does not bode well for their future protection and regeneration.

A number of groups, including the Garry Oak Meadow Preservation Society ("GOMPS"), have called for a new approach to managing Garry oak ecosystems, one that goes beyond the present "tree-by-tree" strategy to a more holistic, ecosystem-based approach. Additionally, some scholars indicate the importance of urban forests as the place where many individuals learn about the interplay between society and nature, arguing that our cities should demonstrate our dependence on ecological health.<sup>8</sup>

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<sup>5</sup> See "Aging urban forests under threat" *CBC News Online*, Indepth: Environment (9 August 2005), online: <[http://www.cbc.ca/news/background/environment/urban\\_forests.html](http://www.cbc.ca/news/background/environment/urban_forests.html)>; "Lifespan of common urban trees" *CBC News Online*, Indepth: Environment (11 August 2005), online: <[http://www.cbc.ca/news/background/environment/trees\\_lifespan.html](http://www.cbc.ca/news/background/environment/trees_lifespan.html)>.

<sup>6</sup> Wayne Erickson, "Garry Oak (*Quercus garryana*) Plant Communities and Ecosystems in southwestern British Columbia" (Victoria, B.C.: BC Ministry of Forests, 1998), online: <[http://www.for.gov.bc.ca/hre/becweb/Downloads/Downloads\\_GarryOak/garry\\_oak\\_communities.pdf](http://www.for.gov.bc.ca/hre/becweb/Downloads/Downloads_GarryOak/garry_oak_communities.pdf)> at 6-7.

<sup>7</sup> Hal Gibbard, "Strategic Planning for our Urban Forests" (Victoria, B.C.: Garry Oak Meadow Preservation Society, undated) ["Strategic Planning"].

<sup>8</sup> Mark Roselund, *Towards Sustainable Communities: A Resource Book for Municipal and Local Governments* (Ottawa: National Roundtable on Environment and the Economy, 1992) at 202-3. This

Although some progress has been made at the local government level, significant legal and policy barriers to an ecosystem-based strategy remain. This report proposes to outline the legal and policy context that currently exists in B.C., with a focus on the Capital Regional District, with the intent that this brief sketch may act as a starting point for regulatory changes. Before examining the legislative framework, this report will begin by proposing an ecosystem-based definition of the “urban forest”. It will then illustrate how urban forests, especially the Garry oak ecosystem, are regulated in British Columbia by examining the legal frameworks currently in place at the municipal, provincial and federal levels. Throughout all of this, specific challenges to and policy recommendations for an ecosystem-based approach to urban forest protection will be explored. Finally, this report will briefly consider the relationship between trees and utility wires and trees near airports, two issues of special interest to GOMPS.

## **II. Defining “Urban Forests”**

As noted by Jeremy Gye in a report prepared for the Habitat Acquisition Trust, most conventional urban forest definitions focus on individual trees within urban spaces.<sup>9</sup> Yet these definitions are inadequate if one aims to sustain interdependent communities of plant and animal species. Individual trees must remain an essential part of any urban forest definition, as they are integral to urban forest ecology. For example, GOMPS has noted that Garry oaks themselves provide habitat for about 48 insect species.<sup>10</sup>

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sentiment was recently echoed in National Forest Strategy Coalition, *National Forest Strategy (2003-2008), A Sustainable Forest: The Canadian Commitment* (23 April 2003), online: <[http://cfs.nrcan.gc.ca/sof/sof03/special06\\_e.html](http://cfs.nrcan.gc.ca/sof/sof03/special06_e.html)>.

<sup>9</sup> Jeremy Gye, “Towards an Urban Forest Stewardship Strategy for Southern Vancouver Island” (6 November 2003) Discussion Paper – published online: <[www.hat.bc.ca/projects/ufsi/UFS\\_final20031106.pdf](http://www.hat.bc.ca/projects/ufsi/UFS_final20031106.pdf)> at 8.

<sup>10</sup> Gibbard, “Strategic Planning”, *supra* note 7.

Nonetheless, an ecosystem-based definition is required so that specialized ecosystems like the Garry oak ecosystem are included in discussions on and plans for urban forest protection and regeneration. Gye suggests that “urban forest” be defined as “a series of treed plant communities that span both natural and built environments and which contribute important ecological benefits to the region.”<sup>11</sup> Because of the importance of an ecosystem-based approach, this is the meaning that “urban forest” will be given throughout this report.

It appears that some levels of government recognize the necessity of an ecosystem-based approach to urban forests. For instance, the Capital Regional District’s Sea-to-Sea Blue/ Green belt initiative recognizes the importance of interconnectivity of green spaces throughout southern Vancouver Island.<sup>12</sup> As well, the provincial government has acknowledged the need for an ecosystem-based approach to conserving Garry oak woodlands in the past through its Sensitive Ecosystems Inventory project, which it undertook in the 1990s. Most recently, the National Forest Strategy Coalition’s *National Forest Strategy* has included urban forests as an essential part of its strategy for the first time. Although it did not specifically call for an ecosystem-based urban forest strategy, it did articulate a general ecosystem-centred approach for managing Canada’s forest resources generally, which could be carried over into urban forest policy.<sup>13</sup>

### **III. Regulating Urban Forests in Canada**

This section will provide an overview of the governments, legal tools and public bodies involved in the regulation of urban forests in B.C. First, it discusses the

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<sup>11</sup> Gye, *supra* note 9 at 9.

<sup>12</sup> See generally online: < <http://www.crd.bc.ca/regionalplanning/growth/annualreport/gbs.htm>>.

<sup>13</sup> *National Forest Strategy*, *supra* note 8 at Objectives 6 and 5 respectively.

responsibility of local governments for urban forest protection. Next, it considers the role of the provincial and federal governments in protecting urban forests and gives a brief description of some international legal instruments that may be of use in lobbying efforts.

### **(A) Local Government**

Because the organization and jurisdiction of local government can be somewhat confusing, this section will attempt to lay out some general details about Regional Districts and municipalities, including their authority over issues such as planning, service provision and passing bylaws. This will provide a basis for understanding the powers available to each level of government that could potentially be harnessed in an effort to foster and protect Garry oak ecosystems, and for understanding some of the limits on these tools.

The term “local government” refers to both Regional Districts and municipalities in British Columbia. However, Regional Districts and municipalities are separate entities with different powers of regulation. British Columbia is divided into 27 Regional Districts, which are federations of municipalities and unincorporated rural areas. Municipalities exist within the boundaries of Regional Districts and are smaller units of local government. Regional Districts and municipalities work closely together to provide communities with day-to-day services like water, roads, ambulances, police protection, public transportation, and parks. They may also work together to manage regional growth by creating land use policies and growth strategies.<sup>14</sup> A variety of provincial statutes and regulations apply to Regional Districts and municipalities. However, two statutes are

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<sup>14</sup> Linda Nowlan, Chris Rolfe & Kathy Grant, *The Smart Growth Guide to Local Governance Law and Advocacy* (Vancouver: West Coast Environmental Law Research Foundation, 2001) at 19.

particularly important for both levels of government. These are the *Local Government Act*<sup>15</sup> and the *Community Charter*.<sup>16</sup>

Both Regional Districts and municipalities are created by incorporation, similar to the incorporation of a company. The document creating them is called the “letters patent” and can be amended by a “supplementary letters patent”. To incorporate a municipality, the size of its population must justify incorporation and a referendum must be held in accordance with section 8 of the *Local Government Act* (“LGA”).<sup>17</sup> Those areas in B.C. that are not incorporated as municipalities are often referred to as “unorganized areas” and are more commonly known as “rural areas”.

### **(1) Municipalities**

Municipalities are the most local of the local governments. They include villages, towns, cities and regional municipalities, classification of which is dependant on total population and population density.<sup>18</sup> Municipal governments are made up of municipal councils, which include an elected councilors and a mayor. Although some people consider municipalities a third order of government in Canada, like a smaller federal or provincial government, they are not recognized as such by the Canadian constitution.<sup>19</sup> Instead, the constitution gives both the federal Parliament and the provincial legislatures the power to make laws on a variety of subjects, and the provinces delegate some of their law-making powers to municipalities. Legally, the responsibility for issues such as land

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<sup>15</sup> *Local Government Act*, R.S.B.C. 1996, Ch. 323.

<sup>16</sup> *Community Charter*, S.B.C. 2003, Ch. 26.

<sup>17</sup> See also Guy MacDannold & Colin Stewart, *British Columbia Municipal Law and Commentary*, 2005 ed. (Markham: Butterworths, 2005) at 2.

<sup>18</sup> *LGA*, s. 17.

<sup>19</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [“*Constitution Act, 1867*”].

use planning and forest resources lies with the province.<sup>20</sup> Any municipal authority to regulate these subjects is received from the province and must be found in provincial legislation.<sup>21</sup> In B.C., municipal authority can be found throughout both the *LGA* and the *Community Charter* (“*CC*”). Section 8 of the *CC* sets out the fundamental powers of B.C. municipalities, which are helpful to consider when conceptualizing the scope of municipal authority. Some of these will be considered in greater detail below. It is important to note that these powers are only enabling powers and that municipal governments are under no obligation to pass bylaws pursuant to any of these powers.

## **(2) Regional Districts**

As noted above, Regional Districts cover larger geographic areas than municipalities. Each Regional District is governed by a Board of Directors that includes appointed representatives from the municipalities and elected representatives from the rural areas that exist within its boundaries.<sup>22</sup> Regional Districts mainly provide services to rural areas and coordinate action on regional issues such as water supply, parks and regional planning including growth strategies. Locally, the Capital Regional District (“*CRD*”) has authority over a significant area where Garry oak ecosystems still exist. The *CRD* includes the following municipalities: Central Saanich, Colwood, Esquimalt, Highlands, Langford, Metchosin, North Saanich, Oak Bay, Saanich, Sydney, Sooke, Victoria and View Royal.<sup>23</sup>

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<sup>20</sup> *Ibid.* at ss. 92A, 92(13) and 92(16).

<sup>21</sup> Stepan Wood, "Canada's 'Forgotten Forests': Or, How Ottawa is Failing Local Communities and the World in Peri-Urban Forest Protection" (2004) 14 J.E.L.P. 217 at 221.

<sup>22</sup> See *LGA*, Part 24, Division 3.

<sup>23</sup> See online: < <http://www.crd.bc.ca/govlink.htm>>.

The core powers of a Regional District are set out in Part 24 of the *LGA*. They include a general authority for establishing any service that the board considers necessary or desirable for the Regional District,<sup>24</sup> building inspections, animal control, regional parks and trails, waste management, recycling, and so on.<sup>25</sup> As well, each Regional District has the power to adopt a Regional Growth Strategy, which is a 20-year strategy that guides future growth and development that may occur within the district over this period. The potential uses of a Regional Growth Strategy to protect and foster Garry oak ecosystems will be considered in more detail below.

A number of strategies are available to municipalities and Regional Districts that wish to promote and restore Garry oak ecosystems within their boundaries. These include Official Community Plans, Regional Growth Strategies, bylaws on subjects such as tree and ecosystem protection, and zoning bylaws. It is important to note that no one tool can best protect and foster urban forests in B.C., but a number of these tools could be successfully combined to create guiding principles and specific requirements to sustain and restore urban forests at the local government level.

### **Official Community Plans**

An Official Community Plan (“OCP”) is a bylaw adopted by local government (either a municipality or a Regional District) and sets broad goals, objectives and policies for the development of communities within the area that the OCP covers. An OCP must contain map designations and policy statements on certain issues such as residential housing, land uses, restrictions on environmentally sensitive lands, services such as roads

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<sup>24</sup> *LGA*, s. 796(1).

<sup>25</sup> See generally *LGA*, s. 797.1 and following.

and sewers, affordable and special needs housing, and so on.<sup>26</sup> An OCP may also include statements of local government policies relating to the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity, though it is not required to do so.<sup>27</sup> These statements are not required to be within an OCP, however.

OCPs are used by local governments to guide their future actions and designate development permit areas for the communities that fall within their boundaries. They can cover a local government's entire jurisdiction or can focus on a small area within the government's boundaries.<sup>28</sup> Regional Districts are somewhat limited in the potential scope of their OCPs, as they cannot require development permits in rural land use areas. However, they can establish conditions for land use and development in rural areas, and for lands that are environmentally sensitive to development in particular.<sup>29</sup>

A good example of an OCP that states a broad series of environmental principles and goals belongs to the City of Victoria. Victoria's OCP contains a list of general and specific objectives related to air and water quality, biodiversity and greenspace, urban design, waterfront, resource conservation and heritage. Under "biodiversity and greenspace", the City's objective is stated as maintaining and restoring, where possible, the city's natural biodiversity.<sup>30</sup> The OCP also states that, as a policy, the city should "[i]dentify and preserve, enhance and restore remaining significant natural landscape features and natural indigenous habitats" and suggests that the City should "[d]evelop an

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<sup>26</sup> *LGA*, s. 877.

<sup>27</sup> *LGA*, s. 871(1)(d).

<sup>28</sup> McDannold & Stewart, *supra* note 17 at 20.

<sup>29</sup> British Columbia Stewardship Centre, *Stewardship Bylaws: A Guide for Local Government* (Victoria, B.C.: Government of British Columbia, revised June 1999), online: <<http://www.stewardshipcentre.bc.ca/publications/default.asp?sProv=bc&siteLoc=scnBC&lang=en#cg>> at 28 ["*Stewardship Bylaws*"].

<sup>30</sup> City of Victoria, *Official Community Plan*, online: <[http://www.victoria.ca/residents/planning\\_dcmntl.shtml](http://www.victoria.ca/residents/planning_dcmntl.shtml)> at 7.2.

inventory of significant flora and fauna, and develop initiatives to protect and provide appropriate habitat within the City” in cooperation with various interest groups.<sup>31</sup> These goals, in themselves, are a step in the right direction and could be used to create new and extensive programs to restore the Garry forest ecosystem within the city of Victoria, like hiring a chief urban forester responsible for planning to protect Garry oak ecosystems.

Nonetheless, some key challenges linked to their permissive nature prevent OCPs from being a strong tool for urban forest protection and restoration. While they offer important statements about a municipality or Regional District’s future development goals, local governments are not legally required to have an OCP in place. As well, if an OCP is in place, local governments are not obliged to include statements in their OCP about protecting ecologically sensitive areas like urban forests, as including such sections is discretionary. What is more, even if such statements are included in an OCP, they are not legally binding on local government.<sup>32</sup> Regulations related to land use, tree cutting and vegetation retention are controlled primarily by zoning and other bylaws rather than by an OCP, and OCPs are understood as “vision statements”, not as enforceable sets of rules.<sup>33</sup>

Recommendations:

- Examine the OCPs for all municipalities within the Capital Regional District and for the CRD itself.
- Develop an urban forest protection clause to be included in all OCPs, which could serve as an advocacy tool for more powerful zoning and other protections.

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<sup>31</sup> *Ibid.* at 7.3.

<sup>32</sup> Nowlan, Rolfe & Grant, *supra* note 14 at 33.

<sup>33</sup> *Ibid.* at 34.

## Regional Growth Strategies

A Regional Growth Strategy (“RGS”) is a planning document with a broad scope designed to guide the overall development pattern within a Regional District. An RGS often states broad social, economic and environmental objectives for the Regional District to which it applies. Although a RGS must be prepared in consultation with the municipalities that it will impact and should be accepted by these governments, it can only be created by a Regional District.<sup>34</sup> As with OCPs, Regional Districts are not required to have a RGS in place. Unlike OCPs, there is no list of topics that a RGS must include, rather they may contain policy statements on a number of issues enumerated in section 849(2) of the *LGA*. These include protecting environmentally sensitive areas, which could extend to protect sensitive ecosystems like the Garry oak ecosystem. If a Regional District does create a RGS, in the two years following the adoption of the RGS each municipality must include a regional context statement within its OCP that identifies the relationship between the RGS and the OCP and, if applicable, how the OCP will be made consistent with the RGS.<sup>35</sup>

In spite of the fact that a Regional District must work together with municipal governments when creating a RGS, municipalities may remain resistant to enacting the bylaws and creating the policies required to make the goals of an RGS a reality. For instance, the Capital Regional District passed its RGS in August 2003. It contained a commitment by all CRD municipalities to protect regional green and blue spaces, including lands of ecological significance in both private and public hands, and to

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<sup>34</sup> See Part 25 of the *LGA*.

<sup>35</sup> *Ibid.* at ss. 866(1)-(3), 866(8).

sustainable management of natural resources and the environment.<sup>36</sup> Both of these objectives could be interpreted as requiring some sort of protection for urban forests in the CRD, especially for rapidly depleted Garry oak ecosystems. Despite this, no member municipality has taken a broad-based approach to protecting and restoring Garry oak meadows beyond establishing parks and tree protection bylaws. Furthermore, some CRD municipalities such as Colwood and Langford do not even have tree protection bylaws in place, even though it has been almost four years since the RGS was passed.<sup>37</sup> Therefore, though RGSs may be useful because they require that Regional Districts sit down and work out long-term development visions with member municipalities, on their own they cannot provide adequate protection for urban forests. Municipal policies and bylaws remain essential for this.

Recommendations:

- Become involved with the amendment process for the Capital Regional District's RGS, which is scheduled to take place in 2008. Demand it include protection and restoration of urban forests as a specific goal.<sup>38</sup>
- Consult other local government initiatives to use as a basis for RGS revision. See, for example, the Regional Municipality of York's *Greening Strategy*.<sup>39</sup>

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<sup>36</sup> Capital Regional District, *Regional Growth Strategy for the Capital Regional District* (13 August 2003), online: <<http://www.crd.bc.ca/regionalplanning/growth/index.htm#rgs>> at 9-10.

<sup>37</sup> Carolyn Heiman, "Patchwork protection of urban forests causes concern" (21 June 2006) *Times-Colonist* B1.

<sup>38</sup> For more information, see online: <<http://www.crd.bc.ca/regionalplanning/growth/amendment/index.htm>>.

<sup>39</sup> See online: <<http://www.york.ca/Services/Environmental/Greening+Strategy/Default+Greening+Strategy.htm>>.

## **Bylaws**

Municipal bylaw making powers are set out in section 8 of the *CC*. For the purposes of urban forest protection, some relevant powers include the power to regulate, prohibit and impose requirements by bylaw in relation to trees;<sup>40</sup> public places;<sup>41</sup> public health;<sup>42</sup> and protection of the natural environment.<sup>43</sup> Generally speaking, most green space within a municipality is regulated by municipal bylaws. However, if the green space is found on land owned and managed by the federal or provincial government, municipal and Regional District bylaws do not apply because municipalities and Regional Districts do not have authority to regulate such lands.<sup>44</sup>

One factor limiting the potential uses of these local government bylaw powers is found in s. 8(7)(c) *CC*. This section notes that none of these powers may be used to do anything that a council is specifically authorized to do in relation to either land use planning and management or heritage conservation under Parts 26 and 27 of the *LGA*. That means that these powers cannot extend to identify areas of concern and zone for urban forest protection, as this would fall under Part 26, Division 7 of the *LGA*, which deals specifically with zoning. Municipal zoning powers under this section of the *LGA* will be explored further below.

### *Tree Protection Bylaws*

Tree protection bylaws (“TPBs”) currently exist in many Capital Regional District municipalities, and have been created pursuant to municipal jurisdiction to regulate,

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<sup>40</sup> s. 8(3)(c) *CC*.

<sup>41</sup> s. 8(3)(b) *CC*.

<sup>42</sup> s. 8(3)(i) *CC*.

<sup>43</sup> s. 8(3)(j) *CC*.

<sup>44</sup> Nowlan, Rolfe & Grant, *supra* note 14 at 21.

prohibit and impose requirements related to trees.<sup>45</sup> TPBs can only be created by municipalities, as Regional Districts generally do not have the power to pass bylaws related to individual tree species protection.<sup>46</sup> Instead, Regional Districts have certain powers related to Regional Development Plans that may be useful in this area, which have been noted above. Tree protection bylaws illustrate at least three specific challenges that arise when using bylaws as a tool to regulate and promote the health and future sustainability of Garry oak ecosystems.

First of all, TPBs seem inadequately suited to the goal of offering broad protection to Garry oak ecosystems. By protecting trees alone, these bylaws do not take the ecosystem-based approach that is required to look after both Garry oaks and their surrounding habitat. As such, they are of limited utility.

Secondly, and most significantly, TPBs contain many exceptions to the general prohibition against felling Garry oaks. For example, Saanich's TPB lists the Garry oak as a protected tree and contains a general prohibition against cutting down protected trees growing on urban land.<sup>47</sup> However, this general prohibition is followed by a number of exceptions that include protected trees growing on a building envelope of a lot less than 1500 m<sup>2</sup> or on a building envelope of a larger lot if the removal of the tree is necessary for constructing a building or an addition to a building, and protected trees growing on the boundary of a building envelope if their removal is necessary for constructing a building or addition, so long as a permit is obtained.<sup>48</sup> Also, protected trees shown as "to

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<sup>45</sup> *CC*, s. 8(3)(c).

<sup>46</sup> See *Stewardship Bylaws*, *supra* note 29 at 34; Nowlan, Rolfe & Grant, *supra* note 14 at 20. For a list of all tree protection bylaws in the Capital Regional District and links to their full text versions, see the attached Appendix A.

<sup>47</sup> Saanich, *Tree Preservation Bylaw*, [1997] No. 7632, s. 3(a).

<sup>48</sup> *Ibid.* at ss. 3(b)(i) – (ii), s. 3(e).

be removed” on conditionally approved subdivision plan can be removed, as can those whose removal is required to install roads and services.<sup>49</sup> If a municipal council considers protected tree to be a hazard to the safety of persons, likely to damage public property, or a serious inconvenience to the public, it can order that the tree be trimmed, removed or cut down.<sup>50</sup> As well, if there is an emergency where a protected tree has been “severely damaged” by a natural cause and is in imminent danger of falling and injuring persons or property, or if a tree must be cut or trimmed for the installation, repair or maintenance of any public works or utilities carried out under the municipality’s authority, the tree may be cut down without further debate.<sup>51</sup> Additionally, a property owner may apply for a permit to either remove or prune a protected tree that, if approved, may give them the ability to cut down the tree. Finally, Saanich’s TPB does not require that replacement trees be planted whenever a protected tree is cut down. Instead, planting and maintaining a replacement tree is only required if a person has cut down a tree in contravention of the TPB or pursuant to a permit. Thus, where a person cuts down a tree under the authority of the many exceptions contained within the TPB no new tree must be planted. Saanich’s TPB, therefore, seems to offer little protection to “protected” trees such as Garry oaks.

Some municipalities within the Capital Regional District have adopted somewhat stronger TPBs. For example, although Oak Bay’s bylaw contains a number of exceptions to the prohibition against cutting or damaging protected trees, including Garry oaks, such as those located within a building envelope,<sup>52</sup> hazardously interfering with utility wires,<sup>53</sup> or where a permit has been granted, many of the instances where a permit may be granted

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<sup>49</sup> *Ibid.* at ss. 3(b)(v) and (iii).

<sup>50</sup> *Ibid.* at s. 12(a).

<sup>51</sup> *Ibid.* at ss. 14 and 15 respectively.

<sup>52</sup> Oak Bay, *A Bylaw to regulate the cutting of trees*, [2006] Bylaw No. 4326, ss. 3(1) – (2).

<sup>53</sup> *Ibid.* at s. 6(2).

demand that the property owner show that an undue hardship would be caused if he or she took an alternate course of action.<sup>54</sup> This requirement may make it difficult for property owners to justify cutting down Garry oaks, as they must prove that other options would cause them undue hardship, which is generally a high standard in law. Though Oak Bay's bylaw does not require replacement trees whenever a protected tree is cut down where a tree is cut pursuant to a permit or in contravention of the bylaw,<sup>55</sup> it does require that two replacement trees be planted. This is an improvement over Saanich's TPB, which requires only one replacement tree be planted in similar circumstances.<sup>56</sup>

Thirdly, most TPBs protect trees that are quite large. As GOMPS notes, Garry oaks may take as long as 50 years before they fall within the sizing specifications in many TBS, which are usually set at 10 cm diameter. The city of Victoria's bylaw provides an exception to this rule by protecting the seedlings of protected trees.<sup>57</sup> However, these seedlings are subject to the same exceptions that apply to protected trees, which are similar to those provided for in the Saanich bylaw noted above.<sup>58</sup>

Despite the limitations on TPBs, they do offer some benefits. TPBs can be used to encourage the replacement of cut trees with native species. They can also be used to require tree retention in ecologically sensitive areas and reforestation in areas that have been subject to development by requiring that a certain number of native species be planted and maintained where Garry oak meadows or other endangered woodlands were present prior to development. As well, amending TPBs to protect seedlings and to include

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<sup>54</sup> For example, see *Ibid.* at ss. 6(5), 6(7), 6(8) and s. 9.

<sup>55</sup> Instead, replacement trees are only required to be planted where the protected tree was cut to make room for a principal or accessory building. *Ibid.* at s. 10(1).

<sup>56</sup> Compare *Ibid.* s. 10(1) with Saanich, *supra* note 14 at s. 16(a).

<sup>57</sup> City of Victoria, *Tree Preservation Bylaw*, [2005] Bylaw No. 05-106, s. 2 definition of "protected tree seedling".

<sup>58</sup> See for example *Ibid.*, ss. 4, 11, 13, 14.

more situations where replacement trees must be planted could lead to significant changes in urban forest coverage and restoration in the CRD.

#### Other Bylaw-making Powers

As noted above, there are other bylaw-making powers that municipalities could use to protect and restore urban forests. For example, as noted above, municipalities have jurisdiction to pass bylaws regulating public places. While this power presently appears to be used primarily to regulate people's behaviour in public places, it could also be used to protect those remaining Garry oak ecosystems that exist on municipally owned public lands. Additionally, it could be used to pass a bylaw requiring that the municipality support the reintroduction and restoration of Garry oak ecosystems on municipal lands to replace non-native plant species or lawn grass.

Municipalities also have jurisdiction under the *CC* to pass bylaws on public health and to protect the natural environment. Although these powers require that a municipality develop such bylaws with the approval of the "responsible minister" from the provincial government, they provide an opportunity for creative lawmaking to sustain urban forests. For instance, a municipality could use its public health jurisdiction to pass bylaws for the regeneration of urban forests throughout the municipality based on the mental and physical health benefits that have been found to accrue to residents who live and work in proximity to natural spaces.<sup>59</sup> A municipal urban forest strategy could also be bolstered by municipal jurisdiction to pass bylaws to protect the natural environment. A robust, ecosystem-based urban forest policy focusing on maintaining and restoring the scope of the Garry oak ecosystem throughout urban spaces would be better supported through this power than through the municipality's power to pass tree protection bylaws, as the

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<sup>59</sup> Heiman, *supra* note 36 at B1.

“natural environment” could be interpreted to include sensitive ecosystems. Recent case law supports an expansive interpretation of municipal powers such as these bylaw-making powers,<sup>60</sup> and the *CC* itself states that the powers it confers on municipalities and their councils must be interpreted broadly.<sup>61</sup>

Nonetheless, the *CC* requirement that bylaws to protect public health and the natural environment be approved by the minister may pose a significant challenge to implementing such bylaws, as it may increase the time and burden of passing bylaws under these powers. The *CC* does not stipulate which minister must be consulted for bylaws passed under these powers, but it appears that it could include the Minister of Health, the Minister of Community Services or the Minister of the Environment. These possibilities should be further investigated as they could offer a creative alternative to the TPBs that currently exist.

Recommendations:

- Review all TPBs in the CRD. Suggest amendments, including:
  - all protected trees that are cut down or damaged must be replaced with trees of the same species;
  - protected trees include tree seedlings;
  - require two replacement trees planted where one is cut down because of the likelihood that their survival rate may be negatively impacted by increased storm activity related to global climate change; and
  - require that undue hardship be proved where a protected tree is to be cut down, especially for those to be cut for building additions, driveways, etc.

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<sup>60</sup> See *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241; *Nanaimo (City) v. Racal Trucking Ltd.*, [2000] 1 S.C.R. 342.

<sup>61</sup> *CC*, s. 4(1).

- Investigate the option of passing broad bylaws under municipal public health and environmental protection powers to safeguard and foster Garry oak ecosystems.

## **Zoning Bylaws**

There are no known zoning bylaws that deal with urban forests, but they are a potentially useful tool for both municipalities and Regional Districts. Zoning bylaws regulate development and land use within the boundaries of a municipality or a Regional District. The *LGA* provides broad authority for local governments to divide their territory into different zones and to regulate the use, density, buildings and structural aspects within these zones.<sup>62</sup> As well, certain types of land uses can be prohibited within a zone.<sup>63</sup> Before changes are made to current zoning bylaws, a local government must hold a public hearing and provide a reasonable opportunity to be heard to those who the changes will impact. As well, any zoning changes within a Regional District must be approved by the minister for them to have legal force within the Regional District, but this is not required for zoning bylaws adopted by municipalities.<sup>64</sup>

One potentially significant use of the local government zoning powers to foster and protect urban forests is the power to zone for the provision of screening or landscaping. Section 909(1)(b) of the *LGA* allows both municipalities and Regional Districts to set standards for and regulate the provision of screening or landscaping to preserve, protect, restore and enhance the natural environment. This power allows local government to set different requirements, standards and regulations between different zones and within zones. It appears that this could be used by local governments to limit

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<sup>62</sup> Nowlan, Rolfe & Grant, *supra* note 14 at 36.

<sup>63</sup> *LGA*, s. 903(4).

<sup>64</sup> *Ibid.* at s. 913.

certain landscaping uses within their boundaries in order to protect and restore native species and ecosystems.

A drawback to this avenue for urban forest protection is that any change to current zoning must be implemented gradually through the operation of the *LGA*'s provisions on non-conforming uses. These provisions allow land that does not conform to zoning bylaws when they are created to continue to not conform to the new zoning requirements until the non-conforming use is discontinued for a period of 6 consecutive months. After this 6-month period, the land then becomes subject to the new zoning rule.<sup>65</sup> A change in property ownership or occupancy is not deemed to be a non-conforming use by the *LGA*.<sup>66</sup> While non-conforming use may not increase beyond the scale that it existed at when the zoning bylaw was passed, and while any new additions to buildings or other structures must comply with the new zoning requirements, this protection presents a significant impediment to the possibility of using zoning to alter current land uses. This is considerable for restoring urban forests, as the extirpation of species within the Garry oak ecosystem is a time-sensitive issue that cannot wait until non-conforming uses are discontinued.

Another limitation on using a zoning approach relates to compliance. If a zoning bylaw is violated, the avenues of legal recourse are restricted to an injunction or prosecution under the *Offences Act*.<sup>67</sup> Implementing zoning bylaws together with blanket bylaws prohibiting certain activities that negatively impact on Garry oak ecosystems and a public education campaign on the importance of the Garry oak ecosystem may lead to greater compliance. However, zoning bylaws can also be amended by local governments,

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<sup>65</sup> *Ibid.* at s. 911.

<sup>66</sup> *Ibid.* at s. 911(7).

<sup>67</sup> *Stewardship Bylaws*, *supra* note 29 at 61.

potentially opening ecologically sensitive areas up to development.<sup>68</sup> Thus, while zoning for Garry oak and regeneration could offer some creative possibilities for urban forest protection, it is not a stand-alone strategy and should be strengthened by other protective mechanisms.

Recommendations:

- Lobby the provincial government for amendments to the *LGA* that alter the non-conforming use rule for urban forests.

**(B) Provincial Government**

Local government protection strategies for urban forests exist in a broader legal and policy context consisting of provincial legislation. Under Canada's constitution, the provinces have exclusive jurisdiction over forest resources, property and civil rights in the province and all matters that are of a local or private nature.<sup>69</sup> The provincial government is involved in urban forest policy through its creation of laws that enable municipal and Regional District land use planning and bylaw powers, and the development of Official Community Plans and Regional Growth Strategies. As well, the province is also involved in designating sensitive ecological areas in southeastern Vancouver Island and creating endangered species legislation. Although it has not done so to date, the province could use its broad powers over forestry to regulate urban forests, and could use its powers over matters of a local or private nature to rework the municipal taxation system. Some of these options are explored further below.

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<sup>68</sup> Michelle Campbell, "Tools for the Protection of Ecologically Significant Private Lands in Ontario: A Case Study of Marcy's Woods" (2006) 17 J.E.L.P 47 at 63.

<sup>69</sup> *Constitution Act, 1867*, ss. 92A, 92(13), 92(16) respectively.

A recent article on the legal regulation of urban forests in Canada suggests that provincial endangered species legislation may play a significant role in safeguarding urban forests.<sup>70</sup> However, given British Columbia's sparse protection for endangered species it does not seem that this avenue is an effective means for protecting Garry oak ecosystems. Currently, B.C. maintains a list of species grouped according to their conservation risk. As well, the Ministry of Environment maintains the Sensitive Ecosystem Inventory ("SEI"), a database of sensitive ecosystems found in Vancouver Island's southeastern tip. The province has also enacted the *Wildlife Act*.<sup>71</sup> However, there are many gaps in the provincial framework for protecting species at risk. Firstly, the *Wildlife Act* offers no protection for plant species, but instead is aimed at protecting animals. What is more, the protections it provides for animals are minimal and do not order the provincial government to create recovery plans or protect the habitat necessary for sustaining species at risk.<sup>72</sup> As well, although the SEI includes Garry oak meadows as "sensitive ecosystems", the province's list of threatened species lists Garry oak trees as "yellow", which means it does not consider them to be threatened.

Another significant problem with the province's current strategy for protecting threatened or endangered ecosystems like the Garry oak ecosystem is the trend of provincial devolution of such responsibilities to local governments and private individuals.<sup>73</sup> For instance, provincial literature on the SEI program encourages private initiatives such as conservation covenants as protection strategies for Garry oak

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<sup>70</sup> Wood, *supra* note 21 at 223.

<sup>71</sup> R.S.B.C. 1996, Ch. 488.

<sup>72</sup> For example, see Gwen Barlee, Devon Page & Andrew Miller, "In Defence of Canada's Spotted Owl" (December 2005), online: <<http://www.sierralegal.org/reports/spotted.owl.dec2005.pdf>> at 25-26.

<sup>73</sup> Wood, *supra* note 21 at 224-25.

meadows.<sup>74</sup> Although private initiatives are one strategy for protecting threatened ecosystems, they cannot guarantee coordinated ecosystem preservation and restoration because of their dependence on the goodwill of individual landowners and non-profit conservancy groups. As with zoning and tree protection bylaws, these tools may be a good short-term solution in the absence of provincial action, but cannot act as the only source of protection for urban forests. Nonetheless, there is the risk that the provincial government may see private action as sufficient for urban forest protection and avoid using its broad powers to create a provincial urban forest strategy.

Another important provincial power is its authority to modify the revenue-raising tools available to local governments. As noted above, local governments can exercise powers only to the extent that they have been granted such powers by the province. Thus, their power to raise revenue is dependent on provincial legislation, which sets out the revenue-raising tools available to municipalities and Regional Districts. Currently, the property tax system is the main source of revenue for local governments and links taxation rates to property value and property classification.<sup>75</sup> Generally speaking, local governments are often supportive of development projects that increase property values as they increase the property tax base and, consequently, the local government's ability to raise operational funds. Although urban forests provide many local benefits by way of preventing soil erosion, providing clean air and water filtration, shading streets and buildings and adding to the aesthetic value of a neighbourhood,<sup>76</sup> these values are not easily monetized and, thus, cannot serve as a means of collecting more property taxes from land owners. Development projects, on the other hand, often involve a flow of

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<sup>74</sup> "Saving Sensitive Ecosystems", *supra* note 1.

<sup>75</sup> See the *LGA* generally for local government taxation powers.

<sup>76</sup> See Tree Canada, online: < <http://www.treecanada.ca/programs/urbanforestry/benefits.htm>>.

capital through rents, purchase prices, and other revenue that can be captured by property taxes. This provides local governments with a strong incentive to allow for rezoning and the destruction of urban forest when a development project will lead to a real increase in their revenue base. This incentive could be curbed if the province were to alter the funding mechanisms available to local government.

Some recent work on alternative tax systems that promote sustainable development and the protection of natural features such as Garry oak ecosystems has been done by Donna Morton and Zane Parker at the Centre for Integral Economics in Victoria, B.C.<sup>77</sup> Their approach could be a significant step on the path to supporting the protection and restoration of urban forests in B.C., as it would shift tax burdens onto unsustainable developments and reward those who protect or restore Garry oak ecosystems with lower taxes, thus creating incentives for private parties to plant and maintain local species and protect sensitive ecosystems. In doing so, it would remove the factors that currently entice local governments to pursue development that threatens Garry oak ecosystems.

Recommendations:

- Lobby for stronger species and ecosystem conservation legislation aimed at protecting and restoring urban forests.
- Investigate tax-shifting measures and lobby the provincial government to amend the *LGA* to allow for alternative revenue-raising tools.
- Call for a provincial urban forest strategy.

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<sup>77</sup> For more information on the Centre for Integral Economics, visit: <<http://www.integraleconomics.org/>>. See also Judy Steed, "Making taxes work" *Toronto Star* (5 September 2005) D1; Norman Gidney, "The tax shifter" *Times-Colonist* (2 November 2003) D5.

### **(C) Federal Government**

Generally speaking, the federal government plays more of an indirect role in urban forest protection. The federal government usually insists that forest management is not its responsibility, but belongs to the provinces that have jurisdiction over forests under the Canadian constitution.<sup>78</sup> Nonetheless, environmental protection cuts across a number of areas of constitutional responsibility and some case law supports the notion of increased federal involvement in environmental protection initiatives.<sup>79</sup> Perhaps most significant is the federal government's power to tax and spend, which can be used to pursue a number of policy goals that touch on areas of provincial jurisdiction, including urban forest protection.<sup>80</sup> As with local government taxation, it would be useful to explore the possibilities offered by tax shifting within the *Income Tax Act*<sup>81</sup> to provide tax relief for those who preserve and restore urban forest ecosystems such as the Garry oak ecosystem.<sup>82</sup>

Despite its limited jurisdiction, the federal government is currently involved in a number of initiatives that could be important avenues for urban forest protection, though none is specifically geared at fostering and preserving urban forests. These include the *National Forest Strategy*, federal Habitat Stewardship Programs and its international commitments. Each of these will be examined in turn.

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<sup>78</sup> *Constitution Act, 1867*, s. 92A.

<sup>79</sup> See *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at 286; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 63-64.

<sup>80</sup> *Constitution Act, 1867*, ss. 91(3) (taxation) and 91(1a) (spending power).

<sup>81</sup> *Income Tax Act*, R.S.C. 1985, C.1 (5<sup>th</sup> Supp.).

<sup>82</sup> This could move beyond the ecological gifts incentives offered through the *Income Tax Act*. For a discussion of these incentives, see Wood, *supra* note 21 at 242-45.

## **(1) National Forest Strategy**

The federal government, in coalition with provincial government representatives, industry associations and environmental groups, has created the *National Forest Strategy*, fifth in a series of strategies dating back to the 1980s.<sup>83</sup> Although the emphasis of this document remains on guaranteeing the future viability of the commercial forest sector and forest-dependant communities, it recognized urban forests as a strategic priority for the first time.<sup>84</sup> As well, the *National Forest Strategy* calls for ecosystem-based approaches for forest management and maintaining biodiversity within existing forests.<sup>85</sup> It is important to note that, as far as implementation goes, it is unclear whether the *National Forest Strategy* has had any impact on the ground, especially given the political instability that has existed federally with the election of two successive minority governments. However, the *National Forest Strategy* remains an important lobbying tool, and Wood notes that its objectives “present an opportunity for municipalities and other actors to urge the federal government to exercise some leadership and initiative in this long-neglected policy area”, especially by developing “guidelines and support tools to help municipalities protect [their] surrounding forests and unique habitats”.<sup>86</sup>

## **(2) Federal Habitat Stewardship**

The federal government appears to be more active in the area of habitat stewardship initiatives. The federal Habitat Stewardship Program (“HSP”), which has been operating since 2001, allocates \$10 million per year to projects that conserve and

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<sup>83</sup> *National Forest Strategy*, *supra* note 8.

<sup>84</sup> *Ibid.* at 19-20.

<sup>85</sup> *Ibid.* at Objective 1.

<sup>86</sup> Wood, *supra* note 21 at 235.

protect species and their habitat where a species has been determined to be “at risk” by the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”).<sup>87</sup> This program is linked to the federal *Species at Risk Act* (“SARA”),<sup>88</sup> although it funds stewards who implement activities on private, provincial Crown and aboriginal lands across Canada while the *SARA* generally applies to federal lands. The HSP presently supports recovery programs for Garry oak ecosystems in Uplands Park and Mill Hill Regional Park, as well as the Garry Oak Ecosystem Restoration Team’s activities throughout the Capital Regional District.<sup>89</sup> Nonetheless, these projects only receive short-term support and must centre on protecting species that are listed by COSEWIC to receive funding. To date, Garry oaks are not listed by COSEWIC, nor are they being considered at COSEWIC’s list-updating meeting to be held in April 2007.<sup>90</sup> Therefore, while the HSP offers some protection for a few Garry oak meadows in B.C., it does not provide funding for long-term protection of Garry oak ecosystems and is limited to those species listed by COSEWIC.

### **(3) International Commitments**

Canada has entered a few international agreements that deal with biodiversity and urban forests. Although they cannot be invoked as legally binding on the federal government, they could be used as tools to lobby the federal government to undertake other initiatives aimed at protecting urban forests.<sup>91</sup> Firstly, there is the Rio Declaration,

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<sup>87</sup> See Canadian Wildlife Service, “Habitat Stewardship Program” (30 November 2006) online: <<http://www.cws-scf.ec.gc.ca/hsp-pih/default.asp?lang=En&n=59BF488F-1>>.

<sup>88</sup> *Species at Risk Act*, S.C. 2002, C. 29 [“SARA”].

<sup>89</sup> See online: <<http://www.cws-scf.ec.gc.ca/hsp-pih/default.asp?lang=en&n=E5ACA303-1>>.

<sup>90</sup> See online: <[http://www.cosewic.gc.ca/eng/sct5/index\\_e.cfm](http://www.cosewic.gc.ca/eng/sct5/index_e.cfm)>.

<sup>91</sup> Wood, *supra* note 21 at 228-230.

which codifies the international consensus reached at the 1992 Earth Summit.<sup>92</sup> The Rio Declaration evidences the federal government's commitment to general principles, including the entitlement to a healthy environment,<sup>93</sup> the obligation to protect the environment for future generations,<sup>94</sup> the integration of environmental protection into all development decisions<sup>95</sup> and the recognition of the important role that local governments play in achieving sustainable development.<sup>96</sup>

Secondly, Agenda 21 provides a comprehensive action plan for governments wherever human activity impacts the environment.<sup>97</sup> Specifically, Agenda 21 calls on countries to make the financial commitments necessary to give effect to its provisions.<sup>98</sup> As well, Chapter 11 of Agenda 21 focuses on forests and encourages the “development of urban forestry for the greening of urban, peri-urban and rural human settlements for amenity, recreation and production purposes and for protecting trees and groves.”<sup>99</sup> It also requires that governments protect and rehabilitate all forests, prevent conversion of forests into other land uses, promote public education on forests and create national forestry action programs.<sup>100</sup> Although land use planning is within provincial jurisdiction, Agenda 21 calls on national governments to promote sustainable urban development,<sup>101</sup> develop national guidelines for environmentally sound urban development and develop

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<sup>92</sup> The Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex 1, U.N. Doc. No. A/CONF.151/26 (Vol. 1) (12 August 1992), online: < <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>.

<sup>93</sup> *Ibid.* at Principle 1.

<sup>94</sup> *Ibid.* at Principle 3.

<sup>95</sup> *Ibid.* at Principle 4.

<sup>96</sup> *Ibid.* at Principles 20-22.

<sup>97</sup> Agenda 21: Programme of Action for Sustainable Development, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex II, U.N. Doc. No. A/CONF.151/26 (Vol. I-III) 12 August 1992), online: < <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>>.

<sup>98</sup> *Ibid.* at para. 33.2.

<sup>99</sup> *Ibid.* at para. 11.13(h).

<sup>100</sup> *Ibid.* at paras. 11.3, 11.11-11.13.

<sup>101</sup> *Ibid.* at Chapter 7.

legislation to protect ecologically sensitive areas from damage by construction.<sup>102</sup> Both the Rio Declaration and Agenda 21 could be used as tools against which current and proposed federal government policies and programs could be measured to see if they meet up to past promises. They could also be used to press the federal government for more concrete action and funding for urban forest programs.

Recommendations:

- Lobby for changes to the *Income Tax Act* that reward urban forest restoration and maintenance initiatives.
- Press the federal government for increased funding for urban forest protection and for the HSP program.
- Apply to COSEWIC to have Garry oaks and related species listed.
- Use the federal government's international commitments as lobbying tools and as benchmarks to measure current federal initiatives against.

**IV. Special Issues**

GOMPS has raised two issues that are of special concern to them: (a) "hazard" trees and utility wires, and (b) trees near airports. This section will examine each issue briefly.

**(A) "Hazard" trees & utility wires**

GOMPS is troubled by the conflict that arises between trees and utility wires, especially in light of the damages caused by the windstorms in December 2006. Utility

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<sup>102</sup> *Ibid.* at paras. 7.18 and 7.27.

wires pose a significant threat to the health and safety of trees in the urban forest, as both tree protection bylaws and provincial legislation contain provisions that ensure that where a conflict arises between utility wires and a nearby tree involving a threat to persons or property, the utility wires win. For instance, section 4 of Victoria's TPB states that it "does not apply to the installation, repair, or maintenance of public works or services carried out by or under the authority of the City", although it does require that these works must be reviewed and approved by the Director before being carried out. This TPB also contains a provision that requires all property owners to remove any trees the Director considers to be a hazard to persons, likely to damage property or that seriously inconvenience the public.<sup>103</sup> It also allows a person to cut down all or part of a protected tree if has been severely damaged by a natural cause or is in imminent danger of falling and injuring individuals or property.<sup>104</sup> Other TPBs within the CRD contain similar provisions, which allow for and in some cases require trees be cut to make way for utility wires or to protect the public and property from the dangers of them falling.

In addition to these exemptions, the *Community Charter* does not permit municipalities to pass bylaws that interfere with tree cutting or removal undertaken by a utility for safety, maintenance, or for the operation of its infrastructure on land that it owns.<sup>105</sup> Furthermore, in the case of power lines, the *Hydro and Power Authority Act* provides that the Authority and any of its agents, engineers, contractors, subcontractors, surveyors or employees may cut down any trees that might endanger its conductors, wires or equipment by falling or by otherwise interfering with them.<sup>106</sup> It also allows these

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<sup>103</sup> City of Victoria, *Tree Protection Bylaw*, *supra* note 57 at s. 13.

<sup>104</sup> *Ibid.* at s. 14.

<sup>105</sup> *CC*, s. 51(1)(c).

<sup>106</sup> *Hydro and Power Authority Act*, R.S.B.C. 1996, Ch. 212, s. 20(1)(b).

individuals to cut any trees that might obstruct the running of survey lines.<sup>107</sup> Thus, because of this provincial legislation, TPBs are useless against a utility company who believes that it must fell or trim a Garry oak that could endanger its wires, conductors or equipment or threaten public safety.

Case law also makes clear that power companies have a duty of care to protect the public from the dangers of the electricity that they transmit.<sup>108</sup> This requires that they remove trees that are potential “hazards”, which includes trees that are dead or dying, damaged, spindly and incapable of supporting their own weight, leaning, or those with ground cracks or heaves. Proximity to power lines must be considered together with the chances of a tree’s “imminent failure” and its potential to hit or damage hydro lines.<sup>109</sup> This being said, a recent case interpreted the *Hydro and Power Authority Act* quite strictly.<sup>110</sup> It held that a B.C. Hydro contractor’s belief that a tree would eventually grow to obstruct power wires was insufficient to meet the Act’s requirement that the tree endanger B.C. Hydro’s power equipment by falling or by some other means.<sup>111</sup> Although the Court did not further explain why it found that the Act was not met, this case could prove to be useful in future as it provides some limit to a utility company’s power to cut trees in the name of safety. All of this must be considered against what could be a decreasing public sympathy for maintaining the urban forest in light of last winter’s violent windstorms, however.

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Marliese v. West Kootenay Power Ltd.*, [1993] B.C.J. No. 1667 (SC) (QL) at para. 42.

<sup>109</sup> *Ibid.* at paras. 18-20.

<sup>110</sup> *Eagle Island Holdings (Two) Inc. v. British Columbia (Hydro and Power Authority)*, [2006] B.C.J. No. 1542 (CA) (QL).

<sup>111</sup> *Ibid.* at paras. 9-12.

Recommendations:

- Advocate for legislative changes that require new trees be planted further away from utility wires where trees are cut or damaged by utility companies.

**(B) Trees near airports**

GOMPS has identified concerns over Garry oaks located near the Victoria International Airport and, specifically, whether they must be topped to provide for the safety of airplanes that fly in and out of the airport. The federal government has jurisdiction over airports in Canada and the land on which they are located. As well, the *Aeronautics Act* states that the federal Cabinet has the power to make regulations that prevent lands adjacent to or in the vicinity of an airport from being used in a manner that is incompatible with the safe operation of an airport or aircraft as determined by the Minister of Transport.<sup>112</sup> Because the federal government has authority over this, the province (and thus local government) cannot do anything to protect any Garry oaks that the Minister deems to be incompatible with the safe operation of Victoria's airport. However, if GOMPS is concerned about the topping of trees in the vicinity of the Victoria airport for safety purposes, it could petition the federal Minister of Transport and offer evidence to challenge the notion that such trees threaten the safe operation of the airport. As well, GOMPS could use international commitments like the Rio Declaration and Agenda 21 to strengthen its arguments against topping trees or to support implementing a federal policy that where trees are cut to make way for airports new trees are planted in a safe area to compensate for the loss.

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<sup>112</sup> *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 5.4(2)(b).

### Recommendations:

- Consult with the federal Transportation Ministry on this issue.
- Advocate for replanting near airports where trees must be cut or topped to provide for the airport's safe operation.

### **V. Conclusion**

Although there are many possible tools at the local, provincial and federal government levels, it is clear that no one tool is appropriate for fostering and protecting urban forests in B.C., especially the Garry oak ecosystem. Many of the powers available to municipalities and Regional Districts could offer some short-term success, but a provincial urban forestry strategy is arguably required to ensure that sensitive ecosystems are restored and sustained into the future. Additionally, the current funding tools available to local governments provide them with the incentive to pursue developments that negatively impact Garry oak ecosystems, and provincial action is required if these are to be altered. In spite of its limited role, the federal government could be a leader in protecting urban forests and sensitive ecosystems by providing more funding for such initiatives, by increasing its Habitat Stewardship Program, and by living up to its international commitments. While utility wires and airports pose a significant threat to the urban forests that surround them, there are some steps that GOMPS could advocate for, such as replanting initiatives that would minimize their impact on the urban forest.

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## **Appendix A – CRD Tree Protection Bylaw Links**

### **Central Saanich**

- *Protected Trees Bylaw No. 1403*, available online:  
[http://www.centrialsaanich.ca/\\_shared/assets/Protected\\_Trees\\_Bylaw\\_1403\\_159.pdf](http://www.centrialsaanich.ca/_shared/assets/Protected_Trees_Bylaw_1403_159.pdf).

### **Colwood**

- No tree protection bylaw

### **Esquimalt**

- *Bylaw No. 2047*, general outline available online:  
[http://www.esquimalt.ca/bylaws/tree\\_protection.htm](http://www.esquimalt.ca/bylaws/tree_protection.htm).

### **Highlands**

- *Tree Management Bylaw No. 010*, available online:  
[http://www.highlands.bc.ca/bylaws\\_policies/](http://www.highlands.bc.ca/bylaws_policies/).

### **Langford**

- No tree protection bylaw

### **Metchosin**

- *Tree Cutting Bylaw No. 287*, available online:  
<http://www.district.metchosin.bc.ca/treecutting.htm>.

### **North Saanich**

- *Tree Protection Bylaw No. 935*, available online:  
[http://www.northsaanich.ca/\\_shared/assets/Tree\\_Protection\\_Bylaw\\_Consolidated1764.pdf](http://www.northsaanich.ca/_shared/assets/Tree_Protection_Bylaw_Consolidated1764.pdf).

### **Oak Bay**

- *Tree Protection Bylaw, 2006 No. 4326*, link available online:  
<http://www.oakbaybc.org/municipalhall/bylaws.html>.

### **Saanich**

- *Tree Preservation Bylaw No. 7632*, available online:  
<http://www.gov.saanich.bc.ca/municipal/clerks/bylaws/treepreserve7632.pdf>.

### **Sidney**

- *Tree Preservation Bylaw No. 1663*, available online:  
[http://www.sidney.ca/\\_shared/assets/Bylaw\\_1663\\_-\\_Tree715.pdf](http://www.sidney.ca/_shared/assets/Bylaw_1663_-_Tree715.pdf).

### **Sooke**

- No tree protection bylaw

**Victoria**

- *Tree Preservation Bylaw No. 05-106*, available online:  
<http://www.victoria.ca/common/pdfs/bylaw05-106.pdf>.

**View Royal**

- *Tree Protection Bylaw No. 193*, available online:  
[http://town.viewroyal.bc.ca/upload/dcd323 Tree Protection Bylaw No. 193, 1994 and Amendment.pdf](http://town.viewroyal.bc.ca/upload/dcd323_Tree_Protection_Bylaw_No._193,_1994_and_Amendment.pdf).